

Part I  
Chapter 1

***Conceptualising Islamic Law, CEDAW  
and Women's Human Rights  
in Plural Legal Settings:***

***A Comparative Analysis of  
Application of CEDAW  
in Bangladesh, India and Pakistan***

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## 1. Introduction

On December 18, 1979, the UN General Assembly adopted comprehensive treaty on women's human rights entitled the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>1</sup> The purpose of this treaty is to eliminate *de facto* and *de jure* discrimination and inequality on the basis of sex. To date 183 countries have acceded to this treaty including a significant number of Muslim jurisdictions.<sup>2</sup> Despite the large number of ratifications, there are grave indications that discrimination against women persists and acts to restrict the rights and freedoms of women in all aspects of their lives. This is especially the case in plural legal jurisdictions of South Asia including Bangladesh, India and Pakistan where custom, culture, religious norms and tradition dominates legal discourse and informs its implementation. Contours of the norm of equality and non-discrimination enshrined in constitutional documents, legislative enactments and human rights treaty regimes present, at best, a fractured reality and fragile framework for women's human rights in the three countries under review.

Bangladesh, India and Pakistan have ratified CEDAW and incurred legal obligations to eliminate all forms of discrimination within their jurisdictions. How then might this continued discrimination against women be interpreted? The question may be addressed at two levels. First, at the international level the

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<sup>1</sup> Adopted at New York on December 18, 1979; Entered into force on 3 September 1981. UN GA Res. 34/180, 34 GAOR, Supp. (No.46) 194, UN Doc. A/34/46, at 193 (1979), 2 U.K.T.S. (1989); 19 I.L.M. (1980) 33.

<sup>2</sup> <http://www.un.org/womenwatch/daw/cedaw/states.htm> accessed on July 19, 2006. As of July 19, 2006, CEDAW has attracted 98 Signatures/183 ratifications, accessions and successions. The latest accession is Brunei Darrusalam which acceded on May 24, 2006.

issue is one of normative conflict between equality and non-discrimination as espoused in CEDAW and other human rights instruments on the one hand, and right to freedom of religion and belief as enunciated in the UN declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief (the Religious Tolerance Declaration) and economic, social and cultural rights and rights of ethnic minorities on the other. Equality among the sexes is perceived by many, as diametrically opposed to the right to practice one's religion or belief and culture as one perceives it. Thus, where religious traditions and customary practices have been used to create gender hierarchies, the right to freedom of religion, belief and culture is said to legitimise these inequalities. Second, at the level of domestic law, complications arise due to the interface between state law, customary norms and religious injunctions often resulting in the application of the most patriarchal and non-regalitarian face of all these regulatory norms.

The objective of the present study is to highlight some of these complexities through its focus on Bangladesh, India and Pakistan and create an increased awareness of the potential of CEDAW as a universal human rights instrument to advance women's rights within these jurisdictions. Whereas Bangladesh and Pakistan are defined as 'Muslim' countries by virtue of the fact that the predominant population espouse the Muslim faith, India, an avowedly secular country is home to one of the largest Muslim populations in the world. How does the intersection of constitutional and statutory laws, CEDAW, customary practices and social spaces impact on women's human rights within these varied jurisdictions? Are state and legal responses to the discourse on rights and entitlements of women significantly different in an 'Islamic' country as opposed to a secular one?

In addressing issues of effective implementation of CEDAW in the countries under review, the distinction between state and non-state law is also noted to pose the question of what it means to implement CEDAW in non-state bodies of dispute resolution and adjudication (for example, *panchayat*<sup>3</sup> and *jirga*<sup>4</sup>)? This is important since the translation of CEDAW objectives into state law has met with opposition from non-state bodies. Women appeal to multiple jurisdictions and often face a plurality of legal subjection from state institutions as well as non-state dispute resolution forums. Lower courts are often in alliance with the family or local bodies of dispute resolution resulting in conditions which make justice impossible for women.<sup>5</sup>

In India, the importance of local bodies of dispute resolution has been realised by programs such as the Mahila Samkhaya where *nari adalats* (women's courts) have been inaugurated. These courts, run by women volunteers at the level of the village, block or *zilla* adjudicate matrimonial disputes, domestic violence

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<sup>3</sup> Traditional dispute resolution forum in many parts of India and Pakistan. *Panch* means five indicating the membership of the forum usually drawn from amongst the most influential men of the area. The presiding member is known as *Sar Panch*. Some panchayats are a part of the legal structures of the state while others are 'informal' in nature.

<sup>4</sup> A traditional dispute resolution forum in the North West Frontier province of Pakistan as well as Balochistan (also in Afghanistan). In Bangladesh, the equivalent of the panchayat and *jirga* would be a *saalish* (literally meaning mediation).

<sup>5</sup> See for instance reviews of Pakistani case law on *Hudood* where lower courts have invariably convicted women (and men) of adultery and fornication whereas their convictions have been set aside by Appellate Courts on appeal. See Shaheen Sardar Ali, 'Interpretative Strategies for Women's Human Rights in a Plural Legal Framework: Exploring Judicial and State Responses to *Hudood* Laws in Pakistan' in Anne Hellum, Shaheen Sardar Ali, Julie Stewart & Amy Tsanga (eds.), *Paths are Made by Walking: Human Rights: Intersecting Plural Legalities and Gendered Realities* (Harare: Weaver Books, forthcoming 2006).

and even rape by using their knowledge of state law, a framework of women's rights in international law and using techniques of shaming and social pressure to implement their decisions (ICRW Report). Likewise in Pakistan, local bodies have a critical mass of women councillors who are being sensitised and trained to raise issues pertaining to their female constituents. Such experiments demonstrate the way transnational categories of women's rights as outlined in CEDAW are translated into the creation of non-state bodies of dispute resolution to address the need for women centred bodies of dispute resolution at the local level. In a sense, the objective to study the application of CEDAW in a comparative perspective in the three jurisdictions must reckon with the vexatious problem of translating the objectives of CEDAW in plural jurisdictions, rather than limit the discussion to state law.

The present study attempts to initiate a process of dialogue and engagement with state and civil society in order to promote a learning oriented and future oriented approach to human/women's rights in the region. Specifically the study expects to:

- i) Enhance understanding of the link between 'religious' and customary processes in the marginalisation of women.
- ii) Provide a background document for a dialogue between religious scholars, human rights activists and government functionaries on the point of convergence/divergence between CEDAW and these practices.
- iii) Become a base for an effective advocacy strategy for legal reform with clear prioritisation and an agreed agenda for legislative and policy change in the area of personal laws relating to property, inheritance, marriage, guardianship.
- iv) To create an increased awareness of CEDAW.

To this end, three country studies of Bangladesh, India and Pakistan, were commissioned by UNIFEM in 2003. The

Bangladesh study (Chapter 2) by Mahmuda Islam sets out to explore the possibilities of full implementation of CEDAW in that jurisdiction. It attempts “to ascertain and promote public opinion so as to help create a favourable condition and environment that will enable the government to completely withdraw its reservations to CEDAW.”<sup>6</sup> The Indian study (Chapter 3) undertaken by Kirti Singh, Sumaiya Musharraf and Maimoona Mollah engages in a comparative analysis of CEDAW and Muslim Personal Law with a view to ascertaining Muslim women’s status as members of a minority community in secular India. The Pakistan study (Chapter 4) by Fatimah Ihsan and Yasmin Zaidi looks at the interplay of CEDAW, national laws and customary practices in Pakistan through a literature review and focussed group discussions (FGDs).

The three studies presented here are complementary in nature and speak of country contexts that place Muslim women as members of majority communities (as in Bangladesh and Pakistan) or, as members of a minority group (as in India). The aim of this introductory chapter is to highlight the complexities inherent in application of plural legal norms (including CEDAW) to women in diverse socio-political and locational contexts. Section 3 provides an overview of the international and Islamic norms of non-discrimination on the basis of sex and women’s human rights. Section 2 presents an overview of the three studies by locating them in some of the main conceptual frameworks animating the

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<sup>6</sup> Mahmuda Islam, ‘CEDAW and Bangladesh: A Study to Explore the Possibilities of Full Implementation of CEDAW in Bangladesh’ in S. S. Ali (ed.) *Conceptualising Islamic Law, CEDAW and Women’s Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan*.

concerns underling the research and highlighting their salient themes.

## **2. Islamic and International Normative Processes of Equality and Non-Discrimination on the Basis of Sex: Complementary or Conflicting Norms?**

The right to equality and non-discrimination represent the twin pillars upon which the entire edifice of modern international law of human rights is established.<sup>7</sup> Since establishment of the United Nations in 1945, emphasis on equality and non-discrimination has been so strong that these norms are regarded as not only representing customary international law, but are also taken to form part of the norm of *jus cogens*.<sup>8</sup> Notwithstanding the enormous significance of equality and non-discrimination within general international law, there are difficulties in articulating a common understanding of their meaning and devise acceptable principles for application.<sup>9</sup> There is an on-going debate as to the

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<sup>7</sup> See W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon, 1983); N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991).

<sup>8</sup> According to Article 53 of the 1969 Vienna Convention on the Law of Treaties, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. For a consideration of the meaning of *jus cogens* see also Article 64 and E. Schwelb, 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission', *American Journal of International Law*, Vol. 61, 1967 pp. 1-946.

<sup>9</sup> Lerner, 1991, p. 25; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon 1995) p. 154. Also see Judge Tanaka's dissenting opinion in *South West Africa* (Second Phase) ICJ Report, 1996, p. 6.

means of creating real and meaningful equality including the true efficacy of affirmative action policies as a means of overcoming past inequality. The limits of formal law have been questioned in countries where despite formal equality; substantive equality continues to elude millions of women, and other vulnerable groups. In the view of some Muslim states for instance, the concept of 'complementarity' is being advanced as the 'synonym' or 'parallel' notion to 'equality and non-discrimination'.<sup>10</sup> The legitimacy and universal nature of CEDAW and other human rights instruments is also called to question by some Muslim states on the basis of *Sharia* being the sole divine source of law. This section attempts to place the discussion of this study into perspective by presenting a brief account of women's human rights in Islam and development of the international norm of non-discrimination on the basis of sex culminating in CEDAW.

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<sup>10</sup> See Egypt's reservations to Article 16 of CEDAW where 'complementarity' is stated to ensure 'true' equality between the spouses.



## **2.1 Human Rights in Islam<sup>11</sup>**

Rights afforded to women in the Islamic tradition emanate from its main sources, i.e., the *Quran*<sup>12</sup>, *Hadith*<sup>13</sup>, *Ijma*<sup>14</sup> and *Qiyas*<sup>15</sup>. An important source of *Sharia*, but one which is usually known as a juristic technique in Islamic jurisprudential terms is *ijtihad*. In the literal sense, the term implies striving hard or strenuousness, but technically it means exercising independent juristic reasoning to provide answers when the *Quran* and *Sunna* are silent on a particular subject. *Ijtihad* was meant to occupy a central place in juristic deduction. A person qualified to carry out *ijtihad* is known

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<sup>11</sup> This section is based on S. S. Ali, *Gender and Human Rights in Islam and International Law Equal Before Allah, Unequal Before Man?* (The Hague: Kluwer Law International, 2000) pp. 42-91.

<sup>12</sup> The *Quran* is the primary source of law in Islam and is believed by Muslims to be the word of God revealed through the Angel Gabriel over a period of approximately 23 years. It has 6,666 verses, divided into 114 chapters and 30 parts.

<sup>13</sup> The *Hadith*, i.e. the custom or usage of the Prophet Mohammed is known as *Sunna*; i.e. his words and deeds. *Hadith*, means the traditions of the Prophet Mohammed—the records of his actions and his sayings. Unlike the *Quran*, which was written and compiled during the lifetime of the Prophet Mohammed, the *Ahadith* (plural of *Hadith*), were not so compiled. It was after the death of the Prophet that the community realised that in addition to the *Quran*, the sayings and actions of the Prophet were guiding principles for Muslims.

<sup>14</sup> *Ijma* or consensus of opinion has been defined as agreement among the Muslim jurists in a particular age on a question of law. A. Rahim, *Muhammadan Jurisprudence* (Lahore: Mansoor Book House, 1995) p. 97. Rahim cites the following authorities: 'Taudih', p. 498; 'Mukhtasar', Vol. II, p. 29; 'Jam'ul-Jawami', Vol. III, p. 288.

<sup>15</sup> *Qiyas*, translated as analogical deduction is the fourth source of Islamic law. As a source of law, it comes into operation in matters which have not been covered by a text of the *Quran* or tradition (the term tradition is used interchangeably with the *Hadith* of the Prophet Mohammed), nor determined by consensus of opinion. The law is, thus, deduced from what has been laid down by any of these authorities, by the use of *Qiyas*.

as *mujtahid*. It is in the doctrine of *ijtihad* that the Islamic legal doctrine was meant to find its evolutionary path. Historically, however, with the emergence of the four schools of juristic thought, it was declared that ‘the doors of *ijtihad* had closed forever’ and that independent juristic reasoning and hence legal development in keeping with the times, was precluded forever. This position has been challenged by many Muslim scholars who believe that *ijtihad* is an ongoing intellectual pursuit and cannot be discontinued.<sup>16</sup>

Over the centuries, Islamic law developed by drawing upon the above sources and juristic techniques. *Sharia*’ which is now used interchangeably with the phrase Islamic law, became rigid and less amenable to changing needs. Since the *Sharia*’ drew heavily upon the two primary sources, the *Quran* and *Sunna* for its formulations, in due course of time, the entire corpus of the *Sharia*’ was elevated to the status of divine law, immutable. Hence, beyond evolution and change. *Sharia*’, it may be argued, by its very definition has evolution built into its meaning and cannot be rigid. (The term *Sharia*’ means a watering place, a flowing stream, where both animals and humans comes to drink water. Stagnant and standing water is not *Sharia*’).<sup>17</sup> How is it then, that a concept that has mobility built into its meaning is perceived as being averse to developing new legal concepts such as human rights? It is submitted that Muslim scholars have failed to make use of the inbuilt dynamism and flexibility in the *Sharia*’; neither

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<sup>16</sup> Cf. Bangladesh study where majority of respondents stated that in their view, *ijtihad* was not a relevant or desirable way forward in terms of discussions on Islamic law and CEDAW.

<sup>17</sup> In the opinion of An-Na’im, *Sharia*’ was constructed by Muslim jurists and although derived from the *Quran* and *Sunna*, is not divine because it is the product of human interpretations of those sources. An-Na’im, *Towards an Islamic Reformation* (Syracuse: Syracuse University Press, 1990).

have those juristic techniques where principles of one school are applied to litigants who in theory belong to another school of Islamic juristic thought.<sup>18</sup> In this context, responsibility for under-utilisation probably also stems from the lack of appreciation of how Islamic law and jurisprudence works and has evolved over the centuries. It also reveals the fact that writers professing a static view of *Sharia*, are unaware of the plurality of legal tradition in Islam or simply impatient with its complexities and desire them to 'will them away' by refusing to engage in a discussion on the subject.<sup>19</sup> If Muslim scholars (and indeed this movement must come from within the Muslim community) succeed in overcoming this psychological barrier of not being able to work on reforming the *Sharia* which they perceive as being divine law, whole new vistas for evolving concepts such as human rights in cross-cultural discourse would open up.

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<sup>18</sup> Such as the doctrines of *Taqlid* and *Talfik*.

<sup>19</sup> There is some evidence to suggest that this plurality irritated the colonial authorities in nineteenth century India, for example, who wanted to 'apply' a cut and dried Islamic law in the courts. For an interesting discussion on the subject see, M. Anderson, 'Islamic Law and the Colonial Encounter in British India' in C. Mallat and J. Connors (eds.) *Islamic Family Law* (London: Graham and Trotman, 1990).

It has been argued that the basic tone and complexion of Islam is reformative, enjoining upon people equity and justice for all.<sup>20</sup> The ethical voice of the *Quran* is said to be egalitarian and non-discriminatory.<sup>21</sup> At the same time, it concedes to resourceful, adult Muslim men, as the privileged members of society, responsibility to care for (and exercise authority over), women, children, orphans, and the needy. The *Quran*, therefore, also contains verses validating the creation and reinforcement of hierarchies based on gender and resources. But these verses are very few, not exceeding 6 out of a total of 6,666 that make up the text of the *Quran*. Yet it is difficult to understand why and how these 6 verses outweigh the remaining 6,660, and the position of women in Islam appears to be determined solely on rules derived from a literal and restrictive reading of these few verses.<sup>22</sup>

A number of scholars have challenged the restrictive interpretations of the religious text in Islam. They argue that norms in the Islamic tradition, discriminatory to women, are a result of the fact that historically it was men who acted as

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<sup>20</sup> For this line of argumentation see generally, F. Rahman, 'Status of Women in the *Quran*' in G. Nashat (ed.), *Women and Revolution in Iran* (Boulder: Westview Press, 1983); J. L. Esposito, *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 1982); A. al-Hibri, 'A Study of Islamic Herstory: Or How Did we Ever Get into this Mess?' *Women Studies International Forum*, Vol. 5, 1982 B. Utas (ed.), *Women in Islamic Societies* (London: Curzon Press, 1983); F. Hussain (ed.), *Muslim Women* (New York: St. Martin's Press, 1984); F. Mernissi, *Beyond the Veil* (Bloomington: Indiana University Press, 1987); F. Mernissi, *Women and Islam* Translated by Mary Jo Lakeland, (Oxford: Basil Blackwell, 1991); L. Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992); An-Nai'm, 1990; R. Hassan, 'An Islamic Perspective' in J. Belcher (ed.), *Women, Religion and Sexuality* (Geneva: WCC Publications, 1990).

<sup>21</sup> Ibid.

<sup>22</sup> These Quranic verses include the following: 2:221; 2:228; 2:282; 24:30; 4:3; 4:34 and will be dealt with in the study.

commentators and interpreters of the religious texts as well as legislators, jurists and judges and people in power.<sup>23</sup> It has also been observed that latter day legal, political and economic developments in the Muslim world too contributed to a perpetuation of an Islamic legal tradition seeking to uphold gender inequality as the dominant theme of the *Quran*.<sup>24</sup> These scholars have attempted to present alternative interpretations to the Quranic verses that declare the inherent superiority of Muslim men by arguing for a radically different construction to be placed on them.

## ***2.2 Women's Human Rights in Islam***

### **A Conceptual Analysis<sup>25</sup>**

Attempting to develop a conceptual framework for women's human rights in Islam is a complex and intricate task primarily due to the multiple layers of regulatory norms informing women's status as well as the varying interpretations of the *Quran* and *Hadith*. In an earlier work,<sup>26</sup> I have used a methodology for this

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<sup>23</sup> Ibid 20.

<sup>24</sup> The Muslim world has had more than its fair share of authoritarian regimes where the voice of the people was rarely heard. Traditionally, women were confined to the home and public life, i.e., matters of state, government and making interventions in public life was considered outside her domain. The last three centuries also saw the vast majority of Muslim countries colonised and hence suppressed under alien rule. The post-colonial era brought its own political and economic problems. It is not surprising, therefore, that in countries where the male population found itself unable to share in governance, women's participation and empowerment was far more problematic.

<sup>25</sup> This section draws upon S. S. Ali, 2000, pp. 42-91.

<sup>26</sup> Ibid pp. 42-91.

framework by combining Esposito's hierarchical notion of rights and Hevener's categorisation of rights and applying this to women's human rights in Islam.

As the very word of God, the *Quran* is the fundamental textual source of Islamic law. John Esposito states that the primary legal value of the *Quran* stems from the fact that it is an ethico-religious revelation and acts as the source book of Islamic values from which specific regulations of substantive law (*furu-al-fiqh*) are derived through human effort.<sup>27</sup> Esposito believes that this task may be achieved through Muslim exegesis which is a systematic study of the value system of the *Quran* and the hierarchisation of its ethico-religious values.<sup>28</sup> This method would resolve the problem of *naskh* (abrogation, the suppression of one *Sharia*' rule by a later one where divergent regulations exist) as well as supply a reasonable explanation for the comprehensiveness of the *Quran*. Most importantly, it would provide a context within which one could understand the value of specific Quranic regulations by shifting the emphasis beyond the specific regulations to its intent, to the value it sought to uphold.<sup>29</sup> Thus, the Quranic prescription has two levels of importance—the specific injunction or command, whose details may be relative to its space and time context, and the ideal or Quranic value, whose realisation the specific regulation intends to fulfil. Since the task of the Muslim community is the realisation of these Quranic values, the goals of jurists is to ensure that *fiqh* regulations embody these *Sharia*' values as fully and perfectly as possible.

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<sup>27</sup> Esposito, 1982 pp. 107-108.

<sup>28</sup> Ibid, citing I. R. al-Faruqi, 'Towards a New Methodology of Quranic Exegesis' *Islamic Studies*, 1962, p. 35.

<sup>29</sup> Ibid., pp. 107-108.

Verses from the *Quran* have been used by different factions to support a woman's subservience to a man and to defend her rights to equality. This seeming contradiction can, therefore, be resolved by an analysis of the relevant Quranic verses through a system of 'hierarchisation of Quranic values' used by Esposito to deal with human rights of women in Islam. This method, it is stated, is reminiscent of the process by which Quranic values were first applied to newly encountered social situations in the formative period of Islam by differentiating between the socio-economic and the ethic-religious categories in Quranic legislation.<sup>30</sup> While women's status is inferior to men in the former, they are full equals in the latter as to the spiritual and moral obligations imposed upon them, in their relationship to their Creator, and in the compensation prepared for them in the Hereafter.<sup>31</sup> While the status difference of men and women in the socio-economic sphere belongs to the category of *Muamalaat* (social relations), which are subject to change, their moral and religious equality belongs to the category of *Ibadaat* (religious duties towards God), which are immutable.<sup>32</sup> By applying the principle of 'hierarchisation' of Quranic values, the Muslim reformers argue that the moral and religious equality of men and women "represents the highest expression of the value of equality"<sup>33</sup> and, therefore, constitutes the most important aspect of the Quranic paradigm on the issue. Keeping this scheme of

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<sup>30</sup> Ibid.

<sup>31</sup> For example, as stated in Quranic verses 33:35; 9:71; 40:40; 9:72; 48:5; 57:12; 3:195; and others.

<sup>32</sup> Esposito, 1982 pp. 107-108.

<sup>33</sup> Ibid., pp. 107-108.

'hierarchisation' in mind, it is possible then to categorise women's human rights in Islam.<sup>34</sup>

Alongside Esposito's hierarchisation of rights, Hevener classifies international human rights instruments relating to women, as having undergone a progressive journey through three stages, each representing international consensus on women's human rights.<sup>35</sup> These categories are: protective, corrective, and non-discriminatory. The protective category is one where laws are formulated which reflect a societal conceptualisation of women as a group which either should not or cannot engage in specified activities. They imply that women are a subordinate, weak and disadvantaged group in society; hence the need to extend protection of unlimited duration.<sup>36</sup> The second category is the corrective category, which also identifies women as a separate group which needs separate treatment. But the aim of the corrective provisions is "to alter and improve specific treatment that women are receiving, without making any overt comparison to the treatment of men in the area. They may be of limited duration, depending on the time period required to achieve the alteration desired."<sup>37</sup> Finally, the non-discriminatory, sex-neutral, category includes provisions, which reject a conceptualisation of women as a separate group, and rather reflect one of men and

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<sup>34</sup> A word of caution here. Although Esposito's attempt at hierarchisation of rights within the Islamic tradition is an important step in his endeavour to develop a modern framework for achieving equality for the sexes, we must not lose sight of the fact that in his attempt to realise the legislative value of Quranic verses, he places emphasis on exegesis or *tafsir*. As is evident from literature on the subject, the process of exegesis itself resulted in some restrictive interpretations to Quranic verses regarding the status of women.

<sup>35</sup> See N. Hevener, *International Law and the Status of Women* (Boulder: Westview Press, 1983).

<sup>36</sup> *Ibid.*, p. 4.

<sup>37</sup> *Ibid.*



women as entitled to equal treatment. The concept is one that holds that biological differences should not be a basis for the social and political allocation of benefits and burdens within a society. These provisions treat women in the same manner as men.<sup>38</sup> For the purpose of analysing women's human rights in Islam, it is proposed to add here a fourth category, i.e., the discriminatory category wherein certain injunctions, rules and regulations of the *Quran* and *Hadith* literature may be placed, where women and men clearly appear unequal. In the remaining part of this section, it is proposed to use a combination of the methods of 'hierarchisation' and 'categorisation' of women's human rights to discuss these within the Islamic tradition.

The non-discriminatory category of rights which is akin to the *Ibadaat* hierarchy proposed by Esposito comes closest to women's rights to equality and non-discrimination in CEDAW. This equality comes across most prominently in issues such as the creation of man and woman, moral and spiritual obligations, and reward and punishment. The Islamic tradition is clear that God created men and women from one fundamental substance. As the *Quran* says:

He created you from one being, then from that (being)  
He made its mate.<sup>39</sup>

*Hadith* literature also presents instances where the principle of complete equality has been espoused. The Prophet Mohammed is reported to have said:

All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab or of a white

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<sup>38</sup> Ibid.

<sup>39</sup> The *Quran*, verse 39:6.

over a black person: Only God-fearing people merit a preference with God. Thus men and women are equal.<sup>40</sup>

In the *Quran*, Adam and Eve are held jointly responsible for the transgression and consequent expulsion from paradise.<sup>41</sup> Verse 7:18-26 is self-explanatory in this regard:

On the ethico-religious level (or *Ibadaat* on Esposito's hierarchy of rights), the position of men and women are on an equal standing, "both as to their religious obligations toward God and their peers as well as their consequent reward or punishment".<sup>42</sup> In support of this argument, Esposito cites verses 9:71-72 of the *Quran* which state thus:

The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil; they observe regular prayers, practice charity, and obey God and His Apostle. On them will God pour His mercy... God hath promised to believers men and women, gardens under which rivers flow, to dwell therein, and beautiful mansions to dwell in gardens of everlasting bliss.

Similarly, the following verses also reflect equality in moral and spiritual obligations:

For Muslim men and Muslim women, for believing men and believing women, for devout men and devout women, for true men and true women, for men and women who are patient and

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<sup>40</sup> The last address of the Prophet Mohammed to the Muslims on the occasion of the *Hajjat-ul-Wida* (the last pilgrimage).

<sup>41</sup> B. Stowasser, 'Religious Ideology, Women, and Family' in B. F. Stowasser (ed.,) *The Islamic Impulse* (London: Croom Helm, 1987) pp. 22-23.

<sup>42</sup> See Esposito, 1982; M. M. Taha, *The Second Message of Islam*, translated by A. A. An-Nai'm (Syracuse: Syracuse University Press, 1987) p. 139. Here he argues that Islam's original precept is complete equality between men and women.

constant, for men and women who humble themselves, for men and women who give charity, for men and women who guard their chastity, and for men and women who engage in God's praise, for them has God prepared forgiveness and great reward.<sup>43</sup>

Whoever doeth right, whether male or female, and is a believer, him verily We shall quicken with good life.<sup>44</sup>

Along with equal rewards in the hereafter, equality in punishment is enjoined for violating divine laws. So, for instance, indulging in sexual relations outside marriage brings with it severe punishment for both men and women as stated in verses 24:2-4 below:

The adulterer and the adulteress,  
Scourge each one of them  
(with) a hundred stripes.  
And let not pity for the  
Twain withhold you from  
Obedience to Allah,  
If ye believe in Allah  
And the last day.  
And let a party of believers  
Witness their punishment.

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<sup>43</sup> The *Quran*, verse 33:35. Taha, in support of the equality argument also cites other Quranic verses. These include 40:17: "Today each soul is rewarded for what it earned, without unfairness. Surely, God is swift at reckoning." Verse 74:38 "Every soul is pledged for what it has earned." Verse 6:164 "Nor does any bearer of burden bear the burden of another, no matter how overburdened and not even of a kin. You are to warn (those) who sincerely fear God and perform the prayer. And who pay alms (*zakah*) is cleansing himself, and to God (you) shall return."

<sup>44</sup> The *Quran*, verse 16:97.

The adulterer shall not Marry,  
Save an adulteress  
Or an idolatress, and the  
Adultress none shall marry,  
None save an adulterer or an idolater.  
All that is forbidden unto believers.

Even though the Quranic verse 2:282 has been used to lay down a rule that the value of the testimony that a woman given in court in financial transactions has to be corroborated by another woman, thus leading to the commonly-held notion that the evidence of two women is equal to that of a single male, yet there are instances where the evidence of one woman outweighs that of a man. A woman's oath in cases where her husband accuses her of adultery is enough to avert punishment. Verses 24:6-9 state the following:

As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies, (swearing) by Allah that he is of those who speak the truth; and yet a fifth, invoking the curse of Allah on him if he is of those who lie. And it shall avert the punishment from her if she bear witness before Allah four times that the thing he sayeth is indeed false. And a fifth (time) that the wrath of Allah be upon her if he speaketh the truth.

Islam has accorded women civil and property rights, including rights of inheritance. She has been guaranteed complete control over what she earns and possesses:

And their Lord hath heard them (and He sayeth): Lo! I suffer not the work of any worker, male or female, to be lost. Ye proceed one from another <sup>45</sup>

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<sup>45</sup> The *Quran*, verse 3:285.

Unto the men belongeth a share of that which parents and kindred leave, and unto the women a share of that which parents and near kindred leave.<sup>46</sup>

Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned.<sup>47</sup>

The above-mentioned Quranic verses thus create a hierarchy of non-discriminatory rights. Some other examples of non-discriminatory laws granting Muslim women complete equality with men are: that she is *sui juris* (legal person) and can make independent decisions as regards entering into a contract, and the acquisition, disposal and alienation of property. The property laws of the *Quran* guarantee women the right to have full possession and control of their wealth including dower, during marriage and after divorce.<sup>48</sup> In the sphere of family law too, certain provisions afford women complete equality. For example, the right to enter marriage of her own will, on attaining adulthood, without an intermediary (*wali*).<sup>49</sup>

Contrary to popular belief, there is nothing in any verse of the *Quran* barring women from participation in public and political life, including the right to vote, holding public office such as head of state, judicial office etc. Many *Ahadith*, however, declare

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<sup>46</sup> The *Quran*, verse 4:7.

<sup>47</sup> The *Quran*, verse 4:32.

<sup>48</sup> The *Quran*, verses 4:7; 4:11; and 4:12 as regards inheritance and bequeathal rights of women. and 4:4; 4:24; 4:20; 4:21; 2:229 for full possession and control over their wealth.

<sup>49</sup> This, however, is a controversial right since under *Shafei* law a women always needs a guardian to contract her in marriage even on attaining puberty. Even under Hanafi law it is subject to debate as seen in the recent Pakistani case *Asma Jehangir vs Abdul Waheed*, PLD 1997 Lah. 301. For a detailed discussion, see chapter 4 of this study.

some professions as out of bounds for women, one such being that of head of state. For instance, one of the most oft-quoted *Hadith* runs thus: “Those who entrust their affairs to a woman will never know prosperity.”<sup>50</sup> This *Hadith* barring women from public life first appeared on the Muslim political scene about 25 years after the death of the Prophet Mohammed and was narrated by one Abu Bakra. He recollected this *Hadith* at a highly opportune moment—the entry into Basra of the Caliph Ali after defeating Aisha (wife of the Prophet Mohammed) at the Battle of the Camel! Abu Bakra was among the notables of Basra who had refused to participate on either side in the civil war and was fearing a reprisal from the Caliph Ali. Conveniently recalling such a *Hadith* obviously meant soliciting political favour with a victorious leader at the cost of the vanquished foe. But this seemingly benign act of political expediency had far reaching consequences on the status of women and how they would henceforth be perceived, for in this case, the defeated insurgent leader happened to be a woman. *Hadith* being a source of Islamic law, has to be compiled scientifically along stringent rules to sift the authentic ones from those that have been fabricated or those that do not fulfil the rules laid down for determining authenticity of traditions.<sup>51</sup> One such rule is uprightness of character of the narrator. Applying this rule to Abu Bakra, he allegedly stands disqualified as he was convicted and flogged for false testimony

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<sup>50</sup> Bukhari, *Sahih*, Vol. 4, p.226. The *Sahih* by Bukhari, along with five other *Hadith* collections, rank as the “Six” authentic compilations of the words and deeds of the Prophet Mohammed. These include *Hadith* collections of Muslim ibn’l Hajjaj; Timidhi; Abu Daud; Ibn Majah and Nisa’i. For details of works see A. Rahim, 1995, pp. 1-31.

<sup>51</sup> For a comprehensive discussion on classification of *Hadith*, and rules for authenticity see *Ibid.*, pp. 58-65.

(*Qadhif*), by the second Caliph, Umar Ibn-Al-Khattab.<sup>52</sup> Despite this questionable background, many Muslims quote this *Hadith* as “authority” for excluding women from decision-making and public life.

The historical context of the *Hadith* under discussion is reported to have been the occasion when the Prophet Mohammed received news that Khusro’s daughter had succeeded to the throne. It is said that this woman was known to be highly authoritarian, and the comment in all likelihood was specifically in relation to her. Scholars like Dr. Abdul Hameed consider this *Hadith* as being informative in nature and certainly not an immutable injunction for Muslims at all times and in all ages.<sup>53</sup>

In contradistinction to the above *Hadith*, one finds that in chapter 27 of the *Quran* entitled “Naml” or the Ants, Bilquis, the Queen of Sheba and her rule is mentioned with great commendation. Verses 32-34 of that chapter in particular describes Bilquis as a ruler enjoying great wealth and dignity, and full confidence of her subjects. She administers the country in consultation with her council who in turn are committed to her and carry out her bidding. Might we not, therefore, argue, that if Islamic injunctions were set against women as head of state or holding any other political office, the Queen of Sheba would not have found such honourable mention in the *Quran*? That women were an important

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<sup>52</sup> Ibn al-Athir, *Usd al-Ghabrafi tamyiz al-sahaba*, Vol. 5, (Beirut: Daral-Fikr) p.38. For a detailed discussion of the circumstances surrounding narration of this *Hadith*, see Mernissi, *Women and Islam*, 1987. For a critique of Mernissi’s analysis see R. Afshari, ‘Egalitarian Islam and Misogynist Islamic Tradition: A Critique of the Feminist reinterpretation of Islamic History and Heritage’, *Critique*, Vol. 4, 1994, pp. 13-33.

<sup>53</sup> A. Hameed, *Mabadi-e-Nazam ul Hukam Al Islami*, cited in Stowasser 1987 pp. 876-878.

constituent of the Muslim community and indeed expected to participate in political life is borne out by the fact that women as a group participated in the initial pledge of allegiance (*bay'a*) extended to the Prophet Mohammed by the Muslims.<sup>54</sup> This practice was continued in later years as well, making it an integral part of the political process.<sup>55</sup>

It is important to make the point here that Aisha, wife of the Prophet Mohammed actively participated in political and public life. She is one of the most renowned and credible narrators of the *Hadith*, and is known to have completed and corrected many *Ahadith* reported inaccurately or inadequately.<sup>56</sup>

### **The Protective and Corrective Category, *Muamalaat* and Women's Human Rights**

In order to appreciate the protective and corrective category of women's human rights in Islam, it is important to study these against the background of the *Jahilliyya*. The basic teachings of the *Quran* focus on efforts to improve the condition of, and strengthen the weaker segments of society in pre-Islamic Arabia—orphans, slaves, the poor, women, etc—segments which had been abused by the stronger elements in society.<sup>57</sup> Therefore,

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<sup>54</sup> Stowasser, 1987

<sup>55</sup> L. P. Sayeh & A. M. Morse Jr., 'Islam and the Treatment of Women: An Incomplete Understanding of Gradualism' *Texas International Law Journal*, Vol. 30, 1995, pp. 311-323 and accompanying footnotes.

<sup>56</sup> *Ibid.*, pp. 322-323 and accompanying footnotes. For an interesting account of the life and personality of Aisha, wife of the Prophet Mohammed see, N. Abbott, *Aishah the Beloved of Mohammed* (New York: Arno Press, 1973). For a more recent account see, D. A. Spellberg, *Politics, Gender, and the Islamic Past. The Legacy of Aisha Bint Abi Bakr* (New York: Columbia University Press, 1994).

<sup>57</sup> Rahman, 1983.



Quranic verses aimed at ameliorating the plight of the downtrodden classes, and women in particular stand out prominently. At the same time it has to be conceded that no matter how revolutionary the philosophy of Islam may have been, in order to take root among a tribal, patriarchal society, an outright break with the past would not have served any useful purpose. It is perhaps difficult to appreciate today, in the closing years of the twentieth century, the extent of reform brought about by Islam fourteen hundred years ago in laying the foundations of an egalitarian society based on the principles of social justice. Therefore, a number of rights discussed in this section will no doubt come across as half-measures and incapable of according women the same degree of importance as men.

Using Esposito's 'hierarchisation' of Quranic values, we come to the second category of women's human rights, i.e., rights that deal with *muamalaat* or the socio-economic sphere of life. Here we discern some verses that accord more rights to men but have been framed so as to appear as corrective of wider forms of discrimination in pre-Islamic Arabia and/or seen as protecting women along with other disadvantaged sections of society. It may be argued that these categories are not immutable as they are susceptible and sensitive to changing perceptions of society.<sup>58</sup> As Fazlur Rahman argues, "although woman's inferior status has been written into Islamic law, it is by and large the result of prevailing social conditions rather than of the moral teaching of the *Quran*."<sup>59</sup> Changing social conditions may, therefore, propel

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<sup>58</sup> In Hevener's categorisation of rights, the protective category is deemed of unlimited duration whereas rights placed in the corrective category may be of limited duration and no longer required when men and women achieve complete equality.

<sup>59</sup> Rahman, 1983.

protective and corrective rights into the non-discriminatory category.<sup>60</sup>

Among many Arab tribes, the girl child was an unwelcome intruder and was buried alive for reasons of poverty and honour.<sup>61</sup> The *Quran* describes the situation in the following words:

When one of them is given the glad tidings of (the birth of) a female, his face darkens as he tries to suppress his chagrin. He hides from people out of a sense of disgrace of the news he has been given and he ponders whether to keep her in disgrace or shove her under the earth. Evil is, indeed, what they judge.<sup>62</sup>

In the corrective category of women's human rights, therefore, perhaps the most important piece of Quranic injunction is the prohibition on female infanticide and hence the right to life for the girl child. In this regard the *Quran* enjoins thus:

Slay not your children,  
Fearing a fall to poverty.  
We shall provide for  
them and for you.  
Lo! the slaying of them  
Is a great sin”<sup>63</sup>

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<sup>60</sup> It is here that my views on Hevener's categorisation differ to the extent that in applying these I perceive all four categories as a continuum flowing one from the other.

<sup>61</sup> Rahman, 1983, p. 37; Rahim, 1995.

<sup>62</sup> The *Quran*, verse 16:58-59.

<sup>63</sup> The *Quran*, verse 17:31. Similarly, in verse 6:151 the same commandment is repeated in these words: “Kill not your children on a plea of poverty we provide for you and for them.”

*Hadith* literature also contains a number of incidents and sayings of the Prophet Mohammed that are reflective of the concern that female infanticide gave rise to. Since pre-Islamic Arabia regarded the birth of a girl-child as a punishment and humiliation from the gods it was important that pronouncements be made to reinforce the Quranic statements prohibiting the practice and removing the prevalent misgivings entrenched in the Arab mind. These *Ahadith* were corrective of the social norm of female infanticide by engendering sentiments of love, affection and mercy for the girl-child in the hearts of their parents.<sup>64</sup>

The pre-Islamic practice of *zihar* whereby an Arab husband would make a pronouncement of divorce upon his wife by comparing her with the back of his mother (and therefore prohibited to him), was also abolished.<sup>65</sup> This prohibition came in the light of the humiliation caused to the woman as a result of this particular form of divorce. Verse 33:4 of the *Quran* states:

God has not put two hearts in any man's breast: He has not made your wives with whom you do *zihar* your mothers, nor has He made your so-called (i.e., adopted) sons your real sons.

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<sup>64</sup> It is related from Aisha, wife of the Prophet Mohammed, "If daughters are born to a parent and he treats them benevolently and beneficently, he will be secured from the fire of Hell." Anas bin Malik reports, "He who brings up two girls and they attain puberty, will come on the day of judgement and he and I will be like this". Saying this the Prophet joined his fingers. Abdullah reports, "If a girl child is born to someone and he brings her up well and educates and trains her well and whatever mercy is shown to him by Allah is showered by him on his daughter, that girl will be a screen and curtain for him from the fire of Hell." Cited in A. Hussain, *Status of Women in Islam* (Lahore: Law Publishing Company, 1987) appendix, pp. 1-10.

<sup>65</sup> For a discussion of the various kinds of divorce in pre-Islamic Arabia, see Rahim, 1995, pp. 8-9; Rahman, 1983.

Another corrective measure in the Quranic text relates to a pagan custom whereby a son inherited his stepmother as part of his father's legacy. The son could either force her to marry him or, debar her from remarrying anyone else for the rest of her life. In the absence of a son, the next male kin of the deceased had the same power over her.<sup>66</sup>

Another example of a protective/corrective right in the *muamalaat* hierarchy is the right of inheritance granted to women which is invariably half that granted to men in comparable situations. The *Quran* states:

God thus directs you as regards your children's (inheritance). To the male a portion equal to that of two females.<sup>67</sup>

Although the right to inheritance is corrective of the pre-Islamic custom of exclusion of women from any form of inheritance while also being protective of her vulnerable economic position, the half share is in any case discriminatory of her equal rights. But many writers on Islamic law have argued that this law does not discriminate against women. Perveen Shaukat Ali, for instance, is of the view that:

...in their opinion this is against the basic rules of justice to give women half of the male's share. It may, however, be pointed out that a woman is in no way a loser in this bargain. She gets her part of property from three different sources i.e., father, husband and son, and this makes her share almost equal to man.<sup>68</sup>

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<sup>66</sup> Rahim, 1995; Rahman, 1983. The prohibition came in verse 4:19 of the *Quran*.

<sup>67</sup> The *Quran*, verse 4:11.

<sup>68</sup> P. S. Ali, *Human Rights in Islam* (Lahore: Aziz Publishers, 1980) p.120.

It is submitted with respect to Perveen Shaukat Ali's argument, that men too inherit from other sources. They inherit from the mother, wife, and daughter and in most cases their share is double that of the woman's.<sup>69</sup> Inheritance rights of women may be placed in the protective category by virtue of the fact that Quranic injunctions ensure to women a basic minimum share, recognising the reality that they will always be a class of persons in need of protection. This is borne out by centuries of oppression where women have not and in all likelihood, will not in the foreseeable future be able to attain substantive economic parity with their male counterparts. At the same time, however, this minimum share does not preclude an enhanced share or a share equal to or more than that of a male. A parent, spouse or any other person may, by executing a valid gift deed, give away his/her entire wealth to a woman to the exclusion of all expectant male heirs. Similarly, a husband may, under a stipulation in the marriage contract, be divested of his entire possessions by way of dower, as there is no maximum limit to what may be given as dower to a wife.

In the area of family law, human rights of women are for the most part of the corrective/protective category although as mentioned above the initial premise of entering into the marriage contract is one of complete equality. However, once the contract is made, then inequality between the contracting parties emerges. For instance, under the "protective" right of dower as a

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<sup>69</sup> For example, as a wife who has children, a woman inherits one eighth of her husband's estate; one-fourth if she is childless. A husband on the other hand inherits one-fourth from his wife if they have children, one half if they are childless. For a detailed exposition of the Islamic law of inheritance see, M. A. Mannan, *Principles of Muhammadan Law* (Lahore: PLD Publishers, 1995) chapter 6, 7, and 8.

“consideration” for the marriage contract, the husband becomes the protector and the wife, the protected. She retains the dower (or the right over it if not paid already), so long as she remains the wife or the husband dissolves the marriage tie by *talaq*.<sup>70</sup> But if the wife is desirous of terminating the contract,<sup>71</sup> then this protection of dower money or property must be returned to the husband to “ransom herself from her husband”.<sup>72</sup>

The *Quran* also introduced significant changes in the concept of dower. In contrast to the pre-Islamic notion of dower as a form of bride-price to be appropriated by the father or other male relative of the woman, the wife became the sole recipient of this sum of money or other property. Islamic law developed dower into an essential component of the marriage contract. Furthermore, verse 4:20 also prohibited the practice of forcing one’s wife to make a will in one’s favour that remitted the dower or any other gifts the husband had given to her.

But if you do want to take another wife in her place (i.e., by divorcing her) and if you have gifted to her a heap of gold, do not take anything back from it; Will you take it back as a stunning lie and a clear sin? And how will you take it back when you have been intimate with each other and they have had solemn promises from you?<sup>73</sup>

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<sup>70</sup> The unilateral right to terminate the marriage contract belongs to the husband under Islamic law which is technically known as *talaq*. The husband has to pay the wife the dower on pronouncement of *talaq*.

<sup>71</sup> The concept of the wife being able to “buy” her freedom by returning her dower is technically known as *khula* which affords a woman the right to get out of an undesirable union.

<sup>72</sup> The *Quran*, verse 2:229.

<sup>73</sup> The *Quran*, verse 4:20.

Haeri sums up this reform in family law in the following words:

In the seventh century AD the Prophet Mohammed unified the multiplicity of pre-Islamic modes of sexual mores of sexual unions by outlawing all but one form of marriage, namely marriage by contract. Fundamental to this rearranging of the existing social structure was the realignment of the role of the husband and wife into that of the principal transacting parties. As distinct from the pre-Islamic form of 'marriage of dominion', Islamic law recognised the wife — not her father — to be the recipient of the brideprice. Implicit in this act is a recognition of a degree of women's autonomy and volition. As a party to the contract, it is the woman herself who has to give consent — however nominally — for the contract to be valid. And it is the woman herself, not her father (custom aside), who is to receive the full amount of brideprice, be it immediate or deferred."<sup>74</sup>

It is an established fact that traditional Islamic law accords the Muslim male a unilateral right to dissolve the marriage (*talaq*) without assigning any cause <sup>75</sup> and without the interference of the court.<sup>76</sup> On the other hand it confers on a woman the right to seek dissolution of the marriage tie by foregoing her dower,

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<sup>74</sup> S. Haeri, 'Divorce in Contemporary Iran: A Male Prerogative in Self-Will' in *Islamic Family Law* (London: Graham & Trotman, 1990) p. 56.

<sup>75</sup> In a famous Pakistani case, *Khurshid Bibi vs Mohammed Amin* PLD 1967 SC 97, their Lordships were of the view that *talaq* is not an unfettered right of the husband as the *Quran* in 4:35, provides for the appointment of arbiters to curtail the unbridled exercise of this right. These fetters are hardly effective if the husband is determined to go ahead with the pronouncement of divorce.

<sup>76</sup> Despite this privilege accorded to the husband in traditional Islamic law, many Muslim countries have legislated certain procedural requirements that have to be undertaken to finalise the divorce. See for instance, the Muslim Family Laws Ordinance, 1961 of Pakistan.

with the difference that the woman has to convince the court of her fixed aversion and irretrievable breakdown of the marriage (*khula*)<sup>77</sup>. Although some leading judgements from the superior courts of Pakistan have tried to equate the right to pronounce *talaq* by the husband with the right of *khula* available to the woman,<sup>78</sup> yet it is submitted that there are major differences between these two modes of dissolution of marriage. No matter what obstacles one places in the husband's right to give *talaq*, at the end of the day by its very definition, *talaq* may be pronounced with or without the intervention of a court of law. On the other hand, if a woman fails to convince the judge of the genuineness of her case for *khula*, she cannot unilaterally terminate the marriage contract.<sup>79</sup> It is with these drawbacks in mind that the right of *khula* is being placed in the protective/corrective category of women's human rights rather than in the non-discriminatory one.

A further protective right as regards dissolution of marriage, is *talaq-i-tafwid* or delegated right of divorce given to the wife in the contract of marriage. Muslim women may take advantage of the fact that marriage is a civil contract and stipulations limiting or even prohibiting the husband from dissolving the marriage tie can be incorporated in it. An effort at achieving some measure of equality may thus be successful.<sup>80</sup>

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<sup>77</sup> PLD 1967 SC 97.

<sup>78</sup> For example in *Safia Begum vs Khadim Hussain* 1985 CLC 1869 and *Syed Mohammed Rizwan vs Mst. Samina Khatoon* 1989 SMCR 25.

<sup>79</sup> For instance, see *Aali vs Additional District Judge I, Quetta* 1987 CLC 27, *Raisa Begum vs Mohammed Hussain* 1986 MLD 1418 and many others.

<sup>80</sup> Here a note of caution as regards these stipulations favourable to women. Societal pressure strongly discourages use of these rights afforded to women. For details, see S. S. Ali, 'An Analysis of the Trends of the Superior Courts of Pakistan in Matters Relating to Marriage, Dower, Divorce', Working Paper for the Women and Law Project, Women Living Under Muslim Laws, 1993.



The right of the wife to be properly fed and clothed at the husband's expense is another protective right afforded to the woman.<sup>81</sup> This right is available to her even though she may be wealthier than the husband and capable of maintaining not only herself but him as well.<sup>82</sup>

The divorce laws stipulating a waiting period (*iddat*) during which the marriage is suspended, but not terminated, may also be seen in a protective/corrective framework. In the pre-Islamic laws of divorce, husbands were not required to follow any particular procedure for terminating the marriage contract. They could at will marry, divorce, and remarry the same woman. By laying down a waiting period before which the divorce became irrevocable, the unilateral right of divorce allowed to men (and not to women), was toned down and chances for reconciliation kept alive until the period of waiting expired.<sup>83</sup>

As regards the rights and privileges of a woman in her capacity as a mother, the concept of child care as a joint parental and social responsibility has deep roots within the Islamic tradition.

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<sup>81</sup> For example as enjoined in the *Quran*, verse 4:34.

<sup>82</sup> But this protective right to be maintained ceases as soon as the woman is divorced or is widowed. For the issue of post-divorce maintenance, see the famous Indian case of *Mohammed Ahmed Khan vs Shah Bano Begum and others* AIR 1985 SC 945.

<sup>83</sup> There are three modes of pronouncing *talaq*. *Talaq-i-Ahsan*, *Talaq-i-Hasan* and *Talaq-ul-Biddat*. The first two offer some scope for reconciliation as the divorce does not become irrevocable for some time. The time afforded before the divorce becomes irrevocable is the first kind of waiting period. Then there is the period of *iddat*, which is a period during which a woman whose marriage has been terminated either by death or divorce may not remarry. *Talaq-ul-Biddat* (the third kind mode), is an irrevocable divorce as soon as it is pronounced and there is no chance of reconciliation. This mode is not the one sanctioned by the Prophet Mohammed, and hence rejected by some Muslims.

While breastfeeding and its duration is recommended, the modalities are to be decided by “mutual consultation” of both parents. If the mother is unable to fulfil her duty, the father is under an obligation to make alternate arrangements, e.g., hiring a wet nurse etc. Where the parents are divorced and the mother has custody, the father is bound to feed, maintain, and pay the mother as he would any wet nurse for performing this job.<sup>84</sup> This placing of the monetary responsibility for the welfare of the child and the nursing mother, although within the protective category of human rights, reinforces the stereotype roles of men as providers and women as passive consumers and men’s liability.

Regarding custody and guardianship of children, in cases of divorced parents, a mother is entitled to *hizanat* or custody of a boy up to the age of 7 and a female child until she attains

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<sup>84</sup> “Nor should he (father) to whom the child is born  
(be made to suffer) because of his child.  
(An heir shall be chargeable in the same way  
If they both decide on weaning)  
If they desire to wean the child by mutual consent,  
And, (after) consultation, it is no sin for them,  
And if you wish to give your children out to  
Nurse, it is no sin for you provided ye pay  
(the nursing woman as hired).  
What is due from you (i.e., money that has been either  
Fixed or according to common practice)  
Observe your duty to Allah, and know that Allah  
Is Seer of what ye do.”

Also see discussion on this point in S. S. Ali and B. Jamil, *The United Nations Convention on the Rights of the Child, Islamic Law and Pakistan Legislation: A Comparative Study* (Peshawar: Shaheen Printing Press, 1994).

puberty.<sup>85</sup> After that period, custody reverts to the father who is generally known as the “natural guardian” of his children. The mother cannot, under traditional Islamic law be recognised as the legal guardian of her own children. One does not come across any verse of the *Quran* establishing the father as the sole legal guardian of his children to the exclusion of the mother. However, there is a saying of the Prophet, which is an extract of his sermon on the occasion of the Last Pilgrimage (*Hajjat-ul-Wida*), to the effect that “the child belongs to him/her on whose bed it is born”. In the patriarchal social organisation it is the man who has to provide the household effects (including the bed on which the child is born). It has thus been inferred over the centuries that the child “belongs” to the father. This is also in line with the above mentioned principle of Islamic law where the father is made to pay for feeding and rearing the child, even if it is by the child’s own mother. But what is very important to realise is that these recommendations/injunctions are always prefaced by the economic superiority of the man. The question posed here is: What would be the position if one were to reverse situations and the woman/mother was the breadwinner/provider of the family?

#### **Discriminatory Category of Rights: The Verse 4:34 Debate**

In the hierarchisation and categorisation of rights, we now come to an area where the male is provided status, control, and authority over the woman (although in recent years some male and female

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<sup>85</sup> These are not uniformly applicable rules as only the *Hanafi Sunni* school of thought adheres to them. Under *Shia* law, a mother is only entitled to custody of her minor children up to the age of 2 years in case of a male child and 7 years in case of a female. See Mannan, 1995.

scholars and theologians<sup>86</sup> are challenging the male-oriented interpretation of some of these verses). In this section it is proposed to analyse these Quranic verses that arguably establish and reinforce gender hierarchies within the Islamic tradition. Although the most oft-quoted verse in this regard is verse 4:34 of the *Quran*, yet male dominance and priority is determined by this verse used in conjunction with verse 2:282 (testimony of women), verses permitting polygamy, superior right of the male to terminate marriage etc. Each of these verses used over the centuries as sources of positive law on the subject in various Muslim jurisdictions are open to diverse interpretations to the point where they have even been used to promote women's rights. (see discussion below).

Some Quranic laws that regulate the structure of authority in the Muslim household stipulate that within the context of marriage and as a member of the husband's household, the wife is his responsibility and hence under his authority. The *Quran* thus endows the man both with authority over the woman in the family setting, coupled with the obligation to provide for her by way of material support.<sup>87</sup> The classic verse confirming male

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<sup>86</sup> See for instance the work of Riffat Hassan who is to the author's knowledge the first and one of the very few female theologians in the Muslim world and has written prolifically on the subject. Some of the more relevant to our present discussion are: R. Hassan, 'The Role and Responsibilities of Women in the Legal and Ritual Tradition of Islam,' Paper presented at a bi-annual meeting of a Dialogue of Jewish-Christian-Muslim Scholars at the Joseph and Rose Kennedy Institute of Ethics, Washington, DC, on October 14, 1980; R. Hassan, 'On Human Rights and the Quranic Perspective' in A. Swidler (ed.), *Human Rights in Religious Traditions* (New York: Pilgrim Press, 1982); R. Hassan, 'An Islamic Perspective' in J. Becher (ed.) *Women, Religion and Sexuality* (Geneva: WCC Publications, 1990).

<sup>87</sup> B. Stowasser, 1987, p. 293.

superiority (or at least perceived as such by most Muslims) is the following:

Men are the protectors  
And maintainers of women,  
Because God has given  
The one more (strength)  
Than the other, and because  
They support them from their means.  
Therefore the righteous women  
Are devoutly obedient, and guard  
In (the husband's) absence  
What God would have them guard.  
As to those women  
On whose part ye fear  
Disloyalty and ill-conduct,  
Admonish them (first)  
(Next), refuse to share their beds,  
(And last) beat them lightly  
But if they return to obedience,  
Seek not against them  
Means (of annoyance)  
For God is Most-High  
Great (above you all)."<sup>88</sup>

As mentioned above, a number of scholars have taken up the challenge of reinterpreting verse 4:34. Riffat Hassan, for instance argues that:

While Muslims through the centuries have interpreted *Sura An-Nisa:34* as giving them (men) unequivocal mastery over women,

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<sup>88</sup> The *Quran*, verse 4:34.

a linguistically, and philosophically/theologically accurate interpretation of this passage would lead to radically different conclusions. In simple words, what this passage is saying is that since only women bear children (which is not to say either that all women should bear children or that women's sole function is to bear children) — a function whose importance in the survival of any community cannot be questioned — they should not have the additional obligation of being breadwinners whilst they perform this function. Thus, during the period of a woman's child-bearing, the function must be performed by men (not just husbands) in the Muslim "Ummah".... It enjoins men in general to assume responsibility for women in general when they are performing the vitally important function of child-bearing.<sup>89</sup>

It is submitted, however, with respect to Riffat Hassan's interpretation of verse 4:34 of the *Quran* that, although by virtue of her innovative interpretation, one may succeed in placing this verse in the protective category of rights for women, her argument cannot be used to acquire non-discriminatory status for women. What is perhaps possible is to emphasise that verses where wealth has been described as the sole determinant of superiority, such as verse 4:34, we may assume that were women to achieve that measure of financial autonomy, they would be accorded the same status as men in a similar position.<sup>90</sup>

A further point with regard to Hassan's interpretation lies in the fact that she fails to come up with a plausible explanation of why men (in that particular superior position) are justified in

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<sup>89</sup> R. Hassan, extract from a paper presented at a Quranic interpretation meeting held in Karachi, Pakistan (8th-13th July 1990), under the auspices of Women Living Under Muslim Laws.

<sup>90</sup> This argument needs further research and refinement.

beating the woman (women) in their charge. According to her view all three stages of admonishment are invokable only if women (*en masse*), refuse to procreate. However, it has to be said that neither a textual reading of the verse nor any contextual evidence leads one to this inference of the said verse as presented by Hassan.<sup>91</sup>

Aziza Al-Hibri, another Muslim scholar analyses verse 4:34 in the following manner: “Men are *qawwamun* over women in matters where God gave some of them more than others, and in what they spend of their money.” Al-Hibri argues that the problematic concept here is *qawwamun*, which is difficult to translate. She says that while some writers translate it as ‘protectors’ and ‘maintainers’ (eg. A.Y. Ali’s translation), this is not quite accurate as the basic notion involved here is one of moral guidance and caring.<sup>92</sup> The ‘standard’ interpretation of the above passage declares men as being in charge of women’s affairs because men were created by God as superior to woman (in strength and reason) and because they provided for women (they spend their money on them). Al-Hibri challenges it on two counts; that it is unwarranted and that it is inconsistent with other Islamic teachings.<sup>93</sup> She concludes therefore that:

Nowhere in the passage is there a reference to the male’s physical or intellectual superiority. Secondly, since men are *qawwamun* over women in matters where God gave some of the men more than some of the women, and in what the men spend of their money, then clearly men as a class are not *qawwamun* over women as a

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<sup>91</sup> Hassan,1990.

<sup>92</sup> Al-Hibri, A ‘Study of Islamic Herstory or How Did We Ever Get into this Mess?’ *Women Studies International Forum*, Vol 5, 1982, p. 207.

<sup>93</sup> Ibid.

class. The conditions of being *qawwamun* as specified in the passage are two:

that the man be someone whom God gave more in the matter at hand than the woman and that he be her provider

If either condition fails, then the man is not *qawwamun* over that woman. If both obtain, then all it entitles him to is caring for her and providing her with moral guidance. For, only under extreme conditions (for example insanity) does the Muslim woman lose her right to self-determination, including entering any kind of business contract without permission from her husband. It is worth noting that the passage does not even assert that some men are inherently superior to some women. It only states that in certain matters some men may have more than some women.<sup>94</sup>

Al-Hibri also makes the point that according to her interpretation of verse 4:34, no one has the right to counsel a self-supporting woman and since “Islam emphasises democracy and enjoins Muslims to counsel each other in making decisions, this resolution falls totally within the spirit of Islam.”<sup>95</sup>

The second line of argument pursued by Al-Hibri in support of her alternate explanation, is to state that the traditional interpretation is inconsistent with other Islamic teachings. She cites verse 9:71 of the *Quran* which declares that:

The believers, men and women, are *awliya*, one of the another

*Awliya* may be translated as meaning protectors, in charge, guides. In fact, conceptually it is quite similar to the term *qawwamun*. Al-Hibri then poses the question: “How could women be *awliya* of

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<sup>94</sup> Ibid., p. 218.

<sup>95</sup> Ibid.



men if men are superior to women in both physical and intellectual strength? And, how could women be in charge of men who have absolute authority over them?"<sup>96</sup>

Esposito, arguing in the same vein as Hassan and Al-Hibri, initiates the discussion by stating that in the socio-economic sphere, scholars of Islam agree that a major concern of the *Quran* was the betterment of woman's position by establishing her legal capacity, granting her economic rights (dower, inheritance, etc.), and thus raising her social status.<sup>97</sup> However, Quranic verses such as 4:34 the traditional interpretations of which would support what today would be deemed an inequitable position for women. This verse has been interpreted as indicating men's priority over women. According to Pickthall's translation of the *Quran*, verse 4:34 states that:

Men are in charge of women, because Allah hath made one to excel the other, and because they spend their property (for the support of women).<sup>98</sup>

However, the 'priority' attributed to men over women is best understood as originating from their greater responsibility as protectors and maintainers within the socio-economic context of Arabian society during the Prophet's time. Men, by virtue of

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<sup>96</sup> Ibid. Hibri also quotes a saying of the Prophet Mohammed where he spoke in favour of equality of the sexes: "All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab, or of a white over a black person, or of a male over a female. Only God-fearing people merit a preference with God" citing M. A. Rauf, *The Islamic View of Women and Family* (New York: Speller, 1997) p. 21.

<sup>97</sup> Esposito, 1982.

<sup>98</sup> M. M. Pickthall, trans., *The Meaning of the Glorious Koran* (New York: Mentor) p. 83.

their duty to defend and support their extended family members, enjoyed more rights and subsequently a different status in Muslim society. This understanding of man's role is illustrated by another possible translation of the same Quranic verse:

...men are the guardians (i.e., protectors and maintainers) over women because God made some of them (to excel) over others and because they (men) provide support from their wealth.<sup>99</sup>

Esposito, too appears to be in agreement with the view that it is primarily the economic superiority and responsibility for the household that accords to the male a degree of excellence, but only to those men, who fulfil this task and not all men.

Barbara Stowasser in her study of the status of women in early Islam states that verses such as 4:34 have fallen prey to the Quranic interpreters who in their enthusiasm to ensure maximum application of Quranic provisions attempted to place "a fence about the law by requiring a precautionary margin in order to ensure the entire fulfilment of its dictates, so the interpreters of the *Quran* demanded more than the original."<sup>100</sup>

As a justification of her argument Stowasser cites a number of commentaries of the *Quran* and shows how each successive commentator became more restrictive of women's rights. Consequently, by the time one reaches the 17th century, women have been completely excluded from all spheres of public life and made 'invisible'.

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<sup>99</sup> Esposito, 1982.

<sup>100</sup> Stowasser, 1987, quoting R. Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957) p. 126.

The earliest comment on verse 4:34 cited by Stowasser is taken from Abu Jafar Mohammed Jarir al-Tabari's (d. 923) work. He says that:

*Men are in charge of their women* with respect to disciplining (or chastising) them, and to providing them with restrictive guidance concerning their duties towards God and themselves (i.e., the men); *by virtue of that by which God has given excellence (or preference) to the men over their wives*: i.e., payment of their dowers to them, spending of their wealth on them, and providing for them in full. This is how God has given excellence to (the men) over (the women), and hence (the men) have come to be in charge of (the women) and hold authority over them in those of their matters with which God has entrusted them.

Tabari's interpretation of this verse is very literal and specifically endowing men with authority over their women in the family setting coupled with the obligation to provide for their women by way of material support.<sup>101</sup>

The second commentary of verse 4:34 is taken from *Nasir al-Din Abu al-Khayr'Abd Allah ibn Umar al-Baydawi* (d.1286). This interpretation following some 350 years after Tabari, becomes more detailed and restrictive, and sanctioning the view of women as creatures incapable of and unfit for public duties.<sup>102</sup>

*Men are in charge of women*, i.e., men are in charge of women as rulers are in charge of their subjects.... *God has preferred the one (sex) over the other*; i.e., because God has preferred men over women in the completeness of mental ability, good counsel, complete power in the performance of duties and the carrying

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<sup>101</sup> Ibid., p. 26.

<sup>102</sup> Ibid.

out of (divine) commands. Hence to men have been confined prophecy, religious leadership (*imama*), saintship (*wilaya*), the performance of religious rites, the giving of evidence in law courts, the duties of the Holy War, and worship (in the mosque) on Friday etc., the privilege of electing chiefs, the larger share of inheritance, and discretion in matters of divorce, by virtue of that which they spend of their wealth, in marrying (the women) such as their dowers and cost of their maintenance.<sup>103</sup>

It is clear, therefore, that verse 4:34 has been used to bring within its ambit the entire legal personality of a woman, denying to her independent personhood. Ahmad ibn Mohammed al-Khafaji (1659) further 'refined' the restrictive detail provided by Baydawi's exegesis by stating that religious leadership (*imama*) (which is inaccessible to women) is understood to include both the *imama kubra* and the *imama sughra*. He understands *wilaya* not as 'saintship' but as 'assuming of responsibility (*tawallin*) for the woman in matters of marriage, which means the power to make decisions', (which in any case by this time was no longer theirs).<sup>104</sup>

The religious rites (*Sha'a'ir*) from which women are barred according to Baydawi, are: the call to prayer (*adhan*), the second call to prayer (*iqama*), the Friday sermon, Friday worship (in the mosque), and the *takbirat al-tashriq* (certain rites during the Pilgrimage).<sup>105</sup>

The foregoing discussion on the varying interpretations of verse 4:34 clearly outlines its importance in creating gender hierarchies within the Islamic tradition. But the most far reaching implications for women's human rights lies in the justification of this verse

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

for physically chastising a 'disobedient' woman. Very little comment in this regard has been offered by any of the writers mentioned above including Riffat Hassan, Al-Hibri or Esposito.<sup>106</sup> Fazlur Rahman however, does take up the issue and offers the justification that:

...the *Quran* appears to be saying that since men are the primary socially operative factors and bread-winners, they have been wholly charged with the responsibility of defraying household expenditure and upkeep of their womenfolk. For their duties and economic struggles and experiences they have become entitled to manage women's affairs and, in case of recalcitrance on the part of women, to admonish them, leave them alone in their beds and as a last resort, beat them.<sup>107</sup>

### **Evidentiary Value of Women's Testimony**

Verse 2:282 of the *Quran* provides another example where pronouncements of arguably restricted application, have been used as justification for creating gender hierarchies within the Islamic tradition. A number of Muslim jurisdictions including Pakistan have legislated on the basis of this verse, thus legally reducing the status of women.<sup>108</sup> The verse states that the testimony of a woman is worth half that of a man in financial transactions reduced to writing:

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<sup>106</sup> Mernissi, 1987. She has dealt with the issue at some length in her work, where she argues that the verse was revealed at a point in time when the newly formed Muslim (male) community feared that the Prophet Mohammed by prohibiting violence against women, was encouraging a 'female rebellion'. Verse 4:34 seems to have quelled those fears forever and reinstated male superiority.

<sup>107</sup> Rahman, 1983.

<sup>108</sup> Section 17 of the *Qanoon-i-Shahadat* Order, 1984.

And get two witnesses,  
Out of your own men,  
And if there are not two men,  
Then a man and two women,  
Such as ye choose,  
For witnesses,  
So that if one of them errs,  
The other can remind her.<sup>109</sup>

*Hadith* literature has further presented this inequality in the value of evidence of a woman as reflecting an innate inferiority of women as opposed to superiority of men. As mentioned above, a *Hadith* quotes the Prophet Mohammed as having stated that women were inferior both in matters of religion and intelligence. The reason the Prophet Mohammed is supposed to have cited for a woman's inferiority in intelligence is that the value of her evidence is half that of a man's.<sup>110</sup> Fazlur Rahman, in analysing this *Hadith* appears to be questioning its authenticity when he argues that it (*Hadith*) presupposes the development of the law of evidence in early Islam.<sup>111</sup> As regards verse 2:282, he is of the

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<sup>109</sup> The *Quran*, verse 2:282.

<sup>110</sup> But some writers have stated that the intellectual status of a Muslim woman is "neither marred nor degraded by the commandments of the Quranic verse". See R. El-Nimr, 'Women in Islamic Law' in M. Yamani (ed.) *Feminism and Islam* (Reading: Ithaca Press, 1996) p. 95. El-Nimr's views appear to be representative of many Muslim writers including Mawdudi who argue in a defensive, apologetic vein. She describes reasons of emotional, physical and psychological strain as disabling women from acting as competent witnesses.

<sup>111</sup> It may be pertinent to point out with reference to this statement of Fazlur Rahman that while he is not explicitly setting it out, he appears to be challenging the authenticity of this *Hadith*.

opinion that the *Quran* is not stating any general law of the evidentiary value of male and female statements as the law.

If the *Quran* did really regard a woman's evidence as half that of a man's, why should it not allow the evidence of four females to be equivalent to that of two males and why should it say that only one of the males may be replaced by two females? The intention of the *Quran* apparently was that since it is a question of financial transaction and since women usually do not deal with such matters or with business affairs in general, it would be better to have two women rather than one — if one had to have women — and that, if possible at all, one must have at least one male.<sup>112</sup>

Fazlur Rahman then goes on to state that one can simply not deduce from verse 2:282 a general law to the effect that under all circumstances and for all purposes, a woman's evidence is inferior to a man's. He is convinced that this verse does not have the slightest intention of proving any rational deficiency in women vis-à-vis men. As an example, Fazlur Rahman cites the example of classical Islamic law regarding women with knowledge of gynaecology as the most competent witnesses in cases involving gynaecological issues.<sup>113</sup> Finally, he also puts forward the suggestion that even if a law could be formulated on the basis of such a generalisation, then may we not change the law when social circumstances so change that women are not only educated equally with men but are also conversant with business and financial transactions?<sup>114</sup>

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<sup>112</sup> Rahman, 1983.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

With respect to the arguments presented by Fazlur Rahman, it is submitted that looking at the formulation of the verse under discussion in its socio-economic perspective, one is inclined to argue that against the background of the social milieu of 7th century tribal Arabia, involving a woman as witness in an activity that clearly lay within the public sphere of life and was until that time out of bounds for women, may be regarded as an important first step. It was without doubt corrective of complete non-recognition of women as legal persons capable of participating in financial transactions reduced to writing. However, what is a matter for concern is the fact that this step towards according woman greater autonomy and legal personality was frozen in time and not taken forward towards achieving equality. Furthermore, one has to acknowledge that this incapacity (of women to give evidence) is not only confined to commercial transactions reduced to writing. In fact, in cases wherever *hadd* punishment<sup>115</sup> may be inflicted, the testimony of women and non-Muslims is not even accepted.<sup>116</sup> A further example is that of the contract of marriage in Islam which is also in the nature of a financial transaction, and here too, women who witness signing of the marriage deed suffer from the same disability.<sup>117</sup>

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<sup>115</sup> *Hadd* means limit. In legal terms it means mandatory punishment limits which have been laid down in the *Quran*.

<sup>116</sup> For details, see for example, the *Hudood* Ordinances, 1979 promulgated by General Zia of Pakistan. For adverse implications and human rights violations of women as a result of these laws see, A. Jehangir and H. Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Rohtas Books, 1990); R. Mehdi, 'The Offence of Rape in the Islamic Law of Pakistan' *International Journal of Sociology of Law*, Vol. 18, 1990, pp. 19-29; S. S. Ali, 'Gender, Islamic Fundamentalism and Human Rights: A Case Study of Pakistan', *Women Against Fundamentalism Journal* Vol. 18, 1990, pp. 1-9.

<sup>117</sup> C. Hamilton, *The Hedaya* (Karachi: Darul-Ishrat, 1989) p. 74.



But it may be argued that verse 2:282 is not necessarily of general universal application. This may be inferred from verse 24:6-9 of the *Quran* where a woman's oath by which she defends herself against her husband's accusation of adultery outweighs that of the man's (her husband's) in the absence of witnesses.

### **Inheritance Rights of Women: A Fixed, Unchangeable Share or the Basic Minimum?**

Another sensitive issue concerning rights of women in the sphere of family law is that of inheritance. As mentioned above, women generally inherit half of what men in comparable situations would inherit. While this was a progressive initial step in a society where, as Fatima Mernissi remarks, the newly converted Meccan aristocrats did not mind sharing Heaven and the rewards of the Hereafter with their Muslim sisters. What hurt their egos (and economic interests) was that they were being required to share their worldly possessions in this world with women who until the dawn of Islam were little more than the chattels and property of these very men.<sup>118</sup> Over the centuries, this entitlement of women to half the share of a man in a comparable situation became the fixed, unchangeable and only share that she was entitled to.<sup>119</sup>

Of the many justifications advanced by Muslims (men and women) regarding the half share in inheritance rights for women the following may be mentioned as the most repeated:<sup>120</sup>

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<sup>118</sup> Mernissi, 1991.

<sup>119</sup> Rahman, 1983

<sup>120</sup> These views are based on personal communications with a wide range of people as well as readings on the subject. For a recent empirical study on the subject see S. S. Ali, 'Using Law for Women in Pakistan' in A. Stewart (ed.) *Gender, Law and Social Justice* (London: Blackstone, 2000).

- a) women are not providers for households, while men are; hence greater burden requiring greater share;
- b) Quranic injunctions do not require a Muslim wife to share her resources with her spouse or spend it on household expenses even though the husband may be destitute. On the other hand, a wife may seek a decree for dissolution of her marriage on the grounds that her husband is incapable of, or will not maintain her;
- c) a husband is required to pay his wife a sum of money or other property as dower as part of the marriage contract, therefore, in addition to her half share in inheritance, she also receives a further share as dower.

With regard to the above arguments, it is submitted that the situations described above are subject to changing realities of society, as well as the socio-economic circumstances of the present day and are, therefore, weak justifications. Thus, for instance, are men always the bread-winners of families? Is it not a fact that there are millions of families around the world where women are heads of households and have had to take on responsibility for meeting entire household expenses. As to the second line of argument, while women are not legally required to share responsibility for the household, yet one would have to look very hard indeed to find a family where the woman, despite having the resources goes hungry and places her spouse and children in a similar predicament. As regarding c), it may be argued that the amount of dower stipulated in the marriage contract is invariably less than an equivalent share in inheritance. Furthermore, in case of a woman seeking dissolution of marriage from her husband, she will have to forego this amount.

### **Polygamy: An Acknowledgement of 'Different Needs' or Statement of Male Superiority?**

The third issue to be addressed in the discriminatory category of rights is that of restrictions imposed on women within the institution of marriage without corresponding limitations on men. Thus Quranic injunctions enjoin strict monogamy on women and also confine her to a Muslim spouse, while men may marry up to four wives at any one time from among *kitabia*<sup>121</sup> women.<sup>122</sup> Polygamy is permitted in Islam although as the Quranic verse allowing it states, it is with certain provisos:

Marry women of your choice, two, three or four, but if you fear that you shall not be able to deal justly (with them) then only one.<sup>123</sup>

The debate around polygamy raises a number of questions. Does, for instance, the Quranic verse create an obligation for all male Muslims to emulate the practice or, is it a qualified 'right' to be exercised under certain 'controlled' circumstances set out in the

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<sup>121</sup> *Kitab* literally means book. *Kitabia* means women of the book. Here it implies women professing one of the revealed religions i.e., Christianity, and Judaism.

<sup>122</sup> The *Quran*, verse 2:221 and 5:5.

<sup>123</sup> The *Quran*, verse 4:3.

verse above?<sup>124</sup> Al-Hibri, is of the opinion that the mere fact that the Prophet Mohammed was polygamous in his later life is no evidence of a 'right' of Muslim men to also be polygamous. She argues on the basis of the Quranic verses that state quite clearly that neither the Prophet nor his wives are like other men and women.<sup>125</sup> Secondly, the passage in the *Quran* which has been used to justify polygamy also attaches a condition for such action i.e., requiring the man to make an undertaking to deal justly with all his wives. Reinforcing this condition is the Quranic (verse 4:129) statement that "Ye are never able to be fair and just among women even if you tried hard." 'Modernist' Muslim scholars are of the opinion that for evolving a rule of law relating to polygamy these two Quranic verses must be read and

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<sup>124</sup> A. R. I. Doi, in his book entitled *Shariah: The Islamic Law* (London: Ta Ha Publishers, 1984) p. 146, outlines the various circumstances for which he considers polygamy to be the 'best solution'. These situations include the wife suffering from a serious disease; where the wife is barren; is of unsound mind, where the wife is old and infirm; where the wife is of 'bad character' and cannot be reformed; where the wife moves away from her husband's place of residence, is disobedient and difficult to live with; as a result of many men dying during war leaving behind a large number of widows. The final reason that Doi advances is that of the husband feels that he simply cannot do without another wife and is capable of providing equal support to the existing wife(ves), then he is justified in doing so. Doi has in effect provided a carte blanche to the man to marry if he feels like it. This hardly appears in consonance with the contextual rationale behind the Quranic verse.

<sup>125</sup> The *Quran*, verse 33:32, 50. For example, while the Prophet encouraged widows and divorcees to remarry, his own wives were not be remarried after his death. They were considered 'the mothers of all believers', and no believer may marry his mother. However, as the Prophet grew older, he gave his wives the choice to leave and marry another male more fulfilling perhaps of husbandly duties. All but one wife refused to leave him. See, al-Hibri, 1982, p. 216, citing J. Al-Afghani (1945) p.79.

interpreted together.<sup>126</sup> The implication of the combined passages in the opinion of Al-Hibri would be as follows:

- a) If you can be just and fair among women, then you can marry four wives
- b) If you cannot be just and fair among women, then you may marry only one
- c) You cannot be just and fair among women; From which follows: i.e. you may marry only one wife. Furthermore, given (c) the condition for (a) is never satisfied, so that we can never conclude: You may marry four wives.<sup>127</sup>

In response to the above argument, it has to be said that some Muslim thinkers claim that the words 'justly' and 'just' occurring in the two Quranic passages above have two different meanings; hence the view that these cannot be combined to draw an inference.<sup>128</sup> Abdur Rahman Doi also challenges the view of the modernists who consider verse 4:129 as a legal condition attached to polygamous unions.<sup>129</sup> Citing Shaikh Mohammed bin Sirin and Shaikh Abubakr bin al-Arabi, he makes the point that the inability to do justice between women referred to in the *Quran* is in respect of love and sexual intercourse only which is beyond the control of the man. Justice required of man is, in the opinion of these scholars confined to matters of providing equality in

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<sup>126</sup> al-Hibri, 1982, p. 216; Rahman, 1983, pp. 45-49. Law reform in Muslim jurisdictions in the twentieth century has relied upon this interpretation.

<sup>127</sup> al-Hibri, 1982, p.216. Taha's arguments follow a similar line. He states that polygamy is not an original precept in Islam and a combined reading of verse 4:3 and 4:129 leads to an implied prohibition of polygamy. See Taha, 1987, p. 140.

<sup>128</sup> al-Hibri, 1982 and accompanying footnotes.

<sup>129</sup> Doi, 1984.

residence, food, clothes to co-wives. So long as a man can provide these, he is seen as being just between women.<sup>130</sup>

***Hijab (Veiling of Women): A Prescription for Female Modesty or Symbolic Division of Muslim Space on the basis of Gender?***

In the Islamic tradition veiling represents the ultimate dichotomy into the public and private spheres of life with the woman confined to the private sphere. But there exists a wide range of views among scholars of Islam regarding this institution and its implication for women's human rights. General and vaguely phrased Quranic verses regarding modesty in behaviour for men and women have been interpreted in a variety of ways by male Muslim scholars, a process that many writers believe led to an ever-increasing exclusion of Muslim women from the public sphere of life.<sup>131</sup> Stowasser is of the view that Quranic exegesis prescribed veiling in absolute and categorical fashion and the wide degree of difference between the commentaries of Tabari, Baydawi and al-Khafaji go to show how Muslim women were forced to disappear behind the veil, not only physically but as a symbol of their invisibility from public life.<sup>132</sup> While Tabari argued that veiling did not include covering the face, half the forearm, eye make-up, rings, bracelets and dyes, Baydawi's interpretation of verse 24:30 reads as follows:

*Let them lower their gaze* before the men at whom it is not lawful to look, and *let them guard their private parts* by veiling them, or by bewaring of (or guarding against) fornication.

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<sup>130</sup> Ibid.

<sup>131</sup> For a feminist interpretation of Quranic verses enjoining veiling and segregation, see Mernissi, 1991; Ahmed, 1992.

<sup>132</sup> Stowasser, 1987.

The lowering of the glances is presented because the glance is the messenger of fornication. And let them not display of their adornment such as jewellery, dress, make-up — let alone the parts where they are worn or applied — to those to whom (such display) is not lawful... what is meant by adornment is the place where adornment is put (or worn)...<sup>133</sup>

As to the opinion that the prohibition to display does not include the face and hands, because they are not pudendal, Baydawi argues clearly “this applies to prayer only, not appearance, because the whole body of a free woman is pudendal, and it is illicit for anyone (except the husband or the *dhawu mahram*)<sup>134</sup> to look at any part of her except by necessity such as (medical) treatment, or the bearing of witness.”

Later commentaries such as al-Khafaji’s Hashiya on al-Baydawi, this restrictive interpretation is further heightened. al-Khafaji justifies the complete ‘disappearance’ of women behind the veil on the authority of al-Shafei declaring categorically: “the whole body of the woman is pudendal, even face and hand, without exception (absolutely).”

Since this interpretation so obviously contradicts the Quranic exemption ‘except that which is apparent,’ al-Khafaji and others deal with it by interpreting this verse as:

a command of exception from the established rule, which applies to such exceptional circumstances as the giving of evidence in law courts and medical treatment only.

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<sup>133</sup> Ibid., p. 26-27.

<sup>134</sup> A male within the prohibited degrees of relationship with whom a Muslim woman cannot lawfully enter into a contract of marriage. In addition, the husband who is her *mahram*, these include a father, brother, son, uncle, whether paternal or maternal, grandfather, whether paternal or maternal.

Among the twentieth century Muslim scholars, Mawdudi is perhaps the most vocal in his restrictive treatment of veiling as an 'Islamic' institution. In his much-read and publicised book entitled *Purdah*,<sup>135</sup> he argues vociferously for the institution on the basis that segregation will prevent 'loose western morals' from creeping into Islamic society, and keep the family intact.<sup>136</sup> In the discussion on the sphere of operation of women and segregation, he initiates the debate by stating that women are rulers of their household and accountable for their actions within it. They (women) have been released from certain religious obligations (that men must fulfil). As example, Mawdudi cites the Friday congregation as not being obligatory on women, neither is participating in the holy war (*jihad*) compulsory on her. A woman may not travel without her *mahram*. In short, he states that Islam abhors the venturing out of the home of a woman unless it is absolutely imperative such as to earn a living.<sup>137</sup>

But modernist Muslim writers challenge this restrictive and literal interpretation of the Quranic verses on veiling and segregation. Fazlur Rahman puts forward the view that the *Quran* advocates neither the veil nor segregation of the sexes; rather it insists on sexual modesty.<sup>138</sup> He further states that it is also certain on historical grounds that there was no veil in the Prophet's time, nor was there segregation of the sexes in the sense Muslim societies developed it. In fact, the Quranic statements on modesty imply that neither the veil nor segregation of the sexes existed.<sup>139</sup>

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<sup>135</sup> Mawdudi, *Purdah* (Lahore: Islamic Publications, 1997).

<sup>136</sup> Ibid. This study uses the Urdu version and all page numbers referred to are taken from this edition.

<sup>137</sup> Ibid., pp. 235-239.

<sup>138</sup> Rahman, 1983.

<sup>139</sup> Ibid.



Hence the need to place some ground rules for male-female interaction. If segregation of the sexes existed, there would have been no point in asking the sexes to behave with modesty. The *Quran* states in verse 24:31:

Say (O Mohammed) to believing men that they should observe modesty of the eye and guard their sexual parts—this is purer for them, but God knows well what they do. And say to believing women that they should observe modesty of the eyes and guard their sexual parts and let them not display their attractions except those naturally exposed—and let them cast down their head-scarves onto their bosoms.

It is pertinent to make the point here that ‘modesty of the eye’ spoken of in the verse above is in connection with both sexes and not only with regard to women. Secondly, this injunction would have no meaning at all if the sexes were segregated or if *hijab* (veiling) as we know it today were observed.<sup>140</sup> The injunction to “not display their attractions except those naturally exposed” have been interpreted in various ways, some restrictive, others liberal. However, it is generally presumed that attractions as are commonly exposed include the face, half the forearm, and any cosmetic or jewellery on these such as rings, bangles, henna or other colouring for hands and nails.<sup>141</sup> The words “and let them cast their head-scarves down their bosoms” also prove that covering the face is not required by this verse.

Other verses of the *Quran* laying down guidelines to women for venturing outside the house appear in chapter 33. Verses 59-60 of Chapter 33 state that Muslim women including women of

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<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

the Prophet Mohammed's household must "draw tight their outer garments" when they go out at night "so that they can be recognised as Muslim women and not molested" and the "Hypocrites"<sup>142</sup> who are said to have molested women are threatened with exile if they do not refrain from such actions. Fazlur Rahman is of the opinion that there is nothing in these verses that calls for the veil as such.<sup>143</sup> In the same chapter verse 33:30 warns the wives of the Prophet Mohammed against any suggestions of immodesty and are threatened with a "double punishment" if they are immodest; verse 33:32 states that the "Hypocrites" are eager to spread rumours about the Prophet Mohammed's wives who are advised "not to speak in an inaudible voice to any male — if you are God-fearing — lest he in whose heart there is sickness covets to exploit the opportunity". This verse, however, is a special case addressed to the Prophet Mohammed's wives, whom the *Quran* declares to be "Mothers of the Faithful" in verse 33:6. On the strength of these Quranic verses it may be argued that segregation and veiling has roots deeper than and preceding Islam and is also strongly linked to class, acting primarily in its present manifestation as a symbol of honour or status.<sup>144</sup>

Ustadh Taha differentiates between the conceptual parameters of *al-hijab*, which requires covering of all of the woman's body except her face and hands and *al-sufur*, which permits more exposure, provided modest dress is maintained in general.<sup>145</sup> He

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<sup>142</sup> The Hypocrites were certain inhabitants of Medina who had reluctantly converted to Islam, but were engaged in subverting it.

<sup>143</sup> Rahman, 1983.

<sup>144</sup> Ibid.

<sup>145</sup> Taha, 1987.

believes that Islam's original precept is *al-sufur* because in his opinion the "purpose of Islam is chastity, emanating from within men and women, and not imposed through closed doors."<sup>146</sup>

The veil, Taha further argues, was imposed as a transitional requisite and would become redundant when inner chastity is achieved through education and discipline.<sup>147</sup> Women Muslim scholars in recent years have questioned the restrictive interpretation of Quranic injunctions on veiling and segregation of the sexes.<sup>148</sup> Nazirah Zein-Ed-Din sums up the feeling of outrage and frustration of the Muslim women in her excellent work entitled *As-Sufur wal Hijab* in the following words:

What is this unjust law (of veiling) which is permeated with the spirit of tyranny and oppression? It is in violation of the Book of God and His Prophet may God bless his soul. This law is the law of the victor, the man who subdued the woman with physical force. Man tampered with God's book to make this law. He prided himself on his tyranny and oppression, even as those hurt him too. He made the law independently, not permitting the women to share in a single letter. So, it came out in accordance with his desires and contrary to the will of God.<sup>149</sup>

From the discussion in the preceding paragraphs, it is evident that attempting to develop a theoretical framework of women's human rights in the Islamic tradition poses insurmountable difficulties, the basic and most crucial of these being: How and to what extent, might religious texts be employed as sources of

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<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Mernissi, 1991; Ahmed, 1992

<sup>149</sup> N. Zein-Ed-Din, *As-Sufur wal Hijab* (Beirut: 1928) p.140 cf. al-Hibri, 1982. Cf N. Zein Ed-Din, "Removing the Veil and Veiling Lectures and Reflections Towards Women's Liberation and Social Reform" (1982) Vol. 5 *Women Studies International Forum* 221.

positive law and rights? Are competing sets of norms in the Quranic text equally valid, and if so, might we base a rule of law on either, in the light of the general principles of *naskh* (abrogation) laid down by Muslim jurists regarding the order of revelation of the *Qurani*? A book of Divine revelation such as the *Quran* coming together over twenty-three years, is by its very nature open to varying interpretations. But how much space is one afforded to discuss and critique laws derived by jurists taking account of the historicity of events, particularly norms that may be completely out of line with contemporary needs of society? And finally, where does one seek legitimation for alternative human rights schemes and categories within the Islamic framework, such as the ones discussed in the present section.

It is also evident that restrictive rules of interpretation of the *Quran*, *Hadith* literature and the process of law-making based on these sources combined to push into the background whatever norm of equality and egalitarianism Islam represented. Leila Ahmed presents the view that:

Even as Islam instituted, in the initiatory society, a hierarchical structure as the basis of relations between men and women, it also preached, in its ethical voice (and this is the case with Judaism and Christianity as well), the moral and spiritual equality of all human beings. Arguably, therefore, even as it instituted a sexual hierarchy, it laid the ground, in its ethical voice, for the subversion of the hierarchy.<sup>150</sup>

Is it this principle of 'subversion' present in the ethical Quranic norms that may, after all be employed to justify a framework for women's human rights in Islam today?

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<sup>150</sup> Ahmed, 1992.

A common feature of the various frameworks of women's human rights discussed above is that these highlight the fact that no matter what methodology one attempts to employ, there appears no escape from certain clear Quranic verses creating gender hierarchies. When we concede to every word of the *Quran*, law-making authority, how can one deny to one group of Muslims the right to legislate on the basis of verses that discriminate against women, just as another group would aspire to invoke the non-discriminatory verses in order to create laws affording complete equality between the sexes?

Whether it is Esposito's hierarchisation of Quranic values or Hevener's categorisation of rights, complete equality as the term has come to be understood in modern day usage is difficult to infer from any of these schemes. It might be strategically opportune to seek a rigorous implementation of all the protective/corrective category of rights before embarking upon the 'equality' and non-discrimination path. By applying the Islamic paradigm of equality of human dignity and worth, and requiring 'those in authority' i.e., men and the State to accept responsibility for fulfilling the material needs of women, children and other disadvantaged sections of society in their charge, and provide them access and control over resources, a move towards substantive as opposed to mere formal equality for all may be possible.

### ***2.3 International Norm of Equality and Non-discrimination and CEDAW: An Overview***

Although human rights are said to include women's rights, traditionally they have been defined as "men's inalienable right

to life, liberty and property.”<sup>151</sup> Leading philosophers, such as John Locke in the 17th century and Jean Jacques Rousseau in the 18th century defined men as individuals innately possessed of certain “natural rights”.<sup>152</sup> Women, on the other hand, were defined not as individuals, but as members of men’s households and thus, along with their offspring, under male control.<sup>153</sup>

In response, numerous women from around the world pressed for women’s rights and argued that as members of the human race, they too are entitled to the same basic rights as men.<sup>154</sup> Yet, even today, despite formal pronouncements of human rights, in many nations of the world, women find themselves confined to the private or familial sphere of life with little or no access to redressal of their human rights violation. The distinction between the public or political and private or familial sphere has been transported from domestic jurisdiction into the international law sphere and, despite the fact that this dichotomy has no place in human rights discourse, continues to prevail. Women’s rights

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<sup>151</sup> See e.g., J. Locke, ‘An Essay Concerning the True Original Extent and End of Civil Government’ and J. J. Rousseau, ‘From the Social Contract’, in S. Commins and R. Linscott (eds.), *The World’s Great Thinkers: Man and the State* (New York: Random House, 1947); the Preamble to the US Declaration of Independence.

<sup>152</sup> Ibid. See Rousseau.

<sup>153</sup> R. Eisler, ‘Human Rights. Towards an Integrated Theory for Action’, *Human Rights Quarterly*, Vol. 9, 1987, p. 287.

<sup>154</sup> Among these women were, Mary Wollstonecraft and Abigail Adams in the 18th century and Elizabeth Cady Stanton and Sojourner Truth in the 19th century. In the 20th century, these numbers have swelled beyond enumeration as women’s rights movement has grown in every country of the world.

have, therefore, been marginalised both institutionally and conceptually from national and international human rights movements.<sup>155</sup> Steiner and Alston sum up this inadequacy of the human rights movement in addressing women's human rights' issues by stating that "Of the several blind spots in the development of the human rights movement from 1945 to the present, none is as striking as the movement's failure to give to violations of women's (human) rights the attention, and in some respects the priority, that they require."<sup>156</sup>

In recent years, significant challenges have been made to a vision of human rights which excludes women's experiences, at the

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<sup>155</sup> For a detailed discussion of how the human rights of women have been split off from the mainstream of the international human rights movement see the special issue entitled 'Symposium: Women and International Human Rights', ed., F. P. Hosken *Human Rights Quarterly*, Vol. 3, 1981.

<sup>156</sup> H. J. Steiner & P. Alston (eds.) *International Human Rights in Context: Law Politics Morals* (Oxford: Clarendon Press, 1996) p. 887. Also see C. Bunch, 'Women's Rights as Human Rights' *Human Rights Quarterly*, Vol. 12, 1990, pp. 486-498 ; J. Rehman, 'Women's Rights: The International Law Perspective with Reference to Pakistan' in R. Mehdi & F. Shaheed (eds.) *Women's Law in Legal Education and Practice in Pakistan: North South Co-operation* (Copenhagen: New Social Science Monographs, 1997) p. 109; R. J. Cook, 'Women' in C. C. Joyner (ed.) *The United Nations and International Law* (Cambridge: Cambridge University Press and American Society of International Law, 1997) p. 182; C. Bunch, 'Transforming Human Rights from a Feminist Perspective' in J. Peters and A. Wolper (eds.) *Women's Rights Human Rights: International Feminist Perspectives* (London: Routledge, 1995) pp. 11-15.

level of governments, NGOs and the international community.<sup>157</sup> A wide array of human rights instruments have been promulgated by the UN and regional organisations for the protection of women's rights and non-discrimination on the basis of sex.<sup>158</sup>

The foundation of the UN was a response to the failure of states to respect human rights of individuals, including their own citizens.<sup>159</sup> The UN Charter (Charter)<sup>160</sup> provides a legal basis for international co-operation among its members for respect for human rights, including the elimination of discrimination on grounds of sex. In fact, the Charter was the first international

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<sup>157</sup> One of the earliest and ground-breaking article on the subject is H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law' *American Journal of International Law*, Vol. 85, 1991, p. 613. Over the past decade, an impressive range of writings on feminist approaches to international law, feminist legal theory, concerns of third world women have emerged. These include, A. Byrnes, 'Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?' *Australian Yearbook of International Law*, Vol. 12, 1989-90, p. 207; S. Wright, 'Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions' *Australian Yearbook of International Law*, Vol. 12, 1989-90; D. Dallmeyer (ed.) *Reconceiving Reality: Women and International Law* (Washington, DC: The American Society of International Law; 1993); C. Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' *Feminist Review*, Vol. 30, 1988, p. 61; Bartlett, 'Feminist Legal Methods' *Harvard Law Review*, Vol. 103, 1990, p. 831; C. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); C. Gould (ed.) *Beyond Domination: New Perspectives on Women and Philosophy* (Totowa, NJ: Rowman & Allanheld, 1983).

<sup>158</sup> For a list of human rights documents adopted by the UN and regional institutions for the protection of human rights see, I. Brownlie, *Basic Documents on Human Rights*, (Oxford: Oxford University Press, 1992); P. R. Ghandhi, *International Human Rights Documents* (London: Blackstone, 1995).

<sup>159</sup> Cook, 1997.

<sup>160</sup> UNTS XVI; UKTS 67 (1946); Cmnd 7015.



treaty to spell out the principle of equality in specific terms. The Preamble to the Charter affirms “the equal rights of men and women” and gives priority to human rights before the rights of states. In addition to the Preamble, the goal of achieving equality between the sexes is reiterated in several Charter provisions with Article 1(3) outlining the purposes of the UN to include “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>161</sup>

Although promotion and protection of human rights on the grounds of non-discrimination was one of the main objectives of the UN, yet it has been argued that when the Charter came into operation in 1945, there were serious impediments in establishing a regime based on equality and non-discrimination. Colonialism had not yet breathed its last and racial, religious and sex-based discrimination prevailed in varying degrees.<sup>162</sup> Renteln is of the view that the major powers, particularly the United States and Great Britain had not been very supportive of sanctifying the cause of complete equality and non-

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<sup>161</sup> This affirmation is repeated in subsequent articles. Article 8 demands that there be no restrictions on eligibility of women to participate in any capacity in UN affairs; Article 13(1) declares that the General Assembly shall initiate studies to promote international economic and social co-operation without distinction as to . . . sex; Articles 55(c) and 56 provide that the UN and its members shall promote respect for international economic and social co-operation without distinction as to . . . sex; Article 62(2) states that the Economic and Social Council shall promote respect for human rights and fundamental freedoms for all; and Article 76(c) lays down that the UN Trusteeship system shall encourage respect for human rights and fundamental freedoms for all without distinction as to . . . sex.

<sup>162</sup> Rehman, 1983.

discrimination.<sup>163</sup> In the opinion of Charlesworth, Chinkin and Wright, the inclusion of Article 8 in the UN Charter (no restrictions on eligibility of women to participate in UN affairs in any capacity) presents an example of how gender-blind the vast majority of the participants were:<sup>164</sup>

While there was no overt opposition to the concept of gender equality at the 1945 San Francisco Conference, which drafted the Charter, some delegates considered the provision superfluous and said that it would be “absurd” to put anything so “self-evident” into the Charter.<sup>165</sup>

The concept of non-discrimination on the basis of sex found further elaboration with the adoption by the UN General Assembly of the Universal Declaration of Human Rights (UDHR).<sup>166</sup> Article 2 of the UDHR gives emphasis to entitlements to all rights and freedoms stated therein “without distinction of any kind, such as race, colour, sex...or other status,” and, although the Declaration is not legally binding in itself, it is widely treated as the “international community’s authoritative guide to the

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<sup>163</sup> A. D. Renteln, *International Human Rights Universalism versus Relativism* (Newbury Park, California: Sage Publications, 1990) p. 219.

<sup>164</sup> Charlesworth et al, 1991.

<sup>165</sup> Ibid. Laura Reanda notes on this point, “It should be stressed . . . that although at San Francisco a consensus was achieved on including in its Charter the principle of equality between the sexes, there was no common understanding of its meaning nor agreement on the concrete measures to be taken.” See L. Reanda, ‘The Commission on the Status of Women’ in P. Alston (ed.,) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon: Oxford University Press, 1992) pp. 265-303.

<sup>166</sup> Adopted on December 10, 1948, GA Res. 217A (III), UN Doc. A/810, 1948.

meaning of human rights.”<sup>167</sup> The UDHR found legal force through two covenants, namely the International Covenant on Civil and Political Rights (ICCPR)<sup>168</sup> and the International Covenant of Economic, Social and Cultural Rights (ICESCR).<sup>169</sup> Both covenants reiterate the norm of non-discrimination by stating that a State party undertakes to respect the individuals’ rights recognised in each covenant “without distinction of any kind, such as race, colour, sex . . . or other status.”<sup>170</sup> Non-discrimination on grounds, among others of sex, appears at several points in each of the two covenants, in particular in Article 26 of the ICCPR requiring equality before the law and equal protection of the law.<sup>171</sup>

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<sup>167</sup> Cook, 1997, p. 184. Also see, A. Eide, G. Alfredsson, G. Melander, L. A. Rehof and A. Rosas (eds.), *The Universal Declaration of Human Rights A Commentary* (Oslo: Scandinavian University Press, 1992). For discussion on the UDHR as constituting part of customary international law see, R. B. Lillich, ‘Civil Rights’ in T. Meron (ed.), *Human Rights in International Law Legal and Policy Issues*, (Oxford: Clarendon Press, 1984) Chapter 4; H. Hannum, ‘Human Rights’ in C. C. Joyner (ed.), *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) Chapter 5.

<sup>168</sup> GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 999 UNTS 171 and 6 *ILM* 368 (1967). The ICCPR entered into force on March 23, 1976.

<sup>169</sup> GA Res. 2200 (XXI), UN GOAR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966), reprinted in 993 UNTS 3 and 6 *ILM* 360 (1967). The ICESCR entered into force on January 3, 1976.

<sup>170</sup> ICCPR article 2(1); ICESCR, Article 2(2).

<sup>171</sup> Specific prohibition of discrimination appears in the ICCPR in Article 3 (equal rights of men and women with respect to the rights set forth in the Covenant); Article 4 (measures derogating from the obligations cannot involve discrimination on grounds of . . . sex); Article 14 (equality before the law); Article 23 (equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution); Article 24 (equal protection of the child irrespective of . . . sex) and Article 25 (equal rights of citizens without distinction on grounds of . . . sex with respect to voting, public service and public representation). See also ICESCR, article 3 (equal rights of men and women with respect to rights set forth in the Covenant) and Article 7 (equal pay for work of equal value).

Very soon after the adoption of the UN Charter in 1945, establishment of a body with a mandate to study and prepare recommendations on issues of special concern to women was proposed. The Commission on the Status of Women (CSW) was, therefore, established by the Economic and Social Council (ECOSOC) in 1946 in accordance with Article 68 of the UN Charter.<sup>172</sup> Its function is two-fold: first, to prepare recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields. Second, to make recommendations to ECOSOC on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.<sup>173</sup> Views on the degree of success of the CSW in advancing the international norm of non-discrimination on the basis of sex by placing it on the human rights agenda, are not uniform. It has been argued by some writers that while the purpose of establishing the CSW was to bring women's rights concern into focus, yet this strategy has in itself been counter-productive.<sup>174</sup> In the words of Laura Reanda, "the adoption of separate instruments and the establishment of specialised machinery to deal with specific women's rights has resulted in a narrowing of the global human

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<sup>172</sup> In all, six functional commissions were established. In addition to the CSW, there were five others including the Commission on Human Rights, Commission on Social Development, the Population Commission, the Sustainable Development Commission, and the Commission on Narcotic Drugs.

<sup>173</sup> S. Davidson, *Human Rights* (Buckingham: Open University Press, 1993) p. 72; Cook, 1997.

<sup>174</sup> M. Karl, *Women and Empowerment. Participation and Decision Making* (London: Zed Books, 1995) p. 122. See H. Pietila & J. Vickers, *Making Women Matter. The Role of the United Nations* (London: Zed Books, 1994) pp. 118-119 who are of the view that at first the creation of the CSW drew some criticism, but the work it has carried out over the years has amply demonstrated its importance.

rights perspective, in a 'ghettoisation' of questions relating to women and their relegation to structures endowed with less power and resources than the general human rights structures."<sup>175</sup>

The CSW has enjoyed most of its success in the area of setting international standards of women's human rights and a number of international conventions have been formulated under its sponsorship. These include the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949,<sup>176</sup> the Convention on the Political Rights of Women, 1952,<sup>177</sup> the Convention on the Nationality of Married Women, 1957,<sup>178</sup> and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962.<sup>179</sup> Moreover, the CSW has assisted a number of specialised UN agencies, particularly the International Labour Organisation (ILO) and the United Nations Educational, Social and Cultural Organisation, (UNESCO), in developing international instruments to improve the conditions of women in employment, education and retirement. The ILO has a history predating the UN of setting standards for the specific protection of women in the workforce. These include matters such as maternity protection (1919) night work (1919), employment in underground mines (1935), and the Convention Concerning Equal Remuneration for Men and Women Workers for Work of

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<sup>175</sup> L. Reanda, 'Human Rights and Women's Rights: The United Nations Approach' *Human Rights Quarterly*, Vol. 3, 1981, p. 12.

<sup>176</sup> 96 UNTS 272 (1950). Although this Convention refers equally to men and women, but in practice applies mainly to women because they are the overwhelming majority of victims of such traffic and exploitation. See on this point, Pietila and Vickers, 1994.

<sup>177</sup> 193 UNTS 135 (1953).

<sup>178</sup> 309 UNTS 65 (1957).

<sup>179</sup> 521 UNTS 231 (1962).

Equal Value.<sup>180</sup> UNESCO adopted the Convention Against Discrimination in Education.<sup>181</sup>

Since 1945, more than two dozen different international legal instruments have been drafted which deal specifically with women. Each of these instruments reflects an international consensus on particular problems relating to women and, it may be said, provide a unique insight into the state of international consensus on the role of women in society.<sup>182</sup> However, because of their restricted scope and lack of provisions for enforcement, these instruments had very little impact on the condition of women world-wide. Neither did they succeed in integrating women's human rights into the mainstream human rights framework. Dissatisfaction with the impact of existing instruments led, from the mid-1960s, to increasing efforts to develop international instruments providing global conceptualisation of the human rights of women and containing concrete measures of implementation and supervision. These efforts led to the adoption of the Declaration on the Elimination of All Forms of Discrimination Against Women in 1967<sup>183</sup> and culminated in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) in 1979. Therefore, it was with the adoption of the Women's Convention, that separate concepts of "women's rights" were recast in a global perspective, and supervisory machinery with terms of reference similar to those of existing human rights organs was provided for.

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<sup>180</sup> ILO Convention No. 100, reprinted in 165 UNTS 303 (1951). In this Convention, the ILO pioneered the principle of women's entitlement to equal pay for work of equal value to that performed by men.

<sup>181</sup> 429 UNTS 93 (1960).

<sup>182</sup> For a detailed description and analysis of international human rights instruments relating to women, see N. Hevener, p. 983.

<sup>183</sup> GA Resolution 2263 (XXII), UN Doc. A/6717 (1967).

### **CEDAW: Substantive Provisions and Implementation Mechanism**

CEDAW has been hailed as a major breakthrough in international human rights law since it adopts a holistic approach towards human rights law and as an effective tool for women's empowerment. It represents the culmination of efforts to develop the international legal norm of non-discrimination on the basis of sex and recognises in its Preamble the need to go beyond legal documents to address factors that will help to eradicate *de facto* inequality between men and women. It highlights the inequities faced by women and affirms non-discrimination and equality as an overarching human right for women. Hellum (1999) states that in adopting CEDAW, the UN sought to lay the foundation for an international women's law of human rights that transcends the borders of national, religious and customary laws.<sup>184</sup> The convention was to provide "a socio-legal tool which within a single and unified framework is intended to help women fit into social, economic and political modernisation processes in all parts of the world".<sup>185</sup>

Rebecca Cook sees CEDAW as the third stage of overlapping and interactive developments within women's human rights law.<sup>186</sup> During the first phase of development, States focused on the promotion of specific legal rights of particular concern to women through specific conventions relating to employment. During the second stage, States included sex as a prohibited ground for

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<sup>184</sup> A. Hellum, *Women's Human Rights and Legal Pluralism in Africa* (Oslo: Tano Aschehoug 1999).

<sup>185</sup> Ibid.

<sup>186</sup> R. Cook, 'Introduction: The Way Forward' in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) p. 47.

discrimination in instruments such as the UDHR, the ICCPR, the ICESCR and regional human rights conventions. CEDAW, as the third stage of this development, addresses the structural nature of violation of women's human rights. As such, Hellum argues that the convention is informed by various theories that address women's roles in development processes, including the women in development (WID) and gender and development (GAD) approaches.<sup>187</sup>

The definition of discrimination against women put forward in CEDAW is important as it transcends the traditional public/private dichotomy by calling for the international recognition of women's human rights both inside and outside the familial sphere (Article 1). The framers of this convention realised that customs and practices as well as formal legislation often perpetuate discrimination against women (Article 2). Article 5 of the convention, for example, addresses this issue by committing States Parties (i.e., signatory States to the Convention) to actually modify "the social and cultural patterns of conduct of men and women" in order to eliminate prejudices and practices based on notions of inferiority and superiority of either sex. Other substantive provisions demand that States Parties grant women complete equality in every field of life, be it nationality, family matters, contracts, right to property, etc. (Articles 9, 13, 15, and 16).

The four parts of CEDAW cover the major areas of women's rights within the rubric of the human rights discourse. As overlapping areas, addressing historical/cultural exclusion through affirmative action (Part I) sits well with endorsing women's participation in public political life (Part II) and is substantiated

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<sup>187</sup> Hellum, 1999, p. 23.



through covering in Part III the arena of socio-economic rights, including those of education and employment. These rights are stabilised within a legal regime of equal rights in civil law (Part IV).

The implications for states are potentially far-reaching. Not only must they abolish all existing discriminatory legislation and practices, they are also obliged to eliminate stereotyped concepts of male and female roles in society. Hiding behind 'traditional customs and practices' will not do. The convention's language is essentially universalist and non-discriminatory and emphasises a rights-based framework, representing a significant difference from previous legislation that was usually welfarist and 'protective' in tone. While obliging State Parties to provide the socio-legal framework for women's equality, CEDAW also provides local struggles with a possibility of speaking a global legal language.<sup>188</sup> It creates the possibility for local groups and movements to bypass national institutional constraints and structures that appeal to the international legal institutions for redress. However, as the study of the monitoring processes of the convention shows, nation-states and cultural norms can place considerable limitations on a universal rights discourse that women seek to employ as part of their strategy for empowerment.

Part V (Articles 17–22) outlines the monitoring rules for implementation of the rights contained in the treaty. Pursuant to these provisions, the convention established the Committee on the Elimination of All Forms of Discrimination Against Women, a body of twenty-three experts, elected by the States Parties to serve in their personal capacity.<sup>189</sup> The committee is established

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<sup>188</sup> See, the work of the International Women's Rights Action Watch Asia Pacific (IWRAP-Asia Pacific).

<sup>189</sup> A. Byrnes, 1989–90, p. 207.

“for the purpose of considering the progress made in the implementation of the Convention” (Article 17(1)). This is to be carried out through the examination of reports submitted by States Parties. These reports are to be submitted every four years or whenever the committee requests them. However, unlike the Convention on the Elimination of All Forms of Racial Discrimination (on which CEDAW is closely modelled), no provision was made for one State to complain of a violation by another State. Until very recently, there was no provision for an individual who claims to have suffered a violation of the convention to submit a complaint against a State Party.<sup>190</sup> The

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<sup>190</sup> In June 1993, the World Human Rights Conference in Vienna emphasised the need for “the adoption of new procedures to strengthen implementation of the commitment to women’s equality and the human rights of women.” It called upon the CSW and CEDAW to examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Women’s Convention. Since January 1994, efforts were underway towards the achievement of this goal, as a result of which an optional protocol has been adopted. See further A. Byrnes and J. Connors, ‘Enforcing the Human Rights of Women: A Complaints Process for the Women’s Convention?’ *Brooklyn Journal of International Law*, Vol. 21, 1996, pp. 682 . Amnesty International, ‘Claiming Women’s Rights: The Optional Protocol to the UN Women’s Convention’, March, 2001; Amnesty International, ‘The Optional Protocol to the Women’s Convention: Enabling Women to Claim their Rights at the International Level’, December 1997; A. Byrnes, ‘Slow and Steady Wins the Race? The Development of an Optional Protocol to the Women’s Convention’ Proceedings of the 91<sup>st</sup> Annual Meeting of the American Society of International Law, 1997, p. 383; S. Cartwright, ‘Rights and Remedies: the Drafting of an optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ *Otago Law Review*, Vol. 9, 1998, p. 239; U. O’Hare, ‘Ending the ‘Ghettoisation: The Right of Individual Petition to the Women’s Convention’ *Web Journal of Current Legal Issues*, Vol. 5, 1997; M. Roche, ‘The Proposed Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women’ *Human Rights Law and Practice*, March 3, 1993, p. 268; A. Wörgetter, ‘The Draft Optional Protocol to the Law on the Elimination of all Forms of Discrimination Against Women’ *Austrian Review of International and European Law*, Vol. 2, 1997, p. 261.

approach taken to enforcement of the convention was one of “progressive implementation” rather than a requirement of immediate action on part of States Parties. Rather than formally pronouncing a State Party to be in violation of the convention, the committee preferred to engage in a “constructive dialogue” with States Parties. The result of this has been that while, on the one hand, countries remain party to the convention, and are not alienated within that system, on the other, however, they do not feel under any immediate pressure to implement and conform to the requirements of the convention.

On October 6, 1999, the Optional Protocol (OP) to the Women’s Convention was adopted.<sup>191</sup> It entered into force on December 22, 2000 and as of June 5, 2006, has 79 signatories.<sup>192</sup> The OP consists of 21 articles laying out the procedure for the complaints system.<sup>193</sup> Its main objective is to allow individuals and groups of individuals who have exhausted national remedies to petition the Committee directly about alleged violations of CEDAW by their governments. The OP also permits the committee to conduct inquiries into grave and systematic violations of the convention in countries that are parties to the convention and OP. An important provision of the OP is that states may not enter reservations to the OP but may opt out of an inquiry. A number of cases have now made their way to the Committee and decisions adopted and it is anticipated that important jurisprudence under CEDAW will evolve.<sup>194</sup> Of the countries under review, only

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<sup>191</sup> A/RES/54/4

<sup>192</sup> See <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm> accessed on July 19, 2006.

<sup>193</sup> The full OP text is available at <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm> accessed on 19<sup>th</sup> July 2006.

<sup>194</sup> The committee adopted its first decision under Article 2 of the OP in July 2004. Some of the cases decided include: *B.J. v. Germany* 1/2003; *A.T. v. Hungary* 2/2003; *Rahime Kayhan v. Turkey* 8/2005.

Bangladesh signed the OP but no case has thus far been reported.<sup>195</sup> The present study, therefore, does not include the OP as part of the discussion towards effective implementation of CEDAW but will raise it as one of the issues in the concluding section.

Linkages between women's rights and child rights, especially in non-western jurisdictions bring into focus the girl-child as a common beneficiary of the UN Convention on Rights of the Child (CRC)<sup>196</sup> and CEDAW. It is this linkage that may act as the final catalyst in concretising women's rights as human rights. This linkage may be the most important step in the journey of developing a norm of non-discrimination on the basis of sex. Thus, the Vienna Conference of 1993 and the Beijing Conference of 1995 endorsing this point of view recognise that "the full implementation of the human rights of women and the girl child (is) an inalienable, integral and indivisible part of all human rights and fundamental freedoms."<sup>197</sup> As Savitri Goonesekere states: "This is a powerful development linking the Vienna and Beijing Declarations and commitments. Both sets of rights have their foundations in international human rights, and it is clear that gender equality cannot be realised without eliminating discrimination against girl children.... A positive environment, therefore, has been created for developing strategies and plans of action which recognise that the realisation of children's rights and the human rights of women are intrinsically linked, both because the core agenda is one of human rights, and because

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<sup>195</sup> Bangladesh ratified the OP on September 6, 2000.

<sup>196</sup> Adopted by the UNGA Resolution 44/25 of November 20, 1989. Entered into force on September 2, 1990. Reprinted in 28 *ILM* 1448 (1989).

<sup>197</sup> *Vienna Declaration and Programme of Action*, para 18.

gender inequality cannot be addressed without linking women's issues to the issue of equality of the girl child."<sup>198</sup>

A further dimension of vital importance in this discussion is that the CRC has developed a framework that recognises a child's right to survival and development, protection from exploitation and participation. The concept of indivisibility of socio-economic and civil and political rights, so crucial to affording opportunity to women in all phases of the life cycle is thus established. This, in turn, leads to the truly remarkable conclusion that, were (girl) children afforded equal rights from birth to the first eighteen years of their life, their rights as women would automatically follow. And, finally, through the CRC, a real possibility of developing a concept of universal human rights arises, as this is the human rights treaty that, barring the United States of America and Somalia, stands universally ratified.<sup>199</sup>

### **Contextualising CEDAW within the Islamic Tradition: A Discussion of Reservations to CEDAW and Implications for Women's Human Rights**

Exercising their right under Article 19 of the Vienna Convention on the Law of Treaties, Bangladesh, India and Pakistan entered reservations/declarations to CEDAW at the time of ratification. Bangladesh ratified CEDAW a few years after the convention was adopted on November 6, 1984, while India and Pakistan took several more years to ratify the convention. India ratified

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<sup>198</sup> S. Goonesekere, 'The Links Between the Human Rights of Women and Children: Issues and Directions', Key note address at the consultation meeting of UNICEF, IWRAW, Save the Children Alliance, New York. January 21, 1998, p. 8.

<sup>199</sup> Information accessed from UN documents on the internet. See [www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_11.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_11.html)

CEDAW in 1993 and Pakistan acceded to the convention on March 12, 1996. Bangladesh initially entered reservations on Articles 2, 13(a) and 16.1(c) and (f) on the basis that it conflicts with *Sharia* law based on the *Sunna* and the Holy *Quran*. Pakistan entered a general declaration that the provisions of the convention are subject to the Constitution of the Islamic Republic of Pakistan; it also has a specific reservation on Art 29(1) (on the arbitration of disputes).

India has entered several reservations to the convention. It has declared that it cannot comply with Art 5(a) (on sex role stereotyping and prejudice based on cultural, social customary practices) and Art 16(1) (on marriage and family relations) because of its policy of non-interference in the personal laws of different religious communities in India. It has further declared that it cannot comply with Art 16(2) (registration of marriages) because of the impracticality of the application of the article in a vast country such as India. India also has a reservation on Art 29(1) (arbitration of disputes). (See Table 1 below)

Reservations<sup>200</sup> and declarations are reflective of state practice and provide evidence of a state's response to norms espoused

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<sup>200</sup> The subject of reservations to the Women's Convention in general and those entered by Muslim states in particular have been the focus of a number of scholarly articles and books and lies beyond the scope of the present article. Muslim states' reservations and declarations are here used to illustrate the argument that there appears an inherent normative conflict between the Women's Convention and the Religious Freedom Declaration. Previous writings include S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan* (Peshawar: Shaheen Printing Press, 1995); A. E. Mayer, 'Islamic Reservations to Human Rights Conventions: A Critical Assessment' *Recht van de Islam*, Vol. 15, 1998, p. 25.

**Table 1**

**Status of ratification and reservations to CEDAW by Bangladesh, India and Pakistan**

<b>Country</b>	<b>CEDAW Ratification Date</b>	<b>Reservations and Declarations made to CEDAW</b>	<b>Reasons given for Reservations to CEDAW</b>
Bangladesh	November 16, 1984	Article 2, Article 13 (a), Article 16(1) (c) (f) Withdrew 13(a) 16.1 (f) 23/07/97	“Conflict with <i>Sharia</i> Law based on the Holy <i>Quran</i> and <i>Sunna</i> .”
India	July 9, 1993	Article 5(a), Article 16(1)(2), Article 29.1	“Abide... in conformity with interference in the personal affairs of any community without its initiative and consent.”
Pakistan	March 12, 1996	29(1)	“Subject to the provisions of the Constitution of the Islamic Republic of Pakistan.”

in a particular treaty. Reservations entered by Bangladesh, India and Pakistan to CEDAW, present an interesting example of the position that in their view, international human rights treaties are

subservient to the overriding supremacy of constitutional, religious and cultural norms (in this case Islamic law and traditions) and exigencies of state policy (in the case of India). In the context of our present study, it also highlights the extent of the normative conflict between the right to equality enshrined in CEDAW and notions of religious freedom as well as expressions of custom, culture and tradition. A commonality of approach is clearly visible in the body of reservations and declarations entered by the three countries despite the disparate ideological and political positions of these jurisdictions.

The three countries under review share similar histories that have diverged over the past decades.<sup>201</sup> Pakistan was created an Islamic republic; this factor being constitutive of its identity. India on the other hand has its particular history of secularism whereas Bangladesh broke away from Pakistan and articulated a Bengali nationalist identity.<sup>202</sup> In India, Muslims are a minority, and yet it has the second largest Muslim population of the world. The clamour for Muslim Personal Laws was a common demand articulated by Muslims of all three countries (when they were part of undivided India). These demands (propelled by the political environment of the time) was nevertheless very much controlled by the male Muslim elite. Their 'Muslimness' therefore was not unbridled and stopped short of an all out demand for application of Islamic law. Thus, agricultural land and other

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<sup>201</sup> Until 1947, Bangladesh, India and Pakistan formed part of the Indian subcontinent, prior to which they were under British colonial rule for one and half century. After 1947, India was divided to become two sovereign states, India and Pakistan (Bangladesh was called East Pakistan). In 1971, Pakistan was further divided into Bangladesh and Pakistan.

<sup>202</sup> This war was marred by violence against women and allegations of widespread abuse of Bengali women by the Pakistan Army.



immovable property was excluded from the purview of Islamic law in order to 'escape' sharing their property with female heirs as demanded by Islamic law of inheritance.

After the Partition of India, law reform continued in Pakistan and Bangladesh, albeit at a slow and uneven pace, and Muslim women acquired a few more rights as a result of progressive legislation adopted in the name of Islam (most prominently the Muslim Family Laws Ordinance 1961). Yet, Indian Muslims remained deprived of these initiatives now that they were part of a secular country due to the special protective policy adopted by the Indian government. The politics of multiculturalism thus rendered law reform for Indian Muslims as a two step forward, one step back situation.<sup>203</sup>

Despite the divergence in the pace, tone and tenor of reform in the area of personal laws in Bangladesh, India and Pakistan, the position of all three governments when it came to adopting human rights instruments such as CEDAW, is amazingly similar. Their defence of personal laws in the name of religion is seen as the principle rationale for entering reservations, making it appear as if Islam is a monolithic entity across geographical boundaries and national frontiers. This, of course, is not the reality on the ground. We must bear in mind that at the governmental level, the degree of opposition to international human rights norms is determined to a large extent by ideological leanings of the particular Muslim State as articulated by the government in power, that may or may not be representative of the people's view on Islam.<sup>204</sup> On the other hand, the position

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<sup>203</sup> This is evident from the Shah Bano case referred to in the Indian study.

<sup>204</sup> An-Na'im, 'Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights' in C. E. Welch, Jr. and V. A. Leary (eds.), *Asian Perspectives on Human Rights* (Boulder: Westview, 1990) pp. 31-32.

of a country like India, that does not fall within the definition of a Muslim country, remains in line with some of the most conservative, literalist positions adopted within the Islamic legal tradition. An-Na'im makes a particularly incisive point in this regard. He states that, "it is important to note that Islamic norms may be more influential at an informal, almost subconscious psychological level than they are at the official legal or policy level. One should not, therefore, underestimate the Islamic factor simply because the particular state is not constituted as an Islamic state, or because its legal system does not purport to comply with historical Islamic law, commonly known as *Shari'a*. Conversely, one should not overestimate the Islamic factor simply because the State and legal system are publicly identified as such. This is particularly important from a human rights point of view where underlying social and political attitudes and values may defeat or frustrate the declared policy and formal legal principles."<sup>205</sup>

Thus, countries like Iran reject unequivocally and completely, any notion of 'secular' human rights, whereas others such as Indonesia, Turkey and Tunisia, to mention a few, adopt a more compromising stance towards international human rights documents. These positions at international law are not, however, indicative of the degree of 'Muslimness' of the people of these countries. *Shari'a*, or principles of Islamic law, however, does not form a single coherent body of law. The corpus of *Shari'a* existing today is a collection of individual juristic opinions, and considerable differences continue to exist among jurists as to its requirements; hence the multiplicity of formulations on, among other subjects, women's human rights in Islam.<sup>206</sup> It may be argued

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<sup>205</sup> Ibid.

<sup>206</sup> An-Na'im, *Toward an Islamic Reformation* (Syracuse: Syracuse University Press 1990) p. 185.

that while *Shari'a* represents the human endeavour to understand and implement the core values and principles specifically referred to in the *Qur'an*, and has a religious nature, it is not immutable or unchangeable as is the *Qur'an* itself.<sup>207</sup> The true essence of the *Shari'a* is brought out by Parwez who describes it thus:

The Shari'a refers to a straight and clear path and also to a watering place where both humans and animals come to drink water, provided the source of water is a flowing stream or spring.<sup>208</sup> It is, therefore, as Hassan so forcefully argues: no slight irony and tragedy that the *Shari'a*, which has the idea of mobility built into its very meaning, should have become a symbol of rigidity for so many in the Muslim world.<sup>209</sup>

Thus, restrictive and literal interpretation of the religious text in Islam became the norm when (in a controversial and much-debated subject), some scholars adopted and advanced the view that the "doors of *ijtihad*" were closed forever.<sup>210</sup> On the other hand, a number of writers have argued against this 'closure' of *ijtihad* stating that, "The notion that at the end of the third century (or shortly thereafter) the doctors of Islam reached an immutable consensus of opinion that further *ijtihad* was unnecessary is untenable."<sup>211</sup>

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<sup>207</sup> Ibid. The distinction is usually drawn between the *Shari'a* (defined as the totality of divine categorisation of human acts and *fiqh* (the science of jurisprudence). We have pointedly made the difference between the *Qur'an* as words of God and *Shari'a* as the human formulation of that divine will. See, B. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998) p. 18.

<sup>208</sup> G. A. Parwez, *Lughat-ul-Quran* (Lahore: Adara Tulu-e-Islam, 1960) p. 941.

<sup>209</sup> Hassan, 1980, p. 4.

<sup>210</sup> Rahim, 1995, p. 142.

<sup>211</sup> Weiss, 1998, supra n. 38, p. 208. See in particular W. Hallaq, 'Was the Gate of Ijtihad Closed?' *International Journal of Middle Eastern Studies*, Vol. 16, 1984, p. 3; F. Vogel, 'The Closing of the Door of Ijtihad and the Application of the Law' *American Journal of Islamic Sciences*, Vol. 10, 1993, p. 3961.

Women became the greatest victims of the abandonment of the *Shari'a* as an emancipatory and creative force since in the area of family law, which affected them acutely, need for reform or accommodation was neither felt nor forced. On the other hand, in the male and 'public' sphere, including structures of governance and financial matters, the pressures of a changing world forced modification in traditional Islamic norms.

A further element arising in the discussion of reservations to CEDAW by Muslim states is the cultural influences on the perception of women's rights in Islam. Discussion of *Shari'a* would, therefore, be incomplete without appreciating the impact of the more potent force of Islam as a cultural reality and a strong motivating force behind the rejection of international human rights obligations by Muslim states. Since its initial phenomenal expansion within the first few decades of its existence, Islam has tended to incorporate and assimilate the social customs and institutions of the various regions and communities which converted to Islam.<sup>212</sup> In these societies, religion and culture interacted, creating a blend of 'cultural Islam' the manifestations of which are evident in the diverse cultural patterns of various Muslim societies. In some areas of Pakistan, women are completely debarred from inheriting, particularly land.<sup>213</sup> Female circumcision, practised in Sudan, Egypt and some other African countries is virtually unknown in Pakistan. The

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<sup>212</sup> Instances include the practice of female circumcision in Egypt, Sudan and other African countries; denial of inheritance rights to women, requirement of covering the face for women when venturing outside the home, accepting money as bride-price for a woman, accepting a woman in exchange for resolving a blood feud and so on.

<sup>213</sup> In particular, the North West Frontier Province and Balochistan province of Pakistan. Rural Sindh and rural Punjab also practice similar norms.

*Daudi Bohras* – an *Ismaili Shia* sect – a community of approximately half a million, settled in port towns of Karachi (Pakistan) and Bombay (India) are exceptions in this regard. The argument of ‘cultural Islam’ with regard to female circumcision is further strengthened by the Egyptian connection of the *Bohra* community.<sup>214</sup> The varying shades of interpretation of *Shari’a* result in divergent views on what constitute ‘Islamic’ values and norms, thus paving the way for national governments to use religion as an escape route from domestic and international legal obligations.

Reservations formulated by Muslim States Parties to CEDAW bear strong evidence of the disparate positions adopted by these jurisdictions on the subject. In the years immediately following the coming into force of CEDAW, very few Muslim states<sup>215</sup> were parties to the convention.<sup>216</sup> This situation has improved considerably and presently forty Muslim jurisdictions have ratified and one country – Afghanistan – has signed, though not ratified,

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<sup>214</sup> For a discussion on the practice of female circumcision among *Bohras* see R. Ghadially, ‘All for Izzat. The Practice of Female Circumcision among Bohra Muslims in India’ in M. Helie-Lucas and H. Kapoor (eds.) *Dossier 16, Grabels: Women Living Under Muslim Laws* 1996 pp. 13-20.

<sup>215</sup> The identifying criteria for Muslim countries vary. One criterion is to consider those countries where Muslims constitute over 70 per cent of the total population as Muslim countries. For statistics, see R. V. Weeks (ed.), *Muslim Peoples: A World Ethnographic Survey* (Westport CT: Greenwood, 1984) p. 882. In this study, the list of member states of the Organisation of Islamic countries (OIC), as the determining criteria for identifying states with large numbers of Muslim populations has been used.

<sup>216</sup> S.S. Ali and S. Mullally, ‘Women’s Rights and Human Rights in Muslim Countries: A Case Study’ in H. Hinds, A. Phoenix and J. Stacey (eds.), *Working Out: New Directions for Women’s Studies* (London: Falmer, 1992) pp. 113-117, cite ten Muslim states who have ratified the Women’s Convention and one that has signed it.

the Women's Convention.<sup>217</sup> Of these countries, the signature and ratification of Algeria, Bangladesh, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Malaysia, Maldives, Morocco, Pakistan, Tunisia and Turkey are subject to substantial reservations. Albania, Azerbaijan, Benin, Bosnia & Herzegovina, Burkina Faso, Cameroon, Chad, Comoros, Gabon, Gambia, Guinea, Guinea Bissau, Mali, Mozambique, Nigeria, Senegal, Sierra Leone, Surinam, Tajikistan, Togo, Turkmenistan, Uganda and Uzbekistan have become party to the Women's Convention without entering any reservations while the reservations of Indonesia and Yemen are confined to Article 29(1) relating to the settlement of disputes which may arise concerning the application or interpretation of the Women's Convention.<sup>218</sup>

States that have used adherence to Islam as justification for entering reservations to the Women's Convention include Bangladesh, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives and Morocco. Tunisia and Pakistan have not expressly cited Islam as reason for reserving their position, but the religious argument may well be inferred from the text of what appears a general reservation.

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<sup>217</sup> Afghanistan, Albania, Algeria, Azerbaijan, Bangladesh, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Chad, Comoros, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Indonesia, Iraq, Jordan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Morocco, Mozambique, Nigeria, Pakistan, Senegal, Sierra Leone, Suriname, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Uzbekistan and Yemen. Muslim countries that have so far refrained from signature/ratification of the Women's Convention include, Brunei, Qatar, Iran, Somalia, Sudan. Updated information on signatures, ratifications and accessions are available at [gopher://gopher.un.org:70/00/ga/cedaw/RATIFICA](http://gopher.un.org:70/00/ga/cedaw/RATIFICA)

<sup>218</sup> <http://untreaty.un.org> (accessed on November 1, 2003).

We have noted that CEDAW is undoubtedly a huge milestone in attaining equality for women. The convention nevertheless has its weaknesses, and its substantive provisions are emasculated by a range of reservations – many of these based on the apparent incompatibility with religious norms and beliefs. Islamic states have relied upon their construction of the *Shari'a* to enter reservations to the convention, although as indicated above, there are inconsistencies and contradictions in these practices. Thus some Islamic states accept the provisions of the conventions, whereas others have objected to several provisions on the basis that these conflict with the *Sharia*.

Women's human rights as set out in CEDAW, are based on a predominantly western liberal feminist discourse that insists on individual rights of women to the exclusion of the multiplicity of her identities. Several writers argue that this approach is premised on a combination of law, modernisation theory, and western liberal feminist jurisprudence.<sup>219</sup> The assumption is that there is an identifiable human nature which is at the heart of recognising appropriate rights to develop, protect and contain elements of this core human identity. Further, that underdevelopment and gender inequality in the Third World are caused by traditional values and traditional social structures. The prescription for attaining equality for women is therefore to address the human rights of women without reference to the cultural embeddedness of these rights in the western liberal States. However, the question that is being posed by women around the world is: To what extent are the concepts of equality and non-

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<sup>219</sup> See H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', *American Journal of International Law*, Vol. 85, 1991, p. 613; A. Hellum, 1999, *supra* n. 24, p. 412.

discrimination cast within the western liberal framework equally beneficial for all women? For example, the point has been made that in the African and Asian contexts most women rely on entitlements embodied in family and community relationships that do not relate to the “equal rights” language. Similarly, religion forms an important part of many women’s identity. They are not comfortable with being asked to frame their identities within a discourse that is avowedly secular. Is the monolithic and individualistic concept of abstract equality able to meet the everyday needs of such women? Critiques of CEDAW pointed to the presence of conflicting human rights principles such as gender equality on the one hand and the right to freedom of religion, culture, and custom on the other. Indeed, it was argued that the Religious Tolerance Declaration of 1981, in conjunction with Article 18 of the Universal Declaration of Human Rights and Articles 18, 26 and 27 of the International Convention of Civil and Political Rights (ICCPR), creates an invisible hierarchy of human rights by placing freedom of religion at a higher level than right to equality irrespective of sex and gender. It follows, therefore, that if the freedom to manifest and practice one’s religion or belief led to discrimination against women, such discrimination could be upheld on the basis of the right to practice one’s religion or belief. Thus, despite its holistic approach toward questions of women’s empowerment through human rights, CEDAW was said to have failed in providing a clear methodology to resolve these conflicting rights.

A balance may be achieved by going beyond a mechanical reading of equal rights for women in international human rights law, assessing critically the evolutionary journey traversed by the concept of ‘equality’ and ‘non-discrimination’ since it was first introduced into international human rights documents. In the initial stages of application, ‘equality’ and non-discrimination was generally interpreted in formal legalistic terms on the premise



that by making that statement in law, equality and non-discrimination would follow in practice. This interpretation and manifestation of the concept was flawed on a number of counts. Equality was perceived and defined as being like a man. As Catherine Mackinnon writes, “man has become the measure of all things.” Over the decades and with inputs from human rights scholars, activists, human rights treaty bodies and domestic courts, the non-discrimination norm and equality has achieved a more nuanced and sophisticated position. It now includes within its meaning the interconnectedness of various human rights to give it substantive content. Equal rights to health, employment and education may imply different and unequal measures – in order to arrive at equal access for all. Where the norm remains to be developed and firmed up is in the area of allocation of resources, both human and material. Most importantly, measures such as gender budgeting need to be introduced as an integral component of any planning, monitoring and evaluation aspect of government projects.

Men and women start the race for equal rights from totally different starting points. As illustrated in the case studies in the present collection, there prevails deep inter connectivity and inter relation between civil and political rights (the issue of non-discrimination and equal access both as women belonging to majority and minority communities), with economic social and cultural rights (safe transport for women to access an educational institution, a health facility and the workplace or simply access to a toilet within the public space).<sup>220</sup> Women’s disadvantages are

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<sup>220</sup> S. S. Ali, ‘Where is the Toilet? Getting down to Basics in Accessing Women’s Rights’ in Anne Hellum, S. S. Ali, Julie Stewart & Amy Tsanga (eds.) *Paths are made by Walking: Human Rights, Intersecting Plural Legalities and Gendered Realities* (Harare: Weaver Books, forthcoming 2006).

often based on structural injustice and rethinking human rights through innovative applicatory mechanisms, may afford opportunities to address those structural injustices and make women's human rights a reality.

### **3. Islamic Law and the Politics of Identity in India, Pakistan and Bangladesh: A Historical Overview**

The three countries of India, Pakistan and Bangladesh have complex and inter-connected politics of identity in relation to Muslim communities which can be traced in part to the history of 'secularism' and 'personal laws' in the British Indian subcontinent. The subsequent independence of the two separate states of Pakistan and India, and thereafter, the Independence of Bangladesh from Pakistan continue to inform the politics of identity of Muslim communities in the region. India has the second largest Muslim population in the world, accounting for 13 per cent of the population of the country. In Pakistan, given the history of its birth as a nation, Muslim communities are in majority accounting for approximately 98 per cent of the population. In Bangladesh, Muslims are also in majority, accounting for 88 per cent of the population of the country.

India is an avowedly secular state. Whilst secularism was added into the fabric of the Constitution via an amendment to the preamble to the Constitution in 1976, the state has been pursuing avowedly 'secular' policies since its inception as a state. This has meant a policy of non-interference in the 'personal laws' of the various religious communities of the country. The Constitution of India, in its Directive Principles of State Policy calls for the institution of a universal civil code, to have a uniform operation of 'personal laws' in the country. The politicisation of this directive with the language of 'appeasement of minorities' by right wing groups such as the Bharatiya Janata Party (BJP) has

meant that the issue of discrimination against women in the personal laws has been usurped for a politics of identity in India. This was starkly evident through the events surrounding the famous Shah Bano case in the 1980s in India.

Pakistan on the other hand, with its particular struggle for independence from British India, gives a context for the continuing (contested) processes of 'Islamisation' of the state. However, the history of secularism in Pakistan is a chequered one. Islamic ideology was formally incorporated into the Constitution in the early 1950s, but in 1962, under martial law, the word 'Islam' was dropped, but was re-incorporated under the 1973 Constitution. While Pakistan is officially an Islamic Republic, the state continues with the practice of personal laws for the different communities of the country.

The early history of Bangladesh attests to the incorporation of the precept of secularism in the Constitution of Bangladesh. However, in 1988, secularism was repealed from the Constitution and it was replaced by 'absolute trust and faith in almighty Allah' and the Constitution was introduced by the opening words of 'In the name of Allah...'. Under Gen Ershad, Islam was made the state religion of Bangladesh. However, like India and Pakistan, Bangladesh too follows the principle of personal laws for the various religious communities in the country.

In what follows, we examine the history of the incorporation of the principle of 'personal laws' in the ethos of the subcontinent and indicate the ways in which the three countries evolved their particular understandings of Islamic law. The attempt, therefore, in this section is to historicise the issues around Islamic law by examining the ways in which it has been strengthened, contested and transformed in the three countries.

### **History of Personal Laws under British India: An Overview**

The history of the relationship of religion and the state in the Indian subcontinent has been a vexed one and in part, can be traced to the introduction of the concept of personal laws by the British very early on. Personal laws in the subcontinent has come to mean both the application of religious laws of the particular communities in the areas of family matters and inheritance as well as an avowed policy of non-interference in these matters on the part of the state. The concept of personal laws, as it was understood in British legal history, drew upon a distinction between personal and territorial laws: personal laws attached to a person at birth and followed them wherever he or she went.<sup>221</sup> The introduction of this concept into the legal framework of the subcontinent, as the India report shows, is traced to the Hastings Plan of 1772, and especially to Article xxiii of Regulation II of 1772, which established a hierarchy of civil and criminal courts and charged them with the task of applying indigenous legal norms 'in all suits regarding inheritance, marriage, caste and other religious usages or institutions'. The thrust of Hastings' initial formulation, which was to reappear in modified form in all constitutive legal documents of the early colonial period, laid out that indigenous norms comprised 'the laws of the *Quran* with respect to the Muhammadans' and those of the 'shaster with respect to the Gentoos' (Hindus).<sup>222</sup> The

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<sup>221</sup> Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992) p 46.

<sup>222</sup> Ibid; M. Anderson, *Islamic Law and Colonial Encounter in British India* (London: Curzon Press Ltd., 1993); J. Nair, *Women and Law in Colonial India: A Social History* (New Delhi: Kali for Women, 1996); Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999).

plan also provided for *maulvis* and *pandits* to advise the courts on matters of Islamic and Hindu law, respectively. In effect, as Parashar suggests, the Hastings Plan laid out the foundation for the British differentiation between laws applicable to personal and to other matters, as well as a policy of non-interference in the private affairs of the various communities by British law-making, by what Parashar terms 'saving for' the Hindus and Muslim communities the right to apply their own religious laws in these matters.<sup>223</sup>

There are several important arguments that Parashar makes in relation to this policy of non-interference in the 'religious', 'personal', 'private', 'family' matters by the British. For a start, she suggests that this policy was not evenly applied: for instance, for a long time there was no similar provision to 'save' the personal laws of communities such as the Parsis, Jews and Armenians.<sup>224</sup>

Secondly, Parashar argues that there was a conflation between 'personal' and 'religious' laws by the British administration. The two major communities of India were identified by the religions they followed and the personal laws, which the English administrators had decided to save, were in turn also understood to be religious. Thus the categories 'religious laws and 'personal laws' became interchangeable but in the process it was forgotten that before the intervention of the British all other aspects of law for Hindus and Muslims were as religious as the religious personal laws.<sup>225</sup>

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<sup>223</sup> Parashar, 1992.

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

Thirdly, Parashar argues that this policy of non-interference did not extend to the *legislative* powers of the state.<sup>226</sup> Janaki Nair contextualises the argument that Parashar makes by suggesting that the colonial state in India passed through at least three identifiable stages:

From a period of predatory mercantilism (from the earliest days of the East India Company in India in the seventeenth century to the late eighteenth century), to the period when its intervention encouraged forms of capitalist enterprise, culminating in a period when the power of the state was increasingly challenged by the moral-intellectual leadership of the Indian national movement.<sup>227</sup>

The related argument that Nair makes is that processes of intervention by the British in the personal laws of the communities were by no means linear: in the early years, the intervention was minimal, by the early nineteenth century, some social practices of the Indians were legally challenged, whereas by the end of that century, the colonial intervention was far more timid.<sup>228</sup>

Although the proclamation of Queen Victoria, on assuming direct control of India contained the assurances that the customs and practices would be respected, the Charter of 1833 conferred extensive powers of legislation on the newly established legislative council.<sup>229</sup> However, the recommendations of the Second Law Commission constituted in 1853, urged against the codification of Hindu and Musli laws. Nonetheless, it recommended that almost all other aspects of civil law be codified on the basis of

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<sup>226</sup> Ibid.

<sup>227</sup> Nair, 1996.

<sup>228</sup> Ibid.

<sup>229</sup> Parashar, 1992.

English civil law.<sup>230</sup> Over a period of time, however, some matters initially considered 'personal' were legislated upon. For instance, contract laws were later made the subject of a separate code; and famously, the practice of *sati* was legislated upon.<sup>231</sup> Further, there were legislations enacted on the 'personal' matters of other minority communities such as the Christians and Parsis. Hindus (communities such as Sikhs and Jains were considered Hindus) and Muslims were excluded from the purview of legislations such as the Married Women's Property Act of 1874.

Flavia Agnes, in her work on law and gender equality also makes several arguments about the British engagement with personal laws. She suggests that with the British categorisation of communities based on their religion, a legal fiction was created that the laws of Hindus and Muslims are rooted in their respective scriptures, leading to the Brahminisation and Islamisation of laws. A further assumption that was cemented through this process, she suggests, was that Hindus and Muslims were homogeneous communities following uniform laws.<sup>232</sup> Michael Anderson takes the critique even further and suggests that the binary categorisation of Hindu and Muslim was inadequate to contain the diversity of legal life on the subcontinent.<sup>233</sup>

Therefore, to summarise from the discussion, while the British followed an avowed policy of non-interference in the personal laws of communities, this was by no means applied evenly, or even adhered to strictly. Further, with the categorisation of communities based on their religion, the presumption of the

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<sup>230</sup> Ibid.

<sup>231</sup> Ibid.

<sup>232</sup> Agnes, 1999; Anderson, 1993.

<sup>233</sup> Anderson, 1993.

homogeneity of the communities was augmented and a scriptural view of Hindu and Muslim laws was imposed leading to the Brahminisation and Islamisation of the laws. Towards the end of the colonial period, especially in the 1930s, several laws were passed regarding the personal laws of both Hindu and Muslim communities. As a stark result of all of these processes, 'what were called "personal laws" at the moment of independence, were often seriously modified laws, amounting in some cases, to nothing more than State enactments'.<sup>234</sup>

This history is important to understand because the processes of reform (or lack thereof) especially with regard to Muslim communities in the context of India (and to other minority communities in Pakistan and Bangladesh) has continued to refer back to the colonial precept of non-interference in the personal laws of the communities, and where such intervention is sought, it is perceived as infringing on the rights of minority identity. We shall examine this further in the next couple of sections. In the next, we shall examine the transformations that occurred in the personal laws affecting Muslim communities in British India.

### **Muslim Personal Law under British India**

It has been widely noted that the colonial period was a gradual period of Islamisation for Muslim personal laws in India (Parashar, 1992; Anderson, 1993; Nair, 1996; Agnes, 1999). Anderson makes several arguments in relation to Islamic identity and the processes of Islamisation during the colonial intervention. Firstly, he suggests that the British worked with the presumption that the Shariat was authoritative for Islamic scholars, consequently, they

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<sup>234</sup> Nair, 1996.



glossed over its internal contradictions and set about applying it as a more or less homogeneous set of rules. In the process of looking for a unified 'Muhammad' law, administrators, therefore, made the mistake of treating certain classical Islamic texts as binding legal codes. Secondly, he argues that under the colonial state, the category of Muslim or Muhammadan took on a new fixity and certainty,

In theory, each individual was linked to a state enforced religious category. Identities that were syncretic, ambiguous or localised gained only limited legal recognition; for the most part, litigants were forced to represent themselves as Muhammadan or Hindu. (Anderson, 1993: 21).

Therefore, according to Anderson, on the one hand, there was a scripturalist turn in the British understanding of Islamic law, which fixed on certain Islamic texts as binding legal codes; and on the other, there was a polarisation of identity into the categories of Hindu and Muslim, thereby eliding the several amorphous and ambiguous identities that existed at the time in India. As Agnes puts it, a fiction was created that Muslims and Hindus were homogeneous communities (Agnes, 1999: 43). Nair makes the related argument that the colonial processes of codification and reform through the nineteenth century, fixated on Hindu law (with instances such as widow remarriage, sati), and not on Muslim law. She suggests that when Muslim law was focused upon, its 'scriptural roots were traced fairly easily by those anxious to produce administrable laws'. This, she suggests was done by relegating customary practices amongst Muslim communities to the influence of Hinduism (Nair, 1996: 26-27). However, the regulation of child marriage in the later political climate of the 1920s did incorporate Muslim communities (Nair, 1996: 80-81).

The further arguments that Anderson makes in relation to the colonial impacts on Islamic law are in relation to the laws of evidence. He argues that the amplification of the process of documentation and the role of the scribe slowly chipped away at the primacy of the oral testimony, especially in criminal law. The culmination of processes of change in evidentiary law was the enactment of the Criminal Procedure Code (CrPC) of 1861 and the Indian Evidence Act (IEA) of 1872 (Anderson, 1993: 18). Agnes, on the other hand, contextualises the changes in Islamic law in terms of the regulation of the 'public' domain by the British. She speaks of the enactment of the Indian Penal Code of 1860 and the Indian Contract Act of 1860 which laid down uniform laws regulating the spheres of crime and punishment and economic transactions, in terms of the regulation of the public domain (Agnes, 1999: 60).

However, as Zakia Pathak and Rajeshwari Sunder Rajan point out, even enactments such as the Criminal Procedure Code did infringe on personal law, for instance, by granting women a right to maintenance. The religion of the woman was considered immaterial under this law, and women from all communities made use of its provisions since the 1870s (Pathak and Rajan, 1992: 259).

Therefore, as the India report attests, many facets of Islamic law underwent modification in the process of the codification of laws by the British. Islamic criminal and evidentiary laws underwent modification, as did the principles of economic transactions with acts such as the Indian Contract Act, and the Transfer of Property Act. All of these acts served to narrow the sphere of Muslim law to encompass certain laws relating to the family. Further, instances such as the Sarda Bill in the 1920s did incorporate Muslim communities in the processes of codification of the minimum ages for child marriage; and other non-personal

laws, such as the Criminal Procedure Code, did infringe on personal matters.

In the wake of the Government of India Act of 1935, which provided the first opportunity for Indians to have a representative legislature, several reform initiatives were introduced for both Muslim and Hindu communities. For Muslim communities, the initiative to change Muslim personal law was taken by the *ulema*. The issue that the *ulema* tackled was the question of customary practices, which the *ulema* felt were inconsistent with the Shariat. While several resolutions were passed by the *ulema* disapproving of this practice, a bill which was introduced into the legislature of the North West Frontier Province was enacted in 1935 as the NWFP Muslim Personal Law (Shariat) Application Act. Thereafter a central law was sought to be passed to the same effect. The main reason for the bill was to secure uniformity of law amongst Muslims throughout India. A further argument for this process of codification was that it would improve the status of women. This was because, it was argued, customary practices denied women their rightful share of property (under Islamic inheritance) (See Parashar, 1992: 146-147).

Thereafter, in 1937, the Muslim Personal Law (Shariat) Application Act, a legislative measure to islamise Muslim personal law in British India by abrogating the role that customary law played, was enacted. However, the benefits for women were limited since Section 3 of the act permitted individuals to choose between customary law and the act in matters relating to wills, adoption and legacies (Nair, 1996: 193). Further, Section 2 of the Act which says that questions of property shall be dealt with by Muslim personal law where the parties were Muslims, left agricultural property out of the purview of the act, leaving that to customary practices.

The Dissolution of Muslim Marriages Act, 1939 was a further act that was enacted prior to independence. The argument based on which it was enacted was that the Hanafi School applicable in much of the subcontinent, allowed for Muslim women's right to dissolution only on apostasy. Troubled by this, the *ulema* through a series of processes culminating in the enactment of the legislation, which was based instead on the Maliki School, provided limited rights to Muslim women to dissolve their marriage. Under this act, a wife is entitled to judicial divorce on neglect or failure of the husband to provide maintenance for two years. However, if the wife 'refuses herself' to her husband without any lawful excuse and deserts her husband, she has no right to claim maintenance and cannot obtain a decree for dissolution of marriage on non-payment of maintenance.<sup>235</sup> The act also differentiated between men and women in terms of apostasy as a ground for dissolution. After the act was passed, apostasy of the wife does not dissolve the marriage, whereas apostasy of the man does. Further, Muslim men's right to unilateral divorce was not affected by the reform. (See Parashar, 1992; Nair, 1996 and Agnes, 1999).

The two acts of 1937 and 1939 used the language of the situation of Muslim women in order to carry out reforms in Muslim personal law. The Shariat Act had the added objective of securing uniformity of law amongst Muslims throughout British India. But as we have seen, these processes were by no means evenly applied and whilst the gains for women were limited, they seem to have strengthened the processes of Islamisation of Muslim personal law (See Parashar, 1992; Nair, 1996 and Agnes, 1999).

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<sup>235</sup> M. H. Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1989).

### **Post-Independence: The Politics of Muslim Identity in India, Pakistan and Bangladesh**

Post-independence, the processes of reform in Muslim personal law have reflected the particular political context of Muslim identity in the countries of West and East Pakistan, Pakistan, Bangladesh and India. In India, given India's stance of avowed non-interference in the personal laws of minority communities, as the report shows, the struggle for reform in Muslim personal laws has been fought mostly through the courts, albeit with contradictory effects. In Pakistan, on the other hand, given the shifting processes of Islamisation, the gains for Muslim women have also been contradictory. In this section, we shall trace the gains as well as setbacks achieved by Muslim women in India, West and East Pakistan, and thereafter Pakistan and Bangladesh.

In India, there was an overhaul of Hindu personal law in the 1950s with the enactment of the Hindu Marriage Act, and the other act which provided limited gains for Hindu women. However, the Partition of India, which had deeply divided communities on religious lines, did not provide a viable context for reform of Muslim personal law.

The exigencies of the post-partition situation in the country prevented the government from doing anything that might be interpreted as a persecution of the minorities, especially the Muslims. The particular circumstances of Muslims in post-partition India demanded that they should be 'encouraged' to become part of the nation voluntarily rather than made to feel that as a minority they would always be coerced by the majority.<sup>236</sup>

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<sup>236</sup> Parashar, 1992.

Therefore, in the sliding scale of rights, the legal rights of minority women were superseded by the overwhelming need to integrate the minorities into the national mainstream (Parashar, 1992, 159). However, although there has been very little reform of Muslim personal law in India since Independence, the question of reforms to Muslim personal law has come up from time to time since the Constituent Assembly debates on the uniform civil code. Agnes points out that the Special Marriage Act of 1954 is the only 'significant move in post-independence period to secularise family laws' (Agnes, 1999: 95-96). She suggests that the opposition to the act from religious communities was struck down with the argument that it was a facilitatory act, as individuals were not bound by its provisions, unless they chose to be (Agnes, 1999: 96). However, Parashar makes the argument that it was with the debate around the Special Marriage Act of 1954, and its applicability to Muslim communities, that the issue came to be crystallised in terms of the sentiments of Muslim communities. However, the question of the similarity of treatment in reform initiatives across communities continued to rear its ugly head, to which the government response was that the reform initiatives were one step towards the normative ideal of the uniform civil code (Parashar, 1992: 163-164).

Agnes notes that the next attempt at uniformity the Adoption Bill of 1972, which lapsed and was re-initiated several times (this went on for about a decade), but did not see the light of day. The bill was opposed by certain segments of the Muslim, Parsi and tribal communities. Although there was support for the bill by several prominent Muslim scholars and jurists, the bill was thwarted with the argument that adoption would create prohibited relationships in matrimonial alliances, and that it would disrupt the Islamic laws of inheritance. The fear of property transferring to individuals was also expressed by the Parsi and tribal communities. Agnes argues that what the Adoption Bill debate

did was to establish the government's acceptance of the religio-political leaders as the true spokespersons of the entire community and conceded to their posture that no Muslim would have the opportunity of rejecting Islamic law through a state enactment (Agnes, 1999: 99-100).

In 1973, a new Criminal Procedure Code was introduced to replace the Criminal Procedure Code of 1898. Under the old code, a divorced woman was not named as a legitimate recipient of maintenance and this was introduced into the new bill. This turned out to be controversial, as certain Muslim religious leaders saw it as infringing on already existing Muslim laws of maintenance. The issue was resolved by amending Sec. 127 with the argument that 'under the customary or personal laws of certain communities, certain sums are due to a divorced woman. Once such a sum was paid, the magistrate's order giving maintenance (under Sec. 125) could be cancelled' (Parashar, 1992: 167). Parashar makes a similar argument to Agnes in suggesting that the debates around the CrPC and the Adoption Bill established that the Muslim leaders 'seemed to have a *carte blanche* with regard to matters claimed to be governed by their personal law' (Parashar, 1992: 168). The Shah Bano case (discussed at some length in chapter 3, epitomises this controversy surrounding reform of Muslim personal law by a secular judiciary.

Pakistan has had a different, but not less turbulent relationship with secularism and personal laws. On obtaining Independence, Pakistan set about reviewing its laws in relation to marriage and family matters. In 1955, a seven-member commission, on Marriage and Family laws, called the Rashid Commission, was set up to consider the personal status laws applicable in the new state and to determine the areas needing reform. The report of the commission which was submitted a year after, led to much debate, especially amongst the *ulema*, who felt that there was an

unjustified tampering of classical laws. In 1961, the Muslim Family Laws Ordinance, which drew on some of the recommendations of the commission, was passed. The MFLO overhauled Muslim personal law in East and West Pakistan and legislated on many important areas such as polygamy and *talaq*. Under this ordinance, although polygamy was not prohibited, it was regulated by requiring a man to apply to the local union council for permission to carry out another marriage, as well as to notify them of existing wife or wives. Similarly, the ordinance provided for the regulation of *talaq*. It treated every utterance of *talaq* in any form whatsoever (except the third of three) as having the effect of being single and revocable. Thereby it formalised the process of *talaq*.

The third Constitution of Pakistan of 1973, which was later suspended in 1977, re-instituted in 1985 and again suspended in 1999, enshrined certain religious principles. However, the changes to personal laws were very significant in the 1970s. The legacy of the Zia-ul Haq regime, which is widely perceived to have set in motion further efforts at Islamisation, carries on with the Hudood Ordinances of 1979, and the constitution of another system of religious courts in the legal system of Pakistan, the Federal Shariat Court. Under the Hudood Ordinances five criminal laws were constituted: covering property (theft, armed robbery), *Zina* Ordinance, Prohibition Order, *Qazf* ordinance (dealing with false accusation of *zina*) and the Execution of the Punishment Ordinance. (Laws of *Qisas* and *Diyat* also fall in the category of the 'Islamised' laws brought in by Zia-ul Haq).

The law of evidence of 1984 is another discriminatory law, which along with the *zina* laws, requires the testimony of four adult male witnesses for rape.



When Bangladesh secured Independence from Pakistan in 1971, secularism was one of the precepts that were central to Fundamental Principles of State Policy of the Constitution of 1972. However, in 1977, the Constitution was amended to remove the term 'secularism' and in 1988, Islam was declared the state religion. However, this was done along with the principle that other religions be practised in peace and harmony. The principle of separate personal laws for the various communities of Bangladesh continues to be enforced. However, there are several laws that have affected the personal laws of the various communities. Some personal laws initiated in the colonial era, continued to apply after the Independence of the country in 1947 when it was East Pakistan. These included the Shariat Application Act, 1937, the Dissolution of Muslim Marriages 1939 and the Child Marriages Restraint Act 1929. Likewise, although the Muslim Family Laws Ordinance was passed when Bangladesh was still East Pakistan, it continues to operate in Bangladesh, with some modifications. This ordinance made the registration of Muslim marriages compulsory, and similar provisions have been made by the Muslim Marriage and Divorce Registration Act of 1974. Under the 1974 Act, documentation and registration of marriage contracts mentioning the amount of dowry is provided for. Further, the Muslim Family Laws Ordinance provided for the payment of 'prompt dowry'— dowry which is payable immediately on demand by the wife. Also, this claim is not lost when the marriage is dissolved by court at the instance of the wife or when the wife exercises the right to divorce (See Kamali, 1989).

In addition to the above personal laws, The Dowry Prohibition Act of 1980 and its amendment in 1986 has made the custom of dowry an offence punishable by fine and imprisonment. The Family Court Ordinance of 1985 has established family courts at the district and other levels, to deal with cases relating to

marriage and divorce, restitution of conjugal rights, recovery of dower, maintenance and custody of children. Provisions have been made for mediation and quick disposal of cases.

The latest law reform affecting women is the Prevention of Women and Child Repression Act 2000 in which sexual harassment and repression are identified as punishable crimes. This law provides the death penalty for those convicted of rape offences and also prevents publication of victim's photographs in newspapers. The introduction of the concept of the safe custody is one of the most important features of the law.

The discussion in this chapter attempted to outline the contours of a conceptual framework for analysing effective implementation and application of CEDAW to women governed by multiple legal norms (one of which is Islamic law). It highlighted the difficulties imminent in such a project and provided some avenues for explorations of strategies on the way forward. The succeeding chapters provide an insight into such application in light of specific country studies undertaken in Bangladesh, India and Pakistan.

Part II  
Chapter 2

***CEDAW and Bangladesh: A Study to  
Explore the  
Possibilities of Full Implementation of  
CEDAW in Bangladesh***

**Mahmuda Islam**

## **1. Introduction**

Women the world over are subject to gender discrimination that results in lack of enjoyment of full civil, political and personal rights by women equally with men. Laws, traditions and customs create and perpetuate gender discrimination. On December 18, 1979, the United Nations General Assembly adopted the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) with the objective of providing ethical and legal sanction to the enforcement, protection and promotion among women in equal terms with men all human rights guaranteed under the Universal Declaration of Human Rights (UDHR), and bringing about full gender equality between men and women.

Bangladesh was the first of the three countries under review to ratify CEDAW in 1984 albeit with reservations to Articles 2, 13(a), 16(1)(c)(f). In view of the demands from women's organisations and human rights groups, the government of Bangladesh set up a committee with representatives from women's groups; the committee recommended withdrawal of all reservations. But the Ministry of Law and Justice, on examination of all aspects of the legal system, approved withdrawal of reservation on Articles 13(f) and 16.1(f). Accordingly, reservations to Articles 13(a) and 16.1(f) were withdrawn so that reservation is now limited to Articles 2 and 16.1(c).

## **2. Objective of the Study**

The main objective of the present study is to explore possibilities of full ratification of CEDAW by helping to create an enabling environment for the government to completely withdraw its reservations. Articles 2 and 16.1(c) of CEDAW come into conflict with religious laws which form part of the legal system in as

much as there is discrimination between men and women in personal family matters like inheritance, guardianship (Article 2) and in marriage and dissolution of marriage (Article 16.1(c)).

Reservations of the government of Bangladesh regarding these articles stems from its unwillingness to interfere with personal religious laws and reluctance to legislate to replace them. In its Fifth Periodic Report for the UN Committee for Elimination of all forms of Discrimination Against Women, January 2003, the government of Bangladesh stated:

In Bangladesh religious precepts influence and govern personal affairs like marriage, divorce, custody of children, inheritance of property etc. In case of Muslims, personal laws are drawn from Shariah Law, which is based on the Holy *Quran* and *Sunna*. The Hindu population is governed by Hindu Law. Significant reforms in Muslim Family Laws, particularly in case of polygamy, divorce etc., have already been undertaken to protect women's interest indicating that the Sharia Law is not immutable and there is scope for initiating further reformatory measures. The government endorses the need for initiating reformatory measures for considerations of well being of people and society. It is also aware of the need to prepare the society for social acceptance of these reforms.

The following facts emerge from government's stand on the issue:

- i) The reservations are not final and may be withdrawn in course of time;
- ii) Religious customs and traditions are amenable to reinterpretation and
- iii) Public opinion is malleable and should be moulded in favour of implementation of CEDAW.

The present study thus originates from the need to create the conditions and environment for enabling the government to withdraw the reservations. Comprehensive knowledge and reliable information are pre-requisites to awareness about the provisions of CEDAW, its importance and significance, and crystallisation of a well-informed, effective public opinion. This study is, therefore, designed to circulate all relevant documents on CEDAW and existing personal laws to a cross section of the population holding different shades of opinions, beliefs and specialisations and to ascertain, analyse and document their knowledge, ideas, views and experience on the issue.

### **3. Methodology of the Study**

In line with the objectives of the study, a paper was compiled containing information about CEDAW, relevant provisions of Islamic jurisprudence, legislation already passed on matters dealt with by religious laws, steps taken by other Muslim countries with regard to CEDAW. On the basis of the information thus compiled, a questionnaire was prepared which asked respondents to give their views on the reserved provisions of CEDAW taking into consideration the information provided. If response is negative on both or either of the two issues, respondents were called upon to adduce reasons/arguments in support of the particular view. Respondents also had the option to propose Islamic juristic principles of *Ijtihad*.<sup>237</sup>

A list of respondents was prepared giving preference to persons in leadership roles connected with institutions, such as, Baitul Makkaram Mosque, Masjid Mission, universities, law associations, political parties, students union, NGOs, media, television, radio.

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<sup>237</sup> See questionnaire in Appendix III.

### **Number of Respondents**

Religious thinkers including <i>Ulema</i> , teachers in the Arabic, Islamic Studies, Islamic History Departments of Universities, Principal, Alia Madrassa, Chairman, Madrassa Education Board, Imams of important mosques, representatives of religious organisations like Islamic Foundation	30
University Professors including those at Faculties of Law	25
Members of Political Parties	10
Lawyers	20
Journalists	10
Students	20
Representatives of NGOs including women's Organisations	20
Civil Society	40
<b>Total</b>	<b>175</b>

The questionnaire was supplied to respondents requesting for written views. The research assistant pursued the respondents. In some cases, the questionnaire was filled by the assistant on the basis of interview with the respondents. The principal researcher personally talked to a number of respondents to facilitate their response. In all, 175 questionnaires were circulated with the expectation that at least 100 would willingly respond. 97 persons, whose breakdown is presented below, responded.

### Category of Respondents<sup>238</sup>

Category	Number
Religious thinkers	18
University level teachers including faculties of Law	21
Political Parties	04
Lawyers	10
Journalists	04
Students	05
Representatives of NGOs including women's Organisations	09
Civil Society	26
<b>Total</b>	<b>97</b>

#### 4. Human Rights of Women in Bangladesh

Women's human rights in Bangladesh, in common with other countries in the region, are informed by multiple sets of norms and laws, both formal and informal. The legal system broadly defined, consists of:

- i) The Constitution of the People's Republic of Bangladesh, which determines the form and character of the government and specifies fundamental rights of citizens. The Constitution declares equality before law, yet all laws are not equally

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<sup>238</sup> About 21 per cent of the respondents are from outside the capital Dhaka and 29 per cent are women.



applicable to every body. The actual situation is that there are different laws for different communities and different religious laws continue to be applicable to citizens professing different religions;

- ii) Customs and traditions prescribed by different religions which have the force of law and are enforceable by the judiciary in respect of members of the particular religion. The areas in which religious laws are applicable include interpersonal relationships in the family context, such as, marriage, dissolution of marriage, protection and maintenance of the family, guardianship of wife and offspring, alimony, inheritance, gift, bequest, adoption, custody of children, descent. These laws are discriminatory to women and provide unequal relationship between men and women;
- iii) Laws enacted by the legislature apply to all other spheres of public and private life. These laws do not discriminate between men and women except in certain limited cases.

### **Structure of the Judiciary in Bangladesh**

Supreme Court = Appellate Division +  
High Court Division

Appellate Division

High Court Division

Sessions Court

Civil Court = Magistracy

The judicial system is the only legal forum for hearing cases, disposing of disputes and providing interpretation in all matters arising out of the legal system including the Constitution, civil and criminal laws and personal laws. There are no religious courts; *Fatwa* given by a religious authority has no validity in law and *Hudood*<sup>239</sup> is not recognised by the legal system.<sup>240</sup> Any body trying to enforce *Hudood* will be liable to prosecution under the criminal law of the country. The issue of *Hudood* and *Fatwa* has been settled by verdicts of the high court which describes it as illegal.

#### ***4.1 Economic Rights of Women***

The Constitution of Bangladesh does not discriminate between men and women in economic activities. It confers on women the right to participate in gainful business occupation and vocation. Every citizen has the right to enter any lawful profession and occupation and to conduct any lawful trade or business. The Constitution provides that no one shall be ineligible for or discriminated against in respect of any employment or office in the service of the state. The Constitution requires the state to

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<sup>239</sup> Literally means 'limit'; As a term of jurisprudence it means an offence for which a prescribed punishment is set out in the Islamic legal tradition.

<sup>240</sup> Hudood refers to crimes for which the *Quran* clearly specifies the procedure of trial and evidence and prescribes the punishment. Adultery is such a crime for which the *Quran* clearly lays down system of trial and punishment. In Bangladesh, these Hudood laws laid down in the *Quran* are not enforceable. Bangladesh has specific laws of crimes, trial, evidence and punishment which are totally different Hudood laws and have nothing to do with the *Quran*. Hudood is not, therefore, legal in Bangladesh. However, in Pakistan legislature passed a specific law with the view to enforce Quranic laws on crime especially adultery.

ensure participation of women in all spheres of national life and to adopt effective measures to ensure equitable distribution of wealth among citizens. Further, the Constitution authorised the state to make special provision for women for their advancement and on that authority, has introduced special quota for women in employment. Despite this progressive trend within the constitutional document, there is provision for the state to exclude women from jobs, which by its nature is unsuited to them. But the state has not taken any step to exclude women from any employment including the armed forces.

#### ***4.2 Social Rights of Women***

The Constitution of Bangladesh prohibits discrimination on the grounds of sex and gives women equal rights with men in all spheres of the state and public life. No citizen can be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort or admission to any educational institution. Women have the right to move freely throughout Bangladesh.

As already pointed out, customs and traditions prescribed by different religions have the force of law in family matters including interpersonal relationships in the family context, and are enforceable by the judiciary in respect of members of the particular religion. These laws are discriminatory to women and negate the constitutional provision of equal rights of men and women in the social sphere and make women subordinate to and dependent on men. Muslims in Bangladesh are guided by the Hanafi School of Islamic Jurisprudence<sup>241</sup> under which the

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<sup>241</sup> For juristic schools of thought in Islam see discussion on Chapter 1.

commonly held perception is that polygyny is allowed to husband, but bigamy is punishable for women; a son has double the share of daughter in parental inheritance and bequest of property to children by will is not permissible. The husband is the guardian of the wife and the children, and can divorce the wife any time without assigning any reason and without being required to go through any divorce proceedings.<sup>242</sup> Women do not have corresponding rights and normally have no right to divorce husband except through an elaborate legal proceedings in which she has to justify her claim by showing grounds acceptable to the court.<sup>243</sup> If a person is survived by at least one son the property of the deceased is retained by the son, and daughter, if any. But if a person is survived by daughters only and leaves no son behind, daughters inherit only a part of the property and a part goes to the male kin to the deprivation of the daughters.<sup>244</sup>

Under the Constitution of Bangladesh, the legislature has the right to pass laws overriding religious laws, which will then become inoperative; but it normally does not legislate on these matters. However, in the past, laws have actually been passed in the area of personal laws in the public interest and in order to mitigate hardships, to ensure equality and to protect women's rights and

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<sup>242</sup> This is clearly a perception as opposed to an actual Quranic injunction as stated in its Chapter 4 entitled *Women*.

<sup>243</sup> Women have a right to *khula* i.e., dissolution of the marriage contract at the initiative of the wife and by agreeing to give up her *mahr*.

<sup>244</sup> As regards inheritance, Islamic law prevails in Bangladesh. Muslims in the world are broadly divided into two sects —Sunni & Shia & there are differences in the practices followed by the two sects. One such area of difference is the practices of inheritance. Muslim in the subcontinent including Bangladesh are overwhelmingly Sunni and follow the Sunni Hanafi School, Shias follow Shia Jurisprudence.

for consideration of well being of people and society. These laws including the Child Marriage Restraint Act 1929, the Dissolution of Muslim Marriages Act 1939, the Muslim Family Laws Ordinance 1961 and the Muslim Marriage and Divorce (Registration) Act 1974 have, arguably, made inroads into the Islamic traditions of polygyny, divorce and inheritance.

Violence against women is a telling reflection of the unequal relationship between men and women and women's subordination and discrimination and is now recognised as a serious constraint to women's advancement and empowerment. One of the worst manifestations of subordination of women is reflected in the institution of dowry which is the prime cause of domestic violence. The menace has assumed such proportion that the prime minister has given special attention to launching a mass movement against it and personally sent an appeal to 120 thousand persons including government officials, local government representatives, members of civil society, political leaders, teachers and religious leaders to work against dowry.

Dowry, however, is only part of the phenomenon of violence. Information collated by the Bangladesh National Women Lawyers' Association states that violence in all forms, including rape, physical, mental and sexual harassment and torture of women in the family, the workplace and in the wider society, is on the increase and has almost doubled in 2003 from 2002.

#### ***4.3 Political Rights of Women***

The Constitution does not make any discrimination between men and women in the area of political rights and gives women equal rights with men to stand as a candidate in election to the Parliament and to vote in elections on the basis of adult franchise.

Women can be members of Parliament, speaker, prime minister or president. Both the prime minister and the leader of the Opposition in the Parliamentary democracy of Bangladesh have been women.

However, historical absence of women from the political arena has weakened women's position for putting themselves forward as candidates. Very few women contest elections to Parliament and not more than 10 women have ever been elected in a Parliament of 300 members. Recognising the situation, an interim provision of 30 reserved seats for women in a Parliament of 300 members was made in the Constitution. The 30 women members were selected by the 300 general members of Parliament. The interim provision has expired and the Constitution has been amended making provision for 45 reserved seats for women. Their right to contest in the 300 general seats, however, remains unaffected.<sup>245</sup>

At the grassroots level, local government institutions have provision for women membership to be elected by adult franchise. One third of the membership of these institutions has been assigned to women to be elected through direct election similarly as the general members. In 1997, direct election of women members in Union Parishad, the lowest tier of local government, took place. Women members at the Union Parishad constitute almost 22 per cent of the total members. In addition to direct election to the reserved seats, 20 women were elected as Chairpersons and 110 women were elected members in the general seats contesting against men candidates.

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<sup>245</sup> Similar experiences are reported from other countries in this collection.

## **5. Women's Rights in CEDAW and the Sharia: Perspectives from the Respondents**

As indicated in Section 3, respondents in the present study represent a fairly well distributed section of the population. We believe their views are likely to be considered well-thought and learned opinions that will go a long way in creating the environment for full implementation of CEDAW by the government of Bangladesh.

### ***5.1 General Observation***

The fieldwork was spread over a period of twelve months from September 2002 to August 2003. The effective time of interviews and receipt of the questionnaires from respondents was January to March 2003. It needs, however, to be noted that very few respondents came forward voluntarily to fill in the questionnaire and most of them had to be persuaded to do so. Both the principal researcher and research assistant had to make follow up visits and telephone them several times. In some cases, the assistant had to fill up the questionnaire on the basis of the view expressed by the respondents. Despite our best endeavors, many did not co-operate mainly due to sheer apathy. This has led to the impression that people in general are either not aware of CEDAW or did not take due notice of it, or simply ignored information on the subject. There appears to be apathy towards women's development and a lack of commitment regarding rights of women. The situation cuts both ways. On the one hand, the government feels insecure about public reaction to ratification of provisions of the CEDAW which fall in the domain of *Sharia* laws. On the other hand, there is the prospect that if the government ratifies CEDAW in full, its action will go unnoticed and there will be little adverse reaction or active opposition. In the past, governments have passed legislations encroaching on

the domain of religious laws, for example, restricting polygamy, revising religious precepts on inheritance, providing arbitration by such civil authority like Municipal Corporation in divorce matters. The *Ulema* accepted the situation ostensibly because they could not muster public support to oppose the legislation. One respondent pointed out that the *Ulema* in Bangladesh are divided and there is rivalry and even hostility among them so they cannot carry the people with them. In the vacuum, political decisions can and do play a decisive role. A bold and firm political will is the need of the hour and is capable of delivering the goods. One respondent went so far as to say that neither the public nor the *Ulema* have at any stage voiced effective opposition to CEDAW and, therefore, delay in its complete ratification is a political stunt on the part of the government.

### ***5.2 Respondents' Observations on Article 2 of CEDAW***

An overwhelming majority of the respondents favoured ratification of Article 2. However, 14 respondents were against any legislation on religious law. Those in favour as well as those opposed to ratification of this article agreed that Islam cherishes equality of men and women and promotes and protects rights of women. There is, therefore, no basic contradiction or incompatibility between Islam and CEDAW so far as these objectives are concerned. Respondents opposing CEDAW, however, believe that equality enshrined in Islam and protection of rights accorded to women in the *Quran* and *Sunna* are much more suited to promotion of social peace and stability, family solidarity and discipline and ultimate welfare and good of humanity. Moreover, they believed that Allah is decidedly the better judge, arbiter and dispenser of what is good for human progress and prosperity than any human institution. Religious principles and dispensations should, therefore, have precedence



over CEDAW and, Allah being the better guide, any change in religious law will be harmful.

Respondents in favour of ratification of articles of CEDAW argued that in Islam there is no inequality in substantive matters; but difference has been created in functional matters by taking piecemeal view and giving narrow and prejudiced interpretation by an all-male religious leadership. The inequality between men and women was a product of the then prevailing social environment. But that environment has undergone profound and widespread change and the time has come for rationalisation of women's rights in the contemporary context. Such rationalisation certainly leads to a broader and more liberal interpretation of Islam and makes CEDAW acceptable keeping within the parameters of Islam. To this end, it may be mentioned that the Supreme Court has given verdicts on guardianship, maintenance of family and marital relationship on the basis of the principles of equality and equity that have rationalised *Sharia* laws and thus enriched a liberal Islamic jurisprudence.

It is pertinent to make the point that action proposed in Article 2(a) to (e) and (g) of CEDAW is already in place in the Constitution of Bangladesh which proclaims equality of all men and women before law, prevents discrimination on the ground of sex, prohibits discrimination in admission to educational institutions on ground of sex, declares equality of opportunity and eligibility for all men and women in respect of employment or office and prohibits restriction on movement. Thus, equality of men and women in relation to civil, political, economic and legal rights is enshrined in the Constitution.

Problems however, remain with clause 2(f) in relation to which personal laws of Islamic jurisprudence are in force. Some respondents referred to the clear constitutional provision that

laws inconsistent with the Constitution are void and inoperative and claimed that personal laws are void and inoperative as they violate constitutional guarantee of equality between men and women, especially the Article 28(2) which states, “Women shall have equal rights with men in all spheres of the state and public life”. Some respondents disagree on the ground that the word, ‘family life’, does not appear in and is not covered by this article of the Constitution and as such Islamic laws regulating personal, family life cannot be called unconstitutional. This view has been considered by some respondents as narrow and misleading. Family is considered the ideal centre for fullest development of individuality of the human species and a child brought up in an unequal family environment will not be able to adjust to equality in state and public affairs. Family life is not, therefore, separable from public life. Moreover, the Constitution aims at removal of discrimination and its spirit clearly and unequivocally against discrimination.

It may be stated that even with regard to clause (f) of Article 2, the position of the government has undergone substantial modification over time. It has already ratified all the clauses of Article 16 with the lone exception of clause (c) and such ratification has set at rest many of the Islamic traditions in favour of CEDAW provisions for equality.<sup>246</sup>

The government has, therefore, assumed obligations to pass legislation or otherwise take measures to do away with discrimination and discrepancies in these matters. Certain changes have already taken place. The notion of the female-headed family has emerged and is officially recognised. Women can be known/

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<sup>246</sup> See Appendix 1 for text of CEDAW.

identified by the name of parents and not necessarily by their husband's identity. Names of both parents must appear in all official documents. Women need not adopt surname of husband and may continue maiden name. Women can opt for parents' household as permanent address and need not adopt in-law's abode.<sup>247</sup>

One respondent asserted that Allah has given men guardianship over women and therefore, brings into question the concept of equality for men and women. In response to this line of argument, it may be stated that in recent years this position has become controversial. The Quranic verses which deal with this issue are subject to different interpretation in the context of time and situation. In the *An-Nisa*<sup>248</sup> it is stated that men are protectors and maintainers of women because men support and spend money for women from their means. Ostensibly, this guardianship is conditional and based on the husband's ability to support the wife. A woman can repudiate the marriage and secure her release from the bond if the husband fails to maintain her. The question is often posed as to interpretation and application of this verse in situations where the woman has an independent income and does not depend on her husband for support. In Bangladesh women are increasingly entering the labor market to earn an income to support the family. Logically, the husband cannot claim guardianship in such case. It has, therefore, been claimed that protection and maintenance means responsibility to provide a service i.e., financial support and does not automatically mean

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<sup>247</sup> Note: Rights presented in this paragraph are recognised as fairly non-controversial within the Islamic legal tradition.

<sup>248</sup> The *Quran*, Chapter 4, verse 34.

superiority or leadership. Moreover, there are Quranic verses (*Al Baqura*, 228; *Al Tawba*, 71) which state that men and women have rights over one another and are protectors of one another. Thus, a rational, liberal and practical interpretation of the Islamic laws will support equality between man and woman. The government in ratifying Article 16.1(d) and (f) has accepted this liberal interpretation which is reflective of the contemporary situation and prevailing conditions in society.

Another issue which some respondents raised in connection with Article 2 is the Islamic law of inheritance which does not afford equal share to men and women. Among the respondents who opposed ratification, 2 specifically referred to the inheritance issue in as much as they believe that the *Quran* has clearly laid down the principle of inheritance and that this must be respected. Among respondents who favoured ratification, 3 suggested that the Islamic law of inheritance should be reviewed in the full perspective of Islamic social arrangement before ratification. They believe that in the Islamic tradition, certain protective advantages given to women may be evoked to justify the discriminatory law of inheritance. For instance, *mahr* is a first charge on the property of the husband and it must be paid from the property before inheritance. Husbands are obligated to maintain their wife and children from their own income, resources of the wife notwithstanding. The husband has no right over the property of the wife and cannot appropriate that property for maintenance of the family. Even if the wife has an independent income, she has no financial obligations and the husband's responsibility to maintain his wife and children neither ceases nor is reduced. Men, therefore, have much greater financial responsibility and burden than women and in this context men should justifiably have greater access to parental property.

It needs to be pointed out here that the reality on the ground is not as narrated by our respondent. The Islamic law of inheritance no longer applies in full in Bangladesh and has been substantially modified by the enactment of the Muslim Family Laws Ordinance in 1961. The Hanafi School of Jurisprudence which prevails in Bangladesh ordains that children of pre-deceased son/daughter are not entitled to share in the property of grandparents. Application of this position of Hanafi interpretation of the Quranic verses on inheritance led to problems for orphan grandchildren. The law enacted in 1961 gave such children share as if the son survived the parents, thus overriding the Hanafi tradition. The legally effected change has been justified on considerations of well being of people and society as it mitigates the gross hardship caused to the children by the Hanafi tradition. Similar hardship is imposed on daughters by the Hanafi law that gives daughters smaller share than sons and deprives daughters of full patrimony if the parents had no son. Daughters are no longer married early and they are given education as much as the sons; needs of unmarried daughters are as much as the unmarried sons and as a result extreme hardship is caused to unmarried daughters and their upbringing, their future is adversely affected due to denial of equitable share in the parental property. Justice demands that the rationale of hardship and considerations of well being of people and society is extended to the case of the daughters and the Islamic tradition be rationalised. This is the view of the majority of the respondents.

The views of respondents on Article 2 may be statistically summed up in the following table:

### **Views of Respondents on Article 2**

<b>Respondents not favouring ratification</b>	14 (14%)
Reason cited: Islamic laws are unalterable	11
Islamic law of guardianship is against CEDAW provision	01
Islamic law of inheritance is against CEDAW provision	02
<b>Respondents favouring ratification</b>	79 (81%)
Reason cited: Both Islam and CEDAW have the similar objective of equality and equal rights of women with men	76
Islamic law of inheritance should be rationalised before ratification	03
<b>Respondents remaining non-committal</b>	04
Reason cited: The issue should be resolved by a meeting of or committee consisting of all shades of opinion.	04

An overwhelming majority of our respondents were of the opinion that Article 2 of CEDAW should be ratified and the reservation withdrawn.

#### ***5.3 Respondents' Observations on Article 16.1(c) of CEDAW***

The CEDAW requirement of same rights and responsibilities during marriage and divorce has a direct bearing on two Islamic traditions: (a) polygamy is claimed to be allowed to men, but monogamy is obligatory on women and (b) husband can divorce

wife at will at any time by just uttering the word divorce three times and without assigning any reason; but wife can only seek divorce through the court and on specified reasons to be scrutinised by the court. Views of the respondents also centered round these two issues.

Out of 97 respondents, only 12 opposed ratification of Article 16.1(c). The basic argument presented against ratification is the same as in the case of Article 2 i.e., that Quranic laws are better and more beneficial to mankind and must take preference over man-made laws. The basic question here is whether polygyny is Quranic law. There is a controversy on the interpretation of the relevant part of Sura *Al-Nisa* which deals with the issue. One interpretation is that the conditions attached to polygyny are so stringent that the spirit of the *Quran* is against it. Allah has ordained that if one cannot observe the conditions laid down for equal treatment of all wives as well as pre requisite for polygamous marriages, then one must be limited to one wife; in the *Sunna* the Prophet (sm) has spoken of severest punishment to those who breach the conditions. Thus the conditions are interpreted as prohibitive and factually disapproving of polygyny. On this interpretation, some Muslim countries have already prohibited polygamy in all forms.

Those who oppose ratification defended polygyny not only on the ground of inviolability of Quranic law but also by considering it necessary for maintaining equilibrium and discipline in the family and in the society. They argued that when a wife is barren, incapable of sexual relations, physically ill and disabled, mentally imbalanced, unable to perform family responsibilities, a subsequent marriage prevents the husband from going astray, protects him from moral turpitude and extra-marital relationship and thus saves the family as well as the society from disintegrating. It is claimed that monogamy has led to sexual promiscuity in the

West and such social behavior is destructive of human values and cannot be approved. They consider approval of polygyny in Islam as a safety clause and not an open permission to marry indiscriminately.

As regards denial of equal rights to women in divorce, the belief in superiority of the Quranic injunction is sought to be strengthened by the following assertions:

- (i) In the *Quran*, women have been described as 'objects' in the affair of marriage and as such they cannot have the option to divorce;
- (ii) Women are quick-tempered, emotional and whimsical; they are, therefore, incapable of taking sound and rational decisions in matters of divorce;
- (iii) For the past 1,400 years, these traditions are in existence and wives of the Prophet (sm), *sahaba-e-keram* [closest companions of the Prophet(sm)], and other women contemporaries never complained or objected; and
- (iv) Since women enjoy some advantages like dower, maintenance, custody of child, possession of tangible assets, it will be discriminatory to give the wife the right to divorce.

Some among those who opposed ratification, held the view that while provisions of the *Quran* and *Sunna* are not alterable, it is always possible to find, within the parameters of religious laws, solution to new problems as they arise depending on their intensity, dimension and urgency.

An overwhelming majority — 79 out of 97 — opted for outright ratification of Article 16.1(c). In addition, 3 respondents favoured ratification subject to fulfillment of some conditions. Respondents who favoured unconditional approval believe that the provision in the CEDAW is in complete accord and agreement with *Sharia*.



One respondent further added that those who disagree are not aware of the true precepts of Islam. The general consensus among these respondents is that since the *Quran* accords equal rights to man and woman, they should have equal rights in marriage and divorce.

One respondent pointed out that despite the concession to men to marry four wives, prostitution continued throughout the history; trafficking, rape, abduction, violence are rampant; and as such, men have forfeited the concession.

Another respondent claimed that polygamy has, in most cases, disturbed family peace and led to disintegration due to bickering among co-wives and step children and other practical problems, polygyny is on the wane and now practically non-existent.

One respondent argued that there is no inherent ideological conflict between the *Sharia* and CEDAW. While proclaiming equality of men and women, in practice, Islam ordains upon Muslims to show utmost respect and consideration to women. Protective provisions for women, such as *mahr*, maintenance, child support etc. which place a burden on men are counter balanced by denying women rights to divorce. If the provision of CEDAW is adopted, all such practical discrimination to men or women will vanish and there will be no bar to women enjoying the right to divorce.

One respondent found the reservation by government to be a political maneuver. He argued that in the past, the government did legislate on personal, family matters of marriage, divorce, inheritance, etc. which are considered to be the domain of religious law and tradition. Child Marriage Restraint Act, Muslim Family Laws Ordinance, Muslim Marriage Registration Act, Family Court Ordinance are some instances which operate in the face of religious laws and such laws have been accepted by the people

and are being enforced by the courts of law. The truth is, therefore, that the government can ratify CEDAW without any fear of opposition provided it has the will and conviction.

Some respondents gave conditional approval for withdrawal of reservation to Article 16.1(c) but raised the following objections:

- (i) Dower, maintenance and similar provisions which are, in fact, discriminatory to men should be abolished before the right to divorce is granted to women; and
- (ii) Kabinnama (Marriage Registration Form prescribed under Muslim Marriage Registration Act) should be suitably modified to allow freedom of choice regarding contract of marriage to both men and women.

The statistical outcome is overwhelmingly in favour of ratification of the Article 16.1(c). This is summed up below:

**Views of Respondents on Article 16.1(c)**

Respondents opposed to ratification	12 (12%)
Respondents favouring ratification	82 (85%)
Ratification forthwith	79
Conditional ratification	03
Respondents who remained non-committal	03

They will prefer to leave the issue to be resolved by a meeting of or committee consisting of all shades of opinion.

#### ***5.4 The Hermeneutics of the Legal Process: Ijtihad on CEDAW***

*Ijtihad* is a decision-making process approved by Imams including Abu Hanafi whose school of jurisprudence prevails in Bangladesh. It is a process of judicial reasoning to interpret or reinterpret rules for new situations arising over time for which the *Quran* and *Sunna* have no specific stipulations.

Our research indicates that very few respondents were prepared to leave the decision to such a process — 04 in case of Article 2 and 03 in case of Article 16.1(c). All others, irrespective of being in favour or against ratification, felt that *Ijtihad* is unnecessary, redundant or fruitless. Those who opposed ratification were of the opinion that instructions and provisions in the *Quran* and *Sunna* regarding marriage, divorce, guardianship, inheritance and related personal and family matters are clear, unambiguous and transparent and transcend time and place and no *ijtihad* can change them. They argued that Muslim lawgivers — the four Imams and their immediate followers have left an adequate legacy in which a body of knowledge solutions for all problems are available. Some of them believe that *ijtihad* in the present circumstances will only be a motivated stratagem to get CEDAW approved.

Respondents recommending complete ratification of CEDAW argued that since there is no conflict between the Quranic law and CEDAW as regards objective of equality and equal rights, the differences in actual operation can be rationally resolved by adopting the provisions of CEDAW and no *ijtihad* is called for. It is further argued that CEDAW is a measure to ensure justice and fair play to women and to eradicate discrimination; Islam also works to that end. No individual with a healthy mind and sober conscience can object to CEDAW and it should, therefore, be ratified without debate.

Another point raised against *ijtihad* is that there is no undisputed religious leader within the Islamic legal tradition who is acceptable to all Muslims. The *ulema* are divided leading to a division amongst their followers. It is impossible to obtain a unanimous verdict and time will be wasted in verbose debates. In the process, implementation of CEDAW will be unnecessarily delayed.

A further point suggested by some respondents is that education of the *ulema* in general is restricted to a very narrow horizon; they have never exposed themselves to the vast store of knowledge that has accumulated worldwide. They, thus, lack the broad, universal and liberal bent of mind to reinterpret equality and equal rights in the perspective of changing time, condition, environment and thought process. *Ijtihad* in such situation of the *ulema* will not yield practical, down-to-earth, rational solution. In this vacuum, only political decisions can provide solutions to legal issues.

Another fact noted by some respondents is that in the past the government has legislated in the domain of religious laws without any *ijtihad*. Considerations of well being of people and society involving removal of hardship, public interest, justice and equity were the guiding principles in such legislations. None of these laws have been rejected by the public. What is required is following up these principles to the logical denouement by completely ratifying the CEDAW. A strong political will and rational political decision is the need and not *ijtihad*. Finally, it was the view of some respondents that whatever equality and rights have been gained over the past years were the result of demands of contemporary time and situation and not the product of *ijtihad*.

## **6. Conclusion**

A range of views and opinions expressed by the respondents highlights some important perceptions regarding the potential

and possibilities of full and effective implementation of CEDAW in Bangladesh. Our research indicates that respondents generally agreed that there is no substantive or ideological conflict between *Sharia* laws and CEDAW with respect to concern for equality and equal rights of women with men. There are, however, differences in actual application of both legal frameworks. The majority opinion is that differences can be resolved by adopting a liberal, progressive, rational reinterpretation of the Islamic tradition keeping in view the exigencies of time, circumstances and contemporary thinking. The majority of respondents recommend immediate ratification of CEDAW including Articles 2 and 16.1(c) without delay. Since this majority represents a cross section of the population, the government may consider their views as reflective of effective public opinion and ratify the CEDAW in full. There is a small minority opposing ratification but we interpret this opposition as a sign of democracy and unanimity in legislative matters is unlikely. The majority will, however, should prevail.

Finally, the view may be advanced that in the past, the government of Bangladesh has passed laws in what is claimed as the domain of religious laws and these have been accepted as based on the considerations of well being of people, society and in the larger public interest. CEDAW may thus be ratified in full by applying these principles. Society at large does not appear to go down the path of *ijtihad*. What is necessary is political will and rational decision on the part of the government.



## Chapter 3

### ***Inching Towards Equality: Application of CEDAW and Muslim Personal Law in India***

**Kirti Singh, Sumaiya Musharraf  
and Maimoona Mollah**

## **Introduction**

In India as in other South Asian countries, different personal laws are applicable to different religious communities. These personal laws in India operate only in the area of family law and inheritance. A common feature of all these laws is that they discriminate against women in varying degrees on the basis of gender, community, class and caste and religion, are subjected to exploitation and oppression. The state response to the discrimination faced by women in the family has been less than satisfactory. Personal laws have remained largely static during the last 50 years with some improvements in the Hindu personal laws during the 1950s and later in 2005,<sup>249</sup> and other reforms in the Christian law of divorce in 2003.<sup>250</sup>

## **The Context and the Study**

India has the largest Muslim population in the world after Indonesia. However, since Muslims constitute a minority in India, they have specific concerns and face particular obstacles in asking for their rights, which are different from those in other countries. Reforms in Muslim personal law are often opposed by sections within the community in the name of protection of minority identity, since personal law or rather a traditional patriarchal interpretation of it, appears to have become or purposely been made the main marker of their identity.

The provisions of the *Sharia*,<sup>251</sup> as they have been understood and applied in India, have also not been fully compared with

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<sup>249</sup> *The Hindu Succession (Amendment) Act, 2005*. This was amended to give equal rights in ancestral property to daughters.

<sup>250</sup> *The Indian Divorce Act, 1869*.

<sup>251</sup> *Shariat* or *Sharia* is the religious law followed by the Muslims.



CEDAW. This report attempts to study the extent of compatibility between Muslim personal law and the manner in which it is applied in India, against the backdrop of CEDAW. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) provides a framework for addressing women's human rights to protect and enhance women's equality and status.

Even though India ratified CEDAW in 1993, it made a declaration that it would abide by Article 5(a) and 16(i) in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent. Since Article 5(a) of the CEDAW Convention asks all States to take appropriate measures to modify conduct to achieve "elimination of prejudices and customary and other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereo type rules for men and women", this stand has obvious negative implications for reform in women's status in India as the retention of the inferior status of the women in the family is often justified in the name of culture and tradition. Similarly, Article 16(i) contains a mandate to State parties to take "all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations". This article, as stated above, also details important areas in the family in which the equality of men and women is a must including free and full consent to enter into a marriage, the same rights and responsibility as parents, the same rights and responsibilities during marriage and at its dissolution. The government has tried to justify its stand by saying that it is being sensitive to the feelings of the minority communities. However, this is not wholly as correct as its actions have been dictated more by reasons of political expediency than any genuine sensitivity to religious and community feelings. The Indian government's declaration under Article 16(ii) stipulates that child marriage shall have no legal

affect and mandates State parties “to make the registration of marriages in an official register compulsory” is even less convincing. The government’s declaration has stated that though in principle it fully supports compulsory registration of marriages, it is “not practical in a vast country like India with its variety of customs, religions and level of literacy” to accept this part of the article. This declaration shows the lack of seriousness with which the state has dealt with the issue.

The government has also entered a reservation under Article 29(i) of the women’s convention, which allows for dispute between State parties to be submitted to arbitration and in case of failure to be put up to the International Court of Justice. The policy of the Indian government that it will not reform personal law except with the consent and at the initiative of the concerned community has proved to be extremely problematic. Instead of defining community in a broad way to mean all sections, denominations of a community, the state seems to have defined community to mean the most conservative and traditional members of the minority communities. This has often meant that either no reforms have been introduced or retrogressive amendments to personal law have been brought about mainly to gain political mileage. For instance, the Indian state introduced the Muslim Women (Protection of Rights on Divorce) Act 1986 at the behest of the most fundamentalist and patriarchal members of the Muslim community to deny divorced Muslim women their right to monthly maintenance under the Code of Criminal Procedure. This showed the lack of concern for women’s rights on the part of the state.

Nevertheless, Muslim women along with liberals in the community as well as women’s organisations and groups have time and again struggled for their rights. For instance, prior to the 1980s, reforms in the Muslim Personal Law were demanded by women’s

groups and activists and other liberal sections within the community in terms of the constitutional provisions of equality and non-discrimination on the grounds of sex. After the Shah Bano Judgment,<sup>252</sup> these groups plus certain committees launched a campaign and asked for retention of divorced Muslim women's rights to maintenance on the grounds that the *Shariat* allowed this and the equality clauses of the Constitution of India entitled them to this. More recently, about two years ago, there were discussions between the women's organisations Muslim women's groups and the Muslim Personal Law Board<sup>253</sup> about making a standard *Nikahnama*<sup>254</sup> with pro women stipulations. Muslim Personal Law in India is based on the *Shariat* and customs. While the *Shariat Application Act* abolished the use of customary law in certain areas, customary practices continued to prevail in certain areas like adoption and making of wills etc. Further legislation regarding agricultural land and the tenancy laws etc. modified the *Shariat*. Common laws like the Dowry Prohibition Act, 1961, The Child Marriage Restrain Act, 1929 and all the provisions regarding violence against women in the Indian Penal Code apart from other common laws, have to varying extents, made inroads into the *Shariat*. Judicial interpretation has also played a part in defining the Muslim Personal Law. Finally and most importantly, the manner in which the Muslim Personal Law has been practiced in India has in significant ways been stated to be against the spirit of *Shariat* and contrary to its basic tenets of equality and justice for women.

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<sup>252</sup> *Mohammad Ahmad Khan vs Shah Bano Begum*, 1985, 2 SCC 556.

<sup>253</sup> The All India Muslim Personal Law Board was formally established at a meeting held at Hyderabad on April 7, 1973 ostensibly to save the *Sharia* Law. The board meets from time to time.

<sup>254</sup> Muslim contract of marriage.

Against the backdrop of the social and economic conditions in which Muslim women live in India and the various political, economic and social issues that impact Muslim women's rights, this study attempts to evaluate the application of Muslim Personal Law, alongside the principles laid down by CEDAW.

### **Methodology**

In order to get an overall picture of the situation of Muslim women in India, regional workshops were conducted in which Muslim women from different social, economic groups, along with other subject matter experts interacted.

The study mainly centres on the collection of secondary data of major studies done on the issue as well as recommendation by the government and other statutory bodies like the National Commission for Women. It has drawn upon various landmark judgments dealing with Muslim Women's rights within the family, whilst concomitantly making a comparison of the formal laws applicable to Muslim women to the different clauses of CEDAW, therein highlighting both the similarities and differences.

The study has resulted in various sections, which have been demarcated according to different aspects of the research. In all the sections, the Muslim Personal Law as interpreted or practiced in India and the codified law, if any, has been discussed. Section 1 broadly discusses the development of Muslim Personal Law in pre and post-independent India and compares it to the Indian Constitution. Section 2 discusses the political, social, economic and cultural status of Muslim women in India and incorporates the main experiences spoken of by the respondents in the workshops. Section 3 discusses Muslim Personal Law and the existing rights of Muslim women within the family regarding marriage and divorce. Section 4 discusses the economic and

financial status and inheritance rights of Muslim women within the family and at the time of separation and divorce. Section 5 discusses the custody guardianship and adoption rights regarding children in the Muslim Personal Law. Section 6 discusses the problem of child marriage. It also discusses the laws relating to abortion for Indian women, including Muslim women. Section 7 compares and contrasts the Muslim Personal Law and CEDAW and makes recommendations.

## **2. The Development of Muslim Personal Law in India**

### ***2.1 Historical Evolution***

In India, Muslim Personal Law (MPL) is largely confined to the areas of family and succession law. During the colonial era, though MPL expressly sought to be applied to Muslims throughout India by various statutes of the 'Imperial Parliament', principles of justice, equity and good conscience<sup>255</sup> and the concept of legally binding precedents or '*stare decisis*' also impacted on MPL. Muslims who settled in these areas abided by customary law and practices prevalent in the country. These customs during the colonial period were specifically sought to be abrogated by the *Shariat Application Act, 1937*. Nevertheless, some of these customs remain even today. These include both practices, which may be considered positive<sup>256</sup> and others that are contrary to the *Shariat* and have a negative impact on women's rights such as the practice of dowry. Further, interpretations by the courts of various provisions of the *Shariat* have further influenced the law. Apart

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<sup>255</sup>M. Hidayatullah & A. Hidayatullah, *Mulla's Principles of Mahomedan Law in the Nineteenth Century* (Butterworths: London, 2004) pp. 1-2.

<sup>256</sup> Large sections of both Muslim and Hindu women as a norm do not practice *purdah* or wear *burqas* (veils), though in the past they did so.

from the courts, interpretations of Muslim Personal Law (MPL) by religious clerics like the *Ulema*<sup>257</sup> and *Kazis*<sup>258</sup> and in religious panchayats and *Shariat* courts<sup>259</sup> on issues of marriage and divorce have had an impact on MPL and the rights of women. In India, these extra legal interpretations by religious clerics and scholars have primarily been based on patriarchal readings of the *Shariat* and are biased against women. Further, though these interpretations are not legally binding they have influenced and continue to influence significant sections of the Muslim population in India for a variety of reasons.

There have, however, been certain liberal and pro-women interpretations in certain critical areas by the appellate courts<sup>260</sup> in India. Thus, MPL as it is practiced and preached by certain groups<sup>261</sup> in India is in several respects patriarchal and discriminatory towards Muslim women. This study, however, mainly examines the developments in MPL in independent India after briefly looking at the manner in which MPL was molded during the colonial rule in India.

One of the early reformers Asaf A.A.Fayzee<sup>262</sup> in his book *Outlines of Mohammedan Law* has observed “the Mohammedan Law as it

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<sup>257</sup> *Ulemas* are religious scholars.

<sup>258</sup> *Kazi* is the one who decides cases on the basis of religious laws.

<sup>259</sup> Religious panchayats/Shariat Courts – A recent case in point is the case which was heavily publicised. The case related to a woman who was raped by her father-in-law. A *fatwa* was passed against her saying that she has now become the mother of her own husband as she has been violated by the father-in-law.

<sup>260</sup> Each state in India is headed by a high court. Below the high courts are the district courts.

<sup>261</sup> Muslim Personal Law Board, *Darul-uloom* (*fatwa* against women contesting elections, supporting triple *talaq*, against women working, against watching television).

<sup>262</sup> A.A. Fayzee, *Outlines of Muhamedan Law* (New Delhi: OUP, 2003).

exists today is the result of a continuous process of development during the fourteen centuries of the development of Islam". Similarly, other reformers in the 1960s and 1970s who had argued for reform in the personal laws in India had stressed on the dynamic nature of the MPL. They had argued that MPL had developed in different countries in response to the "changing needs of time". Most liberal and progressive Indian women's organisations and groups till the mid 1980s had talked of reform of all personal laws by the introduction of a Uniform Civil Code for all Indian women to ensure equal rights in the home. Amongst other reasons, they justified their demand on the basis of the Indian Constitution, which guaranteed the fundamental right of equality to all Indian citizens. However, after the *Shah Bano* judgment by the Supreme Court of India in 1985 and the passing of the Muslim Women (Protection of Rights and Divorce) Act, 1986 the demand for a uniform civil code was dropped by the most progressive and liberal women's organisations and groups who then started emphasising on reform within various personal laws. Most of these organisations still based their demands on the equal rights enshrined in the Constitution and simultaneously argued that the *Shariat* envisages gender equality and had been deliberately misinterpreted by patriarchal and fundamentalist interests.

Furthermore, the Mughal emperors in India were Hanafis and the *Kazis* appointed by them administered the Hanafi law as the law of the land. This continued till the establishment of the British rule, when the influence of the English common law and the principles of equity slowly made an impact on the law. Muslim law was applied as a branch of personal law to the Muslims in accordance with the principles of their own school or sub-school.

## ***2.2 Impact of British Rule on MPL***

As the East India Company was only exercising the right of collecting revenue, Fayzee notes that in the earlier days of the British rule, only Islamic law was practiced and administered. The law officers were mostly Muslims and the criminal law was Muslim. However, in civil matters, Islamic law was applied to Muslims and Hindu law was applied to the Hindus in accordance with the opinions of the *maulvis* and the *pundits* attached to the courts. In fact, soon after the grant of Diwani, the East India Company sought to improve the indigenous judicial machinery and the Warren Hastings plan of 1772 provided for the establishment of civil and criminal courts in each district. This plan also, under Article xxiii of the famous regulation II made the provision that in all suits regarding inheritance, succession, marriage, caste and other usages or institutions, the laws of the *Quran* with respect to the Mohammedans and those of the *shastras* with respect to the Hindus, shall be applied. Where the personal laws of the parties differed, the law of the defendant was applicable. This provision is said to have “laid the foundation for the differentiation on the part of the English administration between laws applicable to ‘personal’ and to other matters.”<sup>263</sup> Some authors have suggested that Hastings and his advisors probably based their thinking on the contemporary English division of law into ecclesiastical and temporal matters.<sup>264</sup> It has also been suggested that the application of religious laws of Hindus and Muslims in family matters showed the concern of the British administrators not to interfere with the religious laws

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<sup>263</sup> Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (New Delhi: Sage Publications, 1992), p.62.

<sup>264</sup> *Ibid.*, p. 63. See also Agnes 1999, p.41.



of the various communities. However this explanation is said to be not entirely correct as the British not only at this stage did not extend this concern to other religious communities such as the Parsis in India, but also introduced legislation for other minorities.<sup>265</sup> The British also introduced legislation in various aspects of civil and criminal law other than family law.

Islamic criminal law underwent modification in 1862. When the Indian Penal Code and the Code of Criminal Procedure came into force, it entirely disappeared. The Islamic laws relating to evidence were also abolished with the coming into force of the Evidence Act in 1872. The British also passed various enactments such as the Contract Act and the Transfer of Property Act and the sphere of MPL gradually narrowed to encompass certain laws relating to the family. Islamic Law was, therefore, gradually replaced by secular laws. Also, gradually the categories of religious law and personal laws in the sphere of family law became interchangeable and it was forgotten that prior to the British era all other aspects of laws for Hindus and Muslims were as personal as family laws.

It is also pertinent to mention that customary claims of the Muslims also got recognition by certain judgments of the Privy Council<sup>266</sup> and regulations.<sup>267</sup> This also showed that the colonial administration did make exceptions whenever they wanted to in

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<sup>265</sup> Ibid. p. 65. However, gradually the Parsis and the Christians secured the enactment of specific laws for marriage and divorce.

<sup>266</sup> *Mohammad Ismail v Lala Sheomukh* AIR 1922 PC 59.

<sup>267</sup> *Punjab Laws Act of 1872* introduced custom as the primary rule of decision in family matters, gifts, partitions and any religious usage and institution. *The Elphinstone Code of 1827*, Section 26 of regulation IV stated that all suits be governed by usage of the country in the absence of an act of Parliament.

the application of religious laws to personal laws of the communities.

Personal laws were also interfered with whenever it suited the British. With the attainment of greater political stability the English rulers openly regulated activities which were considered religious by the natives.<sup>268</sup> Not only were the criminal laws and other civil laws changed but even in the area of family law, legislation which directly impinged upon this sphere was introduced. Modifications to the family law included The Caste Disabilities Removal Act, 1850, the Hindu Widows Remarriage Act, 1856, the Native Converts Remarriage Act, 1866, the Child Marriage Restraint Act, 1929, the Hindu Women's Right to Property Act, 1927. These enactments clearly showed that the British were not overly concerned with the religious nature of personal law.

Apart from this, the English doctrine of equity had an impact on Islamic law. This occurred when British judges trained in English law replaced the earlier untrained officials and started applying the rules of Hindu and Muslim laws according to their understanding after 1790. The English rules of procedure and evidence also impacted on personal laws as did the principles of justice, equity and good conscience.<sup>269</sup> The Privy Council also upheld the application of these principles in certain circumstances.<sup>270</sup>

A significant impact of the English system of law on personal law was on textual law, which became elevated above customs

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<sup>268</sup> Parashar, 1992, p.69.

<sup>269</sup> Various charters had allowed the application of these principles from the early days of British Rule.

<sup>270</sup> Parashar, 1992, pp. 72-73.

and usages. This was because the courts initially relied on *Pundits* and *Maulvis* to interpret scriptures rather than local customs. Even though this system was discounted in 1864 and the courts increasingly recognised customs, textual laws remained prominent.<sup>271</sup> Moreover, customs to be recognised had to fulfil the strict requirements of proof set down in English law. Finally, once a custom had been recognised, it became part of law and a binding precedent. This stopped the recognition of further developments in personal laws.

Arguably, the motive behind the stated policy of the British to retain personal laws was not because of a commitment towards retention of religious/personal laws, although this policy was not adhered to in all situations. Several authors have commented that the hidden motives behind the stated reason for retention of MPL were political and economic rather than religious. Citing Washbrook<sup>272</sup> both Archana Parashar and Flavia Agnes have detailed how the British rule in India can be divided into different periods/phases of colonialism as the mercantilist state (from the inception of the East India Company till late 18<sup>th</sup> century), high colonial state (from the late 18<sup>th</sup> century till mid nineteenth century) and the incipient nation state (approx. 1857 to 1947). The mercantilist state, which created the category of personal law, did so not only to leave traditional and social forms undisturbed but also because this helped them in the collection of debts. During the phase categorised as high colonial state the British were guided by the over-riding concern for political survival and followed policies of social conservatism and agrarian protection. In the period between 1857 and 1947 the British

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<sup>271</sup> Ibid. p. 73.

<sup>272</sup> Ibid. p. 74.

again gave protection to agrarian interests whose members were a part of the provincial governments and benefited from the partnership. This also impacted on MPL, whilst subjecting Muslim women to a more rigorous control of the 'high culture Islamic law'.<sup>273</sup>

### ***2.3 Legislations During the British Rule***

Two important statutes that directly impacted on Muslim women's rights were passed during the British rule. These were the Muslim Personal Law (*Shariat*) Application Act, 1937 and the Dissolution of Muslim Marriage Act, 1939. The Shariat Act, 1937 was a legislative measure to Islamicise Muslim Personal Law in India by abrogating the role that customary law was playing among the Muslims. The act was introduced at the initiative of conservative *Ulema*, the religious clerics of *Jamat -ul-Ulema-i-Hind*, whose stated purpose was to safeguard the *Shariat*. The *Ulema* were concerned that the Muslim population in Punjab and North West Frontier Province and the Central provinces were following customary laws instead of the *Shariat*. In the area of succession and inheritance, customary law which disinherited women was being followed. The main purpose of the Shariat Act was to apply MPL in cases where the parties were Muslim. The act has been seen as a step to secure uniformity of laws for all Muslims in British India and was also seen as an important step to do justice to the claims of women inheriting family properties.

The Shariat Act applied to "intestate succession special property of female, including personal property inherited or obtained

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<sup>273</sup> Ibid. p. 75.

under contract or gift...marriage, dissolution of marriage...maintenance dower, guardianship". The purpose and scope of the section, therefore, was to abrogate custom and usage in so far as these had displaced the rules of Islamic law.<sup>274</sup> The act, however, did not apply to agricultural land, which was to be governed by existing customs or future legislation. Since 99.5 per cent of all property in India at that time was agricultural land this exemption in effect severely curtailed Muslim women's right to inherit property. This was because the state gave protection to wealthy Muslim landholders (Zamindars). Further, in certain areas an option was given to Muslims to be governed either by the *Shariat* or by their customary law in the matter of adoption, wills and legacies.<sup>275</sup>

However, by enacting the Shariat Act, the state expressly accepted the fact that all Muslims should be governed by MPL in India. The principle of communal representation had already been accepted under the Government of India Act, 1935. The Shariat Act further resulted in heightening the distinction between Muslims and other communities.<sup>276</sup> "The Shariat Act affirmed, in the political arena, the equivalence of Muslim identity and a certain form of *Shariat*. It demonstrated the manner in which identities are discursively constructed both by the State and the members of a group who wish to assert their authority within the group in order to gain access to political power."<sup>277</sup>

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<sup>274</sup> M. Hidayatullah & A. Hidayatullah, 2004, p 3.

<sup>275</sup> Section 2 and 3 of the Muslim Personal Law (Shariat) Application Act, 1937.

<sup>276</sup> Parashar 1992, p. 150.

<sup>277</sup> V. Narian, *Gender and Community Muslims Women's Rights in India* (University of Toronto Press, 2001) p. 19.

The Dissolution of Muslim Marriages Act, 1939 was another enactment introduced during the British time by the *Ulema*. The background to this act is that Muslim women were resorting to religious conversion to get a divorce since it was difficult to obtain one under the Hanafi law which, however, dissolved the marriage upon apostasy. The *Ulema* were unhappy with this trend of Muslim women apostacising from Islam. The Dissolution of Muslim Marriages Act, 1939 applied the laws of the Maliki School to all Muslim women, since this school was most favourable to women and allowed them to dissolve the marriage on certain grounds<sup>278</sup>. Prior to the passing of this act in the courts, following the Hanafi interpretation had denied to Muslim women the rights of dissolution available to them under the *Shariat*.<sup>279</sup> The act recognised for the first time the right of a Muslim woman to get a divorce on various grounds including cruelty and desertion and any other ground recognised by MPL.<sup>280</sup> However, the act specifically exempted apostasy as a ground for divorce.

The Dissolution of Muslim Marriages Act, 1939 has been criticised as providing grounds which were limited and difficult to prove. Moreover, women's rights to maintenance were not addressed or provided for by the act. Also men's rights to unilateral divorce or by apostatising remained unchanged.<sup>281</sup>

While this act was generally seen as one of the most progressive enactments passed by the legislature, some authors have argued that the *Shariat Act* as well as this act represents the influence of the scripturalist understanding of Islam. The *Shariat Act* is said

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<sup>278</sup> M. Hidayatullah & A. Hidayatullah, 2004, p. 267.

<sup>279</sup> Narian, 2001 p. 169.

<sup>280</sup> *The Dissolution of Muslim Marriages Act, 1939*. Section 2.

<sup>281</sup> *Ibid.*, p 21.

to have been of particular significance to understanding the manner in which women's rights were used to construct identity as a fundamentally political process and personal law was used to assert an understanding of religion and community, which were essentially political rather than spiritual. For the *Ulema*, the *Shariat Act* was a means to assert control of the Muslim community.<sup>282</sup>

Apart from these two acts, the other legislations, which impacted on MPL were the Child Marriage Restraint Act of 1929<sup>283</sup> and the Caste Disparities Removal Act 1859<sup>284</sup> (also known as the Freedom of Religion Act). In the area of civil and criminal laws and in laws relating to commerce and trade the British legislated common laws to govern all communities regardless of religion. This was necessary for the British to govern the country and consolidate their rule. Equally the retention of religion based laws was also dictated by the political needs of the British and facilitated their policy of divide and rule since different communities would owe allegiance to different religious communities, caste and sect.<sup>285</sup>

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<sup>282</sup> Ibid., p.20.

<sup>283</sup> See Section 7 of this chapter Child Marriage and Abortion Laws.

<sup>284</sup> T. Mahmood, *Civil Marriage Law, Perspectives and Prospects* (New Delhi: N.M.Tripathi Pvt. Ltd.1978) p.2. "The Act abrogated so much of all laws and usages prevailing in India as inflicted on any person forfeiture of rights or property or impaired or affected any right of inheritance "by reason of his or her becoming renouncing, or having been excluded from the communion of nay religion, or being deprived of caste". According to Prof. Mahmood, a main reason for the passing of this act was that in 1830s many low-caste Hindus under the influence of Christain missionaries wished to get converted to Christianity but were scared of loosing their property on conversion.

<sup>285</sup> This, amongst other reasons, including that the British administration was not interested in Social Reforms are often cited by certain authorities. See K. Singh, 'The Constitution and Muslim Personal Law in Forging Identities: Gender, Communities and the State' in Z. Hassan (ed.), (New Delhi: Kali for Women, 1994); Narain, 2001, p. 14.

The British policy of privileging religious personal law above territorial and secular laws only in the area of the family resulted in family related personal law becoming synonymous with religion. This policy furthered the construction of identity on the basis of religion and community and sought to obfuscate the plurality of identities within each community and between different regions. The retention and protection of the regime of personal law also laid the foundation of how MPL would develop or not develop in future in the Indian subcontinent.

#### ***2.4 Reforms in Independent India***

Since the Independence of the country into India and Pakistan, it has been said that the first government did not want to make any changes, which would create further insecurity amongst Muslims. By this time the state along with the *Ulema* and other conservatives had already been quite successful in making MPL the marker of Muslim identity. They further exploited the communal divide that existed in post-partition India. From then on, the *Ulema*, the Muslim League and organisations like the Muslim Personal Law Board have opposed the rights given to women. Immediately after Independence, however, in the Constituent Assembly, despite opposition from these groups, an article<sup>286</sup> stipulating that the state shall endeavor to secure for its citizens a uniform civil code, was included in the chapter of the Directive Principles of State Policy.

The first Congress government, which was committed to a certain degree of social reform took up the issue of introducing a Civil Law of marriage and divorce. This law, for the first time, allowed

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<sup>286</sup> Article 44 of the Constitution of India.



any two Indians to marry under the act, without renouncing their religion. Muslim political parties and religious organisations opposed this law and pleaded that no Muslim should be allowed to marry under it. These political parties included the Muslim League and the Congress backed *Jamaat-e-Ulema-i-Hind*.<sup>287</sup> In 1972, another enabling legislation, the Indian Adoption Bill was introduced in the Parliament, which sought to initiate a uniform law regarding adoption of children irrespective of the religion of the foster parents or the child. This was again vehemently opposed by the three Muslim members of the Joint Select Committee of the Parliament to which the bill was referred and witnesses before the Select Committee, mainly on the ground that the adoption was prohibited in Islam and the bill would interfere with the law of inheritance/succession and of marriage amongst Muslims.<sup>288</sup> It is pertinent to mention, however, that during the debate in the Constituent Assembly and in subsequent discussions surrounding the Civil Law of Marriage (*The Special Marriage Act, 1954*), and the Uniform Law of Adoption, liberal Muslim intellectuals, women's rights activists and others<sup>289</sup> argued for the proposed reforms.

Simultaneously, many reforms took place also altering the landscape of Hindu traditions and practices, introducing laws relating to monogamy for Hindus along with giving them certain grounds for divorce in the Hindu Marriage Act, 1955. In the Hindu Succession Act, 1956, women were again for the first time given full ownership rights over intestate property, which

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<sup>287</sup> Singh, 1994, p. 97.

<sup>288</sup> Ibid., p. 98.

<sup>289</sup> This included the All India Women's Conference which was supported by the Congress Party.

they could now inherit on equal terms with the male heirs. However, they did not get equal rights to inherit joint family property and agricultural land was again excluded from the operation of this law. Under the Hindu Adoption and Maintenance Act, 1956, daughters were allowed to be adopted for the first time while the Hindu wife's right to separate residence and maintenance in certain circumstances was recognised. The Hindu Minority and Guardianship Act, 1956, however continued to recognise the father as the natural guardian of the minor child with the proviso that a child would ordinarily remain with the mother till the age of five. A clause which incorporated certain rights of the child stipulated that in deciding cases related to children, the main criterion would be the welfare of the child.<sup>290</sup> These reforms stopped far short of giving equal rights to women or removing all discrimination against them. One of the main reasons for this was that there was substantial opposition to these reforms from conservative sections within the Congress and from the Hindu right wing party, the Hindu Mahasabha. It has also been said that the Congress Party was more committed to the idea of having a uniform law that would apply to all Hindus than to notions of equality and, therefore, ensuring that women got equal rights was not its priority.<sup>291</sup> After the 1950s, successive central governments have also not initiated any reforms in personal laws barring a few amendments in the Hindu Personal Law to make divorce easier and some significant amendments in the Parsi marriage and divorce law. Some changes were also

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<sup>290</sup> For a detailed discussion on the changes in Hindu Personal Law see Kirti Singh, 'The Question of Reform in Personal Law' in Gyanendra Pandey (ed.), *The Hindus and Others, A Question of Identity in India Today* (New Delhi: Penguin, 1983).

<sup>291</sup> Parashar, 1992, p.77.

made in the Indian Divorce Act governing Christian liberalising the grounds of divorce. While no justification has been given as to why Hindu law has not been amended to give better rights to women, as far as Muslim and Christian personal law are concerned, successive governments have always taken the stand that the issue of reform should be at the initiative of the concerned community and that they will not act against the will of any of the religious communities. However, the Indian state seems to have defined community in an extremely narrow sense to mean only the religious leaders and organisations like the *Jamait-e-Islami* and the Muslim League who have successfully resisted any positive reform from taking place in either general personal law applicable to all communities like a uniform adoption law or in Muslim Personal Law. These parties along with the *Ulema* have also successfully launched a campaign against reform in personal law amongst fairly large sections of the Muslim population. Not only this, they have also successfully managed to lobby with the state and get retrogressive amendments introduced in the laws relating to maintenance and financial support of women and children.<sup>292</sup> The Indian State has allowed itself to be persuaded as it has largely been concerned with issues of political expediency and electoral advantage and have been willing to subordinate Muslim women's rights to these issues.

Apart from the optional civil law of marriage and divorce, certain other personal laws were introduced by the Indian State that was applicable to all communities. The first of these laws was the Dowry Prohibition Act, 1961, which sought to curb and punish the practice of dowry apart from providing for return of dowry

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<sup>292</sup> *The Muslim Women (Protection of Rights on Divorce) Act, 1986* was passed to deny divorced Muslim women their right to maintenance after the *iddat* period.

items to the wife. It later was amended in 1983 and 1986 to strengthen it further. Sections were also introduced in the Indian Penal Code to punish harassment for dowry and other forms of cruelty<sup>293</sup> and to recognise a new species of murder called dowry death.<sup>294</sup>

Another recent civil law which is applicable to all Indian women regardless of the community to which they belong is the Domestic Violence Act, 2005. This act, apart from providing for protection orders, for the first time recognised the right of an Indian wife and a live-in partner to reside in the “matrimonial home” and protects this right. In this legislation, women have also been given rights to ask for maintenance, custody of children and damages. The act will have far reaching consequences for all Indian women and is a landmark in the history of the women’s movement in India.

### ***2.5 The Indian Constitution, Courts and Personal Laws***

The Indian Constitution mandates equality for women and freedom from discrimination under its various articles. Some of the more important articles located in the chapter on Fundamental Rights include Article 14, which, though not gender specific, stipulates equal treatment by the State of any person before the law and equal protection of the laws for all. Article 15 tries to ensure substantive equality by allowing special provisions in laws, including reservation for women and children to overcome the inequality in status. Similarly, Article 16, apart from creating a constitutional right to equality of opportunity and employment states that no citizen shall be discriminated against on grounds

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<sup>293</sup> Sec. 498 A, *Indian Penal Code*

only of religion, race, caste and sex in matters of employment. The other fundamental rights including freedom of speech and expression, movement, assembly, etc. in the Indian Constitution have important implications for women in general. Additionally, Article 21 of the Fundamental Rights, which deals with the protection of life and personal liberty, has been interpreted by the high courts in different states and the Supreme Court of India to include the rights to live with dignity and in an atmosphere free from violence.<sup>295</sup> The Directive Principles of State Policy in the Constitution direct the State to enforce women's rights in various spheres. Thus various provisions of the Indian Constitution, although not as detailed or gender specific as clauses in CEDAW, are in general consonance with the provisions of CEDAW. However, the courts have been extremely reluctant to strike down discriminatory personal laws, though no law is supposed to exist, if it conflicts with the fundamental rights chapter of the Indian Constitution.<sup>296</sup>

The courts have adopted a very conservative attitude towards personal law and have been most reluctant to declare discriminatory personal laws as violative of the Right to Equality or as violative of Article 15, which specifically prohibits discriminatory laws etc. on the ground of sex. Courts, specifically the Supreme Court, have refused in many cases to decide these issues of inequality and discrimination and have stated that it is the duty of the legislation to remove discrimination and bring in equal laws. It has urged the government to bring in a uniform civil code though in some cases it is unclear whether the court

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<sup>294</sup> Sec. 304 B, *Indian Penal Code*.

<sup>295</sup> AIR 1983 AP 356 and subsequent judgments of the Supreme Court of India.

is recommending this to further gender-just laws because it feels that uniformity per se between communities would be in the 'national interest'.<sup>297</sup>

*The Ahmedabad Women Action Group case*<sup>298</sup> is a good example of the courts reluctant attitude. In this case which challenged Hindu, Muslim and Christian personal laws as violative of the Constitution, the court held that the challenge involved issues of state policy and thereby evaded the challenge. A number of cases that challenged the Constitutionality of an obviously discriminatory provision, as seen in *Madhu Kishwar vs State of Bihar*<sup>299</sup> and the *Mary Roy case*<sup>300</sup> where the court avoided the question of constitutionality of the Travocore Christian Succession Act which did not give equal inheritance rights to daughters. Again in the case of *Githa Hariharan and Anr vs Reserve Bank of India and Anr*<sup>301</sup> the court did not decide whether Section 6 (a) of the Hindu Minority and Guardianship Act 1956 was violative of Articles 14 and 15 of the Constitution of India.

As far as specific clauses of MPL are concerned, the courts have mostly through a liberal interpretation of the *Shariat* given better rights to Muslim women. Some of these judgments deal with spousal and child support, while others deal with the rights to dissolve marriages and to enforce certain clauses in the *Nikhahnama*, including a refusal to live with the second wife. An important feature of the struggle for rights by Muslim women

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<sup>296</sup> *The Constitution of India*, Article 13.

<sup>297</sup> *Sarla Mudgal v. UOI* (1995) 3 SCC 635.

<sup>298</sup> *Ahmadabad Women Action Group and others vs UOI* (1997) 3 SCC 573.

<sup>299</sup> (1992) 1 SCC 102.

<sup>300</sup> (1986) 2 SCC 209.

<sup>301</sup> (1999) 2 SCC 228.

in India has been the large number of cases,<sup>302</sup> which have been filed and won in the courts. In all these cases, women have cited feminist and liberal interpretations of the *Shariat* and persuaded the court to adopt these rather than the patriarchal interpretations urged by their spouses or on occasion by groups like the Muslim Personal Law Board.

During the controversial Shah Bano case, many leading representatives of the women's movement formed a committee for the protection of the rights of Muslim women to stop the government from passing a law to deprive divorced Muslim women of their right to maintenance after divorce. Though, at that time this committee along with other Muslim organisations could not stop the passage of the act,<sup>303</sup> this was also the first time that Muslim women came out in demonstrations and campaigns against the Muslim Personal Law Board and others who were against their right to maintenance.<sup>304</sup> Issues affecting Muslim women in India including polygamy, unilateral right of divorce and payment of *mahr* and maintenance have been taken up in different forms in India. While recent debates have essentially focused towards a pro-women re-interpretation of the *Quran*, writers like Fayzee have suggested that since the *Shariat* has developed according to the changing time and has been influenced by the different geographical regions and cultures

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<sup>302</sup> These cases have been discussed in Section 4—The Rights of Muslim Women within the Family; Section 5—Economic and Financial Rights of Muslim Women within the Family and at the time of separation; Section 6—Muslim Personal Law regarding Custody, Guardianship and Adoption of Children, of this chapter.

<sup>303</sup> *The Protection of Muslim Women (Rights on Divorce) Act, 1986.*

<sup>304</sup> Singh, 1994, p.101.

that it has been practiced in, there is nothing in Islam to stop further reforms from taking place.

The lack of extensive reform in the area of personal laws has directly impacted women's lives in India, discriminating against women in both the private and public spheres. Ranging from rights of inheritance to basic rights in the family, women face exclusion and brutal inequality. For example, though women primarily take care of the children, they are not equal guardians of their children in any of the personal laws. Deserted and abandoned women and children, at best, have a right to maintenance. This is often an unrealistic small amount doled out by the court after long periods of litigation. Women and children are, in the meanwhile, forced to live on the mercy of their natal families since the state takes no responsibility to ensure that they live even at a subsistence level. Muslim men also have a unilateral right of divorce and can legally practice polygamy.

The developments in Muslim Personal Law or rather the lack of them along with other factors, like the socio-economic status, has retained the subordinate status of Muslim women in the family. While women belonging to other minority and majority communities in India as well share this subordinate status, Muslim women are in a more vulnerable situation because of the deeper and different layers of discrimination faced by them in several areas.

Notwithstanding the colonial legacy of creating and preserving separate personal laws based on religion for different communities affected, the Indian state has consistently recognised the anti-reform fundamentalist and conservative groups as the spokesperson of the Muslim community. The 'spokepersons' have relied upon the most patriarchal interpretations of the *Shariat* and equated these interpretations with Islam. Therefore, Muslim



women have been unable to find democratic spaces in which they can fight for justice. Despite such hurdles in the justice delivery system, they have managed to access the courts for justice in matters relating to matrimony and the family. They have done so by arguing on the basis of the non-discriminatory provisions of the Constitution of India as well as on the basis of feminist interpretations other than *Shariat*. They have also, along with the broader women's movement been able to bring about reform through the introduction of uniform laws in certain areas like dowry and domestic violence.

### **3. Political, Social, Economic and Cultural status of Muslim women in India**

#### ***3.1 Introduction***

This section highlights the range of factors influencing the status of Muslim women in India today, in addition to the effect of personal law in their lives. It is evident that Muslim women cannot be viewed as a homogeneous group as various regional, class, sect and caste variations determine their status. However, given these limitations, this section is important as it attempts to encapsulate the ways through which Muslims are discriminated in the context of increasing Hindu fundamentalism and communalism, apart from the gender bias within the community, wherein lowering the status of Muslim women and reducing the spaces in which they can ask for their rights.

The section also draws upon available studies such as the National Family Health Survey -2 and other national studies. It is also based on four regional workshops that were conducted by the Indian School of Women's Studies and Development in Bhopal, Bangalore, Kolkata and Kanpur in which a total number of 174 Muslim women participated (See Appendix – IV). The aim of

the workshops was to ascertain the ground realities about Muslim women's lives in different regions and hear their views. There were different sessions in each workshop dealing with violence within the home, the impact of communalism and their economic status. The workshops were conducted for qualitative information on relevant issues. The nature of the proceedings in the workshop was of free discussion with comments and interventions by all the participants.

As mentioned earlier, after Indonesia, India has the largest Muslim population in the world.<sup>305</sup> Geographically, more than half of the entire Muslim population lives in Bihar, Uttar Pradesh and West Bengal. Muslims form a majority in Jammu & Kashmir and the union territory of Lakshadweep and form 23 per cent of the population in Kerala and West Bengal, 17 per cent in Uttar Pradesh, 14 per cent in Bihar, 11 per cent in Karnataka and 9 per cent in Maharashtra.<sup>306</sup>

Notwithstanding the provisions laid down in the Constitution of India, which provides that no citizen shall be discriminated against on grounds of religion and sex<sup>307</sup> in any spheres of life including in the area employment/office under the state,<sup>308</sup> these rights remain mostly on paper. The Constitution allows special

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<sup>305</sup> In the country, 82 per cent of the households are Hindus, 12 per cent are Muslims, 3 per cent are Christian and 2 per cent are Sikhs. However, in urban areas, 15 per cent of the households are Muslims: National Family Health Survey (NFHS-2) 1998-99, p. xix.

<sup>306</sup> S. Kazi, *Muslim Women in India* Minority Rights Group International Report, 1999, p. 24.

<sup>307</sup> Article 14 and 15, 16, *The Constitution of India*.

provision, laws and reservation of seats for women in local bodies or any educational institution and special laws for backward classes of citizen (this category includes backward classes amongst Muslims too) and the Scheduled Castes and Scheduled Tribes. Article 16(4) also provides for reservation of appointments of posts in favour of any backward class of citizens, which in the opinion of the state is not adequately represented in the services under the state.

However, these legal provisions are not reflective of the actual status of Muslims in India who are not only under represented in political institutions like the Parliament and State Assemblies but also in government and other institutions allied to it. The poor socio-economic situation of Muslims in general, and in particular of Muslim women, reflects the discrimination and inequality that is confronted at a day-to-day level.

### ***3.2 Poverty and Employment***

A study carried out by Zoya Hassan and Ritu Menon,<sup>309</sup> which assessed the socio-economic status through a standard of living index comprising various items shows that Muslims had a lower standard of living than that of Hindu lower castes, and significantly less than that of the Hindu upper castes. However, the study also showed variation between the north, south and east and west zones. Muslims in the rural North were the poorest, while those in the South had a relatively higher standard of

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<sup>309</sup> Z.Hasan. R. Menon, *Unequal Citizens: A Study of Muslim Women in India* (New Delhi: OUP, 2004) pp. 18-46.

living. Further, except for the rural East, upper caste Hindus across all zones had the highest average standard of living.<sup>310</sup>

For example, the per capita income of Muslims and their low socio-economic status has been highlighted by certain studies. The table below shows that the level of income of Muslims was below the average income in India.

	<b>Income/ Household (Rs.)</b>	<b>Per capita Income (Rs)</b>
Muslims	22,807	3,678
Hindus	25,713	4,514
Christians	28,860	5,920
Other Minorities	30,330	5,427
India	25,653	4,485

*Source: Abusaleh Shariff : Human Development Report, 1999*

During the workshops, many women reported the discrimination faced by them due to policies of recruitments and the lack of access to government schemes. Most Muslim women in India

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<sup>310</sup> The standard of living index for assessing the socio-economic status considered variables like the type of house, toilet facilities, source of lighting, points for electricity, main fuel for cooking, source of drinking water, ownership of agricultural land, ownership of livestock, ownership of durable goods and ownership of house. "For the Muslim communities the best outcomes on most indicators are in the urban west and urban south zones" (Hasan and Menon, 2004, p. 25). It is clear that location of women in terms of rural and urban residence is extremely important in determining the level of opportunities available to them.

work in the un-organised sector (60 per cent),<sup>311</sup> in home based industry – doing embroidery work like *zardozi*, *chikan* work, *beedi* making and traditional occupation and enterprises, where the middlemen pay them abysmally low wages. It has also been reported that compared to Christian (51.5 per cent) and Hindu women (27.7 per cent) only 15.7 per cent Muslim women were employed in regular salaried jobs. This shows the marginal presence of Muslim women as workers in the formal economy.<sup>312</sup> However, very little current data is available and much more work needs to be done in the area.

### **3.3 Education**

The National Family Health Survey pointed out that nearly 59 per cent of Hindu women and 61 per cent of Muslim women are not literate. On the whole it appears that 90 per cent of women with non-literate husbands are also themselves not literate. However, the survey done by Hasan and Menon indicates that Muslim women have achieved only a modest level of educational competence and in the survey only “43 per cent Muslim respondents were literate, 59 per cent of them had never attended school” and their presence in higher education was negligible. “Among the literate, Hindu respondents were better educated than Muslims; and among Hindus, the upper class were better educated.” It is pointed out in this study that in terms of educational access, the South and West performs better than the North and the East and the burden of deprivation falls most on rural women and members of low socio-economic groups.<sup>313</sup>

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<sup>311</sup> Kazi, 1999 p.24.

<sup>312</sup> Ibid., p.25.

<sup>313</sup> Hasan & Menon, 2004, pp. 71-72.

### ***3.4 Women's Autonomy and Political Participation***

The NFHS-2 survey points out that Muslim women, closely followed by Hindu women are less likely than women belonging to other religions in India to be involved in decisions about purchasing jewellery or other house hold items and about spending time with their parents or siblings. About half of both Hindu and Muslim women do not participate in decisions about their own health care. Greater decision-making autonomy is associated with employment for women only if they are working for money. Muslim and Hindu women are less likely to have access to money than women from other religions.<sup>314</sup>

The study done by Hasan and Menon points out that women in their sample turned out to be keen voters, with Muslim women being keener than Hindu women. They further point out that “three quarters of respondents supported reservations for women in legislatures, expressed interest in contesting elections especially at the local level.” However, they point out that the urban educated women are more aware of rights and policies and are more likely to decide on their own as to which party they should vote for.<sup>315</sup>

### ***3.5 Impact of Communalism***<sup>316</sup>

Increasingly the widespread growth of Hindu fundamentalism in recent years has resulted in vicious propaganda against Muslims in India in several areas and strengthening of stereotypical notions about cultural patterns and social behavior amongst Muslims. This propaganda not only wrongly constitutes Muslims as a

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<sup>314</sup> NFHS-2 Survey p. 68.

<sup>315</sup> Hasan & Menon, 2004, pp. 218-219.

<sup>316</sup> The use or rather misuse of religion for political power..

homogeneous group but also ignores the manner in which communal tension impacts on the daily lives of Muslim women and results in Muslim Women being denied access to various benefits available to women from other communities from the state. One such propaganda by the votaries of Hindutva is regarding the growth rate of Muslim population in India, which they claim will overtake the growth rate amongst Hindus. This claim contradicts recent studies which have clearly shown that not only is there a decline in the total fertility rates amongst Muslims but that regional differences were more important in influencing fertility rates in India than religion. The study has also shown that the Hindu / Muslim differential treatment cannot be divorced from the repeated communal riots that have taken place, affecting the access to family planning and health care services provided by the government.<sup>317</sup>

During the workshops held for the present study, the impact of the growth of communalism over the last few years was discussed at great length. Women reported how communalism had affected their daily lives and how difficult it was for Muslim women to raise issues of equality within the community when the lives and livelihood of a large number of members of their community was in danger.

Throughout the communal riots, women were subjected to extreme forms of violence including rape. It was also reported that during riots since male members are either killed or hurt or arrested, the burden of feeding the family falls heavily on women.

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<sup>317</sup> R.P. Bhagat, P. Prabharaj, 'Hindu-Muslim Fertility Differentials' *Economic and Political Weekly*, January 29, 2005, Vol. 104 No.5, p.412.

Participants from Kerala and Karnataka stated how fundamentalists from the Muslim community are forcing women to wear *burqah* or the veil. Girls were not allowed to attend English or co-education schools and participate in cultural and extra-curricular activities.

The discussion in the foregoing section identifies the range of socio-economic factors impacting adversely on the position of women. It also indicates the specific difficulties confronting Muslim women as minority women that has further weakened their position in the Indian society.

#### **4. The Rights of Muslim Women within the Family**

##### ***4.1 Polygamy and Bigamy***

Polygamy, as is evidenced in the Quranic verse 4:3 is permitted in Islam (although it has been argued it is the exception rather than the rule).<sup>318</sup> The incidence of polygamy in India is extremely low, but in a highly communalised polity, Hindu fundamentalists have often played up this fact to show Muslims as backward. The truth is that as far back as 1975, the Committee on the Status of Women reported that more Hindus than Muslims were in bigamous marriages in India.<sup>319</sup> Recent data<sup>320</sup> surprisingly shows that the incidence of divorce, desertion and separation amongst Muslim women is very low, contrary to the general assumption

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<sup>318</sup> “*And if you fear that you cannot do justice to orphans, marry such women as seems good to you, two, or three, or four, but if you fear that you will not do justice then (marry) only one or that your which your right hand possess. This is more proper that you may not do injustice.*” (4:3).

<sup>319</sup> Report of the Committee on the Status of Women, Govt. of India, 1975.

<sup>320</sup> Hasan & Menon, 2004, pp. 72-84.



that Muslim women are commonly divorced or deserted on account of polygamy and unilateral divorce.<sup>321</sup>

It is worthy to mention that according to Article 16 of CEDAW, both men and women enter into marriage, with free and full consent, one marriage at a time. Thus it neither allows a man nor a woman to contract more than one marriage at a time. Moreover, men and women share the same responsibilities during the marriage and have equal rights at the time of dissolution.

However, in the workshops and surveys<sup>322</sup> it has been gathered that most women have little control over whom and when they marry. It is the parents who decide the match and thus most Muslim marriages in India are arranged and often girls are not even consulted about the terms of the marriage contract, the *mahr* amount and other such issues.

Though not as widespread as it is commonly believed to be, the fact remains that among Muslims in India, polygamy remains legally permitted. Also persons from other religions, mostly Hindus have sometimes converted to Islam merely to get married again. In the famous *Sarla Mudgal* case,<sup>323</sup> the Supreme Court of India held that conversion to another religion for the sake of getting remarried is not permitted and any person so converting and contracting another marriage will be guilty of bigamy. Hence, it is the legality and not the extent of polygamy's recurrence, which is the main problem.

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<sup>321</sup> Hasan & Menon, 2004, p. 83. In a survey of 15,000 Muslim women in 46 districts of India in 1993-95 it was reported that only 5 per cent of the total sample had been either divorced, separated or remarried.

<sup>322</sup> Hasan & Menon, 2004, pp. 131.

<sup>323</sup> (1995) 3 SCC 635.

Reformists and feminists argue that taking more than one wife or up to four wives is not generally allowed in the *Quran*. The permission for polygamy was granted only in a specific context when more than one tenth of the Muslim population was wiped out in war with non-believers, leaving behind many widows and orphans. Even then what was emphasised was that a man had to treat all his wives justly, and if this could not be done he should stick to one wife only.<sup>324</sup>

In *Sainuddin vs Latifannessa Bibi*<sup>325</sup> the husband agreed in the marriage contract, interalia, not to marry a second wife without the consent of the first wife, not to beat or ill-treat the wife, and to allow her to visit her parents. When the husband married a second time, the first wife left him, and the husband filed a suit for the restitution of conjugal rights<sup>326</sup> against her. The wife thereupon “gave herself three divorces in accordance with the Mohammedan law and under the authority given to her by her husband”, and pleaded in defense to her husband’s suit that she

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<sup>324</sup> Asghar Ali Engineer, *The Rights of Women in Islam* (New Delhi: Steerling Publishers Pvt. Ltd., 1992) p. 155.

<sup>325</sup> 1919 I.L.R 46 Calcutta 141.

<sup>326</sup> The restitution of conjugal rights was a medieval European (Christian) remedy which had been incorporated in the English Matrimonial Statutes in 1875. This was applied by the English judges to both the Muslims and Hindus in India by reinterpreting their ancient legal texts. The ‘relief’ of the restitution of conjugal rights is still available to both Muslims and Hindus in India. It was incorporated in the Hindu Marriage Act, 1955. Husbands generally use this section to defeat a claim for maintenance or separate living by the wife. Though in one petition this relief was held as violative of the Fundamental Rights in the Constitution of India by the Andhra Pradesh High Court, the Supreme Court of India held that the ‘relief’ aids in reconciliation. However, even if a decree of restitution is passed against a spouse that spouse cannot be compelled to live with the petitioning spouse.

was no longer his wife. The court accepted the validity of her dissolution of the marriage and dismissed the husband's suit. Reported decisions of cases concerning a delegation of the right of *talaq* to the wife in the event that her husband should marry a second wife go back at least to the early 1870s.

The Calcutta High Court in the case mentioned above cited the *Hedaya* and Baillie's *Digest of Mohammedan Law* to establish the fact that a Muslim husband may validly delegate the right of *talaq* to his wife, thereby entitling her to dissolve the marriage extra-judicially. In the marriage contract, the husband had made such a delegation to the wife and she was entitled, under the agreement, to exercise this right if he should marry a second wife without her consent. That contingency having been proved, the wife's exercise of *talaq-i-tafweed* was valid and the high court decreed her suit.

In addition to the delegation of the right of *talaq* to the wife in the event of certain contingencies, the husband under MPL may himself pronounce a suspended *talaq*, which will automatically come into effect should the stated contingency occur. Thus, in *Muhammad Amin vs Mst. Aimna Bibi*<sup>327</sup> the husband executed an agreement that he shall not marry another woman in the presence of Mst. Aimna Bibi, and if he does so, she will be held to have been divorced by him, on account of the second marriage. The high court upheld the validity of the document and concluded that it operated automatically as a deed of divorce upon the husband's marriage to a second wife. The husband's suit for restitution of conjugal rights was accordingly dismissed.

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<sup>327</sup> Lucy Carroll and Harsh Kapoor, (eds.), *Talaq-i-Tafwid, Women Living Under Muslim Law*, (France: 1996) quotes this case cited as AIR 1931 Lahore 134, on p. 61.

In both pre and post-nuptial agreements, the suspended *talaq* would appear to be much less common than the delegated right of *talaq (talaq-I-tafweed)*. In general, the provision for the exercise of *talaq-i-tafweed* is probably more beneficial to the wife, as it allows her, in the event of the contingency arising, to consider the entire situation and to decide whether to effect a divorce or not. If the stipulation is enforced by a suspended *talaq*, she is automatically divorced whether or not she may wish to be.

The domestic complications of polygamous arrangement are manifold, and it may be noted that stipulations in the marriage contract may also be utilised to protect the interest of the wife who marries a man with one or more wives already.

#### **4.2 Remarriage**

It has been reported that Hindu and Muslim women face similar hardships after divorce contrary to the popular belief that it is easier for a Muslim woman to marry again. Thus, while there is no bar against remarriage for a divorced Muslim woman, the ground realities are quite complicated. While there are significant variations in attitudes to “re-marriage across classes, it is easier amongst the lower classes as in the higher and middle classes remarriage is often looked down upon”.<sup>328</sup> Ahmed also observes that unless the divorced woman is very young and a suitable match is available, remarriage hardly takes place. He goes on to observe, “Since remarriage is not universal, the question of sustenance of the divorced wife remains. Her only option is to revert back to her parents or brothers. This is less of a problem

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<sup>328</sup> I. Ahmad (ed.) *Divorce & Remarriage among Muslims in India* (New Delhi: Manohar Publishers and Distributors, 2003) pp. 35-36.

in economically well-off families as they have the means to shoulder the burden of maintaining their divorced daughter and her children, if they have accompanied her after divorce, though even in such cases she has to make compromises and adjust to the taunts and curses of her family members, especially her sister-in-laws who look upon her as an intruder and a burden on the family resources. However, in the case of women from lower class families, this poses serious problems. Lower class families are already leading a hand to mouth existence and reversion of a divorced daughter and her children puts severe strain on their meager resources. In such families, the divorced women has to face considerable humiliation and is often blamed for adding to the already difficult situation of the family.”<sup>329</sup>

Even *mahr*, which is supposed to provide divorced women with some relief, is hardly ever paid to the women. Thus, even after the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed, Muslim women continued to approach the courts for maintenance and for a ban on the unilateral form of divorce. Women criticised the practice of triple *talaq* and its acceptance by religious leaders. It is also reported that *talaq* was sent by post, on telephone and even advertised in the newspapers. Pregnant women were also divorced. Some women also reported that their husbands had announced *talaq* in a fit of anger or while intoxicated and even though the couple wanted to live together again, the wife had to go through a form of *Halala*.<sup>330</sup>

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<sup>329</sup> Ibid., p. 36.

<sup>330</sup> The Muslim Personal Law stipulates that there can be no remarriage between divorced spouses. In case the husband is repentant, then the wife has to get married to another man and get divorced by him, before remarrying her former husband.

Both the *Sunni* and *Shia* Muslim women in India are affected by this unilateral form of divorce. The most common form of divorce in India is *talaq-i-biddat* in which a man by pronouncing *talaq* thrice at one sitting can divorce his wife, even though it is not the acceptable form of divorce as far as *Shariat* is concerned. The prevalence of this mode of divorce highlights the grip of patriarchal values over the interpretations of the *Shariat*, as even the local *Kazis* had taken the husband's side and refused to help them.

### **4.3 Wife's Right to Divorce**

#### **Khula**

Apart from unilateral divorce that can be pronounced by men, the Muslim Personal Law in India also gives a right to women to take divorce from their husbands.

Islam recognises the right of a woman to repudiate her marriage. This form of divorce is called *Khula*, which literally means to disown or to repudiate. *Khula* has been referred to in the *Quran* in the following words:

Then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby.

It has been stated that wife's right to *Khula* is absolute and no one can prevent her from exercising it.<sup>331</sup>

Negotiation between the spouses over the granting of *Khula* may take place directly. But it is probably more usual for the

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<sup>331</sup> Engineer, 1992, pp. 136-137.

wife who wishes to initiate the process to do so through an intermediary, a *Kazi* or other religious leaders, the local mosque committee or an advocate. If the negotiations fail i.e., if the husband neither pronounces the *talaq* nor agrees to sign the *Khula* agreement, the only option for a woman who is determined to end the marriage is to file for divorce under the Dissolution of Muslim Marriages Act, 1939.<sup>332</sup>

*Mubaraat* is considered a species of divorce by mutual consent. The word *Mubaraa* denotes the act of “freeing each other by mutual consent” with no exchange or payment on either side.<sup>333</sup>

#### **Talaq-i-Tafweed (Delegated Right of Divorce)**

*Tafweed (tafwid)*, explain the translators of the *Fatawa-I-Kazee Khan*, “means the making another person owner of the act which appertains to the person making the tafweed.” The translators of the *Hedaya* adds:

After being thus empowered, she (i.e. the wife, recipient of the delegation in the example being discussed) stands as a principle in the execution of the divorce, and not as an agent; ...a commission of agency may be annulled at the pleasure, whereas the power devolved to another to act, as a principle cannot be so.<sup>334</sup>

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<sup>332</sup> S.Vatuk, ‘Muslim Women and Personal Law’ in Z. Hasan & R. Menon (eds.), *In a Minority: Essays on Muslim Women in India* (New Delhi: Oxford University Press, 2005), p. 38.

<sup>333</sup> H. Kapoor (ed.), Dossier 16. Grabels, *Women Living Under Muslim Laws*, 1996.

<sup>334</sup> *Ibid.*

Like the husband's pronouncement of *talaq*, the wife's pronouncement under authority delegated to her by the husband (*talaq-i-tafweed*) dissolves the marriage without the intervention of the court.

Apart from *Khula*, *Mubaraa* or *Mubaraat* and *Talaq-i-tafweed* are the other forms of divorce that a Muslim wife has recourse to. *Mubaraa* is very little used in India, as is *Talaq-i-tafweed*. However, *Talaq-i-tafweed* has to be a stipulation in the marriage contract. The contract may provide that the stipulation is enforceable should the husband be guilty of a breach of the marriage contract. The contract may also stipulate that the wife would be entitled to live apart from the husband and still be maintained by him (thus giving her a right based upon the contractual agreement as opposed to the relief available at the discretion of the court).<sup>335</sup> This form of divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain her freedom without the intervention of any court.<sup>336</sup>

### **Dissolution of Marriage under the Dissolution of Muslim Marriages Act, 1939**

Apart from the various forms of divorce that can be obtained, the court procedure is lengthy and cumbersome and women have to wait for at least two to three years or more before getting a divorce decree. The act also does not provide for any spousal or child support or for return of dower and separated women have to engage in multiple proceedings to get divorce and financial support for themselves and their children.

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<sup>335</sup> Ibid.

<sup>336</sup> Fayzee, 2003.



It may be stated that, while Muslim men in India can practice polygamy, it is not as widespread as is commonly believed. By approaching the courts, women have been able to stop this practice in certain circumstances. The courts have also recognised conditions in the *Nikahnama*, which allow divorce in certain contingencies. The problem, however, is that *Nikahnamas* which contain these conditions or the delegated rights of divorce are not the norm. Moreover, to defeat the claims of their wives and to force women to submit, men have resorted to filing petitions for restitution of conjugal rights, a barbaric remedy which was adopted in colonial times and women have to fight these cases often without any resources. If women want a divorce, they are often forced to agree to a *Khula* and give up their right to *Mahr* and maintenance and perhaps custody of their children.

## **5 Economic and Financial Rights of Muslim Women within the Family and at the time of Separation**

### ***5.1 Introduction***

Women's economic status on divorce and separation has long been an area of concern for feminists throughout the world. In India, women, regardless of the communities that they belong to, have extremely limited rights on separation or divorce. With limited or no rights over matrimonial property as well as little control over their earnings, women are not directly recognised as entities of their own making. Capital assets are normally acquired in the husband's name except amongst propertied families for tax purposes or when women are in a position to enforce this right. The only right that deserted/divorced or separated women have under all Indian personal laws is a right to maintenance. However, since Indian courts generally award extremely inadequate amounts as maintenance and take so long to do so, women and children in most cases become dependant on their

natal families for financial support and suffer a huge decline in the standard of living.

Since this is the only support, however inadequate, that they can get, Muslim women have waged a long struggle in India to retain this right to maintenance. This is obvious from the number of cases that Muslim women have filed and are filing throughout the country to ask for maintenance after separation and divorce in spite of a law passed by the government which was meant to curb this right.<sup>337</sup>

### ***5.2 Maintenance Under Traditional Law***

It is well known that Quranic stipulations commands a Muslim husband to maintain his wife even if she has means to maintain herself and even if the husband is without any means. In the words of Schacht, "The maintenance of the wife comprises, food, clothing and lodging, i.e., a separate house or at least a separate room that can be locked, she is not obliged to bear any part of the expenses of the matrimonial establishment." Under the Muslim law, a wife's right to maintenance is a debt against the husband and has a priority over the right of all other persons to receive maintenance.

The *Quran* says that not only should a woman be released from marital ties in kindness but that provision be made for her in kindness. The Quranic verse says:

And the divorced women too shall have a right to maintenance in goodly manner. This is a duty for all who are fearful of God.

Maulana Muhammad Ali, commenting on this verse, says, "Note that this provision (*mata'a*) is in addition to the dowry (or *mahr*)

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<sup>337</sup> *Muslim Women (Protection of Rights on Divorce) Act, 1986.*

which must be paid to them. Hence, a provision in addition to her dowry is recommended to the divorced women.<sup>338</sup> Another commentator, Muhammad Asad, according to Engineer says: “This obviously relates to women who are divorced without any legal fault on their part. The amount of alimony—payable unless and until they remarry—has been left unspecified since it must depend on the husband’s financial circumstances and on the social conditions of the times.”<sup>339</sup>

The Supreme Court of India, in its landmark judgment on Shah Bano’s appeal for maintenance against her husband, upheld her right to maintenance under Section 125 of the Cr.P.C.<sup>340</sup> The Supreme Court relied on Allama Yusuf Ali’s translation of this verse in order to reinforce its judgment on maintenance. Allama Yusuf Ali translates the verse thus: “For divorced women maintenance should be provided on a reasonable scale. This is the duty of the righteous.” Thus, it was held that the verse makes it clear that a Muslim husband is duty bound to maintain his wife and that the payment of maintenance is incumbent upon the divorcing husband. This judgment was fiercely opposed by orthodox sections of the Indian Muslims especially by the *Ulemas*, religious leaders and organisations such as the Muslim Personal Law Board who relied on a patriarchal interpretation of the *Quran* that maintenance to a divorced wife cannot be paid beyond the period of *Iddah*, (or the waiting period) which is three months or three mensurational cycles after the divorce. According to the Muslim Personal Law Board, which was an

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<sup>338</sup> Engineer, 1992, p. 129.

<sup>339</sup> Ibid.

<sup>340</sup> Section 125 of the *Criminal Procedure Code* in India, provides for maintenance to all Indian women regardless of religion. This section was amended in 1973 to include within the definition of women, divorced women also.

intervener in the Shah Bano case, and the members of the Jamaat-e-Islami, maintenance beyond this period was contrary to the *Sharia*.

Even earlier, in 1973, Section 125 Cr.P.C. was amended by the government to include divorced women in the definition of women. Before this amendment there was some controversy whether divorced women could be provided maintenance under this section. The section allowed maintenance upto a limit of Rs. 500 per person and was essentially meant for destitute women. However, the amendment to include divorced women within the definition of wives was vehemently opposed by the Muslim League which claimed that the Muslim women are entitled to maintenance only for the *iddat* period. Succumbing to the pressure of the Muslim League and others, the then Congress government allowed a retrogressive amendment to the provision which stipulated that women who had received customary payments due to them under their personal law would not be entitled to maintenance. This was to stop divorced Muslim women from getting any maintenance after the *iddat* period and to restrict their right only to a claim of *mahr*. However, Muslim women continued to claim maintenance through the courts even after divorce.

After the passing of the Shah Bano judgment, the Muslim Personal Law Board and parties like the Jammat-e-Islami, the Muslim League, went on a huge agitation and mobilised substantial support against the judgment, whilst on the other side various progressive sections of the Muslim community and women's organisation supported the judgment. The erstwhile congress government of Rajiv Gandhi which had earlier supported the judgment finally succumbed to the orthodox pressure and passed the Muslim Women's (Protection of Rights on Divorce) Act 1986.

It is ironic that though the act was passed to stop divorced Muslim women from getting maintenance, women again continued to ask for maintenance beyond the period of *iddat* from the courts. This is evident by the large numbers of petitions that were filed under the act and the large number of judgments available under the act. The act sought to restrict the right of maintenance to the *iddat* period.<sup>341</sup> While certain high courts interpreted the issue to mean that divorced Muslim women are entitled to both a reasonable and fair provision for life and to maintenance which should be paid to her before the *iddat* period expires,<sup>342</sup> others<sup>343</sup> held that a divorced Muslim woman is only entitled to maintenance for the *iddat* period and is not entitled

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<sup>341</sup> Sec. 3 (1) *Mahr* or other properties of Muslim women to be given to her at the time of divorce – (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to – i) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;

ii) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim law;

iii) and all the properties given to her before or at the time of marriage or father her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

<sup>342</sup> *Mohammad Ahmad Khan vs Shah Bano Begum* (1985)2 SCC 556; *Bai Tahira vs Ali Hussain* (1979) 2SCC 316; *Fazlu Bai vs K.Khader Vali* (1980) 4SCC125 ; Arab Ahmadiya Abdullah Arab Bail Mohmuna Saiyadbhai AIR 1988 Guj 141 ; *Ali vs Sufaira*, (1988) 3 Crimes 147 ; *K. Kuhammad Hazi vs K.Amina* 1995 Cri LJ 3371(Ker) ; *K. Junaidin vs Amana Begum* (1998) 2 DMC 468 (Mad) ; *Karim Abdul Rehman Sheikh vs Shehnaz Karim Sheikh* 2000 Cri LJ 3560 ; *Jaitun Bai Mubarak Sheikh vs Mubara Fakruddin Sheikh* (1999) 3 Mh LJ 694; *Kaka vs Hasan Bano* (1998) 2 DMC 85 ( P&H).

<sup>343</sup> *Usman Khan Bahmani vs Fathimunnisa Begum*, (1999)Cri LJ 1364 ; *Abdul Rashid vs Sultana Begum* (1992) Cri LJ 76 Cal; *Abdul Haq vs Yasmin Talat*, (1998)Cri LJ 3433 (MP) ; *Md.Marahim vs Raiza Begum* (1993) 1 DMC 60; *Shahida Begum vs Abdul Majid I* (1998) DMC 584; *Bibi Sahnaz vs State of Bihar* and another AIR 1999(1) HLR 137.

to any separate amount by way of “a reasonable and fair provision”. Under the first set of judgments, the Muslim women started getting lumpsum amounts as spousal support.

Finally, while upholding the validity of the Muslim Women’s (Protection of Rights on Divorce) Act 1986, the Supreme Court in its landmark judgment in *Danial Latifi & Anr. vs UOI*<sup>344</sup> settled the law regarding the right of maintenance of a divorced Muslim woman. The Supreme Court held that the wording of Section 3 indicated that the husband had two separate and distinct obligations: (1) to make “a reasonable and fair provision” for his divorced wife; and (2) to provide “maintenance” for her. It further held that both these payments had to be made within the *iddat* period. Stating that whether the word *mata* was interpreted as maintenance or provision had little relevance, except that *mata* was a right of the divorced Muslim woman distinct from and in addition to *mahr* and maintenance during the *iddat* period. The court held that the words ‘reasonable and fair’ had reference to the needs of the divorced woman, the means of the husband and the standard of the living the woman enjoyed during the marriage. The court accepted the analysis of the Supreme Court Constitutional judgment in the Shah Bano case of ‘*Suras 241-42 of Chapter II of The Holy Quran and the other textual material*’.

Finally, the Supreme Court held that any other interpretation of Section-3 of the Muslim Women’s Act would lead the court to declare the section unconstitutional since such an interpretation ‘would not be reasonable, just and fair’<sup>345</sup> and would be violative

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<sup>344</sup> (2001) 7 Supreme Court Cases 740.

<sup>345</sup> In the Daniel Latifi case, the court referred to the Indian society as male dominated and went on to talk of the sacrifices that all classes of women make for the welfare of the family.

of Article 14 and 15 of the Constitution of India. The central government, the Muslim Personal Law Board and the Islamic Shariat Board all appeared in the case and argued that a divorced Muslim woman was not entitled to maintenance.

### ***5.3 Rights of Inheritance***

There are two main schools of law governing the Muslims regarding matters of property in India, namely the Hanafi followed by the Sunni Muslims and the Ithna Ashari governing the Shia Muslims. Since most of the Muslims are Sunnis in India, the Hanafi Law is applied, notwithstanding the broad differences between the Shia and the Sunni laws governing property law.

Under Hanafi law, the legal heirs are divided into three categories: the agnates mostly males, Quranic heirs mostly females and 'distant kindred' who are either women or are connected through a female link. The Shia law, however, besides being slightly different from the Sunni law seeks to give equal rights to both the male and female heirs. Cognates and agnates are put on equal footings. 'Males and females who are linked to the deceased in equal blood and degree inherit together.'

As far as customs and practice regarding inheritance laws is concerned there is a considerable divergence from the *Shariat*. The Muslims of Southwest India follow the matrilineal inheritance, especially amongst the Mapilas of Kerela, while in the rest of India the rule of patrilineal inheritance is followed where even the customary rights of women are highly restricted.

The Muslim Personal Law (Shariat) Application Act, 1937 abrogated the customs or usages in favour of the Muslim Personal Law, but clearly excluded agricultural land from its purview. Though Muslim women by and large suffered because of this

clause excluding agricultural land but in certain parts of the country such as Tamil Nadu, parts of Karnataka and Andhra Pradesh women were given a share in the agricultural land in the year 1949. However, in most of the northern states such as Delhi, Haryana, Punjab and Uttar Pradesh, customs regarding devolution of the property still prevail. Thus, inequality is perpetuated among men and women as agricultural land is the most important form of property.<sup>346</sup>

It is generally argued that daughters have been given half the share in inheritance compared to their brothers and hence they are considered as inferior to men in worth. However, the fact that they are given half the share of male heirs is to be seen in its sociological and economic context. Some scholars have also argued that since under the *Quran* the wife has absolute rights of maintenance and is further entitled to *mahr*, this, in a way compensates for the unequal rights in inherited property.

Others point out that the law on property rights is as subject to change as other provisions of the *Shariat* and the *Shari'ah* as formulated by the early jurist should not be treated as final, and, wherever necessary, should be interpreted or even reinterpreted in the true Quranic spirit in view of the changed conditions and new consciousness of women.

The ground reality is that women in India do not even get the property that they inherit. They are often deprived of their rights in parental property through various stratagems such as being forced to relinquish their shares for her family members, thus left with any security or assets in their name.

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<sup>346</sup> B. Agarwal, *Gender and Legal Rights in Landed Property in India* (New Delhi: Kali for Women, 1999), pp. 36-42.



## **6. Muslim Personal Law regarding Custody, Guardianship and Adoption of Children**

### ***6.1 Introduction***

The laws of adoption, guardianship and custody of children in India are yet to be fully developed. Whilst there is no law of adoption covering minority communities in India, the Hindu Law of Adoption & Maintenance stipulates that only a Hindu can adopt a Hindu child<sup>347</sup> and a person can only adopt a male or female child if she/he does not have a child of the same sex. Efforts by women's organisations and groups to introduce a uniform law of adoption have failed due to the opposition by anti-reform fundamentalist groups as detailed later on in this section. In the meanwhile, small children who have been abandoned or left by their parents continue to suffer. Adults who want to adopt these children have to approach the guardianship court. Apart from this being a cumbersome procedure, the child does not have the same rights as a natural child including a right to inherit a guardian's property.

Although CEDAW stipulates that on the basis of equality of men and women, parents will have the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation, the law relating to guardianship and adoption is inadequate and discriminatory.

For example, the Guardians and Wards Act, 1890, is a piece of archaic colonial law based on notions of guardianship that are completely opposed to the rights of the child. It governs the

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<sup>347</sup> Section 7, 8 and 10 of the *Hindu Adoption and Maintenance Act, 1956*.

custody proceedings for all communities though judges have the power to decide individual cases, based on the personal law of the parties approaching them. All the personal laws including the Muslim Personal Law do not recognise the mother as an equal guardian. The Guardian and Wards Act privileges the rights of the male guardian above those of the child and the mother and in Section 19 states no one can be appointed a guardian of a child if the father is living and is not unfit.

Before the Shariat Act, 1937, customary law recognised adoption among the Muslims. Further, under the Oudh Act, 1869, Section 29, a Muslim *talukadar* was permitted to adopt. But it seems to a very great extent, the custom of adoption stands abrogated. If no declaration under the act has been made, it is open to a person to plead and prove the custom of adoption and if he succeeds, it will be given effect to.<sup>348</sup>

Since there was no law of adoption for any of the minority communities, several efforts were made to introduce an adoption law in India for all the communities in 1972. When the India Adoption Bill was introduced in 1972, it was opposed by the Muslim members of the Joint Select Committee of the Parliament to which the Bill had been referred. They contended that adoption was prohibited under Islam and Muslims could not be allowed to adopt. The Indira Gandhi government allowed this bill to lapse without even a discussion. Though the bill was subsequently introduced by the Janta government in 1980, it was withdrawn because of pressure from the fundamentalist lobby. The succeeding Congress government again reintroduced it but exempted adult Muslim and Muslim children from its purview.

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<sup>348</sup> P. Diwan, *Muslim Law in Modern India* (Allahabad Law Agency, 1999) p. 106; *Mohd. Ismail vs. Noor-ud-Din* AIR 1986 J& K 14.

During the controversy surrounding the bill leading Muslim intellectuals opposed the fundamentalist position and wanted adoption laws for the Muslims as well.<sup>349</sup>

The Muslim law givers and jurist do not use the expression 'natural guardian', but it seems to be clear that in all schools, the father is recognised as a guardian—which term in the context is equivalent to natural guardian, and the mother in all schools of Muslim law is not recognised as the guardian, natural or otherwise, even after the death of the father. Since the mother is not the legal guardian of her minor children, she has no right to enter into a contract to alienate the minor's property. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father's right to control the education and religion of the minor children is recognised. He also has the right to control the upbringing and the movement of his minor children. So long as the father is alive, he is the sole and supreme guardian of his minor children.

The father's right of guardianship extends only over his minor legitimate children. He is neither entitled to guardianship nor to custody of his minor illegitimate children at any time, even after the death of the mother, though it is a different matter that he may be appointed as guardian by the court.<sup>350</sup>

In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.

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<sup>349</sup> See V. Dhagamwar, *Towards the Uniform Civil Code* (New Delhi: N.M.Tripathi Pvt. Ltd., 1989) for a detailed discussion on the issue.

<sup>350</sup> Diwan, 1999, p.108.

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to his executor. Among the Shias, after the death of the father the guardianship passes on to the grandfather, even if the father of the minor has appointed an executor, the executor of the father becomes the guardian only in the absence of the guardian, and in the absence of the grandfather. It appears that the Shias consider the father as a natural guardian, and in his absence, the grandfather is considered to be the natural guardian. No other person can be the natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any. Thus, under all laws, the natural guardian of the child is the father.

However, these rules of guardianship have been modified by certain decisions of the Supreme Court and the high courts in India. The Supreme Court has held that in matters pertaining to the custody of a minor, the sole basis for the decision should not be the legal right of the parties but only and solely the interest and welfare of the minor.<sup>351</sup> It has also been held that though the father may be the natural guardian of the minor, the question of the child's custody has to be decided "on the sole criterion of the interest and the welfare of the minor".<sup>352</sup>

On the other hand, custody of children can be burdensome for women. For instance, often women are forced to take care of the child merely because the father does not want to maintain them. If the woman is poor and illiterate, then she often can't look after the material needs of the child properly. Thus, in a

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<sup>351</sup> *Elizebeth Dinshaw vs. Arvand M. Dinshaw* (1987) 1 SCC 42.

<sup>352</sup> *Chandrakala Menon vs. Vipin Menon* (1993) 2 SCC 6.

workshop it was argued that a woman should get custody only if she wants.<sup>353</sup>

## **7. Child Marriage and Abortion Laws**

### ***7.1 Introduction***

The Child Marriage Restraint Act, 1929 was a significant law passed by the colonial rulers as it was a deviation from their stated policy of not reforming personal laws. However, this piece of social legislation was passed after women's organisations like the All India Women's Conference<sup>354</sup> and other social reformers like Raja Ram Mohan Roy took up the issue. In fact, as early as 1924, a bill was introduced in the Legislative Assembly to raise the age of consent of girls to 14 years in both marital and extra marital cases but was not passed. In 1925, a government-sponsored bill was passed raising the age of consent in extra-marital cases to 14 and 13 in marital cases. In 1927, Har Bilas Sarda introduced a bill to raise the age of girls and boys to 14 and 18 respectively. This bill was referred to a Select Committee and several women testified that the minimum age of marriage should be fixed at 16 years to protect maternal health. Muslim members of the Legislative Assembly like M.A. Jinnah also supported the bill and the bill was passed with surprisingly little opposition. In fact, members of the Legislative Assembly like T.A.K. Sherwani apart from Jinnah argued that child marriage had no scriptural sanction amongst Muslims. However, it has been said that the act's greatest lesson was to show women how

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<sup>353</sup> *Muslim Personal Law and Women*, A Report of the National Conference, 1999, p. 49.

<sup>354</sup> AIWC was set up in 1927 from within the congress party.

powerless they were when it came to implementing legislation.<sup>355</sup> Through the years, the act has been most ineffective in curbing child marriage. Also surprisingly child marriage has not been declared invalid even for children below a certain age. Currently, the Indian government has introduced a bill to amend this act, but has still not outlawed child marriage even in this bill.

As far as abortion rights for women are concerned, India has one law for medical termination of pregnancy, which is applicable to all communities. Various family planning policies of the government of India have also encouraged family planning in all communities. Both Hindus and Muslims use female sterilisation as the dominant method of family planning and this has obvious adverse health implications for women. Muslim women are also not able to access the family planning services provided by the government for a variety of reasons including discrimination, lack of literacy and poverty.<sup>356</sup> Communal tension has also made Muslim women more vulnerable to religious leaders who oppose abortion and family planning as un-Islamic. At the same time, the Right-wing Hindu parties and groups have been incessantly harping on a myth that the Muslim population is growing at an alarming rate and is going to overtake the majority community. This has led to increased communal tension, though studies have clearly indicated that this is not true.<sup>357</sup>

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<sup>355</sup> J. Nair, *Women and Law in Colonial India* (New Delhi: Kali for Women, 1996). The entire discussion on child marriage has been based on pages 80-83 of the book.

<sup>356</sup> See Bhagat 2005, pp. 411-418 for a discussion on the entire issue.

<sup>357</sup> *Ibid.*, p. 417.

The *Sharia* does not lay down any age for marriage. It only envisages that the parties to the marriage contract should be in a position to enter into contract. Muslim Personal Law does not expressly bar or allow child marriage but has allowed the guardians of the child to contract their marriage on their behalves. The child is given a right to repudiate such a marriage on attaining puberty.

The National Family Health Survey showed that despite the steady rise in the age of first marriage, almost universally marriage is early in India and that 30 per cent of women 15-19 years of age are married. Another 4 per cent are married but *gauna*<sup>358</sup> had not taken place. Among women aged 20-24 years, almost 25 per cent were married before age 15 and half were married before they are 18 years. The mean age of marriage in rural areas is about two and a half times lower than urban areas.<sup>359</sup> The recent census data of 2001 shows that 35.5 per cent of the female population between 15 to 19 years is married while 4.5 per cent of the girls are married between the ages of 10-14 years.

As stated earlier, Hassan and Menon show that 60 per cent Muslims and 55 per cent Hindu women are married by the age of 17 years and that women with low education level across region and religion are more likely to be married below the legal age than women with medium or high level of education. They point out that age at first marriage fluctuates between 14-18

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<sup>358</sup> *Gauna* is the ceremony when the girl is sent to her husband's house for co-habitation. It was and still is customary in many parts of the country to marry a girl and then not allow her to leave her parental home till menarche and often later.

<sup>359</sup> Kirti Singh and Divya Kapur, 'Law, Violence and the Girl Child', *Health and Human Rights* Vol. 5 No. 2, 2001, p.17.

years<sup>360</sup>. The mean age at marriage for upper cast rural women across India is lower than that for Muslim women.

The Child Marriage Restraint Act, 1929 is applicable to all religious communities and denomination in India. However, due to a number of factors including customs in some regions and in a number of communities in India and also because of the personal laws of various communities, the provisions of this act remain largely ineffective. The state authorities also hesitate in strictly applying the law and punishing the offenders. The Child Marriage Restrain Act itself does not declare such a marriage void. The act prescribes only mild punishments such as punishment for 15 days and a fine up to Rs 1,000 for the parties to the marriage and 3 months imprisonment to the parents of the parties and this hardly acts as a deterrent. The courts in India have held that though the act aims to restrain child marriage, once such a marriage is performed, it becomes valid.<sup>361</sup> The act, therefore, also needs amendments.

Article 16(e) of CEDAW gives the same rights to decide freely and responsibly on the number and spacing of children and to have access to the information, education, and means to enable them to exercise these rights.

However, in Islamic law, the couple has the freedom and right to choose to practice child spacing or family planning. This decision should, however, be reached with the couple's mutual consent and in the present social set up this seems to be an impossibility as apart from various factors like poverty, illiteracy,

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<sup>360</sup> Hasan & Menon, 2004, p 76.

<sup>361</sup> *Munshi Ram vs. Emperor* AIR 1936 All 11.



lack of economic development and social attitudes it is mainly the women who bear the major brunt of child rearing.

A woman has a unilateral right to have an abortion, only when the pregnancy endangers her health or that of her foetus.

The Prophet believed that every conceived child has a right to life, and there are strong Quranic injunctions against the killing of the child. Majority of Muslim jurists are of the opinion that the soul enters the body of the unborn baby until the time it is ensouled (*nafh-al-ruh*), which they think is in the sixth week of pregnancy; and if an abortion is absolutely necessary, it has to be performed before that time. The Hanafis permit abortion until the end of the fourth month. Others, particularly the Maliki scholars, feel that the matter of when the soul enters the foetus is unproven, and therefore, prohibit abortion absolutely. After ensoulment, abortion is allowed if the pregnancy will endanger the mother's life, the principle being that the real life of the mother takes precedence over the potential life of the unborn.<sup>362</sup>

The Medical Termination of Pregnancy Act is a uniform law and is applicable to all religious communities and citizens in India. Under the act, pregnancy may be terminated within 12 weeks and may also be terminated after this if the pregnancy involves a risk to the life of the women or can result in grave injury to her ( both mental and physical ). An explanation states that anguish caused by an unwanted pregnancy resulting from the failure of any contraceptive device or method would amount to grave mental injury. The grounds for termination are thus quite broad.

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<sup>362</sup> R. W. Maqsood, *The Muslim Marriage Guide* (New Delhi: Goodword Books, 2002), pp. 141-142.

## **8. Conclusion**

One of the major legacies of colonial rule in the Indian subcontinent was the categorisation of personal law as purely religious law. Further, though the avowed policy of the British colonial administration was non-interference in the personal laws of various communities, this policy was conveniently bypassed when it suited their administrative, economic or political interests. Thus, criminal laws and civil laws (other than family laws and succession) were changed and English secular law was brought in to regulate areas like trade, commerce and law and order as this suited their administrative and economic interest. The retention of personal law also suited the British political interest as this helped in their policy of divide and rule. As a consequence, further development of personal law did not take place though Muslim women got rights to inheritance and some grounds for divorce. However, even the Shariat Act and the Dissolution of Muslim Marriages Act were passed at the behest of fundamentalist and patriarchal interests. After Independence, the Indian state also followed the policy of retaining personal law of the separate communities in the area of family law and succession. To begin with, the Indian state was more interested in creating a unified nation and did not want to upset any Muslim sentiments and thus subordinated Muslim women's rights to this. Later on however, the Indian state openly colluded with the fundamentalists and conservatives who vehemently opposed reform or reinterpretation of the MPL. Every time the question of reform was posed, fundamentalist and patriarchal interests raised the bogie of religion being in danger in order to further their political interests and establish their hold over the Muslim community. By this time, personal law had become the major marker of Muslim identity in the minds of many.

Though large constituents of the Indian women's movement has been trying to argue for reform of personal law to make it just and equal, their struggle has been long and difficult. Muslim Personal Law as it is practiced in India contravenes CEDAW in several respects. Muslim women do not have equal rights regarding marriage as Muslim men in India can marry upto four times. They do not have equal rights to divorce as Muslim men continue to exercise an unilateral right to divorce. The right to freely choose a spouse is also not available to them. Their contribution to the building up of the matrimonial home is not recognised and they are discriminated against at the time of dissolution of marriage since they do not have an equal right to matrimonial property. Though their right to maintenance has been established through court cases, the maintenance amount is invariably insufficient for their survival. They are not equal guardians of their children inspite of being the primary care takers in the matrimonial home. Child marriage has not been invalidated under Indian law and this has major consequences for women's health. Their access to family planning and reproductive rights is limited by virtue of them being both members of a minority community and women.

Women's organisations and others interested in personal law reforms have explored various possibilities to bring about progressive changes in personal laws and bring it in consonance with the provisions of the Indian Constitution and CEDAW. Till the early 1980s most women's organisations and groups were campaigning for a uniform civil code. Their conception of this code was that of a gender-just code which would achieve equality between men and women. The concept of a uniform civil code

was, however, appropriated by the Hindu Right<sup>363</sup> which was mainly concerned with the introduction of a uniform code to homogenise different communities and was not interested in the equal rights of women. For the Hindu Right, Hindu women already enjoyed equal rights through the amendments in the 1950s. They wanted to impose these amendments on all communities.<sup>364</sup> Some sections of the Muslim community were also against the imposition of a uniform civil code in India. The stand of the Hindu Right made them even more apprehensive of the code as they feared that a Hindu Code might be thrust upon them. This stand also suited the fundamentalists within the Muslim community who raised the cry of Islam being in danger as they were in any case against reform.

During the agitation surrounding the Shah Bano case, women's organisations like the AIDWA managed to mobilise Muslim women against the anti-reform groups on the issue of maintenance as they were dealing with only this issue. During the campaign, besides using arguments based on women's equality rights other arguments that a denial of the right to maintenance could not be defended on the basis of the *Shariat*.

Since then, most progressive women's groups have been working on reforms within different personal laws. At a meeting of the

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<sup>363</sup> The Bharatiya Janata Party, the Vishwa Hindu Parishad, the Rashtriya Swayam Sewak Sangh, Shiv Sena and Bajrang Dal ( see the 1998 election manifesto of the BJP).

<sup>364</sup> K.Singh, 1994.

Muslim Personal Law Board, women's groups<sup>365</sup> demanded a standard *Nikahnama* which would include a clause denying the man the "right" to a triple *talaq* and the right to polygamy and would contain a provision for *talaq-i- tawafiz*. These groups have also demanded that the *mahr* be set slab-wise according to the difference in income. When the Muslim Personal Law Board circulated a model *Nikahnama* which did not contain these and other demands, women's groups again demanded that the standard *Nikahnama* be changed to remove all discriminatory provisions and include the rights demanded by them. Thus having a standard *Nikahnama* is one way of bringing about reforms in India.

Reform through legislation particularly in areas in which no law exists is another way. Women's organisations have suggested a law for compulsory registration of marriage and a civil law on domestic violence which would also contain a provision of residence for separated/divorced women<sup>366</sup>. In this way, secular laws which advance women's equality rights will be strengthened. In India there are already certain common laws like the Dowry Prohibition Act 1961 and others can be introduced provided the state cooperates.

In the meantime, Muslim women have won certain victories from the court and will continue their struggle for justice and equal rights through the legal system.

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<sup>365</sup> The AIDWA, the Action India—Delhi, Awaaz-Enisawan—Mumbai, the CWDS, the COVA—Hyderabad, Stri Mukti Sangathan—Mumbai, Majlis—Mumbai, the Masum—Poona, Sahr Waru Sanchetana—Ahmedabad, Suruchi Sampati—Kolkata, the Vikas Adhyayan Kendra—Ahmedabad, Women's Research and Action Group—Mumbai, the National Federation of Indian Women, the PUCL, the Joint Women's Programme, the National Alliance of Women—Delhi, Bazm-e-niswan—Bangalore, the Tamzeen-ul-Mohsinat, Bangalore, the Federation of Legal Aid Committee—Jamshedpur.

<sup>366</sup> Equal Rights Equal Laws, AIDWA, New Delhi, 2000.



## Chapter 4

### ***The Interplay of CEDAW, National Laws and Customary Practices in Pakistan: A Literature Review***

**Fatimah Ihsan and Yasmin Zaidi**

## **1. Introduction**

This study attempts to enhance the understanding of the linkages between national laws, 'religious' law and customary practices and the marginalisation of women. It aims to provide a platform for dialogue between religious scholars, human rights activists and government functionaries on the points of convergence and divergence between CEDAW and these laws and practices.

The focus of this study is a literature review of the subject with a particular emphasis on materials available from government sources and civil society. It does not take into account ongoing projects by a plethora of development partners in the areas of legal reform or access to justice, etc. The work of NGOs is also not a focus of this study; however, almost all the literature that has been appraised comes from the contributions of various partners in the civil society to highlight women's issues. The second source of information was through discussions from Focus Group Discussions (FGD).

## **2. Methodology**

The methodology utilised in this study was as follows:

- Collection of information on studies done on the subject of national laws pertaining to women and CEDAW and customary practices;
- Contacting relevant individuals and organisations for information and cross checking of various laws and their updates, if any;
- Three FGDs were carried out in Gujranwala, Jalandhar and Peshawar to understand community perceptions of women's rights reflected in national laws, customary practices



and *Sharia* and what they see as factors that uphold or minimise these rights.

The study period was spread over several months, with an extensive review and meeting key persons in organisations. Everywhere we found people more than willing to share their time, expertise and resources to facilitate us. The process of collecting material, perspectives and views became one of mutual sharing with the authors also sharing information on CEDAW, and national laws, particularly with the smaller NGOs and the communities represented in the FGDs. One of the important aspects of this study and its approach is the analytical framework of various laws and customary practices – regarding women – compared to the 16 substantive articles of CEDAW. The matrix provided in Appendix V has been formulated in a way so that each article of CEDAW is examined in light of the constitution, national laws, Islamic laws and customary practices. The common strand running through the study is to assess women's human rights — social, political and economic — and compare them with the prevailing laws in order to point out the gaps that persist.

### **3. Human Rights of Women in Pakistan**

The situation of women in Pakistan varies greatly depending on the geographical location and class. Generally, women in the urban areas and from the middle and upper classes receive more benefits than women in the rural areas (75 per cent of women live in the rural areas) or poor urban women, who continue to suffer from lack of basic social services as well as abuse of their rights at all levels. Although, some women may enjoy certain privileges, the majority remain disadvantaged and are designated as second-class citizens due to systematic discrimination purported

by social and cultural norms and attitudes.<sup>367</sup> This is the case even though women constitute a significant 48 per cent of the population.

Women's social and legal status has undergone many changes — in over five decades since the creation of Pakistan — some of the changes have been beneficial for women, but, a few have been highly regressive and discriminatory such as the Hudood Ordinances — promoted by General Zia-ul Haq as part of his politically motivated Islamisation (discussed later) which continues to haunt women and minorities even today.

The present government has taken some positive steps such as the creation of a Permanent Commission on the Status of Women, declaring honor killings as murder, increasing the political participation of women and formulation of a National Policy for Women (to name a few), yet, violence against women remains high in Pakistan matched by the same level of inertia by the government. In addition to domestic legislation, which has largely failed to provide justice to women, Pakistan has also signed many international conventions, including CEDAW, which binds the state to implement the articles based on equity and non-discrimination of women and to report on their progress on a regular basis.<sup>368</sup> In the post-Beijing period, the government of Pakistan has adopted the National Plan of Action to a great extent — this covers 12 Critical Areas of Concern and women with disabilities.

The sections that follow will analyse the social, economic and political rights with reference to the informal law or customary

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<sup>367</sup> Human Rights Watch Report, 1999.

<sup>368</sup> An initial report and subsequent reports every four years.

practices, Islamic law and formal laws and in order to situate women's human rights in the complexities that surround it, throughout her life. The following table presents gender indicators of Pakistan in a comparative global perspective and highlights the inequities experienced by women in various spheres of life.

### **Gender Indicators of Pakistan in a Global Perspective<sup>369</sup>**

<b>Gender Indicators</b>	<b>High Human Development and ranking</b>	<b>Medium Human Development and ranking</b>	<b>Low Human Development and ranking</b>
<b>Gender-related Development Index (GDI)</b>	Norway-.0941/rank 1	Malaysia-.784/ rank 53	Pakistan-.469/ rank 120
<b>Gender Empowerment Measurement (GEM)</b>	Iceland-.847/rank 1	Malaysia-.503/ rank 45	Pakistan-.414/ rank 58
<b>Female Economic Activity Rate</b>	Iceland- 66.7	Malaysia-.48.7	Pakistan- 35.8
<b>Year women received the Right to Vote/ Right to Election/Seats in Parliament held by Women</b>	Norway- 1907, 1913/1907, 1913/36.4 lower house	Malaysia- 1957/1957 10.4 lower house, 26.1 upper house	Pakistan- 1947/1947 21.6 lower house 17.0 upper house

<sup>369</sup> Figures taken from *Human Development Report 2003*.

### ***3.1 Economic Rights***

Poverty is one of the biggest challenges in Pakistan, which has an adverse effect on women. Most households are headed by the husband/father who is the sole breadwinner of the family, although women headed households are not uncommon in Pakistan at present. Women's right to work, own property as well as the right to inheritance are violated on a large scale primarily due to certain social and customary practices.

Women generally do not have the right to choose the kind of work they would like to be engaged in. Typically, women take up employment only at the behest of the male members of their family. For men, the most acceptable types of work for women include piecemeal work that women can typically perform at home.

Of growing importance to female labour is the informal sector, which engages approximately 2 million women.<sup>370</sup> Home-based workers do not come under the domain of law, are often invisible and go unrecognised. According to a UNIFEM report,<sup>371</sup> women opt to work in the informal sector due to lack of qualifications and training, social and cultural constraints and lack of viable alternative modes for making a living. Women from bonded-labour families work for money, which is given to the family (males) and not to the women themselves.

The agriculture sector involves over 72 per cent of female labour. Rural women have to work inside the homes as well as help out the male members in the fields. However, men control the income earned through women's participation in agricultural labour.

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<sup>370</sup> Ibid.

<sup>371</sup> Progress of South Asian Women, 2003.

Access to credit for women might vary between the four provinces and in urban and rural areas, but on the whole it is low in Pakistan. However, some positive steps taken by the government include establishment of industrial homes to impart training of traditional skills and provision of loan facilities for women.<sup>372</sup> The First Women's Bank and the Khushali Bank provide loan facilities to women.

Despite some positive measures supported by the government, there are continuing gaps and challenges. Women's work continues to be dominated by gender bias; women's participation in the economy is also constrained by lack of public child care facilities; lack of access to resources and skills to meet the changing markets; and as an adverse effect of globalisation and liberalisation women are being forced into the unregulated informal sector.<sup>373</sup>

Women's right to inherit is a highly controversial issue and is also an area where there is substantial difference between what the Quranic injunctions say and what is actually practiced.<sup>374</sup> The need to keep immovable property within the family has led to women being denied their right to inherit. According to Balchin, "this has led to many outrageous customary practices. One example is that of *haq bakhshwana* found among feudal, especially Syed families in Sindh; either the girl is never married or she is 'married to the *Quran*.'"<sup>375</sup> Women rarely inherit their share, but even if they do, the ownership lies with the male members such as husband or brother. In contrast to the customary practices, "...the courts have consistently upheld women's rights to inherit.

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<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> Women, Law and Society, *An Action Manual for NGOs*, 2003.

<sup>375</sup> Ibid.

There is now a noticeable trend of women increasingly demanding their inheritance.<sup>376</sup>

### **3.2 Social Rights**

In Pakistan, as in many other countries, the inferior attitude towards women is present from the time of her birth, which is acknowledged with despair rather than joy. The girl child is taken as a form of liability – someone who will not be able to contribute anything to the family. Her only asset is her power of reproduction and that of being a sexual object<sup>377</sup>.

Early marriage is still common in many rural parts of Pakistan despite the Muslim Family Laws Ordinance of Pakistan, 1961, that established a minimum age for marriage for women at 16 years. The age for marriage for boys and girls differs in each of the four provinces. In Balochistan the suitable age for marriage of a girl is as soon as she reaches puberty, whereas some matches are even decided before her birth. In Sindh, the age for marriage for a girl is 14 years and above, whereas in NWFP, the age is 12-18 years and in Punjab the age is 16-20 (Balchin, 96: 28). The concept of *Watta Satta* (exchange marriages) is still common and is a direct consequence for preference for cousins so that control over estate can be maintained. As a result, many women are married off to paternal cousins who can be much younger than them.<sup>378</sup> In 1995, the Council of Islamic Ideology (CII) recommended that in order to stop violence against women, girls should be married according to their own choice. The CII

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<sup>376</sup> Ibid.

<sup>377</sup> Mumtaz, Khawar, and Shaheed, Farida, (eds.), *Women of Pakistan: Two Steps Forward, One Step Back?* (Lahore: Vanguard, 1987).

<sup>378</sup> Ibid.

also emphasised that those who violate women's right to choose her own partner, should be punished. (Balchin: 1996).

Women's right of divorcing husbands and obtaining *Khula* is something that is shrouded in many misconceptions. According to a study conducted by Raasta Development Consultants in Punjab and Sindh, from the chosen sample only 13 per cent men and 12 per cent women stated that women had the delegated right of divorce under clause 18 of the marriage contract (*Nikahnama*).<sup>379</sup>

In NWFP, Balochistan and Sindh, the custom of bride price is very common, where the bridegroom pays the father of the bride a sum of money and in return takes possession of the woman. At times, the bride price can be taken in the form of another woman.

Typically, in many areas of Pakistan, a man's honor is defined by the chastity and piety of women. Should a woman enter into any relationship with a man that is outside the norms of society, it means that she is subverting the order of things, and "undermines the ownership rights of others to her body – and indirectly challenges the social order as a whole. She becomes black, *kari* (Sindhi) or *siahkari* (Baloch)." <sup>380</sup>

Over time, the notion of tarnishing male honor has taken to include other so-called acts of defiance by women. If a woman expresses her desire to marry a man of her choice and takes the liberty of getting married to him, she can be killed or her father

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<sup>379</sup> A study of the Interplay of Formal and Customary Laws on Women, Punjab and Sindh Study, 2003, Raasta Development Consultants.

<sup>380</sup> Ibid.

can bring charges of *Zina* (see more under customary and *Sharia*) against her alleging that she did not contract a valid marriage.<sup>381</sup> Several women who have sought divorce through the courts have either been injured or in some cases killed.<sup>382</sup> In the same vein, women can also be killed for being raped since they become a social stigma for their family and tribe and therefore have to be gotten rid of.

According to Jillani and Ahmed, the right to life as laid down in Article 9 of the Constitution is violated when it comes to women. Law enforcement agencies have at times colluded with honor killings due to their own gender biases and the judicial response to such killings is equally disconcerting since courts that are the ultimate forums for justice are lenient when it comes to sentencing men who have committed the crime. This is despite the constitutional guarantee that “Any law or any custom or usage have the force of law, in so far as it is inconsistent with the rights conferred in this chapter, shall, to the extent of such inconsistency be void.”<sup>383</sup> The courts allow the plea of ‘grave and sudden provocation in cases of *karo kari* and often extend it to situations beyond the traditional concept, even though this no longer exists in the law.

Violence committed against women at home is generally swept under the carpet, which includes physical, verbal, sexual (marital rape) and psychological abuse. One severe form of domestic violence is burning women either by dousing kerosene over her or through ‘stove burning’. In most stove-burning deaths, the

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<sup>381</sup> Ibid., p. 15.

<sup>382</sup> In 1999, 29-year-old Saima Sarwar was killed in the lawyer’s office in Lahore.

<sup>383</sup> Hina Jillani, ‘Violence Against Women: The Legal System and Institutional Responses in Pakistan’ (draft document, AGHS, Lahore, 2000).



burnt area of the victim's body exceeds 30 per cent and can be as much as 60–70 per cent. According to medical experts, in a stove-burn case, arms, abdomen and legs get burnt, however, in most such cases, women's genitalia are also found to be burnt. Therefore, the nature of injuries, status of victim in the family and the frequency with which these so-called 'accidents' occur, point to a serious pattern that these women are not burnt by accident, but are victims of pre-meditated murder.<sup>384</sup>

The incidence of rape is not only prevalent in Pakistan, but is on the increase with one woman being raped every two hours.<sup>385</sup> Despite the heinous nature of such crimes, the onus of providing evidence is on women under the Hudood Ordinance. (Mehdi:98)

The literacy rates for women are abysmally low with about 70 per cent being deprived of the right to education. However, the present government is in the process of taking some positive steps (refer to the National Policy for the Development and Empowerment of Women and the NPA) such as announcing the Education Sector Reforms (ESR) and the emphasis on primary school enrolment for girls as well as provision of quality Education For All (EFA).<sup>386</sup>

Pakistan has a high rate of maternal mortality with about 50 mothers dying each day due to complications in pregnancy, childbirth and abortions. In spite of the shift in policy towards reproductive health, for the most part, the focus remains on family planning.

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<sup>384</sup> *Trial by Fire*, Report by Progressive Women's Association, 1998.

<sup>385</sup> Yasmin Zaidi, *National Scan on Violence Against Women*, UNIFEM, 2002.

<sup>386</sup> Government of Pakistan, Ministry of Women's Development, *National Policy on Development and Empowerment for Women*, 2002.

### ***3.3 Political Rights***

The Constitution of Pakistan does not discriminate against the participation of women in the political or public sphere of the country. According to the Constitution, women have the right to vote for members of the national and provincial Assemblies, have the right to be candidate to the Assemblies and Senate, right to be prime minister, right to be president, right to be elected speaker of assemblies and chairman of senate and right to be governor, chief minister and minister.

The actual practice is different from theory as there are several instances where women have been restricted from voting, however, no action has been taken by the government. In some other areas, older women vote instead of younger women. The Independence movement of Pakistan — in which women participated actively – did produce some seasoned women politicians, but the post-independence period failed to give them the required momentum. Among these women politicians, Fatimah Jinnah was the only one who contested the elections as a presidential candidate against Field Marshal Ayub Khan. However, in the succeeding years, some women did participate as candidates in the general elections.<sup>387</sup> The system of reserved seats for women in the legislature came to an end after the 1988 elections. As a result of this, women's representation in the legislative assemblies began to dwindle and thinned out considerably. For example, the proportion of women's representation in the last assembly was a meager 3.2 per cent.

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<sup>387</sup> S. S. Ali, *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law & the Laws of Pakistan*, (unpublished paper, 1995), p. 62.

However, under the present government, initially, seven women were inducted into the government as ministers. In addition to this, the government also reserved about 33 per cent seats for women in the different levels of local government. As a result of this, more than 40,000 women are at present members of local government institutions; of these, over a large number of women came through constituency-based direct elections at the union council level and a sizeable number of women are at the higher tiers of the local government. Many women contested elections for the seats of *Nazim* (mayor), *Naib Nazim* (deputy-mayor) at different levels and 16 of them were successful. In addition to this, 126 women, mostly Christians were elected on reserved seats for minorities.<sup>388</sup> Most of the women had no experience of contesting elections before (79 per cent) and more than half of them are illiterate. Currently, the government and the civil society organisations are involved in the training of the new councilors and legislators.

On January 19, 2002, the government of Pakistan announced a constitutional package to reform the electoral process. As a result of this the general seats were increased to 265.<sup>389</sup> In the aftermath of the general elections, which were held on October 10, 2002, there about 60 women in the National Assembly, 17 women in the Senate, and 128 in the Provincial Assemblies.<sup>390</sup>

The government of Pakistan has also set aside a 5 per cent quota for women in the public and private sectors. A 5 per cent

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<sup>388</sup> *Women's Participation in Local Government 2000-2001* (Lahore: Aurat Foundation, 2001).

<sup>389</sup> *Interplay of Customary and Formal Laws: Punjab-Sindh* (Raasta, 2003)

<sup>390</sup> Government of Pakistan, Ministry of Women's Development, Pakistan Country Paper, Commemorating Beijing Meeting, 2003.

quota has also been fixed for women in the judicial services.<sup>391</sup> At present, some women also hold ambassadorial positions.

It is obvious from the current political participation and representation of women that some positive changes have indeed come about. Whereas, some women have been elected into positions of decision-making and power, most of the rural women continue to be subsumed by their lack of independent decision-making (see under Social Rights, marriage, etc).

A review of the social, political and economic rights of women indicates that there is a persistent gap in what the national laws have accorded women in theory and what is actually practiced. Laws pertaining to women's economic rights need to be updated and amended to reflect current realities of more women entering the workforce. Under the current political set up women are represented at all levels, however, this initiative requires a constitutional safeguard. The Election Commission of Pakistan should be an independent body, which needs to be empowered to take action against those who undermine women's right to vote and ostracise their political participation.

Law pertaining to violence against women, particularly on domestic violence (which should include marital rape) needs to be adopted. Women's access to justice and the right to mobility also need to be safeguarded through enforcing existing laws and abolishing any discriminatory customary practices.

#### **4. Human Rights of Women and Formal Laws**

The legal status of women in any country entails their position under the laws of the land and it includes their legal rights as

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<sup>391</sup> Ali, 1995.

well as responsibilities as contributing members of the society. When considering women's legal position in Pakistan, it is imperative to consider the whole range of laws as well as customary practices, tribal codes and the social measures undertaken to form legislation favorable to women (Kamal: 2002:18). At the legal level, women's status in Pakistan is totally unequal to that of men, despite several constitutional guarantees of "equality before law and equal protection of law", non-discrimination and affirmative action. There are some formal laws that have placed women in a highly disadvantaged position such as the Hudood Ordinances<sup>392</sup> (discussed later in the chapter).

This section, focusing on formal laws, will examine: the Muslim Family Laws Ordinance 1961, the parallel judicial systems, Hudood Ordinances, 1979, Qisas and Diyat Ordinances (Sec 306 C) 1991, the Law of Evidence, 1984, and the personal laws for minorities. Women's personal laws have been especially highlighted since family laws and other personal laws percolate into many different parts of women's lives and it is here that women face discrimination through some formal laws and customary practices.

### **Muslim Family Law Ordinance, 1961**

Although, the process of Islamisation is connected to the period of General Zia, what is often overlooked is the fact that family laws in Pakistan are also based on religious beliefs.<sup>393</sup> At the time of Independence, Muslim family laws were not codified, rather,

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<sup>392</sup> Shehla Zia, Shehnaz Ahmed, and Naeem Mirza, *Legal Literacy in Pakistan* (Islamabad: Aurat Publication and Information Service Foundation, 2002).

<sup>393</sup> Fareeda Shaheed, Cassandra Balchin, Soohail Warraich, and Ayesha Gazdar, (eds.), *Shaping Women's Lives: Laws, Practices & Strategies in Pakistan* (Lahore: Shirkat Gah, 1998).

they were based on religious practices and traditions and were commonly known as personal laws. In 1937, the British enacted the Muslim Personal Law (*Sharia*) Application Act to override existing customary practices, which controlled the 'private' lives of Muslims. The demand to change this situation came from both Muslim men and women since they believed that most customary practices were incongruent with Islamic laws. Thus personal law was applied to marriage, dissolution, divorce, maintenance, dower, gifts, trust, etc, but, inheritance to agricultural property was excluded.<sup>394</sup>

In addition, the Dissolution of Muslim Marriages Act, 1939, was enacted to provide relief to Muslim women from stringent customary laws. Since child marriages were common in the subcontinent, the Child Marriage Restraint Act, 1929, further assuaged the sufferings of Muslim women.<sup>395</sup>

Jillani, Jehangir and Zia, points out that in the period after independence, personal laws regarding guardianship, marriage, divorce, inheritance and other marital rights were based on religious traditions. The 1955 Rashid Commission produced a report on the rights of marriage, divorce, etc remaining very much within the ambit of Islam, but attempting to give it a somewhat liberal flavor. This report found no popular support among the orthodox Muslims who dubbed the report as being un-Islamic. Due to this, the report was not implemented until the military government of Field Marshal Ayub Khan who promulgated an ordinance – Muslim Family Laws Ordinance (MFLO) – which included some of the recommendations of the Rashid Commission.<sup>396</sup>

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<sup>394</sup> Ibid., p. 98.

<sup>395</sup> Jehangir, Jillani and Zia "Muslim Family Laws and their Implementation in Pakistan," (Lahore: 1988).

<sup>396</sup> Ibid., p. 101.

The MFLO was meant to curb erratic divorce practices and second marriages. However, where it does provide for some safeguard for the woman against her husband who wants to contract a second marriage, it does not ban polygamy. Furthermore, as pointed out by Jillani and others, "...the penalty provisions are too inadequate to act as an effective deterrent. Similarly, though the procedure for divorce is to be rigidly followed, yet no effective method was formulated to get the aggrieved woman compensation like dower and maintenance speedily and effectively."

However, many of the provisions in the MFLO are considered to be favorable towards women and welcomed by women's groups in Pakistan, as Jehangir, points out, "There was no movement to reform the law and to bring it in accordance with the concepts of equality, justice and fairness. To the contrary, the ordinance was jealously guarded as a milestone for women's rights in Pakistan."

The enforcement of the Ordinance of 1961 evoked opposition from the more conservative quarters in Pakistan. According to a special bulletin by Shirkat Gah,<sup>397</sup> hearings on some 37 petitions challenging sections of the MFLO as being unislamic have been continuing since 1993. The most recent petition of the FSC was in January 2000 which challenged registration of marriage, polygamy, and procedure for divorce. The attack on the MFLO from the FSC goes on to show that though MFLO is not the most liberal family law, yet, the orthodox sections of society

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<sup>397</sup> Women's Rights in Muslim Family Law in Pakistan: 45 Years of Recommendations vs. the FSC judgment (January 2000) Shirkat Gah Women's Resource Center.

have continued to challenge it during its life of over 45 years. Presently, there are some amendments being suggested to the MFLO; however, most of these are procedural to bring it in line with the Local Government Ordinance, 2000.

### **Parallel Judicial Systems and the Hudood Ordinances**

One of the tragedies that prevails the judiciary in Pakistan is its subordinate position; there have been many instances of interference with the judiciary by the executive. According to Ahmad, the Constitution itself permits such interference, the stipulation to Article 200 provides that the president can, “dispense with the consultation requirement stipulated with regard to transfer of judges....”<sup>398</sup> In Pakistan, almost all governments that have come to power, have tampered with the Constitution (and the judiciary) for their own political gains. During Zia-ul Haq’s regime, for example, his penchant for Islamisation was in fact, to pacify certain sections within the religious/political milieu and as a consequence, he instituted an analogous judicial system.

The Constitution of 1973 proposed a system of courts with the Supreme Court of Pakistan at the apex. The Constitution of Pakistan (1973) enshrines certain religious principles in its essence and all laws are to be enforced through a system of civil courts alone.<sup>399</sup> However, this structure was altered to create alongside it another system of religious courts during the regime of General Zia-ul Haq in his efforts of Islamisation. Some of these parallel judicial systems are applicable to the tribal areas,<sup>400</sup> but, there are

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<sup>398</sup> Balchin, Shaheed, Warraich, Gazdar, 1998.

<sup>399</sup> Ibid.

<sup>400</sup> For details see, S. S. Ali and K. Arif, *Blind Justice for All: Parallel Judicial Systems in Pakistan: Implications and Consequences for Human Rights* (Lahore: Shirkat Gah, 1998).



a number of them applicable to the entire country. According to Ali and Arif, these include.<sup>401</sup>

- The Federal *Shariat* Court<sup>402</sup> which was constituted under Article 303 C of the Constitution, the *Shariat* Appellate bench, constituted under Article 203F of the Constitution. These judicial forums have the brief to determine whether or not existing legislation is in line with Islam.
- A parallel criminal court system – these are in addition to military courts – through the promulgation of the Special Trials Ordinance.

Ali and Arif make the point that the Federal *Shariat* Court and the *Shariat* Appellate Bench were forced as part of a package into the Constitution in order to provide legal cover to Zia-ul Haq's martial law since it was only partially recognised by the Supreme Court of Pakistan. When there was no moral justification left to extend his rule, Zia-ul Haq used Islamisation as a crutch (since this was the major opposition to Zulfikar Ali Bhutto's People's Party in the 1977 elections). The Council of Islamic Ideology (CII), was reactivated and given the task to codify the Hudood Laws, which were promulgated in 1979. In order to enforce these laws a system of courts was required, which were subsequently constituted through the addition of Chapter 3-A to the Constitution. Thus, the legal provision was set in place for creation of *Shariat* Benches in the High Courts as well as a *Shariat* Appellate Bench in the Supreme Court.<sup>403</sup>

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<sup>401</sup> Ibid., pp. 5-6.

<sup>402</sup> The Council of Islamic Ideology already performs the function entrusted to the Federal Shariat Court.

<sup>403</sup> Balchin, Gazdar, Shaheed, Warraich, 1998.

The task of these newly created forums was to assess petitions on their Islamic merit and if they were deemed not to be so, were struck down. In 1980, Chapter 3-A of the Constitution was replaced which legitimised the formation of the Federal *Shariat* Court (FSC). Through this, the General had an upper hand whereby he could appoint judges to the FSC, which essentially became the appellate forum of trial under Hudood Laws. The FSC and the *Shariat* Appellate Bench consist of some religious scholars as well who may or may not be well versed in law and, “moreover, Pakistani *Ulema* are notorious for their misogynistic views and are unlikely to interpret Islamic law in a manner favorable to women’s rights.” (Ali and Arif: 37)

The Hudood Laws are constituted of five criminal laws: covering property ordinance (dealing with theft and armed robbery), *Zina* ordinance (dealing with rape, abduction, adultery and fornication), Prohibition Order (dealing with alcohol and narcotics), *Qazf* Ordinance (dealing with false accusation of *Zina*), and the Execution of the Punishment of Whipping Ordinance (dealing with the mode of whipping for those convicted under the Hudood Ordinances).<sup>404</sup> Though the *Zina* ordinance deals with rape, it does not include marital rape. According to Jehangir and Jilani, the pre-Hudood ordinance criminal laws provided some protection to women and children. Rape was a crime punishable for men alone and women could not be charged for the offence of rape.<sup>405</sup> The Hudood Ordinances have changed this situation whereby women and children can both be accused in the crime

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<sup>404</sup> Asma Jehangir, Hina Jilani, *The Hudood Ordinances: A Divine Sanction* (Lahore: Rohtas Books, 1990), p.23.

<sup>405</sup> *Ibid.*, p. 85.

of *Zina*.<sup>406</sup> The *hadd*<sup>407</sup> (limit; carrying a mandatory punishment) punishment for a married person committing *Zina* is *rajm* (stoning to death) and for an unmarried person is a hundred lashes in a public place. The other category of punishment is *tazir* (discretionary punishment), which basically means that if the crime cannot be proved under *hadd*, then the person is liable for punishment under *tazir*.

### **Laws of *Qisas* and *Diyat* (Retribution and Blood Money)**

This law is discriminatory towards women as well since it puts a monetary value (blood money) on human life and creates a potential for unequal treatment under the law. A woman can only give her testimony on the testimony of two male witnesses. This law has given legal cover to the custom of *swara* (giving women in exchange to settle a dispute). *Diyat* payable for woman is half that of a man and according to one judgment of the superior court, if a man kills his wife and the couple has children, the husband cannot be sentenced to death.<sup>408</sup>

### **Qanoon-e-Shahadat (The Law of Evidence) 1984**

This law reduces the testimony of women to half in financial matters and matters of future obligations. Article 128 (1) of this law states: "Birth during marriage is conclusive proof of legitimacy". This article gives reason to husbands to doubt the moral character of their wives without proof and puts the responsibility for the child's maintenance upon the mother of an illegitimate child.<sup>409</sup>

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<sup>406</sup> Ibid.

<sup>407</sup> Means the limit – for details on *hadd* and *tazir*.

<sup>408</sup> *Women and Law*, National Report for Pakistan (Lahore: Shirkat Gah, 1994).

<sup>409</sup> Ibid.

Most of the cases that have appeared before the FSC relate to the offence of *Zina*. Empirical evidence has shown that the addition of *Zina* Ordinance has changed the mode of handling sexual crimes.<sup>410</sup> There are many cases of women complaining of rape (*Zina-bil-jabar*) who have become pregnant as a result and are accused of the offence of *Zina* by the police. In some cases, the court has given the benefit of doubt to the co-accused male and set him free whereas the woman is unable to prove rape to the satisfaction of the court (as it requires the testimony of four adult Muslim male witnesses for rape).<sup>411</sup>

### **Non-Muslim Women and Personal Law**

Non-Muslim women face the same disadvantages in society as Muslim women, but may be said to face a further disadvantage of belonging to a minority community in a pre-dominantly Muslim country. According to a study done by Raasta, "...any attempt on the part of the women's organisations in Pakistan to help them is countered by minority men as being an attack on their religion and customs."<sup>412</sup> The government of Pakistan has, over the years, set up three commissions and one committee to report on the status of women. However, only one touched upon issues of minority women (Christians only). It was observed by the commission that the Divorce Act, 1869, was enacted over a hundred years ago and needs some attention. Also, the MFLO Ordinance of 1961 which provides some supportive laws for

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<sup>410</sup> *Interplay of Customary, Formal and Informal Laws on Women: Punjab*, Raasta Development Consultants, 2002.

<sup>411</sup> R. Patel, *Islamisation of the Laws in Pakistan* (Karachi: Faiza Publishers, 1990) p. 25.

<sup>412</sup> *Interplay of Customary, Formal and Informal Laws on Women: Punjab*, Raasta Development Consultants, 2002.

women are not applicable for minorities since these laws pertain only to Muslim women. The present commission on the Status of Women (2000) has indicated that it will look into the laws affecting minorities.<sup>413</sup>

Ahmadis (or Qadianis as they are often called), follow the Hanafi law with some minor modifications. Marriage, divorce, custody of children and succession are dealt with according to this school of jurisprudence. However, after Bhutto's government declared Ahmadis as non-Muslims, the administration of these matters is handled by a local *Kazi*, or an appellant board or *Khalifa* located at *Rabwah*.<sup>414</sup> In terms of personal laws, the *fiqh Ahmadiya* (the published Ahmadi Law) is applied and not the MFLO.<sup>415</sup>

In the case of Christians, there is no law dealing specifically with succession and inheritance. The Christian Marriage Act, 1872, which applies to all Christians living in Pakistan is a supportive one; in the event a Christian woman's non-Christian partner contracts another marriage, the former can protect herself as there is no provision for polygamy.<sup>416</sup> However, the Divorce Act of 1869 is relatively austere as it does not allow for an effortless divorce.<sup>417</sup>

There is no codified law applicable to Hindus with respect to marriage, divorce or maintenance, although, Section 488 of the Code of Criminal Procedure is applied in a limited way.<sup>418</sup> The

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<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Debrah deFina, (ed.), Papers of Seminar on Family Laws in Pakistan, AGHS Legal Aid Cell, 1990. Case law, however, does indicate that not all cases are dealt with by the Rabwah board and the MFLO is still invoked.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

Child Marriage Restraint Act of 1929, which is still enforced in Pakistan, defines child as a male under the age of 18 years and female under 14 years. However, the validity of marriages between children is not affected by this act. The MFLO amended the age for females to 16 years, but other minorities do not benefit from this change since they do not come under the MFLO. Therefore, there is a need to look at the personal laws of minorities as well. In Hinduism, marriage is a sacrament and there is no divorce law for Hindus living in Pakistan. This is also the case in inheritance, where Hindu women are left to their own devices. There is a great need for laws relating to divorce and inheritance for Hindus to be promulgated in Pakistan.<sup>419</sup>

For the Parsi community, the Parsi Marriage & Divorce Act of 1939 is applicable. The most important aspect of a Parsi marriage is that the man and woman have to belong to the Parsi faith. Polygamy is strictly forbidden under Parsi personal laws and a divorce virtually impossible for both the spouses.<sup>420</sup>

It is clear from a review of some of the formal laws applicable to women that while the Constitution guarantees basic rights to women, discriminatory laws contradict the fundamental rights of women such as the Hudood Laws, Laws of *Qisas* and *Diyat*, Law of Evidence and at times even the MFLO. There is a need to revise the personal laws for minorities and amend laws that discriminate against them. The Blasphemy Laws included in the Pakistan Penal Code – as amended during the first tenure of the Nawaz Sharif government, have long been a subject of controversy. These have been abused blatantly against minorities

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<sup>419</sup> See Chapter 3 of this study regarding changes to Hindu family law.

<sup>420</sup> *Interplay of Customary, Formal and Informal Laws on Women: Sindh*, Raasta Development Consultants, 2002.

as well as some Muslims in order to victimise opponents or rivals. The present government took a brave step forward by announcing some procedural changes in this law, but had to back down immediately due to pressure from the religious sections of society.

The Hudood Ordinances also discriminate against minorities since they stipulate that a non-Muslim's evidence is not admissible in cases liable for Quranic punishment and "carries less weight than that of a Muslim."<sup>421</sup> The religious intolerance in certain areas of Pakistan is extremely high. Thousands of Hindus serve as bonded labor; Ahmadis are denied freedom of expression and cannot use Muslim burial grounds, and there is on-going violence against the Shia sect.<sup>422</sup>

## **5. Women's Rights and Customary Practices**

Although customary practices in Pakistan vary from region to region, yet one uniform trend that prevails is the subordinate position accorded to women. This deeply entrenched notion overrides the rights of women provided under formal and religious laws.<sup>423</sup>

As pointed out by Balchin, within custom there is a range of variations from conservative to progressive, and these changing

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<sup>421</sup> Voice of the Asia Pacific Human Rights Network, <http://www.hrdc.net/sahrdc/>

<sup>422</sup> Ibid.

<sup>423</sup> This section is based primarily on the findings from the focus group discussions conducted specifically to ascertain women's perceptions of their rights, and the following documents: Ali, 1995; Interplay of Formal & Customary Laws on Women (Raasta study covering the 4 provinces of Pakistan 1997-2003).

patterns need to be identified and made more visible, so that 'culture' or 'custom' is not seen as immutable. In order to understand customary practices, and to uproot ones laden with gender discrimination, it is important to separate them from the web of religion.

An important objective of the Islamic religion was to bring about a social revolution among the people of Arabia and the world at large. To this end, the *Quran* and the *Ahadith* contain a number of injunctions, rules and regulations identifying practices averse to women, children and the disadvantaged groups in society. This is borne out by the fact that a major part of the *Quran* focuses on protective and corrective injunctions for the advancement of women.<sup>424</sup>

In Pakistan, two divergent points of view have evolved, with a whole range of perspectives in between. On the one hand is the conservative, religion-based view, which emphasises the rights and obligations of men and women as laid down in Islam. This view often overlooks the fact that Islam as it is practiced is quite varied between different schools of Islamic belief. Furthermore, the *Sharia* is not a uniform set of laws that are agreed upon by the different schools of thought in Islam. These schools have differences in their interpretation and application of Quranic injunctions, in the relevance or authenticity of various narratives and traditions.

The secular view takes a cautious stand in that it shies away from placing rights solely within a religious framework. This is due to the misuse and discrimination that has been carried out under

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<sup>424</sup> Ali, 1995. p. 45.



the guise of 'religion'. Despite this caveat, it is difficult not to advocate for rights within a certain context and since the overall framework of Pakistan is religious, the proponents of secularism also use religion as a point of departure. Therefore, there is an inherent similarity in the two points of view; both ignore the fact that the present status of women is not necessarily due to 'religion', but rather stringent patriarchal customs and traditions. In many tribal parts of Pakistan, the importance of tribal and ethnic identity precedes that of religious (Islamic) identity thereby giving way to customary laws and practices.

According to Shaheed,<sup>425</sup> the intersection of culture with customs, laws and politics has direct implications for women; it is the power elite who define what shape culture will take and its impact on women; in particular through informal laws and practices, many of which are deeply internalised and relate to the private realm. These informal laws are not neutral in nature but are sanctions for transgression and as in formal law, and these sanctions reflect the ideology and worldview of those with the power to enforce. For example, the practice of 'honor killing' is reinforced by law enforcing agencies (the police and the judiciary), which take a lenient view of the crime<sup>426</sup>. There is a clear dissonance between the state laws and the practices and beliefs of the citizens. Shaheed believes that this is due in part

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<sup>425</sup> Farida Shaheed, 'Engagements of Culture, Customs and Law: Women's Lives and Activism,' in Fareeda Shaheed, Cassandra Balchin, Soohail Warraich, and Ayesha Gazdar (eds.), *Shaping Women's Lives* (Lahore: Shirkat Gah, 1998).

<sup>426</sup> CEDAW Articles 2(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation.

to the failure of the state to create a cohesive, nationally integrated society.

#### **4.1 Social Rights**

##### **Age of Majority**

The Constitution of Pakistan recognises the free agency of adult citizens, men or women. Different national laws, however, quote a different age of maturity for women. Section 3 of Majority Act, 1875, states: "every person domiciled in Pakistan is deemed to have attained majority when he shall complete the age of 18 years and not before". Applicability of this law is not uniform and is subject to exceptions e.g. in matters of dower, divorce, custody a person is considered an adult even if s/he has not attained the age of 18. Under the Hudood Ordinance (1979) the age of criminal responsibility for girls is puberty while for boys it is 18 years; hence a girl as young as 9 years can be exposed to the rigors of the law.

In customary practice, there exists a paradox: a girl is seen as an adult when she reaches puberty, even if it is at age 10; on the other hand, she is never an 'adult' as a '*wali*' or guardian is needed for her to exercise any economic, social or legal agency. The rights of women are compromised when the state fails to recognise, and enforce a fixed age as adulthood. In general, a woman is not *sui juris* or a free agent under customary law and practice, and is seen as the property of her father, brother, husband, or other male family members.

##### **Right to Marriage**

This commodification of women is most visible at the time of marriage. Under *Sharia*, marriage is seen as a social contract

between two consenting adults and women have the right to make their own decisions and set the terms of their contract. In practice, however, a girl's biological ability to bear children, even if it is fragile at such a young age is seen as enough, especially in tribal society. Here the consideration is the concept of honor, and the premium placed on virginity. Families will send a young daughter who has begun menstruation, off to her prospective bridegrooms home (regardless of whether he is underage, or perhaps much older) since then they will not have to vouch for her virginity and purity since the groom's family is now responsible. Incidents are known where these young girls are raped by older members of the family or by the groom himself if he is in his teens or beyond.

Women are often not allowed to participate in the drawing up of her marriage contract; in many areas she can be bartered away at a suitable bride price, known as *sar paisay* in Pakhtun society (most of the money is taken by the male relatives and a small amount spent on clothes, household effects etc for the bride). The amount of bride price is a matter of prestige and esteem for the family and reflects their social status. The male relatives act as the agents for the bride and after her token consent represent her in the *nikah* ceremony. Often a slight a nod of the head suffices for the 'consent' that Islamic tradition requires. The contract is mostly verbal in rural areas of Pakistan, ignoring the written contract as required by law. (In urban areas, the Raasta study found that approximately half of all marriages are registered as required by the law). The ownership of the woman is thus transferred through the *nikah* to the husband, who then assumes total control over her life. Even if he dies, the widow remains the property of the male kin of her husband, who usually prefer to marry her off to either the dead man's brother or to some other male family member.

The bride price or *vulvar* as it is known in the NWFP is also a means of trafficking women. One woman, can be re-sold by successive 'husbands', much like property. However, as the Raasta study points out, the practice of *vulvar*, while it is more prevalent in the rural areas, is on the decline and is found in only 12 per cent of urban households. The practice is also confined to a few areas. In order to address this issue, an anti-trafficking legislation has been promulgated but strict enforcement of the law needs to be taken in this regard.

In Punjab and Sindh, the practice of dowry is common. The terms of marriage are not necessarily completed once it has taken place; fresh demands can be made on the girl's family; failure to comply can result in an increase in domestic violence, divorce or in extreme cases burning.

The practice of exchange marriages known as *watta satta* (Punjab), *addo baddo* (Sindh) and *badla* (NWFP) is still prevalent in Pakistan. This practice refers to the marriage of siblings with another pair of siblings. More often than not, it is an uneven match, with one girl being used to offset some imbalance in the social status/looks/age/etc of the brother. Frequently quarrels among one couple will lead to a tit-for-tat quarrel amongst the other. A divorce in one couple, will lead to a forced divorce in the second one, for the purpose of revenge or violence.

Consistent with this view of women as property of the men, they are offered as peace offerings to settle blood feuds. This custom is known as *swara*, or *vani*. Sometimes the offering may require that more than one girl be handed over to the aggrieved family, especially if she is a minor. Fathers have been known to break the teeth of a minor to make her appear older (thus

avoiding having to give up two girls).<sup>427</sup> This practice is increasingly being seen as unacceptable, and Section 310 of the Pakistan Penal Code (PPC) actually rejects this practice. However it has been construed to be acceptable since it is a part of the 1991 amendment that incorporates the *Qisas and Diyat Ordinances*<sup>428</sup>.

The objective of the above is of course, to make the man pay through this assault on his honor. The concept of honor takes the brutal form of *karo kari* and *siah-kari*, where a couple suspected of having extra-marital relation is punished by death. Usually it is the woman who is killed, while the man has the option to bargain for his release or simply disappear. It has been noted that *karo kari* is often used as an excuse to settle property disputes or other family/community disputes. This custom is accepted as legitimate by community institutions (*jirga/panchayat* etc); the judiciary and the police usually ignore the formal requirements of their position and give the perpetrator a lenient sentence.

### **Divorce**

Divorce, though not frequent, is most often a verbal pronouncement (repeated thrice in immediate succession) by the man. This popular version of 'Islamic law' is the most common. The more stringent divorce procedures noted in the MFLO and in the main *Madhahib* are ignored. Divorce is on the rise in the urban areas; amongst low income groups in parts of the Punjab, it carries no stigma. Usually, however, a life-long separation is

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<sup>427</sup> Discussion with NGO activist working on *Wanni*.

<sup>428</sup> A Bill on honor killing was passed by Parliament in 2004; while it was diluted and compromises women's rights on a number of key points, it has recognised the practice of *swara* as unislamic and also a crime.

preferred to divorce, especially where the marriage is within the family (also for economic reasons: even if they are poor, women believe in the male as the provider; similarly the male provides personal security to a woman).

Divorce is perceived as the worst kind of abuse a man in Pakhtun society can have, being called *zantalaq* if he divorces his wife, since she represents his honor, which can now be taken up by any other man. The right of *Khula* i.e. divorce initiated by a woman, is rarely practiced and has been made cumbersome by various legal requirements, even though there is no clear agreement among judges on whether *Khula* is a woman's right, or as often happens in lower courts, can be refused. However, increasingly women, particularly in urban areas, are using their right of *Khula*, with the support of their natal family.

### **Custody**

In addition to economic and personal insecurity, women fear losing custody of their children in case of divorce. The *madhahib* differ on custodial rights of the mother and the father, depending on the age of the girl child and the boy. (Custodial rights of mother: Hanafi law: boys below 7 years, girls until puberty. Shafei law: until the girl is married. Shia law: boys until 2 years, girls until 7 years). Regardless of custody, the father remains the guardian of the children. However, customary practice extends this to mean physical custody of the child, regardless of age; custody becomes symbolic with male pride. In areas where *vulvar* is practiced, custody remains with the father, no matter what the age of the child; in others, very young children stay with the mother. In Sindh, peasant women face no problems in keeping the children. Custodial rights are also being influenced by the changing shape of the family: in extended families the father could rely upon women (sister, sister-in-laws etc) to take care of

the children; with the increase in nuclear families, this right is being ceded to mothers more often.

### **Reproductive Rights**

A strong son preference implies that women are expected to have children as soon as possible after marriage, and continue to do so until she has more than one son. In the past couple of years, the contraceptive prevalence rate has increased, and women now practice spacing, though a minimum of 4-6 children is still the norm. Women prefer to have the husband or the mother-in-law's support in making the decision for contraception, as consequence ranging from allegations of promiscuity to divorce can be severe. There is no state law against contraception, and within Islamic tradition many opinions in favor of family planning exist. Abortion, on the other hand is illegal by law, and is only justified on medical grounds. Customary practice also strongly disapproves of abortion (though it is practiced). While no statistics exist, it is believed that unsafe abortions are responsible for significant number of maternal deaths and disabilities.

### **Mobility**

In general, economic necessity dictates that women from lower income groups, in rural and urban areas have fewer restrictions imposed on their mobility. Rural women may work in fields, but social segregation and *pardah* are observed in public spaces. The norms are stricter among the Pushtuns. Among Baloch women, *pardah* is not observed strictly, and mobility is not very controlled.

In terms of mobility, there are different views about what the *Sharia* enjoins; a protective rule states that women must be accompanied by a *mehram* (that is any person the women cannot marry such as a brother or father, etc); the exaggerated concern

of physical protection (fear of rape i.e. dishonor) restricts women's mobility. Mobility varies with class, age and marital status. Article 15 of the Constitution guarantees freedom of movement to 'every citizen' and Article 26 provides for non-discrimination in respect of access to public places (other than religious places).

### **Education**

Education for girls is now widely accepted, perhaps more as a privilege than as a right. There are a few areas that do not concede primary education to women. Higher secondary education, or university education, though on the increase is not as commonly accepted. In urban areas, and indeed, in most professional colleges (especially medicine), the female enrolment is at par with if not more than male enrolment. The government has stepped up its efforts to realise the goals of "Education for All" (EFA) and to increase girls enrolment through various national and provincial level programs.

### ***4.2 Economic Rights***

Women can take up work only with permission from their male family members. In rural Pakistan, a large majority of women work in the fields; there are some professions/occupations seen as compatible with a women's perceived primary role of homemaker. Compensation for work, whether informal, formal or agricultural, is not equivalent to a male worker's. In general, women in paid work are acceptable only because of economic necessity, and can also be seen as a sign of shame for the man who is supposed to be the provider. This attitude is slowly changing, especially in the urban areas, and also because the rising incidence of poverty has forced families to send their young daughters out to work. Women will often conceal the



fact that they are working, by saying that they are attending 'classes' in various socially accepted skills (cooking, stitching etc). Notwithstanding the critique, the increase in micro-credit programs (First Women's Bank, Khushali Bank, and through NGOs), have assisted women to make small investments in their productive capabilities.

Customs and lack of mobility of women often means that they will settle for poorly paid jobs, or informal work. NGOs working with rural and poor urban women have been able to offer local women work, and their own women staff has also acted as alternative role models of working women professionals. It is no wonder then that the ultra-conservative males feel threatened by the presence of these 'NGO agents' and often pass various 'rulings' against them. This stands in contrast to the national policy of inducting women into all cadres, even as fighter pilots in the Pakistan Air Force.

### **Property Rights**

Property rights in Pakistan are generally denied to women as it is seen as going into the hands of the another family (her husband's); if a man dies childless his property is immediately taken over by the husband's family: this practice is called *tarboor* in Pakhtun society, but also exists in Punjab. This practice is in clear contradiction of Islamic injunctions but is prevalent across Pakistan.

In Sindh, women may be married off to the *Quran* in a practice known as *haq bakhshwana*; such a woman lives in social seclusion all her life, unmarried either because no match of suitable social status is available, or because the brothers do not want to share the property with her; in return for her giving up her rights her

basic needs (food, shelter) are taken care of. Fortunately, this practice is now rare.

While the *Sharia* provision of women's share in property is acknowledged, social tradition has found a way to circumvent it by equating it to dowry, or protection and care extended to the sister if she needs it (e.g. in case of divorce, or problems with her in-laws/husband etc). Even where property is given to women as part of the marriage contract, she does not exercise any control over it. The Constitution Article 23 asserts that every citizen has the right to acquire, hold and dispose of property in any part of Pakistan.

#### ***4.3 Political Rights***

The traditional and informal system of decision making present in rural communities across Pakistan is one from which women are completely excluded. Decision-making forums such as *jirga* and *panchayat* are essentially a council of tribal elders or 'chiefs'. The council will deliberate and pass decisions on all matters affecting the community. Its decisions are usually binding with severe sanctions for ignoring its rulings. In Pakhtun society for example, women do not have access to the *hujra*, (where men discuss matters and socialise). This is in contrast to the Constitution of Pakistan, Article 32 that 'ensures local government institutions composed of elected representatives with special representation of peasants, workers and women'; and states in Article 34: 'steps shall be taken to ensure full participation of women in all spheres of national life'.

The Local Government Ordinance, 2000, has specifically reserved 33 per cent seats for women, due to which almost 40,000 women are now 'elected'. The *jirgas* and *panchayats* in certain districts issued statements forbidding women to either vote, or run for

election in the elections of 2000-2001. Although this has been brought to the notice of the Election Commission, no measures appear to have been taken.

The Constitution also does not discriminate against women from elections to the Parliament or holding political office. Many commentators have noted that within the *Quran* there is nothing to suggest that women are barred from political participation or holding political office.

#### **4.4 Social, Economic and Political rights: Perceptions of Women (Focus group discussions)**

To understand women's perceptions of their social/economic and political rights, and what enables or inhibits them from asserting their rights, three focus groups were conducted in three different locations. The discussions focused on the factors that cause or reinforce discrimination against women: customs or traditions, lack of legal support, lack of awareness, or enforcement of laws that do not allow discrimination. Another purpose of the focus groups was to see what women themselves identify as the most important issues that need to be taken up.

Each focus group comprised 8-12 women from the community who had experienced discrimination in the social, economic or political sphere. Such discrimination could have been in the form of violence, or discrimination in economic activity (low wages for same work as men) or in political activity. The women were in the age group 18-50 years so as to get the views of young and old alike. The women were lawyers, councilors (local government), survivors of violence, and women representing the labor/agricultural class. The discussion lasted beyond the planned two hours as women were keen to share their experiences.

The discussion focussed around the following themes and issues:

1. Recognising discrimination in social, economic and political sphere.
  - i) What kinds of discrimination exist against women?
  - ii) Are these discriminations a threat to women?
  - iii) Are there any mechanisms that support women's rights? What are they? Note examples (legal, social etc).
  - iv) Do women have any rights according to:
    - a) customs,
    - b) the *Sharia*
    - c) national (Pakistan's) laws.
  - v) Which are they familiar with?
  - vi) What needs to be done to promote women's rights? Who should do it? With whom?
2. Obtaining support:
  - i) What are the problems involved in finding support to ensure rights?
  - ii) Where do women go if they want to get their rights addressed?
  - iii) Who/What supports them in seeking redressal
  - iv) What are the costs associated with seeking redressal? How are these met?
  - v) Are these seen as affordable?
3. Community influencing factors
  - i) What are the ways in which barriers to accessing support for women's rights can be addressed?

Focus group 1 and 2 were held in District Gujjar Khan, in a peri-urban and rural community respectively. The first group venue was a centre for vocational training and special education, along the main highway between Islamabad and Lahore. Focus group 2 was a village, deep in rural Gujjar Khan, and the venue was the home of a local woman. An NGO that has been working with these communities facilitated the logistics etc. Focus group 3 was held in Peshawar; here again a local NGO had invited women from rural and urban areas from around Peshawar. The women were from communities that had access to means of communication (radio, some had television, though not necessarily in their homes).

<b>FGD 1: Peri urban community Gujjar Khan</b>	<b>FGD 2: Village in District Gujjar Khan</b>	<b>FGD 3: Peshawar</b>
1. District Councilor	1. Student	1. District Councilor
2. <i>Tehsil</i> Councilor (middle tier of local government)	2. Teacher	2. Union Councilor, Karak
3. Homemaker	3. Teacher	3. Primary School Teacher
4. Homemaker (mother of special child) Union Councilor	4. Labor Councilor	4. Agricultural Worker; Homemaker
5. Homemaker	5. General Councilor	5. Agricultural Worker; Homemaker
6. Teacher working with special children	6. Home-maker	6. Agricultural Worker; Homemaker

- |               |                         |  |
|---------------|-------------------------|--|
| 7. NGO worker | 7. Union Councilor      | 7. Union Councilor/Activist/Media Person         |
|               | 8. Teacher              | 8. Primary School Teacher                        |
|               | 9. Homemaker            | 9. Project Worker                                |
|               | 10. High School Teacher | 10. NGO Worker                                   |
|               | 11. Homemaker           | 11. NGO Worker                                   |
|               | 12. Homemaker           | 12. Parliamentarian (MNA) and Legal Aid Activist |
|               | 13. Homemaker           |  |
|               | 14. Union Councilor     |  |

Women were fully cognisant of their rights, the discrimination they faced and of violation of these rights. At the same time, the awareness that they have rights, particularly as granted under religion, does not translate into an assertion of rights, nor does it (particularly the religious rights) give them the confidence or courage to stand up for it. All were very aware that it is the community and cultural norms that prevail over all else.

“I think when a daughter is born, the mother feels sad, because she knows that as a woman no matter what she does it will not be recognised; if the son does something everyone acknowledges it. The mother should treat the son and daughter equally. The mother tells the daughter once you are married you should not return to your parental home; we should not discriminate between our children” (#1-6, teacher working with special children)

“Sometimes it is the extended family the *biradari* that creates hurdles and we do not get any rights.” [#2-4 Union (Labour) Councilor, rural Gujjar Khan].

In response to rights under religion, women noted that religion gave them the right to education, women can work outside of her home, “a woman has the right to all kinds of work, whether inside the house or outside it”, women have the right to marry of their own choice, the right to property and inheritance. At the same time, “Religion may have given us rights, even the law has, but who follows it or implements it?” (3-12)

‘It is not that women are unaware or ignorant; women know their rights; but they cannot do anything because there is too much pressure on her (to conform), she is ‘majboor’, helpless.’ (1-2, Tehsil Councilor).

“We cannot raise our voices or fight for other women’s rights even within the family, because husbands do not permit us to. We don’t have the right to speak, how can we speak for others?” (# 3-6, agricultural worker/homemaker, Peshawar).

When asked why, if these rights were there they were unable to exercise them, the overwhelming response was “I think there is too much ignorance; a woman is not given any respect; she is not allowed to go anywhere, they just want her to do the housework”. (# 1-1 District Councilor).

It was interesting to note that women councilors, who have been directly elected to their seats in the Union Council, struck similar chords of helplessness in the face of social norms as did the rest of the women. That they have obviously overcome some of these hurdles was clear, but their words conveyed the sense of regret that rights recognised under religion and law have to struggled for.

At the same time, there is a clear recognition that the customs and norms have changed with time:

One woman shared how as young girls, she and her sister were the first ones in the village to be educated; how their grandfather, a religious scholar, encouraged them; they faced so much criticism that they moved to a hostel for some time; but had to curtail their studies without completing college. With a slight touch of bitterness she added, “Now the daughters of same people who criticised us, have become doctors...I feel bad, but then I also take pride in it that we were the first, and it is because of us that others could follow”. (# 3-11, NGO worker, Peshawar).

There was also a clear sense of the patriarchal dimension of discrimination and the arbitrary nature of male decision-making.

“Men control women’s rights...and it depends on their individual attitude and education (whether they ‘give’ women the rights)...some rights are given, others we cannot assert.” (3-7)

“No woman is involved in decision-making; no woman is involved in the ‘raazi nama’ (reconciliation document) the men say ‘you don’t speak, this is our work.’” (2-11, homemaker, rural Gujjar Khan)

“When we talk of rights we should think of the overall development, and the roots of the issue. Men are basically unaware of women’s rights; women have been given these rights since 1,400 years, but these men are unaware. They have no education and should be educated.” (3-11, NGO worker, Peshawar).

Women are told, don’t talk...this is men’s work. “*Saaf mana’a kar daitey hain...keh auratoun ka faisaloun mein koi dakhil nahin.*” They forbid us clearly, women have no role in decision-making. (3-4, agricultural worker/ homemaker, Peshawar).



Nowhere else does this come across so clearly as in the right to education, to marriage and inheritance rights. In each of these cases women quoted personal examples of how the restrictions were changed or lifted if the men of the family (the husband/ father/ brother) so wished. With male support they were able to 'ignore' resistance from the community as well.

"When my first daughter went to school I was ordered by my husband to accompany her; I had to sit all day at school waiting for her; sometimes she had extra classes; we would come back late in the afternoon; I had three other younger daughters to look after; it was so difficult to manage the household responsibilities, making arrangements for the other children to be cared for etc. When my second daughter went to school, my husband had softened by that time and did not insist that I go; it was a relief." (Pause; then angrily...) "It is the men's wish and ideas that we have to obey: it has nothing to do with religion! They can make and change the rules as they like!" (3-1, District Councilor, Peshawar).

"Yes, women have a right to marry of their own choice, the last wasn't accepted before, now that is changing." (#1-3, homemaker, Gujjar Khan).

Where rights are recognised and allowed to be exercised, they are constrained by male/societal discrimination and limits:

"Religion gives us the right to property and ownership of assets; but those who have it are not allowed to sell it." (# 2-15, rural Gujjar Khan).

"My brother is afraid that the property will be divided so he is not marrying his daughters." (#3-1 District Councilor Peshawar).

"Yes, we have the right to mobility, but we have to be accompanied by a child!" (#3-7, Union Councilor, Peshawar).

An older woman said, "I still have to take whoever is in the house, often my small nephew with me; sometimes it is not even a male, it is a small girl." Another piped up, "That is because they will ask the child where you went, who you met etc. It is not protecting you; it is controlling you and keeping an eye on all your movements!" (Peshawar) All the women laughed and agreed.

"Women and men can marry of their own accord, but they should include their elders and parents because they can guide them. There are customs and traditions but if we go against them, we need the support of men. Education is essential. Rebellion is not the answer." (#3-1, District Councilor, Peshawar).

"Yes we have property rights, but custom does not allow us to have them. We cannot ask for our inheritance rights from our brothers; brothers can ask for it; we can ask for mediation to resolve this, the last recourse is the *thana*, or the court. *Dandey ka zor hou tou mil jaye* (i.e. inheritance/property). ( #3-3, Primary school teacher, Peshawar).

And then, of course, there are consequences for not staying within the norms defined by the family and the community, in contravention of the laws and rights:

"Women criticise those who marry of their own choice; criticise that the husband does not belong to our clan etc. If we do this, then when we need help, (if there is trouble in the marriage) who will help us? Sometimes even if the parents give their permission, the relatives and the community does not accept it/ agree to it. How can we rid ourselves of this fear that if we leave our home to study or to work we will not be beaten? Who will help us? The police? The neighbours?" (#1-3 District Councilor, Gujjar Khan).

In NWFP, during the focus group discussions, women of a village related the extreme lengths that denial of their property rights can go to. Property and inheritance rights of women are recognised and protected by the *Sharia*, and people are aware of it. However, brothers will often only 'loan' the property to the married sister (often if it is agricultural land it provided some subsistence farming for the family and their food needs are fulfilled). She has to return it, or purchase it at market rates from her brother. Often, the women narrated, conflict arises because their husbands refuse to pay the brothers back, as they insist that it is their wives' right to inherit a share of the family property. The brothers will stop at nothing to regain the value of their property, and in case of resistance, often shoot their brother-in-laws, widowing their sisters, and making her children orphans.

"It is not a custom among us" (i.e giving property rights).

"A man was killed because he supported his wife when she asked for her share of the inheritance." (# 3-6, agricultural worker/ homemaker, Peshawar).

We are scared that if we ask for help, the situation will get worse.

"They keep our children" (referring to leaving an abusive marriage). (# 1-5, homemaker, Gujjar Khan) "We are afraid that the issue will escalate" (referring to asking for help to avoid physical abuse). (#1-1, District Councilor, Gujjar Khan) (3-11, NGO worker, Peshawar).

The consequences for choosing to marry are even more severe. "This can lead to honor killing even if it is our right under the law, but society and family do not recognise it." (3-12, legal aid activist and parliamentarian, Peshawar).

There is a (female) doctor who contracted a *nikah* (marriage) without her parents knowledge with a colleague; she is unable to tell her parents that she is already married...so they arranged her marriage with someone else. She has committed a religious transgression rather than face the consequences of a social one!"

There was a sense of despondency on what can really be done to protect women's rights and to support them in the assertion of rights.

"No one can help us. This is the fate of women."

Sometimes parents support us...but then they also ask us to compromise. (1-1, Gujjar Khan).

"Women councilors could help, but they are women and helpless as well."

"[If a woman's husband does not help her, how can the law help her (*Uski qanoon kya madad karey ga?*)" (# 2-15, Union Councilor, rural Gujjar Khan).

"The police cannot do anything." (#1- 3, homemaker, Gujjar Khan).

"Women are victimised everywhere, but in the other (developed) countries the law protects women, but not here. There is injustice everywhere, but would the police protect women here?" (#1-2 Tehsil Councilor, Gujjar Khan).

"*Aurat ki haisiat hi kiya hai keh wo huqooq manwai.*" (Women do not have any status, how can they assert their rights?) (#2-8, teacher, rural Gujjar Khan).

The role of local government, parliament, police, judiciary, family and community were discussed. Women admitted that the community can help by getting together and discussing their

issues, but usually there is a focus on compromise that does not provide them any relief; the councilors can help, if they were empowered enough themselves; but mainly it was the government that was seen as being able to expedite delivery of justice, if it would enforce its own laws, would penalise rights violations, and if it could be more accessible.

“Women have to make themselves strong internally.” (#1-4 Union councilor, Gujjar Khan).

“This courage (*housla*) can only be given by the parents, not by anyone else.” (# 1-1 District Councilor, FGD Gujjar Khan).

“Issues should be resolved through mediation, not by *baghawat* (rebellion).” ( 3-12, legal aid activist and parliamentarian, Peshawar).

“We ask for a *jirga*, get the elders to mediate and discuss it. Otherwise it will have to be the *thana* and the courts.” (#3-2 Union Councilor).

There were quite a few expectations from the women councilors though their current limited scope of being able to help was recognised as well.

“This is why there are women councilors so they can solve women’s problems.” (#1-5 homemaker, Gujjar Khan).

“We voted for the women councilors because we want them to solve our problems.” (# 2-2 Teacher, rural Gujjar Khan).

“We have expectations from the women councilors; we will support her to meet our expectations. If the councilor raises her voice for women’s rights and for women in distress then I will support her.” (# 2-10, High school teacher, rural Gujjar Khan).

“Women councilors can help. However, they are limited because they have limited space in the council itself...no secretarial support; the *Nazim* and other government functionaries are not helpful, they are not available at their offices. Women should be able to go to the *Nazim* and get help.” (# 3-1, District Councilor, Peshawar).

There was demand as well that justice be made accessible by ensuring mechanisms at the Union Council level, the tier of local government that is closest to the community and relatively more accessible to women.

“She cannot go to police stations or the court alone...in fact, they become her enemies. Justice should be accessible at the Union Council, near her somewhere.” (#3-12 Parliamentarian, Peshawar).

“Councilors can play a role in facilitating access to justice.” (#3-11 NGO Worker).

### **Enforcement of the Law**

“Legislation is weak, where there are difficulties, policies should be changed. Women in the national and provincial parliaments should legislate for these rights.”

(with particular reference to inheritance # 3-1, District Councilor, Peshawar).

The discussions from the FGDs clearly show that there is an awareness of rights of women under the law and religion. The sense of injustice being perpetrated by society and community in denying them these rights was also strong; there was a resigned acceptance of the situation, underlying which was the fear of ‘losing it all’ i.e. the little family support they have since the

social sanctions against those women who tried to assert their rights were very harsh. The example of the woman, a doctor (and not some uneducated woman), who married twice against her religious beliefs, to avoid the social sanctions she would face if she disclosed that she had married of her own choice, is a vivid example of the fear instilled in the women.

There is also anger at the government and its representatives and institutions for not upholding the law, and for allowing parallel systems of justice (community-based, male-dominated) to decide their fates. Women were specific in saying that the one thing that would give them confidence and would reassure them is the upholding and enforcement of law by the law gives themselves! Only then would they come forward to assert their rights.

Widespread education, especially of men, legal awareness and provision of legal aid, progressive legislation protecting women's rights, mass awareness etc were given quoted as ways of remedying the situation.

The right to education, mobility, choice of partner, economic and political rights are limited in customary practices. This is contrary to *Sharia*, which enjoins education, inheritance rights, right to work and other economic rights and is strict about forced marriages. However, it is the customary practice that prevails in reality. Customary law and practices are mostly discriminatory to women and enforced by a strict set of rules and punishments, administered by a parallel system of justice through the community. Due to women's restricted mobility, illiteracy, and lack of exposure to other cultures and practices outside their immediate social or geographical boundaries, these informal laws and practices are accepted as immutable, and *kismet* (fate) by the women.

The control of customary practices over women's lives is slowly decreasing, as literacy and access to mass media increases. Exposure through mass media to different systems and practices within the country will allow them to question discriminatory practices seen as unchallengeable. The state fails when it does not provide them with legal literacy, and also the means to meet their legal needs without fear or threat from their social structures. At the same time, statutory law that has caused confusion, and also replaced parts of the PPC, which were protective (as the Hudood laws have done) need to be repealed.

Women are also constrained to accept discriminatory practices because their access to justice is limited. Firstly, they are not aware of their legal rights; secondly, their restricted mobility prevents them from reaching formal institutions of justice. Lastly, these institutions are not perceived as being objective or protecting their rights; rather, women feel that they become vulnerable to exploitation because they have left the (imagined) protection of the home and family, and are now at the mercy of insensitive institutions and functionaries; legal proceedings take months and years; women can be remanded to government shelters, that function almost as subjails.

### **Human Rights of Women and Islamic Laws – The *Shariah*<sup>429</sup> Debate**

Since Pakistan is an Islamic Republic and the Constitution of 1973 also mirrors the same principles and beliefs, the quandary that proponents of human rights are constantly faced with is how to proceed with the struggle for equality. Should it be a

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<sup>429</sup> The terms *Sharia*, *Shari'a* and *Shariat* are used interchangeably in this chapter according to the sources from which they were taken, and all stand for the originally Arabic term 'Shari'ah', the historic legal tradition in Islam.



struggle that can be waged within the parameters of Islam or should the call for equality be based on secular principles? As Ali and Mullally point out, at a strategic level, it may be wise to wage the battle within the confines of Islamic reform since secularisation can alienate and exclude women. At the same time, if one opts for secularisation, it may mean relegating the field to fundamentalist who would continue to promote their own version of *Sharia*.<sup>430</sup> Jillani and others, explicate that the reformulation of the legal system in Pakistan under the Islamisation process has an inherent weakness in that the status of women has suffered immense corrosion and their powerlessness to injustice has only increased.<sup>431</sup>

In Pakistan, the zeal for Islamisation has been a constant with the only variables being the different governments. As aforementioned, the worst case of Islamisation began during the dictatorship of Zia-ul Haq in 1979, with the introduction of the Hudood Ordinances. However, even during pre-Partition times, when the Muslim Family Ordinances were promulgated, they were framed within the confines of Islam. At that time, however, the move came from women and men who had suffered under customary laws and believed that they would gain more rights under the *Sharia*. However, what happened in reality was a failure of the law-makers in overcoming rigidity and obscurantism.<sup>432</sup>

Since Islam has continued to regiment the lives of Pakistanis in one form or another—mostly for political expediency—it may be

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<sup>430</sup> Shaheen Sardar Ali, Siobhan Mullally, 'Women's Rights and Human Rights in Muslim Countries: A Case Study,' in H. Phoenix, A., Stacey J. (eds.) *Working Out new Directions for Women's Studies* Falmer, 1992) pp. 113-123.

<sup>431</sup> Jillani, Jehangir and Zia, 1988.

<sup>432</sup> Ibid.

worthwhile to recount some of the processes of Islamisation that have hit and continue to affect Pakistan. It would also be within the ambit of this chapter to delve into different perceptions regarding Islam and human rights and the debate on Islamic reform.

### ***5.1 Islamisation Process in Pakistan***

The proclivity for Islamisation in Pakistan has typically come from the orthodox conformists (religious lobbies) and has then been given legal cover by the government in power at the time.

Field Marshal Ayub Khan, (first Martial Law in Pakistan) promulgated the Constitution of the Republic of Pakistan 1962. The word 'Islam' had been dropped and some of the religious features of the 1956 Constitution were not integrated.<sup>433</sup> There was a growing demand from members of the National Assembly and politicians for Islamisation of the Constitution, which he agreed to. Again, during General Yahya Khan's Martial Law, the Constitution of 1973 was framed; the Constitutions of 1956 and 1962 were incorporated into this one and Islam was declared to be the state religion.<sup>434</sup>

Zulfiqar Ali Bhutto (PPP) abstained from bending under the whims of the religious sections in society; but in his final days in power, he too could not escape their wrath. Giving into pressure, his government banned liquor and gambling and declared Fridays as the official holiday instead of Sundays<sup>435</sup> When Zia-ul Haq usurped power, he used Islamisation to validate his stay in power by acceding to the cry for Islamisation. He

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<sup>433</sup> Patel, 1990.

<sup>434</sup> Ibid.

<sup>435</sup> Ibid.

thus, passed the Hudood Laws in 1979, the Qisas and Diyat Law and the Law of Evidence (discussed in detail above). These laws were and are extremely regressive and discriminatory for women as well as minorities. As has been mentioned in the previous chapters, Zia's campaign of Islamisation was accompanied by the creation of a parallel judicial system, the *Sharia'a Courts*, in order to implement the ordinances.

The democratically elected governments fared no better. Benazir Bhutto could not reverse discriminatory legislation for women. In 1991, Nawaz Sharif initiated the *Shariat* Bill. The present government of President Musharraf made some positive moves<sup>436</sup> in the beginning, such as the announcement of honor killings as murder and the procedural changes in the Blasphemy Law. Where nothing for the enforcement of the former was done, the latter amendment was withdrawn hastily due to pressure, again, from the religious groups. It has to be pointed out that throughout the process of Islamisation, women and minorities have suffered the most and their human rights have been constantly abrogated.

### ***5.2 Another Parallel Judicial System? Sharia'a in NWFP***

The most recent wave of public discussion and debate on the issue of *Sharia* in Pakistan has been initiated by the 2003 Provincial *Sharia'a* Act in the North West Frontier Province (NWFP). This act proposes for all Muslim citizens to follow Islamic law, which will be 'the supreme law' in the province, though it does not specify what form this law will take, or which of the four main *madhab/maslak*), or legal schools would be

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<sup>436</sup> Since the writing of this report, certain steps have been taken: Parliament passed a bill on honor killings, the discriminatory Hudood laws have been sent to the CII for review etc.

followed. An accompanying bill, the Hasba (Accountability) Bill, which is being debated in the same provincial assembly, chalks out a plan to enforce the “Islamisation in the NWFP” project, envisaging the creation of a “parallel system for judicial, police and accountability functions”.<sup>437</sup> This, if enacted, would create yet another layer of parallel legal systems present in the country.

As described by I.A. Rehman, the Hasba Bill proposes to appoint a *mohtasib* (Ombudsman— proposed to be a religious scholar and qualified to be a judge of the Federal Shariat Court), who would oversee the work of the provincial administration (save the high court and sub-ordinate courts) and secondly, the Mohtasib will be empowered to stop whatever is ‘bad’ an ‘un-Islamic’, and promote virtue and Islamic morality in all spheres of life, reminiscent of the Taliban in Afghanistan. Another point of concern that arises here is whether the NWFP government has the right to adopt measures like the Shariat Bill. Whereas some think that any elected government can do so, many believe that, “...not even the federal Parliament can claim legislature in absolute terms.”<sup>438</sup>

This is not the first time that *Sharia* has been imposed in the NWFP. In Dir district and Malakand Agency, *Sharia* has been implemented forcefully. According to the State of Human Rights in 2000, in the village of Dhog Darra Valley of Dir District, 73 cases were decided by the *Shariat* court set up in the area. Most villagers were filing cases before this court rather than making complaints to the police. There are accounts of how the *Sharia*

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<sup>437</sup> I. A. Rehman, “Look at the Hasba Bill Now,” *Dawn*, July 25, 2003.

<sup>438</sup> *Ibid.*

court was established that clearly challenge the constitutional laws.<sup>439</sup>

The commentary on the process of Islamisation in Pakistan goes on to prove that there are many interpretations of the religion and most interpretations are laden with political motives, which have affected the status of women and minorities consistently and negatively. However, the question remains, is there room for reformation in Islam that can accord women their rights or are human rights to be fought for within the framework of secularisation?

### ***5.3 The Shariah Debate***

Riffat Hassan has challenged the notion that “human rights can exist only within a secular context and not within the framework of religion.”<sup>440</sup> While Hassan has pointed out that there are many sources that form the ‘Islamic Tradition’, she underscores that the *Qur’an* is the ‘Magna Carta’ of human rights and that a large part of its concern is to free human beings from various forms of oppression. Hassan talks about ‘General Rights’ that Islam accords to all humanity; one of these is the Right to Work— she quotes from the *Quran*, to illustrate the principle of equality of the sexes thus established:

“...to men is allotted what they earn,  
And to women what they earn.”[4:32]

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<sup>439</sup> Human Rights Commission of Pakistan, *The State of Human Rights in 2000*, February, 2001.

<sup>440</sup> Riffat Hassan, ‘Are Human Rights Compatible with Islam? The Issue of the Rights of Women in Muslim Communities,’ <http://www.religiousconsultation.org/hassan 2.htm>

She goes on to say that while the *Qur'an* includes women's rights that are favorable, many of its women-related teachings have been used against women rather than for them.<sup>441</sup> Hassan asserts that "rights created or given by God cannot be abolished by any temporal ruler or human agency. Eternal and immutable, they ought to be exercised since everything that God does is for 'a just purpose.'"

This reasoning is antithetical to what a Radical Islamic Reformist, An-Na'im proposes. He considers that as more and more Muslim countries witness movements to apply historic *Sharia* in their domestic contexts, the question of the modern applicability of *Sharia* arises.

"...if historical *Sharia* is applied today, the population of Muslim countries would lose the most benefits of secularisation. Moreover, current international law, including human rights standards established there under, cannot coexist with corresponding principles of *Shari'a*."<sup>442</sup>

An-Na'im attempts to challenge the entire given structure of historic *Sharia* and does not consider it sufficient to reform some of its internal mechanisms alone.<sup>443</sup> He proposes a reinterpretation of the basic sources of Islam [the *Qur'an* (the sacred book), *Sunna* (tradition of the Prophet), *ijma* (consensus), and *qiyas* (reasoning by analogy)] according to a contemporary understanding of society and human rights. This would mark an immense change from the practice of most Muslims who follow the medieval legal tradition of *Sharia*, or at least pay lip service

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<sup>441</sup> Ibid.

<sup>442</sup> A.A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, (Syracuse: Syracuse University Press, 1990).

<sup>443</sup> Ibid., p.51.

to it and consider it inviolable and sacred, while following modern secular law in their everyday lives.

*Sharia* is divided not only in the mainstream by four Sunni mainstream *madhahib*, legal schools (Hanafi, Hanbali, Maliki, Shafi') but also further juristic divergences within these schools. Nor have the primary sources and their use in formulating *Sharia* always been agreed upon. Their authentication is difficult or next to impossible today. Also, consensus is difficult to establish—who should it involve in a modern context? These points are considered by An-Na'im to be problematic and a grave disadvantage in modern application.<sup>444</sup>

*Ijtihad* is a principle of traditional Islamic law and means "independent juristic reasoning" on matters where the *Quran* and *Sunna* are silent—it was a practice that was 'closed off' after the maturing of *Sharia* in the tenth century A.D. Many modernist and reformist scholars of Islam argue for the re-opening of the 'gates of *ijtihad*' as a singular solution to modernise and reform *Sharia*, but An-Na'im argues that: a wider, larger reformation of *Sharia* take place and, that the two traditional conditions on the practice of *ijtihad* be modified (traditionally exercised only when the *Quran* and *Sunna* are silent on a matter, and not in a matter where *ijma*, consensus, is applied).<sup>445</sup>

An-Na'im believes that under the rule of historic *Sharia* Muslim women would definitely stand to lose the privileges and status that they have enjoyed under secular public law, affecting their participation in public life and benefits in private life would be greatly diminished if historic *Sharia* were to be the ruling law.

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<sup>444</sup> Ibid., p.33.

<sup>445</sup> Ibid., p.27.

The status of women is highly debated amongst those Pakistanis advocating the application of Sharia. While the “Absolutists and Mawdudi see the whole of Sharia and jurisprudence as directly applicable, Asad, Perwez, Hakim, and Javid Iqbal speak of the *Quran* and *Sunna* as the basis of the law with room for contemporary human discretion in its interpretation and application.”<sup>446</sup> Thus the Absolutists and Mawdudi agree on a ‘divine sanction’ to segregate women— even though the former consider women completely outside the framework of public life, and Mawdudi would allow them a limited participation considering that segregation would be respected. Both these positions are consistent with historic *Sharia*. In contrast, the positions of the others allow women full participation in public life on an equal footing with men—An-Nai’m argues that while this represents the aspirations of many Muslims today, the stance cannot be considered as representing the ‘correct’ view of historic *Sharia*.<sup>447</sup>

The discrimination against women covers other spheres as well; examples of discriminatory *Sharia* rules of personal and private law that affect women, as noted by An-Nai’m include the following:

A Muslim man may divorce his wife, or any of his wives, by unilateral repudiation, *talaq*, without having to give any reasons or justify his action to any person or authority. In contrast, a Muslim woman can obtain divorce only by consent of the husband or by judicial decree for limited specific grounds such as the husband’s inability or unwillingness to provide for his wife.

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<sup>446</sup> Ibid., p.38.

<sup>447</sup> Ibid.



In inheritance, a Muslim woman receives less than the share of a Muslim man when both have equal degree of relationship to the deceased person.

A Muslim man may marry a Christian or Jewish woman, but a Christian or Jewish man may not marry a Muslim woman. Both Muslim men and women are precluded from marrying an unbeliever, that is, one who does not believe in one of the heavenly-revealed scriptures.<sup>448</sup>

At the same time, writers like Riffat Hassan, and Shaheen Sardar Ali have noted that Islam grants a whole range of social, economic and political rights to women that are not practiced, and are also viewed in narrow terms as being definitive. In fact, some of these rights can be seen as laying down normative standards.

In the context of a country like Pakistan, the kind of Islamic reforms that An-Naim envisages are far from being realised today since there is no consensus on reforms within Islam. On the other hand, it would equally be difficult to advocate for women's human rights in a secular context as religious groups are becoming more politically assertive (see for example the NWFP *Sharia'a* Bill). It may, however, be said that whatever the source of lawmaking might be, the ideals and principles of social justice and equality must not be overlooked. There are certain basic principles that are universally accepted as desired standards of justice. There should be no room to deviate from these basic principles of respecting human dignity and giving it its due worth, nor should any deviations from it be justified on the basis of religion or by stating that Islam has laid down different norms for justice and equality.

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<sup>448</sup> Ibid., p. 176.

In appendix V, a comparative analysis has been undertaken between CEDAW, formal laws, customary practices and *Sharia'a* to show that there are many points of convergence between the women's convention and Islam and some formal laws.

### **Comparative Analysis of Formal Laws, Customary Practices, *Sharia'a* and CEDAW**

As pointed out in the introduction, one of the objectives of this study is to enhance the understanding of the linkages between national laws, 'religious' and customary practices and the marginalisation of women. For this purpose, the present study analysed the points of convergence or divergence between CEDAW, domestic law, Islamic law and the conflicting discriminatory practices within one framework. This framework consists of three common categories of laws: 1) Protective, 2) Corrective and 3) Non-discriminatory Laws.<sup>449</sup> The analysis is presented in tabular form as appendix to this collection.

The previous sections entailed a detailed commentary of different laws that affect women in Pakistan as well as the discriminatory customary practices. Information and analysis from these sections is reflected within the framework to assess points of commonality as well as differences and asking ourselves the questions: where are the gaps—why does implementation of laws favorable to women, fail? What can be the role of CEDAW in implementing women's rights in Pakistan? One caveat to bear in mind while examining the analytical framework is that only those formal laws, *Sharia* or customary practices have been mentioned that

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<sup>449</sup> See S.S. Ali, 'Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan.'

are relevant to the 16 substantive articles of CEDAW. Therefore, this analysis is by no means exhaustive.

### **Analysis and Observations**

With the backdrop of the aforementioned comparative analysis, one can argue that although there is a substantial degree of agreement between CEDAW, *Sharia* and the formal laws of Pakistan, there still remains an abysmal gap between theory and practice. For instance, while many provisions of CEDAW are replicated in the Constitution of Pakistan such as the definition of discrimination, 'equality before the law', 'equal protection of the law' and principles of affirmative action, there still exists a severe lack of 'proper implementation and enforcement mechanisms' that can safeguard the rights of citizens, particularly those of women. Similarly, it has been observed that customary practices have led to disempowerment, and violence and honor killings have constantly threatened the right to security. Yet, it appears that there is no concrete action taken by the government to eradicate this.

All three sets of laws reviewed i.e., formal laws, Islamic laws and CEDAW, have a common aspect in that all laws are categorised as 'protective', 'corrective' and 'non-discriminatory' (see definitions of each above). However, where they do vary from each other is the degree to which laws are deemed protective and in their duration. While most CEDAW articles come under the 'non-discriminatory' heading, most of the constitutional and Islamic come under the 'protective' or corrective category. CEDAW also limits the duration of protective laws whereas, there is no such time limit in terms of National and so-called Islamic laws.

However, since Pakistan is a signatory to the convention, it has become a State Party and has willingly accepted the implicit

responsibilities that are a part of it. It also means that Pakistan has agreed to be scrutinised by the CEDAW Committee and to submit a report every four years on the implementation status of CEDAW. The procedure of reporting to the committee every four years also means that the responsible authorities could use this as a useful internal monitoring tool for gauging the status of women's rights on a regular basis.

Religion and the *Sharia* have undoubtedly dominated the political processes of Pakistan. It is not clear what kind of *Sharia* was being promoted by General Zia; equally vague are the policies of NWFP. With no *ijtihad*, and little recognition of the school of thought (*madhahib*) the Shariat Act belongs to, it is quite reprehensible that a religion (Islam), which is considered sacred and important, is misused arbitrarily for political expediency. With regard to women's political rights, there is no conflict between the rights accorded to women by law or religion. However, in terms of customary practices, women's right to vote is curtailed in some parts of Pakistan, although constitutionally women have the right to vote and participate in the political proceedings of the nation. Article 3 of CEDAW supports women's political rights and there is no bar on women's political participation within Islam.

On the other hand, customary practices have lead to disempowerment, and violence and honor killings have constantly threatened the right to security. Notwithstanding the lack of concrete action taken by the government to eradicate this, CEDAW demands that governments transform not only law, but also the very societies within which these violations occur, enforcing attitudinal changes. Informal settlement systems such as *jirgas* and *faislo* are being increasingly used to settle disputes that they were never meant to adjudicate. The sole purpose of this system was to settle petty disputes and not criminal offenses.

According to the Constitution of Pakistan and Islam, there are no prohibitions on women's right to earn or to have control over their income. The government of Pakistan has taken some positive steps in this direction, such as the signing of the ILO convention 100 for equal remuneration and the provision of credit to women in rural areas through the Kushali Bank and the First Women's Bank. Article 11 of CEDAW pertains to economic rights of women and emphasises the necessity of maternity benefits, safe working conditions and the right to employment of women, etc. Although both CEDAW and the National Laws of Pakistan provide some safeguards to the rights of women working in the formal sector, there are no existing laws (or CEDAW articles) that can be applied to the informal sector. It is primarily this sector, which affects poor women (and men). Due to the fact that the majority of women do not have the necessary qualifications or 'approval' from their families to enter certain professions, they resort to menial jobs and domestic labour, which do not come under any law.

Additionally, the Muslim Family Laws Ordinances 1961 and other laws covering the political and economic rights of women are not publicised and many women are unaware of their existence. Similarly, while CEDAW recognises women's reproductive and productive labour to the extent that it advocates support for it, there are no laws (national) or CEDAW articles that call for the remuneration of women's productive (informal) labour.

Another important area that sought recognition was a woman's right to inheritance. As spelt out in Islam (although there are many interpretations of it), CEDAW Article 16 (g) supports it on an equitable basis with men. The national laws in terms of inheritance have been upheld in courts. These are based on the personal laws of Shias and Sunnis. However, customary practice is different from all of the above in that most women are either

not given their share of the property or are married (against their wishes) within the family to retain control over the estate.

### **Recommendations**

While Pakistan has shown its good will by signing CEDAW, it must follow through on its commitment and institute proper mechanisms to implement the substantive provisions of CEDAW, enforce existing laws favorable to women, and repeal all discriminatory legislation.

Any 'protective' legislation should be constituted for a limited time and not entail any bans for the sake of protecting women from certain kinds of jobs. The state should invest in devising an enabling environment for women in this regard. There is a need for more 'corrective legislation' with regard to women, however, it should be kept in mind that the inherent challenge in this is to be able to take note of differences between men and women and to decide which measures to take that will in fact facilitate equal access, control and equal results.

Since the constitution defines women as full and equal citizens of Pakistan, no legal protection or safeguard under the guise of 'Islam' should be accorded to any customary practice that is discriminatory towards women or any other disadvantaged group. Furthermore, all barriers to women's mobility and accessibility to resources (economic, social, legal and political) need to be removed, in order to allow them to participate as equal citizens in the all spheres of life. Similarly, family laws need to be revised to ensure women their rights. For example, the *Nikahnama*, a legal contract can be incorporated to ensure an equitable distribution of property at the time of divorce.<sup>450</sup>

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<sup>450</sup> Simi Kamal, *The Interplay of Customary, Formal and Informal Laws on Women*, Raasta Development Consultants, 2002).

Also, there is a great and immediate need of providing legal literacy to women about their rights. The government should also take concrete measures against the tribal *jirgas*, *panchayats* and *faislos* that dispense injustice to women, with special focus on issues that pertain to the private domain such as domestic violence, marriage, divorce and inheritance.

Finally, to conduct a roundtable discussion on the study with the aim of seeking agreement between different stakeholders, i.e., *Ulemas*, human rights activists, policymakers, politicians, etc, on advocacy focusing on the elimination of discriminatory practices that are outside the ambit of religion, law or universally accepted standards of social justice. There should also be efforts to involve the lower tiers, particularly in the judiciary and law enforcement agencies, through advocacy campaigns and awareness-raising initiatives so that personal biases are tackled the grass-root levels.





Part III

***Implementation of CEDAW in  
Bangladesh, India and Pakistan:  
Conclusion***

Shaheen Sardar Ali

Bangladesh, India and Pakistan as part of the South Asian region, present a rich diversity of constitutive structures and social regimes including religion, class, caste, ethnicity and political institutions and constitutional structures. People of the region also share the history of a common civilisation and colonial rule.<sup>451</sup> Marked similarities in the position of women in each of these countries is reflective of the unity of approach within this diversity of norms and legal systems, as well as the position adopted by these countries in ratifying women's human rights instruments such as CEDAW.

Although all three studies shared common aims and objectives as described above, each country study evolved a specific focus and area of research and analysis vis-à-vis CEDAW. The backdrop of the investigation is the reluctance of the three countries to accede to CEDAW in its entirety, a position which they have expressed by entering reservations. The main recommendation from the three country studies is to reiterate that while Bangladesh, India and Pakistan have shown their good will by signing CEDAW, the respective governments must now follow this commitment by instituting proper mechanisms to implement the substantive provisions of CEDAW, enforce existing laws favorable to women, repeal all discriminatory legislation and withdraw reservations to CEDAW forthwith.

The findings of the studies were both interesting and challenging. They highlight the ambivalence of governments and vast sections

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<sup>451</sup> The post-colonial era has been marked by a war between India and Pakistan on Bangladesh – the histories of violence within the region has affected women in the three countries; and whilst there are similarities there are discontinuities, ruptures and silences as well where women's histories lie buried and are equally important to examine. These issues are important as they do not form the subject of the present research.

of civil society towards human rights treaties emanating from the UN and the fluid and fluctuating nature of women's rights and entitlements in South Asia. It also reinforces the assumption that in plural legal systems, women-friendly spaces are few and far between, and women's human rights to equality and non-discrimination remains a contested terrain despite ratification of CEDAW by governments.

All three studies reveal how these plural systems collude to undermine women's human rights in their respective societies. The most fragile 'layer' of equal rights to women is afforded under the Constitutions of Bangladesh, India and Pakistan. The constitutional framework also extends affirmative action measures to bring women and other vulnerable groups into the mainstream of national life. Yet this formal equality (in all three constitutions), stands undermined by other 'layers' of law including some statutory laws and customary practices.

The second 'layer' of regulatory norms, i.e., formal enactments also conceptualise women as equal citizens of the state. The exception to this is, first and foremost, the colonial formulation of 'religious laws' known as personal status laws. By codifying Islamic law, the rich variation and flexibility in interpreting the religious text in Islam was lost and is a burden carried over to the post-colonial era. The politics of identity in all three countries led to a fossilisation of these laws and it has been difficult if not impossible to challenge.

But, as reflected in the three case studies, it is the inner and most tenacious 'layer' of custom, culture and tradition that discriminates against women as a group. Customary practices are the key factor in women's disempowerment and violence against women and killing in the name of honour are often justified or condoned under the umbrella of customary law. It is pertinent to highlight

here the double-edged sword of devolution of political power to local institutions. Whilst there is evidence that increasing number of women are members of local councils, yet in a number of instances, informal dispute resolution forums such as *panchayats*, *jirgas* and *faislo* are being increasingly used to settle disputes that they were never meant to adjudicate. The sole purpose of this system was to settle petty disputes and not criminal offenses. From the point of view of women's access to justice, it is alarming for these bodies to exercise the power bestowed on them because the 'justice' and 'law' informing decisions of these bodies is patriarchal and misogynist customary practices.

One of the ways forward would be to propose that equal access to health facilities, education, employment, political participation and safe mobility within the public space is arguably the most effective strategy to translate formal equality into substantive equality for women. Most women in the three countries under review are not literate and unaware of what rights are available to them under the legal system of their country. Legal literacy and awareness-raising of women regarding their rights to equality before law and equal protection of the law is critical for effective implementation of domestic and international human rights instruments. Equality in these areas will also help to 'chip away' slowly but surely, into customary norms that seek to keep women invisible and disempowered.

Another common finding in the country studies is the (common) policy of states to distance themselves from the familial sphere of life irrespective of their nature and ideology. Thus the governments in Bangladesh and Pakistan refrain from active intervention in what is considered personal status laws on the basis that Islamic law governs this aspect of its citizens' lives and the remit of governance is not to encroach upon this closely guarded (predominantly male) territory. On the other hand, the

Indian government is loathe to intervene in family law matters impacting on the lives of its Muslim citizens on the basis that the Indian notion of secularism is an inclusive one and implies non-interference in the personal status laws of religious minorities. In all three jurisdictions, personal status laws governing marriage, divorce, custody and guardianship, inheritance and succession remains the last bastion of 'Muslim' identity whereas matters of public life have been overtaken by 'secular' formulations of law. Having said that, personal law has not remained static and while legislation in Bangladesh, India and Pakistan has remained minimal, all three case studies provide important insights into the role of the judiciary in interpreting personal status laws.

Judicial activism has pushed the boundaries of what constitutes Islamic law and rights of Muslim women. In all three case studies, there is evidence that the superior judiciary (High Courts and Supreme Court) has played an active role in addressing issues of gender justice. This, however, is not the case with the subordinate judiciary and law enforcement agencies, particularly at the lower tiers, which require intense and extensive gender sensitisation. Judgements in the Hudood cases in Pakistan is an example of this trend.

Popular perception of the extent to which women possess equal rights within the Islamic tradition ranges from a positive view to a highly misogynous one. This opinion is held by both men and women and reflected in the Bangladesh study. The possibility of using the juristic technique of *ijtihad* to arrive at a progressive and contemporary interpretation of *Sharia* also met with lukewarm and different responses in Bangladesh and Pakistan. Whilst respondents from Bangladesh did not generally favour the route of *ijtihad*, Pakistani society appears more amenable to such a course of action. In India, progressive interpretation of the *Quran* or *Hadith* does not appear a possibility due to the

inflexible and inward looking approach of the so-called religious leaders within the Muslim community who raised the cry of Islam being in danger as they were in any case against reform. Though large constituents of the Indian women's movement has been trying to argue for reform of personal law to make it just and equal, their struggle has been long and difficult. For instance, the infamous triple *talaq* is one of the most unjust formulations of so-called Islamic law causing distress to numerous Muslim women in India. In Pakistan, however, the Muslim Family Laws Ordinance, 1961, outlaws the triple *talaq*. It is suggested that a more proactive sharing of progressive interpretations of Islamic law be introduced among the Muslim communities in India.

Violence against women (VAW) is an issue impacting adversely on women's lives. Specific laws to cover VAW have only recently been highlighted and adopted in some of the countries under review. Whilst CEDAW does not specifically mention violence against women in its substantive articles, the definition of discrimination is considered broad enough to be applied to VAW as well. Furthermore, CEDAW Committee general comments and concluding observations have supplemented this silence of CEDAW as well as the Declaration on Violence Against Women 1993. Progressive and alternative interpretation of Islamic law relating to violence against women are imperative especially in view of the literal translation of verse 4:34 of the *Quran* supposedly allowing violence against a wife by her husband.

Roundtable discussion on the study with the aim of seeking agreement between different stakeholders, i.e., *Ulemas*, human rights activists, policymakers, politicians, etc, on advocacy focusing on the elimination of discriminatory practices that are outside the ambit of religion, law or universally accepted standards of social justice.

In summing up this analysis of the implementation of CEDAW in plural legal systems of the South Asian region, it has to be admitted that the journey on the road to equal rights for men and women within the UN system and the countries round the world has indeed come a long way. As the Indian chapter states, this is a process where women are inching their way towards the goal of equality and non-discrimination. At the international level, from modest beginnings in the UN Charter and the UDHR, the ICCPR and the ICESCR expanded on the concept. The decades of the seventies, eighties and nineties lent tremendous impetus to these initiatives and women's human rights are incapable of being ignored any more. The UN efforts were greatly facilitated by the NGO community world wide through timely interventions, particularly at the four world conferences on women. Each conference expanded the boundaries of what was the substantive content of women's human rights to reach in the final years of the 20th century, a point where virtually every aspect of women's lives are touched by the rights discourse. CEDAW today is hailed as the International bill on women's rights and synthesises the numerous documents advancing women's rights. Although many problems persist, the major ones relating to state sovereignty and weak and ineffective enforcement mechanisms, yet a beginning has been made.

At the level of domestic law, the struggle to strengthen implementation of women's rights under the constitutional and other provisions continues and has to reckon with poor or no political will. These discriminatory laws can be challenged and indeed are susceptible to modification. Religious laws and customary practices, however, are the most difficult to address as these have been internalised over the centuries and do not lend themselves to easy change or even discussion. In recent years, however, a robust challenge has been mounted against these rigid formulations of women's rights (or lack of them) by

Muslim women themselves. Whilst the path is uphill and the task of challenging deeply held conviction delicate, a dent has been made in an all male version of religion. From now on it is a matter of consistent and persistent exploration of the egalitarian and equitable spirit of the Islamic tradition of women's human rights and translating it into action.



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## APPENDIX I

### Text of CEDAW

#### **CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

##### **The States Parties to the present Convention,**

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development

and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### **Article I**

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition,

enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

## **Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

### **Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

### **Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

**Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

**PART II**

**Article 7**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

**Article 8**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

**Article 9**

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

**PART III**

**Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-

school, general, technical, professional and higher technical education, as well as in all types of vocational training;

- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same Opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

**Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in



order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
  - (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
  - (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
  - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
  - (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.
3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

**Article 12**

- 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
- 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

**Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;

- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

**Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
  - (a) To participate in the elaboration and implementation of development planning at all levels;
  - (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
  - (c) To benefit directly from social security programmes;
  - (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
  - (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
  - (f) To participate in all community activities;
  - (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

#### **PART IV**

##### **Article 15**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

##### **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
  - (a) The same right to enter into marriage;
  - (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

- (c) The same rights and responsibilities during marriage and at its dissolution;
  - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
  - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
  - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
  - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
  - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

## **PART V**

### **Article 17**

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be

established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.
7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.
9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

**Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other

measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

- (a) Within one year after the entry into force for the State concerned;
  - (b) Thereafter at least every four years and further whenever the Committee so requests.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

**Article 19**

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.

**Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.
2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. (amendment, status of ratification)

**Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be



included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

#### **Article 22**

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

### **PART VI**

#### **Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

#### **Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

#### **Article 25**

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

**Article 27**

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

**Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

**Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

**Source: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>**

## **APPENDIX II**

Text of the Optional Protocol to CEDAW Optional Protocol to the Convention on the Elimination of Discrimination against Women Adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day entry into force 22 December 2000

### **The States Parties to the Present Protocol**

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights Resolution 217 A (III). proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights Resolution 2200 A (XXI), annex. and other international human rights instruments prohibit discrimination on the basis of sex,

Also recalling the Convention on the Elimination of All Forms of Discrimination against Women<sup>4</sup> (“the Convention”), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

**Article 1**

A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2.

**Article 2**

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

**Article 3**

Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

**Article 4**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.
2. The Committee shall declare a communication inadmissible where:

- (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (b) It is incompatible with the provisions of the Convention;
- (c) It is manifestly ill-founded or not sufficiently substantiated;
- (d) It is an abuse of the right to submit a communication;
- (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

**Article 5**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.
2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

**Article 6**

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

#### **Article 7**

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.
2. The Committee shall hold closed meetings when examining communications under the present Protocol.
3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.
4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.
5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

#### **Article 8**

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that



State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.
3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.
4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.
5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

#### **Article 9**

1. The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.
2. The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

**Article 10**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.
2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

**Article 11**

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

**Article 12**

The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

**Article 13**

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

**Article 14**

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

**Article 15**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 16**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

**Article 17**

No reservations to the present Protocol shall be permitted.

### **Article 18**

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

### **Article 19**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

**Article 20**

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 18;
- (c) Any denunciation under article 19.

**Article 21**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

**Source:**[http://www.iwraw-ap.org/protocol/text\\_english.htm](http://www.iwraw-ap.org/protocol/text_english.htm)

## APPENDIX III

### **CEDAW and Bangladesh Study Questionnaire**

The questionnaire is in Bangla. Quotations from the *Quran* and its interpretation are taken from *Holy Quranul Karim, Bangla Translation and Interpretation* printed under instructions and patronage of King Fahd of Saudi Arabia. The Following is a summarised English rendering of the Bangla text.

In 1979, UNO adopted CEDAW with a view to ameliorating the conditions of women. Many Muslim countries ratified the convention. Bangladesh also ratified the CEDAW except Articles 2 and 16.1 (c).

The purpose of the study is to explore the possibilities of full ratification of CEDAW by the government of Bangladesh including the Articles 2 and 16.1 (c).

Please go through the CEDAW attached with the questionnaire.

#### **Article 2**

Article 2 of CEDAW declares equal rights of men and women and aims at elimination of all discrimination between men and women and establishment of equality among them.

- (1) In the *Holy Quran*, verse 228, *Sura Al-Baquara*, says, “And as men have rights on women, so women have rights on men, according to rules”. The interpreter says, “In this verse, equality of rights and obligations of men and women has been declared.” It is, therefore, clear that equality of man and woman is a gift of Allah and Islam grants equal rights to man and woman.

- (2) In *Sura Al-Tawba*, Allah says, “The believers, men and women, are protectors of one another: they enjoin what is just and forbid what is evil: they observe regular prayers, practice regular charity, and obey Allah and His Messenger.” Thus in worldly affairs they help each other and they are equal. For the world after, they have the same position; both preach religion. Both have equal rights to education because the Islamic injunctions of prayer, fasting, pilgrimage to Mecca, charity and Kalima apply equally to both. Interpreter interprets, “All men are not superior to all women in status. Because criterion of status to Allah is *Iman* (belief) and true observance of Allah’s instructions (*Amal*). It is possible that some women are more eligible for status before Allah than many men.”
- (3) In *Sura Al-Baquara*, while giving rights to men and women on each other, some differences have also been referred to. In the interpretation, this difference has been interpreted as superiority of men over women. But there is controversy in this matter. Maulana Yusuf Ali, well-known translator of the *Quran*, meant ‘advantage’ while another English translator Pichkthal meant ‘edge’. In any case, the difference cannot be taken to be superiority in status because status is determined by adherence to Allah and observation of His dictates and in this there is no difference between men and women.
- (4) In *Sura Al-Nissa*, verse 34, Allah says, “Men are guardians of women because Allah has given special characteristic to one over the other, because men spend their money for women.” This verse is usually cited as evidence of subordination of women to men. But what is often lost sight of is that the guardianship is not unrestrained, but is contingent on specific reason. The interpreter says, “Men

have been made guardians of women for two reasons. Firstly, men have knowledge and ability which cannot be attained by women. Secondly, men ensure fulfillment of all wants and needs of women from their income or their assets.” Are the reasons valid in the changed social, economic and political situation now prevailing?

- (i) Women were never behind men in knowledge. Bibi Ayesha, wife of the Prophet, and Rabia Basri were head and shoulder above men of their time. The *Quran* is full of praise for the contributions and superiority of the Virgin Mary. Women fell behind because of lack of opportunity. With the limited opportunity now opened up, women are showing their merit in education and knowledge and the girls in the country have fared better than the boys in the recently held public examinations.
- (ii) The days of excellence of manual ability and strength are long gone. Technological knowledge and professional skill are now the source of human power. Ability is now technology and talent based and physical strength can no longer be considered as the yardstick of superiority.
- (iii) In the past, women were dependent on men because of restriction to their economic activity outside home. It is now recognised that women’s work as homemaker is no less important economically than out-of-home work of men. Moreover, time and situation have changed; women are entering the labour market in increasing number and are proving their worth as bread earners. There are families in which women’s income is the main source of subsistence. There are families in which women earn more than men. In poverty-stricken Bangladesh, the income of the wife is now increasingly recognised as essential for maintenance of the family. Men can no longer boast of being maintainers of women.



The two reasons cited for male guardianship no longer hold good. Thus, the interpretation of male guardianship given by the *Ulemas* at a time when women were behind men in education and ability and were dependent on men for maintenance is antiquated and there is need for reinterpretation in the changed circumstances.

- (5) To argue in the reverse direction, if ability, knowledge, and maintenance are held to be the basis of guardianship, then a wife who is more educated and earns more than the husband must be recognised as the guardian of the husband by the same logic. In fact, both should be equal partners irrespective of the difference in ability and income.
- (6) A special situation obtains in Bangladesh. For more than a decade now, women leaders are running the country as prime minister and leader of Opposition through democratic system of adult franchise and this leadership has been accepted by the Islamic political parties. There is a coalition government now and ministers of parties who are committed to make Bangladesh an Islamic state are working under the direct subordination of a female prime minister.
- (7) If women can be the guardians of the state, why can't they be guardians of the family? If a woman can take decisions of the state, why should they be debarred from taking decisions in the family?
- (8) The Constitution guarantees equal rights to men and women in all spheres of life including education and employment. The government of Bangladesh has ratified Article 16.1(c), (f) and (h) of CEDAW which ensures the same rights and responsibilities in matters of children and with regard to guardianship and wardship, and in choice of name, profession and occupation.

The guardianship issue has, therefore, been settled in favour of CEDAW and the government is now obligated to pass legislation giving effect to equality of the husband and wife in matters of guardianship. The government has already issued a circular stating that the name of the mother must occur side by side with the name of the father in all documents and papers.

In the perspective of the facts and circumstances narrated above–

**(1) Do you agree that the Article 2 of CEDAW should be ratified?**

**(2) If no, please cite reasons.**

**Article 16.1 (c)**

This article provides the same rights and responsibilities to men and women in marriage and divorce. But in Bangladesh, women suffer from discrimination in these matters. A husband may have four wives at a time; but the wife must have only one living husband. Husbands may divorce by just uttering the words 'I divorce you' three times without requiring to go to court and without citing any reason. Divorce takes place then and there irrespective of whether the words were pronounced in anger or on the spur of the moment. Even if the husband is repentant afterwards, there is hardly any remedy.

On the other hand, the wife has no right to divorce. She can divorce in a similar manner only and if only the husband delegates his power to divorce to wife. Such delegation must take place before the marriage and must form part of the marriage contract. In Bangladesh, such delegation had never taken place in the past and is of recent occurrence. In the absence of such delegation, the wife must go to the court which may repudiate the marriage on specific grounds approved by *Sharia* laws. Due to the cost of

legal proceedings and the lengthy process involved, dependant wives seldom went to court.

It may be pointed out that *Sharia* laws prevail only in personal family matters of marriage, divorce and inheritance and related matters. *Sharia* laws have no application in other spheres. Civil and criminal laws, legal evidence, interest, banking etc are regulated by acts of Parliament and in many cases these laws are contrary to *Sharia* laws and supersede Islamic principles. But the *Ulema* have not opposed these laws on the ground that *Sharia* laws are unalterable. But when it comes to marriage, divorce and similar matters, they clamour that *Sharia* is unchangeable. In spite of such double standards, laws have been passed in these matters. For example, Child Marriage Restraint Act, Dissolution of Muslim Marriage Act, Muslim Family Laws Ordinance, Registration of Muslim Marriage Act are in operation. It is, therefore, a fact that the Parliament did pass laws in personal and family matters and these laws were enacted on considerations of the well-being of people and society, public interest, hardship of specific sections of population, justice and equity. Further enactments are, therefore, possible and justifiable on same considerations.

### **Polygamy of Men**

Polygamy of men is supported under *Sura Al-Nissa*, verse 3. The provisions of the verse are as follows:

A man can marry and have at a time maximum of four wives provided he can observe the letters and conditions laid down by Allah and thus polygamy is conditional.

The condition is that he will strictly maintain justice and equality among all the wives.

If there is any apprehension in his mind about justice and equality, he must be satisfied with one wife only. For man apprehensive of observing the condition, only one wife is sanctioned.

If there is only one wife, the possibility of discrimination is the least. Since possibility of discrimination is the least with one wife, preference of the *Quran* is for one wife.

A man can have as many slave girls as possible and may have sexual relations with them.

Islam approves slavery and since slavery is banned by the law of the land, the condition (v) is null and void.

Muslim jurists have given different interpretation on the polygamy issue according to the school of jurisprudence. In Bangladesh, Hanafi interpretation is followed and polygamy is permitted even if the conditions are breached. But Muslim countries like Tunisia, Turkey, Yemen, Morocco, Indonesia and Iran consider the conditions as prohibitive and forbid polygamy. These countries have, therefore, abolished polygamy.

Allah himself has suggested that it is difficult to observe the conditions. The interpreter in the Saudi Bangla version notes that the Prophet (sm) has passed the message of horrible punishment for those who violate the conditions. The interpreter has further said that if a man cannot observe the conditions, his second or other marriages will be invalid and he will be punished in the other world. From all these facts, the logical and rational conclusion follows that Islam in fact and in application permits one wife only. Muslim husband should be prevented from polygamy in his own interest in this and in the other worlds. It is the duty of the *Ulema* to protect him from wrath of Allah.

Are the conditions observable in the present context of Bangladesh?

This is a poor country. For most husbands, it is difficult to make both ends meet even with one wife. Many wives now work for an income in addition to the husbands to support the family in both rural and urban areas. It is impossible for a husband to maintain more than one wife not to speak of maintaining them equally. So for Bangladeshi husbands, condition (iii) is a stark reality and monogamy should be enforced by law to protect people from taking rash, thoughtless, fickle-minded and foolhardy decisions to marry a second wife and thus to save them from the wrath of Allah.

The reality is that polygamy is almost non-existent and men with more than one wife are subject of ridicule. Even the Islamic jurists and the *Ulema* in Bangladesh now seldom have more than one wife.

Even the rich in Bangladesh do not practice polygamy. The educated class also shuns polygyny. Because they are now aware of the advantages of monogamy and banes of polygyny.

Women are no longer ignorant. Both in rural and urban areas, women are receiving formal education and entering the economic world. They now oppose and resist polygyny. It is due to the women's movement that the government was forced to enact Muslim Family Laws Ordinance.

Thus, in the light of the current situation, a correct, rational interpretation of the Quranic verses justifies prohibition of polygyny and introduction of monogamy.

### **Divorce**

Discrimination in divorce is defended on the basis of Quranic verse that says, "If you apprehend disobedience (of wives), admonish them, separate their bed and beat them. If they become

obedient, do not seek any other solution.” It is clear from the verse that divorce is not permissible in anger or on the spur of the moment. If there is any conflict between a couple, it cannot be solved by instantaneous divorce. There must be reasonable ground for divorce. Steps must be taken to remove the reason and compromise must be sought. If and only if compromise is not possible, divorce may be resorted to.

The interpreter says that conflict between husband and wife is not unusual; but such conflict should be resolved by compromise and reconciliation and that is why Allah has instructed the husbands that they must not do excess, must not find fault, must assume patience and forbearance and settle and compromise among themselves. Thus, divorce cannot be given in anger and rashness: there must be valid reasons, which may be removed by reconciliation and compromise settlement. If this fails, divorce is the last resort. The verse implies reconciliation and resolution of apparent reasons. Reconciliation and compromise is possible usually through a third party, which can be the court. Already wives have to go to court for seeking divorce. The principles of equality enshrined in the *Quran* and mutual rights guaranteed in the *Quran* lead to the logical conclusion that, like wife, husband should also go to the court for reconciliation and resolution of the apparent reasons. Women are no longer behind men in knowledge, ability and talent. Medical science, psychology and psychiatry all reject any differences between men and women in intellect and intelligence. Women and men should, therefore, have equal rights in divorce.

There is no difference in opinion that divorce is a hateful act to Allah and this hateful act has been permitted only in extremely exceptional circumstances. Such an act cannot be left to the whims and temper of individual husbands; Allah cannot intend such whimsical acts. Both husband and wife must pass through

the same process preferably in a family court already created by law in Bangladesh.

In the perspective of the facts and circumstances narrated above:

**Do you agree that the Article 16.1 (c) of CEDAW should be ratified?**

**If no, please cite reasons.**

### ***Ijtihad***

Islam is a progressive religion and as it extended to new people and new territories and came across new situation and developmenst, Islamic jurists and the *Ulema* brought in reinterpretation, reorientation and readjustment in religious matters. *Ijtihad* is recognised a valid means of interpreting and readjusting Islamic principles.

Society in Bangladesh is confronting change in all spheres of life. Globalisation has added new horizon of change and adjustment. In the international field, CEDAW is a development that we cannot ignore.

Bangladesh does not want to live in isolation; but wants to play a dignified role in the international community. More than 100 countries have already ratified CEDAW. Failure to ratify it will make Bangladesh an outcast. In the past, in the days of Caliphs and afterwards, their followers have given newer and newer decisions and faced challenges of time creditably.

**In the perspective of globalisation and the need to play a significant role in the international community,**

**(i) Do you think that *Ijtihad* is necessary in the changed condition that CEDAW has given rise to?**

**(ii) If no, cite reasons.**

## APPENDIX IV

### Workshops on CEDAW and Muslim Personal Law

This appendix deals with the experiences of four workshops held to explore the rights of Muslim women within the framework of Islamic law and their civil rights. The issues or discussions in the workshop were framed keeping in view the rights conferred by CEDAW provisions. As a minority community, Muslim women in India have experiences very specific to the economic and political context in India. Even the implementation of the various provisions of Islamic law are affected or influenced by such factors. Further, there are variations between women's experiences determined by their class, caste and even regional locations. The workshop tried to ensure that this diversity was given space for expression in the discussions. This was helped also by ensuring that there was representation from different sections of Muslim women. The workshops included different:

- socio-economic groups
- religious denominations (sects)
- castes and discussed
- regional variations, if at all in the implementation of religious laws and whether the *Sharia* is uniform in its application
- class and caste variations, if any, in customary practices
- the impact of political developments on Muslim women in the context of the rise of forces hostile to religious pluralism or the constitutional and legal rights of minority communities
- the economic and political status of Muslim women and whether there was any discrimination against them by virtue of their religious belief



## **2. Details of the Workshops**

The first workshop was held in Bangalore where women from the southern region of India from the states of Andhra Pradesh, Karnataka, Kerala, and Tamil Nadu participated. The second workshop was in Bhopal covering the states in the central and western region—Madhya Pradesh, Uttar Pradesh, Maharashtra, Gujarat, Rajasthan, Haryana, and Delhi. The third one was in Howrah where women from the eastern and northeastern region — West Bengal, Bihar, Orissa, Assam, and Tripura — participated.

In all these workshops, most of the participants were Sunni, therefore, to include a better understanding of the situation of Shia women, a fourth workshop was conducted specifically to interact with Shia women—this was done in Kanpur where women from Lucknow and Kanpur (in Uttar Pradesh) participated. Lucknow has a sizeable Shia Muslim population, which is why this region was selected for the workshop.

In all the four workshops, the group was a mixed caste group. In India, the deeply ingrained caste system among Hindus has influenced other religious communities, including Muslims where caste has no religious sanction. Women from different castes attended the workshop. The socio-economic profile of the participants was also mixed with workers, rural women, urban middle-class professional women attending. For example, there was representation from among the ladaaf (Tamil Nadu), bidi workers (Karnataka), chikan workers (Uttar Pradesh), zardozi workers (Delhi), lawyers, doctors, teachers, peasant women and artisans.

In all these workshops, the urban-rural distribution was maintained.

**The table below gives the details of workshops**

<i>#</i>	<i>Venue</i>	<i>Dates</i>	<i>Participants</i>	<i>Participant states</i>
1.	Bangalore	May 24-25, 2003	45 women mostly Sunni;	Andhra Pradesh, Karnataka, Kerala, Tamil Nadu
2.	Bhopal	June 7-8, 2003	42 women mostly Sunni;	Madhya Pradesh, Uttar Pradesh, Maharashtra, Gujarat, Rajasthan, Haryana, Delhi
3.	Howrah	July 26-27, 2003	75 women almost all of them Sunni	West Bengal, Bihar, Orissa, Assam, Tripura
4.	Kanpur	August 12, 2003	12 women; almost all of them Shia;	Uttar Pradesh

### **2.1 The Bangalore, Bhopal and Howrah Workshops**

The workshops were conducted in three sessions each:

Islamic law and customary practices

Communalism and fundamentalism:

- On the communal situation in the country; how it impacts on the rights of Muslims particularly women
- On the fundamentalist influence within the community and how it impacts on the rights of Muslims particularly women

Economic rights of Muslim women — the socio-economic conditions in which women live; economic and social issues that might impact on women's rights.

### **The Kanpur Workshop**

The workshop in Kanpur was held specifically to get inputs from Shia women on Islamic law and customary practices. It was a one-day single-session meeting. Though issues of the economic condition of Muslim women did come up, it was mainly devoted to practices among Shia Muslims on the issues relating to family laws.

### **2.3 Findings**

1. The one issue that dominated the discussion in all the workshops was the man's unilateral right to divorce at one go – also called “triple talaq”. Apart from this, the legal issues that dominated all the workshops could be listed out as:
  - *Nikah*
  - *Mehr*
  - Dowry
  - *Mut'a*
  - *Khula*
  - Maintenance
  - Custody of Children
  - Polygamy
  - Property Rights
2. In all the workshops, women very clearly and strongly articulated their indignation at what they perceived as the

insensitivity of most sections of the clergy towards their rights within Islamic law. Women almost felt that the interpretation of Islamic law could be more gender-sensitive. There appeared to be a difference within socio-economic groups on how they perceived their legal rights — the poorer sections of working women were more concerned about their immediate problems and solutions regardless of what is sanctioned by personal law.

3. The rise in inter-community tensions and the politics of minority blaming and naming and the impact on women was an important issue of concern.
4. The discussions showed that within India there is no homogeneity in the implementation of many laws and also that there are clear regional and sectarian differences in customary practices.
5. Economic issues were also discussed. Government policies in this sphere, it was felt, impacted on all women. However, there was discussion on the discrimination faced by Muslim women in policies of recruitment, access to government schemes and so on.
6. An important finding was that where there are political forces that have encouraged or given opportunities to Muslim women to participate in public life such as in the panchayat system, Muslim women have benefited. The linkages with other supportive movements such as women's organisations was found to be very beneficial by the participants who stressed it was important for Muslim women to be part of wider democratic mobilisations.

## APPENDIX V

### Comparative Analysis Between CEDAW, Formal Laws, Shariah and Customary Practices

<b>PROTECTIVE LAWS</b>	Where laws are formulated on the basis of women being taken as a group, which either cannot or should not engage in specified activities and, therefore, need prospective legislation, but at times this can be for an unlimited time.
<b>CEDAW</b>	Some aspects of the CEDAW articles can also qualify as protective.
<b>FORMAL LAWS</b>	<p>Article 26 (2) Nothing in clause (1) shall prevent the State from making special provisions for women and children (S.S. Ali). Article 25 (3) “Nothing in this article shall prevent the State from making any special provisions for the protection of women and children.”</p> <p>Chapter 2 of the Constitution — Principles of Policy — more rights have been listed for the protection of women and children and other disadvantaged groups, such as, Article 32 which states that special representation shall be given to peasants, workers and women, and Article 34 which refers to the full participation of women in all spheres of the national life by creating affirmative</p>

actions. Furthermore, Article 35 states that “the State shall protect the marriage, the family, the mother and the child”, and Article 37(e) which calls upon the State to provide secure, just and human conditions of work for women and children as well as women’s maternity benefits. (Fauri: 14) Female Infanticide Prevention Act, 1870, Maternity Benefit Ordinance, 1958 and the Mines and Maternity Benefit Act, 1941, the Provincial Employees Social Security Ordinance, 1965, (Ali: 15-16).

**QURAN/SHARIAH/  
HADITH/**

“Men are protectors and maintainers of women, because Allah has given the one more (strength) than the other and because they support them from their means.” *Al-Nisa*: 34 (Fauri).

**CUSTOMARY  
PRACTICES**

Men have assumed the role of protecting women and their honor. This has led to many discriminatory practices such as curtailing women’s mobility and access to resources, lack of independent decision-making, and segregation etc. This is also an example of how certain discriminatory practices under the guise of ‘protection’ are carried out.

**Corrective Laws:**

**This category implies that women are a separate group who need special treatment. The idea is to alter and improve specific treatment that women are receiving without making**

**any overt comparison to the treatment of men. These may be of limited duration depending on the time period required to achieve the desired result.**

**CEDAW ARTICLE 4** Adoption of States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in this Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards. These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. Adoption by State Parties of special measures including measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

**FORMAL LAWS** Article 26 (2) Nothing in clause (1) shall prevent the State from making special provisions for women and children. (Ali).

**QURAN/SHARIAH/  
HADITH** According to Fauri, "Islamic legislation has laid down rules and regulations that ensure justice and equity for both women and men at all times and under any circumstances. Therefore, if Muslims abide by these provisions and implement them correctly, there will never be a need for changing or modifying any laws pertaining to Muslim women. However, and as evidence of Islam's flexibility certain aspects of Muslim life were left

open to *Ijtihad* depending on the context, the time and place.” (Fauri: 14) According to the *Quran*, “Allah commands justice, the doing of good.” *Al-Nahil*: 90 (Fauri: 14).

**CUSTOMARY PRACTICES**

No supporting customary practices – there are no known practices that are corrective in relation to women. At one time, *jirgas* or tribal councils were considered to be corrective in that they were instituted to provide speedy justice to settle disputes amicably. However, this practice does not have the same connotation, the gang rape of a young woman in Meerwala by *jirga* members being a case in point.

**Non-Discriminatory Laws:**

**These include provisions which reject a conceptualisation of women as a separate group and, reflect one of men and women as entitled to equal treatment.**

**CEDAW ARTICLE 1**

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.



**FORMAL LAWS**

Article 25 of the Constitution states that  
“(i) All citizens are equal before law and are entitled to equal protection of law<sup>452</sup>  
(ii) There shall be no discrimination on the basis of sex alone.” National Policy for Development and Empowerment of Women, 2002, National Plan of Action. The Constitution of Pakistan provides complete equality and is reiterated in the chapter on fundamental rights and those accorded in the Principles of Policy. See Articles 26(1), (2) which states, “Non-discrimination in respect of access to public place”, and Article 27 which prohibits discrimination in services. (see also under protective since some of the protective laws are also non-discriminatory).

**QURAN/SHARIAH/  
HADITH**

According to evidence derived from the *Quran* and *Sunnah*.<sup>453</sup> “O Mankind! Revere your Guardian-Lord, who created you from a single person, Created of like nature, his mate, and from them twain

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<sup>452</sup> According to S. Sardar Ali and Kamran Arif, in ‘Blind Justice to All’, equality before law has a somewhat negative connotation that indicates the absence of any special favor to any individual and equal subjection of all classes to ordinary law. However, equal protection of laws means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or classes in like circumstances.” (pg.1)

<sup>453</sup> Nawal Fauri, *An Overview of Women’s Human Rights in Shari’a Stipulations and CEDAW Articles*, (Jordan: UNIFEM).

scattered (like seeds) countless men and women; revere Allah, through whom ye demand your mutual (rights), and (reverence) the wombs (that bore you): for Allah ever watches over you.” *Al-Nisa*:1. “For Muslim men and Muslim women, for believing men and women, for devout men and devout women, for the true men and true women, for men and women who are patient and constant, for men and women who are humble themselves, for men and women who give charity, for men and women who guard their chastity, and for men and women who engage in God’s praise, for them has God prepared forgiveness and great reward.” Verse XXXIII:35. “Ye are one from another.” *Al-Nisa* 25 (Fauri). According to S. Ali, on the occasion of the Last Haj, the Prophet (SAW) is quoted to have said, “All people are equal, as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab or a white over a black person. Only God fearing people merit a preference with God.”

**CUSTOMARY  
PRACTICES**

Although, the Constitution of Pakistan, CEDAW and *Shariah* are all supportive to women, customary practices are discriminatory towards women. (See more under customary practices, below).

**CEDAW ARTICLE 2**

State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake: To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle; To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against

women; To repeal all national penal provisions which constitute discrimination against women.

**FORMAL LAWS**

The Constitution of Pakistan provides complete equality and is reiterated in the chapter on fundamental rights and those accorded in the Principles of Policy. See Articles 26(1), (2) which states “Non-discrimination in respect of access to public place...”, and Article 27 which prohibits discrimination in services. (See also under protective since some of the protective laws are also non-discriminatory). The discriminatory laws that are in need of repeal are the Hudood Ordinances, Laws of Qisas and Diyat, and the Law of Evidence.

**QURAN/SHARIAH/  
HADITH**

According to evidence derived from the *Quran* and *Sunnah*.<sup>454</sup> “O Mankind! Revere your Guardian-Lord, who created you from a single person, Created of like nature, his mate, and from their twain scattered (like seeds) countless men and women; Revere Allah, through whom ye demand your mutual (rights), and (revere) the wombs (that bore you): for Allah ever watches over you.” *Al Nisa*:1 “For Muslim men and women, for believing men and

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<sup>454</sup> Fauri.

women, for devout men and women, for the true men and true women, for men and women who are patient and constant, for men and women who are who humble themselves, for men and women who give charity, for men and women who guard their chastity and for men and women who engage in God's praise, for them has God prepared forgiveness and great reward." Verse XXXIII:35 "Ye are one from another." *Al-Nisa* 25 (Fauri).

**CUSTOMARY PRACTICES**

In contrast to supportive laws for women, the worst kind of discrimination that takes place as a customary practice is honor killings. Although this has been declared as 'murder', no concrete action has been taken by the government to date.

**CEDAW ARTICLE 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

**FORMAL LAWS**

See comments corresponding to Article 1 and 2 of the convention – The government of Pakistan through the Local Government Ordinance, 2000, has ensured the 33% representation of

women in the local bodies election. There is a 5% quota for women in public institutions.

**QURAN/SHARIAH/  
HADITH**

According to Fauri, quoting from the *Quran*, “Whoever works righteously, man or woman, and has faith, verily to him will We give a new life, a life that is good and pure and We will bestow on such their reward according to the best of their actions.” *Al-Nahil*: 97. According to Ali: “And women shall have rights similar to the rights against them, according to what is equitable.” *Al-Baqqara*: 227.

**CUSTOMARY  
PRACTICES**

Regarding political, social and economic rights of women, there are many discriminatory practices that negate these rights. Examples include: Women being barred from voting in the tribal areas, women’s right to work and income is controlled by men, women viewed as commodities.

**CEDAW ARTICLE 4**

*See under corrective*

**CEDAW ARTICLE 5**

State Parties shall take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women; To ensure that family

education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

**FORMAL LAWS**

According to Ali, Article 5 of the convention puts a difficult obligation on the States as it requires changing of cultural and social attitudes towards women to ensure their participation in society on the basis of equality (p. 45). Furthermore, this article is important in the context of Pakistan where most of the practices stem from biased cultural practices and prejudices. (46).

**QURAN/SHARIAH/  
HADITH**

According to Fauri, "Islamic law does not discriminate between one human being and another and it guarantees both sexes their full rights and freedoms." And "When patterns of cultural and social behavior adhere to Islamic rulings and teachings, justice and equality is ensured for both sexes." The *Quran* says, "Verily the most honored of you in the sight of Allah is the most righteous of you." *Al Hujrat*:12, "And let not the hatred of others to you make you swerve to wrong and depart from justice. Be just that is next to piety." *Al-Maeda*: 8.

**CUSTOMARY  
PRACTICES**

To date, no law has been passed against the practice of honor killings. Increasingly, the so-called Islamic Laws of General Zia-ul Haq are used to perpetrate violence against women and use women to settle scores among men and their disputes.

**CEDAW ARTICLE 6**

State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women

**FORMAL LAWS**

There are a number of laws that exist in Pakistan addressing the issue of prostitution of women. These are: The West Pakistan Suppression of Prostitution Ordinance, 1961, amended in 1968; The Punjab Suppression of Immoral Traffic Act, 1935; The West Pakistan Vagrancy Ordinance, 1958, Pakistan Penal Code, sec 497 and the Hudood Ordinance, 1979 (p. 57).

**QURAN/SHARIAH/  
HADITH**

Islam prohibits all forms of sexual trafficking and exploitation. According to Islamic law, anyone who engages in such activities is subject to severe punishment. (Fauri: 14). "And come not near unto adultery, Lo! It is an abomination and an evil way."

**CUSTOMARY  
PRACTICES**

According to the "State of Human Rights in 2000" there is evidence of women from Sri Lanka and Bangladesh being sold to landlords in Sindh and Punjab. Women



are also trafficked through the custom of *vulvar*.

**CEDAW ARTICLE 7**

State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; To participate in non-governmental organisations and associations concerned with the public and political life of the country.

**FORMAL LAWS**

According to Ali, the Constitution of Pakistan does not discriminate against women for participation in the political and public life of the country. There is also a 5% quota for women in public and private sector. (64). Under the present government, several developments have taken place on issues of women's rights such as seven women who were recruited into the policy-making bodies. Under the Devolution of Power Plan, the government has allocated 33% special seats for women in the local bodies at the union council, tehsil and district levels to

be contested through direct elections.<sup>455</sup>  
The number of women who have been elected through this is 36,105.<sup>456</sup> (Local Government Ordinance, 2000).

**QURAN/SHARIAH/  
HADITH**

According to Fauri, the *Sharia* grants Muslim women the right to participate in all spheres of life. She adds that women have the right to work or hold any public office, except leadership of a Muslim nation. But this is debatable as some Muslim jurists believe that this is forbidden and others give alternative interpretations of *Sharia* that permit women to be head of state. (p. 15) “And in no wise covet those things in which Allah hath bestowed His gifts more freely on some of you than on others, To men is allotted what they earn, And to women what they earn. But ask Allah of His bounty: For Allah hath full knowledge of all things.” Stated in verse IV:32 of the *Quran* (Ali: 60).

**CUSTOMARY  
PRACTICES**

Most women are registered voters and do cast their votes, but in most cases are influenced by the male members of the family. In some areas of Balochistan, NWFP and Punjab, women are not allowed to vote.

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<sup>455</sup> Legislative Watch, January-February 2001.

<sup>456</sup> Naeem Mizra, *Women's Participation in Local Government Elections 2000-2001*, 2000, p. 2.

<b>CEDAW ARTICLE 8</b>	State Parties shall take all appropriate measures to ensure to women, on equal terms with men, and without discrimination, the opportunity to represent their governments at the international level and to participate in the work of international organisations.
<b>FORMAL LAWS</b>	According to Ali, there is no law on the statute book in Pakistan that prohibits women from representing their government at the international level. However, there is no affirmative action measure that ensure diplomatic positions for women abroad. Currently, there are about 6 women ambassadors to different countries. There are many examples of women who have held senior positions abroad and in international organisations, e.g. Dr. Nafis Sadik, United Nation's senior ex-employee. (p. 66).
<b>QURAN/SHARIAH/ HADITH</b>	Fauri interprets this article by saying that any qualified Muslim woman has the right to hold any international positions provided this does not jeopardise their primary responsibilities of being a wife and mother, etc. (Fauri: 15).
<b>CUSTOMARY PRACTICES</b>	Again, here the issue becomes that of control although laws may support women's right to participate in different spheres of life, it eventually depends on their male kin to 'allow' them to

participate. Of course, in most cases women are not allowed to carry out certain kinds of responsibilities.

**CEDAW ARTICLE 9**

State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. State Parties shall grant women equal rights with men with respect to the nationality of their children.

**FORMAL LAWS**

The present government has amended section 5 of the Pakistan Citizenship Act of 1951, to provide that the children of Pakistani women married to foreigners would also be entitled to Pakistani citizenship. This entitlement had previously been available only to children of Pakistani men married to foreigners, not for children of Pakistani women married to non-Pakistanis. However, the government did not amend section 10 (2) of the act, which is equally discriminatory, since it provides for the grant of citizenship to the foreign spouse of a Pakistani man, but does not provide an

equal facility for the foreign spouse of a Pakistani woman.<sup>457</sup>

**QURAN/SHARIAH/  
HADITH**

The *Sharia* grants both men and women the full freedom to choose or retain any nationality they want and to confer this nationality on their children. Although, in Islam sons and daughters must take on their father's name, this does not restrict their parents' right to nationality. The *Quran* says: "O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes that ye may know each other (not that ye despise (each other). Verily the most honored of you in the sight of Allah is (he who is) the most righteous of you." *Al-Hujurat*:13 (Fauri: 15)

**CUSTOMARY  
PRACTICES**

No known customary practice that goes against this provision.

**CEDAW ARTICLE 10**

State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular, to ensure it on a basis of equality of men and women. The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in

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<sup>457</sup> Legislative Watch, January–February 2001.

educational establishments of all categories in rural as well as urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocation training; Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality; The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging co-education and other types of education which will help achieve this aim and in particular, by the revision of text books and school programmes and the adaptation of teaching methods; The same opportunities to benefits from scholarships and other study grants; The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely; The same opportunities to participate actively in sports and physical education; Access to specific educational information

to help to ensure the health and well being of families, including information and advice on family planning.

**FORMAL LAWS**

Ali points out that in the chapter on the Principles of Policy of the Constitution of Pakistan, it is stated thus: Article 37 (b) “The State shall remove illiteracy and provide free and compulsory secondary education within the minimum possible period. Article 37 (c) Make technical and professional education generally available and higher education equally accessible to all on the basis of merit.” There are many laws in Pakistan that promote education, some of these are: The Provincial Primary Education Ordinance, 1962, The Literacy Ordinance, 1985; The Workers Children Ordinance, 1972; Education Policy 1998-2010. The present government has also announced the Education Sector Reforms (ESR) — adult literacy, education for all and technical education covered under ESR — Education for women is also one of the areas of concern in the National Plan of Action. The government has also promulgated legislation for compulsory primary education for Punjab, NWFP and the Federally Administered Tribal Areas (FATA).

**QURAN/SHARIAH/  
HADITH**

Fauri states that all of the measures included in this article are in consonance with Islamic teachings and principles

which promote equal access to education regardless of their sex. (Fauri: 16). Ali quotes the following *Ahadith*. "Educate your children for they are born for a time that is not yours." And, "Seek knowledge even if you have to go to China. Seek knowledge from the cradle to the grave." "To seek knowledge is obligatory for every Muslim male and female."

**CUSTOMARY PRACTICES**

As is indicated, statutory/Islamic laws support women's education; usually traditional laws and norms restrict women's mobility, thereby, reducing access to education. Gender bias and the concept of segregation is often used to implement these restrictions in the attainment of higher level of education for women. However, the attitude towards women/girls' education is gradually evolving in certain rural areas.

**CEDAW ARTICLE 11**

State Parties shall take all appropriate measure to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

The right to work as an inalienable right of all human beings;

The right to the same employment opportunities; including the application of



the same criteria for selection in matters of employment.

The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent trainings.

The right to equal remuneration, including benefits and to equal treatment in respect of work of equal value, as well as equality of treatment in respect of work of the evaluation of the quality of treatment in respect of work of the evaluation of the quality of work. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures: To prohibit, subject to the imposition of sanctions, dismissals on the grounds of pregnancy or of

maternity leave and discrimination in dismissals on the basis of marital status. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities. To provide special protecting to women during pregnancy in types of work proved to be harmful to them.

Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repeated or extended as necessary.