Before the 22nd Law Commission of India

Response of

The All India Muslim Personal Law Board, New Delhi

to the Public Notice dated 14.06.2023 with respect to the 'Uniform Civil Code'

INDEX

Through

MOHAMMAD FAZLURRAHIM MUJADDIDI
GENERAL SECRETARY
ALL INDIA MUSLIM PERSONAL LAW BOARD
76 A/1, Main Market, Okhla Village Jamia Nagar,
New Delhi - 110025 (India)

Before the 22nd Law Commission of India

Response of
The All India Muslim Personal Law Board (AIMPLB),
New Delhi
to the Public Notice dated 14.06.2023 with respect to the 'Uniform Civil Code'

Brief introduction of AIMPLB

That the All India Muslim Personal Law Board (AIMPLB) is a non-government organization constituted in 1973 to adopt suitable strategies for the protection and continued applicability of Muslim Personal Law in India, most importantly, the Muslim Personal Law (Shariat) Application Act of 1937, providing for the application of the Islamic Law Code of Shariat to Muslims in India in personal affairs.

That the Applicant is a Society registered under the provisions of the Societies Registration Act, 1860 and works towards protecting Muslim personal laws, interacts with the public authorities, and guides the general public about crucial issues concerning Islam, its followers, and its practice in India. The Applicant has an Executive Committee of 51 members and a General Body consisting of 251 members, both women, and men, from all over India, comprising of Ulema (scholars of Islam) representing the various schools of thought in Islam, lawyers, activists, and public-spirited individuals.

That the Applicant has in the past intervened or been made a party to litigations brought before the Hon'ble Supreme Court and other High Courts and has assisted the Courts to the best of its ability to ensure that justice, equity, and above all, the ethos and ideas enshrined in the Constitution of India prevails.

Part I: Preliminary Issue

1.1. This Memorandum/Representation is pursuant to your public notice dated 14.06.2023, *"…to solicit views and ideas of public at large and recognized religious organizations about the Uniform Civil Code*."

1.2. First of all, it is submitted that, given the vast nature of the issue involved the content set out in the above-referred notice is vague, too general, and unclear. The terms for the suggestions to be invited are missing. It appears that such a large issue has been floated in the public domain to seek a referendum as to whether the reaction of the general public also reaches the Commission in either equally vague terms or in a 'yes' or 'no'. We are making this submission for multiple reasons because this issue being a purely legal issue has also been fodder for politics and consumption of media-driven propaganda. This issue becomes further important because this commission's predecessor had examined the very same issue and reached a conclusion that Uniform Civil Code (hereinafter also referred to as 'UCC') is neither necessary nor desirable. Within such a short span of time, it is surprising to see the successive commission again seeking public opinion without there being any blueprint as to what the Commission intends to do.

1.3. What is the need for this 22nd law commission to revisit / revise the findings of the 21st law commission contained in the consultation paper of the 21st law commission dated 31.08.2023? The 22nd law commission was constituted for 3 years and was notified on 24.02.2020 by the Department of Legal Affairs, Ministry of Law and Justice, Government of India, without specifying any terms of reference. During this period, the 22nd Law Commission was inactive; its term was extended by subsequent notification dated 22.02.2023 for a further period of 1 and a half years ending on 31.08.2024. The term of reference of the 22nd law commission can be deciphered from the circular dated 24.03.2023 which is in general terms without any specific reference to revise of the findings of the 21st law commission stated in the consultation paper dated 31.08.2018.

1.4. The Law Commission is a non - statutory body and is constituted at the behest of the executive / administrative order of the government. Though it is not a statutory body, it must have the definite terms of reference. No Law Commission can *suo moto* embark on any inquiry without specific terms of reference enabling it to do so. The parallel statutory provision is Section 3 of the Commission of Inquiry Act, 1952 which empowers the government to constitute a commission to inquire into definite questions of public importance. Since the law commission's exercise to launch an inquiry entails a huge expense from the public exchequer and also involves energy and time consumption, not only of the commission but also of the people which may respond to the commission, it is absolutely necessary that the law commission should have the definite terms of reference to indulge in such exercise. As there is not such definite terms of reference to revise or revisit the specific finding of the 21st law commission that at this stage it is neither desirable nor necessary to enact the UCC.

1.5. It is reasonably apprehended by the Muslims in India that the raking of the topic of UCC is with the objective of putting the system of Muslim personal law in peril. In the present atmosphere, the Muslims in India live in a constant siege of dreaded violence and discrimination and have been targeted by hate speeches and the civil society is polarized on communal lines. Muslims have intense fear and invisibility as it is perniciously propagated that they should not be seen in public spaces with Muslim markers and the Muslim girls right to education is imperilled for their choice of wearing the Hijab in educational institutions. Under this atmosphere, to start a debate / discussion putting the Muslim Personal Law into focus is perceived as an attack on their identity.

1.6. These fears are compounded by the law commission following an utterly arbitrary and unfair procedure inviting the response on terms which are vague and within a unreasonably short span of 30 days. It is therefore requested that you may kindly drop this *suo moto* drill of

keeping the pot boiling against the Muslims which is against the Republican values enshrined in our Constitution.

1.7. The preamble of the Constitution of India embodies the resolution of the people of India to become a democratic Republic. India is not only Democratic, but also a Republic. The State belongs to the people of India. As a Republic, it is a public institution and committed to the pursuit of public good. The ruling party which governs the nation is also a Republican institution which means that it is essential to such government that it doesn't work only for the selected people or a favoured class but rather for the whole body of the people. The whole exercise of revisiting / revising the issue of UCC is politically motivated and aims at polarising, dividing the citizenry on religious grounds to achieve political mileage for the party in power.

1.8. Coming to the core legal issue, based upon the observations of the Supreme Court of India, stating that "*Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians*", it is stated that the same is erroneous as far as the position of Muslim and their Personal Laws are concerned. The religious position of other religions (Hindus and Christians) is different as they may not have many concepts, like succession, divorce, adoption etc in their religious books. Whereas, the fundamental religious book of Muslims, being the Holy Quran, Sunnah and *Fiqh* (Islamic Law) in the form of religious texts, which are matters of Articles 25 & 26, mandate its believers to follow the injunctions as prescribed therein. The followers of Islam shall find themselves bound by those injunctions and the same are non-negotiable terms. Personal relationship of Muslims, guided by their personal laws, is directly derived from *the Holy Quran* and *Sunnah* (Islamic laws) and this aspect is linked with the identity of Muslims in India. Muslims in India will

not be agreeable to lose this identity of which there is space within the constitutional framework of our country. National integrity, safety and security and fraternity is best preserved and maintained if we maintain the diversity of our country by permitting minorities and tribal communities to be governed by their own personal laws.

Part II: Response and Report of the 21st Law Commission

2.1. Before we proceed to make our submissions we request the Commission to take into consideration the following documents already submitted in this regard:

2.1.1. Duly signed public opinion of 4,83, 47,596 (Four Crores eighty three lakhs forty seven thousands and ninety six) citizens of India, scanned copies of which was submitted in a Hard Disk, with the 21st Law Commission in relation to the proposed Uniform Civil Code. This document was submitted on 13.04.2017 vide letter dated 13.04.2017 of the All India Muslim Personal Law Board[1].

A copy of the letter dated 13.04.2017 is enclosed herewith and marked as **ANNEXURE-A**

Note: If so desired by the Commission, a copy of the said document can be provided again.

2.1.2. Kindly also see, the representation dated 31.07.2018 submitted by the AIMPLB with this Commission in relation to the Uniform Civil Code.

A copy of the said letter dated 31.07.2018 submitted to the Law Commission is enclosed herewith and marked as **ANNEXURE-B**

Alongwith the above stated communication, upon asking of the Commission, the questions in relation to Muslim Personal Laws were answered and submitted.

A copy of the said document answering the questions submitted with the Law Commission is enclosed herewith and marked as **ANNEXURE-C**

2.1.3. While working on the present draft, pursuant to the Public Notice dated 14/06/2023 it appears that,

[1] https://www.telegraphindia.com/india/48-million-signs-against-single-code/cid/1519641

i. Uttarakhand UCC panel submitted its report and a draft of proposed UCC. It is also reported in the media that the Draft Bill of UCC prepared by Uttarakhand Committee focuses on alleged discrimination in Muslim Law and is a template of the UCC by the Centre.

ii. As per the news in public domain, the Central Government is likely to introduce a bill on UCC in up-coming Monsoon Session in Parliament, which is starting on 20th July, 2023.

2.1.4. Considering the above facts, also available in public domain, the exercise before the 22nd Law Commission, apparently, is nothing but a futile exercise. However, keeping in view the institutional requirement of the Commission, knowing the above facts, the AIMPLB is submitting the present Representation to register our protest against the present exercise which in our opinion shall not lead to a constructive outcome, as projected. The All India Muslim Personal Law Board, being the largest representative body of Indian Muslims, on behalf of Indian Muslims strongly oppose an exercise, aimed to introduce a radical shift in the very fundamental family-matrimonial laws of the country, bound to impact each and every citizen, to be carried out as a mere procedural formality of soliciting views.

2.1.5. The present Representation shall be treated as our Protest Representation submitted to place before the Commission the complexities with the issue of the Uniform Civil Code involved, the Indian tradition of legal pluralism and the core values of the Republic. In the background of no blueprint of a proposed uniform code on family laws and the obscure manner in which the present exercise is being undertaken, on the issue of the interpretation of the Muslim Laws/*Shariat qua* any proposed law, the All India Muslim Personal Law Board reserves its right to solicit its views.

Part III: Uniform Civil Code

4.1. The issue of Uniform Civil Code has been disproportionately raised and talked by certain sections of people from time to time. Apart from

this, different Courts in India including the Hon'ble Supreme Court have made observations about the Uniform Civil Code. Undoubtedly, the issue happens to be part of Directive Principles of State Policy (DPSP) where it is stated that endeavor shall be made to secure for the citizens a Uniform Civil Code 'throughout the territory of India'. There is also no doubt that in legislative powers the issue of personal law is set-out within the legislative domain of the center as well as the states. However, at this stage, like earlier, it has again been put up for discussion in the public domain. It is important to remind the Commission that not long back, the previous Law Commission had stated that 'a Uniform Civil Code which is neither necessary nor desirable at this stage'[2] Again the question before considering this issue is the same as to whether it is feasible to make such law; especially at this stage when different communities, different territories, different localities, different castes, different genders etc. receive differential treatment all sanctioned by either the Constitution of India itself or through the law making process of our country.

4.2. Considering India's pluralistic principles, vast diversity and multiculturalism, it was realized by the makers of the Constitution that laws in India are not governed solely on religious premises but vastly on regions. With these views in mind, personal laws remain in the Concurrent List of the Constitution of India, i.e. empowering the states and the central government to make laws. Certainly, the constitutional intent was never to have a compulsory UCC. Legal pluralism or having multiple parallel legal regimes, throughout the world is seen as an important marker of inclusivity, tolerance and civility. Such exemptions based on diversity are not only confined to personal laws, but even the general laws are not uniform throughout states. More than a hundred amendments to the Code of Criminal Procedure and IPC have been made by states.[3] This is not new or to be frowned upon; to

[2] Paper submitted by 21st Law Commission (in a Report on Reform of Family Law 2018) Para 1.15

[3] For instance, the law of anticipatory bail (Section 438 of Cr.P.C.) differs from state to state. In 2019, anticipatory bail has been restored in Uttar Pradesh with it not being available for around 43 years. Section 295AA added recently by Punjab to the IPC.

preserve legal diversity, democratic nations imbibe these principles. In the United States, for example, criminal law differs from state to state. Land laws in India have also been exempted from judicial scrutiny and have been included in the Ninth Schedule.[4] The Constitution in India itself recognizes specific exemptions for certain communities.[5]

4.3. Reliance upon Article 44 of Constitution of India, which is a part of DPSP, cannot be placed on a higher pedestal than Part III of the Constitution of India which guarantees fundamental rights of citizens and persons. Under Articles 25 and 26, there are various counter arguments which lead to connect with personal law, at least of Muslims. However the Supreme Court of India, in a case of Hindu Endowment, has sought to dispel this aspect by saying that the provisions in Part III of the Constitution do not touch upon the personal laws of the individual. In this judgment the court stated that in applying the personal laws of the parties, the judges could not introduce his their own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of personal law (which was Hindu law in that case); i.e., should have referred to *Smritis* and commentaries, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute. Reference may be drawn from judgment of the Hon'ble Supreme Court in **Sri Krishna Singh v. Ahira Mathur & Ors. AIR 1980 SC 707** (A Hindu religious endowment matter relating to Math & Sanyasi etc.)

4.4. "Prevalence of multiple personal laws by different communities is consistent with religio – cultural rights of the member of Indian communities flowing from conjoint reading of Articles 25, 26 and 29 of the Constitution. The application of such laws as per the religio - cultural norms of different communities / tribes should be celebrated as the shining example of a robust democracy in our beloved country. However, judicial activism has played its role in truncating these rights

[4] 9th Schedule, Constitution of India.

[5] Article 48, Article 25 (Explanation I), Article 290A, Article 371A-G.

by gradually expanding its role in interpreting authoritative religious text of a religious denomination and has evolved doctrine of Essential Religious Practice (ERP). The scope of ERP is now sub – judice before the 9 Judges Bench of the Constitutional Court."

4.5. It cannot be denied that many principles of law have been introduced in our countries which are common law driven non-religious principles. To deal with the concept of family and related laws, insertion of concepts based upon fluid principles to regulate family laws of different communities in our country cannot be the basis to introduce new set of laws. The question is: are we ready to take the same path on family issues on which those libertarian societies have moved?

4.6. Time and again, a class of activists, politicians, judges and lawyers has sought to justify promulgation/implementation of Uniform Civil Code on the basis of the following broad principles:

a) Secularism
b) Gender Justice & Principle of Equality
c) National Integration
d) Supreme Court observations about UCC
e) Creating a homogenous Class of citizen

4.7. On the other hand those who are not in favor of UCC have also relied upon the first three principles stated above to say that UCC is neither practical nor desirable and against the national interest of the country. For them, the last head i.e., creating a homogenous class of citizens is neither factually correct nor it can be imagined in the country like ours for whom the Supreme Court has recorded in a judgment as under:

"The one billion population of India consists of six main ethnic groups and fifty-two major tribes; six major religions and 6400 castes and sub-castes; eighteen major languages and 1600 minor languages and dialects. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person, whatever his/her

language, caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble, in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the colours as well as different shades of the same colour in a map are the result of these small pieces of different shades and colours of marble, but even when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost."

4.8. We, country as a whole, understand that we are not a homogenous class throughout the country. Diversity of different nature and parameters runs through the blood of this nation. Any policy decision to make uniformity in '*personal matters*' (which includes personal laws for the Muslims community as it comes from their religious books) shall be a misadventure in the existing social order.

4.9. The first four categories (mentioned in para 3.6) are discussed herein below for both those who have sought to propagate the relevance of UCC and those who are clearly opposed to the UCC:

a) <u>Secularism</u>

i. All of us must realize that secularism is neither contrary to maintaining diversity with diverse cultural and religious ethos. Neither the concept of secularism is contradictory to plurality[6]. For ensuring the peaceful co-existence of religiously and culturally different people, the scheme of the Constitution of India is such that different family laws for different class of people is perfectly within the bounds of the constitution of India.

ii. Articles 25 and 26 have guaranteed freedom of conscience and free profession, practice and propagation of religion alongwith

[6] Paper submitted by 21st Law Commission (in a Report on Reform of Family Law 2018)

the right to manage religious affairs by every denomination or any section thereof. Visibly, Article 25 itself accommodates different religious practices for different class of citizens. Along with this the terminologies like '*public order*' '*morality*' and '*health*' have been interpreted and used by different authorities and institutions in a discriminatory manner by using the term *essential religious practice*. This principle has not only treated different communities differently but, the religious practices, justifiable under the Constitution, have been made different for different people. Hence, the usage of the constitutional provision itself is different for different people.

iii. Every religious group is based upon an established faith relatable to written text or continuously practiced religious teachings and diktats practiced for a long time. In that process every religious belief of a denomination or section thereof develops some kind of moral principles which we may call 'religious or denominational morality'. This concept of denominational morality calls for understanding the logic and reasons of a religious order or command within the denomination rather than taking out one issue from religion and comparing the same with the general principles as have emerged in contemporary times and the notion of equality which has emerged out of the concept of constitutional morality. For instance, the religious texts of inheritance and succession amongst Muslims granting a defined right to women for succeeding in the property of her relatives vary. In succeeding to a property of her father, the daughter has half a share of her brother. On face value, it appears to be discriminatory between the brother and the sister. However, there is a very sound nuance available in the religious texts of such a distinction. To examine and discuss this issue, the Court and legislature should not only confine itself to elusive interpretations of 'constitutional morality', and ignore the

concerned religious texts which are equally important in the process of decision making.[7] The reference of religious text in this para is not open for interpretation by the Court or any other institution/authority. The mention of the religious texts is only for reference.

b) <u>Gender Justice & Principle of Equality</u>

i. At the outset, it is clarified that the AIMPLB or the Muslim community is not against empowerment of women and their rights as conferred on them. The community has taken steps to clarify many aspects of women's rights.

ii. There are two very fundamental questions directly connected with the issue of equality (sadly seldom discussed): What is equality and who defines equality? These questions are at the heart of the present debate. Who enjoys the primary agency in such discourses? The women on the ground or the powerful lobbies? Another crucial and related analysis is carefully evaluating, historically, how much the debates on equality, the complex and often vague interpretations of gender-justice and liberal constitutionalism have accommodated and benefitted women, from marginalized and minority communities, on the ground? There is one more central aspect to this discussion: Can legal principles be divorced from polity? The answer, clearly, is negative.

iii. It is through this fundamental questioning, the legitimate fears of minorities, the fears that are not unique to the Indian experience and are prudently entrenched in the lived experiences of communities, must be discussed. When the Supreme Court questions certain communities for not forsaking "their sentiments" attached to personal laws for a common civil code, when debates question the minorities for not 'aligning' with the 'national worldview' (read majoritarian

[7] Rethinking Muslim Personal Law: Issues, Debates and Reforms, Routledge India, 2022.

worldview), these inhibitions are not sufficient to only be recognized but certainly be analyzed. This argument, needless to mention, is without prejudice to our central argument that no community in India today, no matrimonial general law in India today, is truly uniform and the popular narrative of projecting minorities or the tribal as legally undisciplined is an ill-founded and mischievous argument.

iv. The other issue is: whose perspective of morality flows in law? The Victorian morality has often been recognized and questioned for being the definitive factor in many laws (the criticism of Victorian morality during the challenge against Section 377 IPC, during marriage equality proceedings, et al). Similarly, Brahmanical morality has been at the heart of codified family laws in India. Take for example the Special Marriage Act, 1954 the prohibited degrees of marriage, the dilution of customary laws, the maintenance of the caste Hindu succession structure—these established laws capture the fear of minorities and tribal. In the name of gender-justice, will women, from minorities and tribal communities, be excluded from the mainstream? How empathetic the law is towards the women of these communities who have been used as pawns for political vendetta for decades with their voices being hushed when they demand their rights (the *Hijab* controversy is the latest example).

v. It is stated law cannot be, rather must not be, analyzed in a vacuum. The contemporary attack on the Muslim identity in India must be kept in the background when analyzing the debates on gender equality. This is the legitimate fear of Muslim women. The latest example can be *the Muslim Women (Protection of Rights on Marriage) Act, 2019* i.e. the Triple Talaq Act. An Act that criminalizes a method of divorce while the marriage subsists. The immediate fallout of such legislation, in the name of gender justice and the supposed empowerment of

Muslim women, has been severely adverse to the Muslim women's cause.[8] This is the same fear tribal women are grappling with and the same is evident from the opposition of a Uniform Civil Code from the North-Eastern parts of the country and the Adivasi communities. [9] It is at this point of discussion it is essential to enquire into the prejudiced but comfortably established popular rhetoric that any remotest manifestation to fill the gender equity gaps can only be done through a uniform code (it is amusing that we do not yet know what such a code entails). The solution to this, certainly, is not in attacking marginalized communities, the solution exists in dialogue and engagement. Muslims in India, in 1939, from all schools of thought, accepted one school of thought i.e. Maliki, in order to ease the problems faced by Muslim women with respect to divorce[10]. The solution, clearly, lies in the approach. Whether it's the minority communities or the tribal communities, the apprehension lies in the replacement of indigenous systems by creating a vague mirage of equality as has been done in the past.[11]

vi. The fact on the ground remains that religious institutions derive their legitimacy from the followers of the faith. Though the system of *Dar-ul-Qazas* does not work as parallel to judicial process in our country but it is Muslim women themselves who have kept institutions such as *Dar-ul-Qazas* relevant.[12] In relation to this very same issue, tribal customary laws and institutions to dispense with justice in certain areas must be kept in mind. For instance, despite the presence of an independent judiciary in Arunachal Pradesh, the prominence

[8] https://www.thequint.com/gender/triple-talaq-criminalisation-leads-to-abandonment-of-muslim-women

[9] https://www.outlookindia.com/national/beyond-the-civil-codes-magazine-290741

[10] Dissolution of Muslim Marriages Act, 1939.

[11] Muslim Women (Protection of Rights on Marriage) Act, 2019.

[12] See Sylvia Vatuk, *Marriage and its Discontents: Women, Islam, and the Law in India* (2017).

of Gaon Buras and Gaon Buris as the highest village councils cannot be denied.

vii. The other aspect of the debate is the presence of gender equality gaps in not only the existing codified community-based family laws (particularly of the majority community) but also in the so-called uniform general matrimonial laws of the land which are often projected as successful models of uniform matrimonial laws such as the family laws in Goa and the Special Marriage Act, 1954. For instance, laws in Goa provide that a Hindu husband can take a second wife in the absence of an issue, if the wife has attained the age of 25, and also if she has attained age 30 without having a son.[13] The SMA takes a person professing Hindu, Buddhist, Sikh or Jain religion solemnizing marriage (Section 18) under SMA with another person of either of the four religions (recognized in the Hindu fold), to the Hindu Succession law. However, if two Muslims or two Christians (also Jews & Parsis) get their marriage solemnized under SMA, the disability provisions shall come in and consequentially the Indian Succession Act shall apply. The Succession Acts, whether general or community-based, take us to interpretations and applications of law that do not fit in the strict yardstick of 'equality' with which Muslim laws are generally measured and consequently criticized. Needless to mention, these are also examples of how the supposed uniform laws, projected as successful models, are in fact not 'uniform'.

viii. To understand the concept of '*equality*'; one must analyze it in context. We have a Constitution of India, which guarantees '*equality before law*' and '*equal protection of law*'. However, it also establishes '*reasonable classification*' based on 'intelligible differentia' and accordingly separate classes may be treated 'discriminately' (which we say 'treated differently'). Common law system has created these principles which we term as

[13] Article 3 of the Decree of Gentile Hindu Usages and Customs of Goa, 1880.

'constitutional principles'. In the same way believers of Islam believe in 'equality before law' and 'equal protection of law' which is a part of *Quran* and *Sunnah*. Like, inheritance and succession in Islam amongst the co-sharers is based upon '*equity*' and not on abstract 'equality'. This Islamic '*equity*' in this regard is relatable to contemporary constitutional terms such as 'reasonable classification' and 'intelligible differentia'. At this stage, we do not wish to comment on other religious books, in relation to inheritance, succession and determination of shares in property. However, we know for a fact that the Parliament made allocation of shares to woman and children in the Hindu Succession Act is reflective of the 'common law' principles and not from the Hindu scriptures (law).

c) National Integration

i. To maintain the diversity of different nature in our federal polity, the scheme as set out in the Constitution of India to consolidate the nation is not, and cannot be, uniform. Different accommodations for different territories are set out in the following provisions of the constitution of India such as:

(a) Article 371 A [State of Nagaland relating to Nagas customs and their customary laws] (b) Article 371 B [Assam] (c) Article 371 [Special provision of Maharashtra and Gujarat] (d) Article 371C [Manipur] (e) Articles 371 D [Andhra Pradesh or Telangana] (f) Article 371 F [Sikkim] (g) Article 371 G [Mizoram] (h) Article 371 H [Arunachal Pradesh]

ii. Till recently, Article 370 was a Special Provision for the State of Jammu and Kashmir, which has been selectively and arbitrarily removed by using the majoritarian force of legislative power. Before starting the debate of bringing UCC, the State must wait the stage to come when the Special Concessions granted by the Constitution of India to different territories of the nation is not required. In other words, before

coming to the issue of unifying the statutory provisions relating to Civil Laws of citizens of this country, the state must wait for the stage when the provisions in the Constitution are able to be unified.

iii. It is also relevant to point out that, two neighboring territories of India i.e. East Pakistan and West Pakistan, despite being governed by the same Civil Code could not remain united because they could not accommodate the diversity in each other resultantly splitting into two countries known as Pakistan and Bangladesh today. It is relevant to cite the example of Pakistan. In Pakistan a separate legislation 'Hindu Marriage Act, 2015' has been promulgated to provide special form of marriage an annulment amongst Hindus as per the customs and practices recognized within the Hindu community there. The effort has not been made to unify the entire civil law irrespective of majoritarian religious belief. We have example of Iran and Iraq before us. We can find many others. Hence, UCC being a factor against national integration is a false bogey to intimidate a particular community [who has also suffered by losing accommodations given in the shape of Article 370].

iv. Substantially homogenized country like France (different from Indian diversity and having a different interpretation of the principle of secularism) has exceptions like accommodating polygamous relations if the same has been solemnized outside the territories of France in their Civil code to regulate the families settled in France[14].

v. In the United States of America, despite a Commission functioning from 1892 has not been able to come up with a draft of Uniform Laws applicable throughout the territory of the United States. The proposals have been addressed to 50 State Legislatures but the efforts have not worked out considering the federal nature of polity and diversity in the

[14] Civil Code France Article 202-1

country. For instance, the age of marriage is different in different regions of the United States[15]. In several states the age of marriage is 14 years going up to 18 years. For example in States like Massachusetts -14 Years Old, New Hampshire- 14 Years Old, Hawaii- 15 Years Old, Missouri-15 Years Old, Alabama-16 Years Old, Alaska-16 Years Old, Arizona-16 Years Old etc. Accordingly, even today 50 different States have different laws on civil matters and yet there is no issue of national disintegration relatable to non-availability of Uniform Civil Laws. In our own country, the laws like the Code of Civil Procedure 1908 are not applicable in certain territories. Similarly, many parts of territory of India, the Indian Penal Code does not apply.

d) Supreme Courts Observations (*Obiters*):

i. Apart from the above broad issues, there has been lots of outcry about the Supreme Court's push to remind the executive and the socio-political system at large as to how the UCC is crucial in national interest. Public Interest Litigations have been filed relying upon those past observations of the Supreme Court, repeated debates have been organized by electronic media, and activists have made hue and cry projecting as if UCC is a matter of national emergency. Even 21st Law Commission has relied upon few of such observations. Owing to the said fact, it is necessary to state some aspects of those Supreme Court Judgments:

I. Sarla Mudgal Case (1995) 3 SCC 635; Lily Thomas Case (2000) 6 SCC 224

The facts of this case, had nothing to do with Muslims or Islamic Law. Be it the *Thomas* case or the *Mudgal* case, the issue was of Hindu married men committing bigamy to avail a second marriage, without dissolving the first and

[15] https://wisevoter.com/state-rankings/marriage-age-by state/#:~:text=The%20general%20marriage%20age%2C%20without,Mississippi%2C%20where%20it%20is%2021.

just by converting from Hinduism to Islam. Facts in these cases deserved condemnation of character of those delinquents who found an opportune moment to relinquish their own faith and belief but on reading of the judgment it appears that Mohammaden Law has been criticized which could have been avoided. It is necessary to point out this fact because these judgments are cited to criticize Muslims at large and requirement of UCC when a discussion is found in public domain or in judicial proceedings.

The *Sarla Mudgal Case* went on to say as under,

> *"33. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27. The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "common civil code" for the whole of India."*

The above observations are erroneous as far as the position of Indian Muslims and their Personal Laws are concerned. Among Hindus and Christians, the concepts of divorce, succession of property of women, independent identity of women after marriage in the customary and religious texts, are either absent or not as developed as that under the Muslim law. Hence, many parts of codified law

applicable to Hindus are non-religious provisions. Same is the position in relation to Christians. Whereas, fundamental religious book of Muslims, being the Holy Quran and supplemental religious texts, which are matter of Articles 25 & 26 mandate its followers to follow the injunctions as prescribed therein. Hence, this observation of the Supreme Court is in complete contradiction with the fundamental issues of Muslims in our country as they believe that the Holy Quran and the supplemental religious texts are mandates of the religion to be followed as their way of life.

II. **Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125**

The facts of this case, again, had nothing to do with Muslims or Islamic Law. This case was related to whether a woman from a tribal community is entitled to parity with a man from a tribal community in intestate succession? In this case, the tribal customs which did not give parity to a woman with a man in the matter of intestate succession was upheld by the Hon'ble Supreme Court of India.

III. **John Vallamattom v. Union of India, (2003) 6 SCC 611**

The facts of this case, yet again, had nothing to do with Muslims or Islamic Law. There, the issue was restriction against a Christian while making a will for religious and charitable purposes. The Court held that the religious freedom of a Christian should be at par with others and struck down the discriminatory provision against Christians. This paragraph was relied upon in the case of *Prakash v. Phulavati* again a Hindu Succession law Case, giving rise to a Muslim Law issue, converting into the Triple Talaq Judgment.

IV. **Prakash v. Phulavati, (2016) 2 SCC 36**

The facts of this case had nothing to do with Muslims or Islamic Law, but it gave birth to *suo moto* proceedings

before the Supreme Court to decide Muslim issues later on confined to the Triple Talaq issue (after the judgment known to be as 'Shayara Bano Case (2017) 9 SCC 1' See Para 28).

V. Jose Paulo Coutinho (2019) 20 SCC 85

The facts of this case had nothing to do with Muslims or Islamic Law. This case was in relation to succession of property amongst the family members of Non-Muslims and the Portuguese Civil Code 1867 and Succession Act of 1925. The Court discussed all succession laws including the Muslim Personal Law (Shariat) Application Act 1937. However, for the Portuguese Civil Code (uniformly applicable in Goa), the Supreme Court stated that

> '*25. … Goa is a shining example of an Indian State which has a Uniform Civil Code applicable to all, regardless of religion except while protecting certain limited rights.*'

This observation of being 'shining example' of Uniform Civil Code, if it is understood in the context of whole of India in terms of the proposed draft of the Law Commission, then it is submitted that Portuguese Civil Code, is neither a Uniform Code nor it is in consonance with the popular perceptions of gender justice, equality, national integration, et al. The Code is discussed in the forthcoming parts of the present Representation.

VI. Shah Bano Case (1985) 2 SCC 556

This was the only case in all the cited cases herein where two Muslims were contesting by relying upon Islamic Law. The issue was providing maintenance to a divorced wife. There is no doubt that S.125-127 Cr.P.C. was in place when this issue was contested. There is already a detailed discussion on this issue in the said judgment. It is also undisputed that the Muslim Community at large contested the application of Cr.P.C. to Muslim divorced couples. Finally the Court reached a conclusion that divorced wife

can file an application under Section 127 Cr.P.C. However, in the meanwhile the Hon'ble Court made an elaborate discussion on Common Civil Code connecting it with the cause of national integration.

Part IV: Existing Civil Laws

5.1. Before we proceed to make submissions under this chapter, we are conscious of the counter reply that to remove the highlighted anomalies in following paragraphs, Uniform Civil Code is being contemplated. We are placing these facts to point out that the religious principles and customary and tribal exemptions that have been reflected in the existing statutes show the inalienable position of the dominant religious group and customs that cannot be dispensed with in such codes.

5.2. The exercise of analysing the scope and nature of a prospective Uniform Civil Code can only be done through analysing the existing family laws—both general and personal. There are two premises of such an analysis:

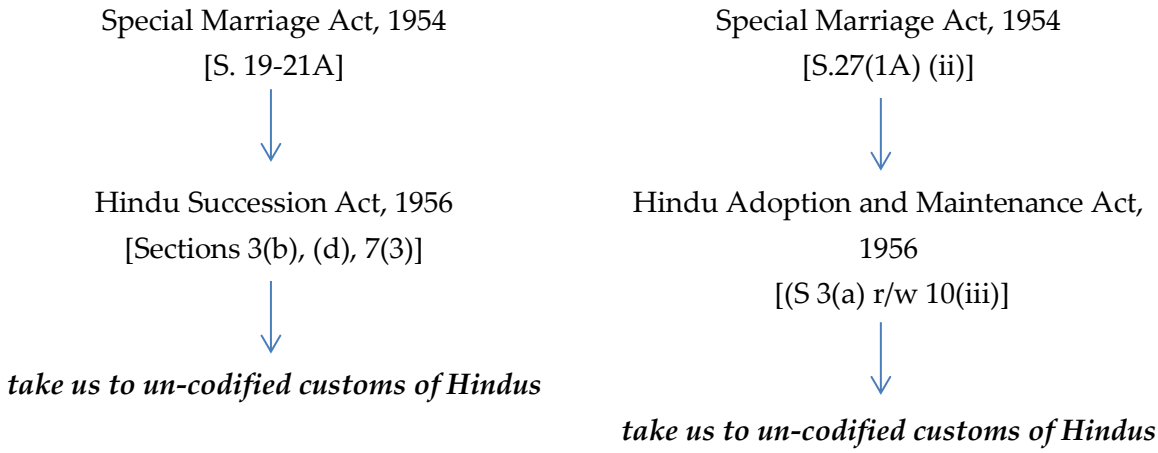
a) Are the existing general/uniform family laws truly *uniform*?

b) Are the existing codified community-based personal laws *uniform*?

5.3. To answer the first question, it is stated that the existing general family laws are far from the remotest conceptualization of 'uniformity'. This discussion further takes us to some of the established general laws, often projected as successful examples of uniform matrimonial laws:

i. The Special Marriage Act, 1954 (hereinafter referred to as 'SMA');
ii. Indian Succession Act, 1925;
iii. The Goa Civil Code or the Portuguese Civil Code of 1867 (hereinafter referred to as 'GCC).

5.4. It is stated that SMA, the closest and continuing model of a uniform matrimonial law in India, is not 'uniform'. SMA, not only has been designed as per the majoritarian morality but provides exceptions for customary laws. The same is reflected below:



5.5. The analysis of the second question will take us to statutory laws of different religions particular the codified Hindu laws [Hindu Marriage Act, 1955 (HMA); Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956]. It is in the analysis of the codified community-based personal laws, one finds that even though these statutes cater to one specific religion or class of people, these laws are filled with exceptions and accommodations for sub-communities, tribes and regional communities. For instance, in HMA, the legislature has protected the customs contrary to the Act by specifically adding Section 29 (2) in the Act. It may also be noted that by virtue of Section 2 (2) of the Act, the Act has been made inapplicable to the Scheduled Tribes. These codified religious matrimonial laws contain provisions to accommodate diverse practices within one set of religion. The Commission must be reminded that diversity, inclusion and accommodation are at the heart of the Indian constitutionalism.

5.6. In the eventuality of a 'Uniform Civil Code', it is evident that different aspects of community-based personal laws shall be touched, tweaked, or superseded. Coming to the Muslim Personal Law/*Shariat* and

creating parallels with the existing family laws (general and personal), a prospective Uniform Civil Code may encroach upon the below mentioned features of the Muslim law. The non-uniformity of the existing family laws, both general and community-based, the complexities of the propositions, the diversity and nuances in the practices has been discussed herein below:

a) Marriage:

i. Nature of Marriage: Unlike the majority Hindu faith, the nature of a Muslim marriage is not sacramental but of a 'sacred contract'. What are the consequences of such a difference? The consequences are crucial. In a Muslim marriage, parties to the intended marriage i.e. wife and husband are free to stipulate and mutually agree to any terms and conditions that are not prima facie opposed to the basic doctrines of the Islamic law. The violation of these mutually settled conditions will lead to consequences as mentioned in the matrimonial contract for instance a right to divorce or a special compensation in addition to *meher* (dower payable by the husband) and maintenance. Interestingly, the Goa Civil Code allows for prenuptial agreements. How similar are these agreements to a *Nikahnama* under the Muslim law? A prospective UCC will have to settle with a particular nature of marriage—such a decision is bound to impact the consequences of such a marriage.

ii. Prohibited Degrees: The degrees of prohibited relationships, in the SMA [Section 2 (b)] are similar to the prohibited relationships set out in the Hindu Marriage Act 1955. It is submitted that different societies have different practices. Hindus (including Jaina, Buddhist & Sikh), Muslims, have different set of prohibition in relationships, [see Mulla, Principles of Mohammedan Law, 19th Edition (clauses 260 to 263)]. Within sections of Hindus and Muslims, some practices

vary and those variations are recognised either through customs or through personal laws.

iii. The degrees of prohibited relationship under Indian family laws are different based on both the differences in personal laws and the regional differences for instance Hindu Marriage Act, Section 3 (g) defines the degrees of prohibited relationship.

However, the Act provides exception for communities (like that of Hindus of South India) *qua* prohibited degrees of relationship under Section 5 (iv) where it says "the parties are not within the degrees of prohibited relationship *unless the custom or usage governing each of them permits of a marriage between the two*".

I. Cousins: Marriage between cousins (paternal, maternal, parallel, cross, first, remote) under the Muslim law is permitted whereas the same falls under the degree of prohibited relationship under the Hindu law (with exceptions such as of South Indian Hindu communities). The Special Marriage Act, 1954 imbibes an interpretation that suits the majoritarian understanding of degrees of prohibited relationship. For instance, in the First Schedule of SMA, Serial Numbers 34 to 37 of Part I and Serial Numbers 34 to 37 of Part II has placed 'cousins' in the degree of prohibited relationship. Quite apparently, the provisions of SMA relating to prohibited degrees in marriage are taken from the Hindu Marriage Act of 1955 and thus are in conflict with Muslim personal law.

II. Fosterage: There are certain special features of Muslim law such as the extension of the net of prohibited degrees in marriage, not only through blood or marriage, but also through fosterage.

III. Customs: A marriage between a person (man or woman) with the former spouse (widowed or divorced) of his or her sibling or uncle/aunt is allowed under Muslim law.

However, the same falls under prohibited degrees under Section 3 (g) of HMA, 1955. Interestingly, marriage with maternal uncle falls under the prohibited degrees under Muslim law as well as among North Indian Hindus (Section 3 HMA prohibits marriage between uncle and niece). However, among South Indian Hindu communities such marriages have been recognized and thus the same find protection through the room for customs placed under HMA (Section 5). These marriages have been recognized and protected by the Supreme Court of India (*K. Dhandapani v. The State by the Inspector of Police*, Criminal Appeal No. 796/2022, Order dated 09.05.2022). The SMA, towing the majoritarian line of HMA, places such marriages i.e. marring with mother's brother in the category of prohibited relationship (Serial Number 32, Part II, Schedule I, SMA, 1955). It is essential to mention that the proviso to Section 4 of SMA that recognizes *customs* to override Schedule I of the Act has been diluted by the requirement of issuance of notification by the State Government of recognizing such a custom. The proviso stands further diluted by a sub-proviso empowering the State Government to decide whether such a custom is "not unreasonable or opposed to public policy".

IV. <u>The Age of Majority:</u> The age of majority differs based on different religious personal laws and different statutes. In the absence of any minimum or maximum age of marriage, classical Islamic scholars reached consensus on the age of attainment of puberty as the minimum age of marriage. Undisputedly, the age of majority under the Muslim law in India has remained 15 years for both men and women. The DMMA (1939), in Section 2, defines grounds for decree for dissolution of marriage. In Section 2 (vii), the Act provides the right to a Muslim woman having been married before attaining 15 years to repudiate

her marriage before attaining 18 years (*khiyar-ul-bulugh*/option of puberty). An analogy in this regard can be drawn with Section 3 of a uniform general law—the Prohibition of Child Marriage Act, 2006. Section 3 of the Act states that child marriages are voidable at the option of contracting party being a child. Here, the Act defines a child as a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. Conversely, there is another mainstream and celebrated uniform general law such as the Special Marriage Act, 1954 prescribing 18 and 21 years as the minimum age of consent for marriage for women and men, respectively. Another general uniform law, the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) defines a child as 'any person below the age of eighteen years'. This definition is gender-neutral and the law is uniformly applicable in nature.

V. Polygamy: Under Muslim law, a Muslim man may contract more than one marriage at a time with a bar of maximum four marriages. The DMMA recognizes polygamy when it puts inequitable treatment towards a wife in comparison to another wife as a ground of divorce for the former [See Section 2 (viii)(f)]. The Administrative Service Rules in India require prior permission of the government for a married male government servant to marry again in the subsistence of the first marriage.

iv. It is stated that it is not only the Muslim law which has space for polygamy, as popularly believed. In India, owing to the vast diversity of the nation, there are many communities where the practices such as polygamy and polyandry are practiced. For instance, polygamy is found among the Naga tribes, the Gonds, the Baiga, the Lushai among others while polyandry is prevalent in the Himalayan tract stretching from Kashmir to

Assam. In its classical form, it is found among the Tiyan, the Toda, the Rota, the Khasa and the Ladhaki Bota).[16]

v. The general matrimonial law of India, SMA, following the majoritarian morality, prohibits bigamy.[17] The Indian Penal code, 1860 declares bigamy to be offence when "such marriage is void".[18] Interestingly, the Goa family law which has been projected as the ideal blueprint for a Uniform Civil Code, permits polygamy for Hindus.[19] Under Section 17 of the HMA bigamy is an offence, "and the provisions of sections 494 and 495 of the Indian Penal Code, 1860, shall apply accordingly". However, despite bigamy being an offence, the child born from the bigamous marriage would acquire the same rights as a child from the first marriage under the law.

vi. Interestingly, the National Family Health Survey-5 (2019-20) showed the prevalence of polygamy was 2.1% among Christians, 1.9% among Muslims, 1.3% among Hindus, and 1.6% among other religious groups. The data showed that the highest prevalence of polygamous marriages was in the North-eastern states with tribal populations.[20]

b) Divorce:

i. The system of dissolution of marriage in Islam is an elaborate and meticulous system. In common parlance, talaq is often used as a synonym for divorce. However, talaq is one of the methods among many recognised methods to dissolve a marriage in the Islamic tradition, with talaq itself having different forms. The tradition imbibes the idea of both

---

[16] Adivasis And Uniform Civil Code: Beyond The Civil Codes, Outlook, available at: https://www.outlookindia.com/national/beyond-the-civil-codes-magazine-290741
Adivasis knock on SC door over civil code, Deccan Herald, available at: https://www.deccanherald.com/content/576933/adivasis-knock-sc-door-over.html

[17] Section 44.

[18] Section 494.

[19] *Codigo de Usos e Costumes de Goa* (Code of Usages and Customs), 1880.

[20] https://indianexpress.com/article/explained/explained-law/the-law-on-polygamy-among-religious-groups-in-india-8602908/

extrajudicial and judicial methods for the dissolution of marriage.

Given the protection of customs under mainstream codified community-based personal laws such as the Hindu Marriage Act, 1955, in our country, we witness prevalence and recognition of different methods of divorce. For instance:

In *Dukku Labudu Bariki v. Sobha Hymavathi Devi* [MANU/AP/0367/2003], the Hon'ble High Court of Andhra Pradesh, approved a custom of divorce prevailing amongst the tribal communities and the Kummari caste people wherein divorce would validly take place, if a woman leaves her husband and elopes with another man and the second husband returns the marriage expenses and the bride-price incurred to the former husband.

In *Loya Padmaja alias Venkateswaramma v. Loya Veera Venkata Govindarajulu [MANU/AP/0798/1999],* the Hon'ble High Court of Andhra Pradesh held that:

> *"18. Sub-section (2) of Section 29 of the Act makes it abundantly clear that the right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act, is saved. When there is a custom prevalent in a community either for dissolution or for performance of a marriage which is accepted and recognised, the same shall not be affected by any provisions of the Hindu Marriage Act, 1955."*

I. <u>Extra-Judicial Divorce:</u>

A. Interestingly, there is a shift, worldwide and in our legal paradigm, with regards to the acceptability and consideration of the system of extra-judicial divorce. The recent judgment of a five judge Bench of the Supreme Court Court in *Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC OnLine SC 544* captures the shift in modern divorce laws by ruling that the mandatory

waiting period of six months prior to consensual divorce in cases under the Hindu Marriage Act can be waived by the Supreme Court while invoking its extraordinary power to do complete justice.

B. That recent studies have demonstrated that Muslim women are the primary beneficiary of the system of extra-judicial divorces (Professor Sylvia Vatuk's study of the family courts in Chennai and Hyderabad[21]). The study found that most Muslim women in India prefer to approach non-State religious bodies (extra judicial) rather than formal family courts for addressing their marital discords. It further demonstrate how the extra-judicial methods of divorce are preferred by Indian Muslim women to seek divorces from their husbands.

C. There are two statutes relatable to Muslim divorce laws in India. The Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Marriage) Act, 2019. It is stated that Muslims in India, largely, follow four schools of thought—two of Sunnis (*Hanafi* and *Shafaei*) and two of Shias (*Ithna Ashari Jafari* and *Ismaili*). In 1939, Muslims, from all schools of thought, accepted one school of thought i.e. Maliki, in order to ease the problems faced by Muslim women with respect to divorce.

D. A prospective UCC is bound to create a general law on divorce. Indian Muslims, who devotedly follow the Islamic injunctions on divorce, are bound to be left in the lurch in such a situation. Needless to mention, the issue shall not be unique to Indian Muslims but various communities across the nation, particularly those from tribal areas where customs govern the law of divorce. These customs seldom fits in the popular

[21] Sylvia Vatuk, *Marriage and its Discontents: Women, Islam, and the Law in India* (2017).

worldview and as legal history shows us, are bound to be either neglected or accommodated in the statutes diluting the supposed 'uniformity'.

c) Adoption & Guardianship:

i. Islamic Law does not recognize the system of 'adoption' *albeit* incorporates a different system of childcare known as the *Kafala* system.

I. <u>The System of *Kafala*:</u>

A. *Kafala* is an Arabic term close to the English word "*Responsibility*". It is relevant to state that adoption is one of the systems for taking care of the children in need of care but it is not the only system. In a *Kafala* system, a guardian/ward role is played out rather than a parent whereby a child is placed under a "*kafil*" who provides for the well-being of the child including financial and emotional support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The system is premised on mainly two aspects:

B. the possibility of a reunion of the child placed under *kafala* with his natural/biological family;

C. the preservation of the lineage, race, and identity of a child. Such preservation is crucial for retaining inheritance from the biological parents/relatives, familial, cultural, and religious roots thereby protecting the child from any identity issues.

ii. India is a signatory to the *Convention on the Rights of Child* (CRC). Article 20 of the Convention[22] recognizes *kafala* as one of the alternatives for providing care and attention to orphaned and destitute children. The Government of India ratified the

[22] "*Such care could include, inter alia, foster placement, kafala of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*"

Convention on the Rights of the Child in 1992. Accordingly, *Kafala* system of Islamic Law is a recognized alternative childcare system.

iii. The Supreme Court of India, has recorded the position of Muslim Personal Law with respect to not recognizing adoption though not prohibiting a Muslim from taking care and protecting a child with material and emotional support.[23] In *Shabnam Hashmi v. Union of India*, (2014) 4 SCC 1 [3 Judges Bench], it was held:

I. *"The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, the Rules and the CARA Guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the Personal law applicable to him."* (Para 13)

A. Alternative System of Child Care in General Law in India:

- Despite the fact that the laws hereinafter mentioned are contentious and the fact that these general laws are not in consonance with the personal laws of Muslims, it is submitted that there are various existing legislations with respect to adoption and guardianship which are generally applicable throughout India whereby they also provide agency to a person who can choose to be governed by either personal laws or general laws. The following legislations are available, out of which a person irrespective of their religious

[23] Please see Para 12 and Para 14 of the Judgment.

affiliation has a choice to avail appropriate remedy:-remedy: -

i. The Guardians and Wards Act, 1890
ii. Juvenile Justice (Care and Protection of Children) Act, 2015

- Adoption is an English term. Defined in Section 2(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015:

> *""adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child"*

[emphasis supplied]

iv. Over the years, alternative systems of childcare have developed in broad categories such as residential care, foster care, and adoption. The JJ Act, 2015 clearly indicates that adoption is not the only form of substitute care for children in need of care and the Act gives recognition to foster care, sponsorship, and sending the child to an aftercare organization. The position of CRC qua Kafala has already been discussed. In India, a Muslim parent can adopt a child under the JJ Act. Hindu Adoption and Maintenance Act, 1956 is largely a regulatory legislation. However it prescribes the conditions and effect of adoption which is in the nature of definition as set-out in the JJ Act, 2015 (See Section 12 r/w Section 5-11 of HAMA, 1956).

v. It is stated that a prospective UCC shall decide on the question of adoption for the entire population of India. Considering Muslim law has a settled position *qua* not recognizing adoption, this aspect of Muslim law is another area of discussion.

d) Maintenance:

i. Under Muslim law, there are unique features and principles with regard to maintenance of the wife by the husband. The wife's right to be maintained by her husband is absolute. A Muslim husband is bound to maintain his wife of a valid marriage and the wife's right of maintenance is a debt against the husband consequently it exists even in spite of the fact that she can maintain herself out of her own property. It is also a precondition of a Muslim marriage that a husband must provide a dower (meher) to his wife.

ii. Pursuant to the judgment of the Supreme Court in *Mohd. Ahmad Khan vs. Shah Bano Begum & others (1985)2 SCC 556*, the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed by the Central Government. The statement of objects and reasons of the Act clearly stipulates the fact that the said legislation was being brought to resolve the controversy as developed pursuant to the *Shah Bano* judgment. Accordingly, Section 3 of the Act prescribed the entitlement of a divorced Muslim Women. Section 3 provides for a reasonable and fair provision and maintenance to the former wife within the *iddat* period by her former husband.

iii. Under Section 125 of the Criminal Procedure Code 1973, the term 'wife' includes a 'divorced wife', including a divorced Muslim wife.[24] Section 20 in the in the Protection of Women from Domestic Violence Act, 2005 provides for *Monetary reliefs* including the maintenance for the aggrieved person as well as her children including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force. In *Ali Abbas Dauwala us Shehnaz Daruwala* [2018 (6) Mh. L.J.], the Bombay High Court concluded that if both parties are governed by Muslim Personal Law, it is not an

[24] See Danial Latifi vs. Union of India [(2001)7 SCC 740], Sabra Shamim vs. Maqsood Ansari (2004)9 SCC 616, Iqbal Bano vs. State of UP (2007) 6 SCC 785, Shabana Bano vs Imran Khan [(2010)1 SCC 666], et al.

impediment in the wife invoking the jurisdiction of the court under the provisions of the Domestic Violence Act and there is no embargo of the said court to confer the relief on the woman, who is an "aggrieved person" within the scope and meaning of the Act, merely because she belongs to Muslim religion.

iv. It is stated that general (or uniform) statutes already occupy the law on maintenance with options to a person, irrespective of religion, with regard to availing remedies under any law or different laws together.

e) Succession & Inheritance:

i. Most post-modern legal systems imbibe the concepts of maintenance by male relatives. A man is legally obliged to financially provide for his wife even after divorce. In most cases, a father is legally obliged to provide for his daughters until they are married. It is the consequential responsibility of the biological and social privileges that men enjoy over women that are often reflected in these laws.

ii. Drawing from the same social understanding, the Islamic tradition does not burden women (in general) with the financial responsibilities. Without attaching any financial obligations, women have been provided fixed shares in the Islamic law of inheritance. These principles are different from the one captured under Section 125 CrPC where once a woman gets married, her father does not remain financially responsible for her maintenance which permanently shifts to the husband, even if divorced, until she remarries.

iii. The uniform general law of succession in India, the Indian Succession Act, 1925 (Applicable on the registration of a Muslim marriage under the Special Marriage Act, 1954), has kept the door open to accommodate diverse practices based on culture and practices. This can be understood from the judgement in *Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125*, where it was categorically stated that "the diversity even under Section 3 of the Indian Succession Act the State Government is

empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region." (Para 4)

Part V: Conclusion

6.1. What is a Uniform Civil Code? The answer seems simple but is entrenched with complexities. These complexities were realised by the Constituent Assembly back in 1949 when Uniform Civil Code was debated. A single day debate witnessed strong opposition from the Muslim community. Dr. B.R. Ambedkar assured the Muslim community how a proposed civil code will to mean that it shall be enforced upon all citizens merely because they are citizens. It is relevant to remember the clarification of Dr. Ambedkar at the end of the debate, "It is perfectly possible that the future parliament may make a provision by way of making a beginning that the Code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the Code may be purely voluntary." Today, more than seven decades later, there is no blueprint of a prospective Uniform Civil Code. Simply put, Uniform Civil Code has remained an enigma since the day of its manifestation.

6.2. The most crucial document of our nation, the Constitution of India, is itself not uniform in nature, prudently and with the intention to keep the country united. Different treatment, accommodation, adjustment is the nature of our Constitution. Different territories of the nation have been given different treatments. Different communities have been made entitled to different rights. Different religions have been given different accommodations.

6.3. Another premise is based on questioning the bases of the celebration of the idea of uniformity in itself. Given the rich diversity of the country and the statutory models available, the impracticality of such an idea, especially when being analyzed from an elusive prism of equality is the majoritarian urge to 'discipline' the minorities by erasing the uniqueness of their identities, experiences and perspectives.

6.4. Mere projection of 'uniformity' is not a valid ground for uprooting established system of laws governing personal matters of different religious communities when even the established general and supposedly uniform laws are not entirely uniform in nature. The Goa Civil Code, as detailed out, is packed with diversity; even the Constitution of India has different provisions for different class of persons and also for different regions. Even Code of Civil Procedure does not apply uniformly in the entire territory of India. Even the Hindu Marriage Act, specifically framed to regulate the personal laws of one community, does not apply uniformly on all the Hindus in India, as stated already above. The Special Marriage Act takes the parties to the Hindu Succession Act and dilutes customary laws qua prohibited degrees of marriage. These examples demonstrate just the tip of the iceberg. Majoritarian morality must not supersede personal laws, religious freedom, and minority rights in the name of a code which remains an enigma.

6.5. After the publication of the Consultation report prepared by the 21st law commission, the Government has kept complete silence on the Question whether the Government has accepted the same either on whole or in part. Nor has the Government indicated what steps it has taken to interpret the findings of the 21st law commission. If it had rejected the whole or some findings of the 21st law commission, it has not disclosed its reason for such rejection.

Through

MOHAMMAD FAZLURRAHIM MUJADDIDI
GENERAL SECRETARY
ALL INDIA MUSLIM PERSONAL LAW BOARD
76 A/1, Main Market, Okhla Village Jamia Nagar,
New Delhi - 110025 (India)

ANNEXURE- A

ALL INDIA MUSLIM PERSONAL LAW BOARD

آل انڈیا مسلم پرسنل لا بورڈ

Ref. No.....

Date.....
Date: April 13th 2017

To,
Hon'ble Chairman
Law Commission of India
Hindustan Times Building, K.G. Marg
New Delhi

Subject: Handing over Hard disk of Scanned Signatures and List of details of Female and Male Signatures to the Chairman, Law Commission of India

Dear Sir,

A Signature Campaign was started by All India Muslim Personal Law Board in November 2016 favouring Shariah Laws and against the implementation of Uniform Civil Code which got a tremendous response from Muslim Women and Men across the country. Lacs of signatures were also sent directly from the states to the recipients i.e. His Excellency President of India, Hon'ble Prime Minister of India, Hon'ble Law Minister of India, Hon'ble Chairman Law Commission of India and Hon'ble Chairman National Commission for Women. A total of 48,347,596 of Signatures were received from approximately all the states of the country, which includes 27,356,934 of Female Signatures & 20,990,662 of Male Signatures. A hard copy of the details of the Signatories is attached herewith. Also, we are handing over a Hard Disk with all the details of the scanned signatures along with the list of female and male signatories.

Thanking You

Yours Sincerely

Md. Wali Rahmani

Maulana Md. Wali Rahmani
General Secretary
All India Muslim Personal Law Board

76A/1, MAIN MARKET, OKHLA VILL., JAMIA NAGAR, NEW DELHI-110025
Ph.: 011-26322991, Telefax: 011-26314784, E-mail: aimplboard@gmail.com
Website : www.aimplboard.in

ANNEXURE-B

31/07/2018

Hon'ble (Dr.) Justice B. S. Chauhan (Retd.)
Chairman,
Law Commission of India
New Delhi

Respected Sir

On your invitation, a group of representatives of *All India Muslim Personal Law Board* (in Short "the Board") had a meeting with you on 21.05.2018. In the said meeting, certain issues were orally discussed and deliberated upon. Thereafter it was indicated that you would like to meet the representatives of the Board again on pointed issues which, in the meanwhile, your office would convey to the Board. The said issues were indicated by you.You had also desired that a written note be submitted on the said issues. All the issues relate to the personal laws of Muslims.

As conveyed by the representatives of the Board who attended the last meeting, you have indicated that working on Uniform Civil Code was not appropriate at this point of time.However, you also indicated that soon,there would be a step forward for making proposal to reform civil laws in the background of religious principles taken from different religions to which the Law Commission considers good and appropriate. For example, as indicated by you, a Hindu can will his entire property whereas a Muslim will have to confine his will upto the extent of one-third of his property. The other example was given in relation to monogamyin Hindu society but Muslims can practice polygamy. You indicated that monogamy can be considered to be made mandatory for every citizen in the country and likewise the authority to make will can be confined to the extent of one-third of his/her property should also be considered for every citizen. You indicated that, likewise, there could be other areas where different issues could be taken from different religious principles and made applicable to all the citizens.

The Board does not agree with this proposition/proposal. The Board considers that citizens of this country follow different religions, cultures and traditions, and live their lives accordingly. Following the personal laws in their personal life, be it religious or customary, has not created any difficulty amongst their followers. We further believe that determination of religious principles, traditions and cultures do not fall within the scope of functioning of the government and accordingly the said issues should not be made part of the law making process. Hence, the government should neither interfere nor be advised to interfere in such areas.

The other issue we would like to point out is that the way of life of other religious groups in India, their cultures and customs, are not based upon their religious texts. On the other hand, Muslims have the basis of their personal relationships, traditions and cultures, in Quranic injunctions (rules) and further, the way shown by the Prophet (PBUH). Quranic rules, as well as other rules flowing from Quran, have their own authority and have been followed for more than 1400 years. Great personalities have carried out detailed research in these areas. Muslims believe & follow that these rules/values are part of their religion which Muslims can't deviate from in their personal relationships or social life. Hence it shall not be proper to advise the appropriate government to drop the religious set of rules or legislate to do away with religious laws for governing personal life.

In relation to monogamous relationship, we must place on record that polygamy, upto the extent of four marriages, is permissible in the Holy Quran with conditions.The conditions also prescribe that if a man is not able to follow the Quranic mandates (conditions), he should have only one wife. It is true that if a man should not have more than one marriage then despite law in force w.r.t. other religions, polygamous relationship is present there also. Rather the incidence of such prohibited polygamy is more than the polygamous relationship among Muslims where it is permitted. The issue of polygamy in Muslims has been subjected to prejudice by the political class and people of vested interests in our country to indulge in vote bank politics without considering the ground realities. We submit that the data in relation to

polygamous relationship in other religions should also be considered despite the fact that in other religions the said polygamous relationship has no place. The issue raised about polygamy amongst Muslims is highly prejudicial to the interest of the community and has nothing to do with the reality on the ground as it has been projected.

We need not repeat the fact that we have also submitted, on earlier occasion, about 5 crores signature of Muslims of our country who state that they do not want any change in their personal laws.

We request you that while advising the government in the law making process, no proposal/recommendation be made which, in any manner, encroaches upon or affects the religiously prescribed law as applicable and practiced by the Muslim community in the country.

We are enclosing a detailed reply to the questions that you had conveyed to us on e-mail. The said reply is clearly based upon the religious texts of Islam and followed by the Muslim community.

Thanking You

Md. Wali Rahmani

(Md Wali Rahmani)
General Secretary

Reply of the All India Muslim Personal Law Board [*AIMPLB*] to the Issues/Questions of Law Commission of India

==========

Question No 1. "**The issue of custody of children**. Hazanat, and the difference between a natural and legal heir and a further distinction between who can maintain custody of children even without guardianship. There are further differences between Shia and Sunni law, under Shia law mother loses custody of a boy after two years- could you please guide us to a source that advises otherwise. Under Sunni law its with the mother till puberty of a girl and 7 years of age for a boy. Could you please direct us towards a precedent where 'best interest of the child would prevail'? Even a dar-ul-qaza judgment in this regard would be appreciated."

==========

Response of AIMPLB to the above Issue relating to custody of Children

Right to bringing up the child:

In Islamic Shariah, male has a greater right to guardianship. In this capacity he is entitled to decide about the child's education, marriage etc. He is responsible for supporting the child. Jurists define guardianship as:

> "*The right to guardianship signifies enforcing one's opinion on someone, whether the latter agrees on it or not*."*(Durr Mukhtar ma Radd Al-Muhtar, Kitab Al- Nikah, 4,451).*

As to the right to bring up the child, Shariah grants a greater right to mother. It is the consensus view among all that if one divorces his wife and has minor children, mother will bring up these children. Slight divergence of opinion is, however, found regarding the age up to which the children will be under her care.

The Hanafi viewpoint

According to Hanafis, the mother will take care of her of her daughter until she comes of age i.e. has her menses. As to son, he will be under his mother's care until he is

able to eat, drink, dress and attend to the call of nature on his own. After this, his father will have the right to bring him up. Since there could be some difference of opinion about the stage when son could accomplish the above basic necessities on his own, jurist have the fixed the age of 7 years. So mother is entitled to bring up her son until he is 7 years old. The leading Hanafi jurist; Allama Ala Al-Din Haskafi opines:

> *Whether the carer(the person under whom the child is being brought up) is mother or any other woman, she has a greater right to bring up a boy until he is not dependent upon her for meeting his needs. For this an estimated age of 7 years has been fixed. This is the standard ruling. For generally this is the case. However, if there is a dispute between father and mother (the boy's parents) and if that boy is able to eat, drink, dress and attend to the call of nature of his own, the boy will be handed over to father, even if the custody is given to him by force. However, if the boy cannot apparently manage his affairs, he will not be placed in his father's custody. Mother or maternal grandmother or paternal grandmother has a greater right to bring up a minor girl up to the time she has her menses i.e. comes of age. If there is a dispute about her having menses or not, her mother's statement will be final. (Al-Durr Al-Mukhtar 3,566, Bab Al-Hizana See also. Al-Hidaya 2,284, Al- Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm Al-Walad ind iftiraq Al-Zawjayn.)*

***The Maliki Viewpoint*:**

According to Malikis, the mother shall have the custody of the son until he comes of age and of the daughter until she is married and goes to her husband's house:

> *"Father is obliged to bear the expenses of the son until he comes of age and of the daughter until she is married. Until then mother has the right to bring them up i.e. until her son comes of age and her daughter is married and joins her husband. Till that time mother has the right to bring them up. It is stated Al-Mudawwina (a collection of Imam Malik's rulings) that if father dies or divorces his wife, his son will be under his mother's care until he comes of age. After that, he is free to go where he likes. Daughter will be placed under her mother's care until her marriage". (Al-Taj wa Al- Aklail li Mukhtasar Khalil, 5,593, Kitab Al-Nafqat min Asbab Al-Nafqat Al-Qaraba. See also Al-Mudawwina, 2,258, Bab ma jaa fi Hizanat Al-umm Sharh Mukhhtasar Khalil li Kharshi, 4,207)*

The Shafai Viewpoint:

In Shafai fiqh (jurisprudence) the same command applies to son and daughter. Mother is entitled to bring them up until the age of 7 years. After this the child will be given a choice to live with father or mother. ,

> *"When parents separate and still live at the same spot, until mother remarries, she has a greater right to bring up child. However, when children are 7 or 8 years old and develop some understanding, they will be given a choice to opt for father or mother. They will live with whom they prefer. If they choose mother, father will still have bear their expenses. Father will not be restrained from providing moral training to his children. This ruling applies to both son and daughter."(Al -Majmu, Kilab Al-Nafqat, Bab Al-Hizana. See also Al-Iqna fi Al-Fiqh Al-Shafai, 1,161, Kitab Al-Khula, Al-Bab fi Al-Fiqh Al-Shafai. 347, Kitab Al-Hizana)*

The Hanbali Viewpoint:

According to the Hanbali ruling, son will given a choice between his mother and father when he is 7 years old. However, father will have the right to bring up his daughter when she is 7 years old:

> *"Among all, child's mother is entitled most to bring up her child. When son is 7 years old, he will have a choice between parents and he will live with whom he prefers. When daughter is 7 years old, her father has a greater right to bring her up. It is father's obligation to provide for a wet-nurse for his children; However, if children's mother wants to feed at the customary charges, she is more entitled."(Al-Umda, 477-479, Bab Al-Hizana. See also Al-Iqna, 4,158-159, Kitab Al-Nafqat)*

In India there are three juristic schools of Ahl Al-Sunnah. Majority of Muslims follow the Hanafi School. Besides, there are those who abide by Shafai and Ahl Al-Hadith schools. The latter follow Hanbali rulings on most of the issues. It will be therefore in order that if the case pertains to Hanafis, their viewpoint should be taken into account. Mother should have the right to bring up her daughter until she comes of age i.e. has her menses and her son until he is 7 years old. Then the custody will be transferred to father. The Shafai and Hanbali rulings should be followed for Shafais and Ahl Al-Hadith respectively. As long as son or daughter is under mother's care, it is father's

responsibility to bear their expenses. He has a right to visit his children. Likewise, when son or daughter is placed under father's care, mother is entitled to visit them or invite them to her house at times.

Protecting the child's interest in the right to custody

In the right to custody the following factors are taken into account: mother's love and her ability to bring up child and father's affection and his important role in their education and moral training. However, the most important consideration is child's own interest.

Although mother has the right to bring up her son up to his age of 7 years and her daughter until she comes of age, she will not have their custody if it is against the child's interest for any reason.

> *"The important point is that if the carer (mother) is engrossed in immorality or sinfulness in a way that may adversely affect the child, she will lose her right. Otherwise, she has a greater right to bring up her child until he/she develops some understanding."(Radd Al-Mukhtar, 3,557 Bab Al-Mizana, see also Hidaya, 2,284).*

Some jurists construe the mother's immorality and sinfulness specific to illicit sex: "*It would be proper to interpret immorality in this context in the sense of illicit sex." (Majma Al-Anhar fi Sharh Multaqi Al-Abhar, 1,480, "Kitab Al-Talaq, Bab Al-Hizana"*

In view of the consideration for protecting the child's interest the ruling is that if mother marries someone who is not child's mahram, she will lose her right to custody. For this may entail some excess against the child:

> "*That woman who marries somone who is not the child's mahram, she will lose her right to custody. Likewise, if mother marries someone who is a stranger to the child, she loses her right to custody."(Bahr Al-Raiq,4,183)*

The same command applies to the child's father or the male relative who gets custody. If his custody violates the child's interest, he would lose custody.

"A girl will not placed under the care of an immoral person who does not care about his action or the advice given to him, even if that person is her mahram. For that person is reckless and he cannot be trusted regarding a girl. Implicit in it is the point that a boy may be placed under his care. However, it is better that even a mahram but wicked person be not entrusted with the custody of a boy or girl. This is the preferred opinion. For immoral conduct negates the right to custody." [(Majma Al-Anhar fi Sharh Multaqi Al-Abhar, 1/483, "Kitab Al-Talaq, Bab Al-Hizana]

According to Malikis, a male or female who has a right to custody should fulfil the following six conditions for making him/ her eligible for custodianship:

"*One of the conditions for custody is that the person should be mentally sound. A mentally unsound person will not have the right to custody even if he/she is occasionally fit mentally. Likewise, an imbecile person will also not have the right to custody. Another condition is that the person should be able to bring up the child. One unable to look after the child, as for example, a very old lady will not have the right to custody. Moreover, that person should have integrity in the religious sense i.e. one notorious for drinking, illicit sex or immoral acts will not have the right to custody. The house in which the child is placed should be safe and secure. One's house or neighborhood frequented by immoral persons who may have any evil eye on a young girl or who may pose a threat to the safety of the child's belonging is not fit. Likewise, the person having custody should possess maturity and sound opinion. A foolish or extravagant person will not have the right to custody. For that person may lay to waste the child's belongings or spend money inappropriately. Another condition is that the person should not have an infectious, harmful disease like leprosy. Such a person will not have the right to custody. So that person, whether a male or female must fulfil all these six conditions*."*(Hashiya Al-Sawi ala Al-Sharah Al-Sagir, 2,759, Bab Wujub Nafqa ala Al-Ghair, Al-Hizana)*

Shafai jurists too, observe the above principles. It is stated in the celebrated Shafai text Al-Majmu:

"The right to custody is not for an imbecile person, nor for those indulging in immoral acts. For this right is essentially about protecting the

interest of the child. It is not in the interest of a child to put him/her under the care of a debauched person."(Al-Majmu, 18, 320, Kitab Al- Nafqat, Bab Al-Hizana)

Hanbali jurisprudence also follows the same norms:

"If that person indulges in immorality which may impair the dictates of custody and may have harmful effects on the child, he/she does not have the right to custody. For example, God forbid, that person is notorious for committing sins like drinking or forbidden acts, does not fulfil obligations, he/she will not have the right to custody. However, if that person drinks wine yet there is no threat or harm to the child, or if a woman eligible for custody may have slandered a chaste woman of illicit sex, as a result of which she may have been declared as a wicked woman, yet if she loves her children much and takes good care them and protects the interests of her children, nephews and nieces, she will still have the right to custody. Her slandering and the consequent declaration as a wicked woman will not affect her right to custody."(Sharah Zad Al-Mustanqa li Al-Shinqiti, 9,344, Bab Al-Hizana, Maney Al-fisq)

In sum, in the opinion of all jurists, mother has the right to custody in the early years of the child. At a later stage, in accordance with the above details, the right to custody will be transferred to father. However, if putting the child under the care of mother or father is harmful for the child's upbringing, they will lose the right to custody. Then others will have this right in the following orders: mother, maternal grandmother, paternal grandmother, sister and other female relatives*. Relevant details may be found in the works on jurisprudence. **Al-Bada'ey wa Al-Sana'ey,4,41 Fasl fi Bayan man lahu Al-Hizana.*

==========

"**Question No 2. Issue of Adoption**. We would like to see a note factoring in section 56 (2) of the Juvenile Justice Act, 2015, which also allows a relative of the child to adopt. Further, could we also get a source where either Islam specifically prohibits adoption or allows it in specific circumstances, and what would be the rights of the adopted child."

==========

Response of AIMPLB to the above Issue(Question)/The Issue of Adoption.

In Islam the tie between parents and children is natural in that the marriage between a male and female results in the birth of children. This tie cannot be established verbally. The Quran clarifies that if one calls someone his mother, she cannot be his mother. Nor can there be the mother-son tie between the two because of his utterance alone. Allah declares:

> "*Those among you who divorce their wives by zihar (declaring their wives to be their mothers) should realize that they are not their mothers. Their mothers are those who gave birth to them. Those guilty of zihar use dishonourable and false words." [Al-Mujadalah, 58:2]*

At another place too, the Quran clarifies that if one calls his wife as his mother, it is not correct. For Allah has not made her his mother:

> "*Allah has not made your wives, whom you compare to your mothers' backs (in order to divorce them) as your real mothers." (Al-Ahzab 33:4)*

Likewise, is clearly states that if one calls someone his son or considers him so, this does not establish the father-son tie between the two. Rather, the Quran proclaims:

> *"Allah has not made your adopted sons as your own sons. These are only words from your mouth. However, Allah speaks the truth and guides to the right path. Call (the adopted sons) by the names of*

their fathers. In the sight of Allah this is just. If you do not know their true fathers, then regard them as your brothers in faith and your allies." (Al-Ahzab 33:4-5)

Here is the circumstantial background to the revelation of the above verse. Zayd ibn Haritha ibn Shurahbil Kalbi was Prophet Muhammad's loyal and devoted servant. Some members of the Makkan caravan had kidnapped him and sold him. Hakim ibn Hizam bought him and gave him as a gift to his paternal aunt, Khadija. When Prophet Muhammad (Peace Be Upon Him) married Khadija, she gave Zayd to him. He served the Prophet (Peace Be Upon Him) with great dedication and love. When Zand's father and uncle came in order to take back Zayd to his tribe and the Prophet (Peace Be Upon Him) allowed them to do so, Zayd preferred to stay with the Prophet (Peace Be Upon Him), rather than to return to his family and tribe. The Prophet (Peace Be Upon Him) freed him and adopted him as his son. This happened before his appointment as the Prophet of Allah. *(Tafsir Mazhari, 7,482. Maktaba Rashidia, Quetta).*

Even after his elevation as the Prophet, the same tie continued with Zayd. The Prophet's Companions used to call him as Zayd the son of Muhammad (peace be upon him), rather than as Zayd ibn Haritha. According to Abdullah ibn Umar, this practice prevailed until Verses 4-5 of Surah Al-Ahzab were revealed, which abolished this tie.

(For details the following Tafasir may be consulted:

- Tafsir Al-Thala'bi, 3,812, Musasa Al-Ala li Al-Matbuat, Beirut.
- Tafsir Al Baghwi, 10,453
- Als wajz li Al-wahidi, 3,58 and 401-501, Dar Ihya Al-Turath Al-Arabi, Beirut.
- Al-Qurtubi, Al-Jame'y Al-Ahkam, 41,8. Al-Kutub Al-Ilmiya, Beirut, Lebanon.
- Abi Al-Saud Tafsir, 1,401-50l. Dar Ihya Al-Turath Al Arabi, Beinut.
- Al-Jassas, Ahkam Al Quran, 3,464 and 264. Dar Al-Fikr, Damascus and Beirut.
- Ibn Al-Arabi, Ahkam Al-Quran,3,405, Dar Ihya Al-Turath Al-Arabi, Beirut
- Al-Tabari Tafsir, 6,851 and 81. Musasa Al-Risala, Beirut.

Thus, it is clear from the Quranic assertion and Prophet Muhammad's action that a verbal statement on one's part does not establish the parent-child tie. Hence, Islam has no provision for adoption, whether that child is a stranger or a relative. A child is born only of his father and mother.

Consequences of taking an adopted child as one's own child:

Let this be realized that adoption is not something simple on straightforward, related only to maintenance and bringing up. It involves several commands:

1) A son's parental children are forbidden for him in marriage. So are father's and mother's brother and sister also forbidden in marriage. Likewise, a child's children, both male and female, are forbidden in marriage for his/her parents. Likewise, their spouses also belong to the forbidden degree, as detailed in the following Quranic passage:

> *"Forbidden to you (in marriage) are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's and your sister's daughters, and your foster mothers, your foster sisters, your wives' mothers, and your step daughter under your care, born of your wives with whom you have consummated your marriage. If you have not consummated your marriage with them, there is no blame upon you, if you marry their daughters. Forbidden to you in marriage are the wives of your sons who have spring from your loins, and to take two sisters in marriage together."(Al-Nisa 4:23)*

Hence, it is a long chain affected by the tie of one's son and many are forbidden in marriage on account of his parents as well as children. If an adopted son is taken as the real son and those adopting him are taken as the real parents, many ties, lawful in marriage will turn in to unlawful. Islam does not allow declaring something lawful as unlawful or vice versa. The Quran chides even the Prophet of Islam once on this count:

> *"O Prophet, why do you forbid for yourself what Allah has allowed you?" (Al-Tahrim 66:1).*

2) Adoption affects also the law of inheritance. Parents and children have a share' in each other's inheritance. If the deceased's parents and children are alive, other relatives do not get a share at all or received a reduced share. Some relative get a share because of parents and children. In sum, the parent child tie has a huge bearing on the issue of inheritance. Many persons' shares are affected by this. So if one takes his adopted son as a real son, it will make a big difference in the norms governing inheritance.

3) Adoption has its effect also on the Islamic command related to bequest. One's bequest for his inheritor is not valid. The Prophet (pbuh) declared it in his Farewell Pilgrimage sermon. *(Sunan Abu Dawud, Bab Al-Wasaya, Hadith No. 782),*

One could make a bequest for Mr A and this could be up to one-third of his legacy. However, on adopting and taking Mr A as his son, he cannot make a bequest for him. Likewise, Mr A cannot do it for the person who adopts him.

4) Adoption affects also the law of hiba (gift). One making hibah may reclaim the gift given by him, subject to certain conditions. In juristic terminology this is called ruju an "Al-Hiba". However, if two mahram relatives, as for example, father and son do hiba to each other, they cannot ask for return. The relevant ruling in the authentic Hanafi jurisprudence work, Al-Hidaya is as follows:

If one makes hiba to his mahram relative, he cannot revert the same. For the Prophet (pbuh) declared that as hiba is done to a mahram relative, it cannot be taken back.(Al-Hidaya, 3,92 Bab Ruju fi Al-Hiba)

So if the adopted son is taken as a real son, the revocable will turn into an irrevocable.

5) Related to adoption also is the law of wilaya. Father has wilaya (guardianship) over his minor and mentally unsound children. Allama Samarqandi, a leading jurist pronounces: "This right of wilaya belongs essentially to the father and the relatives on one's father's side. At times, father may get his son married, draw upon this belongings and in some cases he may be forced into marrying his children. It is stated in Radd Al-Mukhlar: "*The right of wilaya signifies the guardian's imposition of his decision on those under the care, even if, they agree on it or not" (Durr Mukhtar ma Radd Al-Muhtara, 4,451 Kitab Al-Nikah)*

As father seeks her daughter's consent for Marriage, her silence is taken as her consent, as is mentioned in the Hanafi juristic work, Al Hidaya:

"When the guardian seeks an unmarried girl's consent for marriage and if she remains quiet or laughs, it will be construed as her consent." *(Al-Hiddyar, 2,413, Kitab Al-Nikah)*

If an adopted son is taken as the real son, one will assume such rights and obligations to which he is not actually entitled.

6) It has its bearing on the Islamic law related to bringing up and custody. In Islam, female has precedence over male in this right. This is evident from the following order of priority:

> Mother has a greater right to bring up her son. In her absence, maternal grandmother, even if she is a distant one, then paternal grandmother, then sister, then maternal aunt, then paternal aunt. According to a ruling ascribed to Imam Abu Hanifah, maternal aunt has a greater right than sister. *(Al-Hidaya, 2,424, Bab Al-Walad man ahaqa bihi)*

> If an adopted son is taken as a real son, that woman in her capacity as his mother, maternal aunt and sister will have the right to custody to which she is not entitled. Nor can she have such love which a blood relative has.

7) The issue of hijab (segregation) is related with adoption as well. In Islam, a woman may bare her face, hand, palm, arm, head, foot and shank before her mahram 'relatives. However, she cannot do so in the presence of non-mahram. It is recorded in Al-Hidaya:

> A male may look at the face, neck, shank and arm of his mahram female. He cannot have a look at her back, belly and thigh. *(Al Hidaya, 4.164, Kitaki A-Karahiya)*

> If the adopted person is taken as the real son, the female adopting him should observe hijab with him. Likewise, if that person is the real daughter, the one adopting her should observe hijab with her when she comes of age.

8) The obligation of maintenance is due on one's blood relatives. It is binding on father to maintain his son. In certain cases, this obligation is performed by the child's uncle and other. Likewise, when son stands on his feet and his father is needy, it is obligatory on son to maintain his parent. At times, this duty is discharged by grandson. nephew or other relatives. The standing juristic principle is:

> The maintenance is in proportion to one's share in inheritance. This applies to every mahram son and daughter, including an adult daughter who is not still married and an adult son who is unable to

earn bread owing to his disability or any other reason and is needy. This is in line with Allah's command that maintenance be provided to one's inheritor.

If an adopted son is taken as a real son, those obliged to perform certain obligations will be freed from those and those not supposed to bear expenses will have to provide maintenance.

The proposed law will affect also some other related issues. Thus this law will have far-reaching intervention in to the religious laws of Muslims.

Reasons for not declaring an adopted son as one's real son:

Islamic Shariah does not recognize an adopted son as one's real son in view of the following reasons:

1. *Man attaches much importance to his identity*. One is recognized with reference to his ancestors. In the case of taking an adopted son as the real son, one's racial identity is lost. The adopted person's tie with his real parents is severed and he is associated with an unrelated male and female for his recognition. Depriving someone of his identity is great injustice to him.

2. *In some instances and boy is born in a Hindu or Muslim family while he is adopted by an adherent of another religion*. Before adoption, his religious identity was that of his parents. Had he changed his religion after coming to age, it would have constituted his exercising his choice. However, as he is given the religious identity of the person who adopts him in his young age before his adulthood, he loses his religious identity. *In sum, adoption deprives one of both his ancestral and religious identity.*

3. Adoption does not have a good psychological effect. Generally, it evokes rebellion. The adopted child thinks that he has been deprived of his identity. Or he feels resentment against his real parents, for their refusal to bring him up, considering him as a burden and handing him over to someone. This is not some figment of imagination. Such reports do come to light and we have several research studies to this effect. All India Muslim Personal Law Board has submitted its written statement to Supreme Court, in which the above points appear in detail.

4. It goes without saying that one gives precedence to his own parents and siblings over a stranger. He has more obligations towards them. A consequence of taking an adopted son as one's real son would be that a stranger will get a share in the inheritance that childless person who had adopted him while his close relatives, who helped him in thick and thin, will be deprived of his share. This contravenes justice.

5. As adoption will deprive close relatives of their share in inheritance, they will harbour hatred for the adopted child. At times, such hatred can culminate into a criminal act, Viewed thus, taking an adopted child as one's real son or daughter is inappropriate.

Supporting the helpless:

Let this be clarified at this juncture that Islam does not forbid supporting the helpless, poor or orphan. What it forbids is that he/she should not be declared as a real child. Without resorting to this, if one bears the expenses of an orphan or of a child who has parent, it is perfectly lawful. Rather, in most of the cases it is a desirable acts. However, the child under care will be ascribed to his/her real parents who will enjoy the right to custody and guardianship. The share in inheritance will be effective only in the case of that child and his/her real parents. Yet the one supporting a child will have the option to give him/her out of this belongings as a gift or make a bequest for him/her. One can give one-third of his belongings to non-heirs, as part of his bequest. Someone once asked the Prophet (pbuh), if he could make a bequest for all or half of his belongings. To this he replied: “No.” He then asked: “Can I do it for one-third?”. The Prophet (pbuh) replied: “You may do so, at most, for one-third and even this is too much.” *(Sahih Bukhari, Kitab Al-Nafqat, Hadith No. 4535)*

As to giving a gift, it may be presented to anyone. On reflection it appears that adoption is more harmful than beneficial for resolving the problem of helpless children. If this harms the interests of one's own children and their share is diluted, parents with children would like to avoid adoption. However, if adoption does not damage the prospects of one's own children, even parents with children and with a spirit to help humanity will come forward. So the truth is that if the objective of adoption is to help the helpless children, the law of adoption will obstruct this cause. Even if childless

couples adopts a child as their real child, the relatives of the couples may turn hostile and jealous towards the adopted child as he hurts their interests.

Is adoption voluntary?

It is generally said that adoption is a voluntary act. One is not forced into doing it. This assumption is prima facie correct. However, on examination it emerges that in terms of consequences this law would become coercive. If that person adopts a child voluntarily while his wife does not agree on this, it would be a matter of compulsion for her. Likewise, other relatives of the person opting for adoption, whose interests clash, will also find this law as coercive with regard to their interests. They will be compelled into accepting this.

Supporting Orphans:

It will be in order to explain that the Islamic support system does not neglect orphans. This support system operates at two levels: i) individual and ii) collective.

a) *What is meant by the individual support system is that various relatives individually or together have the responsibility of maintenance. If the person who is primarily responsible for maintenance dies or is unable to provide maintenance, the next relative in order will have to perform this obligation. Jurists have discussed at length the order of priority of relatives in terms of their duty to provide maintenance. They have answered these questions: Who will maintain if one's parental relatives are there? Who will maintain if one's children and grandchildren are there? Who will maintain, if only other relatives are there? Who will maintain if persons belonging to all the above three or two categories are there?* (see Al-Bahr Al-Raiq, 4,843, Bab Al-Hizana)

b) *Collective support System: If there is no relative of a boy or girl if they are not in a position to provide maintenance, it is then the responsibility of state or Muslim society to provide maintenance. The Prophet (pbuh) alluded to the same in his observation: "if someone leaves behind something, it is for his heirs. However, if one leaves behind debt or dependents, I am responsible for this. If one does not have any guardian, I am his guardian."* *(Musnad Ahmad, 4,281, Hadith No. 861)*

The Prophet (pbuh) was a caller to truth and guide, and also the head of state and ruler. The above statement is in his latter capacity. State is responsible for helpless persons. By the same token a society is also morally obliged to perform those duties which state has to discharge in a legal sense.

Against the above backdrop, the Muslim society in India has devised two types of support system. "Dar Al-Yatama" (orphanage) have been set up in most of the big and middle size towns. These cater to the boarding, food, education and marriage of orphans.

In Madrasas (religious education institution), free of charge boarding, food, education, medical care and other needs are provided for orphan boys and girls. Presently these institutions have been helping thousands of orphans, while maintaining their self respect in the best possible manner. Those desirous of helping orphans accept their sponsorship and also donate money. Hence it is not a serious issue affecting the Muslim society.

Adoption is a purely civil issue. Islamic legal position has been explained on various aspects on the issue. In relation to the specific issue with respect to Section 56 (2) of the Juvenile Justice Act, 2015, we need not say more than what has been stated above. However section 63 of the said Act stating effect of the adoption is a more serious issue as the said effect clearly contrives the Islamic principles.

==========

"Question No 3. The issue of maintenance and share in property of the wife and children of a pre-deceased son. Will the family of the girl maintain the widow and her children? What are the obligations of a father and father in law towards this daughter in such a circumstance. Rights of an orphaned grandson and his mother."

==========

Response of AIMPLB to the above Issue relating to maintenance and share in property of the wife and children of a pre-deceased son.

a) If son dies before his father, who will maintain his widow?

b) Who will maintain his children?
c) What share will his orphan children and widow get?

Widow's maintenance:

If the widow is neither rich nor employed and has an adult son, it is his responsibility to provide maintenance to her, as is recorded in the **Hanafi jurist manual, Al-Hidaya**:

> "*It is binding on a male to provide maintenance to his needy parents and grandparents, even if they are not Muslim.*"*(AL-Hidaya, 2,425, Kitab Al-Talaq, Bab Al-Nafqa)*

Same is the **Hanbali** ruling:

> "*A well to do child is obliged to provide maintenance to the needy parents*" (*Al-taj wa Al-Aklayl li Mukhtasar Khalil, 5,585)*

Shafai ruling is also of the same import:

> "*It is binding upon children to provide maintenance to their parent. It is premised on Allah's directive that Allah alone should be worshipped and parents be treated well. So it contains the directive for their maintenance." (AL-Majmu, 18,291)*

Hanbali jurists have asserted the same point:

> "*It is incumbent on one to provide maintenance to his parents and grandparents, if they are needy, and even if they follow another religion." (Al-Mughni, l, 74)*

So all jurists are of the opinion that children are obliged to provide maintenance to parents. The same features in the Fiqhi Encyclopedia compiled recently.

> "*There is consensus among jurists that children must provide maintenance to parents. If they have more than one adult son, all sons together should do so*" *.(Al Mawsua Al-Fiqhiya, 41,74)*

"No one will share children's obligation to provide maintenance to their parents. (it is their responsibility not of other relatives). Among their children, both sons and daughters will equally share it. This is the standard ruling." (Al-Hidaya, 2,462)

If the widow does not have a child, her father will be responsible for her maintenance:

"Maintenance is due for every dhi raham mahram, including minor children or daughter. Father must maintain his daughter, whether she is a healthy adult. This provision is for female in an absolute sense, whether she is minor or adult, healthy or disabled. Even if she is capable of earning, her father will support her. However, if she works as a mid-wife on bathes the dead, her maintenance is not obligatory."(Durr Al- Mukhtar ma Radd Al-Muhtar, 2,+938-939).

If she does not have a child, father or grandfather, her maintenance will fall on her other family members, as for example, brother. For it is obligatory to provide maintenance to every dhi raham mahram relative.

If that widow has minor sons and daughters under her care, the grandfather is obliged to provide maintenance to his grandchildren and also pay for his daughter in laws wages for bringing up children. Her wages should cover the expenses on her food, clothes and accommodation.

The Hanafi stance:

The following report is on the authority of a leading **Hanafi jurist**:

"*He was asked whether the divorced woman feeding the child is entitled to wages. He replied in the affirmative, adding that if a servant is needed for the child, the same will be provided. The author of Bahr Al-Raiq has given the same ruling. An identical ruling features in Fatawa Khairiya and Al-Nahr Al-Fiq."(Radd Al-Muhtar, 3,561)*

Like the divorced woman, if a widow is also engaged in bringing up the child, the child's grandfather, in place of the deceased father, will pay wages to her.

The Maliki stance:

According to the **Maliki ruling**, if the mother is needy while the child under her care is rich, she is entitled to get her wages out of his belongings. For Malikis, the deceased father is not under obligation to pay wages to her.

> "*The mother bringing up the child is not entitled to anything for rearing the child under her care. She is not to get maintenance or wages for custody, unless she is needy and the child under her care is rich." (Al-Fawakih Al-Dowani, 2,67. See also Sharah Mukhtasar Khalil li Al-Kharshi, 4, 219).*

So, since father is not to pay wages to her for bringing up the child, grandfather does not have this obligation at all.

The Shafai stance:

For Shafais, if the child is rich, wages will be paid out of his resources. If this is not the case, father is obliged to pay wages.

> "*Expenses on bringing up will be met out of the child's resources, otherwise father is under obligation. Custody is like maintenance for supporting. One obliged to provide maintenance will have to meet the expenses on bringing up the child." (Asni Al Matalib, 3,447. See also Al-Aziz, Sharah Al-Wajiz Al-Maruf bi Sharah Al-Kabir, 4,104)*

Since in the absence of father, grandfather provides maintenance, he will be responsible also for wages for bringing up the child.

The Hanbali stance:

The Hanbali ruling holds father responsible for expenses on bringing up the child:

> *"Mother has a greater right to bring up her child or children. if she demands wages, father is obliged to pay. For children are his. Had he employed a wet-nurse, he would have paid her wages. Likewise, if he had engaged a carer, he would have paid her wages. Also a divorced mother bringing up her children, the children will get maintenance from the father and she will get her wages for bringing up children." (Sharah Akhsar Al-Mukhtasarat, 9,74)*

In the absence of father, grandfather will pay her wages.

In sum, the Hanafi and Hanbali ruling is that a divorced woman bringing up children will get wages from the children's father. For Shafais, the child under care will be responsible. If the child does not have any resources, father will be responsible, Malikis are of the view that the children's father is not under the obligation to pay wages. This is part of the maintenance for the child. If father is not alive, grandfather is responsible for maintenance and hence the will also pay wages for bringing up the child.

In Islam, a woman maintains her tie with her parental home even after her marriage. She get a share in the inheritance of her father, mother and in some instances from her brother and grandfather, so the maintenance of a widow or divorced or needy woman, at times, falls on her close relatives.

Children's maintenance:

If children are minors or adult yet unable to make living, and their father dies, their grandfather will provide their maintenance.

> "*Know that if father dies, in proportion to the share in inheritance, the child's mother and paternal grandmother will be responsible for maintenance. Grandfather will bear two-third and mother one-third expenses. According to one report only grandfather will provide maintenance*". *(Radd Al-Muhtar, 3,614)*

The above is applicable only when grandfather and mother are in a positions to provide maintenance. If either of them is unable, the other one will be responsible. The eminent Hanafi jurist, Allama Sarkhasi states:

> "*If one is needy, he will be excluded, and the next heir will provide maintenance in proportion to his/her share in inheritance.*" *(Al-Sharkhasi, Al-Nabsut, 5,227)*

Going by this principle, if grandfather too, dies, the next of kin will provide maintenance.

This viewpoint is endorsed by Shafai jurists. They hold the view that if father is not there or unable to pay maintenance, grandfather will be responsible for this:

> ***Imam Shafai says:*** Father will bear maintenance of children until they come of age, and in the case of daughter until she menstruates. After this he is not

obliged. However, if the child is disabled and not able to support himself, father will provide. Same holds true for the maintenance of grandson. If father and grandfather are not there the next of kin will have this obligation.*(Al-Hawi Al-Kabir, 1,484)*

What is meant is that the maintenance of not only grandson but also of his children and grandchildren will be provided, provided he does not have anyone in the parental line who is able to provide maintenance.

The widow daughter-in-law's share in her father-in-law's property:

As to a share in property, she will get her share in the inheritance of her husband and parents. She will not, however, get any share in her father-in-law's property. During his lifetime, however, he can give her a gift or make a bequest for her. Since she does not have any blood tie with him, she is not entitled to any share. In view of her blood tie, however, she will get a share in her parental inheritance as daughter, granddaughter and sister.

Grandson's Share:

As regards a grandson, if his father dies during his grandfather's life and he has uncles, he will not get any share in inheritance. This is borne out by the Quran, Hadith the companions' practice and consensus view.

The Quran and Hadith:

The **Quran** lays down the following basic principle behind getting a share in inheritance:

> *"There is a share for men in what their parents and close relatives leave behind. Likewise, there is a share for women in what their parents and close relatives leave behind. There is a share in what is left behind which is decided by Allah, be it little or much."(Al-Nisa, 4:9)*

The above verse stipulates three principles:

1) As long as one is alive, the prospective heirs do not have a share in his belonging. During father's lifetime, his son and daughter are not entitled to a share in his belonging. Only those will have a share who are alive when he

dies. Those who die earlier have no share. For example, if someone has three sons and two daughters and of them one son and one daughter die in his lifetime, the deceased will not have any share. For the Quran speaks about "what they leave behind."

2) The division of inheritance is not linked with one's need. Rather, it is on the basis of one's close blood tie. For example, if some children are very poor and others very rich, shares will not be given to only the former or a larger share while the latter be not given anything or little. So it is blood tie not financial condition, which is at work in the distribution of shares.

3) Another principle is related to the closeness of the blood tie. One's relatives are many. If one includes the kin belonging to a few generations, there will be too many heirs. And if each of them is given a share, no one's needs will be met. In some instance, one house or even one room will have to be distributed among hundreds of heirs. The Quran therefore prescribes shares for only very close relatives. As a result, distant relatives do not have any share:

Let us now examine in this context the issue of the share of the orphaned grandson.

a) Grandsons, granddaughters on father's and mother's side get a share in their paternal grandfather and grandmother by virtue of their father and mother. As orphaned grandson's father's share was not established, for he had died during his father's lifetime.

b) Though it is not always the case, but the orphan paternal and maternal grandsons and granddaughters may be poor and resourceless. However, poverty is not the basis for getting a share in inheritance. Its basis is one's close tie of kinship.

c) Since these orphan children's paternal and maternal uncles and aunts are alive, they are closer in the tie of kinship than the deceased. So in accordance with the principle governing inheritance in their presence, distant relatives will not get any share. So these orphans will not have any share on the inheritance of their paternal and maternal grandfather and grandmother.

The principle of inheritance share is mentioned in the following Hadith, as the Prophet (pbuh) pointed out.

> "Give the shares of inheritance to those whose share has been prescribed. The remnant will go to the closest male kin" *(Bukhari, Narrator: Abolullah ibn Abbas. Kitab Al-Faraiz, Hadith No. 6735).*

The above Hadith too, declares that what is after giving shares to those whom these are due, the remnant will go to the closest relative, the deceased has both sons and grandsons, the former being the closest kin will get the share. The latter are not his closest kin.

The above command applies to both grandson and grandfather. If grandfather's is old, poor and needy, still he will not get share in his grandson's inheritance. For his father is the closest kin and grandfather a distant relative. Given this, he will not get any share.

> *"Among the Prophet's companions, Zayd ibn Thabit excelled all his knowledge of the commands related to inheritance. The Prophet (buh) acknowledged the same, saying "Among my Companions he knows best the commands regarding inheritance" (Sunan Timidhi, Hadith No. 3790).*

Imam Bukhari has cited Zayd's following ruling:

> *The deceased's grandsons belong to the category of his son, if there is no son to compete.*
>
> *Grandsons are like sons and granddaughters like daughters. As sons are heirs, grandsons will be heir if sons are not there. If one's sons are there, distant relatives do not get any share. Likewise in the presence of grandsons too, distant relatives do not get any share. If son is there, grandson cannot be a heir.(Bukhari, Kitab Al-Faraiz, Bab 7)*

Consensus of the Muslim community:

If has been the consensus view since the era of the Prophet's Companions among Ulema of the community that if the deceased's sons are alive, his grandsons will not have a share in inheritance.

Allama Ibn Hazm Zahiri opines:

> *"In the presence of son, grandson is not entitled to a share in inheritance, whether his father on uncle is alive. This is evident from the Prophet's clarification. This is the definite consensus view."(Al-Mahalla,10,16. Also see Mausua, Al-ljma, 3,1124)*

Thus it is borne out by the Quran, Hadith, the Companions practice and the consensus view of the community that in the presence of sons orphan grandsons will not have a share in inheritance.

An alternative for orphan grandsons:

This does not at all mean if paternal or maternal grandfather wants to help the orphaned paternal and maternal grandsons and granddaughters, he cannot do anything. He has these two options:

a. Gift. He may gift them part of his properly. There is no limit on its quantum. It is likely that grandfather may give as gift to his grandson more than what his son would have got as his share. It is also an important point that if one gives a gift lo his mahram relative, this gift is non-returnable. For example, if grandfather gives something as gift to his grandson, he cannot take it back.

b. Bequest: Grandfather may make this bequest that a particular portion of his belongings be given to his orphan paternal and maternal grandson and granddaughter. He may make a bequest of one-third of his belongings. He cannot make a bequest for his heir. However, since his grandson is not his heir, he may make a bequest for him. For example, if grandfather makes a bequest for his grandson up to one-third of his belonging, this may even exceed the share of uncle.

==========

"Question No 4. The issue daughters inheriting half of the share of what the son inherit. What is the premise behind this difference in shares. We are particularly interested in knowing under what circumstance are sons and daughters to inherit equally. Any case law or dar-ul-qaza judgment or a direct citation from Quran or Hadees on the matter would be of valuable to us**."**

==========

Response of AIMPLB to the above Issue relating to difference of share of daughter

Daughters' share in inheritance

This fact is on record that before Islam appeared on the scene, most of the legal systems of the world did not grant any share to woman in inheritance. However, Islam bestowed on woman shares in the inheritance of her relatives in a variety of ways. She gets a share in the inheritance of her husband, father, mother and children, and in some cases in the inheritance of her paternal grandfather, brother and other relatives. Nor is this true that her share is always less than that of male. In some instances she gets more than him. In some other cases she is the heir while male is not a heir of her degree. However, in some cases she gets half of the share of a male, equal to her in kinship. For example, if the deceased has a son and a daughter, she will get half of the share of her brother. **This rule is specified the Quran itself**:

> "*Allah directs you this regarding your children's share in inheritance: the share of the male is equal to that of two females. If (the heir of the deceased are) more than two daughters, their share is two-thirds of the inheritance. If there is only one daughter, she will have half of inheritance*". *(Al-Nisa,4:11)*

There is no divergence of opinion among Hanafi, Shafai, Maliki and Hanbali jurists on the point that daughter's share is half of that of son. There is total agreement among them on this issue and this is the consensus view.

> *"Allah has fixed a share for all the children of the deceased in his inheritance. One son will have a share equal to that of two daughters, if the deceased's ascendants are there, their share will be given first and the remaining one will be divided according to the following principle: one son's share will be equal to that of two daughters, Ulema are unanimous on this point"(Al-Igina fi Masail Al-Ijma ,2,89)*

There is agreement among all Muslims that if the deceased has both a son and a daughter, son's share will be double and daughter's share will be half of that of son.

"This Shariah command is premised on the principle that one charged with greater responsibilities will have more rights. By the same token, one with fewer obligations will have less rights. This principle is reflected in the Prophet's following observations: "Who bears loss is entitled also to deriving profit"

(Abu Dawud, Kitab Al-Ijara, Hadith No. 3508, Trimidhi on Aishah's authority, Hadith No. 1258)

On comparing the financial obligations of males and females it becomes crystal clear that a male has to support himself, his wife, his children and all the expenses of bringing them up and their education and their marriage if his wife refuses to feed the baby, it is his responsibility to arrange for an alternate. In most of the cases he supports also his parents, his orphan, unmarried brothers and his divorced, widowed sisters. If his children, God forbid, die, it is once again his responsibility to support his grandsons and granddaughters. In sum, all financial obligations are on his shoulders. Women have fewer obligations. She is free from supporting even herself. If husband is poor and wife is rich, it is husband who has to support her:

"Wife's maintenance will not be waived off in view of husband's poverty. Rather, it will be due on him. She may take loans in her husband's name in order to spend that money on herself"(Al-Jassas, Sharah Mukhtasar Al-Tahawi, 5,310)

Given this, there should have been even a greater difference between the shares of son and daughter. However, as a special favour to women, there is less difference in the shares of the two.

Hence, the difference in share has nothing to do with gender. Rather, it is the fixation of rights in the light of obligations. One with more obligations has greater rights. By the same token of logic, one with fewer obligation has less rights.

This point may be grasped thus: in Shariah parents have precedence over children. So when one dies while both his parents and children are alive, the former should have got a bigger share than the latter. However, according to the law of inheritance one's parents have a smaller share than his children. For in this stage of life parents are well past their obligations while children are yet to enter life. That is why the deceased's children have a bigger share than his parents.

In such situations in which males have fewer obligation, his share is equal to that of a woman belonging to the same degree. For example, the deceased's father and mother get an equal share, if he has children. Both the parents get one-sixth of his inheritance, as is specified in **the Quran**:

> *"If the deceased has children, each of his parents will have one-sixth of the inheritance."(Al-Nisa, 4:11)*

Likewise, if the deceased is a childless man or woman, with a brother and a sister, both brother and sister will get one sixth of inheritance, as the **Quran** instructs:

> "*If the man or woman has no heir in the direct line, but has a brother or sister, for each of them is one-sixth*".*(Al-Nisa, 4:12)*

Thus the Islamic law of inheritance rests on the considerations of maintenance. Rights are granted in relation to obligations. One with more obligations has greater rights and the one with fewer obligation has less rights. It is a perfectly fair principle which cannot be questioned by any just person.

==========

"Question No 5. The issue of no notional partition. In case of dispute within family, we have case law to suggest that Muslim families have used civil remedies to opt for notional partition, before death of the owner of the property. Please let us know if there is anything in this regard we can add or cite to elaborate on the premise behind not allowing notional partition."

==========

Response of AIMPLB to the above Issue relating to "No Notional Partition"

Division of property while owner being alive

In Islamic Shariah, one is the owner of his movable and immovable belongings as long as he is alive. His children or close relatives do not have any right on his belongings while he is alive. Nor came the prospective heirs ask him to transfer to them part of his belongings. One is absolutely free to dispose of his belongings by way of gift or establishing an endowment for a noble cause. His heirs cannot deter him from this. Likewise, if in his lifetime he may give a gift or parts of his belongings to all heirs, this will come into force.

The Hanafi stance:

It is nonetheless undesirable that one may give a gift to only some heirs and not give any thing to other heirs. Nor should be give unequal gifts. The Prophet's Companion, Numan ibn Bashir recounts:

> *"My father took me to the Prophet (pbuh) and submitted: "O Messenger of Allah, bear witness that I have given such and such things of my belongings as a gift to Numan." He asked: "Have you given the same to other children as well?" When he replied in the negative, the Prophet (pbuh) directed him to take someone else as a witness in his place. He then asked him: "Do you want that all of them should treat you well alike?" When he replied in the affirmative, he advised him: "You should then not act thus. As you want all of your children to treat you well, you too, should treat them in an equally fair way." (Muslim, Hadith No. 1623)*

Another report on Abdullah ibn Abbas's authority is as follows:

"*While giving gifts, do so equally among your children. If I had a choice, I would have given more to women."(Al-Tabarani, Al-Mujam Al-Kabir, 11997)*

Accordingly jurists advise that if parents want to give a gift to their children, they should observe fairness and equality. Does it mean equality among all sons and daughters? Or does it mean that daughters should be given half to that of sons, as their share is after the parents' death. On this issue, jurists are divided into two camps. Some maintain that son and daughter should be given alike in an equal measure, This viewpoint is of Imam Abu Hanifa and his eminent student, Iman Abu Yusuf and also of Imam Malik and Imam Shafai. The other viewpoint is that the same proportion of half share to daughter should be observed, as in the share of inheritance, while giving gifts in lifetime. **This view is held by Imam Ahmad ibn Hanbal and a leading Hanafi jurist, Imam Muhammad:**

"*It is proper for one to be fair in giving gifts to his children. For Allah commands justice and fairness. As to doing justice to them, in Imam Abu Yusuf's opinion, it consists in giving them in an equal measure i.e. son should not get more than daughter. However, Imam Muhammad insists that they should be given in the proportion of their share in inheritance i.e. son should give twice as that of daughter.*"*Bada'ey Al-Sana'ey, 6,127, Kitab Al-Hiba See also Mujamma Al-Anhar fi Sharah Multaqi Al-Abhar, 2,358, Kitab Al-Hiba, Fatawa Alargiri, 4,391, Kitab Al-Hiba)*

The Maliki stance:

Maliki jurists maintain:

"*One giving gifts to his children should give them in an equal measure. However, it is all right if one gives more to some and does not give anything to others. This does not invalidate his gift."* *(Al-Talqin fi Figh Al-Maliki, 2,217, Kitab Al-Ahbas wa Al-waquf wa Al-Sadaqat wa Al-thibat, Ibn Rushd Al-Qurtubi, Al-Bayan wa Al-Tahsil, 13, 371, Kilab Al Sadaqat wa Al-Hiba.)*

The Shafai stance:

Shafai jurists opine:

"*Father should act is justly among his children. If he fails to do so, it is an undesirable act. The same command applies to mother as she gives gifts to her children. Also, both paternal and maternal grandfather and grandmother are bound the same. They should act justly towards their paternal and maternal grandsons and granddaughters. Likewise, if children give a gift to parents, they should give in an equal measure to their father and mother. They may, however, prefer mother.*"*(Nihaya Al-Muhtaj ila sharah Al-Minhaj, 5,416, Kilab Al-Hiba. See also Tuhfa Al-Muhtaj fi Sharah Al-Muhtaj, 6, 308, Kitab Al-Hiba, and Rauza Al-Talibin, 5,378, Kitab Al-Rahan)*

The Hanbali stance:

Hanbali jurists also affirm that children should be treated equally. However, as already stated, for these jurists equality consists in giving gifts to children in the some, proportion which exists in their share in inheritance i.e. son getting twice that of daughter. The leading Hanbali jurist, Ibn Qudama states:

"*There is no divergence of opinion among Ulema on the point that it is desirable to treat one's children. equally and that it is undesirable to prefer one to another. According to Ibrahim Nakha'i, the Prophet's Companions followed the same norm of equality while kissing their children. However, let it be borne in mind that the desirable equality consists in giving to children in keeping with their share in inheritance as ordained by Allah. So son should get twice that of daughter."*

Al-Mughni, 6,53, Kitab Al-Hiba wa Al-Atiya, See also Al-Kafi fi Figh Al-Imam Al-Ahmad. 2,259, Bab Al-Hiba.)

The Quran has spelled out clearly the distribution of the deceased's inheritance. However, if one distributes his belongings in his lifetime, he must act justly. The majority opinion is that both sons and daughters should be given in an equal measure. Some, however, think that as is the law of inheritance, daughter should get half of son.

Law of inheritance does not recognize joint family:

As one dies, according to Islam belongings both movable and immovable are distributed among his heirs in line with their prescribed share. An adult is absolutely

free to dispose of his belongings as he wills. He does not have to take the consent on a heir for this. Allah, in ***Quran*** pronounces:

> "*Allah directs you thus regarding your children's inheritance: the share of the male is equal to that of two females. If (the heirs of the deceased are) more than two daughters, their share is two-thirds of inheritance. If there is only one daughter, she will have half of the inheritance. If the deceased has children, each parents will have one- sixth of the inheritance. If he has not left any child, and parents alone inherit him, his mother will have one-third of the inheritance. If the deceased has brothers and sisters then one-sixth will go to his mother. (All these shares are to be given) after the payment of his bequest and debts. You do not know who are more beneficial to you- your parents or your children. These shares are from Allah Allah is All Knowing the Wisest.*
>
> *In what your wives leave behind, your share is half, if they do not have any child. If they have a child, your share is one-fourth, after the payment a their bequest and debts. In what you leave behind, the share of your wives is one-fourth, if you do not have a child. If you have a child, their share is one-eighth, after the payment of your bequest and debts. If a man or woman has no heir in the direct line, but has a brother or a sister for each of them is one-sixth. If they are more than two, their share is one-third, after the payment of bequest and debts, provided that the bequest does not cause a loss to any heir. This is the command from Allah. Allah is All Knowing, Most forbearing."(Al-Nisa, 4:11-12)*

The salient points embedded in the above Quranic passage are:

1) The Arabic prefix la used for the recipients of the share, as for example, make, father, mother etc denotes their possession. As soon one dies, his heirs become the owners of their share in inheritance.

2) While laying down the law of inheritance, the Quran speaks of "what is left behind by the deceased" and in that heirs have their share. As long as one is alive, he is the owner of all of his belonging. After his death, his heirs will get their share out what the leaves behind. Throughout the Quran has used the same expression "What is left behind by the deceased."

3) One also learns that in Islam, inheritance cannot be had jointly. It makes every individual the owner of his shares, free to spend as he wishes. There is no chief heir whose consent is needed for the distribution or shares.

   Islam does not admit the concept of a joint family with regard to inheritance.

==========

"**Question No 6.** Lastly, we would be extremely grateful if you could please recommend any **model Nikahnama or Talaqnama** that may have been prepared by your organisation that we can implement universally for *all across the community*."

==========

Response of AIMPLB to the above Issue relating to "Model Nikahnama & Talaqnama"

- All India Muslim Personal Law Board has framed a *Model Nikahnama. This Model* was passed by consensus of all the members in its Executive Committee meeting of the Board. As per the said Model, the parties shall have to agree that they shall fulfil the rights and obligations towards each other. It has been clearly stated that, at the time of *Nikah*, the boy or his family members shall not demand or expect any cash amount, dowry or provision of feasting as they are against the *Shariah* and also sin.

- It has also been stated in the *Nikahnama* that the wife's one of the important important rights is her claim of *Mehr.* It is preferable that the entire *Mehr* or part thereof be given to the wife at the time of *Nikah* itself. If the boy is not capable of giving it at that time, then it can be given at a later stage. But, all efforts should be made that *Mehr* be given at the earliest. If *Mehr* is to be given at a later stage, it is better that it should be in the form of gold or silver, because it is the tradition of the Prophet *SAW (PBUH).* Through such determination, the loss of wife due to de-valuation in currency can be avoided.

- The most important aspect of this *Nikahnama* is that it prescribes for a provision for Mediation (Arbitration) on which both the parties sign. If any dispute arises between them, then a person or institution so referred to in the *Nikahnama* shall determine their disputes. Accordingly, the parties shall also be in a position to save their time and expenditure otherwise spent in court litigation.

==========

"**Question No 7. If there are differences in interpretation of hanafi**, Shayfai, Maliki or Humbali law, please do intimate us on these on all of the issues listed above and also let us know which one would prevail."

==========

Response of AIMPLB to the above Issue relating to "Difference of interpretation"

- This issue relates to the field of Qyas, Ijma, Mantiq. The Islamic scholars have written hundreds of volumes on interpretations. What we have understood to be the most appropriate on the point in issue, we have reproduced them in reply to the questions. On the issue as to which interpretation would prevail on the other, cannot be replied by us. The religious denominations have right to follow their religious belief (law) as they understand, believe and practice their religion.

Important Note:

This note contains the position as per different Schools of Sunni sect (Masalik) only. However, due to paucity of time, the position as stated in (i) ***Shia faith (Fiqh/jurisprudence)*** and (ii) ***Shia-Ismaili faith(Fiqh/jurisprudence)***are not part of this document. The position as stated in the said two Sects/Faiths/Schools also requires consideration by the Commission while considering the above issues. Detailed Written notes of these two faiths are in the process of preparation and shall be submitted within 4 weeks.

Thanking You

[General Secretary]
For and on behalf of
All India Muslim Personal Law Board