CHAPTER VII

CONCEPT OF PERSONAL LAWS IN SAARC COUNTRIES

South Asia as a region connotes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Srilanka. They all form the regional institutional grouping called SAARC (South Asian Association for Regional Cooperation). In South Asia, Muslim-majority Pakistan, Bangladesh, Afghanistan and the Maldives are Islamic states. Although Buddhist-majority Sri Lanka stops short of declaring Buddhism as the state religion, it does place it foremost. Bhutan, in its constitution, declared Buddhism as the spiritual heritage and, Hindu-majority Nepal's Constitution defines Nepal as a secular state.

7.1. Pakistan

a. 1956, Constitution of Pakistan

In August 1947, delivering the inaugural address in the Pakistan Constituent Assembly, Mohammad Ali Jinnah said:

"We are starting with this fundamental principle, that we are all citizens of one state. I think we should keep that in front of us as our idea and you will find that in the course of time Hindus will cease to be Hindus and Muslims will cease to be Muslims, not in the religious sense because that is the personal faith of each individual but in the political sense, as citizens of the state."[468]

These words were indeed pregnant with significant implications. It may apparently look surprising to have heard such secular views from the founder of a state the very basis of which was communalism and religious separatism.[469] The interim Constitution of Pakistan drawn from the Government of India Act, 1935, remained un-replaced till 1956. There was nothing in its provisions determining the position of Islamic law in the country. It only mentioned subjects like marriage, divorce, wills and succession, in the Concurrent List without restricting the powers of the legislatures in any way in regard to these subjects. The first step in the framing of a new Constitution was taken in March 1949, when the Constituent Assembly passed the "objectives resolution". The resolution portrays Pakistan as a state in which the Muslims should be able to organize their lives in the individual and

[468] Pakistan Constituent Assembly Debates, 19-20 (1948).

[469] Tahir Mahmood,*Muslim Personal Law: Role of the State in the Indian Subcontinent* 156 (All India Reporter, 2nd edn., Nagpur, 1983).

collective spheres as per the teachings and requirements of Islam as laid down in the Holy Quran and the Sunna."[470]

Over a period of five years that followed, the Constituent Assembly could not decide on the true import and implications of this clause in the objectives resolution. The ulema demanded a theocratic state; the elite refused to accept dominance of theocracy. The conflict was problematic and could not be easily resolved. The assembly, however, did complete a draft Constitution by September 1954. On 24 October 1954 the first Constituent Assembly was dissolved and after hectic political and judicial activity was replaced by a second Constituent Assembly in November 1955. As a result of the latter's deliberations the first Constitution of Pakistan was adopted and enforced on 29 February 1956.[471]As per the Constitution, Pakistan has been defined as an "Islamic Republic" wherein "the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam, should be fully observed.[472]

Besides the Preamble the identification with Islam in the 1956 constitution continues in several articles and the Directive Principles of State Policy (Part III) as follows: (i) steps shall be taken to enable the Muslims of Pakistan individually and collectively to order their lives in accordance with the Holy Quran and Sunnah. (2) the state shall endeavour, as respects the Muslims of Pakistan, (a) to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah; (b) to make the teaching of the Holy Quran compulsory; (c) to promote unity and observance of Islamic moral standards; and (d) to secure the proper organization of Zakat, Wakfs and mosques. More important, however, is Article 98 which lays down that "no law shall be enacted which is contrary to the rules as laid down in the Holy Quran and Sunnah" and "existing law shall be brought into conformity with such injunction."[473]The question whether a law was repugnant to Islamic injunctions was to be decided by the national assembly not by the ulama[474]. A Commission was to be adopted to recommend measures for adapting the existing law to "Islamic injunctions".[475]

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[470] G.W.Chowdhary, *Constitutional Development in Pakistan* 35 (1969).
[471] Ibid.
[472] Preamble to the Constitution of the Islamic Republic of Pakistan.
[473]*See*, The Constitution of Pakistan.
[474]Ulama (singular 'Alim means a religious scholar and a follower of one of the various schools) believe that the laws in Islam are supreme and have long been finally settled by the great Imams - that is the founders of the various schools. They are most reluctant to give authority to any organ or body including themselves to depart from the opinions of the Imams. *See*, Abdul Ghafur, "Islam1zation of Laws in Pakistan: Problems and Prospects" Muslim Islamic Studies 266 (1987).
[475]Note: The term 'existing laws' occurring in Article 198 included Muslim Personal Law was very clear from the explanation appended to the article that its provisions would not affect the personal laws of non-Muslims.

b. 1962 Constitution of Pakistan

The years that followed the promulgation of the first Constitution witnessed that President Iskander Mirza, who had little regard for religious ideology and preferred to keep religion out of state affairs, did nothing to enforce the above mentioned "Islamic provisions" of the 1956 Constitution. In any case, the 1956 Constitution proved to be a short lived measure as it was abrogated and replaced by martial law in October 1958. Under the martial law Pakistan had to be governed in accordance with the 1956 Constitution, including its "Islamic provisions".

In February 1960 Ayub Khan set up a Constitution Commission in accordance with whose recommendations a new Constitution was drafted and promulgated in March 1962. As regards Article 198 of the late Constitution (of 1956), the Commission had recommended that since there was great diversity of juristic opinion within the fabric of Islamic injunctions a high power Commission should first evolve unanimity with regard to fundamentals, before the existing laws were brought into conformity with such injunctions.[476] Nevertheless the 1962 Constitution made provisions for a council of Islamic ideology to advise the state on the question if a particular law enacted in future violated the Constitutional principles of law making.[477] One of which was that no law should be repugnant to Islam.[478] The advisory opinion of the council for Islamic ideology in this respect was not, however, to be binding on the legislature or executive.[479] The first amendment to the 1962 Constitution made it clear that the mandate against repugnance to Islam meant repugnance to the "teachings and requirements of Islam as set out in the holy Quran and the Sunna." It was also made clear that in the application of this principle to the personal law of any Muslim sect, the expression 'Quran and Sunna' would mean the "Quran and Sunna as interpreted by that sect." The call for unanimity in law given by the Constitution Commission was, thus, overlooked by the framers of the new Constitution. In other words, the diversity of legal principles within the fabric of the Muslim Personal Law was perpetuated. Unlike the Constitution of 1956, the new 1962 Constitution originally did not include a mandate for the adaptation of the existing laws to Islamic injunctions. The first amendment, however, reintroduced that mandate.[480]

President Ayub who was the head of the state, was responsible for the implementation of the Constitutional directives regarding Islamic law, was not as orthodox in his outlook as the ulama of Pakistan wanted him to be. In pursuance of his democratic ways he had bowed

[476] Constitution Commission Report, 69(1960).
[477] Second Constitution of Pakistan, 1962, arts. 199-206.
[478] Ibid, Part 11, "Principles of Law Making and Policy".
[479] *Supra* note 8.
[480] Mahmood, *Supra* at 160.

to the wishes of the majority in agreeing to the amendments of the second Constitution in order to make its "Islamic provisions" as rigid as they were under the 1956 Constitution. He did not show much enthusiasm to carry out the mandate relating to Islamic injunctions as understood by the ulama. On the contrary even before the enforcement of the new Constitution, he promulgated the Muslim Family Laws Ordinance of 1961; and the ulama were sure about it. Leaders of the Jamaat-e-Islami (including Maulana Maududi and luminaries of Karachi's Dar-ul-Uloom like Mufti Mohammad Shafi) along with large number of their followers and admirers opposed Ayub's policies tooth and nail. They could never "pardon" Ayub for his failure to build up Pakistan as a "truly Islamic state" governed wholly by Islam. Their warth was one of the factors which led to Ayub's downfall. On 25 March 1969 he abrogated the 1962 Constitution and transferred power to General Yahya Khan.[481]

c. 'New' Pakistan's Constitution, 1973

Within four years of Ayub's downfall, misdeeds of the Yahya regime resulted in the dismemberment of Pakistan and liberation of Bangladesh. Under the civilian rule of Zulfikar Ali-Bhutto a third Constitution was adopted. The 1973 Pakistan Constitution can be characterized as "Islamic, federal and democratic." It established a parliamentary government with a federal structure and an independent judiciary and expressly provided for many fundamental rights for its people, including the right to freedom of speech, expression, and press.[482] This included freedom to establish and practice any religion.[483]

The 1973 Constitution also contained many provisions that signalled the important role of Islam in the structure and governance of the state. Among the Islamic provisions contained in the Constitution were the following: First, Islam was established as the state religion. Second, no laws were to exist that were "repugnant" to Islam.[484] Third, the President was charged with establishing a "Council of Islamic Ideology." While these provisions

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[481] Ibid.

[482] These guarantees can be found in article 19 of the Constitution of Pakistan, which reads:
Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.

[483] "Freedom of conscience and the right to profess, practice, and propagate any religion, subject to public order and morality, were guaranteed. Every religious association and every sect thereof was guaranteed the right to establish, manage, and maintain its religious institutions."

[484] Specifically, one provision mandated that "no law shall be enacted which is repugnant to the injunctions of Islam as laid down in the Holy Quran and the sunnah," while another required that any existing laws also "be brought into conformity with injunctions of Islam as laid down in the Holy Quran and sunnah."

demonstrated the important role of Islam in the governance of Pakistan, they fell short of establishing a nation governed expressly by Shari'a law, and were balanced by the distinctly democratic guarantees also found in the Constitution.[485]

d. The Zia ul-Haq Regime and the Islamization of Pakistani Law

In Zia-ul-Haq, the army Chief General, who ruled the country from 1977 to 1988, the Islamic ideology of Pakistan found its staunchest champion. Immediately after he captured power on 5July 1977 through a military coup, he declared: 'Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why I consider the introduction of Islamic system as an essential prerequisite for the country.'[486]Zia viewed his regime as the "guardian of the faith and made Islamization of the law a primary objective."[487] General Zia-ul-Haq announced a program of legal Islamization for Pakistan in February of 1979.An initial step involved amending the Constitution by adding Article 203-D, which established a Federal Shariat Court.[488] The most important aspect in Zia's Islamization program involved the enactment of Islamic criminal legislation.

Within a few days, martial law was declared and several Quranic punishments were introduced through the Hudood Ordinances (1979). In 1984 the Qanun-e-Shahadat (law of evidence) became the law, which replaced the Evidence Act of 1872 to bring it in 'conformity with Islam'. In addition, three amendments (popularly referred to as the "blasphemy laws") were added to the Pakistan Penal Code in 1980, 1982, and 1986, which criminalized "the defiling, by words or acts, of the Prophet Mohammed and his wives and

[485] Matt Hoffman, "Modern Blasphemy Laws in Pakistan and the Rimsha Masih Case: What Effect—if Any—the Case Will Have on Their Future Reform" Vol. 13, Issue 2, *WUGSLR.*

[486]This proclamation came among other remarks that included Zia accepting the challenge of leading Pakistan "as a true 'soldier of Islam'" and opining that "Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam." He also promised a commitment to democracy and holding elections moving forward, saying via radio and television broadcast shortly after taking power that "he had faith in democracy and that elections would be held in ninety days and power would be transferred to the elected representatives of the people." Ultimately, however, Zia made good only on his pledge to make Pakistan and its laws more overtly Islamic. *Id.* at 377.

[487]In addition, Zia used his commitment to pursuing Islamization both to give himself political legitimacy and to justify "his retention of dictatorial powers and the suspension of constitutional rights." Zia's rise coincided with the increased prominence and authority of the Islamic fundamentalist groups whose activism had led to Bhutto's downfall, as he "relied upon the Islamic fundamentalist groups in the execution of his Islamization policy." For this reason, therefore, "the religious groups were given enormous opportunities to serve as judges, to control government television, to set requirements for university courses, and to attain government towned property to build mosques."

[488]This constitutional amendment was the first step taken by Zia towards his programme of Islamization. The specific role of the Shariat Court was to determine 'whether or not any law or provision of a law [was] repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunna' and [to] rescind laws found to be in conflict with Islam."

relatives and the desecration of the Quran. The amendment of 1986 made such defiling of the Prophet a capital offence."[489]

Whether Zia-ul-Haq's Islamisation drive worked effectively or not, the Islamic tone set by him lingered on even after his death in 1988, largely because his Islamism had the full support of Jamaat-i-Islami and Tabligh-i-Jamaat, the influence of which went on increasing in Pakistani society because of international aid. The restoration of democracy and the electoral process that followed his death did not thus obliterate the Zia legacy. Even the regime of Benazir Bhutto (1988-90), which made women more visible on the media, lifted the ban on their participation in spectator's sports and improved their job status, did precious little to do away with the laws of the Zia regime. So was the case with Muhammad Nawaz Sharif, who became the Prime Minister in October 1990 following the interim government of Ghulam Mustafa Jatoi (August- October 1990). Sharif went a step further by passing the Enforcement of Shari'ah Bill in the National Assembly in May 1991, which Zia had not been able to effectively do. Sharif actually had no choice. His Pakistan Muslim League had come to power with the support of Jamaat-i-Islami and other religious groups, and during the electoral campaign he had made such a commitment to the ulema that he would ensure the passing of the Bill. The Shariat Act was intended to ensure the continuing process of bringing civil law into conformity with Islamic injunctions. Although it did not happen in reality, it was, at least in theory, meant to undercut the authority of the civil courts.[490] In 1999 Nawaz Sharif was deposed and Pakistan was once again brought under a military dictatorship led by General Pervez Musharraf, which virtually coincided with an extreme form of Islamic militancy in many parts of the world, an important theatre of which was Pakistan.

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[489]Sections 295-A, 295-B, and 295-C of the Pakistan Penal Code, read as follows:
295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting Its religion or religious beliefs: Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either
spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.
295-B. Defiling, etc., of Holy Qur'an: Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract there from or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.
295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet: Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine. Act XLV of 1860, PAK. PENAL CODE, *amended by* Criminal Law (Amendment) Act, No. 3 of 1986, The Gazette of Pakistan Extraordinary, Oct. 12, 1986.

[490]Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* 220-21 (Foundation Books, New Delhi, 1995).

It is apparent from the above discussion that the tenor of Pakistan politics has always been such that any modernist approach to politics which even remotely advocates separation of religion and state becomes an anathema for the political class. In its extreme form, this class considers only that person to be a true Pakistani who is a Sunni and also, preferably, a Punjabi, or atleast a Sunni Pathan. Ahmediyas have not been considered Muslims ever since 1974, and the Shias, who form a minority, are often on the receiving end of frequent anti-Shia violence. In this short of climate, the Pakistani state started countenancing a serious challenge from the so-called jehad industry. Although under strong U.S pressure in the aftermath of 9/11, Pervez Musharraf tried his best to cope with the problem. Musharraf banned several extremist's groups and he had tried to exhort his people about the true concept of jehad, originally conceived as a war against poverty and social evils, but it was probably too late for him to extricate Pakistan from the clutches of the Frankenstein of religious politics. There are between 40,000 to 50,000 madrassas in Pakistan, which according to Moinuddin Haider, the former interior minister of Pakistan, preach a brand of Islam which is not good for the country. In the garb of religious teaching they fan sectarian violence. His efforts to get them registered yielded little result. Only about 4,350 responded positively. As there is an intricate nexus between these madrassas, religious extremism and international Islamic funding, something like a 'Jehad International, Inc.' has emerged. One may trace the origin of International Islamic funding to the ideological conflict for the leadership of the Islamic world, between the Shite 'revolutionary' Iran and the Sunni Wahabi Saudi Arabia in the 1980s. Saudis succeeded because of their financial strength. They supported the madrassa education in many Muslim countries and also did not fail to project Iran's Shiaism as an anathema to Sunnism.[491] It must however be underlined that it is too simplistic to conclude that all madrassa breed fanaticism and militancy. Some of them are used by the military regime to counter the democratic forces.[492]

e. Legislation After 1947

(i). The New Shariat Act

After the creation of Pakistan as a Muslim majority state, the ulama, who dreamt of Pakistan as a state governed wholly, by Islamic socio-political norms, urged the government to amend the Muslim Personal Law (Shariat) Application Act of 1937 as applied in Pakistan so that the

[491] Graham E. Fuller, *The Future of Political Islam* 55(Foreign Affairs, Newyork, 2002).
[492]Yoginder Sikand, *The Indian Ulema and Freedom Struggle* 10-12 (Muslim India, New Delhi, 2004).

special provision about adoptions, wills and legacies,[493]made in British India in 1937 could be repealed. The ulama wanted matters relating to testamentary succession and adoption, too, to be governed compulsorily by the law of Islam, in supersession of contrary usage.

The Punjab legislature was the first in the newly created state to accede to the demand of the ulama. In 1948 it enacted the Punjab Muslim Personal Law (Shariat) Application Act, 1948. The new law did away with the place given to custom and usage relating to legacies, wills and adoption in the Shariat Act of 1937 and made a few other provisions to ensure effective and compulsory application of Islamic law in all matters of personal status and succession.

The Lahore legislation had its echo in the capital of Pakistan and the government of Sind was urged to adopt it. The considerations which had prompted Muslim League leaders in undivided India to press for the protection of customs relating to testamentary succession had not vanished after the creation of Pakistan. Nevertheless, those who had created the new state in the name of Islam did not have the courage now to betray their ulama by opposing the latter' s move to get un-Islaimc usages superseded by religious laws. In 1950 the Muslim Personal Law (Shariat) Application (Sind Amendment) Act was promulgated on the lines of Lahore legislation of 1948. The princely states of Bahawalpur and Khairpur which in pre partition days had no laws parallel to the British India Shariat Act of 1937 had become parts of Pakistan. Joining the process of Islamization, these states agreed to enforce laws on the pattern of the new Shariat Application Acts promulgated in Lahore and Karachi. Hence, the Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951, and the Khairpur State Muslim Female Inheritance (Removal of Customs) Act, 1952, were put on the statute book. No steps were taken in the erstwhile East Pakistan for the amendment of the Shariat Act. The reason obviously was that the religious leaders of Karachi and Lahore were neither much active nor, indeed, interested in Dacca. The ulama of Bengal perhaps lacked in the religious zeal and fervour which in West Pakistan had resulted in the promulgation of the new Shariat Application laws.

When the whole of West Pakistan came under a unified legislature it was deemed expedient to enact a new consolidated law relating to the application and scope of the Muslim Personal Law, replacing all the provincial and regional legislation on the subject. The move had full support of the ulama and other religious minded leaders of Karachi, Lahore, Peshawar and Quetta. Accordingly, the West Pakistan Muslim Personal Law (Shariat) Application Act

[493] In respect of these subjects the application of Islamic law, it will be remembered, was not made obligatory.

came into existence in 1962.[494] In 1963, Ordinance no. 39 amended some provisions of the Act enforced earlier.[495]

It is notable that limited life-estate held by women as well as successive legacies were repugnant to the Islamic law of inheritance; the former because they did not give the women holder her full share under Islamic law and the latter since they violated the Islamic principle of "bequeathable third". The termination of both under the Act of 1962 was meant to apply compulsorily the Islamic law of inheritance and wills. The Act was made applicable to the whole of the "Province of West Pakistan" which means (with the exception of tribal areas) the entire Pakistan. It expressly repealed the Shariat Act of 1937 in its application to West Pakistan and also abrogated all provincial laws relating to the scope of the Muslim personal law.

(ii). Family Laws Ordinance 1961

In pursuance of the goal of Islamization of laws, a Commission was set up by the government of Pakistan in August 1955 to survey the laws relating to marriage, divorce and succession with a view to suggesting means for their adaptation to true Islamic teachings. Popularly known as the marriage Commission, it was constituted by Khalifa Shujauddin and on his death was succeeded by former Chief Justice Main Abdur Rashid. In July 1956 the Commission submitted its report recommending certain significant reforms. The personnel of the Commission as well as its report attracted severe criticism from various sections of citizens. People were disappointed to find that except Maulana Thanvi no other member of

[494] Act V of 1962.

[495] Note: The salient features of the Act as amended by the Ordinance of 1963 were:

(i). The difference between agricultural and non-agricultural properties for the purpose of applying Muslim personal law as found in the pre-partition Shariat Act of 1937 was wholly abolished.

(ii). Testamentary succession was as much subjected to compulsory application of Muslim personal law as intestate succession had been ever since 1937. The choice between custom and Islamic law in this regard given to Muslims by the Shariat Act of 1937, was taken away.

(iii). It was provided that in regard to adoption too, Muslims would be governed by the Muslim personal law and would have no right to plead a contrary custom in that regard (which is possible under the Shariat Act of 1937.

(iv). Limited estates in respect of immovable property held by Muslim women under customary law were terminated; and it was provided that such estates would devolve upon the heirs (including the holders) of their last full owners in accordance with the Islamic law of inheritance.

(v) Further operation of legacies created in favour of several successive legatees was to cease upon the death of the legatee-in-enjoyment; and it was provided that such legacies would devolve on the testator's heirs in accordance with Muslim law of inheritance.

(vi). It was laid down that if any person entitled, as an heir, to a share in any limited estate or legacy terminated by the new legislation was not alive at the time, his entitlement would devolve upon his own heirs according to the Islamic law of inheritance.

the commission was a traditional *alim* and that all other were western educated modern men and women. Their expectation that the function of recommending means for the Islamization of the law would be entrusted exclusively to ulama was belied; and they were sore about it. Molvi Mohammad Taqi Amini of the Dar-ul-Uloom, Karachi wrote:

"It was necessary that this Commission should have been constituted by such ulama who have spent their lives in the study of the Quran and Sunna, on whose knowledge and religious insight people have full confidence. On the contrary, except Maulana Ehteshamul Haq, no other alim was taken in the Commission and it was dominated by those who never in their lives had a chance to study the Quran and the Sunna. The result is that these people have formulated certain recommendations which are wholly against the Quran and Sunna, and they had rejected the points made by Maulana Ehteshamul Haq."[496]

It is notable that Maulana Ehteshamul Haq did not agree with the findings of the other six members of the Commission and submitted a long dissenting note. In the Gazette of Pakistan the Commission's report was published, followed by a general demand that Maulana Ehteshamul Haq's dissenting note should be published too. It then appeared in an extraordinary issue of the gazette brought out on 30 August 1956.

Maulana Abul Ala Maududi of the Jama'at-e-Islami, Pakistan was one of the ulama who had sent detailed answers to the questionnaire sent out by the Commission. Nearly all his arguments and suggestions were overlooked by the Commission. He and other leaders of the Jama'at-e-Islami were therefore bitterly critical of the Commission's report and many religious and political parties and organisations joined them.[497] There was, however, another section of people who hailed the recommendations of the Commission. Some members of the Anjuman-e-Tulu-e-Islam (a *ghayr muqallid* organisation whose members do not believe in blind adherence to traditions without ascertaining their veracity) expressed support for the Commission's report. The opponents to the report were however in an overwhelming majority and the supporters could not have their voice heard. Naturally, therefore, the then government did not have the courage of taking action on the commission's report.

The next few years witnessed many changes in the government in quick succession, after a spell of political instability the country came under the military rule. The new regime made a plan to implement the recommendations of the Commission by issuing an ordinance for that purpose. As the government's intention became known, opposition was again voiced by the ulama in various parts of the country. Maulana Maududi of the Jama'at-Islami and

[496]Molvi Mohd. Taqi Usmani, Hamarey Aili Masail, 13 (1962).
[497]*See*, Khurshid Ahmed, Marriage Commission Report X-rayed 33-34 (1959).

Maulana Mohammad Shafi of the Dr-ul-Uloom, Karachi (a former member of Pakistan Law Commission), were in the forefront of opposition. In April 1960 a group of fourteen ulama of Punjab met in Lahore to protest against the move regarding the implementation of the recommendations. A similar meeting of ulama opposed the move in a grand session held at Peshawar at about the same time. Eighty-four ulama of erstwhile East Pakistan too sent a memorandum to Field Marshall Ayub expressing their strong opposition to the Commission's report. The theme of all these protests was indicated by what Maulana Mohammad Shafi wrote in a letter dated 1 April 1961 to Ayub:

"After coming to power you have announced your plans to undo many wrongs done or contemplated by the previous governments recommendations of the Family Law Commission are among the reminiscences of those unfortunate days. The previous governments did not implement them in view of their popular opposition. We wish, instead of adopting those recommendations you had appointed a new Commission to make fresh recommendations...most of the present recommendations conflict with Islamic laws in letter and spirit.[498]

For reasons quite unknown, however the Ayub Khan regime did not budge before the organised protests by the ulama. In March 1961, it promulgated the Muslim Family Laws Ordinance,[499] based on the recommendations of the Commission. Some more provisions were introduced in it by two other successive Ordinances.[500] The new measure from the very beginning became the target of severe criticism by majority of the ulama so much so that when martial law was lifted and a national assembly constituted, the ordinance was discussed in it and the assembly decided to refer it to Islamic consultative council for its opinion. The ordinance however, was never repealed or modified.

[498] Text of the letter is found in Mufti M. Shafi, Ali Qawanin par Mukhtasar Tabsera, 13-19(1963).

[499]Muslim Family Laws Ordinance was a brief document consisting of thirteen short sections. Its main features included:

(i). All Muslim marriages must be registered. A marriage that is not solemnised by the Nikah Registrar has to be reported to him by the person who has solemnised it.

(ii). Polygamy is discouraged. Only if found 'necessary and just' by an arbitration council headed by a civil official, and after the first wife's consent has been obtained can bigamy be allowed.

(iii). Divorce through 'triple talaq' is abolished and one would have to follow a certain process through the Arbitration Council before it is granted.

(iv). In respect of succession, an orphaned grandchild would receive the share equivalent to that which its father or mother would have received if alive. This provision was the most controversial one and the ulema strongly criticised it as it was in contravention of the Quran and the Sunnah.Ordinance No. 8 of 1961.

[500] Ordinance No. 21 and 30 of 1961.

The provisions of the Pak-Bangla Ordinance were admired by Western critics who do not find them in any serious conflict with the traditional laws of Islam.[501] But the ulama not only in Pakistan and Bangladesh but also in India, regarded the Ordinance as a wholly "un-Islamic" measure.

(iii). Reaction to Reform

Reform of the traditional family law has been attempted in Pakistan under the garb of "adapting" the existing laws to "true Islamic principles". The claim to such an adaptation may be correct only if the principles of Islamic law are seen in their true perspectives and interpreted in their true spirit. On the other hand, if retention of the traditional interpretation of the classical principles is insisted upon, one will find a conflict between the same and the reforms. It is regrettable that many ulama of Pakistan and their followers had rejected the reforms by shutting their eyes to the rationale behind the traditional Islamic principles. There were however, also people who were keen on setting aside the obsolete principle of *taqlid* and were willing to accept the new reforms as they find them in conformity to the "true Islamic ideals". Society in Pakistan was thus marked by a conflict between conservative and orthodox elements.

Maulana Amin Ahsan Ishahi, a former member of the Pakistan Law Commission, was a staunch supporter of codification of Islamic personal law on the basis of a suitable selection of legal principles from all the schools of Islamic law. He advocated the idea that in the social conditions of Pakistan and exclusive adherence to any one school of law was not advisable. Maulana Islahi was one of the few ulama of Pakistan who accepted the equal validity and utility of all the schools of Islamic law and on the basis wanted the personal law to be codified. Among the supporters of revolutionary reform in the area of family law in Pakistan were also people belonging to the Aanjuman-e-Tulu-e-Islam- an organisation inspired by the reformist thoughts of Ghulam Hasan. They did not believe in blind *taqlid* and they were convinced that many of the so-called traditions are unreliable or fabricated.[502]

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[501] *See*, for instance, N.J Coulson, "Reform of Family Law in Pakistan," Studia Islamica, Fasc. VII, 133-55 (1956); "Islamic Family Law, Progress in Pakistan," in J.N.D. Anderson (ed.), Changing Law in Developing Countries 240-257 (1963).

[502]For instance, they did not agree that an apostate is to be killed or that it is lawful to indulge in sex with female slaves. Similarly, scholars belonging to this school of thought fully support the view that in the estate of a grand parent issues of his predeceased children should get the same share as would have gone to the link parent if alive. Also an absolute freedom to contract a bigamous marriage and an arbitrary power to pronounce divorce, both are rejected by them.

Among the socially progressive people who found nothing wrong in the reforms were lawyers, social workers and political leaders. S.S.Mohammod, [503] A.I.Kazi, [504] and M.Noorani,[505] were amongst those lawyer-writers who did not regard the reform of Muslim personal law carried out in Pakistan as an un-Islamic measure. Justice Hamoodur Rehman of the Supreme Court of Pakistan was another enthusiastic supporter of the reforms introduced in the country in the area of Family Law.[506]

Members of the Marriage Commission themselves (apart from late Maulana Ehteshamul Haq) were satisfied; it is notable that their recommendations did not violate any provisions of the Quran and the Sunna and they would rather facilitate a better implementation of Islamic social ideals. They, therefore, disavowed any intention to introduce foreign principles into the fabric of Islamic law. They asserted that these reforms meant restoration of the "true Islamic laws" themselves.

On the other hand, leaders of the Jamma'at-e-Islami, Pakistan were convinced that what is now known as Muslim personal law (unreformed) does not represent the true socio-legal ideals of Islam, do not want any interference in the matter by the state. In their opinion the prevailing practices and usages relating to polygamy and divorce are in themselves un-Islamic; but when the state takes steps to reform them, they criticised those steps. Obviously they did not want the traditional jurisdiction of ulama to be ousted and want that whatever reforms are necessary, the same should be affected by the ulama through *labligh*, and not by the state through legislation.[507]Maulana Abul Ala Maududi, founder of the Jama'at-e-Islami rejected the report of the Marriage Commission.. Even though Maulana Maududi himself had written that unilateral divorce is against the teachings of Islam,[508] but when the Mulsim Family Laws Ordinance imposed restrictions on arbitrary divorce, he described it as a despotic measure opposed to Islam. It is quite apparent that he and his followers wanted the

[503]*See* his 'A Commentary on Muslim Family Laws Ordinance', (Lahore, 1961).
[504]*See* his, 'Family Laws Ordinance', Karachi Law Journal, 57-61 (1964).
[505]*See* his, 'A Brief Commentary on the Muslim Family Laws Ordinance (Karachi, 1961).
[506] Justice Hamoodur Rehman while speaking to the newsmen during his visit to New Delhi in December 1971, to participate in an international conference of chief justices had supported the modernisation measures been undertaken in Pakistan with great zeal . See his statement reported in all the leading dailies of New Delhi, issues of 27-28 December 1971.
[507] Note: Maulana Abul Ala Maududi, founder of the Jama'at-e-Islami, was dissatisfied with some provisions of Muslim personal law. According to him, "The law in force here under the title of Muhammadan law is very much different in letter and spirit from the true Islamic Shariat; its application cannot be rightly equated with the enforcement of the Sharia of Islam." He further said, "The law now regulating matrimonial matters among the Muslims though called Islamic law is greatly distorted. No other law has so badly affected the social life of Muslims as this so called 'Muslim law' has. It is difficult to find a single family in the sub-continent in which one or the other life has not been ruined because of this defective law." *See,* A.A. Maududi, Huquq al-Zaujayn, 8 (1968).
[508]Maududi, Huquq al-Zaujayn, 8 (1968). *Id*. at 10.

state should keep away from matters of family law and the ulama should continue to have unfettered powers in these areas.

There was another group of ulama and their followers who refused to accept that there were any flaws in the traditional laws of Islam as applicable in Islam before 1961. Among them was the custodian of the Karachi's Dar-ul-Uloom. The former rector of the Dar-ul-Uloom, late Mufti Mohammad Shafi, was one of the most vocal opponents of reform introduced by the Muslim Family Laws Ordinance, 1961. A former luminary of Deoband, Mufti Saheb was a convinced muqallid. As Mufti-e-A'zam and Shaykh-ul-Islam of Pakistan, he had done his best to dissuade Ayub Khan from implementing the recommendations of the Family Law Commission. Thus, nearly the whole of the Muslim Family Laws Ordinance of 1961 was in the opinion of Mufti Mohammad Shafi, opposed to the teachings of Quran and the Sunna.

After the military coup of General Zia-ul- Haq in July 1977 when the introduction of the Islamic system became the essential prerequisite for the country, the supremacy of the Shari'ah was established in all branches of law.[509] Through various Hudood Ordinances, the Quranic penal laws on theft, fornication, the false accusation of unchastity, the prohibition of alcohol, etc., were introduced. Jurisdictional conflicts between the Supreme court and the Federal Shari'ah courts, however, continued. The latter lacked jurisdiction over the Constitution, over Muslim personal law and the personal laws of other communities and over laws relating to court procedures and fiscal rules. The Hudood ordinances relating to criminal justice remained mostly on paper. No wonder that later, in 2003, when the Shari'ah laws were imposed in the Northwest Frontier Province, there was no discernible difference in the situation. Although this development was hyped up as the beginning of theocracy in Pakistan, a closer look at the laws showed that they were merely the literal translation into Urdu of the Enforcement of the Shari'ah Act adopted by the Federal Parliament and gazetted on 18 June 1991.[510]

Zina Ordinance, 1979 contributed to the circumvention of the provisions of Muslim Family Laws Ordinance. Polygamy was prohibited, but there was little that the government could do to prevent it. Similarly, triple talaq or plain abandonment of the wife also continued because, in many cases, aggrieved wives accepted the situation under social pressure. Sometimes vindictive husbands and their relatives tried to use the Zina Ordinance to harass divorced

[509]Tahir Mahmood, *Common Civil Code, Personal Laws and Religious Minorities* 77 (N.M. Tripathi, Bombay 1995).

[510]P. Nayak & S. Nayak, *Status of Muslim Personal Law in Pakistan* 43-75 (Kalinga, Delhi, 2001).

wives. In many cases, however, the Federal Shari'ah Court dismissed such petitions as malafied.[511]

There were thus, several means of circumventing the Muslim Family Laws Ordinance and in this the Zina Ordinance too came handy. For example, fathers who did not approve of their daughters' marriage choices filed cases of kidnapping against their husbands under the provisions of Zina Ordinance. The husband was made criminally liable for having a sexual relationship outside marriage, because their wives were forced to stand as witness against their husbands. Since the 1970s, access to the Special Marriage Act (SMA) has all but ceased because of the strict penal provisions concerning blasphemy that make it impossible for someone to renounce Islam. Since Ahmediyas/Qadiyanis were declared non-Muslims in Pakistan in 1974, it has not been clear if the Muslim Family Laws Ordinance applies to marriages involving Ahmediyas or if a Muslim woman's marriage to an Aahmediya man is valid. The courts have preferred to avoid dealing directly with this controversial issue and have instead ruled on the immediate issue at hand (the demand for maintenance and the validity of talaq). In the three known cases, it appeared that the husband was attempting to evade his legal responsibilities by claiming that the marriage was not valid and in all the cases the court ruled in the woman's favour without directly dealing with the issue of validity.[512]

In Syed families, especially in Shia Syed families, women are not permitted to marry non-Syeds. If there is no suitable match for a daughter, some feudal Syed families of the Sind province will ask her to forgo her right to marriage. She then makes a formal enunciation on the Quran, or *haqbakhshwana* (literally foregoing the right). The woman is therefore condemned to a life without a husband or children and may live as a recluse. Families inflict such a fate on their daughters to avoid marrying persons of lower social status as well as to ensure that property remains within the family.[513] In June 2005, the Council of Islamic Ideology, and advisory body of the Islamalisation of laws, drafted a bill to punish with

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[511]Werner F. Menski, *Comparative Law in a Global Context* 322-23 (Platinum, London, 2000). In the case of *Allah Rakha v. Union of Pakistan* (2000) the supremacy of Shari'ah over the Muslim Family Laws Ordinance was reiterated. In this case the Federal Shari'ah Court ruled that while Shari'ah was a God-given law and Muslim Family Laws Ordinance was a man-given law the former would naturally receive precedence over the latter in case of a conflict between the two. The case proved that the 1961 reform was just a reformist fig-leaf meant for the educated and modernist middle class, while for an average Pakistani it meant little. *See* Werner F. Menski, "From Dharma to Law and Back? Post Modern Hindu Law in a Global Order" 10 Heidelberg Papers in South Asian and Comparative Politics (2004).

[512]*Nasir Ahmed Shaikh v. Mrs Nahid Ahmed Shaikh* NLR 1986 Civil 659; LN 1986 Lahore 597; *Muhammad Rashid v. Mst. Nusrat Jahan Begum* 1986 MLD 1010 Lahore).

[513]Women Living Under Muslim Law, *Knowing Our Rights: Women, Family Laws and Customs in the Muslim World* 75, 102, 106 (Zuban and Kali for Women, New Delhi).

imprisonment anyone who became a party to a woman's marriage to Quran. The draft bill proposed to amend Section 285-B[514] of the Pakistan Penal Code which prescribes life term for anyone who desecrates the Quran. The draft bill said that the marriage with the Quran had no legal standing and amounted to punishable offence under the Shari'ah Law.[515]

It is evident from the above discussion that reform in Muslim Personal Law in Pakistan is most unlikely. Pakistan is not a theocratic state yet it does not have the political will to extricate itself from the forces of political Islam because of the complex set of vested interest. As a result, the evolution of law suffers considerably. Pakistanis satisfied themselves by merely making general programmatic statements such as the Objectives Resolution of 1949. As such their experiments with the legal modernisation of family law remained half hearted. Even the Islamisation process that started in the late 1970s could not assert itself as a coherent legal policy, resulting in some massive failures of justice. The result was that because of the partition socio-cultural and historical position of Pakistan, there could be only a combination of juristic reassessment of the Quran and some piecemeal efforts at lawmaking.

7.2. Bangladesh

Indian sub-continent got divided in 1947 on the basis of religion and a new country was born i.e. Pakistan. The two nation theory was put forward by Mohammad Ali Jinnah who was of the firm belief that Hindus and Muslims are the two separate nations and they cannot live together. But after the creation of Pakistan which was consisted of two wings West Pakistan and East Pakistan, got divided because of the hard and stubborn nature of Pakistani leadership and with the result Bangladesh came in to existence as a new state in South Asia in 1971. The birth of Bangladesh was an epoch-making event within the post-colonial order of South Asia. Led by the middle classes, a bitter and bloody war of Liberation from Pakistan was fought, based on Bangladeshi peoples' aspirations for democracy, identity and for a more progressive society. Soon after its emergence, Bangladesh adopted the four-pronged state ideology of nationalism, democracy, socialism and secularism. However, not long after the

[514]Section 295-B: Defiling of and marriage with the Holy Quran: whosoever wilfully defiles, damages or desecrates a copy of the Holy Quran or an extract therefrom or directly or indirectly allows the Holy Quran to be used for purpose of its marriage with a female or fraudulently or dishonestly induces any person to swear on the Holy Quran never to marry anyone in her lifetime or knowingly uses it in any derogatory manner or for any unlawful purpose, shall be punishable with imprisonment for life.

[515] Human Rights Commission of Pakistan, *State of Human Rights in 2005* 20-21 (Human Rights Commission of Pakistan, Lahore, 2006).

emergence of the nation-state, religion re-emerged as an important factor in the country, both socially and politically. The assassination of Sheikh Mujibur Rehman and the overthrow of his government by a military coup d'état in August 1975 brought Islam-oriented state ideology into prominence by shunning secularism and socialism.

It is noteworthy that today most Bangladeshi people are not sure which comes first—their loyalty towards political Islam or towards secularism. After the fall of the ―socialist-secular-Bengali nationalist Mujib government in 1975, his successors realized the importance of political Islam to legitimize their rule. The military ruled government in Bangladesh used religion and promoted it from 1975 onwards and denounced the secularist ideology. It was after 1975; Zia-ur-Rehman inserted religious principles in the constitution and removed secularism from the constitution. Thereafter a series of constitutional amendments and government proclamations between 1977 and 1988 lead the body politic towards a process of Islamisation. The erosion of the secular character of Bangladesh deepened when Gen Ershad declared Islam as the state religion in 1988. During both military and democratic regimes the controversy continues into deeper labyrinth which ultimately shaped the state politics and social life. The Bangladesh Nationalist Party (BNP) which was founded by Zia-ur-Rehman and Jamiat-e-Islami are the main promoters of religious ideology while as Awami League is the main force behind the promotion of secular ideology. In 1990 there was a democratic wave in Bangladesh but that too could not sideline the rift between secularism and religion in Bangladesh. After 1990 it was Bangladesh Nationalist Party which came to power and with it the religion got more importance both at governmental as well as at the social level. In 1996 it was secularism propagating party Awami League which formed the government but it could not change the constitution and restored the secular principle. Again it was BNP in 2002 which won the elections and formed the government at the centre and used the religion as a tool both at public forms as well as at the personal level in order to strengthen the base of its party. There were strong allegations of the rising of religious fundamentalism in Bangladesh during this period and Awami League the opposition party also accused it of using the religion for their own political benefits as there were blasts in the major towns in which a leader of the opposition was having narrow escape. In 2008 general elections Awami League had promised that it would restore the secular character of Bangladesh polity by reinstating the original 1972 constitution. After forming the government the Awami League passed the 15th amendment in the parliament in 2011 and restored the secular principle in the constitution but at the same time also accepted Islam as a state religion of Bangladesh. The

government possibly fears that any bold move for the restoration of original constitution could fuel the public unrest which is not desirable at this juncture.

The original 1972 Constitution of Bangladesh embodied the principle of secularism.[516] Sheikh Mujibur Rahman, widely known as the founding father of Bangladesh and Bangabandhu(Friend of Bengal), in 1972 said that secularism does not mean faithlessness, much less atheism. It simply allows the citizens of the country to practice their religion. He explained that the government does not and will never want to ban the practice of religion through the enactment of laws. He said the government would allow members of every religion—Islam, Hinduism, Buddhism, and Christianity—to practice their faith; nobody would prevent or stop them. What the government would not allow is the use of religion as a political weapon or as justification to commit grievous vices, like killings, persecutions, and rapes. He further said that religion is indeed a very sacred thing and that this sacredness of religion must not be used for political advantage. He also said secularism does not curtail people's rights but rather ensures the right of every citizen of the country to practice his religion in accordance with his free will.[517] However, the Fifth Amendment to the Constitution of Bangladesh abolished secularism in favor of Islam[518], and legalized religious political parties.[519] The amendment took place during the rule of Zia-ur-Rahman.[520]

A further amendment to the Constitution of Bangladesh (known as the Eighth Amendment) declared Islam as the state religion.[521] The amendment was passed in 1988 by President Hussain Muhammad Ershad.[522] During that time, the political parties in opposition were vocally opposed to his rule.[523] Realizing that he would not be able to run the government in that critical situation, Ershad decided to incorporate a provision into the Constitution of Bangladesh that recognized Islam as the state religion.[524]Ershad did this to satisfy the Middle

[516] Casanova, states that secularism is a reference to more broadly to a whole range of modern secular worldviews and ideologies that may be consciously held and expressly elaborated into philosophies of history and normative-ideological state projects, as well as into projects of modernity and cultural programs. *The Secular and Secularisms*, *supra* note 21, at 1051.

[517] Sheikh Mujibur Rahman, Prime Minister of Bangladesh, National Assembly Speech, (Oct. 12, 1972). He delivered his speech in Bangla. For an English translation, *See, Meghna Guhathakurta & Willem Van Schendel, The Bangladesh Reader: History, Culture, Politics* 334 (2013).

[518] And incorporated *Bismillah-ar-Rahman-ar-Rahim* (meaning "In the name of Allah, the Beneficent, the Merciful") into the preamble of the Constitution of Bangladesh.

[519] Bangladesh Constitution amend. V, act 1 of 1979.

[520] Ibid.

[521] Constitution (Eighth Amendment) Act, 1988 (Act No. 30 of 1988) (Bangladesh).

[522] Ibid.

[523] Hussain Mutalib, Taj ul-Islam Hashmi, et.al. (eds.), *Islam in Bangladesh Politics*, *in* Islam, Muslims and the Modern State 100, 114 (1994).

[524] Ibid.

Eastern countries and to get prompt support from pious Muslims.[525] He asked the Prime Minister to bring the eighth amendment of the constitution to Parliament.[526] The amendment was passed and allowed him to maintain power for another two years.[527]

At the time Islam was incorporated as the state religion in 1988, Sheikh Hasina and Begum Khaleda Zia lead the two major political parties in Bangladesh, the Bangladesh Awami League and theBangladesh Nationalist Party (BNP), respectively.[528] Both parties declared that they would annul the Eighth Amendment if they came in to power.[529]

Though both Begum Khaleda Zia and Sheikh Hasina became the prime minister of Bangladesh in 1991 and 1996 respectively, they did nothing to change the Eighth Amendment. In 2001, Begum Khaleda Zia again became Prime Minister with a two-thirds majority in the Parliament with the support of Jamaat-i-Islam and other Islamic political parties, so she felt like her hands were tied because she did not want to make the Islamic political parties upset. In 2009, Sheikh Hasina became Prime Minister again with more than a two thirds majority. She made a special amendment to the Constitution on June 30, 2011, Division of the Supreme Court of Bangladesh.[530] The Appellate Division in 2010 had affirmed the judgment[531] of the High Court Division of the Supreme Court of Bangladesh, which held that secularism was one of the fundamental principles of state policy.[532]The original Constitution of Bangladesh, adopted in 1972, had four pillars: nationalism, socialism, democracy, and secularism.[533]Secularism was removed from the Constitution of Bangladesh by President Zia-ur- Rahman, who was also Chief Martial Law Administrator, through the Proclamations (Amendment) Order,1977 (Proclamation Order No. I of 1977) on April 23, 1977.[534] The Parliament passed the Constitution (Fifth Amendment) Act, 1979 on April 6, 1979.[535] The Fifth Amendment Act officially legalized, among others, the Proclamation Order No. I of 1977.

The Fifteenth Amendment of the Constitution of Bangladesh, however, re-instituted all four of the original pillars on June 30, 2011, recognizing that, although Islam is the majority

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[525]*Id.*at 114–15.
[526] *Id*. at 116.
[527] *Id*. at 113-17.
[528] *Id.* at 115-16.
[529] *Id.*
[530]*Khondker Delwar Hossain and others v Bangl. Italian Marble Works Ltd*. (*Fifth Amendment Case*), Civil Petition for Leave to Appeal Nos. 1044 & 1045 (2009).
[531]*Bangl. Italian Marble Works Ltd. v Gov't of Bangl*., Writ Petition No. 6016 (2000) (judgment delivered in 2005).
[532] Ibid.
[533] The Constitution of Bangladesh , 1972, Preamble.
[534]Proclamations (Amendment) Order, 1977 (Order No. 1 of 1977) (Bangl.).
[535]Bangladesh Constitution (Fifth Amendment) Act, 1979.

religion, other religions have equal rights.[536] Nevertheless, the "secularism" and "Islam as state religion"[537]provisions still exist. Werner Menski argues that according to the "plurality-sensitive perspective," there is no contradiction in a Muslim-majority country like Bangladesh showing a commitment to Islam, provided that it both recognizes equal rights for religious minorities and provides "strong and effective mechanisms" to protect those rights.[538]Minorities and progressives in Bangladesh are extremely unhappy with the Fifteenth Amendment of the Constitution.[539] The present prime minister, Sheikh Hasina, is possibly too cautious about the common Islamic sentiment prevailing in the world and the State of Bangladesh's relationship with Middle Eastern countries.[540] In Bangladesh politics, Sheikh Hasina follows the footprints of her father, Sheikh Mujibur Rahman, while Begum Khaleda Zia emulates her husband, Zia-ur- Rahman.[541]Khaleda Zia and Sheikh Hasina did not say that they wanted to establish an Islamic state.[542]Though Sheikh Mujibur Rahman and Zia ur Rahman did not include state religion Islam provision in the Constitution, it was included by Ershad.[543] But Sheikh Hasina did not abolish it from the Constitution.[544]

Bangladesh is a country that derives an important measure of its national identity from its religious character.[545] Islam is the largest religion of Bangladesh; Muslims constitute 89.5 % of the population followed by Hindus who constitute 9.6 %. The remainder of Bangladesh is practices other religions such as Buddhism and Christianity.[546] Personal laws govern important aspects of family life in Bangladesh. Matters such as divorce, marriage, maintenance, custody, adoption and so forth are determined by each religious community's religious-personal law system. Therefore, people of different religions are not treated equally on the same kinds of issues. Many of the personal laws are not gender-sensitive, codified and do not accord to the demand of the time. Political use of religion, patriarchal interpretation of

[536]Constitution (Fifteenth Amendment) Act, 2011.
[537]Article 2A of the Constitution of Bangladesh provides that "The State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Bhuddist, Christian and other religions.".Constitution of Bangladesh.
[538]Werner Menski, *Bangladesh in 2015: Challenge of the iccherghuri for Learning to Live Together*, 1 U. ASIA PAC. J.L. & POL'Y 7, 23 (2015).
[539] Haroon Habib, *A Return to Secularism, Almost*, HIMAL SOUTHASIAN (Nepal) (Aug. 2011), http://old.himalmag.com/component/content/article/4588-a-return-to
[540] ShivamVij & Jyoti Rahman, *Islamic secularism' in Bangladesh: Jyoti Rahman,* KAFILA https://kafila.online/2011/01/11/islamic-secularism-in-bangladesh-jyoti-rahman/.
[541] Ibid.
[542] Ibid.
[543] Ibid
[544] Ibid
Md. Jahid Hossain Bhuiyan, Law and Religion in Bangladesh, Brigham Young University Law Review.
[545]Asim Roy,*The Islamic Synergetic Tradition in Bengal* 15, 16(Princeton University Press, 1983).
[546]*See*, http://en.wikipedia.org/wiki/Religion_in_Bangladesh.

existing progressive laws and the persistent disparity and anomalies in the different personal laws leave the Bangladeshi women's lives in a subjugated state. In the case of Bangladesh where we have a system of pluralist society with diversity of ethnicity and religious origin, gender discrimination and anomalies are evident.

As regards marriage, polygamy/bigamy is allowed for Muslim and Hindu/Buddhist husbands. Under the Hindu law unlimited polygamy is permitted for males while polyandry for females is prohibited. In India however, by virtue of Hindu Marriage Act, 1955, monogamy has been established and bigamy is made punishable both for the male and female. Section 11 of the Act makes a bigamous marriage null and void and Section 17 makes it a penal offence. Other changes made to the laws on Hindu marriage in India include the legalization of inter-caste marriages which continues to be forbidden in Bangladesh. As far as capacity is concerned, only a person who has attained majority can enter into a marriage contract. Muslim law however recognizes the right of guardian to contract marriage on behalf of a minor. A woman is deemed to have reached majority upon the attainment of puberty and as a major, she alone has the right to consent to her marriage. In 1929, the effort was first made to enact a minimum age of marriage which would be uniform, and would apply to all communities of the then undivided India. Due to the fear of backlash from these communities, the Child Marriage Restraint Act, 1929 dealt with punitive measures and could not declare marriages, where the parties were below a certain age, void. In 1929 the minimum age was set at 14 for girls. In 1961 by virtue of the MFLO the age was raised from 14 to 16 and by the Child Marriage Restraint (Amendment) Ordinance to 18 in 1984.[547] Hindu law permits child marriages and though the Child Marriage Restraint Act, 1929 limits the marriage of children by making it a punishable offence, it does not affect the validity of such marriage. Unlike the Muslim girl, a Hindu girl has no option on reaching puberty to repudiate the marriage. Child marriages and the marriage of minors with the consent of a parent or guardian are recognized under the Christian Marriage Act, 1872, as well as the Code of Canon Law. In case of providing consent to the marriage of a minor, there is noticeable discrimination in recognizing only the father as the primary legal guardian of the child. Thus Section 19 of the Christian Marriage Act, 1872 plainly excludes a mother's right to give or withhold consent in the marriage of her minor child in the presence of not only the father but also the legally

[547] Shahnaz Huda, "Untying the knot‖-Muslim Women's Right of Divorce and Other Incidental Rights in Bangladesh" 133-157 *DVS* (1994).

appointed guardian.[548] As under age marriages are allowed under the religious laws and statutory laws did not declare such marriages as void, the practice of child marriage is rampantly continuing leaving the lives of the teenage girls at stake. As far as registration is concerned, although Bangladeshi law provides for registration of Muslim marriages[549] through legal mechanisms, albeit faulty, there are no provisions at all for the registration of Hindu marriages.[550] The lack of proof of marriage is causing considerable difficulty to Hindu women in Bangladesh who seek to validate their rights.

Muslim marriages may be dissolved by the death of the spouse, by the act of parties or by judicial process. Since Islam considers divorce to be distasteful but nevertheless a necessary evil, there exists the scope of reconciliation between the parties in most cases. The various forms of divorce are covered by Section 7of the Muslim Family Laws Ordinance, 1961, Section 5(a) of the Family Courts Ordinance, 1985 and the Dissolution of Muslim Marriages Act, 1939. The primary and unfettered rights of dissolving the marriage lie with the husband who can according to religious law pronounce talaq. In the case of talaq the wife's consent is not required, and the declaration of talaq is extra-judicial, in no way subject to any external check.[551] The Dissolution of Muslim Marriages Act, 1939, provides a woman with a number of specific grounds for seeking a divorce.[552] She may obtain a decree for the dissolution of her marriage without necessarily losing her right to dower[553] if she can invoke one or more of the grounds enshrined in the Act. The Muslim Family Laws Ordinance, 1961 has attempted to make the effects of the talaq-al-bida't a less precipitate.[554] Section 7 enumerates various restrictions to unilateral, arbitrary and unencumbered divorce by husbands. By virtue of this enactment no divorce will become effective from the moment of pronouncement. Notice must be given to the Chairman of the Arbitration Council, who will call a meeting of both parties about reconciliation.[555] A copy of the notice must be supplied to the wife.[556] Divorce is legally effective even in the absence of proof of constitution of Arbitration Council.[557] The divorce will be effective after 90 days even if no such committee was formed and no attempts made at reconciliation. The date of the receipt of notice by the Chairman is the date from

[548]*Supra* note 3 at p.47.
[549]The Muslim Marriages and Divorces Registration Act, 1974.
[550] Shahnaz Huda, Registration of Marriage and Divorce in Bangladesh, A study on Law and Practice; (Bangladesh Legal Aid and Services Trust, Dhaka, 1999).
[551] Pearl, David (1987) A Text Book on Muslim personal Law, 2nd Edition; Croo, Helm, London at p.100
[552] Section 2 of the Dissolution of Muslim Marriages Act, 1939 (as amended up to 1986).
[553] *Id*. Section 5.
[554]*Abdul Kadir v. Salima* (1886) 8 ALL. 149.
[555] Section 7(3) of the MFLO, 1961.
[556]Section 7 (1) of the MFLO, 1961.
[557]*Abdul Aziz v. Rezia Khatoon*, 21 DLR 733.

which the 90 days will run irrespective of the fact that the other party may have been notified later. This is a gross procedural defect because there may be cases where the party initiating the divorce deliberately delays the serving of notice to the other party so as to deprive him/her from accessing to the Arbitration Council. The wife is entitled to her dower and maintenance until the divorce becomes effective. She is required, however, to observe iddat. The MFLO, 1961 legally abolished the need for an intervening marriage; commonly known as –Hilla' marriage with a third person required by the religious law for a woman before she can remarry a husband from whom she has been divorced.[558] The rights of women in Islam regarding the right to divorce are not equal. The man still has unfettered right to divorce his wife whereas the woman has: in the case of talaq-e-tafweez, to depend on her husband's delegation of the right; in the case of khul, where the husband does not consent, to convince the Court that the marriage has transgressed the bounds prescribed by Allah; and in the case of faskh or judicial rescission to involve oneself in costly and complicated legal procedures.[559] Even in the case of judicial dissolution of marriage, a distinct disparity exists between Muslim men and women in relation to the right to divorce. A man can obtain a divorce under any circumstance by pronouncing talaq, giving notice to the Arbitration Council and waiting for 90 days to take it effect. A woman, on the other hand, who has not been delegated the right of divorce, must have recourse to a court of law and prove one or more of the grounds stipulated. This process is not only inconvenient but also time-consuming, expensive and in most cases socially humiliating for the woman and her family.[560] The social stigma attached to divorce is so pernicious for women as opposed to men, that a woman in many cases is compelled to remain with her husband under torture and suppression leading a life of jeopardy.

The dismal condition of the legal status of a Hindu woman is more evident in the case of divorce as divorce for Hindus in not possible in Bangladesh. Under no circumstances a Hindu woman has the recourse to bring a suit for dissolution of marriage. In reality, this means that many Hindu women in Bangladesh lead lives of abject misery in cases of abandonment by the husband who can marry as many wives as he wishes. The deep embedded gender biasness in Hindu law on the question of dissolution of marriage relegates women to a role of service providers, without any statutory rights. The most she may get is limited relief under which

[558]Section 7 (6) of the MFLO, 1961.
[559]Vesey, Fitzgerald, Seymour, *Muhammadan Law: An Abridgement* 154 (Oxford University Press, London, 1931).
[560]*Supra* note 3 at p.25.

she is entitled to separate residence and maintenance from her husband on one or more of the grounds stipulated in the Act.[561] A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or she embraces other religion or is living apart without justifying causes. Many of the disabilities of Hindu women have been removed in India. By the enactment of Hindu Marriage Act, 1955 bigamy is made punishable offence. This Act provided for the registration of marriage and made scopes for bringing a suit for divorce on certain grounds. The existing Hindu law in Bangladesh is a violation of the Universal Declaration of Human Rights, 1948 which declares under Article 16(a) that the right to marry and divorce is a Human Right for all.

According to the Divorce Act 1869, adultery simpliciter by the husband would not entitle a wife to dissolution of marriage, though adultery by the wife is an important weapon in the hands of the husband to get the marriage dissolved. Moreover, under Section 34, for this Act, a husband may sue the co-respondent for damages; not by way of punishment but for compensation for the loss of his wife. A wife, however, has no such redress on the same ground. The Law Commission of Bangladesh, however, submitted a draft of proposed amendment to the Divorce Act, 1989 to the Ministry of Law on 19th February, 2006 with the view to bring substantial change, relief and speedy justice to Christian women who are currently going through a complicated, restricted and time consuming process of dissolution of marriage.[562]

A Muslim mother is never a legal guardian of her child; she can only claim custodianship in limited circumstances. In Hindu and Christian law also, the mother's right to guardianship is secondary to the father's right. Under Hindu law, only men have the right to adopt, that too only a male child who will maintain the family line of succession.

As far as Muslim women are concerned, except for a few exceptional cases, most women inherit half of their male counterparts e.g. the daughter inherits half of what the son inherits.[563] A Bangladeshi Hindu woman's right to inheritance is non-existent. Under the Dayabagha law, the right to inherit arises on the heir's capacity to confer or offer spiritual benefit to the propositus. A widowed, sonless, or childless daughter cannot inherit, as she

[561]Section 2 of Hindu Married Woman's Right to Separate Residence and Maintenance Act, 1946.

[562] *See*, the detail draft of the proposed Amendment to the Divorce Act, 1869 at http://www.lawcommissionbangladesh.org/reports/72.pdf.

[563] For more *See*, Shahnaz Huda, Women's Property Rights in Bangladesh: Effect of Religion and Custom in Development Issues Across Regions: Women, Land and Forestry Wickramasinghe. Anoja (ed.), Corrensa, Peradiniya 294-308 (Sri Lanka, 1998).

cannot afford spiritual benefit through a son.[564] A widow's life-estate generally means that she is not entitled to alienate the immovable property inherited by her but only that she has the power of disposal of the income of the property. She acquires merely a very limited estate, over which she has a restricted power of alienation, and on her death or surrender, it reverts to the line of the last male owner.[565] In India, the Hindu Succession Act, 1956 brought revolutionary changes in the inheritance law of Hindus. In a land-hungry country like Bangladesh, inequalities arising from inheritance rights perpetuate women's disadvantaged position perhaps more crucially than any other areas of family law. Already a number of reforms have been undertaken, mainly through the MFLO, 1961, to ameliorate some areas of discrimination for Muslims. For instance, Section 4 of this Ordinance changed the rule where the grandchild could not inherit their deceased parents' property if the grandparents are alive. By incorporating the Doctrine of Representation, now the grandchildren can inherit the same share as their deceased parents would have inherited. Nevertheless, the position of women has not benefited in any significant way from such piecemeal reforms.[566] The Hindus in Bangladesh belong to the Dayabagha School. Since the laws governing Hindus in Bangladesh date back to the pre1947 period, when it was part of the undivided subcontinent, Hindu women in Bangladesh continue to face disabilities due to application of ancient discriminatory laws. There are at least twenty-seven different documented tribes in Bangladesh and they belong to about six linguistic categories.[567] In some sections of the tribal populations matriarchy is the norm, thus problems evolving in the personal sphere are somewhat different from those under scrutiny herein, requiring a different matrix of assessment. A large part of the ethnic community belongs to the Christian and Hindu faiths. The Buddhists in Bangladesh have no distinct personal or civil law of their own and that from time immemorial they have followed the Hindu religious law and customs in spite of the fact that they renounced the Hindu religion.[568]

[564]MridulKanti Rakshit, *The Principles of Hindu Law—Personal Law of Hindus in Bangladesh and Pakistan 391 (Chittagong , 1985).*
[565]Op. cit. Pereira (2002) p.45.
[566]Op. cit. Pereira (2002) at p.38.
[567]*See*, R.W. Timm, *Ethnic and Religious Minorities in Bangladesh, in state of Human Rights: Bangladesh (*CCHRB. 1999).
[568]Tahmina Ahmad and Md. Maimul Ahsan Khan (eds.), *Custody and Guardianship of Minors in Bangladesh in Gender in Law*; Ahmad, 34 (ADTAM Publishers, Dhaka, 1998).

7.3. Nepal

Nepal has a uniform civil code operative since 1963, notwithstanding the fact that it is a multi-ethnic and multi-religious state. That this code is essentially a Hindu code is another matter, which will be discussed later further. No wonder therefore that the 1990 Constitution of Nepal (which stands abrogated) is silent on the issue of personal laws of different communities for the Constitutional Monarchical Kingdom of Nepal itself is 'Hindu' (Article 4). Indeed, the Constitution also provides that 'every person shall have the freedom to profess and practise his own religion as handed down to him from ancient times having due regard to traditional practices'.[569]

It may be argued that the 1990 Constitution may not have mentioned personal laws because the matter had already been settled through the enactment of the 1963 national legal code. A comparison with the Indian situation should clarify the point. The Constitution of India too guarantees freedom of conscience to all communities, yet advices the state to try to achieve the objective of a uniform civil code as contained in its Directive Principles of State Policy. Unlike this, Part IV of the Nepalese Constitution, which is almost similarly titled 'Directive Principles and Policies of the State', does not mention anything in respect of civil laws, as if the matter is settled for good. For sure, apparently there is no controversy in Nepal over the personal laws.[570]

Before the unification of Nepal, the common characteristic among the principalities was the recognition of the law based on the Dharmashasthra viz; veda, smirities, purana, commentaries. King Prithivi Narayan Shah entrusted the responsibility of justice to Dharmaadhikara. The King was the foundation of law and Justice. He established the trial and appellate courts in all provincial and district level courts. Pundits of Brahmin caste were appointed as representatives of Dharmadhikari, who were responsible for the application of law and religion in all cases. The doctrines of equality were ignored, the caste system was predominant, and the criminals were treated in accordance with their caste.[571]

Jung Bahadur Rana, an ambitious and astutue courtier, established the Rana regime in 1846, and made the position of Prime Minister hereditary to the Rana family and maintained the status quo in all areas. Jung Bahadur travelled to England and France in 1849 to observe its legal structure. The structure of the English and French courts, the Napoleon Code and the

[569]Partha S. Ghosh, *The Politics of Personal Law in South Asia; Identity, Nationalism and the Uniform Civil Code* 190 (Routledge, 2007).
[570] *Id.* at 191.
[571] Kanak Bikram Thapa, "Religion and Law in Nepal" National Report: Nepal, available at: https://www.iclrs.org/content/blurb/files/Nepal.pdf (last visited on October 2, 2018).

Civil Code of France, influenced him. During his visit he was impressed by the governmental institution of their method of functioning. After his return from Europe, he began revising the laws of Nepal, and in 1851 he appointed the Law Council (Ain Kausal). Ain Kaushal worked diligently for almost three years, and finally on January 5, 1854, the country code (Muluki Ain) was promulgated. The code comprises of 163 chapters running into 1400 pages. The code deals with criminal and civil law, as well as provisions relating to administrative law, land law, regulation for the management of revenues administration, land survey, and so forth.[572]

The code (Muliki Ain, 1854) embodied the various customs, laws, uses, social norms and royal proclamations of Nepal, including the untouchability and punishment for breaking the hierarchy of castes, making legal the traditional rules of caste-based discrimination. The country code of 1854, the first code of modern Nepal, was therefore based on the Hindu jurisprudence and incorporated the different castes and ethnic groups of Nepal within the framework of the national hierarchy of castes.

The preamble of Muluki Ain of 1854 mentions that the code entered into force to introduce the uniformity of the legal administration in the country. The 1854 Code has been changed and recreated from time to time and has been subjected to up to thirteen minor and major changes. It continued as a main source of law in the country until 1963, for about 110 years, until it was replaced by the country code (Muliki Ain) of 1963.

The code of 1854 remained the backbone of the Nepal's legal system until 1951. The Code fell into a state of limbo, when the dynasty of Prime Ministerial, Rana Dynasty, fell out of power after a popular revolt. Thereafter, after the return of the monarchical authority in its panchayati incarnation in 1960, the King Mahendra in 1963, replaced the code of 1854.

The Country Code of 1963 codified all the laws of Nepal – civil, criminal, religious, and customary laws. The code abolished all forms of discrimination and untouchability. The Code also recognized customary rules and practices of certain indigenous communities. It prohibits converting another person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years strict punishment. If the person is a foreign national, after serving six years he/she will be expelled from the country.[573]

[572] Ibid.
[573] *Id.* at 519

The Country Code of 1963 codified all the Laws of Nepal – civil, criminal, religious and customary laws. The code abolishes all forms of discrimination and untouchability. The Code also recognizes the customary rules and practices of some aboriginal communities. It is forbidden to convert person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years of stringent punishment. If the person is a foreigner, after serving six years, he will be expelled from the country.[574]

a. Religion in the Constitution of Nepal

The constitution is the supreme and fundamental law of the land. The constitution is legally binding on the state and all subjects within it. The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech assembly, and worship, but they did not mention anything about the right to freedom of religion or anything regarding personal laws.

The Constitution is the supreme and fundamental law of the land and is binding on the state. The first three constitutions of Nepal, namely, the Government Act 1948, Interim Government of Nepal Act 1951, and the Constitution of Kingdom of Nepal 1959, guarantee the fundamental rights that are protected by the due process of the law. The Constitutions contained provisions on the Directive Principles of State Policy and ensured the rule of law. The citizen of Nepal was provided the freedom of the person and worship, but did not mention anything about the right to freedom of religion or anything related to personal laws.
In 1962, the king rejected the parliamentary system and introduced the so-called partyless democracy known as the "Panchayat system." On December 16, 1962, a new constitution was promulgated which laid the foundations of Panchayat democracy in the country. It was said that it was a constitutional innovation and that the system was essentially Nepali in character and spirit. By introducing the system, King Mahendra stated that the Panchayat system has its roots in the soil of our country, and is able to grow and develop in the prevailing climate in

[574] Ibid.

the country. Some have claimed that the constitution was nationalist in the background and democratic. Fundamental rights and due process of law, with the exception of the right to form a political organization, were granted to the people.[575]

Nepal's 1962 constitution declared for the first time that Nepal is an independent, indivisible, sovereign, and monarchical Hindu kingdom. Religious freedom has been granted, although the conversion of religion has been banned. The Constitution of Nepal 1962 had mentioned that the word "His Majesty " means His Majesty the reigning King now, descendant of the great king Prithivi Narayan Shah and believer of Aryan culture and Hindu religion. The Constitution also gave fundamental rights to religion, according to which each person should have the freedom to profess and practise his or her own religion as it is transmitted since antiquity, taking due account of the traditional practices but that no one should have the right to convert another person into a different religion.

The Nepal Constitution 1962 was replaced when the Constitution of the Kingdom of Nepal was introduced in the year 1990. The 1990 Constitution of the Kingdom of Nepal introduced the multiparty parliamentary system in the country, but the basis of the Hindu Kingdom and the prohibition of the conversion of a religion remained intact.

After the success of the People's movement of 2006, the 1990 Constitution of the Kingdom of Nepal was repealed in the year 2007 and interim Constitution was introduced. The interim Constitution of Nepal stated, in Article 3 to "have a common aspiration united by bonds of allegiance to national independence, integrity, national interest and prosperity of Nepal". All Nepalese collectively constitute the nation with multi-ethnic, multilingual, multi religious and multicultural characters. "

Article 4 of the Interim Constitution establishes that the state of Nepal is "an independent, indivisible, sovereign, secular, inclusive and fully democratic state". Article 23 stipulates that the right to religion as a fundamental right means that every person has the right to profess, practice and safeguard his or her own religion as has been transmitted to him since ancient times, taking due account of the prevailing social and cultural practices. Provided that no person is allowed to convert another person from one religion to another, and that no act or action is made in such a way as to threaten the religion of others. Every religious denomination shall have the right to preserve its existence and to function and protect their religious site and religious trust according to the law.[576]

[575] Ibid.
[576] Ibid.

The 2015 Constitution states that the country is a secular state and defines secularism as "the protection of age-old religion and culture and religious and cultural freedom." The Constitution provides that every individual has the right to profess, practice and protect his or her religion. While exercising this right, the Constitution prohibits individuals from engaging in acts "contrary to public health, decency and morality" or "disturbing the situation of law and public order ". It also prohibits people from converting other people from one religion to another or disturbing the religion of others, and violations are punishable by law.

b. Demand for Secularism

From the year 1950s, the grave and most common demands of secularism emerged only in 1990 after the fall of the partyless Panchayat regime. Launched by Theravada Buddhist monks and lay people who no longer wanted to be considered members of a Hindu sect, and strongly supported by Janajati (indigenous) activities this campaign aimed to achieve the same recognition, rights and space for all religions practised in the country.

The activists recognized that a century old process had integrated Hinduism into the Nepalese national identity, seeking to homogenize an extremely heterogeneous population and leading to the domination of the "high caste" Hindus all the spheres i.e; political, legal, economical and educational. Secularism was therefore, a request for recognition of the country's multi-ethnic and multi religious structure. It was not a movement to banish the religion of public life but rather a call for non-Hindus to be treated at par with the Hindus. The central elements of this petition were the de-hinduization of the state (for example: substitution of Hindu symbols and rituals for the state), the thrust for a multicultural Nepal and the recognition of the distinctive identity of the ethnic groups.[577]

The Constitution of 1990 retained Nepal's identity as a Hindu kingdom, but secularism won after seventeen years with the efforts of the Maoist party. The Maoists had called for secularism since the beginning of their ten-year insurgency. It was listed in the petition of 40 point demand that they submitted to the government before the launch of the "People's War " in 1996. Its pro-secular position was popular among the Janajatis, which formed a large part of its support. Opinion polls have always shown that most Janajatis, unlike other important groups in the country, favor a secular state – although there is still a significant minority of Janajatis who prefer the Hindu State. Secularism was supported by NC and UML parties in

[577] Chiara Letizia, Secularism and statebuilding in Nepal, available at:https://www.c-r.org/downloads/SecularismAndStatebuildingInNepal.pdf (last visited on October 5, 2018).

2007 and 2008 since they saw it as a necessary step to dismantle the power of the monarchy, which existed in symbiotic relationship with Hinduism. Although many of their leaders had reservations, they still went along with the secular tide for fear of being considered monarchists.

Secularism has faced strong opposition specifically because it implies a new pluralistic notion of national identity in which different religions gather on the basis of equality. The anti-secular and Hindu nationalist associations and political parties focus on the sanatan Dharma (Hinduism as transcendental, the "eternal Religion") as a shared Nepalese (and South Asia) heritage. They argue that Hinduism is the most secular religion in the world, which includes many different sects and assures tolerance and harmony between the different religious communities of Nepal. Hindu Nationalists ignore the fact that the various ethnic and religious identities of Hinduism (especially Islam) have a long history in Nepal, and that seeing some people as more Hindu than others confers them special privileges.

Neglecting the vital role that the movements to assert of a non-Hindu identity have played in the recent history of Nepal, Hindu nationalists prefer to portray secularism as a foreign import. In doing so, they capitalize both the lack of an appropriate public debate on secularism before the declaration of a secular state, which astonished and stunned many and the widespread belief that foreign actors play an important role in politics of Nepal. Therefore, secularism is often seen by its opponents as the product of a Christian conspiracy to allow proselytizing. In this discourse, secularism is seen as conferring to religious minorities the right to convert and eat cows – while the protection of cows and the prohibition of conversion symbolize the purity and Hindu-ness of the past kingdom. Secularism, therefore, is perceived as a lack of respect, communal violence, and loss of unity and national identity. The idea that Nepal is the "last country of the Hindus ", or the only Hindu state in the world, retains its appeal to a younger generation seeking assertion of its Nepali identity.

c. What does secularism mean now and what has changed

The declaration of secularism did not bring about radical legal changes: "Anti-secular laws " like those of penalising cow slaughter and proselytizing were not abrogated. None of the gods left the political sphere. A large part of the symbolic and ritual apparatus of the monarchy was unaltered to the secular republic. The rituals that included the king's public

presence continue to be financed as state affairs, and the president of secular Nepal has appropriated the king's ritual role in important Hindu festivals.

Far from being a mere continuation of the status quo, however, this reconfiguration of the royal rituals in the rituals of the state is a means in which the young secular republic is legitimized, which is precisely why some seek to reverse this trend. While secularism has not undermined the dominance of the power of the traditional elite, the fact that Hinduism is no longer formally guaranteed a hegemonic place has opened the possibility that Nepali's of different religious backgrounds can represent the state in the future. Certainly, other challenges for Nepali secularism will emerge when minorities begin to represent themselves more in the courts, the legal profession, the political parties, and the government apparatus.[578]

So far, secularism in Nepal has not meant the strict separation of state and religion and seems to be inspired by the Indian model, according to which the State maintains all the religious traditions of its people alike. It does not make religion a private matter or a secular society. By contrast, through secularism, religious minorities seek recognition on equal terms with the majority, and religious and ethnic groups involved in identity making processes have tended to strengthen their traditions by ensuring that they invite the President or the Prime Minister to New Year's festivals. The multiplication of the religious festivals in the national calendar and in the public space is considered as well as a secular development and an important symbolic recognition of the religious and ethnic minorities.

Secularism has changed the nature of the relationship between Hinduism and minority religions – from a paradigm of remote control under a hegemony tolerant to a situation of competition and negotiation between equals. Secularism has been an essential step in the project of creating a new, inclusive and republican Nepal, but it has also led to a public debate about the relationship between religion and the state that has sometimes become fractious. Religion continues to be a crucial modality for building individual and collective identities, including at the national level, which explains the lasting sensibility around the idea of secularism. Except for a few isolated incidents, however, secularism did not give rise to religious conflicts. Despite the fact that the principle is highly divisive, it is still evolving,

[578] *Id.* at 110.

and actual secular practices and accommodation can be built and worked over time, without resorting to identity politics.[579]

7.4. Bhutan

The kingdom of Bhutan was a theocracy since the reign of the first Zhabdrung[580], Ngawang Namgyal, Tibetan Buddhist abbot, who ruled from 1616 till the time he died in 1651.[581] Bhutan, famously known as the Land of the Thunder Dragon has been perceived as a Be Yul (Hidden Land) preserving the Buddha dharma, which is why its traditions and culture are closely related to the Buddhist religion.[582] Majority of the population in Bhutan practices Mahayana Buddhism, with three-quarters of Bhutan's population hold on to the Drukpa Kagyupa or Nyingmapa schools.[583]

In the year 2008 the Himalayan kingdom adopted its first written Constitution and transformed itself from theocracy to a constitutional monarchy. The person responsible behind this political transformation of Bhutan was King Jigme Singye Wangchuk. This initiative was taken by the said King, as he was apprehensive that the kingdom could one day encounter the 'misfortune of inheriting a King of dubious character'. [584] Keeping into consideration the historical and cultural connection of Bhutan with the Buddhist religion, Buddhism has played a significant factor in shaping the Bhutanese constitutional order. Under the Constitution the role of the monarch and the role of the legislature in supporting Buddhist values have been clearly defined.

Even though Bhutan had taken a conscious decision of not declaring Buddhism as the official religion, however the Chairman of the constitutional drafting committee had continued to declare Buddhism as the 'spiritual heritage of Bhutan'. As mentioned above Buddhism had always been an integral part in Bhutan, however, in the Parliament when the debate on the

[579] Ibid.
[580]King, literally "the feet before which he submits".
[581] Tashi Wangyal, "Ensuring Social Sustainability: Can Bhutan's Education System Ensure Intergenerational Transmission of Values?" 4 *JBL* 106 (2001).
[582] Richard W Whitecross, "Separation of Religion and Law? Buddhism, Secularism and the Constitution of Bhutan", 55 *BLR* 707(2007).
[583] Darius Lee, "Here There Be Dragons! Buddhist Constitutionalism in the Hidden Land of Bhutan" *AJAL* Vol 15 No 1, Article 2: 1-19 (2014).
[584] Aim Sinpeng, "Democracy from Above: Regime Transition in the Kingdom of Bhutan" 17 *JBS* 21 (2007)

Article 3(3)[585] i.e. of not mixing religion and politics together was being discussed, it stirred a controversy. The Chairman of the drafting committee in response to disagreement on Article 3(3) had given two reasons; the first reason was change from theocratic order. The Chairman noted that 'Lord Buddha was the first to divide religion from politics by renouncing His Kingdom to pursue enlightenment', having perceived that otherwise 'it would be the sentient beings who would ultimately suffer.' The second reason was historical. The aim was to carry on in the written constitution the theocratic system that was established by Zhabdrung Ngawang Namgyal, who had administered a dual system, consisting of a religious branch and a civil branch. Je Kenpo (Lord Abbot), headed the religious branch of the system and he had the influence over the Buddhist monasteries in Bhutan and Druk Desi (Dragon Regent) headed the civil branch of administration. The process of political modernisation had merely reformed the civil branch of government into a democratically-elected legislative branch under a constitutional monarchy. Although Article 3(3) of the Constitution establishes a 'secular political system', however, it is evident that secularism in Bhutan does not have the same connotation as universally understood in academic literature. Nonetheless there is retention of strong Buddhist values in the constitution. The Preamble of the constitution honours the triple jewels of Buddhism, i.e., the Buddha, Dharma (the teachings of the Buddha), and Sangha (the monastic order). The responsibility of upholding dharma which previously was the duty of the king has been now been handed over to the state.[586]

a. Respect for Religious Freedom under the Constitution

Buddhism as the state's 'spiritual heritage' is recognised under the constitution of Bhutan and it lay down that it is "the responsibility of all religious institutions and personalities to promote the spiritual heritage of the country."[587] The constitution of Bhutan guarantees to every citizen the right to freedom of thought, conscience, and religion and it prohibits discrimination based on religion. The constitution enumerates that the king ought to be Buddhist and he shall be the protector of all religions.

The constitution of Bhutan spells out the duty on the Bhutanese citizens towards respect for each other, to promote tolerance and promote brotherhood amongst each other.[588]

[585] Article 3(3): It shall be the responsibility of religious institutions and personalities to promote the spiritual heritage of the country while also ensuring that religion remains separate from politics in Bhutan.
[586] *Supra* note 9 at 8.
[587] Article 3(1), Constitution of Bhutan.
[588]Article 8(3): to 'foster tolerance, mutual respect and spirit of brotherhood amongst all the people of Bhutan transcending religious, linguistic, regional or sectional diversities'.

The constitution states "no person shall be compelled to belong to another faith by means of coercion or inducement."

Coercion or inducement to convert as a misdemeanour is punishable by up to three years' imprisonment under the penal code. Oral or written communication "promoting enmity between religious groups" is prohibited and is punishable with sentence of up to three years' imprisonment for violations.

Under the penal code it provides that if any individual is found guilty of promoting civil unrest by advocating religious abhorrence, disturbing public tranquility, or committing an act prejudicial to the maintenance of harmony between religious groups shall be punished with imprisonment of five to nine years'. Under Article 9(20) of the Constitution, the state is obligated with the duty to 'create conditions that will enable the true and sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values.'[589]

b. **Religious Demography**

The total population of Bhutan is 750,000 (July 2016 estimate) and 75% of the population follows the Drukpa Kagyu or Nyingma schools of Buddhism. The Hindus comprise approximately 22 % of the total population and they reside mostly in southern region of the country.[590] The population of the Christian community range from 2,000 (from the Pew Research Center) to 15,000 (from the Bertelsmann Foundation's Transformation Index 2016 country report). The estimates by local and international Christian groups range from 3,000 to 15,000. The Christians are reportedly residing in the towns in the south region of the country. Irrespective of the fact that besides the majority Buddhist population, people belonging to Hindu and Christian community also reside in Bhutan, however, the Bhutanese constitution is silent on the minority rights.

[589] International Religious Freedom Report for 2017 United States Department of State • Bureau of Democracy, Human Rights, and Labor file:///G:/2017%20report/bhutan%202017.pdf (Visited on 6 October, 2018).

[590] According to the Pew Research Center, available at: https://www.state.gov/documents/organization/269172.pdf (last visited on October 8, 2018).

c. Personal Laws in Bhutan

In present day Bhutan there is no issue concerning personal law. Since almost all controversies around personal laws, start and end with the rights of the women and gender equality and since women in Bhutan are equal to men in all respects; personal law is not an issue.[591] The situation is rooted in two sociological phenomena; in the first place; Bhutan guarantees the same legal rights to men and women and secondly it has a fluid marriage system. This means in this marital system, partners can live together as married couples without any formality. Men and women are free to choose their partners and leave them freely.As such divorce in the context of formal marriages is also quite simple. Because women retain their property rights, they are economically independent.[592]

Most marriages in Bhutan are still performed in the traditional way and most disputes, if any are to be settled traditionally through some king of panchayat system. But in case any such dispute has to be adjudicated, then the marriage needs to be registered. If a marriage is not already registered, it can be done by paying a fine or fee.[593] The judicial system is structured as a three layered system. The lowest level is the sub district court (Drungkhag), above which is the district court (Dongkhag) and at the top is the high court (Thrimkhang Gongma). The judicial rules are still uncodified and largely, the tradition based Ngalong norms apply across the board irrespective of whether one is Ngalong (elite Buddhists of Tibetan origin), Sarchop (the majority population, living mostly in the eastern and central parts, who, though Buddhist, have little say in the government) or Lhotshampa (ethnic Nepalese of southern Bhutan). The disputes arising within the Nepali, who are mostly Hindus, are settled at the local levels by the community elders or the village headmen, who are officially appointed. Since hardly anything exists in written form including judgements, case law has little significance. Increasingly, however, disputes are being settled in formal courts. The reason is that court procedures are being streamlines and made cost-effective. [594] One of the rare codified situations is in respect of the maintenance to be paid for children in case of divorce, as per Marriage Act, 1980. All such children must be with the mother till they are nine, after which they can choose either of their parents to stay with. Earlier the father was supposed to pay

[591] Partha S. Ghosh, *The Politics of Personal Law in South Asia, Identity, Nationalism & Uniform Civil Code* 210 (Routledge, 2007).
[592] Reiki Crins, *Religion and Gender Values in a Changing World,* in Karma Ura and Sonam Kinga (eds.), The Spider and the Piglet 581-95 (Centre for Bhutan Studies, Thimpu, 2004).
[593] *Supra*.
[594] Lungten Dubgyur, *Review of Judicial Reforms in Bhutan'*, in Karma Ura and Sonam Kinga (eds.), The Spider and the Piglet 379-87 (Centre for Bhutan Studies, Thimpu, 2004).

20% of his salary or income to the mother for each child, with a ceiling of 40%. But there has been a change in the law. Now if divorce is on account of the adultery of the wife, then the rate is 10%, the ceiling, however, remaining at 40%. From the discussion it seems to be clear that personal law is not an issue in Bhutan.[595]

7.5. Srilanka

Sri Lanka, formerly known as Ceylon, is a small island country in South Asia. It is also known as a 'legal museum' since various kinds of law has influenced the development of Sri Lankan law. The SriLankan justice system includes a variety of different systems and traditions, and the interplay between legal systems can be clearly understood when it is explained in a historical perspective. The existence of many laws in Sri Lanka is the result of the historical development that was followed by the attack of the various European powers. The 1600s heralded the beginning of the Western era with the arrival of the Portuguese in 1505.[596]

Portugal was the first European power in Ceylon. They only won part of the island. At that time, the two main components of the population were Sinhalese who spoke Sinhalese and Tamils who spoke Tamil. The southern and western parts of Srilanka were occupied by Buddhist Sinhalese; while the Tamils, who were Hindus, occupied the northern regions. The others were a community of Muslim merchants who had settled on the west coast.

Although the Portuguese occupied Ceylon in the years 1505-1656, they did not introduce their own laws in Ceylon for reasons that the Portuguese legal system had not developed sufficiently. Before the Portuguese arrived there was a single system that was governing the Sinhalese region. However, at the time of the Portuguese regime, a clear distinction was made between the laws and customs of Kandyan (including the center and the north of the island) and the low country (coastal areas outside Kandyan). Portugal having not occupied the province of Kandyan, they had no influence on the laws in this region. The laws and customs of the maritime province, however, have had the effect of Portuguese customs and the laws and customs of the Sinhalese have changed in due course.

After Portugal, the Dutch ruled over some parts of Ceylon from 1656 to 1796. A Roman-Dutch law was introduced in Ceylon as they applied the law of their own country to their

[595] *Supra* at 212.

[596] Fathima Azmiah Bary, "The Legal System of Sri Lanka" available at: http://klibredb.lib.kanagawa-u.ac.jp/dspace/bitstream/10487/4132/1/kana-14-26-0009.pdf (last visited on October 10, 2018).

colonies scattered in the East and West Indies. The initial policy of Dutch was to apply its laws to Europeans and local population. However, it was obvious that the non-recognition and annihilation of local customs led to the hostility amongst the local population.[597]

Thus, the Dutch had applied its laws in criminal matters and allowed the local customs to be applied in civil matters. The law of the Dutch was applied when the customary laws were silent or the Dutch considered them inappropriate. Since the Dutch never occupied the Kandyan provinces, they had no effect on the Sinhalese laws of that province. Jayawardena, in his book, 'The Roman-Dutch Law in Ceylon', states that Dutch law was not the primary law applicable to Sinhalese in the maritime provinces in the Dutch time. He also notes that, it is clear that the Dutch were mercenaries and considered colonies as sources of income. The Dutch were not interested in implementing their laws in such colonies. However, at the end of the eighteenth century, colonial legislators codified the rules of inheritance, marriage and divorce law in order to facilitate the application of the family law of Muslims. These special laws were maintained and approved after the British conquered the Dutch in 1796.

In 1796, the British conquered the island. The kingdom of Kandy in the central mountainous region of Ceylon, had throughout the Portuguese and Dutch governments, maintained its territorial integrity. However, in 1815, the King of Kandy was overthrown and the whole island passed under British sovereignty. Britain acquired Sri Lanka and the existing law, which existed prior to cessation, continued to exist until it was changed. The laws of each colony remained in force until they were changed by the new sovereign.[598]

This principle was also given legislative guarantee that the laws which were in force in the former government of the United Provinces i.e., during the Dutch should continue subject to such changes in the prescribed manner by the legal authority. As a result the Roman-Dutch laws and the customary laws of the Sinhalese, the Tamils and the Muslims continued to be in force. The laws of the Muslim law were applied as a strict personal law. A personal law is a law that applies to a certain part of the population taking into account certain common factors. Thesavelamai, a personal law was administered only on the Tamils residing in the Jaffna district. Kandyan's law was applicable to the Sinhalese people in the Kandyan Kingdom. Buddhist law and Hinduism influenced the development of the laws of the Sinhalese and the Tamils but were not given effect by the courts as separate and distinct systems. Religious laws were given effect if observed as custom or if the religious dispute affected the civil rights. Under the British, a Roman-Dutch law was applied under the British

[597] *Id.* at 116.
[598] *Id.* at 167.

administration for residents of Europe, the Sinhalese outside the Kandyan provinces and for those subject to the personal laws where these laws were silent.

a. The Personal laws

The applicability of the personal laws does not depend on the place of residence of the person but it applies to the population of a given region, taking into account certain common factors. Srilanka's personal law is divided into three; that is to say, the general law of marriage established by the Roman-Dutch law applicable to the lowland Sinhalese residing around the centre of Colombo, the Kandyan law applicable to the highland Sinhalese residing around Kandy, Thesavelamai and the Tamils of Jaffna, and Muslim law applicable to Muslims. These legal systems are not universally applicable, but apply to special communities within Srilanka.

b. Kandyan Law

Kandyan's law is another name for the laws and customs in force under the Sinhalese kings, whose sovereign powers were limited to the central hilly areas of Sri Lanka from 1505 to 1815. [599]Between 1815 and 1853, the British considered the Kandyan law as a territorial law rather than a personal law and were applicable to the inhabitants of that territory, including Hindus and Europeans who were domiciled there.[600]Before 1859, the Kandyans had no written laws and marriages were solemnized on the basis of the customary rituals and by recognition by the general public. Polygamy and polyandry were also prevailing in Kandyan law. It has been legally recognized that the Kandyan law is a personal law of Kandyan Sinhalese.[601]

[599] Marsoof,.,n.d. *Insights into Sri Lankan Family Law*. [Online] Available at: https://www.academia.edu/9940386/Insights_into_Sri_Lankan_Family_Law (last visited on 10 October 2018).
[600]Bari, F. A., 2013. The Legal System of Sri Lanka. *Departmental Bulletin paper*, 19 11, 165-180.
[601] Ibid.

c. Muslim Law

The Muslims of Ceylon were descendants of Ceylon Moors, Indian Moors and Malays. Their communities are scattered across the country. In the south-western province and in the central highlands, they live with the Sinhalese; in the eastern and northern provinces, they live with the Tamils. Unlike other customary laws in Ceylon, Muslim law is a religious law and is applicable to anyone of any race who is a believer of Islam whether by birth, or conversion. Although Muslim law was originally codified as a collection of customary law, and as a part of a colonial policy recognizing different laws governing different segment of the population, however, Muslim law has a broader application in the modern law. When the Muhammad code of 1806 was repealed the law to which a Muslim belongs to in terms of marriage and divorce, inheritance, and certain types of gifts was introduced by way of an enactment. Srilanka Muslims belong to the Sunni sect and the majority is followers of Shafi'i school of law. Statutory provisions thus make it possible to apply Muslim law as a personal law governing the Muslims.

The factor which administers Muslim law is not whether a person belongs to a particular race or community, but whether or not the person professes Islamic religion. People born to Muslim parents are supposed to be Muslim. A person can also become a Muslim by conversion. In a case where the conversion was not genuine - for example, a man who gets married for the second time by converting himself to Muslim, when the first wife is alive, the burden falls on the person who allegedly professes Islam to refute the evidence of an dishonest conversion.[602]

However, in the case of *Katchi Mohamed* vs. *Benedlct*, the accused was a Muslim man married to a Muslim woman according to Muslim ceremony. Later, the husband became a Catholic and married a Catholic woman without getting divorced from his first wife. It was held that he was guilty of bigamy because the second marriage came within the definition of

[602] In *Reid v. Attorney General*, is a case in which a man had contracted a marriage according to Muslim rites. He had, as a Roman Catholic, contracted an earlier marriage and his first wife was still alive. He was charged with the offence of bigamy. He pleaded that he was a convert to Islam and that hence his second marriage was a valid one. The accused and his second wife had become converts to Islam on 13th June 1959, and they registered their marriage on 16, July, 1959. Chief Justice Basnayake said that although the proximity of the date of the second marriage to the date of conversion gave room for the suspicion that the change of faith was with a view to overcome the provisions of the marriage ordinance, such circumstances do not affect the validity of the second marriage. Basnayake C.J. referred to the evidence of the Muslim priest had testified to the conversion. The inference that may be drawn is that if there is such conversion, the court will not go into the circumstances that led to such conversion.

marriage as laid down under Section 84 of the Marriage (General) Registration Ordinance, and was therefore an invalid marriage.

d. Thesavelamai Law

The word Thesavelamai means 'customs of the land'. The origin of these customs can be traced to those of the Dravidians from the Malabar coast of South India. When they ruled Jaffna, the Portuguese allowed the customs to continue. But their successors, the Dutch, felt it necessary to codify them, because there were no clear principles for the proper administration of justice. Much of the codification of Thesavelamai in the twentieth century has been through case laws. Thesavelamai applies to all persons who come within the description of Tamil inhabitants of Jaffna. But certain sections of the law apply to lands in the Northern Province, irrespective of the race or nationality of the owner. In essence, it applies to transactions relating to land owned by Jaffna Tamils. It does not apply to Tamils from other areas. Under the law, land has to be offered either to the co-owners or the persons having their hereditary rights before it is sold to others. Is Thesavelamai a personal law or a territorial law? According to Cooray:

"The Thesavelamai is not a personal law in the real sense of the term. The application of a personal law depends on the existence of a personal link among a class of persons who are subject to a single system of law. But unlike Muslim law which applies to all who answer to the description of Muslims, Part I of the Thesavelamai applies to a class of persons namely Tamils, who are bound together by a personal link, but who must in addition be resident in a particular territory. It is thus a personal law in some respects, with a territorial limitation. Persons subject to the Thesavelamai could change the law by which they are governed by changing their inhabitancy. All persons subject to Kandyan law however cannot rid themselves of its incidence except by marriage."[603]

e.Calls for amendments to Personal Laws over two centuries

The customary practices of every community have changed over the last two centuries in Sri Lanka. The common law and the customary laws have changed steadily, both with and without resistance to change. In the case of common law promulgated in 1815, for example,

[603] Partha S. Ghosh, *The Politics of Personal Law in South Asia; Identity, Nationalism and the Uniform Civil Code* 206 (Routledge, 2007).

Regulation No. 7 1815 was amended at least thirteen times in the 18th century, and sixteen times in the 19th century until the enactment of Marriage Registration (Amendment) Act No. 12 1997. Between the year 2000 to 2016, there was at least one amendment, with the Marriage Registration (Amendment) Act No. 11 of 2001.[604]

Despite this history of revision, there is still the demand for change. In 2007 the Law Commission proposed enactment of Matrimonial Causes Act relating to family matters applicable to all marriages except those contracted under Kandyan and Muslim law. Calls for reform of Kandyan law were not new in the legal domain. It has been stated that the law of Kandyan Sinhalese community and Tamil communities in Sri Lanka need to be modified in parallel with the process of law reform.[605] Further so called customary laws contain many provisions which are in fact derived from English colonial law and the colonial Roman-Dutch law and these are in clear conflict with constitutional and human right standards.

With regard to the 'Thesavelamai' law, it has been stated that 'every positive system of law that came in contact with the 'Thesvealamai' left its imprint on it.[606] The Hindu Law, the Mohammedan law, the Roman-Dutch Law and even the English Law have in turn made their contributions in development of the Thesavelamai'. Thesavelamai was codified by the Dutch in 1706. Subsequently the British enacted the Thesavelami Regulation No. 18 of 1806. Other relevant laws are Ordinance No. 5 of 1869, the Matrimonial Rights and Inheritance Ordinance of 1911, amended by Ordinance No. 58 of 1947, the Thesavelamai Ordinance and Thesavelamai Pre-Emption Ordinance, and the Jaffna Matrimonial Rights and Inheritance Ordinance No.1 of 1911.[607]

Unlike 'Kandyan' and 'Thesavelamai' laws, changes to the Muslim personal law have been relatively fewer during the last two centuries. The Mohammadan Code of 1806 was amended in 1929, nearly after 120 years after its enactment. It was then repealed around 20 years later, by the Muslim Marriage and Divorce Act of 1951.[608] Subsequently, several efforts were made to reform the act, in 1959, 1973 and 1992. In 1992, the recommendation of the ministerial committee on Muslim Personal Law, initiated by a memorandum submitted to it

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[604] Sri Lankan personal laws between justice and freedom – A value based perspective, available at: https://groundviews.org/2016/12/01/sri-lankan-personal-laws-between-justice-and-freedom-a-value-based-perspective/(Visited on October 12, 2018).

[605] Savitri Goonesekar, *Violence, Law and Women's Rights in South Asia* (Sage Publication, New Delhi, 2004).

[606] H.W.Thambiah, *The Laws and Customs of the Tamils of Jaffna* (Women's Education Centre, 2004).

[607] A.V.Tambimuttu, Srilanka: Legal Research and Legal System (2009) available at: http://www.nyulawglobal.org/Globalex/Sri_Lanka.html (Visited on October 12, 2018).

[608] M.A. Numan, *Understanding Srilankan Muslim Identity* (International Centre for Ethnic Studies, Colombo, 2002).

by Muslim Women's Research and Action Forum (MWRAF), were met with outrage by conservative groups. Reform efforts were ultimately shelved.

f. Need for Reform

The personal laws that prevail in SriLanka are discriminatory towards women. In fact, certain provisions of the Theswalami and Kandyan laws have provisions that are incompatible with women's rights. For example, according to the Theswalasai law, followed by the Tamils in the northern province of Sri Lanka, a woman must obtain her husband's consent to dispose any immovable property. In addition, Articles 11 and 12[609] stipulates that women may not possess property in the event where the property was not gifted by her husband.

The existing law dealing with Marriage and Divorce is discriminatory towards the rights of Muslim women.[610]The law itself permitted child marriage under an authorization of Quazzi. Also the Muslim men, according to their wishes can divorce their wife while the Muslim women must prove the fault of their husband. In addition, the law gives the greatest freedom to Muslim men to marry up to four times, while the same freedom is not available to Muslim women.[611]

In the Srilankan Constitution, the equality before law is substantiated from the Article 12 (1).[612]However, the article does not provide protection to the Muslim women who have been victims of such unfair legal restrictions.[613]This absurd article created a legal uncertainty as to its applicability because in the interpretation of this article the whole law which was enacted before 1978 will be treated as valid even if they are infringing the fundamental rights granted to all citizens.[614]The discriminatory status of women under the SriLanka personal rights system has received the attention of the international organisation.[615]

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[609] Kandyan Law Ordinance No. 38 of 1939.

[610]As an example in Sri Lanka age 18 is the legally approved age for marriage, but this is not applicable under Muslim Marriage and Divorce Act in Sri Lanka.

[611]Gender Discrimination by Unjust Law of Personal Laws in Sri Lanka, available at: https://www.slguardian.org/gender-discrimination-by-unjust-law-of-personal-laws-in-sri-lanka/ (last visited on October 14, 2018).

[612] Article 12 (1): Right to equality; All persons are equal before the law and are entitled to the equal protection of the law.

[613] This is because of the reason that Article 16(1) of the Constitution of Sri Lanka stipulates that all laws i.e. written and unwritten which existed before the 1978 Constitution is valid and binding.

[614] The Muslim women activists in the country consider that this article should be annulled by the Constitution as it impedes the rights conferred by Article 12(1), of the Constitution. But by looking at the facts on ground it is certain that none of parties representing the communal demands of the Muslim community in Sri Lanka

The issue dealing with eradication of provisions which undermines the dignity of women under the personal laws have become a major challenge for the authorities.[616]In December 2017, there was uproar among the Indian Muslims when the Lok Sabha in India passed a Bill which sought to prosecute Muslim men who divorced their wives by way of "triple talaq", or an instant divorce. The same response can be expected in Sri Lanka if the government decides on changing personal laws. The Sri Lankan government should either make a law on the unification of family law, in accord with the Convention guaranteeing equal rights for both women and men.

g. Why resistance to reform personal laws

Today, the customary laws of various communities in Sri Lanka are considered to be part of their identity and increasingly patterned in the context of their constitutional right to freedom to practice religion. Requests for reform are seen as attempts by other communities, including the West, to suppress their identities. Contrary to this notion, all those personal laws were drafted by the same west during their colonial rule to limit the flexibility embodied in the customary laws. During the colonial period, the fear of losing religious beliefs and customs was common to the three communities, and led them to adopt a defence and isolation strategy to protect their culture and customs.

With all these factors put together, each community encompasses the negative perceptions of others, and any call to reform is seen as a conspiracy to annihilate their identity. Resistance in the Sri Lankan Muslim community is no exception to this home-grown mentality. Whenever a certain Muslim section has proposed reforms, it is opposed by the other section which, in turn, prevents politicians from making proposals for reform because they fear losing their vote banks.

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attempt to raise these issues openly as they have to appease the Muslim population. Mainly the male hegemony over the Quazzi positions in spite of many of the educated Muslim women in Sri Lanka having exposed a tip of the iceberg and it has been reported that in many occasions Conservative Muslim groups have created a hostile environment among their community which has deviated the voice of Muslim women activists. However, in observing the facts, there is no doubt that none of the parties representing the claims of the Muslim community in Sri Lanka are trying to raise these issues openly because they want to pacify the Muslim population.

[615]The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee requested the Government to abolish all existing discriminatory provisions in all personal laws. In addition, CEDAW underlined that gender identity and sexual orientation should be taken into account in the proposed Constitution making process.

[616]This is because Muslims and Tamils in Srilanka can become frantic about such a movement as an act of attacking their rights.

Furthermore, reform initiatives by a segment of Muslim society over a decade also failed to succeed in their effort due to public outcry within the same customary group. Also many Muslims view that these projects also part of the western agenda aimed at systematic abolishment of the customary and religious practices and identities of the Muslims.

Although Sri Lanka has been influenced by foreign laws, SriLanka's law retains strong traditional factors. There is a mixed interface of various laws in the Sri Lankan society. Thesavelamai, embodied in the social structure, and the Kandyan law, as practiced among the people seem to have contributed to the formation of the culture of Sri Lanka, whether in harmony or discord with each other. The Islamic law was then added to this blend of transplanted law. Although not well integrated into a single law system, indigenous law and previous transplanted laws together form the indigenous structure of the Ceylon law. These transplanted laws have retained their basic traits, as evidenced by their adoption in contemporary official law. The personal laws prevailing in SriLanka are discriminatory with respect to women's rights.

The Srilankan government was asked, "to amend all the personal laws in order to remove discriminatory provisions regulating ownership, inheritance, transfer and disposal of land and property, and provisions regulating legal capacity, marriage, divorce and custody of children."[617] However, the lack of progress in reforming the provisions of the Kandyan law and the Thesavelamai law was reported.[618]

[617]United Nations Convention on Elimination of Discrimination against Women, Committe had recommended to: (a) Formulate a uniform family code in conformity with the Convention in which equal rights of women and men in the family relations, including marriage, divorce, inheritance, property and land are addressed; (b) Amend the General Marriage Registration Ordinance to ensure that Muslim women have the free choice to opt out from the Muslim Personal Law, so as to be registered under the general law; (c) Ensure that property rights are governed by general civil contractual and property law rather than religious law; (d) Increase the minimum age of marriage for all women in the State party to 18 years of age; (e) Eliminate any restriction on women's eligibility to be appointed as Quazis, as Members of the Board of Quazis, Marriage Registrars and adjudicators; and, (f) Amend article 363 of the Penal Code to ensure that the crime of statutory rape applies to all girls under the age of 16, without exception in order to abide by the Convention the country is party to. *See,* Zahrah Imtiaz, CEDAW asks Sri Lanka to amend personal laws, Daily News dated Mar., 8, 2017 available at: http://www.dailynews.lk/2017/03/08/local/109743/cedaw-asks-sri-lanka-amend-personal-laws (last visited on October 16, 2018).

[618] Ibid.

7.6. Maldives

The Republic of Maldives, located about 900 km from the southwest coast of India and Sri Lanka, is made up of a group of 26 atolls in the Indian Ocean. The atolls cover an area of 1,192 islets, of which about 200 are inhabited by people. Although small, the country has been populated for over 2000 years. Because of its strategic location, the inhabitants of Maldives are of different ethnic origins. The language of the country is Dhivehi, which is of Indic origin. In 1153, the Maldives converted to Islam, prior to which it was a Buddhist country. Because of the distances from one island to another, the conversion did not take place simultaneously and many years passed before the whole country became Muslim.[619]

The origin of Muslim law in the Maldives dates back to the arrival of Ibn Battuta on the island in 1343. Ibn Batuta was the great Moorish traveler from Tangier, who had interpreted his journey to occupy, for several years, the position of Maliki Chief Qazi at the court of the Sultan of Delhi. As there was no qualified judge in the Maldives, he was asked to act as chief justice. He only spent a year and a half in the country when he fell out of favour with the Maldivian Prime Minister. Ibn Battuta was very impressed by the Maldivian people and their pious nature, but he found their obedience to the Islamic legal precepts deficient: "The first bad practice I changed was the practice of divorced women who remain in their ex-husband's house, I put it in order." As Qazi he tried to make the woman to wear a breast-cover, but failed to implement it.[620]

Over the centuries, the saints and sultans who visited the country tried to impose stricter Islamic norms, that included men growing beards, women to wear veils and to cover their bodies and prohibited the use of the silver belt, but they did not succeed. After the Portuguese rule in Male, from 1558 to 1573, there was a religious resurgence in the country, after which the Maliki system of jurisprudence was replaced by the stricter Shafi School. This school was founded in the early 19th century. It was introduced for the first time in the central Islamic lands and southern Yemen, from which it was transported to the Maldives by Sheikh Muhammad Jamal-ud-din. Their rules are different in a minor ways: one cannot touch a marrigeable person after ablutions before praying, women must wear the veil in the presence of men (not observed in the Maldives) and some of the hours for praying are different. However, in general, Maldivian society is quite modern in terms of gender equality; women are present in all professions, even if the country offers only limited opportunities.

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[619] Tahir Mohamed, Common Civil Code, *Personal Laws and Religious Minorities* 109-110 in Mohammed Imam (ed.), Minorities and the Law (N.M.Tripathi, Bombay 2002).
[620] Clarence Maloney, *People of Maldive Islands* 228 (Orient Longman, Madras, 1980).

a. The Constitution and Freedom of Religion or Belief

The Maldives, after transferring power to their first democratically elected government in 2008 under the presidency of Mohamed Nasheed, implemented a new constitution aimed at ensuring equal protection of human rights; however, it grants these freedoms only to the extent that they are compatible with Sunni Islam, in accordance with Sharia law.

In the non-discrimination clause of the Constitution, it should be noted that religion does not appear in the clause, but it is incumbent on all Maldivian citizens to preserve and protect the state religion of Islam.[621]

Therefore, there is no freedom of religion or religious expression in the Maldives, as the Constitution prohibits the practice of any religion other than Islam. Only Muslims obtain citizenship, whereas formerly-Muslim religious converts are punished by the revocation of citizenship. As a result, it is unlikely that the Maldives will strive for freedom of religion for non-Muslims, as Islam, as an official religion, holds both political and religious power. "In the Maldives, Islam is so closely linked to politics that it is the only country in the world where it is illegal for a citizen to be anything other than a Muslim."

The Constitution of the Maldives states that "a non-Muslim cannot become a Maldivian citizen". In addition, the Maldivian government has incorporated into its legal system an aspect of Sharia law that states that "citizens who have converted to another religion can have their citizenship revoked" or be sentenced to death.[622]

b. Protection of Religious Unity Act

The Protection of Religious Unity Act, 1994 states that "the government and the citizens of the country must protect the religious unity they have created". Despite the "grave concern" of the 2010 Working Group for religious freedom which applies the Religious Unity Act, the Government of Maldives has ratified and published the new draft of the Regulations in 2011. The legal provisions of the Religious Unity Act prohibit from propagating a religion other than Islam in Maldives or participating in any effort to convert a person into a religion other

[621] The Constitution of Maldives states that "everyone is entitled to the rights and freedoms set forth in this chapter without discrimination of any kind, including race, national origin, color, sex, age, physical or mental disabilities, political or other opinion, property, birth or other status, or native island.

[622] Religious Freedom in the Maldives: Present and Future Challenges, available at: https://hrwf.eu/religious-freedom-in-the-maldives-present-and-future-challenges/ (last visited on October 16, 2018).

than Islam. "It is also illegal to publicly portray or display non-Islamic religious books and writings, and it is unlawful to translate non-Islamic religious writings into Dhivehi, the Maldivian language. The articles that disseminate information about various disciplines, intellectual and comparative studies between Islam and other religions, description of sayings and expressions on Islam by people of other religions and dissemination of Muslim expressions on other religions, remain exempted under the said Act.

In addition, it is "illegal to publicly display any symbol or slogan belonging to or belonging to any religion other than Islam." This regulation, in addition to the regulation on the protection of religious unity, prohibits the media from publishing documents "humiliating Allah or his prophets, the Quran or Sunnah of the Prophet (Mohammed) or the Islamic religion" This authorized the Maldivian Ministry of Islamic Affairs to block eight websites in 2008 and 2009 for allegedly publishing anti-Islamic and pro-Christian content in the Dhivehi language.[623]

c. **Apostasy Law**

The growing influence of Islamists is a major concern for the country. In addition to the constitutional provisions that grant equal protection of human rights only to the extent that they are compatible with Islam, there has also been talk of integrating and fully implementing Islamic law in the country. Even under the current legislation, some aspects of Sharia law are incorporated into the legal system. For example, from the age of seven, apostasy is punishable by death.

In May 2010, during a public question-and-answer session with Islamic Speaker Dr. Zakir Naik, Mohamed Nazim stated that he was “Maldivian and not a Muslim”. Nazim was the first Maldivian to publicly announce he was not a Muslim. The Islamic Foundation, a local religious organisation, urged that Mohamed Nazim be stripped of his nationality and he shall be sentenced to death if he did not apologize and embraced Islam. Nazim’s statement questioned the constitutionality of annulment for renouncing the Muslim religion. The 2008 Maldivian Constitution states that anyone who was a Maldivian citizen at the commencement of the Constitution is a citizen of the Maldives. It also states that “no citizen of the Maldives may be deprived of citizenship”. Thus, Maldives’ adherence to Sharia law, which punishes

[623] Ibid.

apostasy with revocation of citizenship, is contradictory to the Maldivian Constitution. Nazim said, “When I did what I did, legally I was absolutely convinced that there was no way I could not be a Maldivian”.[624]

In the end, Nazim returned to Islam after being detained for five days in Dhoonidhoo prison, where he received advice from religious scholars. However, he said that "the extremism that was taking root in the Maldives was growing so fast”. I needed to talk about it." Nazim said that "someone had to do it, you had to talk about it. The repression of thought, the absence of debate and the lack of a public sphere in which such a discussion can take place are dangerous.

There is no freedom of religion or religious expression in the Maldives because the practice or propagation of a religion other than Sunni Islam is not only prohibited, but is also punishable by the revocation of citizenship or of death. With Islamic extremists gaining political power in the Maldives, freedom of religion will continue to deteriorate, even within the Muslim community. Currently, there have only been limited demonstrations of religiously motivated instability and violence. But as radical Islamist groups continue to increase their power, moderate Muslims and non-Muslim will begin to experience severely restricted religious freedom. Therefore, the Working Group should stress the importance of freedom of religion and freedom of expression, and particularly urge the Government of Maldives not to adhere to radical Islamic ideals.

8.1. Afghanistan

a. Islamic Law in the Afghan State

Afghanistan was founded by Ahmad Shah Durrani in 1747, who ruled till 1773. During his term of office, the administration drafted a legal code and the courts were in the hands of the ulemas (religious scholars), with the exception of the death penalty to be approved by the king or a governor. After Ahmad Shah's government, the main judicial base remained in the Pashtunwali tribal code (Pashtun code of conduct), although Sharia courts was existent in urban centres until the late 19th century. To date, the official legal system is not available mainly in the rural and tribal areas of Pashtun. The Pashtun social code, Pashtuwali and other customary laws fulfill the function of law in social decisions and judicial decisions. However,

[624] Ibid.

at the time of Amir Abdur Rahman (1880-1901), Islam was the driving force of his centralized government. He has made all the laws to act in accordance with Islamic law and has given Sharia importance over customary laws. Thus, Islam influences not only the legal system, but also plays an important role in the affairs of the state.

The King Amanullah (1919-1929), initiated the secularisation process and introduced numerous changes intended to develop Afghanistan. He abolished the traditional veil for women and opened a number of co-educational schools. Later it designed the basis for democratization and the proclamation of the 1964 Constitution under Zahir Shah (1933-1973). The Republican government of Muhammad Daud has established a one-party government, a "democracy based on social justice". With the intention of giving power to the majority - farmers, workers, and youth, he introduced the Afghan Constitution, 1977. After the Daub government, the Marxist government pursued land reform. Despite brutal political executions aimed at suppressing the resistance of agrarian reform, this did not succeed.[625]

There was strong politicization of Islam during the resistance of the mujahideen to defend the country against the Soviet invaders between 1979 and 1989. An Islamist movement was created in 1958 at the University of Kabul, particularly by the faculty of Islamic law, but their strength has only come when Soviet was defeated. After the Soviet defeat, the Islamic State of Aghanistan was formed and a religious leader assumed the political function of the state. Nevertheless, the religious leader and the mujahideen were not experts in assuming political responsibility and leading the state. At the same time, rivalries between the mujahideen groups and the civil war compounded the problem of the political stability of the weak state.[626]

The resistance of the Mujahids to the defense of the country against the Soviet invaders was strongly politicized between 1979 and 1989. After the defeat of the Soviet, the Islamic State of Aghanistan was created with a political function. However, the religious leader and the mujahideen were not experts in political accountability and ran the state. Meanwhile, rivalries between the mujahid groups and the civil war compounded the problem of political stability

During this period of political instability from 1992 to 1994, the Taliban appeared in the Afghan political scenario with the promise of greater security and the end of the civil conflict. The Taliban set up a theocratic regime under the leadership of Mullah Muhammad Omar, who proclaimed himself "Commander of the Faithful". The government officials and leaders

[625] Legal System in Afghanistan, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/18418/9/09_chapter%203.pdf (last visited on October 18, 2018).
[626] Ibid.

were mainly members of the ulema. The Taliban strictly enforced Islamic religious laws largely based on Wahhabism. However, the reign of Afghanistan with religious laws has ended with the fall of Taliban in 2001.

One of the main objectives of the Taliban that controls Afghanistan was to establish Islamic states and rule on the basis of Islamic laws. The Taliban, after settling in Afghanistan, adopted the name of "Islamic Emirate of Afghanistan" and applied rigid Islamic laws. The Taliban's decision on any issue is based on the will and advice of the ministers Amir Al-Mu, who are supposed to guide on the basis of the Sunnah. In the name of liberating Afghanistan from the influence of the unfaithful government and ideology, the Taliban have adopted Puritan politics. The Taliban interpreted the Qur'an to reflect their political interests and personal whims and used Islam to hide their brutal crimes. The Taliban's religious policies were not only opposed to the international community, but also to Islamic believers. Under the Taliban regime, the conservative interpretation of Islam was introduced. The most severe law used by the Taliban in the name of Sharia law is Hudud, the stoning of adulterer and amputation of the thief.

The implementation of Shari'a and Hudud laws, by the Taliban, is aimed at the security of life and property of the people.[627]The implementation of Shari'a and Hudud laws, by the Taliban, is aimed at the security of life and property of the people**.** Men and women were regulated in their behaviour and dressing. Men had to wear traditional clothes, avoid Western-style clothes and avoid shaving. Men were asked to strictly observe their religion and to pray five times a day, preferably in mosques. Women were the worst victim under the Taliban government. According to Taliban, "women face corrupt men", and the women were prohibited from accessing public space. The women were invited to observe the Hejab by using a burga to cover her whole body. The women were prohibited from working outside their home and access to education, public washrooms were barred and they were even asked to screen or paint the window to prevent men from seeing them inside.

The Constitution states that Islam is the official religion of the state and declares that no law can contravene the beliefs and provisions of the "sacred religion of Islam." In addition, it stipulates that the provisions of the Constitution should not be modified with regard to respect for the fundamental principles of Islam. According to the constitution, followers of other religions other than Islam are "free to practice their religion and perform their religious rites

[627]*Id.* at 63.

within the limits established by law." According to the constitution, "the state must design a cohesive curriculum on the basis of the provisions of the sacred religion of Islam" and develop courses on religion based on Islamic sects.

The penal and civil codes derive their authority from the Constitution. The constitution specifies that the courts will apply the constitutional provisions as well as the law in the settlement of cases. For cases in which neither the Constitution nor the Penal or Civil Code deals with a particular case, the Constitution states that the courts can apply Hanafi Sunni jurisprudence in the limits established by the Constitution to obtain justice. The constitution also allows the courts to apply Shia law in cases involving Shia supporters. Non-Muslims cannot testify on matters requiring Sharia jurisprudence. The constitution does not mention separate laws applicable to non-Muslims.

Conversion from Islam to another religion is apostasy according to the Hanafi school of jurisprudence applicable in the courts. If someone converts to another religion from Islam, he or she shall have three days to recant the conversion. If the person does not recant, then he or she shall be subject to the punishment for apostasy. Proselytizing, to try to convert individuals from Islam to another religion is also illegal according to the Hanafi school of jurisprudence applicable in the courts and subject to the same punishment. Blasphemy, which may include anti-Islamic writings or speech, is a capital crime according to the Hanafi school. The law prohibits the production, reproduction, printing, and publishing of works and materials contrary to the principles of Islam or offensive to other religions and denominations. It also prohibits publicizing and promoting religions other than Islam and bans articles on any topic the government deems might harm the physical, spiritual, and moral wellbeing of persons, especially children and adolescents.

Sum Up

South Asia as a region connotes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Srilanka. They all form the regional institutional grouping called SAARC (South Asian Association for Regional Cooperation). In South Asia, Muslim-majority Pakistan, Bangladesh, Afghanistan and the Maldives are Islamic states. Although Buddhist-majority Sri Lanka stops short of declaring Buddhism as the state religion, it does

place it foremost. Bhutan, in its 2008 constitution, declared Buddhism as the spiritual heritage and Constitution of Hindu-majority Nepal have defined Nepal as a secular state.
Pakistan and Bangladesh were part of India before 1947 and both are predominantly Muslim countries. In Pakistan non-Muslims are allowed to follow their respective personal laws. Bangladesh is a pluralistic society with four major religious communities -Muslims, Hindus, and Christians as well as a number of ethnic minority communities who follow these or other religious-cultural practices. The constitution of Bangladesh guarantees freedom of religion to all citizens of the country and allows each religious community the freedom to live according to the separate personal laws that have governed their communities since much before the partition of the Indian sub continent. The Hindus constitute the largest minority group in Bangladesh. The Buddhist community also follows the Hindu personal family. However, there are some anomalies existing in the religious laws.

In the year 2008, the Himalayan Kingdom adopted its first written Constitution and transformed itself from theocracy to a constitutional monarchy. The Buddhism as the states's spiritual heritage is recognised under the Constitution of Bhutan and it lay down that it is the responsibility of all religious institutions and personalities to promote the spiritual heritage of the country. The Constitution of Bhutan guarantees to every citizen the right to freedom of thought, conscience and religion and it prohibits discrimination based on religion. In Bhutan there is no issue concerning personal law. Since almost all controversies around personal laws start and end with the rights of the women and gender equality and since women in Bhutan are equal to men in all respects, personal law is not an issue.

The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech, assembly, and worship, but they did not mention anything about the right to freedom of religion or anything regarding personal laws. From the year 1950s, the grave and most common demands of secularism emerged only in 1990 after the fall of the partyless Panchayat regime. Secularism in Nepal has not meant the strict separation of state and religion and seems to be inspired by the Indian model, according to which the State maintains all the religious traditions of its people alike. It does not make religion a private matter or a secular society. Secularism has changed the nature of the relationship

between Hinduism and minority religions. Secularism has been an essential step in the project of creating a new, inclusive and republican Nepal, but it has also led to a public debate about the relationship between religion and the state that has sometimes become fractious.

In respect of Srilanka, the SriLankan justice system includes a variety of different systems and traditions, and the interplay between legal systems can be clearly understood when it is explained in a historical perspective. Srilanka's personal law is divided into three; that is to say, the general law of marriage established by the Roman-Dutch law applicable to the lowland Sinhalese residing around the centre of Colombo, the Kandyan law applicable to the highland Sinhalese residing around Kandy, Thesavelamai and the Tamils of Jaffna, and Muslim law are applicable to Muslims. These legal systems are not universally applicable, but apply to special communities within Srilanka. Today, the customary laws of various communities in Sri Lanka are considered to be part of their identity and increasingly patterned in the context of their constitutional right to freedom to practice religion. Requests for reform are seen as attempts by other communities, including the West, to suppress their identities.

Maldives is an Islamic country and after transferring power to their first democratically elected government in 2008 a new constitution aimed at ensuring equal protection of human rights was adopted. However, it grants these freedoms only to the extent that they are compatible with Sunni Islam, in accordance with Sharia law. In the non-discrimination clause of the Constitution, it should be noted that religion does not appear in the clause, but it is incumbent on all Maldivian citizens to preserve and protect the state religion of Islam

Therefore, there is no freedom of religion or religious expression in the Maldives, as the Constitution prohibits the practice of any religion other than Islam.

Lastly, with regard to Afghanistan, the Constitution states that Islam is the official religion of the state and declares that no law can contravene the beliefs and provisions of the "sacred religion of Islam." In addition, it stipulates that the provisions of the Constitution should not be modified with regard to respect for the fundamental principles of Islam. According to the constitution, followers of other religions other than Islam are "free to practice their religion and perform their religious rites within the limits established by law." According to the constitution, "the state must design a cohesive curriculum on the basis of the provisions of the sacred religion of Islam" and develop courses on religion based on Islamic sects.