NOTES & COMMENTS

PERSONAL LAWS IN BANGLA DESH—A COMPARATIVE PERSPECTIVE

I

SPEAKING TO a sports rally at Dacca in March 1972, Prime Minister Shaykh Mujibur Rahman said:

> In the past religion has been misused in order to enslave women; this will no more be permitted.[1]

Proclaiming that the women of Bangla Desh, who had played an appreciable role in the struggle for independence, could not remain interned in homes any longer, the Shaykh added that his government would secure equal rights for men and women as early as possible.[2] Pregnant with significant implications, these words cannot be brushed aside as a statesman's optimistic prediction about the future of an emerging nation. And, when translated into action, they will necessitate a reconsideration of almost all branches of the country's legal system, including personal laws.

The emergence of Independent Bangla Desh as a sovereign democratic republic has once again drastically changed the face of the Indian subcontinent. With the dismemberment of Pakistan, Islam has ceased to be the official religion of a vast land in the east. The third free nation appearing on the subcontinent has, like India, accepted secularism as one of the pillars of her socio-political structure. Separated from the theocratic Pakistan, the new nation has to build up its own policies at home and abroad. One of the important aspects of the social life of its citizens which Bangla Desh has to look after is the unsatisfactory state of personal laws prevalent in the country. Though it is too early to expect the new nation, still convalescing from the pre-separation sufferings, to give consideration to personal law reform, it is fascinating to watch and see what relief it provides to its citizens against the drawbacks in family laws. This brief paper is aimed at surveying —in comparison with the conditions in some other countries, more particularly, India and Pakistan—the existing position of the personal laws of various communities in Bangla Desh, highlighting those areas which are in need of an early reconsideration.

II

Attitudes in India

At the time of the partition of the Indian subcontinent into Bharat and Pakistan twenty five years ago, various religious communities of the

1. Urdu Daily *Da'wat*, Delhi, 29 March 1972, p. 3 (translation by the author).
2. *Ibid.*

land had their separate religion-oriented personal laws. This system was a legacy inherited from the British rulers, which in succession was handed down to them by the Muslim imperial regime.

After Independence, the nation at our side of the newly demarcated international boundary nipped into bud the wounds of partition and coolly proceeded with its programmes of socio-economic reform. As regards personal laws, Independent India opted, under the Constitution itself, for a common civil code to be applicable to all its citizens irrespective of religion;[3] though it decided to secure it gradually.[4] And within the transitional period, realizing as it did that the stage of transition might be prolonged, it introduced drastic amendments into all the major fields of Hindu personal law; at the same time extending its application to the followers of all quasi-Hindu religions, *e.g.*, the Buddhists, the Jains and the Sikhs.[5] Scared of the possible repercussions unequivocally indicated by the conservative opinion in the minority community,[6] Independent India did not, however, attempt reform of any branch of the Muslim personal law. Nevertheless, it made available to all its citizens, including the minorities, an optional secular law of marriage and inheritance, under the provisions of the Special Marriage Act 1954,[7] and the Indian Succession Act 1925.[8] Supplemented by the proposed secular law of adoption, now pending with the select committee of Parliament in the form of Adoption of Children Bill 1972, these laws would constitute a secular civil code. However, now while about a quarter of a century has elapsed since the enactment of article 44, direct action for an early implementation of the ideal of a common civil code is being more frequently, more forcefully and more sincerely debated.[9]

The scene in Pakistan

The nation that emerged in 1947 on the other side of the boundary chose Islam as its social and political ideal and decided to base all its reform programmes on true Islamic doctrines.[10] Though a Family Law Commi-

3. Constitution of India, art. 44.

4. See Dr. Ambedkar's speech in the Constituent Assembly, VII *Constituent Assembly Debates*, 759 (1950).

5. A critical appraisal of the amendments effected into Hindu personal law in 1955-56 will be found in Tahir Mahmood, *Changing Law in the Hindu Society* (1968).

6. See the speeches made by Hasrat Mohani and Mohammad Ismail in the Constituent Assembly, *supra* note 4 at 756, 759.

7. Men and women, whether professing the same or different religions, can contract a marriage, or register an existing marriage, under the Special Marriage Act.

8. Succession to the property of a person whose marriage is solemnized or registered under the Special Marriage Act is regulated by the general provisions of the Indian Succession Act 1925. See the Special Marriage Act 1954, s. 21.

9. See Tahir Mahmood, Islam and a Common Civil Code, *Hindustan Times*, New Delhi, 22 June, 1972, p. 5.

A long list of the recent articles on the subject of a uniform civil code, published by authors professing different religions, will be found in the bibliography appended to the Indian Law Institute publication : Tahir Mahmood (ed.), *Islamic Law in Modern India* (1972).

10. See Constitution of Pakistan, 1956, art. 198.

ssion was constituted as early as 1955 to suggest reforms in the laws of marriage, divorce and inheritance, with a view to assuring to women a social status "in accordance with the fundamentals of Islam",[11] reform of personal law paled into insignificance in the wake of instability and unrest resulting from unskilful handling of the problems faced by the newly created state. After a lapse of about fourteen years, there appeared on the scene of socio-legal reform in Pakistan, Field Marshal Ayub Khan's Muslim Family Laws Ordinance 1961, made applicable to the western as well as the erstwhile eastern wing of the country.[12]

The major achievement of the Ordinance was that it imposed restrictions on polygamous marriages and unilateral divorce and introduced the Doctrine of Representation into the law of inheritance in regard to the right of predeceased children's issues.[13] One year later, the government of Pakistan introduced further reforms under the [West] Pakistan Muslim Personal Law (Shari'at) Application Act, 1962.[14] These, however, remained confined to the four provinces in the west. Its provisions extended compulsory application of Islamic law to cases of adoption, wills and legacies as well—which were hitherto regulated by custom, unless its application was ousted by the person concerned himself.[15]

Like India, however, Pakistan too did not touch the personal law of the minority—there the Hindus—with the result that in that country Hindu personal law remains where it stood in British India on the 14th day of August, 1947. Twenty five years of Independence have brought no change for the Hindu minority in Pakistan in respect of their outmoded laws of marriage, adoption and succession.

III

Muslim personal law in Bangla Desh

Like the rest of the subcontinent, the newly created Republic of Bangla Desh has among its citizens diverse religious affiliations. Followers of Islam constitute there the numerically biggest religious community. In regard to family law and succession, they are governed by Islamic law, whose application is regulated by the Muslim Personal Law (Shari'at) Application Act 1937, enacted in undivided India ten years before Independence. The [West] Pakistan Muslim Personal Law (Shari'at) Application Act 1962,

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11. A detailed history of the appointment of this Commission and an analysis of its report will be found in Khurshid Ahmed, *Marriage Commission Report X-rayed* (1959).

12. For the text of the Ordinance and a study of its provisions, see Tahir Mahmood, *Family Law Reform in the Muslim World*, 247-262 (I.L.I. pub., 1972).

13. *Id.* at 249-253.

14. Act V of 1962.

15. The text and a brief study of the Act will be found in this author's work, see *supra* note 12 at 247, 255-256.

which replaced the pre-partition Act of 1937, was not extended to the erstwhile "East Pakistan."[16]

Under the provisions of the Act of 1937, which is also applicable in India, there is no uniformity as to which law will govern the Muslims in respect of various family matters. As regards marriage, divorce and succession, they are invariably governed by Islamic law[17]; but in matters of wills, legacies and adoption they are subject to local custom and usage—unless an individual Muslim opts out of the customary law and, by means of a statutory declaration, subjects himself, his minor children and their descendants, to the laws of Islam.[18]

Further, unlike Pakistan where life estates created in favour of women under (and regulated by) customary law have been specifically terminated and subjected to Islamic law,[19] such settlements are still lawful in Bangla Desh. Thus, the law relating to the scope and application of Muslim personal law is the same in Bangla Desh as in India. In both the countries, Muslims are governed in regard to different matters by two different legal systems, namely, Islamic law and customary law.

Happily, in regard to marriage, divorce and intestate succession—which are compulsorily regulated by Muslim law—the present law in Bangla Desh is different from and much better than the traditional laws adhered to by the Indian Muslims. In that country the Muslim Family Laws Ordinance issued by the government of (united) Pakistan in 1961 is applicable. Under its provisions, men's rights of polygamy and unilateral divorce—both exercisable in an arbitrary manner under the traditionally enforceable law—are restricted; and provision is made for a share in the property of a deceased Muslim in favour of the issues of predeceased children, not decreed by the classical law of Islam.[20]

Though the Ordinance of 1961 has put the Muslim personal law in Bangla Desh in a much more satisfactory state than that applicable in India, its provisions are neither adequate nor free from defects. Certain sections of the people in Bangla Desh[21] (as also in Pakistan[22]) are dissatisfied with the reforms introduced by the Family Laws Ordinance of 1961. Whereas its provisions relating to polygamy and divorce remain ineffective in most cases, that concerning orphaned grandchildren's succession rights

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16. *Id.* at 247.

17. See Muslim Personal Law (Shari'at) Application Act 1937, s. 2.

18. *Id.* at s. 3.

19. *Supra* note 17 at ss. 3-4.

20. *Supra* note 12.

21. During this author's visit to the U.K. in 1969, several persons from Dacca and Chittagong, pursuing higher studies in law at the London University, expressed to him their strong dissatisfaction with the provisions of the Muslim Family Laws Ordinance as applied by the courts in those cities in accordance with the rules framed by the former state government.

22. A critique of the Ordinance by Maulana Muhammad Taqi Usmani of Dar-ul-Ulum, Karachi, will be found in his book : *Hamâre 'Âilî Masâil* (1962).

represents "a gain achieved at the cost of a considerable number of anomalies."[23] Further, the Ordinance has a rather limited scope. It has left unchanged many unsatisfactory aspects of the traditional law, which have, during recent years, been reformed in several West Asian countries.[24]

The aforesaid drawbacks in the substantive law, coupled with the possibility of the Islamic law being ousted, in cases of adoption, wills and legacies, by local custom and usage still point out to the need for further reform.

The judicial trends in Pakistan in regard to the interpretation of Islamic legal principles have been very different from those in India. Braving the vituperations made by conservative sections of the society, the courts in Pakistan assumed the role of the *mujtahid* (interpreter of law under classical Islamic jurisprudence) and put a progressive interpretation on many traditional legal principles relating to marriage and divorce.[25] All judicial reforms so introduced into Muslim law by the Supreme Court of Pakistan[26] till the separation of Bangla Desh are expected to remain applicable to the Muslims in the latter country.

Hindu law in Bangla Desh

The Hindus in Bangla Desh constitute a strong minority, much more substantial than that in the united Pakistan. The state of their personal law undoubtedly needs a careful consideration. The Hindu Code Movement launched by the reformists in British India could bear fruit only as late as 1955-56, when the sizeable Hindu community in East Bengal was no more in a position to benefit by it. Consequently, the ancient Hindu law—with its unrestricted polygamy, unregulated customary divorce, religion-oriented adoption leading to insurmountable complications, and the classical scheme of inheritance as under the *Dayabhaga* law[27]—still prevails in Bangla Desh. The rights of Hindu women are confined to the insufficient relief provided by the Hindu Women's Right to Property Act, 1937[28] enacted in British India. The reforms introduced into Hindu personal law by the Indian

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23. See J.N.D. Anderson, Recent Reforms in the Islamic Law of Inheritance; 14 *I.C.L.Q.* 399-65 (1965) at 359.

24. See this author's work, *supra* note 12 at 273-291.

25. For an important instance of such judicial reforms, see Doreen Hinchcliffe, Divorce in Pakistan : Judicial Reforms, 2 *Jour. of Islamic & Comparative Law*, 13-25 (1968).

26. Brief references to some Pakistan judicial decisions of this nature will be found in Mulla's *Principles of Mahamedan Law* (17th ed. by M. Hidayatullah, 1972).

27. The *Dayabhaga* school of Hindu law prevails in a major portion of the territories now constituting the Republic of Bangla Desh. See this author's work *supra* note 5 at 27.

28. This Act maintained the distinction between the *Mitakshara* and *Dayabhaga* schools to a certain extent. As to its provisions regulating intestate succession to the property of a Hindu governed by *Dayabhaga* school, see s. 3 (1) of the Act.

legislature during 1955-56, though adopted substantially in some East African countries,[29] are still foreign to the Hindus in Bangla Desh.

Law of marriage-age

The only uniform law relating to family affairs applicable to all citizens of Bangla Desh irrespective of religion is the law restraining marriage of minors. This law, passed by the British Indian legislature in 1929, and retained in Pakistan with some minor amendments effected in 1961, is known as the Child Marriage Restraint Act, 1929. The amendments are applicable also in what is now Bangla Desh.

IV

Compared with the situation in the other secular part of the subcontinent, namely, India, the Muslims of Bangla Desh have a personal law which is much better in many respects. However, in regard to certain matters, the Muslim law in Bangla Desh still suffers from many drawbacks and presents a contrast to the codes of personal status and succession enforced, in the recent years, in Muslim countries like Tunisia, Morocco, Syria, Iraq, Egypt, *etc.*[30] On the contrary, the Hindus in Bangla Desh are miles away from the progress made in respect of family law and succession by those in India. The Christians and Parsis in Bangla Desh stand, as in India, where they were in August 1947.

It is not the purpose of this paper to make to the government of Bangla Desh any uninvited suggestions in regard to the reform of family law. Yet, it may be stated that various countries of the world have adopted different courses of action in the matter. While Muslim Turkey and predominantly Muslim (though communist) Albania, have replaced Islamic and all other personal laws by common civil codes,[31] some secular countries having dominant Muslim majorities, *e.g.*, Indonesia, Senegal, Mali, Nigeria and Chad, have retained the traditional Islamic law, as also the personal laws of the minorities, without any substantive reform.[32] Between these two extremes, some multi-religious countries, including Lebanon, Israel, Singapore and Ceylon, while sticking to the system of communal personal laws, have reformed all of them severally.[33] Also, a large number of Muslim countries—representing a major portion of West Asia and North Africa—have, during the current century, reformed and codified their laws of personal status and succession.[34]

It is for the people and the government of Bangla Desh to make a choice between a modernized secular law of personal status applicable with-

29. See J.D.M. Derrett, *An Introduction to Modern Hindu Law*, 535-558 (1963).

30. A thorough account of the reforms introduced in all these countries will be found in this author's work, *supra* note 12.

31. *Id.* at 5-6; 18-19.

32. *Id.* at 3-4; 264-66.

33. *Id.* at 6-9; 35-36; 200-206; 218-220.

34. *Supra* note 30.

out regard to the faith of individuals and the system of communal personal laws based on the respective religions of the various communities. As said above, it is perhaps too early now to expect them to be exercising the choice.[35] Pending that, however, reform of the various personal laws is inevitable and cannot be avoided for long. The possibility of codifying the Muslim personal law as far as possible, and reforming the Hindu family law on the pattern of the Indian Hindu Code of 1955-56, may be considered as temporary measures. If, and when, at a later stage, secularization of family law is opted for, much of the spade work will have already been done.

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35. According to the information given to this author by Dr. Kamal Hussain, Minister for Law, Government of Bangla Desh, during his visit to New Delhi in June 1972, the Constitution of the New Republic—then being drafted under his supervision—did not include any provision corresponding to article 44 of the Indian Constitution The Constitution has now come into effect.

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