BOOK REVIEWS

MUSLIM LAW AND THE CONSTITUTION (1985). By A.M. Bhattacharjee, Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 700 011. Pp. [32]+189. Price Rs. 68.

THE BOOK[1] is the revised version of the Ibrahim Saliman Salahjee Lectures, 1981, delivered by the author at the Calcutta University. The subject chosen by him shows a remarkable degree of foresight. It has assumed growing importance since then. It is amazing that constitutional lawyers and political thinkers should have avoided discussion of this subject so long. Perhaps they did not do so because this is thought to be a sensitive subject. But this sensitivity is a contrived one. Some members of the Muslim community have chosen Muslim personal law as a plank for their claim to a separate identity. The recent agitation against the Supreme Court decision in *Md. Ahmed Khan* v. *Shah Bano Begum*[2] shows that it is not the correctness of the judgment with which the agitation is concerned. Rather it is a resistance to the evolution of a common law for all the Indians and an attempt to ensure that the Muslims would always be governed by a separate personal law. The best way to calm down passions aroused by the agitation is to make a study of the fundamental questions involved. This is what the author has done in this book. He has taken Constitution as the test on which the claims of Muslim personal law to a separate identity have to be decided. Such separate identity can be preserved only in so far as it would be in consonance with the Constitution. With this object in mind the inquiry by the author has developed into seven lectures, which constitute the book.

The author takes the bold stand that "the Muslim Laws must have failed to the extent they were inconsistent with the provisions of the Constitution."[3] That is to say, the Muslim or the Hindu personal laws can be regarded as valid only insofar as they are consistent with the Constitution. Hindus had no illusions about it and the agitation for the Hindu Code resulted in the enactment of statutes in 1955 and 1956 which virtually codified the major part of Hindu law. Muslims were also originally touched with the reform movement. It is at their instance that the Dissolution of Muslim Marriages Act 1939 was passed. It gave Muslim wives the right of divorce on certain grounds and thereby amend-

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1. A M. Bhattacharjee, *Muslim Law and the Constitution* (1985).
2. A I.R. 1985 S C. 945.
3. *Supra* note 1, preface at 11-12.

ed the Muslim personal law. This amendment was made on the assumption that the Muslim personal law was valid in India except insofar as it was changed by statutory amendment. But later the reform movement was overpowered by a surge towards fundamentalism. Making a pretext of the Supreme Court decision a general agitation for the retention of Muslim personal law separate from the rest of the law of India has been launched. The government has of course assured the Muslim community that it would not change the Muslim personal law by legislation unless the community itself so desired.

But the fundamental question which the author has raised is whether the Muslim personal law has any valid claim to a separate existence. The same question was dealt with by the learned author in another lecture.[4] The author has denied the claims of both Hindu and Muslim personal laws to a separate existence as laws in their own right. He has pointed out[5] that after the commencement of the Constitution all the "laws in force in the territory of India *immediately before the commencement of the Constitution*" shall continue in force but subject to the provisions of the Constitution and until they were altered, repealed or amended by the legislature. By this test those portions of the personal law which were inconsistent with the Constitution would stand automatically repealed.

At one time it was thought by no less an authority than Justice P.B. Gajendragadkar that personal laws were laws because they came down from the ancient times as customary laws. They were not enacted by the state and would not be state action. Therefore, their validity could not be challenged on the ground that they discriminated among the people of India on the ground of religion alone.[6] But the learned author has successfully countered this view. He has shown[7] in considering the authority of the Muslim law that it has been made applicable in India to the Muslims not by any inherent authority of such laws but by the legislation enacted to give the force of state law. The British Government in India enforced the personal laws by enacting a series of regulations or statutes from the 19th century onwards. Even as late as in 1937, the Muslim Personal Law (Shariat) Application Act was passed to give effect to the Muslim personal law in India. Admittedly the position, therefore, was that the Muslim or Hindu personal laws needed to be recognised by the legislature and the courts before being enforced as laws in India. If they were thus enforced by the state and not by any other authority then their validity is subject to the fundamental rights in part III of the Constitution. The learned author is probably the first scholar to boldly challenge

4. Manmath Nath Bose Lecture 1981 also delivered at the Calcutta University and now published as *Hindu Law and the Constitution.*

5. *Supra* note 1 at 39-40, referring to provisions of articles 372(1) and 13(1).

6. *State of Bombay* v. *N A. Mali*, A.I.R. 1952 Bom. 83.

7. *Supra* note 1, ch. 1.

the validity of all personal laws in India insofar as they are opposed to the Constitution. Logically, the thesis of the author cannot be disputed. The authority of the law flows from the state. There cannot be a law which is not authorised, recognised or enforced by the state. The enforcement of law is, therefore, state action whether the law is personal or statute law. For, even the personal laws are enforced only by statutes. By this test, the author has shown that several parts of the Muslim law would fail to stand the test of being consonant with the Constitution.

The result is remarkable. Parts of Muslim personal law would be regarded as unconstitutional as being inconsistent with the Constitution even though the Shariat Act of 1937 and previous statutes and regulations have given a statutory force to the Muslim personal law. This thesis strikes at the root of much of the claim for a separate identity of the Muslim personal law. Indeed, even the assurance of the government that it would not change the Muslim personal law except when the community itself desires a change would not be able to preserve wholly the separate identity of the Muslim law. For the government itself is subject to the Constitution. This reviewer had suggested[8] that the Hindu and Muslim personal laws should act in their own spheres and the latter should not be used for an encroachment on the former. If a Hindu or a Christian husband were to change his religion to Islam, he should not be allowed to marry again because his monogamous marriage under the Hindu and Christian personal laws was still valid. Unless his second marriage as a Muslim is regarded as valid, he would be guilty of bigamy under section 494, Indian Penal Code 1860 since his conversion to Islam was not a genuine change of belief but only a ruse for defeating the monogamy imposed on him by the Hindu and Christian personal laws. The abuse of the Muslim personal law should not be allowed to defeat these provisions of the Hindu and Christian personal laws. It had been stated that on this view it would not be necessary to challenge the validity of that part of the Muslim personal law which would allow such a second marriage, to take place thereunder. But if necessary such part of the Muslim personal law could be challenged on the ground that it is opposed to article 15(1) of the Constitution which prohibited the state from legislative or executive action which discriminates among people of India on the ground of religion alone.

The author has pursued this line of reasoning in considering different aspects of Muslim personal law such as the Muslim law of marriage, succession, divorce, pre-emption and the Muslim law generally. It would appear that the framers of the Indian Constitution had understood the legal position correctly. They had known that the personal laws in India cannot exist on their own steam. They have to be enforced by the state if

8. V.S. Deshpande, "A Harmony of Laws", A.I.R. 1982 *Jour.* 1-9.

they are to be laws. It is with this object in view that entry 5 of list III of the seventh schedule of the Constitution was enacted. It gives the central as well as the state legislature power to enact laws regarding "all matters in respect of which parties in Judicial Proceedings were immediately before the commencement of the Co stitution subject to their personal law." It is thus obvious that the whole of the personal law can be changed by legislation.

Article 44 of the Constitution which requires the state to secure for the citizens a uniform civil code throughout the territory of India is based on this understanding of the legal position. Those who dispute the validity or the desirability of such a code are apparently not taking note of the legal and the constitutional aspect. In the face of the Constitution personal laws cannot claim to have a separate identity. They can be brought into line with the Constitution only by being merged in a uniform civil code. The reason is that article 15(1) prohibits application of different laws to different persons in India by separating them on the ground of religion alone.

Those who maintain that separate identity of the Muslim personal law is secured by the right to freedom of religion guaranteed by articles 25 and 26 of the Constitution apparently misapprehend the scope of these fundamental rights. Both these articles open with the words "subject to public order, morality and health and the other provisions of this part." The Constitution, therefore, does not recognise the freedom of religion at all if it were to conflict with public order, morality, health and any other provisions of part III. Similarly article 25(2)(*b*) excludes the application of those fundamental rights to legislative or executive action providing for social welfare and reform. Therefore, any measure of social welfare and reform can be undertaken by the state without any fear of transgressing a personal law.

It is a pity that people raise controversies complaining that courts have no power to interpret the Muslim personal law or the state has no power to change it without paying regard to the fundamental constitutional and legal position. It is the personal law which has to yield to the Constitution as well as the statute law and not *vice versa* The learned author has made a deep study of the Muslim personal law in its relationship with the Constitution and the statute laws. He has analysed all aspects of the provisions of the Muslim personal law, the Constitution and the statutes with detachment, scholarship and clarity. The book deserves to be studied by all concerned to enlighten lawyers, politicians and other social thinkers. The author has rendered public service by this study which will remain a permanent landmark in rational thinking and enlightenment on a subject which has been unnecessarily clouded by passions.

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