SOME PROBLEMS OF MUHAMMEDAN LAW IN INDIA

A.A. A. Fyzee

India is a multi-religious state, treating all religious with equality.[1] It is strictly not a "secular" state in the legal sense of the term, as religion is recognized for the purposes of determining the personal law applicable to parties. There is no separation of church and state as in the United States of America.[2] Both Hindu and Islamic religious institutions, if they can be brought within the purview of the law, are recognized India. A further difficulty often pointed out is that religion and law are intimately connected in the Hindu and Muhammedan laws.

Islamic law is a world-wide phenomenon; the particular form received in India is known as "Muhammedan Law", a term consecrated by usage, although it is not very apropriate. In all parts of the world difficulties have arisen because of the conflict of Islamic notions of law, and social justice as understood in the 20th century. With regard to the former, J. N. D. Anderson has recently said:

1) Considerable relief has been given almost everywhere to ill-used wives.

2) Restrictions have been imposed in most countries on the almost unfettered scope previously accorded to absolute repudiation (*Talak*).

3) Child marriage has been sought to be eliminated.

4) Polygamy has been restricted in most Islamic countries, and in Tunisia it has been totally forbidden.

5) Several interesting reforms have been introduced in the law of intestate succession, sometimes directly, sometimes indirectly.

6) The rigidity of the law previously applicable to bequests has been partially relaxed.

7) A number of abuses in the law of *wakf* have been remedied.[3]

Judged by the foregoing analysis, the law in India is very backward; and unless the community wakes up and desires reform by legislation, the

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1. The Constitution of India, articles 15, 16 and 25, in particular .

2. Agreeing with V. D. Luthera, *The Concept of the Secular State and India*, 4, 146 and elsewhere, (1963) contra D. E. Smith, *India as a Secular State*, (1963).

3. "Codification in the Muslim World: Some Reflections", *Rabels Zeitschrift* (Berlin-Tubingen), 30 (1966), 247.

position will remain unsatisfactory. The remarks I propose to make are directed towards pointing out some of the difficulties that arise having regard to the law in the Indian environment.

A difficulty also arises about customary law where it is in conflict with the *shariat,* despite the Shariat Act, 1937. A modern instance is the right of women in Kashmir. The Shariat Act does not apply to the State. There is a separate piece of legislation which makes the Muslim Personal Law applicable. The provision is contained in Sri Pratap Jammu and Kashmir Laws Consolidation Act, 1877 (Act No. 4 of 1877).

In the state of Kashmir there is a custom amongst the agricultural classes by which Muslim women are prevented from taking the Koranic share of inheritance. According to the customary law, the male descendants exclude all females from taking any share in the inheritance excepting the *khananashin* daughters. A daughter is said to be *khananashin* if she is kept at the paternal home and a husband is brought into the family by her father. In such cases she inherits exactly like a son. In the absence of male descendants and a *khananshin* daughter, the agnates succeed according to law. A widow gets a life estate in the property, where there are no lineal dscedants. A sister may inherit as the nearest agnate according to custom.

However, according to the latest decision of the Jammu and Kashmir High Court, in *Mst. Khatji* v. *Mst. Kukhti and others*[4] the custom of total exclusion of daughters has not been accepted. The customary law applicable in the Kashmir valley is thus complicated and will be found in *"The Code of Tribal Custom in Kashmir,* by Sant Ram Dogra, and is known as the *Riwaj-i-Am* of Kashmir. The book is rare and not easily available.[5]

Property in India is either public or private. Public property is regulated by statutory law; private property is dealt with by custom, personal law, or statutory law. This appears to be the historical sequence in which the various forms of procedural and substantive laws have arisen. In regard to private property, the most important relation is that of vendor and purchaser. Our own experience supports this. A Hindu or a Muslim purchaser nowadays no longer bothers about the ancient laws. The statutory law of India governs the case. We need not therefore consider the complicated provisions of the classical Islamic law relating to sales, purchases and hiring.[6]

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4. (1962) Kashmir Law Journal, 103.

5. I am greatly indebted to Mr. M. A. Karim, Assistant Advocate-General, Jammu and Kashmir State, for the above information which he gave me in a letter dated 4 April, 1964.

6. Hamilton's *Hedaya,* especially Book XVII.

The next relationship is one of the commmmonest and of the greatest human interest. What rights do parties to a marriage obtain from each other after the marriage is dissolved by death or divorce? It may safely be said that although at its inception the Muhammedan law was very advanced in this regard, today we lag behind some European countries and do not come up to the expectations of social justice in this country. The divorced wife gets her dower, but no alimony, and in modern conditions this is a decided hardship.

One of the most usual cases of hardship in Muslim society in India is the peculiarly unsafe position of the widow. A simple case may be taken. A husband dies leaving him surviving a widow W, and three daughters, A. B. C. Fourteen annas in the rupee (97 paise) will go to the daughters to be shared in equal proportions. But the widow is left with two annas (13 paise). This is not at all an equitable distribution, as she would be reduced to starvation or destitution, unless special provision has been made for her. Experience however shows that such provisions are not generally made.

In many cases the *mahr* (dower) is meagre or, it has been "gifted away" to the husband for love and affection; or, the *mahr* is so large that a court of law would have to adjudicate upon it at the suit of the other heirs. What can a middle class Muslim do in such cases? The answer is that he can register his existing marriage under the provisions of the Special Marriage Act, 1954.[7]

Such registration frees him from the irksome restrictions of the personal law applicable to him. He remains a Muslim in all other respects but he can make a will and dispose of his property under the provisions of the Indian Succession Act, 1925. He can leave a substantial part or the whole of his property to the wife. In case of intestacy, she still obtains as much as one half of the husband's property.

This statute is of the greatest value for Muslims as a developing community. Here is first of all a permissive law the benefit of which can be obtained by a person of any faith; and secondly by exercising such such right he is exactly in the same position asany the creation of a "Common Law for India." Thirdly and this fact must be doubly emphasized: he has not abjured his religion; he retains his status as a Muslim for all purposes other than the matter of testate and intestate succession.

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7. Fyzee, *Outlines, of Muhammedan Law*, 469, read with 356, etc. seq. (3rd. ed. 1964).

Recourse to the Special Marriage Act, 1954, is being had increasingly by educated Muslims all over India in urban areas, and it is hoped that even in the *mufassal* this knowledge will in time increase, thus ameliorating the position of widows. The act is a great boon to safeguard the future of the life-partner in unforeseen and emergent circumstances.

Muslim family life in India is following the pattern of social dispersal. Hardly any large families reside together in a commodious family mansion, *kothi, mohalla,* or *wadi* (*bari*), as in the days of my own youth. Sons marry girl's out of the *biradari;* educated girls marry young men of their choice who may live outside the state or even in foreign countries. The widow whether young or old, can hardly expect the financial support of a brother or uncle. She has to fall back on her own resources or earn her livelihood. In such circumstances a revision of the family law, particularly in the case of widows and divorcees seems to be called for.

I would suggest the following reforms for consideration:

A. *Boards of conciliation* should be set up in every district for giving advice and bringing about better relations between married persons. This is entirely in consonance with the spirit if not the letter of the Koranic precepts, and will help persons of moderate means. The Boards will assume the moral and social responsibilities of the cadis of olden times.[8] Each Board should consist of three members—a lawyer, a social worker, and necessarily a woman of experience. Only one out of the three need belong to the Muslim community.

B. *Alimony* should ordinarily be provided to the divorced woman, unless she is guilty of adultery or misconduct. Proper provision for the children should be made.

C. *Polygmy* should be restricted to cases where there is real need. Such cases should be formulated with great precision. The permission should be granted only by the High Court, and preferably, by a Division Bench consisting of two judges.

D. *The triple divorce* should be abolished by law. Divorce should be granted after notice, and only in certain stated cases. Where the husband gives the divorce, normally he should pay alimony until remarriage.

E. The *elimination of domicile* as a basis of jurisdiction in divorce and the substitution of habitual residence of either spouse.

F. The encouragement of *consensual arrangaments for divorce,* when there is family breakdown.

In the law of gifts, although the law is complicated, it is now firmly established that life-interests can be created. The law is still difficult, complicated and usually uncertain. It should be made simple, well defined and provide for the such cases in a scientific and rational manner. The leading case on the subject is *Anjuman Ara* v. *Nawab Asif Kader*[8] and a careful study of this case will show the complexity of the subject, dealing as it does with corpus, usufruct, life-tenancies, estates, powers of appointment, restrictive covenants, and related legal matters.

The law of wakfs and their management is so vast a subject that an adequate treatment would require a book by itself. Moreover it is one of the subjects where the modern literature in Arabic, relating to the Middle Eastern countries, is enormous. It is therefore proposed to make the briefest reference to the ordinary cases of unfairness or difficulty merely in order to draw attention and call for a discussion.

It often happens that a man is worried about his own immediate descendants or heirs, and creates an oral *wakf*.. This avoids certain complications and stamp duty is saved. Such *wakfs,* however, suffer from some positive defects. It is always a matter of difficulty to establish them by satisfactory evidence. Secondly, the opposite party in case of litigation has the chance to comment upon the settlement as being an ambiguous one. If the solvency of the party is in doubt, the wakf can be asserted to get away from the liability; if there is no one left to desire the benefit of the *wakf,* it can very easily be "forgotten", with substantial profits for him who has possession.

There is a great deal of legislation in regard to *wakfs* all over India, and yet the situation has hardly improved. There are continuous disputes about minor matters in *wakf* councils, and the public officers are often unable to stave off litigation. I am firmly of the opinion that family *wakfs* are of no benefit to the Muslims and the day will soon come when no one will come forward to make such settlements which breed inefficiency and corruption, and lead to ruinous litigation in the majority of cases. Those who are anxious to win "merit in the eyes of the Lord" may well employ a more suitable and more profitable form of charity, and not take back with one hand what they appear to put away with the other.[9]

India is a developing country, moving rapidly towards socialism and industrialization. In such a country there is great need for personal laws to be revised and codified from time to time, even if the codification is

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8. I.L.R. (1955) 2, Cal. 109. For a full discussion see Fyzee, *op. cit.,* 234 et seq.; and Lord Holhome *Cases in the Muhammedan Law of India and Pakistan,* Cases No. 28, 29 and 30, 337-378, (1965).

9. Slightly altering the words of Lord HoLhome, *Id.* at 395.

piecemeal, provided it is well conceived and drafted with skill. For this reason the writer has always advocated the separation of law and religion in Islam. Unless we take a definite step in this direction, no great change for the better can be expected. In India, alimony for divorcees, better protection of widows, restriction of the power of divorce enjoyed by the husband, curtailment of polygamy, clarification of the law pertaining to life and limited interests, discouragement of family *wakfs* by increasing fees and stamp duty, and removal of certain inequalities in the law of inheritance, are some of the more important reforms that are needed. Nevertheless it has to be admitted that reformers and students of law have little influence with the community at large. Reform therefore cannot be expected unless by education newer principles of social justice are actively adopted by the community, or law is entirely separated from religion.