

PERSONAL LAWS AND THE CONSTITUTION IN INDIA

Mohammad Ghouse

I. The problem

THE CONSTITUTION of India empowers the legislatures to legislate with respect to family relations governed by the personal laws of the various religious groups in India and also directs the state to replace these personal laws by a common civil code. With the enactment of the Hindu code to replace significant segments of the customary Hindu law, the demand for a common civil code on the one hand and for the reform of the Muslim personal law on the other, has gained momentum. Enactment of a common code is recommended for a wide variety of reasons, which include avertion of communal riots and acceleration of the process of national integration. Similarly, some of those who advocate reform of the Muslim family law, dub or denounce this law as inhuman, antiquated, arbitrary and so on. Advocacy of reform or replacement of the Muslim law by a common civil code has provoked intense opposition from a section of the Muslims. Not all the advocates of the reform or replacement of the Muslim family law, nor all their opponents, in India are scholars of Muslim law. They do not conduct the debate on sound and sober lines. Consequently, the real issues are lost in a whirlpool of non-issues.

This debate has, however, brought to light a contention, that merits a careful consideration, that the religious freedom guaranteed in article 25 and the cultural rights enshrined in article 29(1) immunize the Muslim personal law from amendment or abrogation by the state. We propose to consider this contention in this paper.

II. Travaux preparatoires

The Constituent Assembly considered whether the religious and cultural rights enshrined in the draft constitution might render the Muslim law inviolable. Some of the Muslim members of the Constituent Assembly sought to immunize the Muslim personal law from state regulation. Moha-

mmed Ismail¹ said that a secular state should not interfere with the personal law of a people, which was part of their faith, their culture and their way of life. He claimed that some European countries, including Yugoslavia, protected the Muslims in the matter of family law and personal status. Naziruddin Ahmad² pleaded that abrogation of a personal law should not be treated as regulation of secular affairs surrounding a religion or as a measure of social welfare and reform. He pointed out that even the British, who enacted uniform civil and criminal codes, never tried to scrap the personal laws. Pocker Saheb³ disclosed that he had received representations from various organizations, including Hindu organizations, which characterized the provision relating to common civil code as tyrannous. Hussain Imam⁴, wondering whether there could be uniformity of personal law in a diverse country like ours, said:

How is it possible to have uniformity when there are eleven or twelve legislative bodies (entitled to) legislate on a subject (like marriage, divorce, succession) according to the requirements of their own people and their own circumstances ?

Munshi, Alladi Krishna Swami Iyer and Ambedkar replied to the debate on behalf of the drafting committee of the Constitution. Alladi⁵ taunted the Muslims by saying that the Hindus alone were willing to adjust themselves to changing circumstances. But Munshi⁶ echoed the voice of Pocker Saheb, when he said, "I know that there are many Hindus who do not like a uniform civil code. . .". Munshi pleaded for divorcing "religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession". He asserted that as enactment of a uniform civil code would come within article 25(2), which empowers the state to regulate secular affairs surrounding religion and to enact measures of social welfare and reform, it would not violate religious freedom guaranteed in article 25. Alladi⁷ drew the attention of the Muslims to abrogation by the British of various branches of the Hindu and the Muslim laws and to the enactment of common codes on matters of personal status in European countries. Ambedkar⁸ emphasized that in a secular state religion should not be allowed to govern all human activities and that personal laws should be divorced from religion. He argued that not all the

1. VII *Constituent Assembly Debates*, 540-41 (1948).

2. *Id.* at 541-548.

3. *Id.* at 544-546.

4. *Id.* at 546.

5. *Ibid.*

6. *Id.* at 547.

7. *Id.* at 549-550.

8. *Id.* at 550-552.

Indian Muslims were governed by the Muslim law and that the state had enacted laws to codify or amend Muslim law.⁹

Munshi and Alladi claimed that the state could enact a common civil code even if there was no article 44 in the Constitution.¹⁰

Alladi¹¹ thought that replacement of the diverse personal laws by a uniform code was necessary to preserve national unity and to remove dangers threatening national consolidation. Ambedkar¹² and Alladi emphasized that it would be unwise for a legislature seeking to enact a common civil code to ignore "strong opposition from any section of the community". Ambedkar asked the Muslims not to read too much into article 44 and assured them that even if a common code was enacted it would be applied only to those who voluntarily consented to be bound by it.

Eventually, the Constituent Assembly rejected the following amendment proposed by Mohammed Ismail Saheb :

That after clause (2) of article 19 (now art. 25) the following new clause be added :

(3) Nothing in clause (2) of this article shall affect the right of any citizen to follow the personal law of the group or the community to which he belongs or professes to belong.¹³

The debates, thus, clarify that religious freedom does not immunize the personal laws from state-regulation.

III. Progressive codification of Hindu law and the Constitution

Some of the High Courts grappled with petitions challenging the validity of the laws abolishing polygamy among the Hindus. In Madras¹⁴ and Bombay¹⁵ High Courts it was argued that the challenged legislation abolishing polygamy unconstitutionally infringed the religious freedom of a Hindu and discriminated against him on grounds of religion. Hinduism, it was argued, permitted a sonless Hindu to take a second wife to beget a son for performing funeral ceremonies essential for his parents' salvation. And Muslims were allowed to practise polygamy with impunity.

The Madras High Court relied on a passage in *Reynolds v. U.S.*¹⁶ that distinguished religious belief from practice and held that practice of religion

9. *Id.* at 549, 781-782.

10. *Id.* at 548.

11. *Id.* at 549.

12. *Ibid.*

13. *Id.* at 830, 839.

14. *Srinivasa Aiyar v. Saraswathi Ammal*, A.I.R. 1952 Mad. 193.

15. *The State of Bombay v. Narasu Appa*, A.I.R. 1952 Bom. 85.

16. (1879) 98 U.S. 145.

was subject to state regulation. The court said that the state could regulate or restrict a practice if it "thinks that in the interest of social welfare and reform it is necessary to do so".¹⁷ The court pointed out that an adopted son, too, could perform the essential funeral ceremonies with equal efficacy. The court denied that prohibition and punishment of polygamy among the Hindus only amounted to an unconstitutional discrimination against the Hindus on grounds of religion.¹⁸

The Bombay High Court also rejected similar arguments and upheld the Bombay Prevention of Bigamous Marriages Act 1947 which made bigamy among the Hindus a cognizable and non-compoundable offence. Relying on *Davis v. Beason*¹⁹, Chief Justice Chagla, too, read the belief-practice dichotomy into article 25 and held that the impugned law did not violate any religious practice of the appellants. He also held that abolition of polygamy was a measure of social welfare and reform. The Chief Justice pointed out that introduction of reforms by stages, by applying them first to the advanced community and later to other communities, denied neither equality before law nor equal protection of the laws to a member of the advanced community. He held that as a sonless Hindu wife would herself egg on her husband to take a plural wife to beget a son, she would neither initiate prosecution if bigamy was non-cognizable nor compound the offence if it was compoundable. Therefore the legislature had made bigamy among Hindus a cognizable and non-compoundable offence.²⁰

The Allahabad High Court upheld abolition of polygamy by the Hindu Marriage Act, 1955.²¹ The court said that Hinduism did not sanction polygamy as an essential religious practice and even if it did prohibition of polygamy among the Hindus was a measure of social welfare and reform.

Before the Manipur Judicial Commissioner abolition of polygamy was questioned on sociological grounds.²² Relying on Freud, Bertrand Russell and Kinsey's Report, it was argued that imposition of monogamy in Manipur, which had more females than males, would condemn the excess number of females (10,265) to celibacy and compel them to resort to prostitution to satisfy their biological needs. And that would promote immorality and traffic in human beings, which the Constitution prohibited. The Judicial Commissioner rejected these arguments and held:

Morality is not always connected with the physique and one thing evolution through the ages has done to mankind is to bring under

17. *Supra* note 14 at 196.

18. *Id.* at 195-196.

19. (1899) 133 U.S. 333.

20. See *supra* note 15 at 86-87.

21. *Ram Prasad v. State of U.P.*, A.I.R. 1957 All. 411; also A.I.R. 1961 All. 334.

22. *H. B. Singh v. TNH. Ongbi Bhani Devi*, A.I.R. 1959 Manipur 20.

greater control the physical aspect of matter and to subordinate it to the mind. If it were not so, we would not find unchaste married women and chaste widows or unmarried women. It cannot, therefore, be asserted that marriage is the panacea for all evils.²³

The court pointed out that even if it was presumed that on lifting the ban on polygamy married men might come forward to take second wives, the first wife would rarely agree to share her husband with a second wife. Therefore a second marriage by a husband might break up the home of the first wife and bring misery to her children.

The belief-practice dichotomy, which accords constitutional protection to freedom of conscience and subjects religious practice to regulation by state, on which the Bombay and the Madras High Courts relied on, has been rejected by the Indian Supreme Court in *Lakshmindra*²⁴ and the American Supreme Court in *Sherbett*.²⁵ This weakens the opinion of the Bombay and Madras High Courts that imposition of monogamy on the *Hir dus* did not infringe their religious freedom. Nevertheless, their view that abolition of polygamy was a measure of social welfare and reform still stands.

IV. Reform of Muslim law and the Constitution

Does the replacement or the reform of Muslim personal law violate religious and cultural rights of the Muslims? Article 25(1) guarantees, besides freedom of conscience, the right to profess, practise and propagate religion, subject to the limitations specified in that article. A Muslim who wants to take plural wives or to divorce his wife unilaterally for no reason or any reason, or does not want to maintain his divorced wife, is engaged neither in professing and practising nor in promoting or propagating his religion. He cannot, therefore, complain of denial of the right to profess, practice or propagate religion, if the state imposes monogamy on him, takes away his unilateral right to divorce his wife, or compels him to maintain the wife he has divorced. Though the basic source of the Muslim law is the *Qur'an* and the *Sunna*, the relations it regulates are, from no standpoint, religious. They are, on the contrary, social relations, well within the province of the state. Muslim polygamy has no religious motivation, as Islam neither prescribes funeral ceremonies performable by a son nor denies salvation to a sonless Muslim.

Therefore marriage, divorce, inheritance and other aspects of personal status are, despite the sources of the Muslim law regulating them, social

23. *Id.* at 21.

24. *Commissioner Hindu Religious Endowments v. Lakshmindra*, (1954) S.C.R. 1005 at 1023, 1924.

25. *Sherbett v. Verner*, (1963) 374 U.S. 398.

or secular activities surrounding religion. The state can validly enact measures of social welfare and reform in respect of the matters governed by the Muslim law. In India the Muslim law acquired binding force not from its divine origin but from the Constitution of the country.

The contours of the right to conserve culture guaranteed in article 29(1) has not so far been delineated by the Supreme Court. Whether amendment or abrogation of the Muslim personal law infringes article 29(1) depends on whether the cultural identity of the Muslims rests only or mainly on their personal law. Neither polygamy and unilateral right to divorce nor non-maintenance of divorced women and disinheritance of orphaned grandchildren can be identified with Muslim culture. As most of the Muslims in India are monogamists and have not exercised their right to divorce, they would be uncultured if polygamy and arbitrary divorce are regarded as the warp and woof of Muslim culture in modern India.

The Muslim law on these aspects does not also represent the moral mores reflected in Qur'anic verses. The *Qur'an* permits polygamy subject to the condition that the husband should be able to deal justly with his wives. This shows that the law ignores the Qur'anic condition for polygamy. Considered in the context of the history of Arabia, the condition is more noteworthy than the permission. Therefore the condition cannot be torn out from its context without doing violence to the Qur'anic verse.

There is in the realm of divorce a similar hiatus between the morality reflected in the *Sunna* and the law. The former says that of all the permissible things, God dislikes *talāq* most. Yet, the *Hanafī* law, especially, permits and recognizes the most arbitrary kind of divorce.

Considering this gap between the moral mores of the law and the *Qur'an* and *Sunna*, it is difficult to see how reform or replacement of the existing Muslim law can affect the cultural or religious identity of the Muslims in India.

In this connection it is also useful to note that neither abrogation of the *Sharī'a* in Turkey nor its reform in several other Muslim countries, especially this is noteworthy in Pakistan, has destroyed either the cultural identity or the religious freedom of the local Muslims.²⁶ These reforms demonstrate that neither the religion nor the culture of the Muslims is eroded or encroached upon when the state reforms the Muslim personal law.

From this discussion it may safely be concluded that neither reform nor replacement of the Muslim law in India violates unconstitutionally the religious or cultural rights of Muslims guaranteed, respectively, in article 25 and 29 (1).

26. For a thorough account of these reforms see Tahir Mahmood, *Family Law Reform in the Muslim World* (1972).

V. Validity of some features of Muslim family law

There is no doubt at all that reform or replacement of the Muslim family law is valid. It is doubtful, however, whether some features of the Muslim family law are constitutionally valid. The Muslim law, as applied in India, requires a Muslim wife to share her home, husband and happiness with three other women (if her husband chooses to marry them), subjects her to eviction from matrimony by her husband for any or no reason and denies maintenance to her from her husband when he divorces her. The Constitution of India guarantees to all persons, which includes all wives, equality before law and equal protection of the laws, in article 14, and prohibits discrimination against citizens, which also includes wives, on the ground of, among others, religion.

All wives, irrespective of their creed or caste, form one class. The protection accorded to them in respect of marriage, divorce and religion must be equal even if it is accorded in separate laws, for, the pledge of equal protection of laws is a pledge for protection of equal laws. The Muslim wife, for reasons noted above, is denied this protection. This denial of protection does not conform to the doctrine of reasonable classification. Between the Muslim and the non-Muslim wives there is no intelligible difference. And denial to her of the benefits flowing from monogamy, regulated divorce and maintenance in case she is divorced, has no reasonable object.

Similarly, a Muslim wife is discriminated against in all these respects on the ground of religion only. There is no doubt at all that the benefits of monogamy, regulated divorce and maintenance after divorce are available to all wives except a Muslim wife. And the basis of this denial is her religion, because only a Muslim is governed by the Muslim family law. From the Muslim family law a Muslim wife cannot, unilaterally, escape.

While examining the validity of these features of the Muslim family law, the public policy of the country must be kept in view. Chief Justice Chagla's statement in the *Narasu Appa* case²⁷ may be treated as an exposition of India's public policy in the realm of family relations :

Marriage is undoubtedly a social institution, an institution in which the state is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the state of Bombay

27. *Supra* note 15 at 86.

compels Hindus to become monogamists, it is a measure of social welfare and reform, and if it is a measure of social reform, then the state is empowered with regard to social reform under art. 25 (2) (b)”²⁸

It was argued, however, by Chief Justice Chagla and Justice Gajendra-gadkar that a personal law, which term includes Muslim law, is not “law” within the meaning of article 13 of the Constitution.²⁹ This implies that no personal law need conform to any fundamental right. This is *contra legem*. For, article 13 says in clause 1 that an existing law not consistent with a fundamental right is void to the extent of the inconsistency and clarifies later that “law” includes, besides statutory law, customs also. Muslim law is made enforceable by the Constitution along with other pre-Constitution laws. Besides, if the Bombay High Court’s contention is accepted, a part of the Muslim law contained in the statutes will be law, while the rest of it will not be law for purposes of article 13. This will subject the Mussalman Wakf Validating Act 1913 and the Dissolution of Muslim Marriages Act 1939 to fundamental rights, and make the rest of the law relating to marriage and divorce and *waqf* supra fundamental rights.

It is also difficult to see why a personal law should be supra fundamental rights when constitutional law is not. Seervai, therefore, rightly says that “law” in article 13 includes personal laws also.³⁰

It is argued in some circles that both articles 14 and 15 are addressed to the state; and the disability and discrimination that a Muslim wife is subject to does not come from the state. This argument ignores the language of article 13(1), which speaks of inconsistency between an existing law and a fundamental right. If the above argument is accepted, no existing law, especially customary law, can ever contravene a fundamental right. Therefore, while examining the validity of an existing law under articles 14 and 15, it has to be considered whether the said law denies the protection enshrined therein.

In *Gurdial Kaur v. Mangal Singh*³¹, the Punjab High Court said:

If the argument of discrimination based on caste or race could be valid, it would be impossible to have different personal laws in this country and the court will have to go to the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds or communities can be constitutional. To suggest such an argument is to reject it.

28. *Id* at 86.

29. See *Narasu Appa*, *supra* note 15.

30. Seervai, *Constitutional Law of India*, 254-255 (1968).

31. A.I.R. 1968 Punjab 396 at 398.

To decide the point at issue in that case it was not necessary for the court to make this observation. There the issue was whether article 15(1) decreed that all heirs belonging to any sex have the same rights of inheritance. The court held that it did not. And this is unimpeachable. But can it be said that existence of multifarious personal laws is a valid defence to a plea that a personal law flouts and violates fundamental rights? Will the Muslim law relating to pre-emption be preserved even if it violates the right to property on the ground that invalidation of this unique feature of that law would lead to uniformity in that sphere among all personal laws? The cases on pre-emption show that this argument was considered too absurd to be raised before the courts. Besides, the contention of this paper is not that because of diversity all personal laws are violative of article 14 or 15. The contention is that the Muslim wife is discriminated against in respect of marriage, divorce and maintenance by the Muslim law, from which she cannot unilaterally opt out. In other words, what the Muslim wife can seek is invalidation of the disabilities and discrimination she alone is subject to.

VI. Conclusion

It is evident from the preceding discussion that the Constituent Assembly refused to make the Muslim law immutable and invariable and that in its opinion the state could enact laws to reform or replace the personal laws by a common civil code, under article 25(2), as a measure of social welfare and reform. The High Courts have upheld its view by saying that abolition of polygamy among the Hindus is a measure of social welfare and reform. And reform of the Muslim law, too, violates neither religious freedom nor the cultural rights of the Muslims.

On the contrary, the disability and discrimination to which the Muslim law subjects the Muslim wife infects that part of it with unconstitutionality.