

# ISLAMIC PERSONAL LAW : SCOPE AND METHODOLOGY OF REFORM IN INDIA

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## I. Scope of reform

### The unchanging core

MUSLIM PERSONAL law, as we understand it, is fundamentally based upon and derived from the principles and injunctions enshrined in the *Qur'an* and the *Sunna*. It is precisely this character of Muslim personal law that distinguishes it from secular laws as well as from personal laws of the other religious communities. A secular law sustains itself on and gets sanction from individual or collective wisdom of men in any given period of time; and the personal laws of non-Muslim communities are based largely on custom and tradition. Both can be changed partly or wholly depending upon the corresponding changes in human wisdom and custom. There is no unchanging basic core of these laws. On the other hand, the *Qur'an* and *Sunna*, on which the Muslim personal law is ultimately based, are unalterable. For a sympathetic understanding of the attitude of the Muslim community, this distinctive feature of its personal law should be borne in mind. Much of the uncalled for misunderstanding of the position taken by the Muslims in India is rooted in our failure to appreciate this point.

### The flexible details

However, Muslim personal law does not incorporate only the injunctions of the *Qur'an* and *Sunna*; it also includes the application, to one's own circumstances, of the principles enunciated therein. The *Qur'an* does not give detailed and specific instructions applicable to each cross-road of social life. It gives specific rules only where it deems that the situation has some essential ingredients of an everlasting character or, alternatively, is based on enduring human nature. In most of the social aspects of human life it confines itself only to broad guidelines of human conduct, values and ideals. These are not vague expressions of pious hopes only,

but have been precisely and accurately defined. Throughout Islamic history, individuals and the society—singly or collectively—have tried to apply these principles, values and ideals to personal and collective life. That attribute of Islam lends to this religion built-in flexibility and its inherent quality of applicability to different times and places. Hence Muslim personal law, in so far as the application of these principles, values and ideals in a particular time is concerned, is certainly open to reconsideration and revision; provided that the roots are not ignored, circumvented, or indirectly undermined. In so far, however, as the law is based on specific rules of conduct, *i.e.*, on clear textual injunctions, it cannot change. Moreover, it should also be emphasised that Islamic law stands for enforcement, by legal sanction, of the socio-ethical objectives of an Islamic society. To judge the provisions of Islamic law divorced from these objectives is not only unscientific but also self-defeating. These are the very essence of Muslim religious life, and to destroy these laws is tantamount to destroying the religious life.

## II. Why reform is opposed

### Unwarranted attacks on Shari'a

This is the true position of Muslim personal law. Why then, it may be asked, the Muslim community resents any change in its personal law and scoffs all attempts directed to invite its attention to a crying need of the time. The answer to this question is not simple. It is partly rooted in misunderstandings and suspicions arising from two different factors. First, these is the tendency to denigrate the Islamic *Shari'a* as a whole while criticizing the Muslim personal law as enforced in India. In the assertions of some critics there are implicit and oblique references to the *Shari'a* as being inherently inferior to other modern laws and out of tune with the modern concepts of justice and equality. It must be noted that the Muslim personal law as enforced in this country exhibits, in several respects, a failure to understand the true Islamic law. Thus, the shortcomings of the Muslim personal law as enforced in India do not mean defects in Islamic legal injunctions as such. It must also be noted that very little comparative study of the *Shari'a* and the modern law has been made to substantiate the claim that the provisions of the former are out of tune with modern ideas of justice and equality. Secondly, some of those who have been crying for change in the Muslim personal law are unfortunately not genuinely interested in the welfare of the community as such. They have invariably proved that their chief target is the destruction of the very fabric of cultural existence of the Muslims and, to that end, they sometimes pose as true secularists and pretend to be the true well-wishers of Muslims by citing the real or fanciful injustices arising from Muslim personal law. Little do they care for the sentiments of the Muslim masses, dub them as conservative and

reactionary, and dismiss their arguments as irrational. They must realise that the intellectuals, as they proudly christen themselves, do not occupy the crucial place in a democratic society; and if they continue their posture, the community is bound to dismiss them as non-entities.

### Lack of confidence

Of course, there are people, both Muslim as well as non-Muslim, who are sincerely interested in the welfare of the Muslims and find, according to their own understanding of the existing socio-economic conditions, certain aspects of the Muslim personal law, as enforced in India, calling for a change. To them we want to address a few words. It is not that the Muslims or their '*ulamā*' are opposed to all changes or are ignorant of the snags that have developed in the Muslim personal law as applied in India. Such a blanket pronouncement is uncalled for and untrue.

In a secular democracy it is necessary to inspire confidence among the people, to convince them of the need of change, if any, and to reckon their sentiments duly. Unfortunately that process has never been initiated in India, so far as the Muslims are concerned. The channels of communication between the Muslim masses and the majority community are totally blocked. On account of some historical events resulting into the widespread ignorance of Muslim masses, whenever a communication has been attempted to be established with them, it has been on wrong wave-lengths. The group of pseudo-intellecuals of the Muslim community is like a rudderless boat. It fails to communicate to the masses. Hence it is important to inspire confidence among the Muslims by talking to them through those whom they really recognize as their leaders.

### III. Methodology of reform

1. There is a core of the Muslim personal law which will never be changed. This irreducible minimum is provided by the express injunctions enshrined in the *Qur'ān* and *Sunna*.<sup>1</sup> Of course, in this limited sphere also, wherever the texts permit their reinterpretation and adaptation in accordance with the new socio-economic milieu, it is allowed.<sup>2</sup>

2. All alterations in the present Muslim personal law have to be within

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1. Numerous verses of the *Qur'ān* are explicit on this point. See, for instance, IV : 59 and XXXVIII : 56. These verses state categorically that a Muslim has no alternative but to adhere to the injunctions of the *Qur'ān* and the *Sunna*. The '*ulamā*' have always interpreted these verses in similar vein. For instance Ibn Qayyim has classified opinion into three categories, viz., (i) those conflicting with the texts and hence invalid without doubt; (ii) those conforming to the texts and hence valid, and (iii) those of doubtful validity. He rejects the first and the third categories. (*Ilām al-Mūqī'in* at 67-68).
  2. Caliph 'Umar used to strive in understanding the wisdom for which a verse was revealed and worked hard to grasp the interest for whose sake a Tradition came down. He would adhere to the spirit and not the letter (of both), (*al-Qada fi'l-Islam*, 14).

the framework of the general principles of Islam, its values and ideals. The Muslims will never accept the substitution of these by any scheme of preference foreign to Islamic temper. That, however, does not preclude the association of new aspirations and objectives in so far as they agree with the general Islamic ideals.<sup>3</sup> Elaboration and reinterpretation of Islamic legal rules in accordance with new experiences is permissible.

3. Changes in Muslim personal law should be made only on account of genuine needs and real grievances, if any.<sup>4</sup> We do not hesitate to recognize that during the course of time the application of Islamic laws has inadvertently caused injustices to certain sections of the community, and that the loosening of moral grip on the masses has necessitated the introduction of additional safeguards for the weaker sections.<sup>5</sup> But we reiterate that these needs should be real and not originating from one's cherished ideas about progress or modernism.

4. There are numerous schools of Islamic *fiqh*. The solution to problems that have necessitated a change in the Muslim personal law, as applied in India, should first be sought within the schools of Islamic legal thought. Such a search may lead to the abandonment of some *Hanafī* provisions dominant in India, or their partial modification, or a judicious combination of the principles of various schools. Most of the Muslim countries have adopted this method for the development of their personal law.<sup>6</sup> A different method of reform should be adopted only in regard to those problems which cannot be solved by this method.<sup>7</sup>

5. The only natural, intelligent and democratic way to bring about the required changes is that the '*ulamā*' and the experts in modern law drawn from the Muslim community should sit together and thrash out the relevant issues. The '*ulamā*' are not only conversant with the Islamic *Sharī'a* and its sources; they are also guided by their anxiety to preserve the values, ideals and principles enunciated in the *Qur'ān* and *Sunna*. They must be consulted. Moreover, in matters of religion (which Muslim personal law certainly is) it is they who enjoy the confidence of the Muslim masses, understand their

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3. The recognition of '*urf* (current desirable practice), *istihsān* and *masālih al-mursala* as secondary sources of Islamic law, by some schools, are indicative of the importance of emergent needs, new aspirations and other objectives.

4. That social needs may be recognized in the interpretation of Islamic law and its application to changing circumstances is confirmed by the famous principle of Islamic jurisprudence: "Needs make permissible what is not otherwise permitted".

5. In this connection it would be illuminating to note the procedure and substance of numerous pronouncements made by the *Imārat Shar'īya* of Bihar in regard to cases of marriage, divorce and *khul'*. These pronouncements have taken due cognizance of new needs, the removal of difficulties and prevention of evil.

6. See Tahir Mahmood, *Family Law Reform in the Muslim World*, 267-68 (1972).

7. Caliph 'Umar once wrote to Abū Mūsa Ash'arī : "Use your understanding in what disturbs your mind about (issues) that have not reached you from the *Qur'ān* and the Traditions" (See al-Suyūṭī, *al-Ashbāh wa'l-Nadāir*, 6).

language and can convince them of the need for change, if any. But since they are not conversant with modern challenges, problems and trends, they may be assisted by the modern experts of law. Any consensus that emerges out of such joint deliberations of the '*ulamā*' and the modern lawyers will be acceptable to the Muslims.

#### IV. Conclusion

We have made an attempt to spotlight the essential issues at stake.<sup>8</sup> The Muslim personal law is a part of Islamic religion, based upon its enduring values. Its distinctive nature must be sympathetically understood and appreciated. As long as there is a lurking fear in the Muslim mind that there are some people—harbouring peculiar notions about secularism, progress and modernism—who are out to destroy their religion, they will stoutly oppose any move in this direction. But if that fear is removed, they would certainly welcome genuine reforms. In this connection, the first step is to discourage the so-called 'forward looking' Muslims, the pseudo-intellectuals of the community, and to initiate a direct dialogue with its genuine representatives. Secondly, there is need to adopt a democratic process. Democracy is based on persuasion and argument and not on deception or force. Staging a drama of presumptuous grievances of the Muslim women and side-tracking the real issues by glibly talking about secularism cannot help. The Muslims should be won over through persuasion, sympathy and a sincere appreciation of their sentiments. Loose talk about secularism should be discouraged. Restoration of the confidence of the Muslim community is a must. Both the minority and the majority communities should work for that end, as this is an essential step of a primary nature in the direction of effecting necessary reforms in the Muslim personal law.

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8. We have not discussed those specific issues that call for change or are subjected to most frequent criticism. Some of the issues which deserve a fresh consideration belong to *nikāh*, *talāq* and *waqf*.