NEED FOR A CODE OF MUSLIM LAW

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I. Introduction

The Muslim personal law as applied in India is to a very large extent uncodified. The disadvantages arising from this are: first, that custom and usage sometimes make inroads into its principles, and secondly, the courts—ignorant of the original legal texts—wrongly interpret and misapply them. One factor contributing to the wrong interpretation and misapplication of the Muslim law is the availability of conflicting interpretations of the texts made by different Muslim jurists themselves. It is, therefore, advisable that the principles of Muslim personal law as applicable in India should be codified.

Unfortunately, there is not one basis for the application of Muslim law in India. Certain aspects of Muslims law, *e.g.*, inheritance are applicable to Indian Muslims under express legislative enactments. On the contrary, in some parts of India, particular principles of Muslim personal law are applied by the courts under the principles of equity, justice and good conscience. Strangely, there is no uniformity in the standards of equity, justice and good conscience, so much so that while the High Courts of Bombay and Allahabad have applied the Muslim law of pre-emption on the basis of these principles, under the same principle, that part of Muslim law has been unacceptable in Madras. There is, therefore, no uniform basis available to the courts for deciding whether or not a particular aspect of the Muslim law will be applicable in India. It is, therefore, desirable to have an enactment clearly defining the scope of Muslim law as well as giving statutory form to its traditional principles.

In the absence of a definite factor regulating the applicability of Muslim law, and in the presence of varied interpretations of the texts made by the ancient Muslim jurists themselves, the courts are quite likely to make mistaken and confused decisions in regard to Muslim law. The validity and correctness of many noted judicial decisions are, in the opinion of this

author, already questionable. A few illustrations of these are given below:

II. Misinterpretation : a problem

(i) *Presumption of legitimacy* : The Muslim law of legitimacy and the provisions of section 112 of the Indian Evidence Act are opposed to each other. This provision of the Evidence Act is based on a western concept incorporated into that Act without taking into consideration the corresponding provisions of a substantive nature under the Muslim law. It has been said about the Evidence Act that its provisions are not intended to supersede any substantive rule of law. It is, therefore, submitted that the decision in *Sibt Mohammad* v. *Mohammad Hamid*,[1] to the effect that section 112 of the Evidence Act superseded the Muslim law of legitimacy was not correct. Ameer Ali has correctly said :

> Section 112 of the Indian Evidence Act embodies the English rule of law and cannot be held to vary or supersede by implication the rules of the Mohammadan Law; the Muslim law does not recognize the doctrine of *legitimatis per subsequens matrimonium*.

The view expressed by Mohmood, J. in *Muhammad Allahabad* v. *Muhammad Ismail Khan*,[2] agreed with Ameer Ali's opinion. It was observed :

> No such rule is known to the Mohammadan law, and we should really be introducing doctrines foreign to that system, if influenced by the analogies furnished by the Roman, the French or the Scotch law of legitimation, we were to place acknowledgement of parentage under the rule of *legitimatis per subsequens matrimonium*. . .

Ronald Wilson has also expressed a similar opinion :

> The rule of the Indian Evidence Act, section 112 . . . is, notwithstanding its place in the Statute Book, a rule of substantive marriage law rather than of evidence and as such has no application to Mohammadans so far as it conflicts with the Mohammadan rule that a child born within six months after the marriage of its parents is not legitimate.[3]

It is probable that Sir Fitz James Stephen drafted this section without giving sufficient thought to the Muslim law of legitimacy. Whatever be the reason, the Muslim law of legitimacy constitutes substantive law and as

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1. 48 All. 625.
2. 100 All. 289.
3. Wilson, *Anglo-Muhammadan Law* 161, (6th ed.). For Tyabji's view on the subject see his *Muslim Law*, 262 (3rd ed.).

such cannot be superseded by section 112 of the Evidence Act. It is, therefore, submitted that the Allahabad decision in *Sibt Muhammad's* case was incorrect, and that the Judicial Commissioner of Nagpur was right in deciding that section 112 of the Evidence Act did not apply to Muslims.[4] The Oudh Chief Court's ruling that the said section is inapplicable to *fasid* marriages[5] was also correct.

(ii) *Formalities of li'ān*: Though the formalities of *li'ān* may be regarded a part of adjective law, the Muslim law makes no distinction between adjective and substantive laws. It is, therefore, proper that the formalities of *li'ān* should be treated as a part of the substantive law, at least on the same ground as the formalities attending on pre-emption are so regarded. The formalities in the case of *li'ān* are, in fact, more important, for the solemn oaths alone make the separation of spouses valid and permissible. No consideration was given to this fact by the Allahabad High Court in *Zafar Husain* v. *Ummat-ur-Rahman*[6] and *Rahiman Bibi* v. *Fazal*,[7] by the High Court of Lahore in *Mohammad Husain* v. *Begam Jan*,[8] and by the Bombay High Court in *Khatijabi* v. *Umar Sahib*[9] and *Suleman Vohra* v. *Mt. Bai Fatma*.[10] In all these cases the courts disregarded the solemn formalities to be complied with under the Muslim law of *li'ān*. This resulted in an incorrect application of the Muslim law.

(iii) *Bātil and fāsid marriages* : The attitude adopted by the Calcutta High Court in *Aziz-un-nissa Khatoon* v. *Karim-un-nissa Khatoon*,[11] in which it had to decide on the validity of marriage with the wife's sister, shows lack of a correct appraisal of the Muslim law relating to distinction between *bātil* and *fāsid* marriages. Criticising this case Ameer Ali has observed :

> The learned judges naturally imported English ideas into the consideration of the question and look at it through English spectacles, for the English law, as it stands, regards the wife's sister as being within the prohibited degrees, and as one with whom a marriage is illegal even after the wife's death.[12]

(iv) *Remission of dower* : Under the Muslim law, a wife who has attained puberty is competent to remit her dower in favour of her husband:

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4. *Zakir Ali* v. *Segrabi*, 43 I.C. 883, 15 N.L.R.I.
5. 3 O.W.N. 141.
6. 41 All. 278.
7. A.I.R. 1927 Ali. 56.
8. (1926) 93 I.C. 1017.
9. (1928) 52 Bom. 295.
10. A.I.R. 1931 Bom. 76.
11. 23 Cal. 130, following *Khairunnisa*, 3 S.D.A. 210 (1823). On this point the Bombay decision in *Talbi* v. *Mowla Khan* (41 Bom. 485), followed in Nagpur in *Zaker Ali* v. *Sograbi*, (43 I.C. 883) and in Lucknow in *Mst. Kaniza* v. *Hasan Ahmed*, (3 O.W.N 141), are correct.
12. Ameer Ali, II *Mohammedan Law*, 382 (5th ed.).

but this view was not accepted by the Madras High Court in *Abi Dhunimsa Bibi* v. *Mohammad Fathi Uddin*,[13] where it was held that a remission of dower by a wife, who had attained puberty according to the Muslim law but not majority under the Indian Majority Act, was invalid.

(v) *Option of puberty* : The decisions of some courts have modified the effect of the exercise of the option of puberty. The Allahabad High Court has held that a Muslim girl's right to exercise option of puberty is prolonged until she is acquainted with the fact that she has such a right.[14] It is difficult to support this view, as it conflicts with the established position under Muslim law.

(vi) *Doctrine of equality in marriage* : Under the Muslim law if a woman contracts an unequal marriage, her father or other guardian is entitled to seek annulment of the marriage by the court. But the whole law of equality of spouses seems to have been superseded by the decision of the Privy Council in *Atkia Begum* v. *Muhammad Ibrahim*.[15] The effect is that an adult Muslim woman in India can marry any man of her own choice in disregard of the objection raised by her guardian on the basis of the doctrine of equality.

(vii) *Alienation of minor's property* : The various decisions upholding the validity of alienations of a minor's property by a *de facto* guardian in the interest of the minor,[16] seem to be opposed to the correct Muslim law on this subject.

III. Codification : a solution

The present author attributes all the aforesaid wrong or confusing judicial decisions to an incorrect appraisal of the relevant principles of Muslim law because of the fact that these principles are lying in an uncodified form in a foreign language.

So, India should have a code of Muslim law. The famous works on Muslim law produced in the country, *e.g.*, these of Ronald Wilson, Tyabji, Mulla, Ameer Ali, Abdur Rahim and this author,[17] may be greatly helpful in drafting the proposed code. In four different parts the proposed code may deal with the following :

1. Rules regarding the application of the principles of Muslim law as contained in the latter parts of the code.
2. The substantive law of marriage, dower, divorce, parentage, guardianship and maintenance of relatives.

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13. 13 M.L.J. 78.
14. *Bishmillah Begam* v. *Nor Mohammad*, 19 A.L.J. 488.
15. A.I.R. 1916 P.C. 250.
16. *Inambanai* v. *Mutasaddi*, 45 Cal. 878, A.I.R. 1918 P.C. 11, *Matadin* v. *Ahmad Ali*, 34 All. 213.
17. *Muslim Law as Administered in India and Pakistan* (4th. ed. 1954).

3. The substantive laws of gift, *waqfs* and pre-emption.
4. The rules relating to inheritance, wills and administration of estates.

The advantages of a codified law are: its certainty, simplicity and uniformity; its sole disadvantage is its artificial rigidity. But codification of Muslim personal law is necessary in India in order to remove uncertainties, prevent it from being tampered with by the introduction of alien rules and avoid the evils of judicial legislation. These advantages carry more weight than some unavoidable disadvantages of codification, *e.g.*, rigidity. No doubt, the Muslim legal system is highly elastic and flexible, but in India that elasticity and flexibility is of no use, since here Muslims follow only particular schools of Muslim law.

An attempt to codify the Muslim law in the Indian legislature is likely to cause resentment among certain sections of the Muslims; but ways and means to overcome this difficulty may be found out.

Keeping in view the benefits that the Muslim community will get through stability and certainty in its personal laws, it must agree to having a code of Muslim laws; which may be brought about without much deviation from the traditional law. We expect that our Muslim brethren will not be led away by sentiments in this respect.