

PRESIDENTIAL ADDRESS

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IT IS a privilege to have been asked by the Indian Law Institute to preside over the inaugural session of this seminar, which is perhaps unique in recent times in as much as it poses a problem which is interesting though controversial and sometimes sensitive, namely, the topic of Islamic personal law in modern India.

Reference is sometimes made to the increasing legislative output of Parliament and state legislatures. It is evidenced by the growing size of the statute book. In one direction, however, there has been little legislation; it is the field of personal law, particularly Islamic personal law. This was the position before independence and has continued to be so afterwards. The "closure of the gate of *ijtihad*" has resulted in the continuance in the Islamic society, of the legal principles settled before the tenth century *A.D.* by ancient juris-consults. Although pleas for modernization and reform have been made by persons as eminent as Iqbal and Ameer Ali, the intervention of the legislature was infrequent. The notable occasions when the legislature intervened, before independence, in the field of Islamic personal law include the enactment of the Shari'at Act of 1937 and the Mussalman Wakf Validating Acts of 1913 and 1930. These Acts essentially sought to restore the application of the old law on the subject rather than make any change in it. There are, however, two exceptions—both of a noteworthy character. The first was the law which could normally not be regarded as one directly affecting personal law, *viz.*, the Insurance Act of 1938 which permitted conditional or contingent assignment of policies of insurance and removed to this extent the hardship caused by the rule of Islamic law against conditional, contingent and future gifts. Secondly, the Dissolution of Muslim Marriages Act, 1939 gave Muslim women the right to seek divorce on a number of grounds, though it did not affect the husband's unqualified right to divorce his wife. One may also refer to the Child Marriage Restraint Act, 1929 which applies to all communities and cannot as such be regarded as a reform or modification of Islamic law but it did cover partly the field previously governed by the traditional Islamic law.

This was the position at the commencement of the Constitution which,

in Part IV, contains the Directive Principles of State Policy. Article 44 of the Constitution provides that the state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. However, for reasons which I will presently mention, the field of personal laws, with the exception of the personal law of the Hindus, has remained almost untouched after independence. The only legislation in the field of Islamic law was the Wakf Act of 1954 which essentially deals with the secular and administrative aspects of *waqfs*. The Special Marriage Act, 1954 was in a way a major step towards the implementation of the directive contained in article 44. It is, however, of an enabling character.

The reason why the legislatures in India have not touched the Muslim personal law is not far to seek. It is not so much because of the fear of the repercussions but because of a desire to hasten slowly in a matter which vitally affects the beliefs and sentiments of the Muslim community in India. I think it is easy to appreciate that with assured majorities in legislatures it could not be difficult to have laws passed affecting the minorities in India. However, while the government has always appreciated the importance of the Directive Principles, it has, in my view, rightly hesitated to use its strength in the legislatures so as to impose any reform affecting the Muslim community in India. We believe that while we should do everything possible to build up and cultivate the consciousness for reform, the urge and the demand for the reform must come from the community itself.

With the passage of time the growing demand for change, I am sure, will come from our Muslim brothers themselves. In certain fields, the passage of time has brought about changes which have been generally accepted. It is interesting to observe that men and women belonging to the Muslim community have already started demanding a change. Further, the changes taking place in other countries which are predominantly Muslim cannot but make an impact on Muslim opinion in this country. It is well-known that many Muslim countries, including Turkey and Pakistan have made substantial changes in their personal laws.¹

When the question of reform of Islamic personal law is taken up, matters which are most frequently debated are polygamy and divorce. There are other topics too, e.g., the law of guardianship. Commenting upon the scope of the possible reform in these fields, a distinguished Muslim Chief Justice of India has observed :

If the injunctions of the *Qur'an* and *Hadith* are not lost sight of, it is possible to make changes by legislation in a widening area. The latter day writers like Ameer Ali, Iqbal and reformers like Muham-

1. For a thorough account of these changes and reforms see the recent publication of the Indian Law Institute, *Family Law Reform in the Muslim World* by Tahir Mahmood (1972)—*Ed.*

mad 'Abduh maintained the possibility of reform. The lead is coming from Muslim countries and it is to be hoped that in course of time the same measures will be introduced in India also.²

While I am not suggesting that there should be an attempt to copy what has happened in other countries, I am expressing the hope that the Muslim community in this country, which does possess an enlightened leadership, will foster and urge in course of time a progressive change in the Muslim personal law.

Let me congratulate the Indian Law Institute for having taken the initiative in organizing this seminar for discussing vital issues which, I find from the break-up, cover practically the whole gamut of personal law in so far as it is of practical day to day importance. I once again thank the Institute for having given me the opportunity of participating in this seminar.

2. Quoted from M. Hidayatullah's sixteenth edition of Mulla's *Principles of Mahomedan Law*, xxxi (1968)—*Ed.*