ISLAMIZATION AND THE POLITICS OF MUSLIM LAW REFORM

On 31 October, 1981 eminent legal sociologist Upendra Baxi, Professor of Law, Delhi University, spoke in the Department on the issue of Muslim personal law reform. Full text of his talk follows—Ed.

Prologue

I have, as always, been introduced as a 'jurist'; and always I must enter a caveat. In India the word 'jurist' has now lost all its meaning. Almost every senior lawyer, every judge of the High Court and Supreme Court, active or retired, every law minister, and every public figure, save perhaps the lawyer's munshi, who holds the law degree is called a jurist. India is the only society where even knowledge and even wisdom come, as it were, ex officio.

There exist strong and growing tendencies towards devaluation of learning and knowledge in contemporary Indian society. A renaissance, nothing less, is needed. And institutions like this (Institute of Islamic Studies) could contribute a great deal to revival of learning. Islamic law and jurisprudence testify to the contribution of the learned and the wise to the development of human spirit, society and culture. The traditions of Islamic jurisprudence assign a central role to questing intellect and to pious heart. We need recall ourselves and remind others of this great tradition of learning and wisdom in aid of restoration of the role of true jurists in the growth of law and justice in our society.

It is, therefore, no mean modesty which makes me disclaim the title of a 'jurist'; and even as a student of law and jurisprudence, I have at once to add that I am not a deep student of Muslim law and theology. Why am I here then? I venture to be here as a hybrid animal known in recent times as 'sociologist of law'. Sociologists of law accept no boundaries; they think they should go to as many disciplines as they could to explore the meaning and reality of law and injustice. A very serious charge is often made against sociologists in general—that they make simple things complex and against lawyers that they make clear things confused. And my listeners have in me, in minor proportions, a rather fatal combination.

My serious preoccupation with certain problems of Muslim law and jurisprudence begins with Asaf A.A. Fyzeze, whose passing away we lament today. Back in 1974 Tahir insisted that I contribute an article to a festschrift for Fyzeze which he was editing; and, after much struggle with myself, I arrived at what I still regard as a worthwhile sociological grasp of the problems of Muslim personal law reform in my contribution to the festschrift.1

The folklore

When I looked at the problem of Muslim law reform in India, and at the state of the debate, I was intrigued by the fact that while there was a substantial elite consensus (both among Muslim and non-Muslim elites) concerning the need for reform and rationalization of certain aspects of the law, the Indian Parliament did not move an inch to take any ameliorative measures; and that in fact it went several steps backwards whenever an occasion or opportunity for reform arose (as in the case of maintenance for Muslim wives under the Criminal Procedure Code5 or the Adoption Bill9). I am still puzzled by this phenomenon, which contradicts many a well-established notion of law's relation to social change. I have begun to see now somewhat more clearly that explanation of this puzzle is sought to be provided more by recourse to folklore, rather than facts. The folklore about the lack of reform has three or four aspects.

The first element of the folklore refers to the idea that Islam is a conservative religion and thus pre-modern and anti-rational. Given this image, the second element of folklore maintains that the Indian politicians are moved by narrow political considerations, especially of electoral gains, in maintaining status quo; any reform measures would so affect religious sensibilities as be pernicious to the future viability of ruling coalitions. The third element of the folklore has been assiduously propagated by freinds like Fyzeze, whom I call modernists or progressives. They attribute stalemate on reform to the incorrigible obscuring of the leaders of the orthodox or conservative Muslim opinion. A fourth element is provided by the morally offensive propaganda, even at the hands of many senior politicians in India, which wants us to believe that Indian Muslims do not wish reform of their marriage law because the institution of polygamy is vital to them in their planned strategy to achieve, in course of decades, numerical superiority over the Hindus in India.

These then are the salient aspects of the folklore. The last is clearly obnoxious and repugnant; it does not deserve the compliment of reasoned rebuttal. It is against the well-known facts of the inci-

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2 Sections 125-127.
3 Bill No. 18 of 1972 (withdrawn in 1978).
a watered down concept of secularism. Therefore there has emerged in India, during the last twenty to twenty-five years, the concept of communal violence as a way of politics. This fact adds to the perception of a minority group of the risk of persecution and violence.

**Analogies of reform**

I mention all these facts which are known to everyone only to show that the reform of Muslim personal law cannot be seen outside the existing realities. In these circumstances to say that in Tunisia or Morocco or Egypt or Libya Muslim law has been reformed may be futile. People must know that a change is being initiated elsewhere, but one must not forget that India is a different society. Here firm constitutional decisions regarding change in personal laws are to be taken by a majority whose organisation of state and whose concern for the minority provides a rather discouraging record for confidence and trust. The situation in India is not one that can truly be compared with any society where Muslim law has been reformed by the majority of Muslims themselves.

Argument has often been advanced that the Hindu law was reformed in 1955-56 by the Hindu Code Bill; so, what is the difficulty in getting rid of the inegalitarian sex-based discrimination under the Muslim law? It misses the point completely. Enactment of the Hindu Code was not a participatory law reform. It achieved only normative rationalization of the law. Modern Hindu law is in many respects less openly discriminatory against women. But, reform of Hindu law has not percolated down to the people. In fact it has been in many respects a paper exercise. Studies made in the awareness of law have shown that many Hindu women have no idea of their rights. Do we want a similar reform of the Muslim law?

**No real dialogue**

I should like to say that there have been numerous calls for reform of Muslim personal law, but there has been no real debate on the issue. Calls can be made by those who are in a position to make them; debate is a dialogue among people with different viewpoints—an attempt to convince one side or the other of the need to change their positions. And I think that—confining myself to the Muslims and their writings—there has been no dialogue. Such dialogue as has been alleged to have occurred between conservatives and modernists has indeed been a dialogue of the deaf. A Muslim scholar has said:

As a matter of fact there has been no real debate at all. The pro-changers express their views in the English press, their opponents reply in Urdu. The pro-changers refer to

the wind of change, to the spirit of modernity and to the constitutional provisions relating to a uniform civil code; while their opponents quote the Qurʾān and Sunna, emphasise the religious and cultural rights of the minority and the long history of the existing laws. Specific proposals for change are rarely debated. Bad sociology, fictitious statistics and hearsay account of what has been happening in the Muslim countries are glibly swallowed by the limited readership of a few modernists, while the masses and the *ʿulamā* are generally satisfied by cursory arguments supported by supposedly awe-inspiring authority, which in reality serves only their own self-complacency.

I think it is a key passage, rich in ideas for serious discussion. "Fictitious statistics" may be misleading about what is happening elsewhere. Polygamy has been abolished, or women given rights, or unilateral *falāq* abolished by legislation in any Muslim society may be only half truth; the other half on discovery may turn out to be the real problem. Laws are made, but mere making of laws does not mean their implementation. Therefore one has to study the effectiveness of laws made in the Muslim societies. When a modernist argues he tends to overlook the Indian context and looks only at what he calls "law in the books", not "law in action". Law in action is the actual implementation of the law or the actual acceptance in behaviour and mental attitude. Normative change is important, but when we present an account of changes made in the law in Muslim countries we are doing only half the job. And obviously there is no modernist in India who would want only a change on paper. I suppose we all want it to be a real change.

The impulse for reform of Muslim law is based on one fundamental perception of injustice, and that is injustice to women—whether it be unilateral divorce or succession. I would want reform of the Muslim law only for the purpose of equality of sexes. And, therefore, I would look at it from that point of view. How far does the modernist feel that this is going to be achieved only by enactment of legislation? Do people who advocate reform of Muslim law have no intellectual or moral obligation to help create social conditions making it possible that if some reform were made, it could in fact be implemented?

**Politics of reform**

I have a feeling that there is also a 'politics' of law reform. And by 'politics' I do not mean anything sinister. I refer to an activity in which those who argue for law reform and those who oppose it are

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*F.R. Faridi & M.N. Siddiqui (ed), Muslim Personal Law, iv (Aligarh, 1973).*
consciously or otherwise doing something else, are accomplishing objectives of different kind, under the rubric of law reform. Those who are opposing it, I think, really favour what is called ‘Islamization’—that is, the kind of situation where one goes back to one’s distinctive cultural identity. The opponents of reform are clearly saying that the best of Islamic culture has to be preserved (and law is a part of that culture). The underlying idea of their viewpoint is assertion of a cultural identity.

As regards modernists, theirs is an ideology of human rights and elimination of sex-based discrimination. But, if that is their ideology, I wonder why an attempt for a social change has not been a part of their strategy and why has it been assumed that legal change is the first and the only attainment to be made by them?

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