Is Codification a Solution or Problem in Regulating the Personal Affairs of Muslims Under Islamic Law?

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Abstract
The codification of religious law, at times, poses multiple challenges to the fuller achievement of its objectives. Islamic law is no exception to this rule. It is pertinent to note that Islamic law witnessed the so-called codification many centuries after its birth i.e., in the Ottoman era wherein a code of laws comprising the rules of Hanafi fiqh was compiled for its uniform enforcement. Later, the Indian sultans like Muhammad Tughlaqand Aurangzeb compiled Fiqh Feroz Shahi and Fatawa Aalamgiri respectively for the same purpose. The codification of Islamic law experienced yet another attitude when the non-Muslim British colonialists made the 'Acts' to regulate the personal affairs of their Muslim subjects. Moreover, such type of legislation continued in the post-independence era in India and Pakistan. This paper aims to provide a critical analysis of the history of the legislation of Islamic law in the subcontinent to frame the conclusion as to whether such legislation has helped enforcement of Shari'ah or spoiled the spirit of this.
Keywords: *codification, personal affairs, Islamic law, legislation, subcontinent*

Introduction:

The codification generally means to bring uniformity and to avoid the disparity and divergence among the subjects in relation their right and liabilities. The modern Indian constitution needs "the state shall endeavor to secure for the citizens the codification throughout the territory of India." In certain religious minority communities, this order poses a concern since they continue to follow their private laws in affairs of family, implemented inside Indian Legal System.

Considering that India is a country with many different races, castes and ethnic groups, codification is a very sensitive, subjective and complex topic. Distinct religions have different marriage and divorce laws as well as guardianship and succession laws that apply to them. For example, the Hindu Minority and Guardianship Act, the Hindu Adoption and Maintenance Act, Hindu Succession Act, and the Hindu Marriage Act, regulate Hindus' personal affairs. Various laws based on Quranic principles, such as the Muslim Women (Protection of Rights on Divorce) Act, the Muslim Marriage Dissolution Act, and the Shariat Act control the private lives of Muslims. In addition, the Cochin Christian Succession Act, the Indian Divorce Act, the Indian Christian Marriage Act, etc., are used to regulate the Indian Christian community. As a result, Parsis are subject to a separate set of laws. The differences in rights between religion and gender are reflected in all personal legislation, personal laws are not uniform. Marriage, divorce, and adoption are only few of the topics that are governed by a civil code. When the Indian Constitution seeks to codify a directive principle or purpose for its population, this phrase is employed.1

To begin with, religion and law were intertwined in early Hindu history since men feared God before they handed authority to monarchs. Such regulations were enforced more effectively by divine sanction than kingly edicts. Because they were founded on tradition and experience, they might be considered rules of nature. Therefore, it was only reasonable to think that there was something mystical, creator or daemon. At that time, religion was a dominant factor in Hindu law; therefore, the priest class or Brahmins were in charge of teaching the religion as well as law. It is clear from a study of Hindu law that the state did not meddle with Hindu law throughout the era of the Hindus. They had total impunity, and their own rules governed the entire situation.

Law and religion are united in Islamic jurisprudence. "In Islam," says James Bryce, "Law is Religion and Religion is Law, because both have the same source and equal authority being both contained in the same divine revelation."2 Every element of a Muslim's life is under Islam's control. Non-Muslims or unbelievers were either to be converted, subjugated, or murdered. Pagans in the Arab world had no choice but to convert or die.3 The same could not be said for the Indians. India's huge non-Muslim population could not be eliminated or converted due to its impossibility.4 Non-Muslims were only subject to Islamic law if they were directly or indirectly connected to Muslims. In the criminal justice system, Muslims and non-Muslims are subject to the same Islamic norms.5

The attitude of English Law towards Islamic Law in Colonial India

The subject impact is measured by Fyzee by analyzing the cases pertaining to issues of Islamic Law (IL) as reported in Indian Appeals. The courts, by and large, dealt with IL in the following four manners:

1) When IL was found same as English Law (EL), The courts upheld the IL but used English phraseology and doctrines in the decisions,
2) When there were smaller differences the courts slightly modified IL,
3) When there was clear departure, the IL was over ruled by EL and
4) In some cases, they abolished IL.

Fyzee divided the cases in three broad categories:

A. Where the British courts were no more anxious to interfere with the local custom and religion.
B. Where some aspects of local customs, shariah and shaster were refined by using the concepts of Equity as understood by English Lawyers.
C. Where the local laws were outworn and could not be followed they were abolished.

To maintain their dominance in a heterogeneous country like India, the British altered the criminal code. They developed their own method to cope with civil law issues. In order to protect the Indians' religious sensibilities, they did not want to injure them. Because they felt religion interfered with their peaceful trading with Hindus and Muslims, they also considered that it threatened their national security. In 1772, Warren Hastings enacted a number of measures. As a result, the Koran and the Shastras were to be used in all cases involving family and religion matters, for Muslims and Hindus accordingly.6 To preserve Hindu and Muslim law, Britain as a whole agreed with Warren Hastings's stance.

There was a lot of confusion and instability in India's judicial system in the early nineteenth century. Muslims and Hindus each had their own laws, while others non-Muslims had their own set of rules. Codification looks to be a means of achieving certainty and consistency. Lord Macaulay was appointed to the First Law Commission of India in 1833, where he served as a law member and then as its chairperson. The Dowry Prohibition Act 1961, the Child Marriage Restraint Act 1929, the Caste Disabilities Removal Act 1850, were all passed, and they all affected Muslims. The Dissolution of Muslim Marriage Act 1939, the Muslim Personal Law (Shariat) Application 1937, The Wakf Act 1913, were all passed during the British period. These

traditions were abolished by the Muslim Personal Law (Shariat) Application Act, which was passed in 1937.7

The Shariat Act went into effect on seventh of October 1937, which is functional in the whole country. There are no exceptions. One section of the Act outlines the issues that must be handled by Muslim personal law among Indian Muslims.8 All of them were related to Muslim household.

In personal laws, the legislative assembly had many disagreements. The important thing to know here is, "whilst all the Muslim speakers favored continuation of the British policy of neutrality, the Hindu speakers emphasized that the guarantee of religious freedom by draft article 19 did not exclude the jurisdiction of the state in matters of personal law."9 Both proposed paragraphs 19 and 35, according to the Muslim speakers, do not allow for governmental regulation of personal laws.10 Similarly article. 35 states that, "The State shall endeavor to secure for citizens a codification throughout the territory of India."

The Legislative Authority with regards to Personal Affairs

There is a mandate within the Constitution that was established on January 26, 1950, "Secure for the citizen a codification throughout the territory of India" and Personal law concerns are specified in one or the other of the legislative lists.

When it comes to personal law concerns, Art. 372 is the key. "All law in effect" is acknowledged in art. 372 (1), which is equivalent to sec. 292 of the Government of India Act, 1935. In United Provinces v. Atiqa,11 This term includes non-statutory law and personal laws, according to the federal court. The High Courts continued to exist after the Constitution came into effect, of Rajasthan,12 Hyderabad,13 Calcutta,14 Madhya Pradesh,15 and Bombay.16 Notice that all three categories in Schedule VII involve locations where conventional personal laws should apply. List III defines the following:

(a) Prior to the enactment of this Constitution, all parties involved in court processes were governed by their own law. This included marital and divorce proceedings as well as issues relating to infants and children.
(b) Other than farming property transactions; documenting deeds and paperwork.
(c) Organizations such as charities and benevolent societies, charitable trusts and religious foundations, and religious institutions.

Burial and burial sites are included in List II (which specifies the issues on which state legislatures can create laws) "rights in or over land" district-level administration of justice and court organization (including succession to agricultural properties). In List – I reveal to Muslim law is "pilgrimage to places outside India" A legislation governing Haj and Ziyaraat can be passed by the Parliament under this provision.

To what extent may Indian Muslims, Hinduism, Christians and Jews be controlled by distinct religion rules pertaining to marriage and inheritance under the constitution, etc.? Personal laws are not affected by basic rights, are they? The solution to these questions depends on whether "all laws in effect" in art. 13(i) includes personal laws or not. Since article 13 and several other (articles 19, 25, 44) were enacted, the Legislative Assembly did not aim to exclude personal laws from the country's legal authority. The prominent academics have dissented from the judicial decision of the two outstanding judges of the period, late M.C. Chagla and late P.B. Gajendragadkar in the Narasu Appa case,17 like D.D. Basu,18 H.M. Seervai19 and Mohammad Ghause,20 that all personal laws including their non-statutory elements are impacted by article 13-(1). In spite of this, all the higher courts in the nation have adopted the 1952 Chagla-Gajendragadkar judgement. According to the recent ruling in Krishan Singh v. Mathura Ahir, the Supreme Court: "Part III of the Constitution does not touch upon the personal laws."21

There were three writ petitions that were dismissed by the Supreme Court of India, alleging, among other things, that they breached articles 14 and 15 of the Constitution, Ahmedabad Women Action Group v. Union of India.22 The Court observed that the

"questions involved in the case were the issue of State policies with which the court will not ordinarily have any concern." In Maharshi Avadhesh v. Union of India, the Supreme Court expressed the same judgement.23 It is apparent from the legal trend thus far that the Courts are reluctant to evaluate the validity of different personal legislation based on Articles 14 and 15 of the Constitution.

Supreme Court ruled in Ratilal Panchand v. State of Bombay that every individual has basic rights, subject to the restrictions imposed by Article 25, "not merely to entertain such a religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion…" In another case.24

In Mulla Tahir Saifuddian v. State of Bombay,25 to apply Article 25(2) (a), the Supreme Court said that religious activities must be divided into those that have a fundamentally religious character and those that do not. In Durgah Committee v. Hussain,26 According to the ruling, the court must assess whether or not a religious activity is an important component of a religion and that the denomination's position is not definitive.27 When asked if personal law is a part of Islam, a Muslim will generally answer with a resounding yes. In Sri Krishna Singh v. Mathura Ahir,28 Part III of the Constitution does not include personal law, according to the Supreme Court. In T. Sareetha v. Venkatasubbaiah,29 Sec. 9 of the Hindu Marriage Act, which allows couples who live apart without good explanation to retain their conjugal rights, was ruled to violate personal liberty under Article 21 of the Constitution by the Andhra Pradesh High Court. When a reluctant spouse is pushed by the state into living with the other spouse, the court ruled that there has been a breach of the right to privacy. In Harvinder Kaur v. Hermender Singh,30 Delhi High Court affirmed Section 9's constitutional validity as a legitimate rule safeguarding marriage in line with Art. 21. In Saroj Rani,31 case Chaudhary J. of the A.P. High Court's opinion was rejected, while Delhi High Court's was upheld. Personal law as a legal concept did not come up in these decisions.

Article 227 of Pakistan's constitution specifies that 'the term Quran and Sunnah must mean Quran and Sunnah as understood by the sect.'

Did codification serve the Purpose?

Criminal Procedure Code stipulates that all persons are obligated to support their spouse, children under the age of 18, unmarried daughter, and parents who are unable to support themselves financially in accordance with the objective of social justice and economic security for the dependents. Moral and material abandonment in family life can be avoided by enforcing the responsibility of upkeep. They have no connection to religion whatsoever. In Bai Tahira,32 and Shah Bano,33 cases There were no violations of Muslim Personal Law or religious freedom in this case since the Supreme Court relied on Section 125 of Criminal Procedure Code, which mandates a support duty. It was held that the husband's obligation to support his wife was not removed by payment of Mehr and maintenance during iddat. According to the court, the application of religious principles was irrelevant for the purposes of secular and welfare laws like Sec. 125 of the Cr. P. C. It does not matter whether the religion is not mentioned in Art. 24 of our Constitution, the state has the authority to pass laws for social change in semi-religious subjects. As a result of an extensive review of the Muslim theological literature, the court found Muslim husbands and wives to be married beyond the Iddat period. As outlined in Article 44, the court stressed the codification's purpose.

In Srinvasa Aiyar v. Sarawathi Ammal, the Madras Hindu (Bigamy and Divorce) Act, 1949, was challenged by the Madras High Court in 1952.34 Specifically, Section 4 of the Act was contested:35 "Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnized after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such

solemnization shall be void." In Ayesha Bibi vs. Suboth Chandra Chakravarty,36 in this instance, after examining the position under Islamic law, the court looked into the possibility of administering Hindu law. In Robaba Khanum vs. K. B. Irani.37 The alternative argument was rejected by Mr. Justice Blagden He made an observation: "The law of India is not Mohammadan law nay more that it is Hindu law or Christian ecclesiastical law, but the Mohammadan law is by virtue of the general law of India the personal law of the minority of Indians, regulating their relations with one another it differs in degree but not in kind, from (say) by the law of the Willingdon Club."38

A Hindu husband's conversion to Islam without dissolving his prior marriage renders his second marriage null and unlawful, as the Supreme Court ruled in the Saral Mudgal Court Case.39 According to Section 494 of the Indian Penal Code, the apostate spouse would be guilty of the ofence. However, it is not true to say that, only a court ruling may make a convert male Muslim's second marriage a criminal offence. Just by intercepting what was already in place, the court has simply changed the law. Because the court does not legislate, but rather gives an interpretation of existing legislation, a provision's retroactive date must be set at the time of the law's passage. If the decision in Sarla Mudgal cannot be implemented retroactively, then it cannot apply to those who have solemnized marriages in contravention of the law previous to the judgement.

Conclusion

Millions of cultures and communities make up India. Almost everyone believes their religion and culture are the greatest. Despite the fact that no one is interested in improving their own system, everyone is concerned with the state of other systems. As a tool for minority bashing, UCC is more frequently than often employed in lieu of real social reforms. People would become more protective of their supposed identity and customs since they are being attacked, which will further reduce the chances of UCC being nurtured in its embryonic stage.

This has been made worse by the unfortunate mingling of religion and politics. In India, no one can impose a UCC because of the political stakes. Instead, interested politicians will merely keep the UCC issue blazing to criticize their opponents and appease their vote banks.

Personal laws should be codified and repealed, according to proponents of the idea, since it would foster national integrity. What is the impact of different personal laws on the process of integration? The Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, and the Hindu Adoptions and Marriage Act, 1956 are all applicable to all Hindus, including Sikhs, Jains, Budhists, Lingayats, Aryasmajis, etc., for the previous sixty-seven years, this code has failed to unite Hindus, and the argument for national unity has not been advanced to the necessary amount.

Most of India's Muslim residents view Article 44's call for India to codify its laws as a bad dream. This problem is the result of two different anthropogenic factors in the society. One group is the ultra-traditionalists who would stop at nothing to ensure that the Islamic personal law is enshrined in the country, including all of its principles.

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