MUSLIM PERSONAL LAW IN INDIA

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I VISITED India from January 3-23, 1972 at the invitation of the President of the Indian Law Institute (the Chief Justice of India) to give a series of lectures, to take part in a special seminar on "Islamic Personal Law in Modern India", and generally to give any advice I could on the future of Muslim personal law in that country. The original invitation had come from Chief Justice Hidayatullah some fifteen months ago, but a number of factors delayed my visit to India. The invitation was renewed, however, by the present Chief Justice; so, after another short delay (occasioned by the war in Bangladesh in the east and against Pakistan in the west), it was possible for the seminar to be convened and my visit to proceed.

Broadly speaking, the spectrum in India today represents a conflict of views between those who are pressing for the introduction of a uniform civil code, as envisaged in the Directive Principles of the Indian Constitution, and those who resist any such development. The demand for a uniform code comes, naturally enough, from the dominant community, which has radically reformed Hindu law—at least as far as legislative enactments are concerned—in the Hindu Marriage Act, 1955. This Act, which prohibits polygamy and provides for judicial divorce on a basis of equality between husbands and wives, was forced through in the face of considerable opposition from Hindus of more conservative or traditional opinions; but this was comparatively simple in a country which, though officially secular, has a very large Hindu majority. Inevitably, therefore, the question is widely asked why the Muslim minority should continue to enjoy the 'privilege'—or at least concession—of a man being allowed to marry as many as four wives, to divorce his wife at his unilateral discretion, and to take a share in his parents' estate which is double that granted to his sisters. The fact that polygamy is, in fact, very rare in India—and, indeed, that it does not seem to be any more common among Muslims than it is in reality (whatever the law may prescribe) among Hindus—is not felt to impinge, in any significant way, on the principle involved.

It is one thing, however, for a dominant community to legislate for the

adherents of its own religion, and quite another for it to legislate for a minority which follows a different religion. Naturally enough, therefore, the government does not want to bulldoze the Muslim community, but rather to win its support for any legislative reforms which particularly concern it. And, while there are a minimal number of Muslims in high places who would welcome a uniform civil code, the vast majority of the community is passionately opposed to it, on two quite distinct grounds. Their first objection is theological, in that they believe their personal law not only to be based on divine revelation but to represent an essential part of their religion. Their second objection is sociological, in that they fear that any abandonment of their personal law would lead to a loss of their identity, and that the distinctive character of the Muslim community would be eradicated. It is, of course, precisely this last point that the more convinced "secularists" most desire: an India in which communal and religious loyalties are completely submerged in a common citizenship in which religious differences are confined to matters of faith and worship.

The Muslim community as a whole, however, is so opposed to this viewpoint (loyal to India as a state, and highly critical of developments in Pakistan, though the Muslims certainly are) that they resist even the most obvious reforms in their personal law. They are apt to view any change whatever in the *status quo* as the first step down a slippery slope leading to a uniform civil code. The greatest need of the moment, as it seems to me, is to convince them that their personal law, as this is at present administered in India, stands in urgent need of reform; that reforms in personal law as administered by the courts have in fact been introduced in most of the leading Muslim countries without any sacrifice of what they consider to be essential Islamic principles; and that the enactment of reforms in those aspects of the Muslim personal law (as at present enforced by the courts in India) which give rise to the most serious criticisms would not necessarily represent a step towards any suppression of their law, but might, indeed, prove the exact opposite. A house which is in good condition is, clearly, much more likely to stand the stresses and strains of the elements than one which is in a sad state of disorder and disrepair. Another crying need, at this juncture, is to convince the majority community that there is no urgency about the implementation of article 44 of the Directive Principles of the Constitution. These principles are not mandatory as such[1]; and the impatience in this matter shown by Justice K. S. Hegde[2] and many others seems to me misplaced. It has inevitably given rise to a marked feeling of insecurity in the Muslim community which is damaging to the best interests of the state. It would be infinitely preferable, as I see it, for reforms in Muslim personal law to be proposed by the Muslims them-

1. See art. 37 of the Constitution.

2. *Cf.* K. S. Hegde, 'Directive Principles of the State Policy', I *S.C.J. 50-72* (1971).

selves rather than imposed on them against their will. But even if the Indian government eventually decides to force through a uniform civil code, it would surely be in the interests of the Muslim community to have defined what they believe to be the essential elements in their law, in contradistinction to the vagaries and abuses which at present discredit it; for it must be presumed that a uniform civil code would represent one drawn up by consultation between the different communities in India on a principle of give and take, not a Hindu code enforced on every citizen, irrespective of his traditions or religion.

The fact remains, however, that the Muslim minority in India (which numbers no less than sixty million) at present appears to be more on the defensive than any other Muslim community I have ever visited—except, perhaps, that of Saudi Arabia. So it was a great encouragement when the seminar on "Islamic Personal Law in Modern India", in spite of its representative character and the wide differences in approach manifest among its members, eventually voted unanimously (1) that their law, as applied in India, stood in urgent need of reform; and (2) that a working party should be set up, under the joint aegis of the Indian Law Institute and the Faculty of Law in the Aligarh Muslim University, to study—in cooperation with scholars trained in Islamic law and theology as such—how these reforms could most appropriately be effected. An admirable summary of what has in fact been achieved in one after another of the Muslim countries has recently been published by the Indian Law Institute, in the form of Tahir Mahmood's *Family Law Reform in the Muslim World* (1972). This provides more information on this subject within the covers of a single volume than can be found anywhere else, and should prove most useful. In addition, I was myself requested to give an outline of my views on this matter, consequent on the seminar and many other discussions, to provide the working party with some proposals which they could study —and then accept, modify or reject. Such is, in fact, the purpose of this present paper.

What, then, are the matters which stand in greatest need of reform, and how could such reform best be effected? The order in which these are most commonly listed is, I think: (1) polygamy, (2) divorce, (3) inheritance and (4) custody of children—and, although I would be inclined myself to adopt a somewhat different order, it will be best, perhaps, to discuss them in this sequence.

(1) *Polygamy* : As has already been noted, this is not in practice a very pressing problem in India, but it looms large, as a matter of principle, in any discussion of the differences in the law of marriage applicable, respectively, to Muslims and to all the other communities in the country. Unless, therefore, the Muslim community agrees to effect some reform in this matter, public opinion will almost certainly insist, sooner rather than later, on direct intervention by the government. But reform which might

well prove acceptable to Muslim opinion—provided that a strong lead is given by the *'ulamā'* or *maulvis* themselves—would not appear to present any insuperable difficulty. In Tunisia, which is almost exclusively Muslim, polygamy has in point of fact been completely prohibited; and this was justified by President Bourguiba on two distinct grounds. The first was the broadly based argument that there were certain institutions, such as slavery and polygamy, which were acceptable at a certain stage in human development, but which were repugnant to the civilised conscience today; so, seeing that Muslims are virtually unanimous in accepting the prohibition of slavery in contemporary circumstances, permitted though it is in the *Qur'ān*, why should they not take a similar view of polygamy—which is permitted, but certainly not enjoined, in their sacred book?

The second argument was more traditional among Muslim reformers: namely, that the "Verse of Polygamy" itself allows a plurality of wives only on two conditions, one of which is that the would-be polygamist should have no fear whatever of treating them with less than equal justice. But experience, the President said, had proved that no man other than a Prophet was capable of such a feat, especially in contemporary conditions; so it was certainly within the competence of government to forbid the contracting of unions which would inevitably prove sinful under the sacred law.

A less drastic reform has been introduced in a considerable number of Muslim countries, where polygamy has not been positively forbidden but considerably restricted. The argument on which the relevant legislation is based is, again, the explicit restrictions on plural marriages imposed on a husband by the "Verse of Polygamy" itself: namely, the fact that he has no fear whatever of not being able to accord a plurality of wives just and equal treatment, and also that he is in a position not only to support his existing dependents but also to assume further obligations in this respect (according to al-Shāfi'ī's interpretation of the last clause in that verse as meaning that "your children may not increase"). In the past, admittedly, the possibility of fulfilling these conditions was left to the conscience of the individual concerned, and their enforcement relegated to the bar of eternity. In modern life, however, it has been widely felt that it is right for the state, and the courts, to intervene; so legislation has been promulgated providing that a man who already has one wife may not marry another without first obtaining the consent of court or of some administrative agency, and that this should be given only if it seemed probable that these two conditions would be fulfilled—or, indeed, in a few countries, if some justification existed for that plurality of wives which many modern Muslims regard as a concession designed to cover special circumstances rather than the Islamic norm.

Which of these two courses of action would seem more appropriate in India; and how, indeed, could it best be achieved? There can, I think, be no doubt that the dominant community would, in present circumstances,

unhesitatingly opt for the outright prohibition of polygamy, and that it would be exceedingly difficult to get legislation which specifically permitted even a restricted right of polygamy, for Muslims only, through the Indian legislature. But it may be relevant to observe that a severely limited and controlled right to marry a second wife, in exceptional circumstances, might be acceptable to Hindu as well as Muslim opinion. In any case I am myself firmly convinced that a complete prohibition of polygamy, if coupled with the husband's unrestricted right to unilateral divorce, would be a retrograde rather than progressive step, for it would mean that a man determined to marry a second wife would feel compelled to divorce his first wife. It would certainly be more beneficial to Muslim women to permit polygamy under specified conditions (which might well include a full consideration of the attitude adopted by the first wife herself), and to grant a wife who so chose the right to claim a divorce in such cases.

But would it be possible, even if the Muslim community agreed, to obtain legislative approval for such an arrangement? It seems distinctly doubtful, as I have already observed, if the Indian legislature would specifically endorse even a severely restricted right to polygamy in favour of one community alone. Unless, therefore, legislation along these lines proved acceptable to Hindus too, the only feasible possibility would seem to lie in a more indirect approach: namely, legislation enforcing the registration of all marriages by means of a statutory contract, which would itself include suitable conditions. This device should be regarded as fully consonant with Muslim principles—provided, of course, that the conditions were acceptable. It is true that the *Hanafīs*, *Mālikīs* and *Shāfi'īs* concur in the view that the normal effects of marriage have been prescribed by the Lawgiver and may not be varied at the discretion of the parties; but the *Hanbalīs*—of whose Islamic orthodoxy there can, surely, be no doubt—insist that several of the incidentals of the law of marriage (such as the fact that a man is permitted to marry more than one wife, to prevent his wife from pursuing her profession, or in certain circumstances to submit her to corporal chastisement) are no part of the essence of marriage as such. Whereas the other schools, therefore, take the extreme view that, where a marriage has been contracted on the explicit understanding that a husband will not in fact exercise one or other of these rights, the marriage remains valid and binding but the stipulation is void, the *Hanbalīs* insist that the sacred law, while it *permits* a husband to behave in certain ways, certainly does not *enjoin* this—so, if a husband voluntarily stipulates that he will not exercise one of these rights, that stipulation must be regarded as valid and effective, according to the well-known maxim that "A Muslim is bound by his stipulations."

(2) *Divorce* : This is, in fact, the most pressing area in which reforms are already long overdue, for the law applicable in India to formulae of unilateral repudiation of their wives by Muslim husbands is as retrograde

as that in any country in the world. Yet the path was blazed for suitable reforms in the law of divorce by the provisions enacted in India as long ago as 1939, giving a right to judicial divorce to ill-used wives. The Statement of Objects and Reasons which introduced this legislation specifically states[3]:

> There is no provision in the *Hanafī* code of Muslim law enabling a married woman to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women. . .The *Hanafī* jurists, however, have clearly laid down that in cases in which the application of *Hanafī* law causes hardship, it is permissible to apply the provisions of the *Mālikī*, *Shāfi'ī* or *Hanbalī* law.... A lucid exposition of this principle can be found in the book called "*Hīlat al-Nājiza*" published by Maulana Ashraf Ali Sahib....This has been approved by a large number of '*ulamā*' who have put their seals of approval on this book.

In the light of this progressive attitude, it may well be thought strange that no corresponding reforms have been introduced to cover the husband's power of repudiation.

As the law now stands in India, a formula of divorce uttered by a *Hanafī* husband under compulsion, intoxication, or the influence of such rage as deprives him of self-control, is regarded as valid and binding—although legislation, based on authorities in the other schools of law which are of unquestionable repute, has been introduced in one after another of the Muslim countries to ensure that this "dominant *Hanafī* opinion" should no longer be followed by the courts. Reforms to ensure that formulae of repudiation pronounced merely as an oath or threat should also be regarded as of no legal effect, and that the "triple" divorce when pronounced on one and the same occasion should be regarded as only a single (and therefore revocable) divorce, have also been widely accepted in Muslim countries. These find their juristic justification partly in the *dicta* of jurists of the past,[4] both *Sunnī* and *Shī'ī*; partly in the statement that the triple formula when pronounced on one and the same occasion counted as a single repudiation

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3. *Gazette of India*, 6 (1938).

4. *E.g.* the *Zāhirīs* and a number of early authorities such as 'Alī, Shurayh, Tāwūs and 'Ikrima, regarding the formula used as an oath; and Muhammad ibn Ishāq, Dā'ūd al Zāhirī, various doctors of Cordova and later jurists such as Ibn Taymiyya and Ibn al-Qayyim, regarding the triple divorce pronounced on one and the same occasion—to say nothing, in either case, about *Shī'ī* views.

in the time of the Prophet of Islam and his first Successor, and that it was only in the time of 'Umar that this was changed with the intention of restraining husbands from an increasingly common abuse; and partly on the broad grounds that these practices represent manifest evasions of the spirit, if not the letter, of the Islamic reforms—introduced as these were to ensure that a husband would have a reasonable opportunity to think better of, and retract, a formula of divorce uttered in the heat of the moment.

Even so, these reforms do nothing whatever to restrain a husband who is determined to divorce his wife from doing so, however unjustified his action may be. More recent legislation in some Muslim countries, therefore, often introduces one or more of three further reforms. The first (which has ample justification in the *Qur'ān* and has been widely accepted and applied in the *Mālikī* law) empowers a court to compel a husband who repudiates his wife without adequate reason to pay her some financial compensation (technically known as *mut'at al-talāq*) in addition to such maintenance as may be due to her. The second insists that no formula of divorce pronounced outside a court of law, and before any attempt has been made to reconcile the parties, will be legally recognised; and this finds its justification in the Qur'anic provision that, if any discord is to be feared between spouses, two arbitrators should be appointed—and in the argument that there can, obviously, be no divorce without some previous discord, so a formula of repudiation uttered without recourse to arbitration should be regarded as an evasion of this salutary provision. The third, which is up till now peculiar to Iran, not only prescribes that no divorce may be effected before a "certificate of impossibility of reconciliation" has been granted, but also enacts that such a certificate will in no case be issued unless the request for this certificate is based on one of a list of permissible reasons for divorce. As the law stands in Iran this last provision can quote no specific authority in any Islamic text; instead, it may be regarded as an administrative measure designed to check manifest abuses of Islamic teaching which the law has previously regarded as valid, but which theology has always insisted are sinful and abhorrent to the Almighty. But the same result could also be achieved, I should have thought, by the insertion of a suitable stipulation in the standard contract of marriage to which reference has already been made—on the argument that a husband may have the legal (although not the moral) right to divorce his wife without adequate cause, but certainly is under no obligation to do so. If he stipulates, therefore, that he will not divorce his wife except in specified circumstances, he must be held to his stipulation—on the principle so cogently urged by the *Hanbalīs* in closely similar circumstances. And the same stipulation could negate the right to divorce until suitable arrangements had been made in regard to alimony—if, indeed, this cannot be adequately covered under a provision for financial compensation to be fixed by the courts or by some "council of conciliation" (see above)—for the pro-

vision of alimony is an urgent problem in a country in which divorcees or widows seldom remarry.

One further point may be mentioned in this context. It has recently come about that a notable extension of the grounds on which an unhappy wife may obtain a judicial divorce has been effected in India by judicial decision; for in *Aboobaker Haji* v. *Mamu Koya*[5] Krishna Iyer, J. not only decided that a judicial divorce may be granted in India, under section 2(ii) of the Dissolution of Muslim Marriages Act, on the grounds that a husband has "neglected" or "failed" to provide maintenance for his wife even in circumstances in which he is under no legal duty to support her—which seems to me, with respect, an wholly unjustifiable interpretation of the statute—but also that a wife is entitled to a divorce, under section 2(ix) of the Act (*i.e.* "on any other ground which is recognised as valid for the dissolution of marriages under Muslim law") if her marriage has broken down. This corresponds closely with similar judicial decisions in Pakistan and with statute law in Tunisia; and the principle can find juristic justification in a tradition which depicts the Prophet of Islam as commanding a Muslim to divorce a wife who pleaded for this on the grounds of incompatibility—or breakdown—rather than any matrimonial offence, or even as a short cut in the *Mālikī* principle that a divorce may be granted by the court whenever the arbitrators appointed to examine a case of discord between a husband and wife decide that reconciliation is impossible and dissolution of the union the only practicable solution. It is noteworthy, however, that both the Tunisian legislation and the Pakistani decisions insist that the wife must, in such circumstances, pay her husband some financial compensation or refund the dower, as was also the case in the tradition attributed to the Prophet. In any case, it is certainly arguable that, so long as a husband has the right to repudiate an "innocent" wife (even if only on the condition that he pays her such compensation as the courts may decree), justice requires that a wife should be granted a corresponding right to demand a judicial dissolution of her marriage. This was, in fact, persuasively argued in the Pakistani cases, and has been achieved by legislation in Tunisia and Iran. Again, moreover, a suitable provision to this effect could well be included in a standard contract of marriage.

3. *Inheritance* : There are a number of reforms which could comparatively easily be made, if desired, in the law of testate and intestate succession as at present applied in India, most of which I have listed in the paper on this subject which I wrote for the seminar. But perhaps the most controversial problem in this context, in India today, is posed by the fact that the Islamic law of intestate succession gives a son twice the share of a daughter, and a brother of the full or consanguine blood twice that of a corresponding sister (and, indeed, a widower twice a widow's share, and a

5. 1971 K.L.T. 663; see also *Yusuf* v. *Sowramma*, A.I.R. 1971. Ker. 261.

father, in certain circumstances, twice that of a mother). To change all this would be to upset the whole structure of the Islamic law of inheritance, which is as complex, finely balanced and mathematically precise as any system in the world, and which rests more directly on the explicit injunctions of the *Qur'ān* than any other part of the *Sharī'a*. The argument most frequently heard in India in favour of such change is based on the Fundamental Rights enshrined in the Indian Constitution, which provide that : "The State shall not deny to any person equality before the law . . . "[6] and that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".[7] But it is vital to note that these injunctions are addressed to state action, not to the existing personal laws.

Even so, the question may well be debated whether the principle of "double share to the male" (which pervades much, though not all, of the Islamic law of inheritance) does in fact constitute a discrimination against daughters, sisters, *etc.*, "on grounds only of sex". At first sight this might certainly appear to be the case; but I think it is distinctly arguable that this is not so. It must be remembered that celibacy is extremely rare among the Muslims of India, where the overwhelming majority of Muslim women are married; that it is a fundamental principle of Islamic law that a husband must provide his wife with a dower, while the provision of a dowry by the wife's father has no place in the Islamic system; that it is incumbent on a Muslim husband to provide his wife with maintenance and housing, however poor he may be and however affluent may be her own circumstances; and that the duty to support the children of a marriage is invariably placed, primarily at least, on the father. In view of these manifold obligations I think it is distinctly arguable that the greater share normally given to males in the Islamic law of inheritance does not, in fact, constitute a discrimination which can be said to be based on sex *alone*—particularly in view of the fact that there is no question whatever of the exclusion from inheritance of a daughter, sister, mother or wife in the *Sharī'a*, common though that often is in the customary law of different parts of the subcontinent.

It is true that when the right to inherit passes beyond the "inner" family (*i.e.* parents, grandparents, children, grandchildren, brothers, sisters and spouses) the *Sunnī* system gives a right of inheritance to the agnates alone, to the complete exclusion of any relative—female or even male—who is not related to the deceased through the male line. But it is significant that the *Shī'is* have never followed this principle. On the contrary, they treat cognates on a complete equality with agnates, and when they grant inheritance to a male relative, however distant, they invariably allow a female in the same degree of relationship to take her share as well. A

6. Art. 14.
7. Art. 15(i).

female who is closer in degree to the deceased will, indeed, completely exclude a more remote male. But even among the *Shī'īs* the distribution, as between sons and daughters, brothers and sisters, *etc.*, gives a double share to the male.

A further problem arises in the *Sunnī* system of inheritance, with its superimposition of the Qur'anic reforms on the pre-Islamic customary law —which, naturally enough in a tribal and very warlike society, limited inheritance to agnates alone. The result is that, where there is no agnatic heir closely related to the deceased, the "Qur'anic sharers" will take their prescribed shares and then the residue will go to the nearest agnate, however remote he may be. A striking illustration of the outworking of this principle is provided by a father or mother whose only immediate heir is a daughter: for here the daughter will receive her prescribed share of half the estate, while the other half may go to a distant agnate whom the deceased has never met or whom he heartily dislikes. This no doubt made very good sense in a tribal society, but frequently gives rise to considerable suffering today—where the nuclear family represents the basic unity of society, and where an uncle cannot necessarily be trusted to treat nephews and nieces on an equality with his own children. It was the desire to provide more adequately for a daughter in such circumstances which persuaded a number of Iraqis, some years ago, to transfer their allegiance from the *Sunnīs* to the *Shī'īs*, and which also played its part in promoting the legislation introduced in that country in 1963 which has made the broad outlines of the *Shī'ī* system of inheritance applicable to all Iraqis.[8] Under this system the daughter, in such circumstances, will first receive her prescribed half of the estate and then the remainder by the doctrine of the return, to the complete exclusion of the distant agnate. This emphasis on the nuclear family in the law of succession is one aspect of the *Shī'ī* law which seems particularly suited to contemporary society; and it may well be that a reform along these lines would be acceptable in India.

Another way of dealing with the same problem—in part, at least—would be by legislation enabling *Sunnīs*, as well as *Shī'īs*, to bequeath up-to one-third of their estate to anyone they choose, heir or non-heir, without this being subject to the consent of the other heirs. This would have a number of advantages. In the case considered above, for example, the parent could bequeath one-third to the daughter, who would then take half the remainder—that is, two-thirds in all. Again, a husband could in this way make more adequate provision for his widow—restricted as she is, in most cases, to a meagre one-eighth of his estate under the law of intestate succession. Once again, a father with four sons—the first an eminent physician, the second a successful lawyer, the third a partner in his father's

8. Although, within these broad outlines, differences of detail are still allowed to *Sunnīs* and *Shī'īs* respectively.

commercial or industrial company, and the fourth a helpless invalid—could make special provision for the one who stood most in need of assistance or who had received the least educational and other advantages during the father's lifetime. This reform has been effected in Egypt, the Sudan and Iraq, and the official Explanatory Memorandum, which accompanied the Egyptian Law of Testamentary Dispositions, 1946, makes the following comments :

> The *validity* of a bequest to heirs which does not exceed the bequeathable third represents the opinion of the majority of jurists, while its *execution* is based on the Qur'anic verse "It is incumbent upon you, if one of you draws near to death and leaves property, that he make a bequest in favour of parents and relatives. . .". This, too, is the view of a number of expositors, among whom is Abū Muslim al-Asfahānī, and also a number of jurists from outside the four schools. The view that a bequest to an heir is permissible was, moreover, chosen because of the social need for such a provision.

Another pressing problem is that presented by orphaned grandchildren who are survived by an uncle (*i.e.*, by a son of their grandparent). In such cases these grandchildren, who may well have been supported by the grandparent in his lifetime, will be completely excluded from any share in his estate by their uncle—on the principle that "the nearer in degree excludes the more remote". This, again, may well have been a tolerable principle when the family was a strongly cohesive unit in which nephews and nieces would normally be treated on an equality with sons and daughters; but it is open to manifest abuse, and consequent hardship and suffering, today. It was for this reason that the principle of representation was introduced in Pakistan by the Muslim Family Laws Ordinance, under which orphaned grandchildren will step into their father's or mother's shoes and inherit what he (or she) would have taken had he been still alive when the grandparent died. But this principle, although it provides for the need of the orphaned grandchildren, makes chaos of the Islamic system of inheritance. Of this a single illustration must suffice. Should a man die survived only by a daughter and a deceased son's daughter, the daughter will initially take one-half and the son's daughter one-sixth, under the traditional system, and finally—by the application of the principle of the return—three-quarters and one-quarter respectively; whereas, under the Pakistani law, the son's daughter will receive twice the share of the daughter.

It was to avoid such a distortion of the Islamic law of succession that the Egyptian reformers dealt with the problem of orphaned grandchildren under the Law of Testamentary Bequests, 1946, rather than the Law of Intestate Succession, 1943, by the ingenious device which is commonly

called "obligatory bequests"—and this reform has been accepted, in a modified form, in Tunisia, Syria and Morocco. The principle is this: that the grandparent is commanded, in these circumstances, to make a bequest of the share a deceased parent would have taken, had he or she survived, to such grandchildren as would otherwise have been completely excluded from inheritance, provided always that this does not exceed the bequeathable third (and also provided he has not made them an equivalent gift *inter vivos*). If the grandparent in fact fails to do this, then the court will act as though he had; and in any case these "obligatory bequests" will take precedence over any other (or "voluntary") bequests. Where there are more than one orphaned grandchildren, moreover, the parent's share will be divided between them on the intestate priciple of "double share to the male."

This ingenious device makes adequate provision for the grandchildren without in any way upsetting the basic principles of the law of intestate succession. It finds its juristic justification, primarily, in the Qur'anic "Verse of Bequests" (see above) which commands a Muslim to make bequests in favour of "parents and relatives", and in the view of a number of early authorities that this verse, however much it may have been abrogated in regard to those relatives who were subsequently accorded a fixed share in the "Verses of Inheritance", still makes it incumbent on a Muslim to make provision by will for any close relative who is not otherwise provided for. Next, it rests on the view of Ibn Hazm, some dicta attributed to very early jurists, and one report in the school of Ahmad ibn Hanbal, that where a testator fails to make such an "obligatory" bequest it should nonetheless be executed out of his estate. Finally, it claims that the selection of orphaned grandchildren as the only relatives in whose favour such action is to be taken, and the details as to what they are to be given, represent a legitimate exercise of the ruler's discretion in accordance with the public interests.

Other possible problems in the law of testate and intestate succession are less important and could, in any case, be solved very easily. Among these may be listed :

(*i*) The total exclusion, under *Hanafī* law, of brothers and sisters of the full or consanguine blood when in competition with a paternal grandfather. This often means that all the estate will pass to an old man, who may be very near the end of his life, and then to his surviving sons—and that a brother or sister of the original deceased will get nothing whatever, whether immediately or ultimately, from his brother's estate. But this was not the view of the Two Companions of Abū Hanīfa or of any of the other three *Sunnī* schools, so the view attributed to Zayd ibn Thābit, 'Alī ibn Abī Tālib or Ibn Mas'ūd in this matter (or, indeed, some such combi-

nation of these views as has been preferred recently in Egypt and elsewhere) could easily be adopted.

(*ii*) The total exclusion from intestate succession, in both the *Hanafī* and *Shāfi'ī* systems, of one who has accidentally killed a person from whom he would otherwise have inherited. In the *Hanafī* system this takes the ridiculous form that one who has caused his death by a direct act, however unintended by him or distressing to him this may have been, will be excluded, while one who has quite deliberately contrived his death by indirect means will be permitted to inherit, and thus profit from his villainy. Here the *Mālikī*, *Hanbalī* and *Ithnā 'Asharī* principle that the sole criterion will be the matter of intention seems greatly preferable, and this has now been accepted in a number of Arab countries.

(*iii*) Again, the *Hanafī* principle that a baby who is still alive when half-born, but who then dies, is entitled to inherit and pass inheritance—and that this is also true of an embryo born dead as a result of an assault (deliberate or accidental) on the mother—seems less convincing than the principle followed in all the other schools: namely, that a baby must be alive when it has wholly emerged from its mother's body if it is to inherit; that the embryo born dead will in no circumstances succeed; and even (according to the view of Rabī'a ibn 'Abd al-Rahmān and Layth ibn Sa'd) that the special blood money (*ghirra*) payable in such circumstances will not be regarded as paid to the embryo, and thus to its heirs, but to the mother, in compensation for the loss of what is still virtually a part of her own body.

4. *Custody of Children* (*hadāna*) : In the *Hanafī* system a divorced or widowed mother is entitled to the custody of her children only up till the age when they are regarded as being able to dispense with the care of women; and this is fixed, in India, as the age of seven in the case of a boy and nine in the case of a girl. This rule causes great anguish to the mothers concerned, who frequently undergo the traumatic experience of having children, for whom they have come to have a very deep affection, wrenched away from them; and it may be still more injurious to the children concerned. Recent legislation in Egypt has left it to the discretion of the courts to leave these children for two further years in their mothers' care, if this seems to be in the best interests of the child, on the basis of another interpretation of the basic *Hanafī* principle. But it is relevant to remember that the dominant *Mālikī* doctrine does not end the period of a mother's custody until the age of puberty in the case of a son and marriage in the case of a daughter; and there can be no valid objection to the adoption of *Mālikī* principles (as in the Dissolution of Muslim Marriages Act) where these are better suited to the needs of society. It is suggested, therefore, that the

termination of the period of custody should be left to the discretion of the courts, and that the best interests of the child should be the overriding criterion.

Finally, what is the best method of introducing, in India, such reforms as may be considered necessary? There are a number of alternatives.

(*a*) One method, which would concern only a handful of Muslims—for the present, at least—would be by extending to those who so choose, whether married or unmarried, the sort of option provided at present by the Special Marriage Act, 1954. A Muslim who so desires can today contract a marriage, or register a marriage already contracted, under this Act, and thereby ensure that the "civil" law of the Act, and not his personal law, will prohibit a bigamous marriage, will govern any question of the dissolution of his marriage, and will also cover all questions of testate and intestate succession. So there would seem to be no convincing reason why a similar option in regard to the law of testate and intestate succession should not be made available to all citizens of India—married or unmarried, and irrespective of religion. The same sort of option might also be open to Muslims who desire to adopt a child. These several matters might, indeed, be brought together in the form of a basic civil code, of secular inspiration, to which those dissatisfied with their personal law might opt to submit themselves.

(*b*) Another possible method of reform would be by judicial decision rather than legislative enactments. Examples of how this method has already been used in India can be found in the judgment of Justice Mahmood in *Jafri Begum* v. *Amir Muhammad Khan*[9], which ran completely counter to the basic *Hanafi* rules applicable to the administration of a deceased person's assets on death, and in the much more recent judgment of Justice Krishna Iyer in *Aboobacker Haji* v. *Mamu Koya*[10] regarding a woman's right to a judicial divorce on the ground of the breakdown of her marriage. It is true that the Privy Council set its face against any freedom of the judicature to pick and choose between the different schools or jurists or—still more—to put its own interpretation on the ancient texts. But this attitude has been expressly repudiated in Pakistan in *Khurshid Jan* v. *Fazal Dad*[11] and, implicitly at least, by Justice Krishna Iyer in India.[12]

9. (1885) 7 All. 822.
10. *Supra* note 5.
11. P.L.D. 1964 Lahore 558.
12. *Supra* note 5.

The disadvantages of such judicial law-making are, I think, obvious : first, that it leaves too much to the discretion of an individual judge; and, secondly, that it makes for uncertainty in the law. The first of these drawbacks can, however, always be remedied on appeal; and a growing body of case law would ultimately go far towards remedying the second also. But the advantage in this method of procedure is equally obvious: that it can effect a radical change in the law without the argument, dispute and popular turmoil which may attend legislation on some of these matters. It is, however, noteworthy in this context that the Indian courts have already gone quite a long way in discouraging polygamy (which they clearly regard as socially undesirable). Thus Dhavan, J. held, in *Itwari* v. *Asghari*,[13] that the fact that a husband has taken a second wife, in the absence of some "weighty and convincing" explanation, raises a presumption of cruelty to the first wife, and will justify the court in refusing a decree of restitution of conjugal rights should she refuse to continue to live with him. Similarly, a number of judgments have been given granting a wife who refuses to live with a husband who has married a second wife, or who keeps a mistress, maintenance under section 488 of the Criminal Procedure Code—on the grounds that his behaviour has given her just grounds for her refusal.[14] It is also significant that, under the All India Services (Conduct) Rules and the Central Civil Services (Conduct) Rules, no government employee may contract a second marriage while his first is still in existence without prior permission of the government, nor may any female employee marry any person who already has a wife without first obtaining the permission of the government.[15]

The most obvious method, however, is legislation on the model of the Dissolution of Muslim Marriages Act, 1939. But it is significant that Muslim opinion in India was prepared for this reform by the writings of Maulana Ashraf Ali Sahib and the approval with which these were greeted by a number of the '*ulamā*'; and it is to be hoped that the proposed working party, together with the '*ulamā*' whose cooperation the working party propose to invite, will play a similar role in paving the way for such further reforms as seem necessary. Some of these might well take the form of an expansion of the Dissolution of Muslim Marriages Act, for there is no fundamental reason that I can see why this should be confined to the circumstances in which a Muslim wife may demand a dissolution of her marriage; instead, it could be made to include some additional grounds on which a wife may petition the court for a divorce; suitable restrictions on the right of a husband unilaterally to repudiate his wife; and provisions, in all cases,

13. A.I.R. 1960 All. 684.
14. See a review of the case law on this subject by Krishna Iyer, J. in *Shahulameedu* v. *Subaida Beevi*, 1970 K.L.T. 4.
15. Rule 18, in both cases.

for prior reference of any matrimonial discord to a court of law, to some suitable administrative body, to a special form of "family court" or to some "council of conciliation"—without which a formula of repudiation would not be recognised by the courts. And I may remark in passing that it would seem to me much more logical to deal with those cases in which a wife seeks the dissolution of her marriage because her husband has falsely acoused her of adultery, not under the aegis of the ancient system of *li'ān* (which is covered by section 2 (ix) of the Act), since this is not really applicable as such in modern India, but rather as instances of cruelty [under section (viii) (a) of the Act].[16]

Many of the points mentioned in this paper could, moreover, best be covered, in my view, by legislation enforcing the registration of all marriages by means of a standard contract of marriage, which could include a series of suitable stipulations. There is excellent authority in the *Qur'ān* itself for the reduction to writing of all contracts, and marriage is essentially a contract in Islamic law. Failure to register a marriage would then, of course, always entail a criminal sanction; but it might also be provided that an unregistered marriage would not be given any recognition whatever by the courts—just as a divorce pronounced contrary to the provisions of the law or to some stipulation included in the marriage contract would not be accorded any legal recognition.[17] The stipulations concerned should, moreover, not only provide for the deliberate limitation of some of those "rights" (which are certainly not *duties*) accorded by the law, as traditionally applied, to a Muslim husband, but also for granting corresponding rights to demand the dissolution of a thoroughly unsatisfactory marriage, under similar conditions, to a Muslim wife—in the form of a delegation to her by her husband of his right of repudiation. This represents the ingenious method followed by the Iranian Family Protection Act, 1967, which puts the wife, in practice, on an equal footing with her husband while yet preserving the form and ethos of the traditional law—as does also the suggestion about a standard contract of marriage.

16. This has been persuasively argued by my colleague, Dr. Doreen Hinchcliffe, in a Ph. D. thesis (which has not yet been published) on *The Islamic Law of Marriage and Divorce in India and Pakistan Since Partition (1971)*.

17. As a solitary exception, the children of such a union might be given the right to go to court to claim legitimate status.