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Changes in Muslim Personal Law: Can Sharia Law be Modified?
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In this chapter, the researcher has tried to analyse the reforms in Muslim Personal Law. For meaningful research, it is very important to discuss the position of Shariah in context of reforms. Ijtihad and sources of Islamic law have been taken into account. Emphasis has been laid on constructive analysis and attention is given to amendments during the times of Caliphs and Imams.

The problem of reform in Muslim Personal Law in India has assumed a highly controversial and complex nature. The opponents of reform regard the Shariah law as absolutely immutable, while reformists reject their theory. The later feel that since the Shariah law had been amended by the Muslim jurists themselves, during the first few centuries falling the emergence of Islam and many of its principles had been reformed, in the recent past, in several Muslim countries. There should be no objection to its reform in India as well. The present chapter deals with this problem –

(1) Whether it is permitted to have any reform in Islamic Shariah law,
(2) If it is so then, what should be the mechanism for such a reform.
(3) What are the areas where such reforms are required in India.
A. Whether it is Permitted to have Any Change in Islamic Law

Going through the history of Islam we find that the Caliphs and Imams did very much juristic activity in early days of Islam. During the life time of Prophet Mohammad (SAW) there was no problem at all as Prophet Mohammad (SAW) was guided by Almighty Allah through Angle Gabrael, whenever he faced any problem. That is why it is believed by the Muslims that Qur'an contains the direct words of Almighty Allah and the Sunnah—whatever Prophet (SAW) said, did or tacitly approved, contains the indirect word of Allah. After the demise of the Prophet, the Rightly guided Caliphs strictly followed the injunctions of the Qur'an and the Sunnah. Whenever they found nothing in the Qur'an or the Sunnah they exercised their own 'Ray' i.e. reasons and judgement. Pages of Islamic History reveals that reforms were frequently introduced in the Shariah law by the ancient jurist themselves. Caliphs Umar and Ali had overruled some principles of law settled by their predecessors. Imam Mohammad Al-Shaybani had set aside some of the verdicts of his master Imam Abu Hanifa: Ghazzali had deviated from certain principles of law laid down by Imam Shafei; Shaybani had dissented from some of the opinions of Imam Malik and so on.

These are the facts of Islamic history which needs some explanation.

The Prophet (SAW) of Islam had not come with any 'Corpus juris'. Neither Qur'an, nor the Sunnah had furnished any
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exhaustive code of law. These ‘nusus’ had provided only the fundamentals of Shariah law. Formation of detailed legal rules was left to the Prophet (SAW) during his life time. After his demise, the mission was taken over by the Caliphs who were the administrative-cum-ecclesiastical heads of the Islamic state, and, at a latter stage, by the Ulema, jurists and interpreters of revealed law. Through the media of their judgement and fatwas, they filled the scriptural skeleton of the law with flesh and blood.

The tool employed, for the purpose, by the interpreters of law was the exercise of reason the validity of which had been decreed by the Prophet (SAW) himself. The exercise of reason assumed in the hands of jurists, the form of various sources of Islamic legislation. Some of these sources were:

1. *Qiyas* (Analogy)
2. *Istehsan* (Equity)
3. ‘*Urf* and ‘*Ada*’ (Custom and Usage), and

Muslim law, thus, underwent a long process of evaluation. The fabric of law was woven and re-woven with the spindle of juristic interpretation or administration. During these period of development, Islamic law remained a law in the making. In this period, if a latter jurist or interpreter overruled the law settled by the predecessors, it constituted a step towards the development of law. Difference of law in this period of Islamic legal history,
infact, formed part of the process of legal evolution. So when Umar Farooq set aside Siddiqui ruling, abrogated Shaybani a Hanafi precedent, Ghazzali overruled a Shafei principle, Tufi dissented by a Hanbali verdict or Moosa Kazim deviated from Jafari ruling, each of the doctors of law aimed at the further systematization of legal principles. All this juristic activity was based strictly on the interpretation of the mandatory laws revealed by the Qur'an or settled by the Prophet (SAW) under divine authority.²

Due to the above mentioned juristic activity several schools of Islamic law were established in different parts of the Muslim world. These school were based on the same sources but having conflicting doctrines in the matters of detail keeping in view the public interest or public welfare.

The study of the Holy Qur'an leads us to the inference that there exist only two alternative ways of human behaviour. One consists in the obedience of the Holy Prophet (SAW) and the other in obeying one's own desires and urges, the former is the truth path while the later leads astray and is 'zalal'. no third alternative is available, Allah ordains:

And now we have set thee (O Mohammad) on a clear road of (our) commandment. So follow it, and follow not whims of those know naught. Lo! They can avail thee naught against Allah.³
Another verse exhorts the Holy Prophet (SAW) in unequal terms to act according to whatever has been revealed to him. Any deviation from this course amounts to leaving Allah and opting for the obedience to protecting freinds beside Him:

"Follow that which is sent down unto you from Lord, and follow no protecting friends beside him. Little do ye recollect."4

Elsewhere in a verse the obedience to Allah and His Prophet (SAW) has been defined as an obligatory course of action and a reference back to Allah and His Prophet (SAW) in the event of disputes has been held as an essential ingredient of Faith (Al-Iman):

"Oye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the Messanger if ye are (in truth) believes in Allah and the Last Day. That is better and more seemly in the end."5

The Holy Qur'an has expressly stated in the following verse that a believer has no option left once Allah and His Prophet (SAW) have taken a decision on any matter:

"And it becometh not a believing man or a believing women, when Allah and His Messenger have decided an affair (for them), that they should (after that) claim any say in their affair".6
The Holy Prophet (SAW) has similarly termed those constituting the greatest trial of the Ummat who ignore Divine revelation and alter the permissible into prohibited items on the basis of their own desires and intellectual disposition.\(^7\)

The Holy Prophet (SAW) has, thus observed:

"My people will be divided into numerous groups; the most corrupt will be those who decide Deen according to their views – prohibiting on that basis what Allah has permitted and legalising what Allah has prohibited?\(^8\)

Thus, the Qur'anic verses and sayings of the Holy Prophet (SAW) corroborate the view that we, as Muslims, have no option to evade or bypass the Shariat and instead follow our own self made laws and codes of behaviour. This always holds true whatever the needs of secularism and national integration. And what possible justification can be offered to destroy distinct cultures, languages, faiths and religious teachings, after all these high sounding promises to ensure freedom of religion and guarantee protection to all these?\(^9\)

B. Mechanism/Procedure for Change in Islamic Law

Now we should discuss the second problem. Is there any rule for alteration in the Shariat laws to accommodate changing needs of time, modern inclinations and the revolution in the social and political setup? In this connection, let us understand clearly, that a
Muslim is not free to adopt any course of action in violation of the limits set by Almighty Allah and the path shown by the Prophet Mohammad (SAW). If a Muslim violates the limits prescribed by the Qur'an and the Sunnah it means he had transgressed the limit set by Almighty Allah then he would commit a sin which a true believer would never like to adopt. Thus, the adoption of a course of action in matters of religion independently of text of the Shariat and its principle would certainly defeat its objectives and open the way to revolt against Islam and Divine commandments. It does not mean that the Islam ignores the contemporary trends, social changes and the needs of the time. If the Shariat fails to take due congnizance to new situations and the inability of scholars of Islam to provide answer to the newly emerging issues and problems, then in course of time it would generate dissatisfaction with the religion. In the words of Allama-Ibn-Qaiyem:

"I am of the opinion that right path lies in giving adequate and full consideration to the objectives of the Shariat and the understanding the spirit of its laws, on the one hand, and undertaking a search for finding solutions to the new problems and resolving the difficulties arising out of the changed in the light of the general principles of the Shariat, similitude and precedents on the other..."

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It is this very ‘path’ that has been chosen by the companions of the Prophet (SAW) themselves and by the eminent Ulama in all stages of Islamic history. It has been reported about Hazrat-e-Abu Bakar that when some problem came before him. He first of all searched for its solution in the Qur'an and Sunnah and failing to get an answer in these two basic sources he would call a meeting of the companions of the Prophet (SAW) for advise and would decide the matter in the light of these consultation (i.e. Ijma).10

And Omar used to do like wise. If he failed to get anything in Al-Kitab and Al-Sunna he would ask : ‘did Abu Bakr decide anything in this matter’? And if there happened some decision of Abu Bakr in this matter. He would decide accordingly otherwise he would call a meeting of the knowledgeable among the people and consult them and if they agreed on some opinion he could decide accordingly,11

More ever Hazrat Umar has indicated the procedure of Ijtihad in a letter to Abu Musa Ashari in the following words :

“When you come across any issue which, according to your knowledge has not been pronounced upon by the Book (of Allah) and the Sunnah and you are yourself clear of your mind as to what ruling would be proper in this regard try to grasp the issue first. Find out similar and analogous cases. Then reason analogously, draw parallel and go in for what in your
opinion would be the (ruling) most desirable to Allah and nearest to the truth in that regard.\textsuperscript{12}

From the above ruling of Hazrat Umar it is crystal clear that he has laid down a definite procedure to deal with the new emerging problem in future. The procedure may be stated in following words:

"The textual or reported precedents of decisions or laws relating to different issues that are available in \textit{Shariat} should be kept in view so that issues and problems on which the text are silent may be decided by striking a similitude between the former and the latter. At the same time the subtle difference between the above mentioned two categories of precedents has to be kept in view to avoid doubts."

In addition to this he has pointed out the fundamental principle that the spirit of \textit{Shariat} laws and its objectives should never be lost sight so that in the process of drawing conclusions within newly emerging issues the interests of the \textit{Shariat} and its aims and objects are not defeated."\textsuperscript{13}

It is also evident from the life account of the companions of the Prophet (SAW) that they adopted the same procedure. The \textit{Ulema} and \textit{Mujtahideen} in every age had been similarly dealing with problems relevant to these periods keeping with the view of the objective of \textit{Shariat} and delicacies of their time. The books
on Islamic jurisprudence are full of these examples. Hazrat Umar himself took numerous decisions taking into account the spirit of *Qur'an* and *Sunnah* and the expediency of this time. For example both during the period of Prophet (SAW) and Abu Bakr, ladies visited the mosque but Hazrat Umar could foresee that the said practice would lead to evils. The changed circumstances led him to the conclusion that the innocence of the eyes characteristic of the time after Prophet (SAW) was no more to be found. Keeping in view the difference between the desirability of visiting the mosque and prevention of vice he stopped the visits of ladies to the mosque by an order. Likewise he accorded due consideration to the importance of *jehad* and the necessities of war on one hand, and the need to safeguard Muslim society against corrupt practices on the other and set down four months as the maximum period for which warriors could stay away from home. This is why the author of the book ‘*Al-Qadah-fi-Al-Islam*’ has observed as follows:

"Umar strove to grasp the end in whose regard the verse was revealed and tried to understand the purpose for which the traditions came down and adhered to the substance and not the letter (thereof)."

Similarly one more example of the *Ijtehad* is the problem of paid employment for religious duties pronouncing illegal by the
early jurists. Later the system of collective treasury fell into disorder, and the conditions worsened to such an extent that the only alternative to legalising it was the risk of extinction of Qur'anic education – a havoc which could not be allowed to happen. The scholars of the time appreciated its urgency and look into the account the absence of any system of stipends for the collective treasury and also the lack of public zeal to ensure its continuance through voluntary contribution. In view of the above the Ulema and the religious elite of Bulkh legalised the acceptance of wages for the teaching and education of Qur'an for in the alternative either the teachers of Qur'an and their families would be exposed to the danger of liquidation and the ruin of their families or the Qur'anic education itself could go bydefault. Subsequently payment on such religious services of symbolic significance as the call as to prayer and imamat were also ruled as permissible.15

It is stated in Fatawa-e-Hamidiya that:

"So the later people pronounced on its permissibility and some of them allowed also employment for call to prayer and imamat for the above stated reason, and because both of them are symbols of the Deen and in their default lies the demolition of Deen. These are examples of exceptions made for necessity since necessity legalises what is not permissible."16
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Thus we are exercising many new situations. They call for an answer in the light of the Qur'an and Sunnah. Some of these newly emerged situations and problems are unprecedented, and hence the books of Islamic fiqh are silent in this regard. While others, though not new, yet are accompanied with entirely unique circumstantial context and hence require re-appraisal in the light of Qur'an and Sunnah and a new solution harmonious in the interest of Shariat. Both of these are only different aspects of the function of Ijtehad.

Now the question arises the reform of Muslim Personal Law in India. Shariah, the code of Islamic law is generally regarded as immutable. The fundamental principles of Shariah are not open to reconsideration by man. In the legal theory of Islam, Allah is the only law giver and there exist no other basis of the legal fabric than the Divine will. While accepting this theory of immutability it should be clearly understood that what is immutable is actually the ‘grundnorm’ of the Shariah and not any of its varied interpretation.

C. How to Effect Changes in Islamic Law

It is, thus, clear that Islamic law by its very nature is amendable and changeable. The principles of Islamic jurisprudence, the numerous schools of thought in Islamic law and the practice of theologians throughout the practice of Islam show that Islamic law has always been flexible and adoptable, in order
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to meet the legitimate and genuine requirements of the people at a
given time and under specific conditions and circumstances.
However, Islam being a particular way of living with certain
objectives and principles guiding human activities and ambitions
*it is not to say that change of every kind would be acceptable in
Islam*. For the purpose of reconstruction of any particular
principle of Islamic law, one has to make sure that:

i) The change in issue is not contrary to the basic teachings and
objectives in Islam,

ii) Is the change is really in the interest of the society, leading to
its welfare, happiness and prosperity, and

iii) The change will have no evil repercussions in the near or
distant future.\(^\text{17}\)

If the above three conditions, if satisfied then one may
proceed to find out the ways and means to make reforms in
Islamic law. Following procedure may be adopted for this
purpose.

D. Method of Ijtihad

According to Islamic law there are four basic sources of
Islamic law:

1. *Qur'an* (Book of Allah),
2. *Sunnah* (Traditions),
3. *Ijma* (consensus of opinion) and
The Qur'an is the fundamental source of Islamic Shariah and direct revelation by Almighty Allah (SAW) to the Prophet Mohammad (SAW). It consists of 114 chapters and the number of verses are 6666. The versus are of two kinds:
(a) verses which are mandatory, fundamental and of established meaning and, as such, the foundation of the Book, and
(b) the verses which bear allegorical meaning.

This implies that the interpretation of the verses of second category may be different from man to man, but no interpretation should be contrary to what has been laid down in the fundamental verses.18

Sunnah, is, what the Prophet (SAW) said, did or tacitly approved. It is indirect revelation or the indirect words of Almighty Allah. Although the main task of the Sunnah is to explain the meaning of the Qur'an, no Sunnah will be acceptable which, in content or spirit, stands opposed to the plain statements of the Qur'an.

Ijma and Qiyas together constitute the method of Ijtihad, a living source of legislation in Islam. They differ from each other in that the former is a collective opinion while the later is an individual one. They are sanctioned as sources of Islamic law in the Qur'an as well as in the Sunnah, and are to be made use of in cases where there is no explicit command of God or Prophet (SAW).19
It may be noted for the purpose of our discussion that though the Qur'an, Sunnah, Ijma and Qiyas are all accepted as main sources of Islamic jurisprudence, a point of difference between them is that the former two are recognized as absolute arguments while the later are arguments obtained by exercise of reason and hence not absolute. This is indeed a very significant point because it suggests that the door is still open for reassessment and re-evaluation of arguments which fall in the second category, in a given changed condition of the society. Such a reassessment or evaluation amounts to *ijtihad*. The main tasks of a *Mujtahid* are:

(a) to suggest any change or amendment, if possible, in the law prescribed by the old doctors of Islamic jurisprudence, in order to meet a new situation, and

(b) to find a solution to new problems arising out of the changed social and economic conditions of the world.

In the former case the *Mujtahid* will have to go deep into the basis of particular principles. If the basis is found to be a verse of the Qur'an or Sunna a *Mujtahid* will have to see if the injunction concerned is *Nasus*, i.e., a clear verdict by God or by the Prophet (SAW) without assignment of any reason.

If so, change and no amendment would be possible. If, on the other hand, the particular injunction mentioned in the Qur'an or a Sunnah is based on a reason specified therein or indicated
by the Prophet (SAW) or by one of his eminent companions (either though words or by action), then it would be the task of a Mujtahid to see whether that particular case would be applicable to the new situation which he has to face. If a Mujtahid finds that a principle of Islamic law is not based on the Qur'an or a Sunnah and derives authority from mere conjecture and reasoning of a jurist interpreter, then he is entitled to express a different opinion, provided he is well-equipped and is in a position to argue his viewpoint. Thus, he can possibly do even when an old jurist has based his decision on an interpretation which he put to a verse of the Qur'an or to a Sunnah according to his own understanding and that interpretation could be refuted on mere reasonable and logical grounds.

Some of the important principles of Ijtehad are discussed below. Custom and usage play a very important role in the formulations of laws it is essential that a person who is not familiar with the custom and usage of the time is not eligible to give rulings on Islamic law. Some eminent jurists of Islam have discussed the importance of custom in the development of basic principles of Islamic law. Shah Waliullah of Delhi is one of them. Regarding custom and usage Imam Abu Yusuf, an important jurist of Hanafi School declares:

"One who is not familiar with the custom of his time is not permitted to give a religious verdict."

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Public interest is also a deciding factor in *Ijtehad*. Things good for the human society (Masaleh-al-Mursalah) constitute another factor determining the merit and value of an issue to be decided by the process of *Ijtehad*. This method of deducing rules from the Text Qur'an and Sunnah is very prominently used by the Maliki School. In addition to the above there are certain other rules which are necessary and which provide guidance in the process of *Ijtehad* are as follows:

a. Permisibility is at the root of all things;

b. He who is caught between two evils must prefer the lesser one;

c. A safeguard must be provided against an anticipated nuisance;

d. Necessity makes forbidden things permissible;

e. Prevention is better than cure;

f. Religion is an easy thing to be practised;

g. God does not impose upon any person a duty which is beyond his capacity.\(^{21}\)

Further, social harmlessness of a thing, as stated by the Prophet (SAW), also counts in Islamic legislation. In this connection benefit may be taken even of the practice and experiment made by non Muslims.\(^{22}\)
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E. How to Reform Muslim Personal Law in India?

Under Islamic law although the injunctions laid down in the Qur'an and the Sunnah can not be changed by any human agency but where there is ambiguity and where a new problem has arisen then the recourse may be taken through Ijma and Qiyas which are the two methods of Ijtehad. Ijma is the collective method of Ijtehad while Qiyas is an individual effort.

Coming to the main problem of our discussion that is the Muslim Personal Law and Uniform Civil Code. We must be very clear that there are certain aspects of Islamic law which are said to be causing hardship to the Muslim community in general and women in particular. It is also alleged that there is a gender discrimination in Islamic law. Let us see what are those important areas where the problem is most burning and where certain kind of reform is required. Following are the main areas where reform is required.

1. Polygamy
2. Triple Divorce
3. Succession and Inheritance

1. Polygamy

Perhaps the most burning problem of our times is polygamy. It is said that the Muslim personal law gives liberty to the Muslims to contact as many as four wives at a time. But if we go through
the Qur'an and the history of Arabia we find that according to Qur'an, monogamy is the general rule and polygamy is an exception and allowed for certain exigencies. This is quite evident from the very text of the Qur'an in which this provision had been made. The verse relating to polygamy runs as follows:

1. “If ye fear that ye shall not deal fairly with the (female) orphan wards under you, (do not marry any of them),

2. but marry other women whom you like, two or three or four; and

3. if ye shall fear the ye shall not act equitably, then marry one only (from free women) or

4. from the female captives under your charge. This will facilitate just dealings on your part.”

The important point to be carefully noted here is that this verse does not enjoin polygamy. It only permits polygamy and that permission, too is given on a very strict condition, i.e. if one can be equitable between the wives. If one can not do justice between the wives he is forbidden to marry more than one wife. It may be noted that this verse was revealed after the battle of 'Uhad' when the Muslim community was left with many orphans, widow captives. As Abdullah Yusuf Ali in his translation of the Qur'an points out that:

"Their treatment was to be governed by principles of
the greatest humanity and equity. The occasion is past
but the principles remain”.24

If we go into the history of the Islam then we find that before
the advent of Islam people generally lived in an age when fighting
was the order of the day with the result that the number of men
was much less than that of women. Such women were
unfortunately left to live at a destitute and miserable life. This state
of affair largely contributed to the continuance of the institution
of polygamy. Such condition continued to prevail during the early
period of Islamic history. It is no secret that Muslim were in state
of perpetual war against an enemy bent upon there extirpation
women lose their husband and young children lose their fathers. It
was in order to meet such emergencies than Islam permitted a man
to have wives more than one. There may be other circumstnaces,
too, necessitating polygamy.

So polygamy in Islam is a remedy – is an exception rather
than the rule. It has its uses and abuses. Islam guides against the
later and allows the former under restrictions and within stringent
limits. Polygamy comes under that category of legal principles
within (Ahkam) which are called Mubahat (permissibles) and as
such, like other permissible. If there comes a time when a certain
permissible things begins to be abused and misused for nefarious
ends shattering the moral structure of the society, then, an Islamic
state or a Muslim society, as the case may be, would have every
right to interfere in the matter by stopping it temporarily and putting some restrictions on its operation. In this connection, rapid growth in the population of mankind other social and economic repercussions of the practice of polygamy may be lawfully given consideration. However, the interest of those who are genuinely in need of having a second wife must not be jeopardized.

2. Triple Divorce

Another important area where the need of Ijtihad arises is the divorce in general and triple divorce in particular. Allowing the practice of triple divorce in India is not in conformity with the true Islamic law but the practice, due to certain historical and legal reasons, have found a way in India where majority of the Muslims follow the Hanafi School of jurisprudence. There is no need to go into the historical reasons of triple divorce yet it is an established fact that the overwhelming majority of the Muslims in India consider triple divorce, due to their ignorance, as the only means of divorce available to them. They use it frequently and thus cause hardship to thousands of families including themselves.

Now we would see does Islam permits any reform or any restriction on triple divorce and its solution under Islamic law? Divorce, another Mubah (permissible thing), was described by prophet as (Abghad-Al-Mubahat), the most destestable of the permissible things. The practice of the unscrupulous of the
Muslim community in this regard has been disastrous to a sound social order causing misery to innocent women without any fault on their part. It is, therefore, a demand in certain sections of community to consider the Islamic law of divorce with a purpose of finding out whether any changes could be introduced therein. There is ample scope for *Ijtehad* in respect of this problem also. First, it should be kept in mind that according to the *Qur'an*, in all disputes arising between husband and wife which may lead to breach – two judges are to be appointed from the respective people of the two parties.²⁷

These judges are required to try to reconcile the parties, failing which a divorce, or *khula* would be the last resort. This implies that though it is husband who has to pronounce a divorce, yet certain limitations are placed upon the exercise of this right and he is not left free to use it arbitrarily. Ali, the fourth Caliph is reported to have told a husband who was under the impression that he had the sole right to repudiate his wife that he would have to abide by the judgement of the judges appointed under the verse referred to above. The Prophet (SAW) also is reported to have interfered in the matter, some times by disallowing a divorce pronounced by a husband and so restoring the marital relations and some times by treating three divorces at one. This shows that the authority constituted by law has the right to interfere in the matter of divorce. As such, Muslim jurists of any age will be entitled to make an amendment or effect a change in the existing law of divorce in order to meet an emergency of these time.²⁸
The consideration a possible change in the law of divorce will be focussed on three points:

a. Whose pronouncement of divorce would be legally valid?

b. In what circumstances a divorce would be valid or invalid?

and

c. What procedure of the pronouncement of divorce would be deemed as valid?

These points have been extensively discussed by our eminent jurists in the books. Their discussions certainly provide a wide scope for a Mujtahid in our time to exercise his own judgement and discretion in regard to the modern problems of divorce.

As far as the women's right to divorce is concerned this right is given to her and is called as Khula. This is the most important right available to a Muslim woman as for as the dissolution of her marriage is concerned. It is almost equal to the right of husband to dissolve his marriage through divorce. The only difference between the husband right to divorce and wives right to divorce is that if the husband does not oblige the wife and refuses to divorce her through Khula she has to go to the Qazi or the court as the case may be. But unfortunately in India this right is not available to Muslim women due to the judicial misinterpretation of the rules relating to Khula. This lacuna which is causing hardships to thousands of Muslims women may be rectified by a pronouncement of the Supreme Court or by amendment in law by the Parliament.
3. Succession and Inheritance

The third most important aspect of Muslim Personal Law which is often criticised by the so called enlightened and progressive Muslims and the proponents of a Uniform Civil Code is the share of female in property matters and the exclusion of the grandson from the property of his grand father if the father predeceases. The problem of inheritance and the shares is given in Qur'an itself. If any supposed injustice is done on the basis of clear cut verdict in the Qur'an or the Sunnah then no Muslim is authorised (rather no human agency is authorised) to effect any change in that. If any rule of inheritance has been given by any school on the basis of Ijtehad then that may be amended by a latter Ijtehad fulfilling all the necessary requirements of a valid Ijtehad.

To conclude the whole discussion we can say that no human agency is competent to change or amend any of the explicit provisions of the Qur'an and the established practice of the Prophet (SAW). Every Muslim is bound to have faith in them and to severely follow them. A Muslim is also not free to interprete the verses of Qur'an and the traditions of the Prophet (SAW) which run counter to the unanimous interpretation of our predecessor. Within the limits prescribed by these Ulema the Muslim Personal Law may be reformed, if the circumstances so demand. Following are certain guidelines for proposed reform in Muslim Personal Law in India.
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1. A list should be prepared enumerating all such laws which give rise to complications and difficulties and which call for solution.

2. If any one of the laws enlisted above are explicitly provided in Qur'an and Sunnah, it should be presumed that the difficulties and complication arise only because of lack of proper understanding compliance, or that the society needs to be morally toned up. The possibility may, however, be considered of subjecting these provisions of certain condition and limitations if they did not go against the spirit of the Qur'an and Sunnah. In most of the Muslim countries the changes which have taken place is that they have replaced the one provision of any school of Islamic jurisprudence and by any other provision of other school. In this regard we should act upon the advise of Shah Waliullah, that is, of the many opinions and verdict we should prefer that which is more in tune with the spirit of the Qur'an and the Sunnah and which may solve the problems with more satisfaction.

In this regard Maulana Syed Hamid Ali has formulated the procedure:

"The need of the hour, therefore, is to constitute a committee consisting of Ulema representing various Muslim sects and organisations and Muslim jurists. This committee be entrusted with the task of
preparing a draft, leading eventually to the final
drafting after a free and full discussion over it." 31

From the Islamic point of view this draft will assume the
status of law code for Muslims to abide by, yet because of the
dispensation of things in the country which requires every such
code to get the sanction of the Parliament before it can be
enforced by the law courts, it will have to be referred to the
Parliament. The effort will have to be made to get the finalised
draft passed without any amendments. But if any amendments is
deemed necessary it should be referred back to the aforesaid
committee of Muslim Ulema and jurists. 32

Summary

Reformation in Muslim Personal Law is a controversial issue,
dividing the community for and against such a process. To
address the issue meaningfully, several aspects as the permission
to make any change and the manner for that shift including the
identified areas must be considered.

When Prophet Mohammad (SAW) was at the helm of affairs,
there was no problem. After his demise, Caliphs followed Qur'\'an
and Sunnah in letter and spirit. They also applied their mind and
judgement in this regard. Shariah law was amended several times
during the Caliphate of Umar and Ali. Again in later period, several
Imams interpreted certain principles according to their analysis.
In fact reasoning was the base for all such deviations and amendments. *Qiyas* (Analogy), *Istehsan* (Equity), *Urf* and *Ada* (Custom and Usage) and *Masaleh-al-Mursaleh* (Public Interest) were also the sources. In this way, Muslim Law passed through a long process of evolution. *Ijtehad* is the only way for effecting reforms in Islamic law.

In India, three areas of Muslim Personal Law demands attention for reforms. Polygamy, Triple Divorce, Succession and inheritance. Polygamy is not a facility but remedy sanctioned in Islam. In specified circumstances second wife can be taken. Triple divorce may be banned through the process of *Ijtehad*, as the practice followed in India is an innovation in Islamic law. Inheritance has been clearly discussed in *Qur'an* and it should be that way. Above all change must come from within and not by outside quarters.
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References


2. Ibid.

3. Holy Qur'an, XLV, 18

4. Holy Qur'an, VII, 3

5. Holy Qur'an, IV, 59

6. Holy Qur'an, XXXIII, 36


9. Supra note 7 at 71

10. Supra note 8 at 62

11. Ibid

12. Al-Ashbah-Wan-Nazir by Suyyuti

13. Supra note 7 at 75

14. Ibid.

15. Id. at 77


17. Sayeed Ahmad Akbarabadi, “How to Effect Changes in Islamic Law”, Islamic Law in Modern India, Tahir Mahmood ed., p. 116 (1972)

18. Id. at 115

20. *Id.* at 116

21. *Id.* at 116

22. The Prophet (SAW) is reported to have once made up his mind to prohibit cohabitation during the period of foster age. But he abandoned the idea when he came to know that the practice was in vogue amongst the people of Persia and Rome without any adverse effect either on the mother or the child.

23. *The Qur'an*, IV, 3

24. *Supra note* 17 at 120

25. Support for this is found in the history relating to the legislative policies of Umar b. Khattab, the second Caliph. For instance, a Muslim is permitted to marry a *Kitabiyya* women, but when ‘Umar came to know that this practice was gaining popularity in the community he came forward to ban it and said:

   “I have no right to make an illegal thing legal or vice versa. But imagine what would happen to the maidens of Arabia if you got fascinated with the beauty of Roman girls”.

26. *Supra note* 15 at 120.


28. *Supra note* 15 at 121.


30. *Khul'a*: The literal meaning of *Khul'a* is to take off and to pull out. *Khul'a* means that the demand of *talaq* may be made on behalf of the woman from the man. Its one side is moral and the other is legal. Even as the Sharia’ah does not like the *talaq* on the moral side, it also does not like the *khul'a*, because the shari’ah’s objective is one and the same place and not the separation, and *talaq* or *khul'a* is valid only as the last remedy.

Thus, termination of marital relation by the husband in consideration for a return agreed upon by the parties is
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*khul'a*, whether it is through the word *khul'a* or by *mubara'at*, or by the word *talaq* or any of its synonyms.

The basis of the *khul'a* is the following verse of the Qur'an:

"And it is not proper for you at the time of bidding her farewell that what you have given her you take it back from her. However, this form is an exception that the spouses may not be within the compartment of Allah's limits. In such a case if you feel that they will both not fear of remaining on the divine path, then there is no distress if a common bond is signed by them that the woman, by giving something to the husband, may obtain separation from him." (Baqarah 2:229)

If the matter of *khul'a* may not be settled mutually and the matter may reach the court, then the court has the right to obtain the *khul'a* to keep the limits of Allah intact, by command and source.

In case of not obeying the order the court the example of *Jahr* (compulsion) is found in a decision of Hazrat Ali who had written in it to a violent husband that "you will not be left as long as you may also be ready to accept the decision of the Hakimin as the woman has been."

31. Recently, on 26 July, 2001 "A compendium of Islamic Laws", containing a sectionwise compilation of the rules of Shariat falling into the domain of Muslim Personal Law, has been prepared for and on behalf of the All India Muslim Personal Law Board. It is based on the most authentic principles of the Islamic Law.

The compendium is available both in Urdu and English. The complete operative part of the compendium, running into 440 sections, has been translated by Professor Tahir Mahmood. The English translation has been arranged under five parts covering 34 chapters