Historic Stirrings

Ever since the Supreme Court verdict in the Shah Bano case in April 1985, the whole question of the nature of secularism in the Indian context, and the place of Muslims in such a scheme, has become a major political and social issue in the country. M Iqbal Asaria draws together the various strands of the debate.

NOT since the agitation for the retention of the Khilafat in the early twenties, have Muslims of India stirred in such numbers and with such unison across the length and breadth of the country. Rallies and *morchas* (protest marches) numbering upto half a million people have been held in most major cities and towns, calling for the Supreme Court to keep its hands off interpreting the *Sha'ria*, and demanding the respecting of undertakings given at the time of independence to maintain the autonomous status of Muslim Personal Law.

The *causus belli* of these developments was the Supreme Court judgement in the Shah Bano case, where the court tried to overrule the established precedent of denying a Muslim woman maintenance beyond the period of *iddat* from her husband, on the grounds of its inadmissibility in Islamic Law. Two previous cases, both decided by Justice Krishna Iyer, had made some overtures in this direction. Two Supreme Court judges - Murtaza Fazal Ali and A Varadarjan, JJ - were of the opinion that these were incorrectly decided. They, therefore referred the Shah Bano case to a larger Bench stating that:

'As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in *Bai Tahera V. Ali Hussain Fidaali Chotia & Anr,* and *Fuzlunbai V. K Khader Vali & Anr.* require reconsideration because, in our opinion, they are not only in direct contravention of the plain and unambiguous language of S. 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in cases where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decisions also appear to us to be against the fundamental concept of divorce by the husband and its consequences under Muslim law which has been expressly protected by Sec.2 of the Muslim Personal Law (Shariat) Application Act, 1937 - an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three Judges.'

Chief Justice Y V Chandrachud, delivering the Supreme Court verdict, not only ignored this observation completely, he also complimented Justice Krishna Iyer for using teleological and schematic method of interpretation so as to advance the purpose of the law. Further, without going into the contradiction between Muslim Personal Law and Section 125 of the Code of Criminal Procedure, he proceeded to issue a novel interpretation of Islamic Law on the subject. A G Noorani, a Muslim lawyer writing in *Femina* (October 7, 1985) observes, 'The Supreme Court judgement in the Shah Bano case reflects bad reasoning, bad law and bad taste.... The errors perpetrated are many and sad.'

So much for the *ratio decidendi* of the case. However, what irked Muslims more were the virulent *obiter dicta*. Chief Justice Y V Chandrachud, opened his judgement by quoting from an 1843 work by Edward William Lane - a rabidly anti-Muslim orientalist - that:

'And it is alleged that the fatal point in Islam is the degradation of women.'

He then betrayed his total ignorance of the Qur'an and the Muslim institution of marriage by saying:

'Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. *Indeed for no reason at all.'* (emphasis added).

The Court, so argued the Chief Justice, thus felt justified in discarding universal Muslim practice and gave its own interpretation of Islamic Law. The combination of the two was explosive and was seen by Muslims as the tip of the iceberg in a grand design to force Muslims to shed their personal law and distinctive way of life.

The Muslim community in India had for some time before the judgement, begun to regain its composure after the creation of Pakistan and the traumas following the establishment of Bangladesh. Slowly, but perceptibly, the movement for getting a fair share of the national cake had started to take root. Indeed, many observers have seen this gradual threat to the status quo, as the main cause sustaining increased anti-Muslim riots, and other agitations like Mosque/Temple disputes and petitions to ban the Qur'an. In a very real sense the Shah Bano case served to act as an ideal bonding to help the community vent its perceived grievances.

It is thus that the scale of the protest against the Supreme Court judgement surprised most politicians, and as the dire consequences of alienating the Muslim vote began to come through via electoral results, much rethinking in the higher echelons of party heirarchies commenced. Having assessed its strength, as the ruling Congress(I) began moves to pacify the Muslim voters, the worst fears of the Muslims began to be realised. The specifics of the Shah Bano case were soon swept aside, and a deluge of anti-Muslim paranoia surfaced in the nation's press. Chief Justice Chandrachud and Justice Krishna Iyer started by defending their stances and called for rapid movement towards a 'uniform civil code.' Other lesser known figures followed by warning of a Hindu backlash, and advocating the submerging of the Muslim minority into the 'mainstream' of Indian life. Pride of place in this tirade, however, must go to Arun Shourie, a former World Bank man turned journalist, who in two long articles in *The Illustrated Weekly of India* put forth an Indian version of the attack on the Sha'ria first mounted by Joseph Sacht and Ignaz Goldzieher. Having thus 'established' the irrelevance of the Sha'ria to contemporary realities, he advocated a move to a uniform civil code for India. Needless to say this approach cut little ice with the Muslims, but did provide a lot of ammunition for people having little familiarity with Islam.

Such attacks only served to inflame the Muslim community even further, and even those who had reservations about the practice of Muslim Law in India, began to join the ranks of those who demanded a parliamentary bill to overrule the Supreme Court decision. Many politicians also joined the fray.

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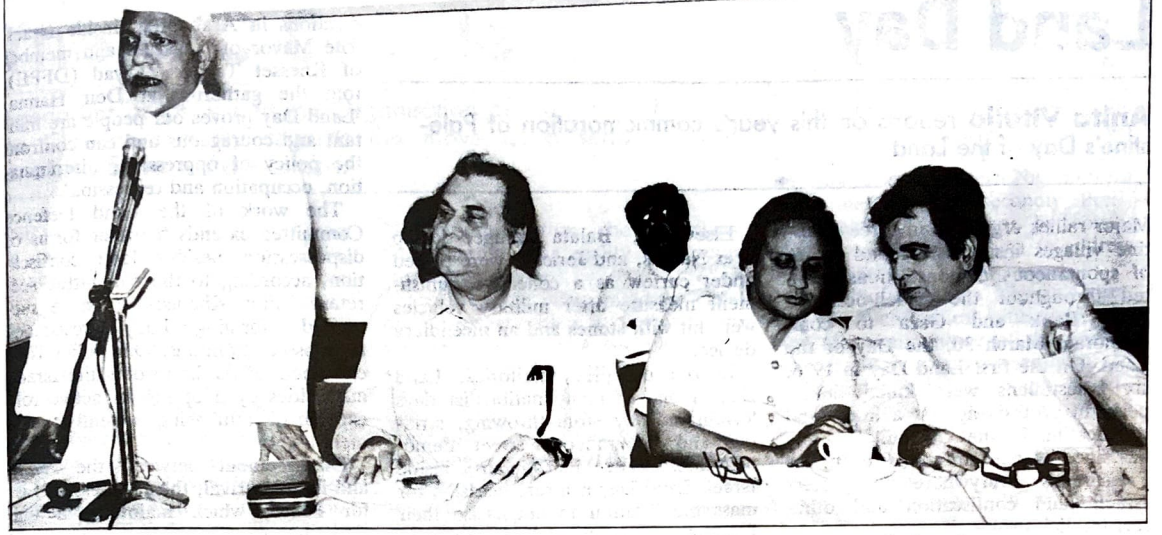

A pro-Bill gathering: (from left) **Ziaur Rahman Ansari, Ahmad Zakaria, Professor Tahir Mahmood, and Yusuf Khan** alias **Dilip Kumar.**

Some like Arif Mohammed Khan, a Union Minister, resigned and courted the 'progressive' vote. Others like Ziaur Rahman Ansari, also a Union Minister, redoubled their efforts to persuade the Government to introduce a bill and diffuse the issue. Instrumental in putting forward a cogent case for the Muslims has been the tireless efforts of Dr Tahir Mahmood, professor of law at Delhi University.

Tahir Mahmood, who specialises in Hindu and Muslim personal law, was the right man for this occasion. He has several publications in the field to his credit, and was invited by Bombay University to give the prestigious P B Gajendragadker Memorial Lectures for 1984/85 in August 1984. He had chosen the question of the operation of personal law in India as his subject. In these lectures now published as *Personal Law in Crisis* (Metropolitan Book Co,(P) Ltd, Delhi, 1986, 170pp, $19.00) Tahir Mahmood discusses the whole gamut of issues raised by the Shah Bano case in detail. After pointing out that the precedent bound Indian judiciary relies on the follies of Anglo-Indian rulings in matters of Muslim Law, as exemplified by the standard text by the Parsi lawyer, D F Mulla *Principles of Mohammedan Law*, he argues that ignorant *maulvis* have also contributed not a little to this parody of Islamic Law.

The basic dispute problem stems from the 'failure to understand ... the difference between the Hindu and Christian concepts of marriage on the one hand and the Islamic concept on the other. Under the classical Hindu matrimonial jurisprudence, on marriage every girl would be *finally and perpetually* transferred to her husband's family; in the family of her birth she would thenceforth, be welcome only as an occasional guest..... Neither the traditional Hindu law nor Christian law allowed divorce and, so, under both these laws engrafting of the wife into the husband's person and family would be absolutely irreversible..... In Islamic matrimonial culture neither is there an inter-familial transplantation of the girl on her marriage, nor are her parents or guardians perpetually absolved, after that, of their liabilities towards her. In Islam, since marriage is always a dissoluble union, the parents' liability to maintain their unmarried daughter remains only *suspended* during her married life.'

Professor Mahmood then examines the thesis of a uniform civil code and finds it riddled with problems in a multi-ethnic and multi-religious society like India. Indeed, he points out that changes to the law since independence have strengthened Hindu law rather than move it towards the direction of uniformity. The ban on cow slaughter, the cleansing of the *holy* Ganges, or the ban on first cousin marriage in the *secular* laws of the country are sighted. The best course for a country like India would be to seek proper codification and enforcement of the personal laws of the different communities. This would also square with the original vision of Indian secularism, he argues.

It would appear that the cogency and the brilliance of the exposition of Tahir Mahmood's argument has won the day. Prime Minister Rajiv Ghandhi, to his credit has had the courage to override strong objections within the Congress(I) and with the co-operation of the All India Muslim Personal Law Board (AIMPLB), tabled a bill in the *Lok Sabha* called The Muslim Women (Protection of Rights on Divorce) Bill, to nullify the Supreme Court judgement. Muslim opinion has swung strongly behind this move, despite the anomalies, since it is seen as a first necessary step towards a much needed codification of Muslim Personal Law, based on original sorces rather than the vagaries of the Anglo-Indian judiciary.

Mahmood is probably right when he says that, 'If there is a referendum 95% of Muslims will vote for this bill.' The opponents having lost the argument have switched to new tactics of delay and fillibuster in the hope of frustrating the bill. Muslim rallies and meetings continue unabated, and it will be difficult for Premier Rajiv to postpone the bill for long.

If as expected the bill goes through, a new era in the awakening of the Muslims of India would have dawned. But sadly as yet there is little sign of the emergence of a young and dynamic leadership to tap this renewed vigour and vitality. However, the vehemence of the onslaught from the majority community serves as a timely reminder to the Muslim community that they have to put their own house in order. This is a better channel for 'progressive' Muslims to operate in than pandering to vague 'liberalism.' ■