National Agenda Series - I

# JUDICIARY, GENDER & UNIFORM CIVIL CODE

Compiled and Edited by
IPF Research Team

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भारत नीति प्रतिष्ठान

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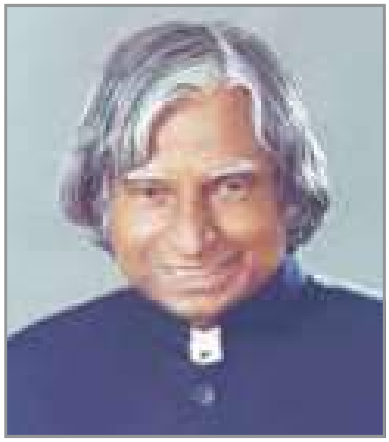

***Uniform civil code is essential for a county like India with a billion people, as any law has to be uniformly applicable.***

***"We have to make India economically strong, technologically advanced and prosperous. Education, particularly girls' education, is very important We must also generate employment for several of our unemployed. I believe these are the two most important factors"***

***A P J Abdul Kalam***
*Former President of India*
*September 29, 2003*
*Chandigarh*

ACKNOWLEDGMENT

# List of Contributors

**Abhinav Prakash Singh**

He is a Research Scholar from School of Social Sciences/Centre for Economic Studies and Planning, Jawaharlal Nehru University.

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**Ajit Kumar Jha**

He is a Research Scholar from School of Social Sciences/Centre for the Study of Regional Development, Jawaharlal Nehru University.

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**Amba Shanker Bajpai**

He is a Research Scholar from School of International Studies/Central Asian Studies, Jawaharlal Nehru University. He is working on process of Democratization in Mongolia.

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**Gayettri Dixit**

She is a Research Scholar from School of International Studies/Centre for African Studies, Jawaharlal Nehru University. She is working on partnership and challenges among India - Brazil - South Africa (IBSA).

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**Prem Anand Mishra**

He is Ex-Correspondent-Business Standard. He has done his M.A from School of International Studies, Jawaharlal Nehru University.

---

**Shushant Jha**

Freelance Journalist and Previously Worked for Doordarshan and India News Translated India after Gandhi and Patric French's India in Hindi.

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**Sourabh Jyoti Sharma**

He is a Ph.D. Doctoral candidate at the Department of Political Science, University of Delhi. He specializes on Comparative Sino-Indian Strategic Studies & Maritime Affairs.

# Contents

# Preface

The Jammu and Kashmir High Court's landmark judgement of April 30, 2012, on the issue concerning the status, dignity, identity and self-respect of women has reopened the debate on Uniform Civil Code. Stressing the natural and fundamental rights of women in society, this judgement has declared the conventional system of divorce by pronouncing **three *Talaq*** uttered in one sitting as incompatible not only with modernity but also the spirit of Islam. The judgement has dubbed the custom as "the most despised". It is a very forceful intervention indeed to initiate social and legal reforms in the personal laws of the Muslim community in the country. But the media has by and large ignored it. It is time our media highlights the significance of such judgements across the country and helps in creating an atmosphere in which the government would have no choice but to go in a for a uniform civil code. Unfortunately both the Indian media and intelligentsia have not paid heed to this historic judgement in influencing the minds of the key policy makers at the highest echelons constitutionally endowed with decision making.

Pertinently, in its aforesaid judgment, the High Court has raised the question on the application of Islamic law in a democratic and secular society. The post - Shah Bano period of Indian politics witnessed the decline of index of secularization. The new judgment is an opportunity to push a major community of our national population for greater and desirable reforms. It is an opportunity for the Muslim society to enter into negotiation with the elements of modernity and shed the shadow of medievalism. It is not only essential for the progress of Muslims in general and Muslim women in particular but is also a prerequisite to preserve secular democracy. Classical concept of Semitic ideology is a threat to our age old tradition of multiculturalism. No society can be static and it has to recognize the changing pattern of life, emerging social trends and new cultural aspirations. Here, the role of the State becomes significant. We have seen the the Nehruvian State's reformist role regarding reforms in the Hindu society. It introduced Hindu Code Bill and undermined the social and religious opposition by a section of the Hindu society. However, the role of the successive governments has been disappointing. Therefore, the social philosophy of the Indian State needs to be discussed and debated. The intelligentsia must ask if the Indian State has been pursuing the constitutional agenda of secularization of communities, traditions, personal laws or it has been either escaping or compromising with the predominant and vocal forces representing status quo ism or even annihilation of the human values, dignity of man and woman, egalitarian thoughts and ideas.

I would suggest that our independent Indian State may learn something from the Raj legacy which, despite all its inaccuracies, more often than not helped the forces of progress. For instance, Ishwar Chandra Vidyasagar gave a memorandum in support of the widow re-marriage which was legalized in 1856. It was signed by only 987 people while the counter memorandum opposing widow re-marriage by a conservative leader Radhakant Deo that was signed by 36,765 people. Nevertheless, the British administration stood for the minority but progressive view and pushed the agenda for reforms.

The Constituent Assembly vowed to lead India for a homogeneous social order. Here homogeneity does not mean uniformity or flattening of all diversities. The introduction of uniform civil code as a part of the Directive Principles of the State Policy in the Indian Constitution categorically means that the social regeneration should precede the enactment of laws. However, all efforts of regeneration within the Muslim community met fatal blow from fundamentalists. They consider gender equality as a threat to their religious identity and patriarchy.

The State failed to show resilience and resistance in regards to Muslims as it had earlier exhibited while enacting the Hindu Code Bill. While it was debated, the government faced stringent opposition by a section of the Hindu society. It witnessed huge debate and confrontations at social, religious and political levels. But the Hindu society eventually sided with the progressive measures. Moreover, it accepted the reform with hope and optimism. As **JDM Derrett** considered the attempt to pass Hindu Code Bill as ***"the first step towards a uniform civil code."*** Hindus considered the new law as an inauguration of State intervention to remove anomalies in social and cultural life of the nation. It was thus, sense of the future that the opposition of the Bill remained weak and it gradually declined. The subconscious of secular India was preparing to come out with a uniform civil code. Robert D Baird delineated it as follows, ***"It was a 'code' that was not only a unification but also a modernization of Hindu Law on the basis of reason, equality, modernity and public opinion. Those who argued for it conceived it as a first step towards a unified civil code. The next step would be to accommodate the Muslims, Parsis, Christians and Jews, the minorities not inclined in it."***

However, the Indian State incrementally became lazy, apathetic and withdrew from progressive activism. Concomitantly, the dormant reactionary forces in all such communities have been encouraged to raise its voice, consolidate themselves against constitutionalism to deter integration with liberal democratic evolutionary process of modernity. The political class made an overture. It legitimized such trends, traits and leadership. Nevertheless, the Indian judiciary, in its highest tradition of enlightened activism, continued to create atmosphere for gender equality, dignity, autonomy and self of woman.

The history of independent India is replete of socially progressive judgements which have been suppressed by the emergence of low-level politics in the country. In the ***Itwari vs Asghari*** case of 1959 the petitioner asked the court to order the restitution of conjugal rights with his first wife. The court denied the request. The Court made the statement of universal importance, ***"There are no divergent forms of cruelty such as Muslim cruelty, Hindu cruelty or Christian cruelty but the concept of cruelty is based on universal and humanitarian standards."***

Similarly, the **Kerala High Court,** in the ***Shahilameedu vs Subaida Beevi*** case in 1970, held that the wife of a Muslim who had taken a second wife but who still cohabitated with him was nevertheless, entitled to maintenance under the Criminal Procedure Code. The Court pointed to Muslim countries that had prohibited polygamy and urged for uniform civil code. The judgment of the J&K High Court also shows that the judiciary is consciously pursuing for socially progressive reforms.

I hope our political class will pay heed to all such enlightened judgments and stands for reforms and it will not perpetuate the politics of selective secularism in the country. The uniform civil code is a national agenda. **It should not be bracketed with any political party or ideology. It is in itself an ideology of modernity. It is both a means and an end for reforms and change.** Muslim society needs to take to serious introspection. It cannot gain and achieve the fruits of modernity and development unless it decides to fight the ghost of backwardness which pushes it to ghetto mentality. It should heed the counsels of its progressive leaders like **AAA Faizee, Humaun Kabir**, **Moin Shakir**, **Justice M H Begh** and **Arif Mohammad Khan** et al. They have made attempts through intellectual and political activism to liberate the minorities in India from their age-old narrow-mindedness, poverty and backwardness. Ironically, however, we have, even after 65 years of our Independence, made little progress in this regard in tune with liberal, pluralist and democratic values enshrined in the Preamble of the Indian Construction as its core guiding philosophy as well as the "best practices" of the UN or other international covenants on human rights or prevention of gender discrimination/gender justice or equality.

Significantly, as seen in the historic ***Shah Bano*** case, our judiciary has repeatedly stressed on the need for a uniform civil code. It has also warned the government from time to time against its failure to go beyond overhauling the personal laws of majority community and effect appropriate changes in those of the minority communities as well.

Our advice to the Government would be: make the best use of our independent judiciary and implement the mission of a uniform civil code that has been a long overdue. Needless to say, I also hope that this research publication would serve to make our intelligentsia, including the media, aware of its role in spreading our national consciousness in regard to the need for a universal civil code in the country. Lastly, I would like to remind the nation the following remark made by **Acharya J B Kripalani**, the leader of the **Praja Socialist Party**, during the debate on Hindu Code Bill in the Lok Sabha, ***"If we are a democratic State, I submit we must make laws not for one community alone. Today Hindu community is not as much prepared for divorce as the Muslim community for monogamy…..will our government introduce a bill for monogamy for the Muslim community? Will my***

***dear Law Minister apply the part about monogamy to every community in India? I tell you this is a democratic way; the other is a communal way. It is not the (Hindu) Mahasabhaites who are alone communal; it is the government also that is communal, whatever it may say."***

I hope this research publication will be useful in impressing upon the government to put in place a uniform civil code as early as possible making operational certain common laws in the interest of all sections of people in our civil society.All developed democratic States in the world - the United States, the United Kingdom, Canada, Germany, France and Japan - have had such a code within. Our secular democracy too must have it. This is simply essential for the sake of national integration, gender justice and above all, the genuine secular character of the Indian State as the world's largest democracy.

**Dated: 12/12/12**

**Prof Rakesh Sinha**
Hony. Director
India Policy Foundation

Chapter 1

# Landmark Verdict of Jammu and Kashmir High Court on Personal Law

***Rekindling the Long Standing Constitutional Demand for a Uniform Civil Code in India***

***"Muslim man's power to Talaq (divorce) his wife is not "unrestricted or unqualified"***[1]

Justice Hasnain Massodi of J&K High Court in the Landmark Mohammad Naseem Bhat vs Bilquees Akhter on April 30, 2012

## 1.1 Introduction

Coming almost 27 years after the controversial Shah Bano case, the recent judgment by Jammu and Kashmir High Court challenging the hitherto unchallenged and conceived notion of Muslim man's absolute power under Islamic laws to pronounce Talaq has opened another Pandora's box by observing it as the "most despised" practice in contradiction with the spirit of quest for gender equality/justice as held by the Holy Quran.

A 23-page judgment by Justice Hasnain Massodi; extensively quoted ***Sharia*** (Islamic Laws) and the Holy Quran before arriving this historical judgment. Historical for being this ground breaking judgment despite of many concerned voices in the recent history since Shah Bano case by many jurist in India as well as civil society representatives; this is indeed a defining judgment. Justice Hasnain has not only question the sacrosanct of Muslim man's absolute and unrestricted power to pronounce Talaq but termed it as not being 'absolute' and 'unrestricted'. Questioning the 'Triple Talaq' in his judgment, he condemned the existing laws as most despised and formed some guidelines before pronouncing Talaq.

In Mohammad Naseem Bhat Versus Bilquees Akhter case (561-A No. 158/2009IA No. 336/2009), delivered on April 30, 2012, Justice Hasnain Massodi has included excerpts from Quran and quoted Hadith in the judgement. However, the clergy and senior lawyers believe the court, which is not entirely based on ***Sharia***t, is not qualified to comment on the religious matters. It is not their jurisdiction, they claim. Zaffar Qureshi, a senior lawyer and President of J&K Bar Association said, "The case was a dispute over maintenance allowance and should have been resolved on the similar lines. There was no need to raise questions about a man's power to

1. http://kashmirlife.net/muslim-mans-power-to-divorce-is-restricted/

divorce his wife. This judgement has high chances of landing all of us into serious trouble."

Bashir Ahmed Kirmani, a retired judge of Jammu and Kashmir High Court has filed a petition of rehearing of Justice Hasnain judgment and wanted it to be annulled. Like a bigoted Muslim fundamentalist Kirmani said, "If this judgment is accepted today, the man-made courts (terming Indian courts) would be judgmental tomorrow on all other religious matters of the Muslims. This has never been acceptable to Muslims in the past, nor would ever be in future" as reported in a J&K based news web portal (www.kashmirlife.net). The Muslim fundamentalist groups in the valley have already up the ante against Justice Massodi's verdict calling it "preposterous" and "anti-Islamic." But Justice Hasnain stands firm on his judegement

### 1.2 The Judgement: A Historic Verdict in the Annals of Indian Judiciary in Civil Jurisprudence

The 23-page judgement was passed in a case where a divorced woman, Bilquis Akhtar, was seeking quashing of a court order which had barred her from claiming maintenance allowance under section 488 Cr. P.C. The court order had maintained that she was divorced and hence not entitled to receive any maintenance from her husband. But the court said her daughter should be given an allowance of Rs 1800 per month. Bilquis Akhtar was married to Naseem Bhat in 2002 and they got divorced in 2005, two years after their daughter, Kareena Naseem, was born.[2]
Justice Hasnain's judgment has some basic observation-

- Talaq should be the last option and can't be pronounced until two witness 'who are endued with justice' are not present and only when husband provides that enough efforts were made for reconciliation.
- There must be representatives from both sides to settle the dispute before pronouncing 'Talaq'.
- The case should be genuine

Justice Massodi, quashing the earlier court order, raised and answered what is being termed as an 'irrelevant question' on whether a Muslim husband had an absolute and unqualified power to pronounce divorce on his wife and wriggle out of his obligations under the marriage contract. He has tried to answer it in the light of Quran and Hadith.

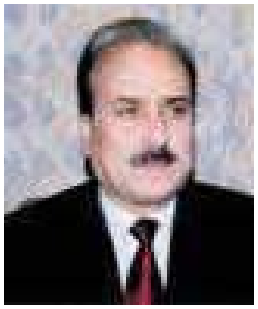
"To find out the answer to the question, and manner in which the marriage may be dissolved or the marriage contract may come to an end, we have to go to the fundamental sources of Shariat Law," the judgment reads. "It needs to be pointed out at the outset that a Muslim in the matters of marriage, divorce, adoption, maintenance and inheritance etc. is in terms of Jammu and Kashmir *Sharia*t Act, 2007, governed by the ***Sharia***t Law. The primary sources of ***Sharia***t Law are Quran

2. See the complete judgement in http://kashmirlife.net/stuck-in-divorce/

and Sunna-practice and sayings of Prophet. Ijma, Qiyas and Ijtihaad supplement the primary sources."
But the senior lawyers say Justice Masoodi should have either called upon the local Islamic scholars and leaders or should have consulted domestic and international Islamic schools or universities for help, instead of interpreting the Holy Quran on his own. But facts say otherwise.

In the relatively succinct judgement divided into 29 points, Justice Hasnanin Massodi has quoted extensively Quranic injunctions or verses in support of his view that Islam gives no preferential treatment to the Muslim men in matters of marriage, inheritance or Talaq. He said that Islam is gender-neutral and does not support a patriarchal or male dominated or gender biased system in matters of marriage and divorce (Talaq).

**Hon'ble Shri Justice Hasnain Massodi, LL.B**



Born at khrew, a suburb of Srinagar, on 02-01-1954 to Sh. Ghulam Ali Massodi and Zainab Khatoon, a pioneer in women's education who established first girls school in the year 1938 AD. Had his early education at a Govt. school in his native place and thereafter graduated in science from S.P.College, Srinagar. Did his LLB, three years Degree Course from Faculty of Law, Kashmir University, securing first position in the faculty with distinction in five subject areas and was awarded certificate of merit in 3rd Annual Convocation of the University. After brief stint at bar, appeared in J&K Civil Services (Judicial) Examination and passed the examination with first rank in the state and was appointed as Munsiff, JMIC on 16-1101982. Was also selected for Kashmir Administrative Services in 1984 but decided to continue as a Judicial Officer. Proceeded for Higher Education to United States in 1992 and did his Master's in Law from Harvard University Massachusetts, USA with Constitutional Law, Administrative Law and Environmental Law and Planning , as major subject areas.

During his career as Judge, spreading over a period of about 27 years held important positions in the district judiciary and High Court Registry. Served as Registrar Vigilance, Principal Secretary to Hon'ble Chief Justice , Registrar General of the Hon'ble High Court, Special Judge Anti Corruption, Kashmir and Principal District and Sessions Judge Budgam and Srinagar. Participated in 1998 UN conference on Organized Crime and played a significant role in strengthening the Institution of Lok Adalat and Legal Services in the State. Elevated as Additional Judge of High Court of Jammu and Kashmir on 13.11.2009. Appointed as permanent Judge of High Court of Jammu and Kashmir on 26.10.2012.

**Key Points of the Judgement (For detail see Appendix I)**

- Whether a Muslim husband has an absolute and unqualified power to pronounce divorce on his wife and wriggle out of his obligations under the marriage contract?

- It needs to be pointed out at the outset that a Muslim in the matters of marriage, divorce, adoption, maintenance and inheritance etc. is in terms of Jammu and Kashmir Shariat Act, 2007, governed by the ***Sharia***t Law.

- The primary sources of ***Sharia***t Law are Quran, and Sunna-practice and sayings of Prophet. Ijma, Qiyas and Ijtihaad supplement the primary sources.

- To find out the answer to the question, and manner in which the marriage may be dissolved or the marriage contract may come to an end, we have to go to the fundamental sources of ***Sharia***t Law and to understand the concept of marriage in Islam, the rights of the parties to the marriage contract i.e. husband and wife and the mode and manner the marriage contract is dissolved.

- The marriage is a social institution that forms bedrock of family and Society. The Supreme Court in ***G. V. Rao vs. L. H. V Prasad*** and others (2000) called marriage "sacred ceremony, the main purpose of which is to enable the young people to settle down in life and live peacefully". In ***Smeda Nagpal vs. State of Delhi*** and others (2000), the Supreme Court holding that "basic unit of society is a family, observed that "marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution". The concept of marriage in Islam is no different. Marriage in Islam is a "solemn covenant". It is union of love, affection, mutual respect, loyalty and obedience.

- The institution of marriage in Quran is described as sign of mercy of Almighty Allah with the object to bring peace and tranquility to the husband and the wife. Quran-Chapter 30 verse 21 ordains. "And amongst His signs is that he created for you spouses from among yourselves, that you may find peace in them, and he put between you affection and mercy. Verily in that there are signs for those who reflect".

- In Islam marriage, is not only means to achieve emotional and biological gratification but also Ibadah as by contracting marriage, the parties to the marriage display obedience to Allah and to the Sunnah. The Prophet is reported to have said "marriage is my tradition whosoever keeps away there from is not from amongst me."

- Since the marriage is based on mutual love, affection and loyalty, Islam does not give preference to either of the parties (read male or female) to a marriage.

- Islam does not prefer or encourage a particular pattern of life for a married couple. This further reinforces the proposition that a man and women have equal rights, equal role and equal power while contracting marriage. The parties after they contract marriage retain their personal rights as against each other.

- Marriage in Islam is not temporary feature. It is meant to continue and remain intact for the entire span of life.

- In Islam husband and wife protect each other. Quran calls them "garments for each other". The verse is to indicate the level of proximity or intimacy between the spouses. Here again Quran does not make any difference between wife and husband. A garment does not only protect a person from heat and cold or bodily injury but also is something close to the body of a person. The expression "garments for each other" therefore, means that no other person can be as protective and close to husband or wife as his or her spouse.

- Though Islam does not treat marriage as a temporary relation and expects it to create an eternal bond between the spouses based on love, affection, fidelity, and mutual respect, yet it does not rule out a situation where because of reasons beyond control of the parties marriage may break down.

- Islam recognizes three modes of dissolution of marriage. It may be dissolved by (i) mutual consent of the spouses - Khula, (ii) divorce by the husband - Talaak or (iii) by intervention of the Court - judicial divorce. Ila, zeher, mubara'at are other modes of dissolution of marriage.

- Though Islam visualizes a situation where a marriage may run into rough weather, for reasons beyond control of the parties to the marriage and provides for a mechanism to end or dissolve the relationship in such case, yet emphasis remains on making every effort to help the marriage work, and to require the parties to marriage realize, that the weft and warp of marriage is love, affection, loyalty, care, accommodation and understanding and differences are to be resolved on the basis of said principle.

- The device of divorce is to be used as a last option when the marital relations have irretrievably broken down and only way in the interest of both the parties and the society is to help them separate, to make a new beginning and start a new life, so that they are in a position to play the roles for their well being and betterment of other members of the Society. In other words, Islam is strongly against the divorce and wants it to be avoided unless there is no alternative, except separation.

- A closer look at the Quranic verses dealing with the subject of divorce, as also Sunna relevant to the subject, makes it abundantly clear that the divorce is

discouraged and an effort is made to make it difficult and inconvenient for a husband to pronounce Talaak. On the other hand every effort is made to facilitate reconciliation, where the relationship is marred by disputes and disagreements.

- Chapter 65 verse 1 and 2 of Holy Quran places restrictions on divorce and at the same time ensure that conditions are created for reconciliation. The wife even after Talaak is pronounced is to stay in the house of the husband. The husband is under command not turn out the divorcee from his house. The object is to make the couple live under same roof, during the waiting period and help them realize their importance for each other and what they mean to each other, so that the husband is prompted to give a second look to his decision and take back his wife in marital fold.

- The Prophet is reported to have said "Jabra'il (Gabriel) so much commended the cause of the women, and so counselled me as to give me the impression that, except in the case of adultery, the wife does not deserve to be divorced".

- The Prophet was once informed that Abu Ayyub Al-Ansari was determined to divorce Umm Ayyub - his wife. The Prophet knowing that the divorce of Umm Ayyub was not grounded in a genuine cause said "Verily the divorce of Umm Ayyub is the great sin". It follows that husband must have a genuine and valid reason to divorce his wife. The power or right to pronounce divorce is not to be used arbitrarily, at whim and caprice and in absence of a valid and genuine reason.

- From the above brief overview of Quran and Sunna relevant to the subject the fundamental sources of Shariat Law governing the Muslims in the matter of marriage, divorce and other family matters, it emerges that though husband under Shariat law has power to divorce his wife yet this power is not absolute, unqualified and unbridled.

- The Quran ordains that wherever and whenever there appear fissures in the marital relationship and there is disagreement between the spouses, the husband does not have an absolute and unqualified power to divorce his wife so as to get out of relationship, bruised by discontent.

- To make divorce (Talaak) valid, it is not enough that it is pronounced in presence of two witnesses. The Quran prescribes qualifications of such witnesses. It emphasizes that the witnesses must be endued with justice. The purpose is to ensure that the witnesses, prompted by their sense of justice, may request, implore and persuade the spouses on the verge of separation, to calm down, resolve their disputes and lead a peaceful marital life.

- A husband to wriggle out of his obligations under marriage including one to maintain his wife, claiming to have divorced her has not merely to prove that he has pronounced Talaak or executed divorce deed to divorce his wife but has

to compulsorily plead and prove certain pre-conditions as prescribed in the Quranic injunctions on marriage. Therefore, Muslim man's power to Talaq (divorce) his wife is not "unrestricted or unqualified" and does govern by the prior fulfillment of some pre-conditions. Hence, the earlier order by the lower court stands quashed by this Court.

### 1.3 Post the Historic Verdict: Rekindling the Longstanding Constitutional Demand for a Uniform Civil Code in India

Had there been a Uniform Civil Code (UCC) as directed under Article 44 of the Indian Constitution in place instead of having multitude and mutually conflicting of civil codes or personal laws specific to the religious communities living in India, the Mohammad Naseem Bhat vs Bilquees Akhter case would not have happened. But lack of a determined political will and distorted interpretation of the UCC under Article 44 of the Indian Constitution has today led to a volcanic situation where the rights of the fair sex have been trampled upon with impunity and that too in the name of secularism. It happened with Begum Shah Bano in 1985 where her legal right to seek suitable maintenance money from her divorcee husband even after held rightful by the Supreme Court of India was overruled by the then government under pressure from the Muslim clergies (Imams or Mullahs). The sagacious but 'unpopular' decision by Justice Hasnanin Massodi in Bilquees Akhter case perhaps become successful in giving her some temporary relief, but gender justice or equality in matters of civil laws in India is still a far cry.

However, the verdict has rekindled the longstanding constitutional demand for implementing a UCC for India as envisaged and envisioned by the makers of our Constitution under Article 44 of the Directive Principles of State Policy, considered as beacon light for the policy makers (i.e the Executive and Legislature). It has now sparked a very significant debate crucial to the Indian democracy and her secular image and underlines the need for a uniform civil code in India replacing all the existing personal laws of all the religious communities.

Chapter 2

# Uniform Civil Code in India : A Backgrounder

**Article 44.** Uniform Civil Code for the citizens.-"The State shall Endeavour to secure for the citizens a uniform civil code throughout the territory of India."-
-The Constitution of India

## 2.1 Introduction

India's history is testimony to the fact that it's been a country of personal laws. The personal laws of the major religious communities had traditionally governed marital and family relations, with the Government maintaining a policy of non interference in such laws in the absence of a demand for change from individual religious communities. India is a land of diverse religions Hindus, Buddhists, Jains, Christians, Muslims, Parsis and Sikhs form the nation. Unity in diversity is the core feature of the Indian nation. Each community has its own laws governing marriage and divorce, infants and minors, adoption, wills and succession.

In India, most family laws are determined by the religion of the parties concerned. Hindus, Sikhs, Jains and Buddhists come under Hindu law, whereas Muslims and Christians have their own laws. Muslim law is based on the Sharia. The personal laws of other religious communities were codified by an Act of the Indian Parliament. Other sets of laws such as criminal laws and civil laws on contract, evidence, transfer of property, taxation were also codified in the forms legislation.

India is a secular country where every community is allowed to have its own personal laws. Christians have the Indian Christian Marriage Act, 1872 and the Indian Divorce Act 1869, Hindus have the Hindu Succession Act, 1925[hereinafter HSA, 1956] and the Hindu Marriage Act, 1955[hereinafter HMA, 1955] and so on. However, Muslim personal law, based on the Sharia, is not codified. Since Muslims are governed by the Sharia, an Indian male Muslim is entitled to have four wives at any time.

Uniform Civil Code (hereinafter UCC) of India is a term referring to the concept of an 'overarching Civil Law Code' in India. A UCC administers the same set of secular civil laws to govern all people, even those belonging to different religions and regions. This supersedes the right of citizens to be governed under different personal laws based on their religion or ethnicity. Such codes are in place in most modern nations. There is no doubt that the idea of UCC is by and large, a child of independent India.[1]

1. Destha, Kiran (1995), Uniform Civil Code in Retrospect And Prospect, New Delhi: Deep and Deep)

The spine of controversy revolving around UCC has been secularism and the freedom of religion enumerated in the Constitution of India. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. The UCC will not and shall not result in interference of one's religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim not to be forced to carry out sindur-daan.[2] The issue of Uniform Civil Code opens discussion on the nature and working of Personal Laws in India. The subject of personal law is related to a very important feature of secularism, i.e; the protection of minorities in a plural setting.

The Constitution is ambiguous on the issue of personal laws, as arguments in favour and against are both based on provisions laid in the Constitution. Opposition to reform of personal laws is based on the freedom of religion and conscience, whereas the guarantee to citizens of equal protection from the law and before the law supports a uniform civil code. This issue also raises questions concerning the hierarchy of rights - can the right to be governed by personal laws (a component part of the right to freedom of conscience) have precedence over the right to equality and legal pluralism in a diverse society?

## 2.2 The Origin of UCC in India

India has had a long history of personal laws. Till 1935, the Muslims in India followed different rules according to their practice. Khoja Muslims and Kutchi Memons are examples of this. The Kutchi Memons worshipped Hindu Gods and Ali is their tenth avatar instead of Kalki. They had the inheritance laws as per Hindus and also the marriage laws as per Hindus. When a common Muslim Personal law was formed, there were many minority creeds of Muslims who had to accept these laws though they differed from their practices. The Hindu laws, too were different in different parts of the country. However, they have undergone a turbulent change, courtesy, geographically united India. Child marriages were banned, Sati was banned, widow re-marriage was encouraged, divorce was introduced and inheritance laws were amended. “Narabali” or human sacrifice, which was considered a religious practice of Hindus, was also banned.*

The debate on UCC dates back to the colonial period. The Lex Loci Report of October 1840 emphasized the importance and necessity of uniformity in codification of Indian law relating to crimes, evidences, contract etc., but it recommended that personal law of Hindus and Muslims should be kept outside such codification.[3]

2. Kumar, Ravi (2010), Complex relation between Religion and Law, Secularism and the Law, National Foundation for Communal Harmony: New Delhi August, p. 28 (http://nfch.nic.in/WORD_FILE/SECULARISM.pdf).
* http://legalservicesindia.com/article/article/should-india-have-a-uniform-civil-code-3941.html.
3. Banerjee, Anil Chandra (1984), English Law in India, New Delhi: Abhinav Publications, p 134.

The conflict of sex equality and plural religious personal laws was one anticipated prior to independence in India. In the 1940s the National Planning Committee recommended the enactment of the UCC as a measure to attain women's equality, recognizing the discriminatory provisions of family law that were at odds with the progressive reform agenda of the Indian State.[4] Later, during the Constituent Assembly debates shortly after independence in 1947, the focus of UCC related debates, however, shifted from gender equality to national integration.

In Hindu law there are two principal schools, ***Dayabhaga*** and ***Mitakshara***. ***Mitakshara*** is again subdivided into four minor schools. Beside, the custom of sadachar also occupies important position. Attempts to reform Hindu law by legislative processes commenced during British period. Reforms such as The Caste Disabilities Removal Act, 1850, the Hindu Widows' Remarriage Act, 1856, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu law of Inheritance (Amendment) Act, 1929, the Hindu Gains of Learning Act, 1930, the Hindu Women's Right to Property Act, 1937, the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 were all enacted to give relief to those who are not content to abide by ancient shastras.

The Hindu Law Committee was appointed in 1941 to look into a comprehensive legislation covering all Hindu laws.[5] This committee ceased to function after sometime due to war. It was revived in 1944 under the chairmanship of Sir B.N. Rau and recommendations of Rau Committee were given effect by a series of Acts passed in 1955 and 1956, to regulate marriage succession, guardianship and adoption. These were the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, finally the Hindu Adoptions and Maintenance Act, 1956.[6]

Among Muslims there are Sunnis, Shias, Ismailis, Bohras, Khojas and unorthodox Ahmadiyyas. There are four different schools among Sunnies. There are also Kutchi Memons, who retain to some extent the private laws of the Hindus.[7] Most of the legislations of were enacted mainly to override judicial decisions and to restore shariat or Islamic law. The Wakf Validation Act, 1913 was passed to override the decision of Privy Council.[8]

A number of Acts from the colonial period specifically exempted Muslims in an effort to avoid resistance from that community. The Indian Succession Act of 1925, which dealt with inheritance and succession, specifically exempted Muslims. Muslims had a complicated inheritance system based on the Quran. The original Indian inheritance law had been enacted in 1865 and had exempted Hindus as well. However, the Act was ultimately applied to Hindus. The Special Marriage Act of 1872, which was essentially a secular civil marriage law, also exempted Muslims.

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4. Flavia Agnes (1999), Law and Gender Inequality: The Politics of Women's Rights in India, New Delhi: Oxford University Press, p192.
5. David C. Buxbaum (1968), Family Law and Customary Law in Asia: A Contemporary Legal Perspective, The Hague, Netherlands: Martinus Nijhoff Publishers, p 219.
6. Ibid.
7. http://www.memonpoint.com/History.htm
8. http://www.commonlii.org/in/legis/num_act/mwva1913251/

Not all calls to exempt Muslims were accepted. The Indian Evidence Act of 1872 included section 112, which concerned the legitimacy of children. This section was later found to apply to Muslims, despite its inconsistency with Muslim law. Shariat Act, 1937 swept away any custom or usage contrary to the shariat in all questions regarding succession, special property of females, marriages and dissolution of marriages, guardianship, gifts, trust properties, wakfs[9] etc. Muslim Dissolution of Marriage Act 1939 granted women the right to dissolution of marriage.

In the case of Christians there Indian Christian Marriage Act, 1872 was enacted. But this was not a comprehensive Act. Personal Law of Parsis is partly codified but the machinery for dealing with divorce and other matrimonial reliefs are not proper.

### 2.3 Constituent Assembly Debates on UCC: How Article 44 got Enshrined in the Constitution

In the Constituent Assembly debates, there were wide differences amongst the members on the issue of personal laws. On the one hand, there were demands to protect religious freedom, especially minority interests and on the other, to have a uniform civil code for all, based on a notion of homogenized citizenship. In the Constituent Assembly Debates (CAD) brought out by the Lok Sabha Secretariat, the above Article 44 was discussed on 23rd November, 1948 as bearing No. 35. A reading of the debate shows that all Muslim Members of the Assembly uniformly asked for the retention of Sharia, e.g. B. Pocker Sahib Bahadur from Madras had suggested the following addition to Article 35: "provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law". All Hindu members, on the other hand, had pressed for a UCC particularly stressing the fact that India had already paid a heavy price for division of India on communal lines.[10] It did get support from the Chairman of the Draft Committee and father of our Constitution Dr. B.R. Ambedkar along with some prominent journalists like G. S. Iyengar, K. M. Munshiji and Alladi Krishnaswamy Iyer amongst others to name a few.[11] Dr. Ambedkar himself said, "I personally do not understand why religion should be given this vast, expansive jurisdiction, so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, discriminations and other things, which conflict with our fundamental rights."[12] Denouncing the notion that Muslims were practicing their personal laws since ancient times, Dr. Ambedkar observed, "My friends who have spoken on this amendment have quite forgotten that up to 1935, the North - West Frontier Province was not subject to the Shariat law. It followed the Hindu law in the matter of succession and in other matters. Up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay the Muslims to a large extent were governed by the Hindu law in the matter of succession...

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9. Ghosh, Muttahidah qaumiyat in aqalliat Bihar: The Imarat-i-Shariah, 1921-1947, Indian Economic & Social History Review, 34 (1): 1. (http://ier.sagepub.com/cgi/pdf_extract/34/1/1)
10. www.janasangh.com/jsart.aspx?stid=288
11. www.mightylaws.in/278/time-uniform-civil-code-india.
12. Christophe, Jaffrelot (2003), Ambedkar and The Uniform Civil Code, Outlook, August 14, 2003 Issue.

It is therefore no use making categorical statements that the Muslim law has been an immutable law which they have been following from ancient times."[13] Supporting Dr. Ambedkar, K. M. Munshi said, "The House has already accepted the principle that if a religious practice followed so far covers a secular activity or falls within the field of social reform or social welfare, it would be open to Parliament to make laws about it without infringing the Fundamental Right of a minority."[14] Alladi Krishnaswamy Ayyar took a pot shot on Muslims as he said, "Did the Muslims take exceptions, and did they revolt against the British for introducing single system of criminal law? Similarly, we have the contracts governing transactions between Muslims and Hindus between Muslims and Muslims. They are governed not by the law of the Koran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again there are various principles in the law of transfer which have been borrowed from the English jurisprudence." [15]

Distinguished members like Shri Minoo Masani, Smt. Hansa Mehta and Rajkumari Amrit Kaur put in a note of dissent saying that one of the factors that has kept India back from advancing to nationhood has been existence of personal laws, based on religion, which keep the Nation divided into watertight compartments in many aspects of life.

They were strongly in favour of the view that Uniform Civil Code should be guaranteed to the Indian people within a period of five to ten years. But even after sixty-four years, because of perverse secularism and perverted communalism, Uniform Civil Code has not come into being.

### 2.4 Why India must have a UCC given under the Article 44 of the Indian Constitution in place?

The UCC has been permanently associated in the Indian mind with opposition by the Muslims. It was rightly pointed out in the Constituent Assembly that almost all Hindus were in favour of UCC. They (read Muslims) felt that the personal law of inheritance, succession, etc. is really a part of their religion. If that were so, Indian women can never be given equality or gender equality with a man which is enshrined in Art. 14 of the Constitution. Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex and place of birth or any of them.[16]

Had personal law of Hindus remained a part of Hindu religion, equality can never be attained among men and women, rectified by Nehru's "corrective" Hindu Code Bill (HCB). Religion must be restricted to religion only and the secular activities attached to the religion must be regulated, unified and modified for a strong and consolidated nation.[17]
In fact that was the logic behind amending the Hindu Personal Law via Hindu Code

13. Ibid.
14. www.janasangh.com/jsart.aspx?stid=288.
15. Ibid.
16. Jain, M.P. (2008), Indian Constitutional Law 904, (5th eds.), New Delhi: Wadhwa and Company Nagpur (1962).
17. Constitutent Assembly Debates vol. VII 547- 48.

Bill (HCB) in 1955 by a determined Nehru even in the face of very strong opposition from the stalwarts of within his own party. It was cited as "great progressive legislation" by Nehru himself. Why he was not equally determined or "progressive" in amending the Muslim Personal Law based on an anachronistic and medievalist Sharia or Quran, then? Why this explicit double standard, Mr. Nehru?

The present Muslim law can never provide gender equality to the Muslim women -- if personal law is considered as a part of their religion. To elevate the position of Indian women and provide them with gender equality, which has been rendered "endangered" by the Mullah appeasement politicking of the pseudo-secularists here, India is badly in dire need of a UCC for all Indians.[18]

Regarding existence of numerous personal laws and its subsequent perilous impact on gender equality, what Justice M. C. Chagla said is worth remembering. The great jurist and a statesman wrote in his autobiography "Roses in December", thus:

*"Consider the attitude of the Government to the question of a uniform civil code. Although the Directive Principles of the Sate enjoin such a code, Government has refused to do anything about it on the plea that the minorities will resent any attempt at imposition. Unless they are agreeable it would not be fair and proper to make the law applicable to them.*

I wholly and emphatically disagree with this view. The Constitution is binding on everyone, majority and minority, and if the Constitution contains a directive, that directive must be accepted and implemented.

Jawaharlal showed great strength and courage in getting the Hindu Reform Bill passed, but he accepted the policy of laissez faire where the Muslims and other minorities were concerned. I am horrified to find that in my country, while monogamy has been made the law for the Hindus, Muslims can still indulge in the luxury of polygamy.

It is an insult to womanhood; and Muslim women, I know, resent this discrimination between Muslim women and Hindu women."[19] (Note: the single quote of Justice Chagla has been paraphrased, bold and italicized for greater impact)

**2.5 UCC vs Secularism: The Great Indian Debate**

The Government, the press, the politicians, the academics and even the minority organisations none of them have taken any sort of active interest in the UCC. Thus we could easily infer from the attitude of people prevailing these days that this

18. Dhagamwar, Vasudha (1989), Towards The Uniform Civil Code 53, New Delhi: The Indian law Institution.
19. www.janasangh.com/jsart.aspx?stid=288

concept has been ignored and at worst they have spread false information and impression about it. But, if we see today's scenario then India is more communalized then it was in 1947, so we should realise that the concept of UCC had become very important and need immediate concern. People, who were the founding fathers of constitution as well as non Muslims thought that a uniform civil code was necessary for our national unity and secularism.

But along with them there are also few people who disagree about this concept like Prof. Paras Diwan says, "The uniform civil code has nothing to do with Indianisation or national integration or interfering with the religion of one community or the other."[20] Even few Christian organisations believed that the seeds of communal violence in the separation had been sown by separate personal laws. To quote Choudhary Hyder Hussain, a prominent Muslim lawyer, "Living under the British rule for about two centuries we have come to consider it only natural for Hindus to be governed by Hindu Law and Muslim to be governed by Muslim Law; but it is wholly a medieval idea and has no place in the modern world...I would therefore strongly urge the necessity of having one single code to be named as Indian Civil Code applicable to everybody living within the territory of Indian Union irrespective of caste, creed or religion persuasions. This is the juristic solution to the communal problem. It appears to be absolutely essential in the interest of the unification of the country for building up one single nation with one single set of laws in the country."[21] (emphasis added)

So in order to make India peaceful and free from any sort of communal violence there is necessity of creating UCC. The people who do not think that UCC as an instrument for national integration should look back to the days of India before the Britishers. Before, Britishers came to India Kazi's and Pandit's had already created a legal fiction in the laws. Like during earlier time women were not considered as witness and they were regarded as Kafirs, whereas among Hindus Pandit's give unequal punishment to the offenders on the basis of the caste of offender and victim. To do away with all these problems and to create uniformity Britishers framed laws like Criminal Procedure Code, 1898 and Indian Evidence Act, 1872.

### 2.6 Critical Appraisal and Conclusion

It is interesting to note that after independence, Pakistan modernized its personal law and made it quite difficult for a man to marry a second time. Tunisia and Turkey have actually abolished polygamy. In India, only Muslim men may practice polygamy and Hindu sons inherit greater shares of their parents' estates than their sisters do, but changed after an amendment to HAS in 2005 giving daughters equal right in her father's property.

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20. Mahmmod, Tahir (1972), Common Civil code, Personal Law and Religious Minorities, (eds.), Mohammad Imam, p. 420, 460.
21. Destha, Kiran (1995), Uniform Civil Code In Retrospect And Prospect, New Delhi: Deep & Deep Publication. 2002)

While one's religion determines which law will apply to him or her regarding marriage, divorce, maintenance, guardianship, adoption, inheritance, and succession., a call for a UCC enshrined in the Directive Principles of State Policy under Article 44 in Part IV of our Constitution is often, if not always, termed to be a communal or anti-minority (read Muslim) seditious or sectarian demand. Very strong adjectives but very poor and strange logic, aren't it?

If demanding UCC for all Indians throughout the territory of India is communal or anti-national, please tell us who is secular; those who want to subvert and sabotage a Constitutional mandate upon the Executive or Legislative wing of the Government of India (the Indian State) in a perverted fashion or those who want this Constitutional mandate or directive upon the State to be implemented in its true letter and spirit so that in a secular State of India secular laws govern the personal laws of all the religious communities living as citizens of India.

Lest, the venom of an increasingly communalized and polarized Indian polity will led to the another partition of Mother India. Are we willing to let that "demographic disaster" history to repeat itself? Remember, the golden words of George Santayana, "Those who do not remember the past are condemned to repeat it". Do we want the bloody past to haunt us all Indians once again?

Then, wake up, raise your voice and fight via debates, discussions and spreading mass awareness acting like "war-time intellectuals" rather than "peace-time" ones and rest not till the UCC is implemented in India replacing all the existing personal laws of all the religious communities living as citizens of India. And this is the sole objective of this publication brought to you in a precise, lucid, informative, factual and reader friendly format by the IPF within a very short period of time. A painstaking research work done by the Research Team of the IPF working day and night.

If we can have one common criminal code (Indian penal Code) for all Indian citizens, irrespective of religions, genders, sexes or castes, then why not a UCC to govern the personal laws of all religious communities harmoniously and uniformly all over the territory of India, as the Constitution of India itself rules out a "directive" to the Indian State in this regard? We must not let the demand for a UCC get evaporated in the din and heat of an increasingly communalized Indian polity in the excuse of "building consensus" or "seeking unanimity" for good.

We must keep the pressure on for the immediate implementation of UCC in a time bound manner as envisaged and envisioned in the Constitution of India; irrespective of the political hues of the ruling dispensations in Delhi whose political will is most often than not dictated by and mortgaged to the sheer logic of vote-bank politics.

Chapter 3

# Uniform Civil Code and Gender Justice: A Call from Indian Judiciary

***"The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a "Uniform civil Code" for the whole of India"***

-Supreme Court of India[1]

## 3.1 Introduction

**Indian judiciary has been very emphatic on the issue of enforcing Act 44 of Indian constitution that enjoys a duty on the state to enact uniform civil code. Judiciary is convinced that uniform civil code (hereinafter UCC) is the charter of equality and dignity to women in India, especially belonging to the oppressed and suppressed sections of the women in the country.** Though the court did not issue any directions to the Parliament or the executive to frame UCC, it made observation the various cases underlining the need for UCC for the save of national and social integration and justice.

**The Supreme Court, as the Apex Court of India as well as the guardian of the Indian Constitution has remarked that there is no connect between freedom of religion as guaranteed under Article 25 and 26 and the personal laws.**[2] It is true, as recognized by the Supreme Court, that **no Hindu can be forced to observe Muslim rites and customs or vice versa while performing the act of marriage,** but the matters relation to divorce, maintenance inheritance and succession are secular activities that are in larger social /public interests.

## 3.2 Judiciary and Gender Justice in India: Prominent Case Studies

The conflict of **sex or gender equality/justice and plural religious personal laws** was one anticipated prior to independence in India. In the 1940s the **National Planning Committee** recommended the enactment of the UCC as a measure to attain women's equality, recognizing the discriminatory provisions of family law that were at odds with the progressive reform agenda of the Indian State.[3]

However, The Supreme Court has not developed a uniform approach to dealing with personal laws and their conflict with gender equality or gender justice, and

[1] See Smt. Sarla Mudgal, President, Kalyani and others v. Union of India and others, AIR 1995 SC 1531.
[2] See http://www.napsipag.org/pdf/judiciary_as_change_agent_rajvir_sharma.pdf.
[3] http://www.bc.edu/content/dam/files/schools/cas_sites/polisci/pdf/A_Case_of_Competingpdf, See page 17.

there exists "no uniformity of decisions as to whether personal laws can be challenged on the touchstone of fundamental rights.[4] Whereas legal scholars have insisted that under the existing constitutional guarantees, discriminatory provisions of religious personal law must be read down as unconstitutional or ultra vires, the Supreme Court and different states' High Courts have been generally reluctant to intervene and apply constitutional measures to personal law cases.[5]

This reluctance runs contrary to the progressive text of the Indian constitution as Mihir Desai notes, "Women not being natural guardians, talaq, polygamy and absence of coparcenary rights for women under Hindu undivided family, etc. should all have been declared as void by now as they all discriminate against women. But surprisingly that has not happened."[6]

The three predominant reasons that have been presented for this lack of intervention in family law to reform its gender discriminatory aspects by the Indian judiciary have been as follows:

1) **Fundamental Rights not applicable since personal laws are not 'laws in force'**
   The applicability of Part III (Fundamental Rights) of the Constitution to religious personal laws was first considered in 1952 by the Bombay High Court in the case **State of Bombay** vs **Narasu Appa Mali.**[7] The defendant, on being prosecuted under the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 argued that the Act was unconstitutional because the provisions discriminated against Hindus, who were criminally charged for polygamy, while Muslims were not subjected to the same, thereby violating the provision of non-discrimination under Article 15. According to Article 13(1), all laws in force before the commencement of the constitution are void if they conflict with fundamental rights guarantees. The Bombay High Court ruled that personal laws are not 'laws in force' and thus, are not rendered void even upon conflict with equality provisions of the Constitution. The ruling in "obtaining the short-term gain of defending the provision of monogamy for Hindu males" established a precedent that "erected an insurmountable obstacle for gender equality within personal laws" by disallowing a test of constitutionality against personal laws.[8] **In Krishna Singh** vs **Mathura Ahir**, this non reluctance to intervene was echoes by a two-bench Supreme Court that, disagreeing with the decision of the lower court, stated: "In our opinion, the learned judge failed to appreciate that part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the

[4]Desai, Mihir (2004), "Flip-Flop on Personal Laws", Combat Law 3(4).
[5]This is not to imply, however, that there have not been cases where the courts have intervened favorably and upheld sex equality provisions. It is only argued here that this has not been the dominant trend, as might be expected of a progressive text like the Indian Constitution. For cases where the courts has taken a sensitive stance to gender discrimination in personal law systems, see Swapna Ghosh vs Sadananda Ghosh A 1989 Cal 1.(Section 10 of Indian Divorce Act, 1869 for Christians is deemed discriminatory to women), Sareetha vs Vekata Subbaiah A 1983 AP. (Section 9 of the Hindu Marriage Act, 1955 is read as discriminatory to women).
[6]Desai, Mihir (2004), "Flip-Flop on Personal Laws", Combat Law 3(4).
[7]State of Bombay vs Narasu Appa Mali, 1952 AIR 39 (Bombay).
[8]Agnes, Flavia (1999), Law and Gender Inequality: The Politics of Women's Rights in India, New Delhi: Oxford University Press, p192.

parties, he (the High Court judge) could not introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu laws, i.e. Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or abrogated by statute."[9]

2) **Privacy**

In **Harminder Kaur** vs **Harmander Singh Choudhry**, the constitutionality of **Section 9** of the codified **Hindu Marriage Act, 1955 (HMA)** that provides for the restitution of conjugal rights was considered as violating Article 14.[10] The Delhi High Court ruled against the wife who had appealed the decree and brought the constitutional challenge. In rejecting the challenge the court ruled that constitutional law was inapplicable to the 'family' realm. It said: "Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a China shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 has any place."[11] The constitutionality of Section 9 of the HMA was once again considered, this time by the Supreme Court, in Saroj Rani V. Sudarshan Kumar.[12] The Supreme Court, while not explicitly invoking an argument of privacy, claimed that Section 9 "serves a social purpose as an aid to the prevention of the breakup of marriage" and without further regard, determined it did not violate article 14.[13]

3) **Judiciary is not the place for reform**

In Ahmedabad Women's Action Group vs. Union of India, a women's group challenged the gender discriminatory provisions of Hindu, Muslim and Christian personal laws as violating constitutional guarantees of equality.[14] The Supreme Court exercised restraint on the premise that since the issues involved state policies it was the legislature's discretion to intervene, and not the task of the court to undertake.

An interesting trend of differential intervention emerges in cases pertaining to Hindu family law, which though unequal across gender lines, but is codified unlike Muslim law. The discriminatory aspects of Hindu personal law are deflected through the strong focus given to Muslim **(Sharia)** personal law and its backward provisions. As mentioned before, courts have been reluctant to acknowledge the unfair burden placed by **Section 9** of the **HMA**. Similarly **Narashimaha Murthy** vs **Susheelabai (Smt.)** [15] upheld the sex-differential statutory coparcenary division of the Hindu Succession Act. Sons of intestates were allowed to unilaterally block division of property on sale of a dwelling house by living in it regardless of marital

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[11] *A 1984 Del 66 at 75*
[12] *A 1984 SC 1562*
[13] *http://www.bc.edu/content/dam/files/schools/cas_sites/polisci/pdf/A_Case_of_Competingpdf, See page 20.*
[14] *Ahmedabad Women's Action Group & ors. vs Union of India 1997 SC 3614.*
[15] *(1996) 3 SCC 644.*

status, so daughters would inherit nothing until later, while daughters could live in the house only if they were married.

**Flavia Agnes** has attributed this reluctance to reform the discriminatory aspects of a codified Hindu law as resulting from the desire to see the reformed Hindu law as 'ideal legislation' for the emancipation of women, when in reality there remain many discriminatory aspects to different laws in the code. This 'ideal legislation', she suggests, sets the standard for the Muslim communities who maintain adherence to Sharia law.[16]

### 3.2 Supreme Court on Uniform Civil Code (UCC): A Case Study of Important Judgments

Even after more the five decades from the faming of the Constitution, the ideal of UCC under Article 44 is yet to be achieved. However, efforts in this discretion continued as reflected in various pronouncements of the Supreme Court from time to time.

In **Mohammad Ahmed Khan v.s Shah Bano Begum**, popularly known as the **Shah Bano's** case, the Supreme Court held that **"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter."**[17] Despite section 127 of Cr. P.C. 1973 (which provides that if a woman has received an amount under personal law, she would not be entitled to maintenance under section 125 of Cr. P.C. 1973 after divorce) Muslim women would be entitled to maintenance if amount received by her as "dower" under personal law is not sufficient for her sustenance. Though the decision was highly criticized by Muslim Fundamentalists, yet it was considered a liberal interpretation of law as required by gender justice. Later, on under pressure from Muslim fundamentalists, the central government passed the Muslim women's (Protection of Rights on Divorce) Act, 1986, which denied right of maintenance to Muslim women under section 125 of Cr. P.C. The activists rightly denounced that it "was doubtless a retrograde step. That also showed hoe women's rights have a low priority even for the secular state of India. Autonomy of a religious establishment was thus made to prevail over women's rights."[18]

In **Sarla Mudgal (Smt.), President, Kalyani and others v.s Union of India and others, Justice Kuldip Singh,** while delivering the judgment directed the government to implement the directive of Article 44 and to file affidavit indicating the steps taken in the matter and held that **"Successive governments have been wholly remiss in their duty of implementing the Constitutional mandate under Article [44]. Therefore, the Supreme Court requested the Government of India, through the Prime Minister of the Country to have a fresh look at Article 44 of the Constitution of India and endeavour to secure for its citizens a UCC throughout the territory of India."**[19] In his **25 pages judgement, Justice**

[16]Agnes, Flavia (1999), Law and Gender Inequality: The Politics of Women's Rights in India, New Delhi: Oxford University Press, p 77.
[17]See (1985) 2 SCC 556
[18]Kumar, Virendar (2000), "Towards a Uniform Civil Code: Judicial Vicissitudes", from Sarla Mudgal (1995) to Lily Thomas (2000), 42 Journal of Indian Law Institute, 315.

**Kuldeep Singh**, rightly points out that it has been judicially acclaimed in the United States of America that the practice of polygamy is injurious to public morale **Justice R. M. Shahai,** while agreeing with **Justice Kuldip Singh,** too agreed that **"Ours is a Secular Democratic Republic. Freedom of religion is the core of our culture. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentiality civil and material freedoms, are not autonomy but oppression."**[20] Further, it said, **"Where more than 80% of citizens have already been brought under codified personal law, there is no justification whatsoever to keep in abeyance, any more, the introduction of uniform civil code for all citizens in India."**

In ***Lily Thomas etc***. *vs* ***Union of India*** and others the Apex Court held that: "The desirability of UCC can hardly be doubted. But it can concretize only when social climate is properly built up by elite of the society, statement amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."[21] The court further added while it was desirable to have a UCC, the time was yet not ripe and the issue should be entrusted to the Law Commission of India which may examine the same in consultation with Minorities Commission of India.[21] (emphasis added) That is why when the court drew up the final order signed by both the learned Judges it said, **"The writ petition are allowed in terms of the answer to the questions posed in the opinion of Justice Kuldip Singh. These questions we have extracted earlier and the decision was confined to conclusions reached thereon whereas the observations on the desirability of enacting the UCC were incidentally made."**[23]

In ***Danial Latifi* and another** vs ***Union of India***, the court upheld the validity of Sections 3 and 4 of the Muslim Women (Protection of rights on Divorce) Act, 1986, as not being violative of Articles 14, 15 and 21 of the Constitution of India.23 Under Section 3 of the Muslim Women (Protection of rights on Divorce) Act, 1986, a Muslim husband is liable to make reasonable and fair provision for future of divorced wife which includes maintenance also, so she is not entitled to claim maintenance under section 125 of Cr. P.C. Under Section 4 of the Act, divorced Muslim woman unable to maintain herself after iddat period (three menstrual cycles) can proceed against her relatives or Wakf Board for maintenance. Justice Rajendra Babu, on behalf of a five Judges bench consisting of Patnaik, Mohapatra, Doraiswamy, Patil, JJ and himself observed that: "In interpreting the provisions where matrimonial relationship is involved we have to consider the social conditions prevalent in our society. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized by persons belonging to all religions."[24]

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[19] AIR 1995 SC 1531.
[20] http://lawlib.wlu.edu/lexopus/works/579-1.pdf, See page 7*
[21] ibid
[22] ibid
[23] (2001) 7 SCC 740.

In ***John Vallamattom*** vs ***Union of India*** the Supreme Court in a PIL by a Christian priest, John and other citizens of Christian community, challenging the validity of the Section 118 of the Indian Succession Act, 1925, while striking down the said section as being violative of Article 14 of the Constitution, and also concerned over the contradictions in marriage laws of various religions, in a historic judgments, emphasized the need for a legislation by Parliament on common civil code.25 Stressing that there was no "necessary connection" between religious and personal laws in a civilized society, a three judge bench headed by Chief Justice V. N. Khare held that it was matter of regret that Article 44 of the Constitution, which provided for the State to "endeavour" to secure a UCC for its citizens throughout India, had not been affected. The Court further observed that **"Parliament is still to step in for framing a UCC in the country. A UCC will help the cause of the national integration by removing the contradiction based on ideologies."**[27] It observed, "It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution (right to freedom of religion)." Distinguishing between Article 25 and **Article 44**, **Justice Khare** said "the former guarantees religious freedom whereas the latter divests religion from social relations and personal law."

The Apex Court was even more categorical in Shabana Bano vs. Imran Khan [Criminal Appeal No. 2309 of 2009] case of December 4, 2009. It said, "Even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under section 125 Cr. P.C. after the expiry of the period of iddat as long as she does not marry."

Not only the Supreme Court, the High Court of Jammu and Kashmir in Mohammad Naseem Bhat Versus Bilquees Akhter case as latest as April 30, 2012 observed that Muslim man's power to divorce his wife is not "unrestricted or unqualified". A 23-pages judgment by Justice Hasnain Massodi; extensively quoted Sharia (Islamic Laws) and the Holy Quran before arriving this historical judgment. Historical for being this ground breaking judgment despite of many concerned voices in the recent history since Shah Bano case by many jurist in India as well as civil society representatives; this is indeed a defining judgment. Justice Hasnain has not only question the sacrosanct of Muslim man's absolute and unrestricted power to pronounce Talaq but termed it as not being 'absolute' and 'unrestricted'. Questioning the 'Triple Talaq' in his judgment, he condemned the existing laws as most despised and formed some guidelines before pronouncing Talaq.

**Justice Hasnain judgment has some basic observation-**

- **Talaq** should be the last option and can't be pronounced until two witness **'who are endued with justice'** are not present and only when husband provides that enough efforts were made for reconciliation.
- There must be representatives from both sides to settle the dispute before pronouncing **'Talaq'.**
- The case should be **genuine.**

But as expected as usual the verdict faced the wrath of numerous Muslim fundamentalists groups in the Valley and even by some retired judges of the High Court like **Bashir Ahmed Kirmani,** who has filed a petition of rehearing of **Justice Hasnain** judgment and wanted it to be annulled. Like a bigoted Muslim fundamentalist Kirmani said, **"If this judgment is accepted today, the man-made courts (terming Indian courts) would be judgmental tomorrow on all other religious matters of the Muslims. This has never been acceptable to Muslims in the past, nor would ever be in future"** as reported in a Jammu& Kashmir based news web portal. *

It can be said that after mentioning the Apex Court's and other Court's (like HC of J&K etc) views regarding the implementation of UCC that Article 44 needs to be interpreted to sustain the plurastic character of the Indian community. It should be on the gender justice/equality rather than on uniformity. However, the Supreme Court has not yet interpreted Article 44. Such an irony!

On all its decisions on matters pertaining to personal laws the Apex Court enjoined upon the parliament to enact a UCC without specifying what a UCC would mean. However, the word "uniform" should not mean the same law for all but it should mean similar laws for all and similarly should be regarding equality and gender justice.

### 3.4 Uniform Civil Code in the Context of Indian Constitution**

- Like the concept of secularism, justice , liberty, equality and fraternity all are essential and inseparable part of Indian Constitution and along with clarity and security are also considered as essential part of the constitution and as stated earlier prevalence of different personal laws ruins the clarity of laws and creates apprehensions in the mind of different religions so the very purpose of the Constitution is not fulfilled and there is a necessity for the formation of Uniform Civil Code.

- Providing justice without equality to the individual will not fulfill the very basic purpose of the Constitution. It will create such a situation in which a person have the power to go to courts for infringement of his rights but the basis of this infringement is equality itself which is not provided to individual.

- Along with the above reasons the Fundamental Rights which are considered to be the basic structure of the Constitution will also not be provided to the individual under the garb of different personal laws. Their will be infringement of Articles like 14, 15, 16, 17 and 18. As all of them talks about equality like Article 15 prohibits discrimination on the grounds only of religion, race, caste, sex or any of them. Article 16 talks about equality in matters of public employment.

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* www.kashmirlife.net.

**Choudhary, Vaibhav, A Proposal for Uniform Civil Code for Law of Succession in India (August 31, 2010). Available at SSRN: http://ssrn.com/abstract=1669547 or http://dx.doi.org/10.2139/ssrn.1669547

Thus the very purpose of these Articles will not be fulfilled if the different personal will keep on prevailing as they provide different treatment to individuals with in accordance with the religion they follow.

### 3.5 Reasons for the Establishment of a Uniform Civil Code in India:

There are several reasons which could support the view for establishment of UCC. These reasons ranges from Constitutional and philosophical ideologies to practical views.

Preventing Communalism and Promoting The Spirit of Constitution:

- To achieve the spirit of our constitution i.e. secularism which is featured in our Preamble.
- Uniform civil code is a safeguard against the political domination by means of minority fundamentalism. Thus it is a means of preventing encouragement to the communalism spread by political parties in order to achieve their political ends.

**Simplicity in Law**

Uniform civil code provides clarity which arises out of simplicity. Different religions had made the legal system a maze by creating rights for individuals in some ways and taking them in another way depending upon the religion they follow. Thus to create clarity for the rights available to all individual uniformly, there is a requirement of Uniform Civil Code.

### 3.6 Demand for a UCC and India's Commitment to UN Conventions on Prevention of Gender Discrimination: Whither Gender Equality ?

There is a compelling need to study the personal religious laws from a human rights perspective. India has time and again pledged its commitment to upholding the normative regime of human rights, be it in the provisions of the Constitution or the terms of the various international covenants and treaties. Principles of equality, non-discrimination and fairness which form an essential part of the human rights discourse are the subject matter of the debate regarding personal laws of India. These principles are enshrined in the **Preamble** to the Constitution, **Fundamental Rights and the Directive Principles of State Policy.**

**Gender equality is a facet of equality and it is one of the basic principles of the Constitution.** Moreover, the doctrine of equality as enshrined in Article 14 of the Constitution of India is not merely formal equality before the law but embodies the concept of real and substantive equality which strikes at all the inequalities arising on account of vast historical, socio-economic an customary differentiation. Thus, we see that **Article 15(3)** of the Constitution empowers the State to make special provisions for protection of women and children. **Article 25(2)** mandates that social reform and welfare can be provided irrespective of the right to freedom of religion. **Article 44** which **directs** the state to secure for its citizens a **Uniform Civil Code** throughout the territory of India is the **cornerstone for women's equality** in the country and must be urgently implemented so as to eliminate antiquated discriminatory norms of religious laws.

The United Nation (UN), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) is a unique international convention in that it was based on the need for special formulation that would assert, protect and promote women's human rights. The Convention expressly states that discrimination against women is socially and culturally constructed and encompasses public and private spheres, thereby bringing within its fold the domain of the family. **The CEDAW has contributed significantly in setting new normative standards for human rights law and practice but it is regrettable that CEDAW has the distinction of being the most reserved human rights convention today, i.e. State parties have modified or waived obligations in relation to certain parts of the treaty by means of reservation clauses.**

**India too has ratified CEDAW with a declaration to limit its obligations relating to changing the discriminatory cultural practices within the community and the family. Hence, with regard to articles 5(a)[2] and 16(1)[3] of the Convention, the India declares that** "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent". India's reservation is an unqualified exemption from State interference into customary practices and it also fails to specify a time frame.

**This reservation can only be construed as being inconsistent with the objectives and purpose of the Convention and** an indication of the utter lack of political will on part of the Indian State, **even in face of international duties and obligations, to bring about an** egalitarian, uniform civil law **in the country.**

Whither gender justice/equality?

Chapter 4

# Endangering Gender Equality: The Shah Bano Case Legacy

*The Secular State in Self-retreat for Politics of Muslim Vote Bank?*

*"A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies."*
*-The Supreme Court of India in Shah Bano case in 1985*

## 4.1 Interpretation of Shah Bano Case Judgement: Reasons why the Shah Bano Case is a Landmark Case

The Shah Bano case [1985 AIR 945, 1985 SCC (2) 556] is one of the most important and controversial cases in Indian personal laws. Here are five reasons why it is such a landmark case:

1. **Triggered the Muslim woman's fight for Justice**
   In India, a Muslim woman is perceived as obedient to the dictates of her religion and community. For a Muslim woman to question the Islamic law and fight for alimony in court for justice was unheard of. By claiming what she believed to be rightfully hers, she challenged the beliefs of a religion and the way it was interpreted by the society, the religious leaders as well as the entire socio-legal system that prevailed in the country.

2. **Bold Ruling by the Supreme Court**
   Typically, Muslim personal laws are interpreted by considering it in light of the principles of Islamic law. The case threw open wider issues pertaining to a Muslim woman's security and dignity in a marriage.

3. **Debate and Discussion in the Country**
   The whole country discussed and debated about the Shah Bano case because nothing so staggering had ever happened before. There was a mixture of reactions to this ruling that awoke the nation's conscience at large. From anger to shock to disbelief and to downright rage, this case brought together a variety of cultural responses from India's diverse population.

4. **Enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986**
   Few Acts have been so quickly passed as did the Muslim Women

1. http://articles.timesofindia.indiatimes.com/2010-08-16/india/28306685_1_muslim-women-muslim-community-hindu-community.

(Protection of Rights on Divorce) Act 1986. The Act came under extreme criticism as a majority of non-Muslims perceived it as a clear symbol of political appeasement at the time of elections. The new Act stated that the Muslim husband is liable to pay alimony only during iddat (the span of 3 months after the divorce). It also stated that if a divorced woman has no relatives to take care of her or she has no way to take care of herself, the magistrate has to order the State Waqf Board to provide support to the woman and her children.

5. **Personal Laws can be Political Battlegrounds**
The Shah Bano case taught the country that personal laws can become political battlegrounds because religions influence personal law. In cases that challenge personal laws, it becomes nearly impossible to delineate the historical, personal and political elements from each other as they are all seamlessly woven into one entity.

### 4.2 Why Shah Bano Case Was A Milestone for the Muslim Women and How Political Appeasement Betrayed Indian Democracy

The Shah Bano case was a milestone in the Muslim women's search for justice and the beginning of the political battle over personal law. A 60 year old woman went to court asking maintenance from her husband who had divorced her. The court ruled in her favour. Shah Bano was entitled to maintenance from her ex-husband under Section 125 of the Criminal Procedure Code (with an upper limit of Rs. 500 a month) like any other Indian woman. The judgment was not the first granting a divorced Muslim woman maintenance under Section 125. But a voluble orthodoxy deemed the verdict an attack on Islam.

The Congress Government, panicky in an election year, caved in under the pressure of the orthodoxy. It enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. The most controversial provision of the Act was that it gave a Muslim woman the right to maintenance for the period of iddat (about three months) after the divorce, and shifted the onus of maintaining her to her relatives or the Wakf Board. The Act was seen as discriminatory as it denied divorced Muslim women the right to basic maintenance which women of other faiths had recourse to under secular law.

The Bharatiya Janata Party (BJP) saw it as a blatant 'appeasement' of the minority community and discriminatory to non-Muslim men, because they were still bound to pay maintenance under Section 125, Cr. PC. However, lawyers who have seen the Act in operation say that there is good reason to take another look at the Act. It contains provisions which have left it open to liberal interpretation.

Flavia Agnes, a Mumbai-based lawyer, says that liberal interpretation has not been wanting. Clause A in Section 3 (1) of the Act says that a divorced woman shall be

entitled to "a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband." The injunction that 'a reasonable and fair provision is made' and 'maintenance paid' leaves enough scope for gender-sensitive judgments. Ms. Agnes cites a slew of rulings in States such as Kerala, Maharashtra, Gujarat and Andhra Pradesh, which have awarded sums as maintenance, and 'reasonable and fair provisions' in the form of a one-time lump sum payment that Muslim women have never received before.

Apart from this, Ms. Agnes says, the 2001 ruling of the full Constitutional Bench of the Supreme Court in the Daniel Latifi case, in effect, gave Muslim women a law on maintenance. While the 1986 Act appears to have worked better than it was expected to, what remains a concern to many is the inherent discrimination in excluding divorced Muslim women from a provision of law outside the realm of personal law, which is applicable to all other women.

One decision that Rajiv Gandhi was not proud of it was that had the Shah Bano case not happened, the Babri Masjid locks would not have opened? The fact is that the consequences of both the incidents proved to be a blot to the secular ethos of India.

The Shah Bano case started off with a petition by Begum Shah Bano, a 60 year old woman from Indore, Madhya Pradesh, who had five children. She had been divorced by her husband in 1975 after 43 years of successful marriage. The Judicial Magistrate Court of Indore ruled in favour of the appellant who claimed her right to maintenance. Finally in 1985, an appeal was filed in the Apex court, which entitled Shah Bano to be given maintenance by her ex-husband just like any other Indian woman under section 125 of Cr. PC. The Muslim orthodoxy considered the court's decision an encroachment to Muslim Personal Law or Sharia.

The then ruling Congress with a brute majority of three fourth of Parliament (Lok Sabha) passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 that annulled or overruled the Apex Court's judgment in this regard. Prima facie, it was indeed a blatant case of Muslim appeasement.

On February 1, 1986, the locks of Babri Masjid were opened to allow Hindus to worship the Ram Lalla idol in its precincts. Rajiv Gandhi did it to soothe the religious sentiments of Hindus, just like he did for Muslims in Shah Bano case. Thus, both these decisions of Rajiv Gandhi regime have been widely seen as to placate hardcore elements in Hindus and Muslims.

### 4.3 Arif Mohammed Khan: The Enlightened voice of an Indian Renaissance

Arif Mohammed Khan resigned as a Minister of State (MoS), Ministry of Home Affairs from Rajiv Gandhi's Council of Ministers in 1987 in protest after the government moved a bill in Parliament to overturn the Supreme Court verdict in the Shah Bano case. He has since remained a consistent voice of the progressive and secular minded Muslims of India. When Arif Mohammed Khan opposed the Muslim Women (Protection of Rights on Divorce) Act, 1986, passed in the wake of Shah Bano case judgment, about which he writes in detail he became almost a hero overnight for the Left and the liberal sections of society. It is true that the entire

phalanx of Muslim orthodoxy opposed the court's view. But it is also true that many liberal Muslims and women's rights organizations hailed it as a blow for the dignity of women denied by an orthodox interpretation of Islam.

Arif Mohammed Khan has served as Deputy Minister of Information and Broadcasting; and Minister of State in the Ministries of Home Affairs, Agriculture, Energy, Industry, and Company Affairs. He was also Cabinet Minister in charge of Energy and Civil Aviation. Born in 1951, he was General Secretary (1972-73) and President (1973-74) of the students union of Aligarh Muslim University. He was elected to Uttar Pradesh Assembly in 1977. He was subsequently elected to Parliament as a member of the Lok Sabha four times. He has authored Text and Context, a 2010 bestseller. The volume contains two pieces on Kashmir: "Kashmir must not forget its Rishis", and "Kashmir: Keep it Together".

Arif Mohammad Khan made a stirring speech in Parliament supporting the Apex Court's interpretation. Rajiv Gandhi after first supporting Khan, caved in and the minister resigned on grounds of conscience. There have been voices of dissent within the Muslim community. Rajiv Gandhi's Minister Arif Mohammad Khan was against surrendering to the demands of dogmatic mullahs on the Shah Bano case in the 1980s. He even resigned from the government when Rajiv Gandhi decided to go ahead and defy the SC in the hope of cornering Muslim votes. Khan lost the election.

### 4.4 The Legacy of Shah Bano Case Still Undone: The Secular State in Self-retreat

Not much progress has been made towards achieving the ideal of a uniform civil code which still remains a distant dream. The only tangible step taken in this direction has been the codification and secularization of Hindu law. The codification of Muslim law still remains a sensitive matter. The unique feature of Islam is that the historical foundations of Islamic religious law, i.e. sharia, include a universal system of law and ethics and purport to regulate every aspect of public and private life. The power of sharia to regulate the behaviour of Muslim derives from its moral and religious authority as well as the formal enforcement of its legal norms. Many authors hold the view that the nature of sharia reflects specific historical interpretations of the scriptural imperatives of Islam.

However, to an overwhelming majority of Muslims today, sharia is the sole valid interpretation of Islam, and as such ought to prevail over any human law or policy. This becomes extremely problematic because sharia conflicts with international human rights standards in that it discriminated against women and non-Muslims. The divinity of sharia insulates it from challenge by an average Muslim and prevents a successful criticism from the human rights perspective from taking place. What needs to be remembered, however, is that India is a secular country where the Constitutional philosophy reigns supreme. Personal laws, howsoever scared, should not be allowed to encroach upon the inviolable collective values of the nation.

## 4.5 Conclusion

India is not an Islamic country and in fact, has a secular code for criminal law. If the Muslim community has accepted a non-sharia code in one sphere, then logically, it should be amenable to such a code in other spheres as well. But they have never demanded their own personal law or sharia as a separate criminal code for them instead of the Indian Penal Code and Cr. P.C. Because they fear punishment under a sharia based criminal code will be much harsher (stoning to death, cutting of physical organs etc) than that of IPC or Cr. P.C.

It must be understood first and foremost that there is no logic or religiosity whatsoever attached to their vehement opposition to the Uniform Civil Code (UCC) given under the secular constitution of India It is just a matter of convenience and suitability for their future political and other ambitions in a democratic India where political parties run to them for their bloc political votes like beggars and where being a democracy, demography (numbers) defines or destroys its destiny. As Augustus Comte said so presciently, "In democracy, demography is destiny."

It is necessary that law be strictly divorced from religion. With the enactment of a UCC, secularism will be strengthened; much of the present day separation and divisiveness between various religious groups in the country will disappear, and India will emerge as a much more cohesive and integrated nation. Perhaps the Shah Bano episode served as a landmark in the policy of judicial intervention in personal laws. The backlash of the community was not as unfortunate as the complete disregard by the then government of Constitutional directives, egalitarian values and notion of gender justice or equality.

**Eminent Jurists on Shah Bano Case and Need for a Uniform Civil Code**

- In 1985, the then Chief Justice Y.V. Chandrachud, in such a controversial case of Shah Bano asserted that a Uniform Civil Code would remove disparate loyalties to laws which have conflicting ideologies. The Court has time and again emphasized the desirability of adoption of Uniform Civil Code for all citizens.
- An eminent retired judge of Supreme Court. Justice V. R. Krishna lyre and others have been espousing the cause of a uniform Civil Code for years together. The basic and fundamental idea behind the formulation of a Uniform Civil Code in to enable easy interpretation and end discrimination.
- A well known jurist. Rajeev Dhavan says "the genuine concern is that many personal laws relating to marriage, inheritance, guardianship, divorce and maintenance and property matters in all communities are unjust, especially to women. Women are the worst victims of the personal laws especially the Muslim women."
- The question of Uniform Civil Code is a very-very sensitive issue. India is a country which has a multifarious race, caste and community," former Chief Justice of India, K. G. Balakrishnan.
- Former Attorney General Soli J. Sorabjee said an academic discussion on uniform civil code issue was always welcome but the challenge must be met by the Legislature adding that "there cannot be unilateral imposition of the Uniform Civil Code".

Chapter 5

# Critical Evaluation: Seeking a Uniform Civil Code and Gender Justice in India

***Even after Sixty Four Years, Still the Time for a UCC not yet Ripe?***

> **"*It is not the (Hindu) Mahasabhites who alone are communal; it is the government also that is communal, whatever it may say. It is passing a communal measure. I charge you with communalism because you are bringing forward a law about monogamy only for Hindu community. Take it from me that the Muslim community is prepared to have it but you are not brave enough to do it. It is not the Hindu voice that is raised against the Prime Minister of Pakistan for having married a second wife. If you want to have (provision of divorce) for Hindu community, have it; but have it for the Catholic community also. Why only codify Hindu rituals and customs and not those of Muslims?*"**
>
> Acharya J. B. Kripalani of Congress ridiculing PM Nehru that Muslims in India were not yet ready for reforms during the debate on Hindu Code Bill in Parliament.

A Uniform Civil Code (UCC) administers the same set of secular civil laws to govern different people belonging to different religions and regions. This supersedes the right of citizens to be governed under different personal laws based on their religion or ethnicity.

The need for UCC has been felt for more than a century. The country has already suffered a lot in the absence of a uniform code for all. It is rather a pity that the longest and most elaborately written constitution in the history of mankind, the Indian constitution is responsible for creation of erosion in society. The society has been fragmented in the name of religions, sects and sex. Even at present, in India, there are different laws governing rights related to personal matters or laws like marriage, divorce, maintenance, adoption and inheritance for different communities. The laws governing inheritance or divorce among Hindus are thus, very different from those pertaining to Muslims or Christians and so on. In India, most family law is determined by the religion of the parties concerned Hindus, Sikhs, Jains and Buddhists come under Hindu law, whereas Muslims and Christians have their own laws. Muslim law is based on the Shariat; in all other communities, laws are codified by an Act of the Indian parliament. There are other sets of laws to deal with criminal and civil cases, such as the Criminal Procedure Code (Cr. P.C.) and the Indian penal code. The multifarious castes and creeds and their sets of beliefs or practices are bewilderingly confusing and nowhere is a scenario like in India, of various personal laws jostling together, allowed.

1. http://articles.timesofindia.indiatimes.com/2010-08-16/india/28306685_1_muslim-women-muslim-community-hindu-community.

Does India need the UCC as laid down under Article 44 of the Indian Constitution? Of course, it does. It is high time that India had a uniform law dealing with marriage, divorce, succession, inheritance and maintenance.

But, it must be realized that the scenario in India is extremely complex. India has a long history of personal laws and it cannot be given up easily. Unless a broad consensus is drawn among different communities, the UCC can't do much good to the country. The reality in India is much more complex than Western societies which have been totally secularized. The need is to work on the existing laws in such a way that they don't go against any particular faith or religion.

Uniform Civil Code will in the long run ensure Equality. While other personal laws have undergone reform, the Muslim law has not. It is a mockery of gender justice and secularism to allow Muslims, for example, to marry more than once, but prosecute Hindus or Christians for doing the same. Therefore, there is the demand for a uniform civil code for all religions. Also, UCC will help to promote Gender Equality. Several liberals and women's groups have argued that the uniform civil code gives women more rights.

However, the opponents of UCC argue that this law is poking into their religious practices; They feel that this code will affect the religious freedom of minorities. One fails to understand how abiding the law of land can go against religious principles! The claim that the sentiments of the minorities are not considered while implementing a common law is, thus, beyond comprehension. UCC does not insist people from one religion to start practicing rituals of other religions. All it says is, with changing living styles along with the time, there should be a Uniform Civil code irrespective of all religions as far s social ethics are concerned.

The crusade for the implementation of the UCC and homogenizing the personal laws is justified and should receive the support of all progressive thinking Indians, not because of any bias, but because it is the need of the hour. But it needs to come on the heels of a political consensus and that is what needs to be evolved. It is rightly believed that the UCC is necessary to effect an integration of India by bringing all communities into a common platform which at present is governed by personal laws which do not form the essence of any religion. India as a nation will not be truly secular unless uniformity is established in the form of rational non-religious codified laws.

Politics apart, the case for a UCC which will cover the entire gamut of laws governing rights relating to property, marriage, divorce, maintenance, adoption and inheritance - has been most argued on behalf of women. There is universal agreement that personal laws, regardless of the community, are skewed against women. In the long sittings of the Constituent Assembly, it seems none had a notion about the injustice that was being done to women in the name of religion as also to the majority community by retaining certain customs among the minority communities and by giving them certain privileges. A uniform code provides equal rights to men and women. The absence of a uniform code is thus responsible for one

calamitous vicissitude in the nation the subjugation of women in almost all the faiths.

One reason why personalized laws based on religion is not favoured is because religious laws tend to be highly gender biased. Most major religions developed, over time, a bias towards women treating them as somewhat inferior. In Christianity, Eve was meant to be the root cause of all evil. In Hinduism, Sati was practiced in some communities for ages till the British formally put a stop to it. The practice of dowry and the ill treatment of widows continue till today in many regions. In Islam, the staunchest Muslims don't let women travel alone, wear something revealing or go to work. These are just a few examples of the deep underlying biases that lie within faiths. Such practices are justified via religious texts or customs that simply "must not be broken". It has taken generations of rebellion to inculcate any change within these religions. Also, religious laws cannot be viewed objectively. They are created from sentiments regarding what is correct according to conceptions of God. Thus to alter such a law one also has to change perceptions regarding core religious fundamentals. As a result, true progress in terms of equality can be hindered by many years.

Let us take a look into the case of Imrana a 28 years old woman, and the mother of five children. On June 6, 2005, Imrana, was raped by her 69 year-old father in-law Ali Mohammad. Soon after she was raped, a local Muslim panchayat (council of elders) asked her to treat her husband Nur Ilahi as her son and declared their marriage null and void! Can any law of the land justify this?

The fact that such a verdict could take place in the world's largest secular democratic India is itself an insult to our legal system in civil matters. Had she been a Hindu or Christian, such a verdict would not have occurred, further highlighting the inequality of the situation. In India, secularism has come to mean "non-intervening in the matter of religion." This needs to be relooked and debated as there cannot be any discrimination in the guise of secularism.

Furthermore, the perception that a UCC would change only Muslim personal law is wrong, and probably came about because the Bharatiya Janta Party (BJP), a Centre Right party is the only political party in India that actively supports it. But the then Prime Minister Atal Bihari Vajpayee clearly dispelled such baseless skeptic perception when he said, "There is no question of imposing Hindu laws over other communities. There will be a new code, based on gender equality and comprising the best elements in all the personal laws."[2] Orthodox practices in Hindu personal law or Christian personal law will also have to undergo changes. For instance, the law pertaining to succession among Hindus is unequal in the way it treats men and women. The concept of the "Hindu undivided family", with respect to succession, would be changed under a UCC. Christian personal law does not allow the succession of wealth to charitable organizations. Under a UCC, this law may very well be altered. This also explains why historically changes in personal law have

2. delta.nitt.edu/.../[A+MBA%20Dec%202003]%20GD%20 (accessed on December 10, 2012).

been resisted not just by one community, but by the ruling orthodoxy in all of them. Moreover, many Islamic countries have codified and reformed Muslim personal Law to check its misuse. Muslim countries like Egypt, Turkey, Syria and even Pakistan have reformed their laws. Terence Farias, in his book "The Development of Islamic Law" points out that the 1961 Muslim Family Law Ordinance of Pakistan "makes it obligatory for a man who desires to take a second wife to obtain a written permission from a government appointed Arbitration Council." The interesting point regarding Pakistan is that until 1947 both India and Pakistan had governed Muslims under the Shariat Act of 1937. However, by 1961 Pakistan, a Muslim country had actually reformed its Muslim Law more than India had and this remains true today.

There is no reason why India should continue with vastly discriminatory personal laws. In fact, the reforms meted out in Tunisia and Turkey helped abolish Polygamy. Polygamy has also been either banned or severely restricted in Syria, Egypt, Turkey, Morocco, Iran and even in Pakistan. Besides Muslims who live in U.S.A., Australia, U.K. and other parts of Europe readily accepted the civil laws applicable uniformly to all citizens in the respective countries but do not feel insecure on that account. So, then, why, in India should there be such a feeling? Iran, South Yemen, and Singapore all reformed their Muslim laws in the 1970s, although Iran appears to have backslided in this respect.[3]

In the end the argument is quite clear that if Muslim countries can reform Muslim Personal Law and if western democracies have fully secular systems, then why are Indian Muslims living under laws passed in the 1930s?

The real social opposition each time has come from the Muslim community that sees any attempt to bring a UCC as an attack on its religious rights. The debate in India seems to have gone the way of the secularists in this respect and the recent rulings by the Supreme Court calling for a Uniform Code has not witnessed the protests and alarms that took place following the Shah Bano case in 1985. It is quite possible that the Muslim community sees a UCC as a fait accompli after almost 60 years of Indian independence.

The matter is far more political than legal. Every time the issue has come up there have been angry words from both sides of the debate. Religious fundamentalism must go, social and economic justice must be made available to the Muslim women and other women and their dignity and quality be ensured, basic human rights guaranteed and there should be an end to exploitation of Muslim women and usher in an era of gender justice and gender equality in tandem with the prevailing "best international practices" across the civilized world.

The debate over immediate implementation of a Uniform Civil Code (UCC) across all the religious communities as citizens of India is now fully ripened. It must not be allowed to turn into another lost opportunity for India and repent it later. We can

3. Hazarika, Raya (2010), Should India have a Uniform Civil Code, October 24, retrieved from the link: http://legalservicesindia.com/article/article/should-india-have-a-uniform-civil-code-394-1.html.

never afford to have that luxury as India is in dire need of a UCC to propel its growth and developmental trajectory as a Great Power in the comity of nations of the world in future. The good news is this, as echoed by US President Barack Obama that India is an "already emerged" nation!!

## Positive Effects and Impacts of Implementing a UCC

**Marriage:** In almost all recent cases where the need for a UCC has been emphasized women were at the receiving end of torture in the garb of religious immunity. Apart from the famous Shah Bano (1986) and Sarla Mudgal (1995) cases, there have been several other pleas by Hindu wives whose husbands converted to Islam only in order to get married again without divorcing the first wife.

**Divorce:** All major religions have their own laws that govern divorces within their own community, and there are separate regulations under the Special Marriage Act, 1956 regarding divorce in interfaith marriages. Under a common civil code, one law would govern all divorces.

**Inheritance:** Patriarchy is the basis of personal law, regardless of community. Inheritance laws have created less noise and debate than marriage and divorce laws, mainly because in this regard social inequity has cut across communities. And women, for most part repressed and unaware of even the rights that exist, have been unable to secure them.

**Adoption:** Of all aspects of personal laws, those of guardianship, custody of children and adoption are the most inextricably linked to religion and culture. This is about bloodlines and perpetuation. And with children and young people involved, can have serious implications. A UCC will affect laws on adoption and therein could lay a lot of resistance.

Appendix I

# High Court of Jammu and Kashmir at Srinagar

561-A No. 158/2009
IA No. 336/2009
Date of order: 30/04/2012

Mohammad Naseem Bhat
Versus
Bilquees Akhter and anr.

Coram: Hon'ble Mr. Justice Hasnain Massodi, Judge

**Appearing Counsel:**
For the appellant (s): Mr. H. I. Hussain, Advocate
For the respondent (s): Mr. S. H. Thakur, Advocate

i. Whether approved for reporting in Press/Media: Yes/No/Optional
ii. Whether to be reported in Digest/Journal: Yes/No

1. Petitioner seeks quashment of Revisional Court order dated 15.10.2009 in Criminal Revision Petition No. 7/2009 titled Bilquees Naseem Vs. Naseem Ahmad Bhat whereby the Revisional Court has reversed the finding recorded by the Trial Court that Bilquees Naseem was divorced by her husband Mohammad Naseem Bhat disentitling her from claiming maintenance under Section 488 Cr. P. C. The admitted and undisputed facts are as under:-

2. Mohammad Naseem Bhat and Bilquees Akhter alias Bilquees Naseem-petitioner and respondent No. 1 in the present petition, contracted marriage on 24.08.2002 and out of wedlock Baby Kareena Naseem-respondent No. 2 in the petition, was born on 06.06.2003. They however, some time after respondent No. 2 was born, fell apart. The parties have their own versions as regards reasons for their separation.

3. Be that as it may, respondent No. 1 on her behalf and on behalf of her minor daughter-respondent No. 2 on 30.01.2006 filed an application under Section 488 Cr. P. C. in the Court of JMIC/3rd Additional Munsiff Srinagar. The respondent's case before the Trial Magistrate was that the present petitioner not happy that respondent No. 1 had begotten a female child, subjected her to inhuman treatment and threw her out along-with Baby Kareena Naseem from her marital home, leaving her without any source to fall back upon. It was insisted that the petitioner was a man of substance, had an income of Rs. 30,000/- per month and had sufficient resources to maintain the respondents. The respondents asked for Rs. 3000/- per month to each of them, as maintenance allowance. The petitioner resisted the application on the grounds

that he had divorced respondent No. 1 on 22.12.2005 and he was not under any obligation to pay maintenance allowance to respondent No. 1. The petitioner denied that the respondents were thrown out and insisted that the respondent No. 1 left his house on her own, taking with her all her belongings including ornaments and apparel and even got false and frivolous case registered against him at Women's Police Station, Rambagh, Srinagar.

4. Learned Trial Magistrate on perusal of pleadings and appreciation of evidence brought on the file, held respondent No. 1 to have been divorced by petitioner before respondent No. 1 approached the Trial Magistrate with her application under Section 488 Cr. P. C. and thus not entitled to receive any maintenance from the petitioner. However, the petitioner was directed to pay an amount of Rs. 1800/- per month to respondent No. 2 from the date of filing of the application.

5. The respondent aggrieved with the order of the Trial Magistrate dated 30.06.2009, whereby her claim for maintenance was rejected, questioned it through medium of a revision petition before 1st Additional Sessions Judge, Srinagar. Learned Revisional Court on perusal of the record and after making a survey of law on the subject, set aside the Trial Magistrate order dated 30.06.2009 holding it to be perverse, illegal and passed in a mechanical manner. The Revisional Court asked the Trial Magistrate to determine the quantum of maintenance allowance to which respondent was entitled in the facts and circumstances of the case.

6. The order of Revisional Court is questioned in the petition on hand on the grounds set out in the petition. It is insisted that the Trial Court order is well reasoned, in conformity with law and does not suffer from any error, illegality or impropriety so as to warrant interference under Section 435 Cr.P.C. The Revisional Court order, according to petitioner, amounts to abuse of process of Court and deserves to be quashed in exercise of inherent powers vested in the Court under Section 151-A Cr.PC.

7. I have gone through the petition as also Trial Court and Revisional Court record. I have heard Counsel for the parties.

8. Whether a Muslim husband has an absolute and unqualified power to pronounce divorce on his wife and wriggle out of his obligations under the marriage contract? The fate of the present revision petition hinges on answer to this question. It needs to be pointed out at the outset that a Muslim in the matters of marriage, divorce, adoption, maintenance and inheritance etc. is in terms of Jammu and Kashmir Shariat Act, 2007, governed by the Shariat Law. The primary sources of Shariat Law are Quran, and Sunna-practice and sayings of Prophet. Ijma, Qiyas and Ijtihaad supplement the primary sources. To find out the answer to the question, and manner in which the marriage may be dissolved or the marriage contract may come to an end, we have to go to the fundamental sources of Shariat Law and to understand the concept of marriage in Islam, the rights of the parties to the marriage contract i.e. husband and wife, and the mode and manner the marriage contract is dissolved.

9. The marriage is a social institution that forms bedrock of family and Society. The Supreme Court in G.V. Rao Vs. L.H.V Prasad and others (2000) 3 SCC 693 called marriage "sacred ceremony, the main purpose of which is to enable the young people to settle down in life and live peacefully". In Smeda Nagpal Vs. State of Delhi and others (2000) 9 SCC 745, the Supreme Court holding that "basic unit of Society is a family, observed that "marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution". The concept of marriage in Islam is no different. Marriage in Islam is a "solemn covenant". It is union of love, affection, mutual respect, loyalty and obedience. The Institution of marriage in Quran is described as sign of mercy of Almighty Allah with the object to bring peace and tranquillity to the husband and the wife. Quran-Chapter 30 verse 21 ordains.

   "And amongst His signs is that he created for you spouses from among yourselves, that you may find peace in them, and he put between you affection and mercy. Verily in that there are signs for those who reflect".

10. In Islam marriage, is not only means to achieve emotional and biological gratification but also Ibadah as by contracting marriage, the parties to the marriage display obedience to Allah and to the Sunnah. There is no celibacy in Islam. The marriage is a religious duty, a moral safeguard and a social necessity as it enables the marrying couple to establish a family as a fundamental unit of the society. The Prophet is reported to have said "marriage is my tradition whosoever keeps away there from is not from amongst me."

11. Since the marriage is based on mutual love, affection and loyalty, Islam does not give preference to either of the parties to a marriage. The message in Chapter 30 Verse 21 is not gender specific. It does not address a Muslim man or Muslim woman. It does not say that Almighty Allah created for a man, woman as his spouse or vice-versa. It, on the other hand, addresses both men and women saying that He created spouses and it is a sign of His mercy. This clearly indicates that a man and woman are equal partners in a marriage. Again Quran uses expression "Zawj" for both husband and wife. It means either of the pair. Wherever Quran makes mention of ideal partners in a marriage, it refers to them as "Zawj" and not husband or wife. This again makes it clear that husband and wife in Islam are equal partners and have equal status.

12. With the above baseline, Islam does not prefer or encourage a particular pattern of life for a married couple. It gives them complete freedom to decide on life pattern and assign roles as long as such patterns or roles are not in conflict with fundamental principles of Islam. The husband and wife, at the time the marriage is contracted, must be competent to enter into a contract. The contract is to be based on mutual consent i.e. offer and acceptance. This further reinforces the proposition that a man and women have equal rights, equal role and equal power while contracting marriage. The parties after they contract marriage retain their personal rights as against each other and as against others.

Having regard to the object of the marriage and its basis, it does not require any emphasis, that marriage in Islam is not temporary feature. It is meant to continue and remain intact for the entire span of life.

13. In Islam husband and wife protect each other. Quran calls them "garments for each other". The verse is to indicate the level of proximity or intimacy between the spouses. Here again Quran does not make any difference between wife and husband. A garment does not only protect a person from heat and cold or bodily injury but also is something close to the body of a person. The expression "garments for each other" therefore, means that no other person can be as protective and close to husband or wife as his or her spouse. The love, affection, care and protection that marriage creates between spouses have positive spill over for the family, the society, the world and the universe. The marriage in Islam therefore forms building block for the universal love and peace.

14. Though Islam does not treat marriage as a temporary relation and expects it to create an eternal bond between the spouses based on love, affection, fidelity, and mutual respect, yet it does not rule out a situation where because of reasons beyond control of the parties marriage may break down. Islam recognises three modes of dissolution of marriage. It may be dissolved by (i) mutual consent of the spouses-Khula, (ii) divorce by the husband-Talaak or (iii) by intervention of the Court-judicial divorce. Ila, zeher, mubara'at are other modes of dissolution of marriage. In the present case we are concerned with divorce by husband-Talaak. It may take three forms:
    (i) Talaak ahsan-single pronouncements of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.
    (ii) Talaak hasan-three pronouncements of divorce made during successive tuhrs, without any intercourse during any of the three tuhrs,
    (iii) Talaak bid'i-three pronouncements of divorce made during a single tuhr either in one sentence or in three sentences or any other form like in writing, indicating intention of the husband to irrevocably dissolve the marriage.

15. It is important to note that Talaak ahsan, whereby a husband pronouncing divorce during tuhr i.e. period of purity, before having any sexual relations with his wife, is only form of divorce that finds approval of Quran. This is the approved form of divorce, as it leaves room for reconciliation. Talaak ahsan, in a way, is a mechanism of experimental temporary separation, where spouses falling apart have adequate opportunity to proceed on an onward journey and understand negative spill over of separation on them and those around them. Talaak hasan is next to Talaak ahsan in the degree of acceptability. However after divorce is pronounced twice i.e. in two consecutive period of tuhr, the parties thereafter have a choice to either live together as husband and wife forever or to separate forever never thinking of reunion. Once the two consecutive experiments of reconciliation fail, third divorce operates as

Talaaki bai'n. Quran in Chapter 2 verse 229 commands "a divorce is only pronounced twice; after that the parties either to hold together on equitable terms or separate with kindness". Talaaki bid'i is a later innovation and does not find approval of Shariat Law. It is a medicine that was conceived to cure the menace of multiple divorces at one time, but turned out to be more lethal than the disease it was to cure. It nonetheless, operates immediately, dissolves marriages, leaving the divorcee with rights, like right to claim maintenance and right to shelter during the period of iddat. Most despised and discouraged of all forms of talaak, the talaak bid'i is frequently used device to dissolve marriage.

16. In case of irrevocable divorce where husband pronounces divorce twice i.e. two consecutive tuhr's and thereafter decides not to live with his wife or pronounces a third divorce, the husband pronounces triple divorce or uses any other form of divorce to make it clear that it is to operate irrevocably, he cannot remarry the divorcee. Quran in Chapter 2 verse 2230 ordains "so if a husband divorces his wife irrevocably, he cannot after that remarry her until after she is married to another person and he has divorced her". There is no such bar in case of Talaak ahsan. Chapter 2 verse 232 provides "when ye divorce women, and they fulfill the term of their (iddat), do not prevent them from marrying their (former husbands) if they mutually agree on equitable terms". However, as the Talaak bid'i is the most frequently used method of divorce, the discussion is to remain focused on the said form of Talaak.

17. Though Islam visualises a situation where a marriage may run into rough weather, for reasons beyond control of the parties to the marriage and provides for a mechanism to end or dissolve the relationship in such case, yet emphasis remains on making every effort to help the marriage work, and to require the parties to marriage realize, that the weft and warp of marriage is love, affection, loyalty, care, accommodation and understanding and differences are to be resolved on the basis of said principle. The device of divorce is to be used as a last option when the marital relations have irretrievably broken down and only way in the interest of both the parties and the society is to help them separate, to make a new beginning and start a new life, so that they are in a position to play the roles for their well being and betterment of other members of the Society. In other words, Islam is strongly against the divorce and wants it to be avoided unless there is no alternative, except separation.

18. A closer look at the Quranic verses dealing with the subject of divorce, as also Sunna relevant to the subject, makes it abundantly clear that the divorce is discouraged and an effort is made to make it difficult and inconvenient for a husband to pronounce Talaak. On the other hand every effort is made to facilitate reconciliation, where the relationship is marred by disputes and disagreements. Chapter 65 verse 1 and 2, reference to which would be made during course of this judgment, place restrictions on divorce and at the same time ensure that conditions are created for reconciliation. The wife even after Talaak is pronounced is to stay in the house of the husband. The husband is under command not turn out the divorcee from his house. The object is to make

the couple live under same roof, during the waiting period and help them realize their importance for each other and what they mean to each other, so that the husband is prompted to give a second look to his decision and take back his wife in marital fold.

19. The Prophet is reported to have said "Jabra'il (Gabriel) so much commended the cause of the women, and so counselled me as to give me the impression that, except in the case of adultery, the wife does not deserve to be divorced". Imam Ja'far Sadiq quotes the Prophet as saying:

"To God no house is dearer than the house where there is the union of marriage, and no house exists which deserves His wrath more than that in which the union of marriage is broken by divorce." According to Imam as-Sadiq: "The word Talaq (divorce) occurs repeatedly in the Qur'an, and that the details of the matter of divorce have been honoured with the attention of the Holy Qur'an. The reason for this is that God is an enemy of separation". Tabarasi in Makarimu 'l-akhlaq quotes the Hadith "Get married, but do not divorce because the throne of Allah shudders when there is divorce." Imam as-Sadiq says: "No lawful thing is the object of so much wrath and hate in the eyes of Allah as divorce is. Allah considers the man who repeatedly divorces as His enemy." Abu Dawud in Kitab Sunnah quotes Hadith "Allah declared lawful nothing so abominable to Him as divorce." Jalalu-Din-Rumi refers to the tradition of Prophet, "as far as possible do not step into separation, for the most detestable thing to me is divorce".

20. The Prophet was once informed that Abu Ayyub Al-Ansari was determined to divorce Umm Ayyub-his wife. The Prophet knowing that the divorce of Umm Ayyub was not grounded in a genuine cause said "Verily the divorce of Umm Ayyub is the great sin". It follows that husband must have a genuine and valid reason to divorce his wife. The power or right to pronounce divorce is not to be used arbitrarily, at whim and caprice and in absence of a valid and genuine reason.

ran Chapter 4 Verse 35 of Surah Nisa. It reads:□21. From the above brief overview of Quran and Sunna relevant to the subject-the fundamental sources of Shariat Law governing the Muslims in the matter of marriage, divorce and other family matters, it emerges that though husband under Shariat law has power to divorce his wife yet this power is not absolute, unqualified and unbridled. The proposition is further reinforced by Q

"If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things alright, Allah will cause their reconciliation: for Allah loveth not the arrogant, the vainglorious;"

22. The Quran ordains that wherever and whenever there appear fissures in the marital relationship and there is disagreement between the spouses, the husband does not have an absolute and unqualified power to divorce his wife

so as to get out of relationship, bruised by discontent. As the first step, two arbiters are to be appointed one from the husband's family and one from the wife's family and the two arbiters so appointed are to be given an adequate opportunity to resolve the dispute and give their verdict. The verdict whatever given by the two arbiters is expected to be followed by the spouses. It is pertinent to mention that Quran uses the word "Hakm" or "arbiter" and not "mediator". The arbiters therefore, have not to simply mediate but to give their verdict so as to redress the grievances, and such verdict is expected to be followed by the spouses. It is important to note that after insisting on "appointment of arbiters, "Quran reminds us that "Allah loveth not the arrogant, the vainglorious". It is to exhort the parties to a marriage plagued by disputes, to abide by the verdict given or course suggested by the arbiters and not to be rude, obstinate or recalcitrant.

23. The Quran in chapter 65 Verses 1 and 2 ordains:
    1. " O Prophet when ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.
    2. Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence for the sake of Allah. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out."

    The above quoted verses, obviously place, certain restrictions on the power of husband to pronounce divorce. The restrictions are that the husband, even where he has a valid reason to divorce his wife, has to divorce her at the prescribed period. The divorce is to be pronounced after end of menstrual cycle but before the husband indulges in sexual intercourse with his wife. In case after menstrual cycle the husband and wife copulate during the period of purity or tuhr, the husband cannot pronounce Talaak during that tuhr and has to wait till tuhr comes to an end, and the second menstrual discharge ends and thereafter pronounce Talaak in next tuhr. Again divorce is to be pronounced in presence of two witnesses who are endued with justice. There is no scope for disagreement with the legal proposition that as Quran and Sunna refer to Talaak ahsan, restrictions placed on use of said device, as laid down in Chapter 65 verse 1 and 2 and elsewhere in Quran and Sunna have reference to Talaak ahsan. However, there is no reason to conclude that the said restrictions applicable to the most approved form of divorce, should not be applicable to the most despised and discouraged form of Talaak i.e. Talaak bid'i. On the other hand restrictions warrant strict enforcement in case of Talaak bid'i.

24. The divorce, (Talaak) to be valid and in accordance with Quran and Sunnah, must be pronounced during tuhr. Furthermore, in case husband after the menstrual cycle comes to an end and the period of purity or tuhr commences, has sexual intercourse with his wife, he is forbidden to divorce his wife in that tuhr and if he persists with his resolve to pronounce Talaak, he has to wait till next menstruation and pronounce Talaak in tuhr thereafter. The legal position is made clear by the case of Abdullah- bin Umar reported by all the treatise on Hadith. Abdullah-bin Umar divorced his wife Amina-binti Gaffar when she was in middle of menstrual cycle. Umer-bin Khatab-father of Abdullah-bin Umer reported the matter to the Prophet. The Prophet disapproved the divorce pronounced by Abdullah- bin Umar, asked him to restore relations with his wife making it clear that in case Umer bin Abdullah was adamant in his resolve to divorce his wife, he may do so during next tuhr. It follows that the pronouncement of divorce during menstrual cycle is strictly prohibited and any violation or disregard renders divorce (talaak) non-est and inconsequential. Why does Quran ordain that Talaak to be valid must be pronounced during tuhr and Sunna insist on it's compliance, as is evident from verdict rendered in Abdullah-bin-Umar's case, is not difficult to understand. The husband as per the dictates of Quran is to stay away from his wife during the period of menstruation. In such circumstances the husband, when he has no access to his wife, may not be in a position to appreciate in right perspective the fallout of divorce on his life and that of his family. He would be in a better position to realize the importance of his wife if he has access to her and they are in a position to relish their marital relations and perform marital obligations. The husband in such situation may feel dissuaded from pronouncing Talaak on his wife. The restrictions on pronouncement of Talaak after the husband and wife copulate, in that tuhr, is to serve the same purpose. The object is to, as far as possible delay the divorce, so that husband has sufficient time to give a fresh look to his decision. Once period of tuhr in which husband has sexual intercourse with his wife comes to an end, and the wife does not have the menstrual discharge indicating thereby that she has conceived, the husband realizing that he has fathered a child may no more be interested in pronouncing Talaak and may very well abandon the idea. The end game is to facilitate and ensure continuation of marriage and to avoid the family breakdown.

25. To make divorce (Talaak) valid, it is not enough that it is pronounced in presence of two witnesses. The Quran prescribes qualifications of such witnesses. It emphasises that the witnesses must be endued with justice. The purpose is to ensure that the witnesses, prompted by their sense of justice, may request, implore and persuade the spouses on the verge of separation, to calm down, resolve their disputes and lead a peaceful marital life.

26. From the above discussion, it emerges that a husband to wriggle out of his obligations under marriage including one to maintain his wife, claiming to have divorced her has not merely to prove that he has pronounced Talaak or executed divorce deed to divorce his wife but has to compulsorily plead and prove:

(i) that effort was made by the representatives of husband and wife to intervene, settle disputes and disagreements between the parties and that such effort for reasons not attributable to the husband did not bear any fruit.
(ii) that he had a valid reason and genuine cause to pronounce divorce on his wife.
(iii) that Talaak was pronounced in presence of two witnesses endued with justice.
(iv) that Talaak was pronounced during the period of tuhr (between two menstrual cycles) without indulging in sexual intercourse with the divorcee during said tuhr.

27. It is only after the husband pleads and proves all the above ingredients that divorce-Talaak, would operate and marriage between the parties would stand dissolved so as to enable husband to escape obligations under the marriage contract, including one to maintain his wife. The Court in all such cases would give a hard look to the case projected by the husband and insist on strict proof.

28. In the present case the petitioner failed to prove the above ingredients to make the Talaak claimed to have been pronounced by him operational and result in dissolution of marriage. Though a feeble attempt appears to have been made to prove that there was some kind of intervention by the elders before Talaak was pronounced by the petitioner, yet this is of no avail to him, as all the above requirements or ingredients of a valid divorce (talaak) are not proved.
29. For the reasons discussed, the petition is dismissed. The order of the Revisional Court is upheld and Learned Magistrate directed to deal with the matter afresh after issuing notices to the parties. The trial Magistrate as a first step shall determine on the basis of the pleadings, the amount of the interim maintenance to be paid by the present petitioner to the respondent and ensure that the interim maintenance is paid with effect from the date such maintenance is directed, within four weeks from the date of the order.

**(Hasnain Massodi)**
Judge
Srinagar
30.04.2012