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## **TOWARDS THE UNIFORM CIVIL CODE: A SECULAR OR A GENDER-JUST LAW?**

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India as an independent state wanted to project itself as a secular- democratic country. The Article 44 of the Directive Principle of the Constitution states that ‘State shall endeavour to provide for its citizens a Uniform Civil Code (UCC) throughout the territory of India.’ During the colonial period the women’s organizations particularly the All India Women’s Conference demanded a uniform social code to remove the legal disabilities of women of all religion. It was later known as the Uniform Civil Code. Personal laws operate in matters related to inheritance, marriage, divorce, maintenance, and adoption, regarded as “personal” issues, matters that relate to the family or “personal” sphere. They control the relationship between men and women regarding aforementioned matters. Despite differences between them, the personal laws of all communities are discriminatory toward women. Implementing separate personal laws applicable to the different religious communities in India is a legacy of colonial administration. Four religious communities, the majority i.e. Hindu, and the minority, i.e. Muslim, Christian, and Parsi communities, have their own personal laws (other religious groups such as Sikh, Buddhist, Jain, and tribal and scheduled castes are subsumed under Hindu law). Personal laws are not just customary (or common) laws, but also statutory laws based on religion.

The twentieth century women who came out of seclusion as a result of the national movement campaigned for a uniform social code (now referred to as Uniform Civil Code). The All India Women’s Conference (AIWC) from its very inception fought against the legal disabilities of women particularly Hindus. It was due to their consistent pressure that the Rau Committee (1941-46) was formed by the colonial government for formulating a code of Hindu law which later came to be known as the Hindu Law Committee. Eventually, five separate acts were passed. The Special Marriage Act of 1954 providing civil marriages, divorce by mutual consent, age of marriage being 18 for woman and 21 for a man and the succession to be governed by the Indian Succession Act; the Hindu Marriage Act of 1955 legalizing inter-caste marriage, monogamy and divorce; Hindu Succession Act of 1955 where Mitakshara coparcenary retained in name, in absence of will, estate was divided and passed to heirs, widow, daughter, mother and son got equal share of property and females having absolute estate in property; Hindu Minority and Guardianship Act of 1956 where custody of child under three was with mother and the natural guardian was to be first the father and then the mother and ultimately the Hindu Adoption and Maintenance Act of 1956 where daughters could also be adopted. Fully three decades of AIWC’s struggle ultimately led to these Acts. In independent India, the demand of a uniform civil code arose again in the following cases which are landmark in the process of a uniform civil code.

### **THE SHAH BANO CASE**

The Mohd. Ahmad Khan vs. Shah Bano Begum & Ors. or the Shah Bano maintenance case is seen as one of the legal milestones in battle for protection of rights of Muslim women. While the Supreme Court upheld the right to alimony in the case, the judgment set off a political battle as well as a controversy about the extent to which courts can interfere in Muslim personal law. The case laid the ground for Muslim women’s fight for equal rights in matters of marriage and divorce in regular courts,

In April 1978, a 62-year-old Muslim woman, Shah Bano, filed a petition in court demanding maintenance from her divorced husband Mohammed Ahmad Khan, a renowned lawyer in Indore, Madhya Pradesh. Khan had granted her irrevocable talaq later in November. The two were married in 1932 and had five children — three sons and two daughters. Shah Bano’s husband had asked her to move to a separate residence three years before, after a prolonged period of her living with Khan and his second wife.

Shah Bano went to court and filed a claim for maintenance for herself and her five children under Section 123 of the Code of Criminal Procedure, 1973. The section puts a legal obligation on a man to provide for his wife during the marriage and after divorce too if she isn't able to fend for herself. However, Khan contested the claim on the grounds that the Muslim Personal Law in India required the husband to only provide maintenance for the iddat period after divorce.

Iddat is the waiting period a woman must observe after the death of her husband or divorce before she can marry another man. The length of the iddat period is circumstantial. The period is usually three months after either of the two instances. In case the woman is pregnant, the period carries on until the childbirth. Khan's argument was supported by the All India Muslim Personal Law Board which contended that courts cannot take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate The Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat. After detailed arguments, the decision was passed by the Supreme Court of India in 1985. On the question whether CrPC, 1973, which applies to all Indian citizens regardless of their religion, could apply in this case. Then Chief Justice of India Y.V. Chandrachud upheld the decision of the High Court that gave orders for maintenance to Shah Bano under CrPC. For its part, the apex court increased the maintenance sum.

He said that it is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". He also said that there is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge that gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.<sup>1</sup>

The case was considered a milestone as it was a step ahead of the general practice of deciding cases on the basis of interpretation of personal law and also dwelt on the need to implement the Uniform Civil Code. It also took note of different personal laws and the need to recognise and address the issue of gender equality and perseverance in matters of religious principles.

Justice Y.V. Chandrachud said in his decision: "Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion." This was a historic judgment according to many where justice, righteousness and equality came before religion. It was a bold, brave and impartial decision. One of the key points of relevance in the verdict that set it apart from previous cases was the recognition of women's claim for treatment with equality and dignity, particularly in cases of marriage. Voluble orthodoxy deemed the verdict as an attack on Islam. Muslims took to streets, they felt threatened. Rajiv Gandhi's Congress government, elected in 1984, passed the Muslim Women (Protection on Divorce Act), 1986. This law overturned the verdict in the Shah Bano case and said the maintenance period can only be made liable for the iddat period. The new law said that if a woman wasn't able to provide for herself, the magistrate had the power to direct the Wakf Board for providing the aggrieved woman means of sustenance and for her dependent children too.

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<sup>1</sup> Chief Justice Y.V. Chandrachud in Mohd. Ahmed Khan vs. Shah Bano Begum AIR 1985 SC 945

Shah Bano's lawyer Danial Latifi had challenged the Act's Constitutional validity. The apex court, though upholding the validity of the new law, said the liability can't be restricted to the period of iddat. Both the Hindu right and liberals have pilloried Rajiv Gandhi for the flip-flop in the Shah Bano case and have viewed it as a move to appease minorities for votes by giving in to the orthodox Muslim clergy, even if at the expense of gender inequality. Significantly, Shah Bano later withdrew the maintenance claim she had filed.

### **SARLA MUDGAL CASE**

In the Sarla Mudgal v. Union of India, there were two main petitioners. The first was Kalyani, a NGO that works with needy and distressed women, which is headed by Sarla Mudgal. The next petitioner was Meena Mathur, married to Jitender Mathur, in 1988, Meena finds that Jitender converted to Islam and solemnized second marriage with Sunita Narula, also known as Fathima. Meena Mathur complains that her husband converted to Islam only for the purposes of getting married again and circumvented the provisions of Section 494 of IPC.

In Writ Petition 424 of 1992, Geeta Rani, married to Pradeep Kumar alleged physical and mental violence by her husband. She later found out that her husband, Pradeep, eloped and married another woman after converting to Islam, in 1991. Sushmita Ghosh, petitioner in Civil Writ Petition 509 of 1992 married G. C. Ghosh according to Hindu rituals in 1984. The husband told her that she wanted a divorce and the petitioner argued that she was the legally wedded wife. The husband embraced Islam and wanted to get married to Vinita Gupta. The petitioner has prayed to not let her husband to enter a marriage with Vinita Gupta. The supreme court's judgement in 1995 laid down the principles against the practice of solemnizing second marriage by conversion to Islam, with first marriage not being dissolved. The verdict discusses issue of bigamy, the conflict between the personal laws existing on matters of marriage and invokes article 44 of Indian Constitution. It is considered a landmark decision that highlighted the need for a uniform civil code. The Court held that the first marriage would have to be dissolved under the Hindu Marriage Act, 1955. The man's first marriage would therefore, still be valid and under Hindu law, his second marriage, solemnized after his conversion, would be illegal under Section 494 of the Indian Penal Code, 1860. The Sarla Mudgal judgment has issued no directions for the implementations of Uniform Civil Code, though Justice Kuldeep Singh has requested the government to look at the Article 44 of the Constitution.

"The State shall endeavour to secure for the citizens a uniform civil code through-out the territory of India" is an unequivocal mandate under [Article 44](#) of the Constitution of India which seeks to introduce a uniform personal law - a decisive step towards national consolidation. Pandit Jawahar Lal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through". It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve [Article 44](#) from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians". The reasons are too obvious to be stated. The utmost that has been done is to codify the Hindu law in the form of the [Hindu Marriage Act](#), 1955. [The Hindu Succession Act](#), 1956, the Hindu Minority and [Guardianship Act](#), 1956 and the Hindu Adoptions and [Maintenance Act](#), 1956 which have replaced the traditional Hindu law based on different schools of thought and scriptural laws into one unified code. When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India.<sup>11</sup> The Judges declared "Till the time we achieve the goal - uniform civil code for all the citizens of India - there is an open inducement to a Hindu husband, who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim."

Since monogamy is the law for Hindus and the Muslim law permits as many as four wives in India, errand Hindu husband embraces Islam to circumvent the provisions of the Hindu law and to escape from penal consequences." The court also wondered that how long will it take for the Government to implement the mandate of the framers of the Constitution under [Article 44](#) of the Constitution of India.

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<sup>11</sup> 1995 AIR 1531, 1995 SCC (3) 635

The traditional Hindu law - personal law of the Hindus - governing inheritance, succession and marriage was given go- bye as back as 1955-56 by codifying the same. There is no justification whatsoever in delaying indefinitely the introduction of a uniform personal law in the country.

### SHAYARA BANO CASE

Shayara Bano was married for 15 years. In 2016, her husband divorced her through *talaq-e-bidat* (triple talaq). This is an Islamic practice that permits men to arbitrarily and unilaterally effect instant and irrevocable divorce by pronouncing the word 'talaq' (Arabic for divorce) three times at once in oral, written or, more recently, electronic form. Ms Bano argued before the Supreme Court of India that three practices – triple talaq, polygamy, and *nikah halala* (the practice requiring women to marry and divorce another man so that her previous husband can re-marry her after triple talaq) –were unconstitutional. Specifically, she claimed that they violated several fundamental rights under the Constitution of India (Constitution) namely, Articles 14 (equality before the law), 15(1) (prohibition of discrimination including on the ground of gender), 21 (right to life) and 25 (freedom of religion). Her petition underscored how protection against these practices has profound consequences for ensuring a life of dignity. Further, it asserted that failure to eliminate de jure (formal) and de facto (substantive) discrimination against women including by non-State actors, either directly or indirectly, violates not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants. On 16th February 2017, the Court asked Shayara Bano, the Union of India, various women' rights bodies, and the All India Muslim Personal Law Board (AIMPLB) to give written submissions on the issue of *talaq-e- bidat*, *nikah-halala* and polygamy. The Union of India and the women rights organizations like Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA) supported the Ms Bano's plea that these practices are unconstitutional. The AIMPLB has argued that uncodified Muslim personal law is not subject to constitutional judicial review and that these are essential practices of the Islamic religion and protected under Article 25 of the Constitution.

After accepting the Shayara Bano's petition, the Apex Court formed a 5 judge constitutional bench on 30<sup>th</sup> March 2017. The first hearing was on 11<sup>th</sup> May 2017. On 22nd August 2017, the 5 Judge Bench pronounced its decision in the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority. The majority judgment held triple talaq to be unconstitutional under Article 14 read with Article 13(1). In this regard, the Court held that the practice had been sanctioned as a matter of personal law by the Muslim Personal Law (Shariat) Application Act, 1937. The Court clarified that "...an action that is arbitrary, must necessarily involve negation of equality" and determined, as triple talaq provides that "...the marital tie can be broken capriciously without any attempt at reconciliation so as to save it", this arbitrariness violates Article 14. The Court concluded that the 1937 Act is void to the extent that it recognizes and enforces triple talaq, on the basis that as per Article 13(1) all laws in force immediately before the commencement of the present Constitution (which includes the 1937 Act) shall be void in so far as they are inconsistent with the fundamental rights set out in the Constitution. The Court also considered whether triple talaq is protected under Article 25 but, following a review of relevant precedents and Islamic scholarship, concluded that it is not essential to the practice of Islam.

This decision means triple talaq is no longer legal throughout India. Following the judgment, and on its own initiative, the government introduced a bill criminalizing triple talaq. The Lok Sabha (Lower house of India's bicameral Parliament) passed this bill in December 2017 and the Rajya Sabha in 2019. The bill has many reactions. While some celebrated it as a historic judgement, it is also criticized by certain commenters as being less about gender justice and more about political persecution of a minority community.

### CONCLUSION

All these cases indicates a move towards the uniform civil code. The women's movement in India has over the years gradually deviated from their demand for a Uniform Civil Code to gender just laws. With the passing of time, while the rightists supported the uniform civil code, the women's movement is skeptical as the Hindu Code Bill according to some was not only very far from offering equal rights to women, in fact took away many existing, more liberal customary provisions available to women of different castes and communities.<sup>iii</sup>

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<sup>iii</sup> Menon, Nivedita, 'The Historian and 'His' Others: A Response to Ramachandra Guha,' *EPW*, Vol.43, No.40 (October 4-10, 2008) pp. 73-76.