

## **UCC: WOMEN AS KEY**

Written by *Vishnu Mangalvedkar*

2nd Year BA LLB Student, School of Law Christ

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### **ABSTRACT**

The words Religion, Caste and Culture when heard strikes an emotional turmoil in the minds of most Indians. The same words have also invariably crept into the Indian legal system. India was successful in removing the barriers of Religion, Caste or Culture when it came to Criminal Law, however, when it raised to do the same in the matters of Personal Laws, we welcomed this decision with protests. This debate of whether or not we need a uniform structure of Personal laws, which include matters of marriage, divorce, inheritance, adaption, etc. which are undeniably close matters to our religious actions in the Indian scenario is discussed in this paper. This issue of the Uniform Civil Code has a huge impact on the lives of the religious minorities and also the lives of women in general. On one side it hits the old outdated barbaric practices of a few laws such as the Shariat Application Act which has stripped down the most basic rights of women, and on the other side it challenges a person's rights to practice and profess his own religion which mandates him of following the same said laws. Thus, keeping in mind the few cases such as the famous Shah Bano case or the recent Shayara Banu case which brought about this discussion to a whole new level, I would like to discuss the effect such cases have on the future prospect of the Uniform Civil Code in India. As this law is facing the maximum opposition by practitioners of Islam, it is important for us to analyze the effect of Personal laws on women, particularly on Muslim women while keeping the above-mentioned cases in the backdrop. I firmly believe that bringing about a change and making article 44 of the Indian Constitution a reality will lie in the hands of Indian women alone.

## **EMERGENCE AND STRENGTHENING OF THE MUSLIM PERSONAL LAW**

The Act XXVI of 1937 also famously known as the Muslim Personal Law (Shariat) Application Act was enacted during the colonial period by the British government under the Government of India Act of 1935<sup>1</sup>. The set of laws under this act were not taken from a divine source of authority but was rather just man-made being derived from the interpretation of the holy text of Islam. Even after the emergence of Independence, the Islamic population was more than willing to give up the barbaric punishments mentioned within this act when it came to the matters of crime. The same population, clearly dominated by the men of the cast were stringent in matters of marriage, divorce, adaptation, inheritance, successions, partitions, etc.<sup>2</sup> thus forcing the government to maintain the Shariat Application Act as it is in the above-mentioned matters.

The Constitution of India on the 26<sup>th</sup> of January 1950 gave legal sanctions to the pre-existing Shariat Application Act, which was to govern the Islamic population in terms of civil laws. Similar provisions were allowed to the Hindus which included the Hindu Succession Act, the Hindu Marriage Act, etc. which was mostly derived from the Government of India Act of 1935. At the same time the same Constitution of India, under Article 44 put forward the idea of a Uniform Civil Code which was said to be essential for an ideal future of a simplistic civil body which was to uphold our basic fundamental rights promised to us under part III of the Constitution. Further amendments were made in matters of the Hindu Personal Laws by the then Nehru government to modernize the very laws. The government failed to take such similar actions in matters of the Muslim Personal Law out of the fear of radical oppositions, this very action by the then government acted as the foundation stone for post-independence Identity Politics to the Muslim community.

The Muslim Personal Law in India has never been “non-negotiable” like the claims of many conservative Islamists. Many matters which were directly based out of the Shariat were abolished; for example, a Muslim judge was no more mandatory for sentencing, lending money

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<sup>1</sup> *Reversing the Option: Civil Codes and Personal Laws*, 31 ECONOMIC AND POLITICAL WEEKLY, 1180–1183 (1996), <http://www.jstor.org/stable/4404139>

<sup>2</sup> Razia Patel, *Indian Muslim Women, Politics of Muslim Personal Law and Struggle for Life with Dignity and Justice*, 44 ECONOMIC AND POLITICAL WEEKLY, 44–49 (2009), <http://www.jstor.org/stable/25663732>

for interest by a Muslim was not made illegal anymore, Adultery was not punishable by death, etc. Certain changes were happily welcomed by the Orthodox community for their own personal benefit, however, this very community was rigid in matters pertaining to a Uniform system of civil laws or to giving more rights to women<sup>3</sup> of their very own community. The Islamic conservatives in 1967 felt that the then ruling party Jan Sangh was using the matters of the Uniform Civil Code to gain political mileage by lashing out at the Muslim community. As a result, an NGO called the Muslim Personal Law Board was established by members of the community with the main intention to protect the Muslim Personal Law.

The Muslim Personal Law Board in India can now be seen as the greatest threat to make the Uniform Civil Code in India a reality. A handful of secular lobbies within the Muslim community who are comparatively more modern in their approach have time and again questioned the legitimacy of the Muslim Personal Law Board which claims to be representing all the Muslims of India<sup>4</sup>. Unfortunately, only a small sect of the Muslim society come under the ambit of a newer generation of thinkers who are profoundly supporting Uniform Civil Code in India. The Muslim Personal Law Board has a sway on the majority of the Islamic community. This very fact has led to its influence on the politics of India as it acts as a heavy vote bank mechanism which might influence the governments in matters of policy making.

The growing influence and power of the Muslim Personal Law board was and will be of great concern for the implementation of UCC in India because of the nature of political power it holds. The only possible way, the power of this organization can be broken is through acting within the Muslim community by highlighting the atrocities committed on women of their very own community. This is precisely what happened in the cases mentioned in the forthcoming chapters. Petty politics should also be avoided when such matters of serious issues arise. The Rise and involvement of Muslim Women's Associations, National Organization for The Protection of Women, etc. in matters of Women rights can truly bring about a change in attitude regarding the passage of the Uniform Civil Code in India.

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<sup>3</sup> Anita Yadav, *Rights of Muslim Women: An Analysis of Indian Muslim Personal Law*, Faculty of Law University of Lucknow, 220 onwards (2015)

<sup>4</sup> JONES JUSTIN, "'Signs of Churning': Muslim Personal Law and Public Contestation in Twenty-first Century India." *Modern Asian Studies* 44, no. 1 (2010): 175-200. <http://www.jstor.org/stable/27764651>.

## FIRST INSTANCE OF CHANGE IN ATTITUDE

Among many provisions under the Muslim Personal Law, there has been some constant voice raised by certain sections of the society against provisions related but not limited to those of oral divorce, maintenance after divorce, polygamy etc. The above-mentioned provisions more often than not completely violate the principles of gender neutrality and basic human rights<sup>5</sup>. There have been quite a few attempts made in vain which tried to highlight the problems faced by the women community. The Muslim community which is heavily influenced by the words of the maulanas and religious scholars who all happen to be men are twisted in a way to shun the idea of replacing personal laws. In addition to that, the same maulanas also issue fatwas against women who are brave enough to raise their voice against unfair practices within the religion.

A retaliation to such old customs did come up in the case of *Mohd Ahmed Khan v. Shah Bano Begum*<sup>6</sup>. This landmark case which related to laws regarding maintenance was all about a 62-year-old woman Shah Bano who was a mother of five. Shah Bano, who was divorced by her husband was not provided for, for the same purpose, Shah Bano went on to file a case for the alimony she truly deserved. She was also successful in claiming what was rightfully hers. The court had invoked Section 125 of the CrPC which was to provide maintenance for the aggrieved party. The court also held that this particular law would apply to all irrespective of their caste, creed, race or religion. The court also made an eye-opening statement by claiming that Art 44 of the Constitution of India should not be a dead letter of the law, but rather be implemented for the benefit of the citizens and cause national integration of Laws<sup>7</sup>.

As an aftermath to this controversial judgement and continuous protest from the Islamic community who believed that the integrity of their Holy book was questioned, the Indian National Congress under the leadership of Rajiv Gandhi who had succumbed into the pressure from the conservative Islamic community and the Muslim Personal Law Board, passed The Muslim Women (Protection of Rights on Divorce) Act 1986. This Act, quite contrary to its name, took away all the rights promised to Muslim women by the Shah Bano case<sup>8</sup>. The act

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<sup>5</sup> Karishma Assudani, *Gender Equality Vis a Vis Personal Law*, 3 INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, 398-416.

<sup>6</sup> A.I.R. 1985 SC 945(1985) 2 SCC 556

<sup>7</sup> A.M., *The Shah Bano Legacy*, The Hindu, <http://www.thehindu.com/2003/08/10/stories/2003081000221500.htm>

<sup>8</sup> Jindal, T.P, (1995). *Ayodhya Imbroglia*, New Delhi: Ashish Pub House.

which was later pushed to the protection of the ninth schedule had specific provisions which said that the Muslim man would be liable to maintain his wife and provide alimony for only 90 days which is termed as the iddat period, since the day of the utterance of Talaq<sup>9</sup>.

Later on, multiple activists revolted against the passing of the abovementioned bill and questioned the interference of the government in controversial matters when there were prior secular provisions regarding the same in Sec 125 of the Code of Criminal Procedure. A good number of activists claimed that the Act was unconstitutional as the government had overreached. Similar contentions were made in the case of *Daniel Latifi and Anr v. Union of India*<sup>10</sup>. The court tried to strike a balancing act in this case by reassuring women rights without dwelling into the matters of the constitutionality of the clause as such. This judgement further strengthened the judgement arising out of the Shah Bano case as it vehemently upheld the validity of the previous judgement. The Muslim Personal Law Board further made contentions that the court has no authority to interpret the religious text.

The lone statement made by the court regarding the importance of the Uniform Civil Code as prescribed in Article 44 of the constitution of India further added to a series of events. This move agitated the orthodox Muslims, leading to a new wing of fundamentals. Furthermore, a few Hindu activists portrayed Muslim Personal Law as a special privilege exclusively given to Muslims and thus against the spirit of secularism. A campaign powered by Jan Sangh, the forefather of the current ruling party in India, promised that favouritism to the Muslims over any other religion which was predominant in India would be washed out when they came to power. Such statements made by different political parties changed the entire issues from that of basic women rights and equality to that of Secularism and communalism.

Politicizing such radical issues always leads to problems and causes ripple effects. Furthermore, agitated by the revelations against the branding of the entirety of Shariat as opposed to women, the popularity and support of the Muslim Personal Law Board quadrupled. The Congress tried to appease this heavy vote bank time and again, on the other hand, the Hindutva parties promised the Uniform Civil Code in India, the intention of the promise was mere to attract the Hindu vote bank. Thus started a new page of Identity Politics in the heart of

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<sup>9</sup> Benhabib, Seyla (2002), *The claims of culture equality and diversity in the global era*, Princeton, NJ: Princeton University Press.

<sup>10</sup> (2001) 7 S.C.C. 740, 746.

India due to heavy interference and propaganda pieces by multiple parties regarding this matter. Later on, this entire agenda was merely used for political mileage rather than to bring about actual justice.

## RE-IGNITING THE SPARK

After the passage of three decades of the controversial case, in a landmark judgement of *Shayara Bano v. Union of India and Ors*<sup>11</sup>, the Supreme Court of India declared triple Talaq unconstitutional and stripped it down. The five-judge constitutional bench held that triple Talaq was against the basic essence of the Quran with a 3:2 majorities. Descending verdicts were given by Chief Justice J.S. Khehar and Justice S. Abdul Nazir, whereas Justices Kurien Joseph, Uday Lalit and Rohinton Fali Nariman held triple Talaq unconstitutional.

*Talaq-e-biddat* is a practice where a Muslim husband by uttering or for that matter even typing the word Talaq thrice in one occasion, can directly divorce his wife even without hearing her arguments. A petition was filed by Muslim women who believed that the whole system of declaring Talaq thrice by their husbands on one go, sometimes by phone, WhatsApp or text, to get a divorce was a very discriminatory custom. It was argued that triple Talaq was discriminatory on the grounds of gender and it was not an integral part of the Quran. The court had even ruled in a similar case of discrimination against women in the *Haji Ali case (Dr Noorjehan Safia Niaz And 1 Anr vs The State Of Maharashtra And Ors)*<sup>12</sup> where it pressurised the dargah to allow Muslim women equal entry. With this verdict, the Supreme Court had made its stance against discrimination quite clear.

A bench, comprising of judges with different religious backgrounds such as Sikh, Christian, Parsi, Hindu and Muslim, had heard seven pleas challenging the practice of issuing triple talaq in the Muslim community. During the hearing, the court vehemently called the practice of issuing triple talaq the “worst” and “not a desirable” form of termination of a Muslim marriage, even though certain schools of thought claimed that Triple Talaq is completely legal. Amid the

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<sup>11</sup>Omar Rashid, *Who Is Shayara Bano: The Triple Talaq crusader*, THE HINDU REPORTS (2017), <http://www.thehindu.com/news/national/who-is-shayara-bano-the-triple-talaq-crusader/article19611402.ece> (last visited Mar 3, 2018)

<sup>12</sup> Gautham Bhatia, *The equality of entry*, THE HINDU REPORTS (2016), <http://www.thehindu.com/opinion/lead/The-equality-of-entry/article14626846.ece> (last visited Mar 3, 2018)

contentions, the All India Muslim Personal Law Board portrayed triple talaq as "horrendous", "sinful" and "undesirable" with no endorse of the Quran and the Shariat. In any case, India's biggest Muslim body had additionally forewarned that "testing the validity of customs and practices was a slippery slope".

The Government had supported the petitioners, announcing triple talaq illegal, and slanderous and oppressive for ladies. In any case, it had contended that the court should first articulate its choice on the established legitimacy of triple talaq, at exactly that point it would bring a law. The minority judgement given by Chief Justice Khehar and Justice Abdul Nazeer directed the Union of India to come out with a legislation with regards to this matter by setting aside other political differences, and until that time, the practice of triple talaq would be put on a hold for six months. They also asked the government to take into consideration the acts of other legislation in the world with regards to the Muslim Personal Law and make sure that the concerns of the minority are taken into account.

The majority judgement held that the practice of divorcing through Triple Talaq is violative of the constitution and should thus be rendered unconstitutional. Two judges, namely Justices RF Nariman and UU Lalit stated that Triple Talaq was codified and was permissible under section 2 of the *Shariat Act of 1937*, and this makes it an "arbitrary practice" and hence rendered it unconstitutional due to its lack of consensus with the Indian Constitution. The other judge who gave a similar judgement with a different line of reasoning was Justice Kurian Joseph who said that the practice of triple talaq found no sanction in the Quran and was thus not protected under *Article 25* of the Constitution which guaranteed *Right to Freedom of Religion*.

As per the advice provided by Chief Justice Khehar and Justice Abdul Nazeer, the government of India passed a bill to criminalize triple talaq without any hurdles in the Lok Sabha or the lower house. The government did not politicize the matter and most of the matters were put forward in the bill after the Govt. scrutinized a draft regarding the same which was sent by Muslim Women through their organization, The Bharatiya Muslim Mahila Andolan(BMMA). Furthermore, the Govt. before tabling the Muslim Women (Protection of Rights on Marriage) Bill of 2017, consulted a sample of 60,000 Muslim women of different economic backgrounds and states. The Muslim women have an almost overwhelming support to imprison their

Husbands in cases of the utterance of Talaq-e-biddat<sup>13</sup>. However, the opposition clearly acted as a hurdle to the plans of the govt. in the upper house or the Rajya Sabha. It was common knowledge to the masses that this was an effort made by the opposition to politicizing the issue.

## **MILES TO GO BEFORE WE SLEEP**

After contemplating the issues faced by Muslim women along with the courts time and again suggestions made to the Govt. to make Art. 44 of the Indian constitution a reality, we can say that there are three brigades currently functioning either for or against Uniform Civil Code in India. The first set of people include orthodox Muslims who are completely against any compromise when it comes to matters of their Personal Laws. We also have a set of pseudo seculars who blindly back such claims made by the orthodox Muslims and the Muslim Personal Law Board for the sake of a healthy vote bank. This can be seen as one side of the extreme brigade in India who try to politicize an issue of national integrity.

On the other extremity of the brigade, we have a set of fundamentals who use the code as a means to humiliate Muslims. The Sangh Parivar or many such other organizations including the Vishwa Hindu Parishad use the idea of the Uniform Civil Code to try and alienate Islam as a religion in India. This move by these conservative organization has further lead to the strengthening of the Muslim Personal Law Board because the Muslims out of the fear of such fringe groups go and hide behind such organizations which make false promises of protecting their men. Thus we can see another extreme brigade trying to politicize the issue and causing much havoc in the already existing scenario of misunderstandings.

The third set of people include seculars who agree that there are persistent flaws in the existing system of Civil Law. However, this set of individuals are divided within them with both their ideas being feasible options. The first set of this brigade wants no discrimination at all and are firm on their stance for the Uniform Civil Code. The second set is demanding reforms within the Personal Law systems to make sure that the laws are in line with principles of Justice, equity

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<sup>13</sup> Kapil Sibal, *Civil wrong, criminal act: on the triple talaq Bill*, THE HINDU REPORTS (2018), <http://www.thehindu.com/opinion/op-ed/civil-wrong-criminal-act/article22369273.ece> (last visited Mar 4, 2018)

and good conscience. Taking a look at the current scenario of the country, we can state that the country is not yet ready for the passage of the Uniform Civil Code. Thus, it is safe for us to state that the option provided to us by the second set of the Secular brigade would probably be the most suitable.

To complete, we can state that the only possible means to achieve certain changes within the frame of Personal Law via amendments is by safely keeping our senses open regarding the atrocities faced by the lower classes of that said religion. By slowly analyzing and changing certain laws within the frame of Personal Law system for the benefit of the lower or aggrieved party, we can slowly accustom the masses to the passage of Uniform Civil Code in the future. Thus, it is our duty to support and promote the voice of the unheard just like in the case of Muslim Women. This is the only path to the successful implementation of Article 44, The Uniform Civil Code in India.