Shahbano

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Pro Women Or Anti Muslim?

The Shahbano Controversy

ANYONE reading about the Shahbano controversy in the newspapers would get the impression that:

1. Ex chief justice Y.V. Chandrachud was the first judge ever to have granted maintenance to a Muslim woman under section 125 of the Criminal Procedure Code (Cr PC);

2. In doing so, he overruled Muslim personal law.

The creation of such erroneous impressions by the media is an indicator of how much more dangerous ignorance can be when it is systematically disseminated by the press. In fact, while delivering this judgment, Chandrachud and companions on the bench, Desai, Venkataramaiah, Chinnappa Reddy and R. Misra, merely confirmed two existing supreme court precedents: Krishna Iyer's, Tulzapulkar's and R S. Pathak's judgment in the case of Bai Tahira versus Ali Husain Fissalli, 1979, and Krishna Iyer's, Chinnappa Reddy's and A.P. Sen's judgment in the case of Fuzlunbi versus K.Khader Vali, 1980. In both these cases, the right of the divorced woman to maintenance was upheld. No furore was created by either judgment.

Why then such a furore over Chandrachud's judgment, which is not even a precedent? In order partly to understand this question, it is necessary to read the three judgments.

Justice Krishna lyer, in the two judgments delivered by him, dwells upon social injustice to women. Not once in the Bai Tahira judgment does he even mention the word "Muslim." He emphasises that under section 127, Cr PC, any amounts paid to a divorced woman under the personal law of the parties will be taken into consideration, while settling the maintenance. If such amounts are sufficient to maintain the woman, no further maintenance need be granted to her. But if they are insufficient, then maintenance has to be granted to safeguard the woman from destitution.

In his judgment in the Fuzlunbi case, Krishna Iyer quotes Muslim authorities to show that *mehr* is a token of respect for the wife, a settlement upon her, and not a divorce payment. He makes no comments upon Muslim personal law in general. His emphasis throughout is on the need to curb what he refers to as "masculine injustice" and to help "a woman in distress."

In contrast, every substantive paragraph of the judgment in the Shahbano case obsessively dwells upon "Muslims" and "Muslim personal law." Take, for instance, the following statement: "Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all.'' If the word "Muslim" were deleted from this sentence, would it not hold equally true?

Do not most husbands in our society exercise this privilege, regardless of their religion or lack of religion? By singling out Muslim men and Islam in this way, justice Chandrachud converts what is essentially a women's rights issue into an occasion for a gratuitous attack upon a community. The entire tone of the judgment gives one the erroneous impression that other communities in India have a perfectly egalitarian and secular law. Of this, more later.

This is not to deny that Muslim personal law, as codified and practised in India, is heavily biased against women, and that Muslim fundamentalists have so far resisted all attempts to introduce necessary changes, thus causing great harm to their own community, especially women. In this, they are no different from men of most communities anywhere in the world. Men have, throughout the centuries, managed to project their own sectarian interests as the interests of the entire community, thus denying women the possibility of asserting their interests, especially when these conflict with those of men.

Ever since the judgment was delivered, the issue, as framed by Chandrachud, has been picked up vociferously by various self appointed reformers amongst the Hindus to whip up the most blatant kind of anti Muslim hysteria, using the plight of Muslim women as a banner. Once again, women are being used by men of different communities to settle scores with each other.

There is no intention to make use of the issue genuinely to protect the interests of women. The results are clear for all to see. Shahbano spent 10 long years fighting her case and stood firm on her demand. As soon as her case was picked up by the media and self styled reformers, she withdrew for fear of being exploited by communalists, and requested the Supreme Court to rescind its judgment.

It is significant that when she was interviewed on television, she was very strong in asserting that injustice had been done to her by her husband. When asked to explain why she had appealed for the judgment in her favour to be withdrawn, she made a simple but revealing statement. She said this judgment seemed to be creating conditions for *danga phasad* or riots, and she did not want to be the cause of anti Muslim riots. Thus, even while strongly acknowledging the injustice done to her as a woman, she felt compelled to give up her struggle in order to save her community from attack by Hindu communalists. She was made to feel as if by asserting her rights as a woman, she was exposing her already very vulnerable community to further attack.

As one M. Y. Kazi wrote to *The Times of India:*

"…it is such a pity that the issue of Muslim personal law has been politicised by motivated people and thus vitiated the atmosphere for a serious debate. As a Muslim, I am only too well aware of where the shoe pinches and what needs to be done. But let me make it very plain, I won't oblige those who regard any identity except their own inferior, alien and unpatriotic, and who would shed copious tears on the 'plight' of Muslim women but have no sympathy to spare when those very women are made widows and orphans in the streets of Bhiwandi, Ahmedabad, Baroda, Meerut and innumerable other places...As a Muslim, I would not mind having a common civil code provided that code incorporates the good points of all the existing codes."

It is significant that not only have women like Shahbano been frightened by the nature of the "support" extended to their cause, but even many of those Muslims who have all along favoured reform in Muslim personal law or advocated the need for a common civil code, are feeling rightly concerned lest in the guise of sympathy for Muslim women, many non Muslims, notably Hindus, will seize the occasion to spread even more hatred and contempt for the Muslims in an atmosphere already charged with anti Muslim sentiment.

Feisal, this being the maximum maintenance possible under this section for any person, regardless of religion. Separate maintenance would have been granted to Qaisar too, had she been unemployed.

However, ever since the Supreme Court judgment in the Shahbano case, the newspapers have been gleefully reporting each case of a Muslim woman getting maintenance in the lower courts as yet another "victory"—in seeming ignorance of the fact that many such awards were made prior to the Shahbano judgment.

Divorced women sitting on fast, Kolhapur

Was The Judgment So Progressive?

Before the stirring up of a storm over this judgment, a number of Muslim women were routinely granted maintenance by various courts under section 125 Cr PC. One example is that of Qaisar Jahan, who had approached Manushi for help. Her husband, Ghalib Husain, a reader at Jamia Milia University, Delhi, had divorced her and remarried. Qaisar, employed at Aligarh, was supporting their 10-year-old son, Feisal Ghalib.

Manushi lawyers filed a petition for maintenance under section 125 CrPC, and in October 1984, a woman metropolitan magistrate, Deepa Sharma, awarded Rs 500 per month for

The spirit of the attack on Muslim law that is being carried on today has an interesting historical parallel. After the British succeeded in firmly establishing their rule in India in the nineteenth century, one of the main ideological weapons they used to justify their domination over Indians was to claim they had a mission to reform what they characterised as the "uncivilised" and "backward" state of Indian society. They arrogated to themselves a "civilising" role. Their favourite symbol of the "unreformed" state of Indian society was the plight of Indian women. Customs such as Sati, child marriage, female seclusion, and ban on widow remarriage were used as proof of the backward state of

Hindu society, much in the same way as Hindus are today using burkah, *talaq*, and other discriminatory aspects of Muslim personal law and practice to "prove" how barbaric and backward Muslims and Islam are.

In both cases, the issues picked up are indeed valid issues in their own right. However, in both cases, the motivation behind the ostensible concern is of greater importance than the issues picked up, because the motivation largely determines the actual outcome of the campaign undertaken. For instance, the British used the issue of Indian women's oppression to demonstrate that a race as "backward" as the Indians was incapable of governing itself. This became another justification for treating Indians with contempt. It also helped the British to distract attention from no less basic issues such as their economic, social and cultural subjugation of the entire Indian population.

Sensing this, many prominent nationalists ended up taking extremely defensive positions on the issue of social and religious reform, We would do well to remember that men like Lokmanya Tilak vociferously opposed the Age Of Consent bill which sought to raise the age of marriage for girls to 14. His arguments sound similar to those of many Muslim leaders today. He insisted that women's rights were an internal matter and the British had no right to encroach upon Hindu customs and personal law.

We would also do well to remember that even during the later phases of the national movement, Gandhi had continuously to struggle against prominent Congress leaders who opposed various social reform measures because they felt that internal disputes over these issues would weaken and divide the community.

A similar situation prevails among Muslims today. The manner in which concern for Muslim women is being expressed today feels to Muslims more like an attack. It seems to be born not out of sympathy for Muslim women but of antipathy towards all Muslims.

Muslims, being a minority community, are constantly suspect in the eyes of Hindus, and are constantly expected to prove their patriotism and loyalty to this country. They are expected happily to agree to be "reformed" as a test of their loyalty to the Indian nation.

If a Hindu resists a particular social reform measure, he is merely seen as a "conservative." But if a Muslim does so, he is at once accused of being a foreign agent, propped up by petrodollars, or he is asked to quit and go to Pakistan.

No wonder most Muslim women have also begun to demand that their law not be tampered with. The fury of the anti Muslim campaigns seems to have silenced many of the outstanding defenders of women's rights amongst Muslims.

We need to be concerned that the manner in which the campaign for reform in Muslim personal law is being conducted has had the unfortunate effect of silencing the voices in favour of women's rights from within the Muslim community. Like the British attack on "evil" customs of Hindu society, this attack is meant to divert attention from very basic issues:

1. Muslims are even today a heavily disadvantaged community, economically and socially.
2. They are constantly discriminated against in matters of employment and other opportunities.
3. Even today, despite much talk of secularism, most Hindus treat them as untouchables. They do not accept food cooked in a Muslim house or eating establishment.
4. Very few Hindu landlords will rent their houses to Muslims. As a result, Muslims end up living a ghettoised existence, and are then accused of creating "mini Pakistans."
5. Very little has been done to support literacy and education programmes for Muslim women of lower income groups.
6. Muslims are constantly subjected to brutal violence in the form of riots so that the community has no sense of security in their own country,
7. All Muslims are always suspect as actual or potential Pakistani agents.

One could add many more points.

However, instead of finding solutions to these basic problems there is a tendency to pursue red herrings. Just as the British, in their enthusiasm for pointing to the brutal treatment meted out to Indian women, almost always forgot that the situation of most English women in England was far from enviable, so the reformer enthusiasts of today are prone to overlook the fact that both the actual and legal rights of Hindu women are far from satisfactory.

Muslim Maintenance Law

The position under the Criminal Procedure Code and the Muslim personal law is stated by Danish Latifi in his written arguments for an intervention in the Shahbano versus Mohammed Ahmed Khan case.

Section 125, CrPC, provides for maintenance up to a maximum amount of Rs 500 a month for a needy wife, child or parent. Section 127 (3) (b) provides that a maintenance order under Section 125 shall be cancelled where "The woman has been divorced by her husband and she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law, applicable to the parties, was payable on such divorce.

Justice Krishna Iyer had interpreted this clause to mean that if the amount paid under personal law was sufficient to save the woman from destitution, the maintenance order under section 125 would be cancelled, but in case the amount paid under personal law was not sufficient to save her from destitution, then the order under section 125 would stand. He argued that section 125 exists to protect people from destitution, and to see that the state is not burdened with their upkeep if they have close relatives who should look after them.

However, Mohammed Ahmed Khan challenged this interpretation,

pointing out that section 127 clearly states that if "the whole" amount payable under personal law has been paid, the woman is not entitled to relief under section 125. Therefore, the Supreme Court had to decide whether Shahbano had in fact received the whole amount payable to her under Muslim personal law.

Mohammed Ahmed Khan had paid the *mehr** of 3000 and also the maintenance during *iddat.*** He claimed that under Muslim personal law, these are the only two payments due to a woman on divorce.

Shahbano's counsel argued that apart from these two payments, another payment known as *mataa* is also due to a woman on divorce, under Ayat 241 of Sura II (Sura-al-Baqr) of the holy Quran:

"Wa lil motallaqatay mataa un bil maroofay haqqan allal muttaqeena" which translates as

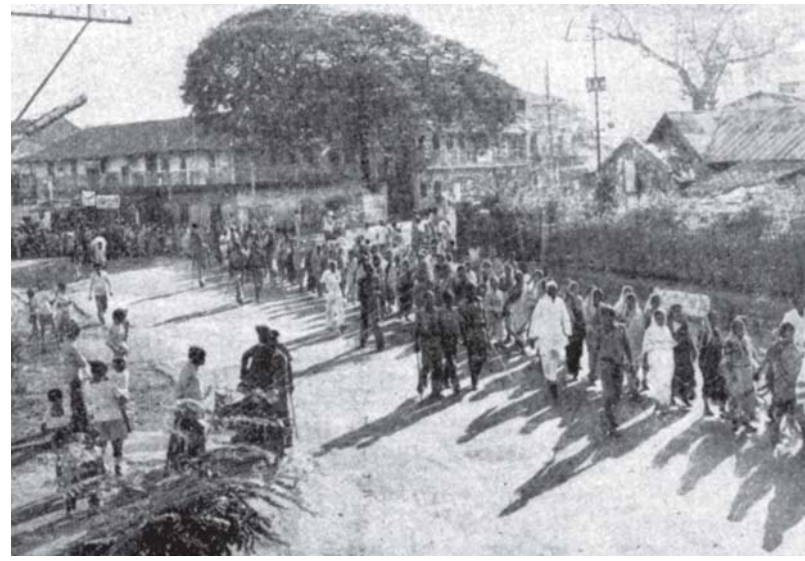
"And for divorced women let there be a fair provision. This is an obligation on those who are mindful of god."

(transd. Dr Syed Abdul Latif, 1969)

Shahbano had not been paid *mataa.* Her husband's counsel argued that this provision is not obligatory on all Muslims but only on the *"muttaqeena"* or those who are specially pious, which he does not claim to be. Shahbano's counsel replied that the Quran is addressed, right in its beginning, to the *"muttaqeena"* so if all Muslims believe it is addressed to them, then all Muslims are *"muttaqeena"* and this verse applies to all of them.

Shahbano's counsel also cited several respected authorities' interpretations of this verse:

"Two reputed authorities who have dealt with this matter are Maulana Baizawi and Ibn Katheer... These commentators have declared that the obligation upon the husband of paying *mataa-un-bill-maaroof* (reasonable provision) to his divorced wife is imperative and binding and not merely optional. It may be noted that the opinion of Imam Shafei particularly is



The Talaq Mukti Morcha

acceptable to all the schools of Sunni, including the Hanafi jurisprudence... The same view has been expressed perhaps with even greater force, by Imam Jafar-al-Sadiq, the highest authority among all schools of Shia jurisprudence. Prof Fyzee states: 'Imam Jafar-al-Sadiq held it *(mataa-un-bil maaroof)* to be obligatory *(farida wajiba)* and always decreed its payment.' He further states: 'The *mataa* should be a generous payment."

Thus, according to several respected authorities, Muslim personal law is in favour of a generous payment to a woman at the time of divorce, apart from *mehr* and maintenance during *iddat.* Shahbano's counsel appealed to the court to uphold the law in this matter, which they did. The interpretation of Ayat 241 relied upon by the Supreme Court judges was that of jurists like Imam Shafei and not the judges' own.

Is Maintenance Law Satisfactory?

Maintenance law in India is far from satisfactory, whether under CrPC, Hindu law or Muslim law. The issue of maintenance and alimony needs to be reexamined and made more equitable in law.

Maintenance is available to Hindu women under the Hindu Adoption And Maintenance Act, 1955. A woman can claim a maximum of one third of the joint incomes of her husband and herself. That means that if, for example, she is earning Rs 500 and her husband Rs 1,000, she cannot claim anything because she already has one third of the joint income which is Rs 1,500.

In practice, however, it is extremely difficult for a woman to claim and get her right under Hindu personal law, just as it is extremely difficult to get the "generous payment" under Muslim personal law. The case is a civil one which means that the husband can employ all sorts of dilatory tactics to drag the case out for years. What a woman may finally get is a pittance, like the Rs 179 that Shahbano got from the high court and which the Supreme Court confirmed. She will have spent much more on court expenses, by that time. And there is no way of ensuring that the husband will regularly make payments. If he stops paying, the woman has no redress but to go to court again. She cannot approach the police to compel the husband to pay her.

Therefore, most women prefer to plead under 125 CrPC which is not really the relevant provision for maintenance of a divorced wife. Maintenance is the right of a divorced woman whereas 125 CrPC exists to

safeguard all destitute women, children and old parents. Yet most divorced women have to sue for maintenance under this clause because it is a criminal case and they can get relief somewhat more quickly. But under this clause they can get a maximum of only Rs 500 which is much less than the amount many of them would be entitled to as maintenance after divorce. Also, the sum of Rs 500 is a fixed one and bears no relation to the income of the husband. Even if he is earning lakhs, she can claim a maximum of only Rs 500. Under the personal law, she may be able to claim more, but the procedures under the civil law are so cumbersome that it is hardly worth fighting for maintenance under those clauses. Thus, women are caught in a dilemma created by a biased system.

Thus, in practice, all the laws on maintenance are highly inadequate. It is not enough to state that a woman should get a "fair" or "generous" payment because the definition of generosity varies widely. Women have been too long dependent on the generosity of men. What is needed is an assertion that maintenance is a woman's right. She does not have to be a destitute to claim maintenance.

The procedures for claiming maintenance have to be such that a woman can quickly get relief, and the sum payable has to be in proportion to the husband's income. The society and state too have a responsibility in this regard, not merely to safeguard women from dying of destitution, but to ensure a decent standard of living to a woman who is maltreated or abandoned by her husband.

Shahbano's case is only one instance of the way most Indian women have to struggle for maintenance. She had to spend 10 years knocking at the doors of the secular legal system before she got a pitiful amount of maintenance —Rs 179 per month which is less than half the statutory minimum wage in most parts of the country. Earlier, she had been granted a sum of around Rs 25 by the lower courts, which is more of an insult than an award.

Can an ordinary woman, without the support of fairly well off male family members (in this case, Shahbano's sons) afford to carry on such a prolonged battle, after she has been abandoned by her husband, and to get so little in return?

Yet, the media completely and deliberately ignored this aspect of the plight of women, whether Muslims, Hindus, Christians or Sikhs. Instead of sounding embarrassed or ashamed at this example of the failure of the legal system to offer any meaningful relief to a woman in distress, the judges made it seem as if they were bestowing a great boon on Shahbano and, by implication, on all Muslim women. The media too has been mindlessly projecting the judgment as a great "victory" for Muslim women.

Is Hindu Law Secular?

Powerful members of any community, whether the majority or a minority, ought not to have the right to oppress vulnerable sections of the community in the name of religion or any other ism. But Muslim men are certainly not unique in using religion as a shield for the purpose of exploiting women.

Most of the non Muslims who are vigorously demanding scrapping of Muslim law seem to be under the erroneous impression that only minorities are governed by personal laws. Most Hindus seem to believe that their law is "secular and Indian" and not "religious" at all. But the fact is that Hindus continue to be governed by Hindu personal law in such matters as marriage, divorce and succession.

It is true that Hindu personal law has undergone some reform, and shed some of its blatantly discriminatory aspects. However, it continues to be heavily biased against women in many important ways. To give some notable examples.

A daughter's inheritance rights are severely circumscribed in comparison to a son's. A son, from the moment of his birth, is considered a coparcener, that is, an equal owner of the family's joint property, with other male members. A daughter cannot be a coparcener in a Hindu undivided family. She can only get a portion of what her father inherits if and when the property is divided. An unmarried daughter has a right to maintenance from the family property. But once she marries, she has no right to maintenance from her natal family's property, not even if she is divorced, abandoned or widowed.

In the father's self acquired property, a Hindu daughter is supposed to have an equal share if he dies without making a will. However, most Hindu fathers are averse to giving property rights to daughters so they usually make a will disinheriting their daughters. Even when a father dies without making a will, daughters are usually pressured into signing away their rights in favour of their brothers.

Under the Hindu Minority and Guardianship Act, 1955 (read in conjunction with the Guardians And Wards Act), a Hindu father is the "natural guardian" of his legitimate child over the age of five. This means that if there is a conflict over child custody between separated spouses, the primary right over the child belongs to the father. The mother can get custody only by proving in court that he is unsuitable to be the child's guardian. This law is an important weapon in the hands of men who can keep blackmailing their wives into continuing a bad marriage, by refusing to relinquish custody over the children.

Under the Hindu Adoption And Maintenance Act, 1955, a Hindu man or woman who is single can adopt a child in his or her name. But a married Hindu woman cannot adopt a child in her name. The child has to be adopted by her husband.

Further, there are many religious elements in the Hindu personal law which can and do cause serious problems for women. For instance, under the Hindu Marriage Act, 1955, a Hindu marriage is valid even if not registered. It is normally considered complete only if certain ceremonies like

saptapadi are performed. Many men undergo a second marriage and deliberately omit certain parts of the ceremony. Since the second marriage takes place in public with pomp and show it is recognised by society, but since a certain religious ceremony required by law was not performed, the court will not consider the marriage a valid Hindu marriage. This is one reason why it is almost impossible for a Hindu wife to get a husband punished for bigamy. So even though bigamy is prohibited for Hindus, in practice it continues to take place.

Practice No Different

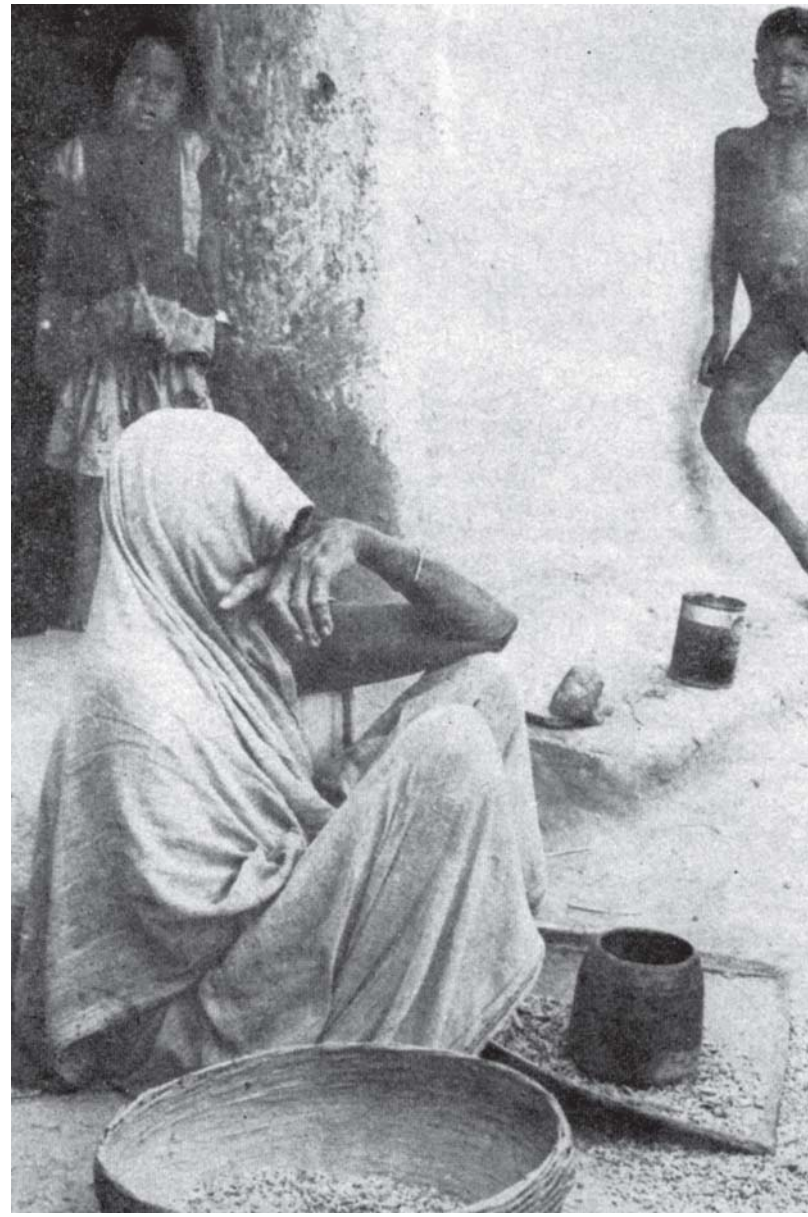
Of equal if not greater importance is that, though there are some differences between Hindu and Muslim law, there is very little difference between the practices of the two communities.

Most Hindus do not follow the codified Hindu law as represented by the Acts passed in 1955. Instead, they follow the customary laws prevalent in their own kinship group and region. For instance, a very large number of Hindu girls are still married and their marriages consummated before the girls attain the age of 18 despite laws to the contrary.

In some respects, reformed Hindu law is worse than unreformed Muslim law. For instance, a Muslim daughter cannot be disinherited by her father making a will. But a Hindu daughter can be and often is deliberately excluded by her father making a will exclusively in favour of his sons.

Even where Hindu law is better in words, it is usually not worth much more in practice. For instance, the Committee on the Status of Women in India stated in its 1975 Report that a census of India survey had revealed that the incidence of polygamy was 5.8 percent among Hindu men and 5.7 percent among Muslim men. That is, there is no meaningful difference in the incidence of polygamy amongst Hindus as compared to Muslims, even though polygamy is legal for Muslims and illegal for Hindus.

In practice, the law can be evaded or ignored by men, by virtue of their dominant position in society, the family, the community. A woman, whether Hindu or Muslim, can very often be compelled to accept her husband's bigamy if she is economically and socially dependent on him, or has no security against violence or threats of violence.



Hindu forms of parda—any better?

Much has been made of the injustice done to a Muslim woman by the provision which allows a man to divorce his wife by pronouncing the word *"Talaq"* or "I divorce you" three times. But, when a man walks out on an unemployed woman and refuses to maintain her or their children, it makes very little difference whether he says to her "I divorce you" or whether he omits to say this.

We have been approached for help by a very large number of deserted Hindu women who were no better off than deserted Muslim women. For example, a few days ago, a young woman with two small children who was living in a foreign country with her husband, a brahman priest there, was suddenly deserted by him. He had been maltreating her and having affairs with other women. Then he

disappeared without giving her any warning. The temple authorities sent her back to India. Her parents are too poor to support her; her in-laws are hostile to her. She is uneducated and unskilled. She does not know where her husband is. It is no consolation to her that her husband did not say *"Talaq, talaq, talaq"* before he walked out.

In many other cases where the whereabouts of the husband are known, and the wife manages to sue him for maintenance, he simply disobeys the court order. The wife has to approach the court again This process can continue indefinitely and the wife will spend more money on court expenses than she is likely to get as maintenance.

Thus, a key consideration is whether a woman has economic and social independence, so that, if a husband walks out, she is materially no worse off than she was before. After all, if a wife walks out, a husband is rarely reduced to destitution. The present inequality is built into the economic and social condition of the husband and the wife, the man and the woman. Equality cannot be conferred by any law in the absence of substantial changes in the political, economic and social condition of women.

Media Mischief

Unfortunately, the media has helped cloud the real issues. Instead of using this occasion to start a real debate on how to remove various disabilities imposed by the legal system on women of different communities, it has highlighted the issue of injustice to Muslim women, in order to whip up anti Muslim hysteria.

The newspapers are full of demands for a common civil code. This would mean scrapping not only Muslim and Christian personal law, but doing away with Hindu personal law as well. But scrapping Hindu personal law has not figured anywhere in the media debate. It is assumed that Hindu law is already the last word in secularism, and all that needs to be done is to extend a version of the so called reformed Hindu law to all other communities.

As was stated earlier, while in some parts Hindu law is somewhat better, in many other aspects it is even worse than Muslim personal law. But most people vociferously involved in the debate seem either to be ignorant of or are deliberately ignoring this fact. To give one example: Under Muslim personal law, the father is considered the guardian of a child over seven years of age (although it has been held in certain cases that the mother is to be considered the guardian of a girl up to the age of puberty).

A group of self styled reformers in Uttar Pradesh has, in response to the Shahbano judgment, prepared a cassette recording of arguments for scrapping Muslim personal law, a copy of which they sent to us. In this, they wax eloquent about the agonies of a Muslim mother: "What cruelty is inflicted upon a mother when her suckling child is snatched away because the Shariat gives the man the right over the child! The mother who kept the child in her womb for nine months, who suffered the pangs of childbirth, who starves so that she may feed the child, who remains sleepless that the child may sleep, who bears heat and cold but shelters the child in her lap, is told that on the authority of the Shariat this portion of her heart must be snatched from her! What kind of justice is this?"

Hawahi Attar, a divorced woman, speaking at a public meeting at Jalgaon

What these ardent sympathisers of the Muslim mother forget is that under the Hindu Minority and Guardianship Act, a Hindu father is "the natural guardian" of a child above the age of five. What, then, is the intention of an outpouring like the one quoted above? Clearly, if it was inspired by sympathy for the divorced woman whose child is taken away from her, it would not focus exclusively on the Muslim woman, when other women too suffer the same lack of rights to custody of their children.

The cassette goes on to say: "All social evils are built into the foundation of Muslim personal law," There is no acknowledgement today that many features of Muslim personal law are in fact better than features of other personal laws. To take only one example, a Muslim can dispose of only one third of his or her property by making a will. Two thirds go to the heirs in fixed proportions. Thus, a Muslim father cannot disinherit his daughters by making a will in favour of the sons, as a Hindu father can do.

When such facts are not acknowledged, and the Hindu personal law is assumed to be the only norm of "reformed law" and secularism, the demand for a common civil code becomes suspect. Such a code will be "common" only in name, common in the sense that it will be imposed on everyone.

Hindu communalist bodies like the Shiv Sena and the RSS have issued

statements demanding a common civil code in the interests of national unity. But what they mean by national unity is clear from their other statements. For instance, RSS chief Balasaheb Deoras, said on November 9, 1985, that the main purpose of the RSS is Hindu unity and it believes all citizens of India should have a "Hindu culture."

When confronted with such sympathisers, who are the very people that stir up anti Muslim riots, small wonder that women like Shahbano are compelled to retreat from the position they had taken.

Hindu Reform—Similar History

It is indeed unfortunate that after the judgment went in her favour, several prominent Muslim leaders and many fundamentalist organisations began a pressure campaign against Shahbano. They began to raise the bogey of "Islam in danger" to frighten Muslim women into submission. This attitude is not unique to Muslim men. Men have tried throughout history to use religion to legitimise their unjust power over women.

When the Hindu code bill to reform Hindu law was introduced in parliament a similar campaign was launched against it by Hindus. It was not just known conservatives who opposed any reform of Hindu law relating to women, but even eminent nationalists like Sardar Patel tried to thwart it.

The debate over the Hindu code bill waxed fast and furious in parliament, in the media and amongst the public. Every time it was introduced in parliament, the debate was inconclusive. The bill was first introduced in 1944 but could not be passed until 1955.

The Congress was split over the issue, and stalwarts like Pattabhi Sitaramayya, president of the Congress, vociferously opposed it. Women members of parliament were united across party lines in demanding reform. This was referred to by members in parliament as a "tyranny of women." Sitaramayya regretted that "half a dozen lady members can drag us by the heels and make us take up this bill."

Every clause of the bill was opposed, including the one that abolished polygamy. Members in parliament called the bill "anti Hindu and anti Indian." The cry of "religion in danger" was raised. Massive demonstrations against the bill were staged in different parts of the country and outside parliament.

This massive campaign delayed the passing of the bill for many years. Various Congress members openly warned Nehru that the bill would alienate people and could lead to Congress losing the elections.

The most vehemently opposed clause was the one that gave daughters a share in property. Because of this opposition, daughters were finally excluded from a share in ancestral property. Supporters of the bill regretted that by the time it was passed, it had been so amended as to be of very limited benefit to women.

In fact, even today any reform in Hindu law meets with a lot of opposition. For instance, the recent attempt by the Andhra Pradesh state legislature to amend the Hindu Succession Act and make daughters coparceners in joint family property came in for a lot of criticism and was delayed because of opposition by the ruling party at the centre.

Logic Of Being a Minority

Perhaps we can better understand the implications of this logic if we compare the reactions of Muslims as a minority to a situation where Hindus are in a minority — say in Britain. What if the British government were to decide that Hindu marriage law and customs are backward and the cause of injustice to women and, therefore, declare that all those aspects of Hindu

Shabhano—premature felicitations

personal law which are contrary to contemporary British notions of justice for women are to be considered invalid? They could argue that since Hindu marriage ceremonies make women take vows which are contrary to the notion of equality between the sexes, therefore a Hindu ceremony would be invalid, thereby legislating that all marriages be performed in a secular way, that is, be registered in British courts. This would bring citizens of different faiths on a common platform and would remove their disparate loyalties to conflicting ideologies.

There is no denying that the British government could argue their case with some logic and that Hindu women in England would undoubtedly be better off in some ways. But it is very likely that the same people who are so strongly arguing in favour of scrapping Muslim personal law would react no differently from the way Muslim leadership is reacting today to what they call "outside interference." Hindus in England are likely to see such an attempt as a racist attempt by the majority community to repress a minority's culture and religion.

Thus, a minority community's reactions have a logic of their own and cannot be lightly dismissed, especially if the minority has been a disadvantaged community. Both Muslims in India and Hindus in England can well be considered disadvantaged minorities.

In such a situation, the task of removing some of the real causes of their fears has to assume high priority in order to start a meaningful dialogue on the issue of reform within the community.

Only One Loyalty Allowed?

Even progressive Muslims are feeling nervous and insecure because of the way the community is today being held up for attack while liberal Hindus are taking increasingly aggressive postures. Many of those who have jumped into the fray around this case have stated that minorities must prove their loyalty to the Constitution by agreeing to a common civil code. Mr. Ram Jethmalani is alleged to have even gone so far as to say that this is the price Muslims must pay for staying in

India instead of going to Pakistan. In an article in *The Indian Express* of October 26, 1985, he wrote: "Muslims of India owe loyalty to the directive principles of India's Constitution including Article 44. A newly added Article of 1976 (Article 51 A) makes it the duty of every citizen to abide by the Constitution and respect its ideals and institutions, to develop the scientific temper, humanism and the spirit of inquiry and reform. The duty is declared to be fundamental and must, therefore, override all obligations arising from any source —secular or divine."

A scientific temper and a spirit of inquiry can only be developed in an atmosphere of freedom from fear. It is absurd to imagine that a duty to be humane or scientific can be imposed on anyone and can be performed by anyone successfully when it is thus forced. All that can be done is to provide an atmosphere conducive to the development of such a temper, and hope that exposure and opportunity will lead people to develop the best in themselves. A scientific temper and a humane spirit are not commodities available for sale or by filling out a form and paying a fee.

Further, to say that citizens must respect all the ideals of the Constitution is to convert the Constitution into a substitute for a holy book. If every word in the Constitution is to be taken as unquestionable truth and blindly obeyed, then how is it different from what many religions impose on their followers? It is most unscientific to advocate such slavish adherence to any set of ideals and institutions. It should be a fundamental right to criticise, comment upon and feel dissatisfied with aspects of the Constitution as of any book, holy or otherwise.

Is it possible or desirable to impose any one loyalty on people? Should loyalty to the State override loyalties to family, friends, and community and to one's beliefs? If the State turns fascist, as it did in *Germany* under Hitler, would the citizens have an overriding duty to sacrifice their other loyalties at its altar?

This is precisely the logic used by fascists—one country, one religion (or lack of religion), one party, one leader—to crush all voices of dissent. Such oneness is achieved not by uniting people, but by crushing out of existence those who do not fit into the ideal pattern imposed on them from above. A major reason why Jews were hated in Europe was because they were the main visible non-Christian group in Christian dominated societies.

The Hindu community has to learn to enter debate and discussion about the affairs of the minority communities without engaging in physical and cultural aggression. Statements such as "if the Muslims don't want this change, let them go to Pakistan" are based on the arrogant assumption that this country belongs only to Hindus and others can stay here only on their terms. Such an approach, far from bringing about "national integration" will tear the country and its people apart. We have to understand that conservative Muslims and Christians have as much right to be citizens of this country as do conservative Hindus.

What Needs To Be Done

The most important task is to prevent the Hindu communalists from using what is essentially a women's rights issue for the purpose of stirring up communal hatred against the

Muslims and other minorities. This hatred campaign can only have the effect of strengthening Muslim fundamentalists and silencing the voice of reform within the Muslim community.

We should urgently proceed to draft a uniform secular code available to all in this country. However, while working in that direction, we need to be extremely vigilant and remember that it is very easy for a dominant majority community to project its own customs and beliefs as the "norm" which ought to be followed by all others. That is why the idea of a uniform civil code as extending the Hindu personal law to other communities is inadequate and dangerous. We need to resist such a move with determination.

Many liberal minded people have suggested that a common civil code be devised in such a way as to incorporate the best features of all the existing personal laws—including Hindu, Muslim, Christian and Parsi.

From the standpoint of women's equality, this stand is clearly not adequate. Even if we were to put together some of the best features of existing personal laws, they would still not help women obtain fair and equal treatment. Therefore, a uniform civil code needs to be devised keeping the principles of fairness and equality foremost in mind.

This uniform civil code should be available to any citizen of India on demand—man or woman. Equal rights for women should be an underlying principle of such a code.

Hindu, Muslim, Christian or other personal religious laws should be a matter for the believers to accept or not accept without being enforced by the State. The government should not be permitted to enforce or even participate in the administration of religious personal law nor should such law be incorporated in any way into the laws of the State, if it is to remain secular.

Enforcement of religious law should be a private matter resting solely on the voluntary moral commitment of the parties to any dispute. The option of choosing the uniform civil code should always be available to all parties to any disagreement, and the government should only have the authority to enforce the uniform civil code, and should not have authority to enforce personal religious law. Implementation of religious law should occur solely as a consequence of the free assent of all parties to a dispute to the decision of the religious authority.

Instead of becoming the tail end of controversies unleashed by men, women's organisations need to take the lead in working out the provisions of a uniform civil code. We need an intensive debate on this issue. We must also make sure that women of minority communities are fully involved in the debate and in working out a new code of women's rights.

Given the history of the actual functioning of the legal machinery in India, we need to give crucial attention to how these laws can actually be implemented.

Some important steps in that direction would be as follows:

(a) The government assumes the responsibility for informing every citizen, especially women, of their basic rights and the options available to them. A manual of basic rights with special emphasis on women's legal rights should be provided free to every household by the government.

(b) The new laws must be framed in simple language and available in all the regional languages.

However, even while making a strong plea for a uniform civil code, let us not have any illusions that this can have any rapid effect in substantially changing women's lives in this country.

The vast majority of women in this country cannot even dream of approaching courts of law for seeking justice. It is totally beyond the realm of possibility for them for various reasons. Most women do not have the right to take independent decisions in such matters. Just as marriage is decided by families, so is divorce and other related problems. Divorce is not a matter of choice for most women, whether Hindu or Muslim, in this country. It is usually unilaterally thrust on them by their husbands. In such a situation, they are usually left without any means of their own so that they become dependent on their adult sons or their natal family's goodwill and support. Most women would not dare approach the courts against the wishes of their natal families. Most families in India settle these matters either by direct negotiation or by appealing to some *biradari* or kinship elders for acting as intermediaries. Even though women don't manage to get justice very often through such interventions, the system has the advantage of being quick and inexpensive. Only few among those who have adequate resources ever think of going to court. Even for them, the time and energy involved in legal procedures makes it a very unattractive proposition. Moreover, even women whose families have the required resources hesitate to take this recourse because the outcome is uncertain and unlikely to go in the woman's favour.

Given the remoteness of the legal system from most ordinary people, few women are even likely to be aware that such redress through the courts might be possible for them. Thus, the position of women within the family, most women's lack of resources to fight expensive legal battles, as well as the incredibly poor functioning of the legal machinery, make the legal system virtually inaccessible to all but a very few women in India.

Yet, this is not to suggest that attempts to change laws are a totally irrelevant exercise. Even if, for the foreseeable future, change in laws will only affect the lives of a small minority, it does become a pointer in the direction from which overall change needs to come. One hopes that such changes will make the society publicly commit itself to more humane norms even if practice lags behind. It will make the task of extending equal rights to women somewhat easier. ❐