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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **MAINTENANCE RIGHTS OF DIVORCED MUSLIM WOMEN: INTERPLAY BETWEEN BNSS 2023 AND PERSONAL LAW**

AUTHORED BY - HARSH BHALOTIA

## **Abstract**

This paper explores the complex legal scenario surrounding the maintenance rights of divorced Muslim women in India in light of the recently introduced **Bharatiya Nyaya Sanhita (BNSS) 2023**, which replaces the Code of Criminal Procedure, 1973. The paper analyzes the continued tension between secular statutory law and religious personal law, specifically the **Muslim Personal Law (Shariat)** and the **Muslim Women (Protection of Rights on Divorce) Act, 1986**.<sup>1</sup> The dual legal system creates legal ambiguities and conflicting judicial interpretations, particularly on whether Muslim women can claim maintenance beyond the iddat period under secular law. This paper aims to assess the constitutional implications, judicial trends, and policy gaps, ultimately advocating for harmonization through either legislative reform or a progressive interpretation of personal laws aligned with gender justice.

## **1. Introduction**

India's legal system is marked by a complex coexistence of personal laws based on religion and a secular legal framework that governs criminal and procedural matters. While this pluralistic model respects religious freedom, it often leads to **legal uncertainty and discrimination**, particularly concerning women's rights. One such area of enduring conflict is the **maintenance rights of divorced Muslim women**.

The issue was famously brought to national attention in the *Mohd. Ahmed Khan v. Shah Bano Begum* case, which led to an intense socio-political and legal debate over the primacy of secular law versus personal law. In response, Parliament enacted the **Muslim Women (Protection of Rights on Divorce) Act, 1986**, limiting Muslim women's maintenance rights largely to the **iddat period**.<sup>2</sup> However, subsequent judgments have interpreted this in more inclusive ways.

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<sup>1</sup> *The Muslim Women (Protection of Rights on Divorce) Act, 1986*, Act No. 25 of 1986.

<sup>2</sup> <https://www.drishtiias.com/daily-updates/daily-news-analysis/right-to-maintenance-of-muslim-women>



With the introduction of the **BNSS 2023**, which replaces the CrPC, it becomes imperative to examine whether the progressive changes in the new code ensure gender justice or continue to leave room for religious exceptions. This paper critically evaluates the **interplay between the BNSS 2023 and Muslim personal law**, emphasizing the need for clarity, consistency, and constitutional morality.

## 2. The Legal Framework: BNSS 2023 and Muslim Personal Law.

### 2.1. BNSS 2023: A Modern Law or Repackaged CrPC?

The **Bharatiya Nyaya Sanhita, 2023 (BNSS)** is one of three new criminal codes that aim to replace colonial-era laws with legislation rooted in Indian values. BNSS replaces the **Code of Criminal Procedure (CrPC), 1973**, maintaining most of its procedural structure, including the key **provision on maintenance (Section 144 BNSS)**, which corresponds to **Section 125 CrPC**<sup>3,4</sup>.

While heralded as a “decolonized” version, the BNSS largely replicates its predecessor without fundamentally altering the **maintenance regime**, except for enhanced procedural speed. This reveals a **missed opportunity** to engage meaningfully with long-standing issues involving religious personal laws and their interface with secular rights.

#### Key features of Section 144 BNSS:

- It allows a **wife, children, or parents** who are unable to maintain themselves to seek maintenance from a person with sufficient means.
- The provision is **religion-neutral**, but the **silence on personal law conflicts** continues.

Here lies the issue: **Does BNSS 2023 override religious personal law when it comes to maintenance, or does it continue to function in parallel?** The answer is not clear. This ambiguity sets the stage for confusion in courtrooms and personal distress in households.

### 2.2. Muslim Personal Law and the 1986 Act: Autonomy or Anachronism?

Under **Muslim Personal Law**, maintenance (known as *nafqah*) is traditionally due **only during the iddat period** — roughly three lunar months post-divorce. This law was codified in the **Muslim Women (Protection of Rights on Divorce) Act, 1986**, following political

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<sup>3</sup> <https://www.linkedin.com/pulse/what-section-125-crpc144-bnss-joginder-singh-rohilla-wu0jf>

<sup>4</sup> Section 125, *Code of Criminal Procedure, 1973*, now replaced by Section 144, *Bharatiya Nyaya Sanhita, 2023*.



backlash against the Shah Bano judgment.

On its face, the 1986 Act seems to:

- Limit maintenance to the **iddat period**.
- Require “**reasonable and fair provision**” to be made within this period.
- Impose obligations on **relatives** or the **Waqf Board** if the woman is left destitute.

But a closer legal reading, particularly after *Danial Latifi*, reveals that the Act **does not prohibit post-iddat maintenance**. The phrase "provision and maintenance" has been interpreted to mean a **lump-sum support for the future**, not just during iddat.

Still, the **absence of procedural clarity**—on how, where, and under what circumstances a Muslim woman should claim this support—makes the law **functionally inadequate**. The procedural simplicity of BNSS Section 144 is absent from the 1986 Act, **leaving women trapped in ambiguity**.

### 3. Legal Ambiguity Due to Parallel Systems

The most glaring issue in this debate is **jurisdictional conflict**: when a Muslim woman is divorced, should she approach the magistrate under BNSS 2023 (Section 144) or file under the 1986 Act?

Unlike civil law disputes like contracts or torts, **family law in India is governed by a mix of civil codes and uncodified personal law**. The result is that maintenance becomes a **legal limbo** for Muslim women.

#### Case Example:

Suppose a Muslim woman is divorced and seeks monthly maintenance:

- If she approaches the **magistrate under BNSS**, she may be told her remedy lies under the **1986 Act**, which requires a separate, sometimes community-led process.
- If she approaches a **family court**, the court might defer to **religious considerations**.

In practice, this dual system creates:

- **Delays in justice** due to forum shopping.
- **Conflicting interpretations** based on the judge's perception of religious primacy.

- **Compromised rights**, especially for economically or socially vulnerable women.

A uniform interpretation is urgently needed. **Legal certainty** is not just a procedural requirement; it is a precondition for **access to justice**.

#### 4. Constitutional Conflict: Gender Equality vs. Religious Autonomy

India's constitutional fabric is pluralistic — it respects religious diversity while enshrining **fundamental rights**. However, this has led to a **collision course** between:

- **Article 25 (freedom of religion)**
- **Articles 14 and 15 (equality and non-discrimination)**

In family law, particularly for Muslim women, this tension becomes acute. Courts have **grappled** with whether religious laws that disadvantage women can survive constitutional scrutiny.

##### Two Normative Principles Clash:

1. **Freedom of religion** protects community autonomy.
2. **Gender justice** ensures individual dignity, autonomy, and freedom.

In *Shayara Bano v. Union of India* (2017), the Supreme Court ruled triple talaq unconstitutional on grounds of **arbitrariness** under Article 14.<sup>5</sup> This was a landmark moment — the first time the Court **directly invalidated a personal law practice** on constitutional grounds.

However, the Court stopped short of **examining maintenance laws**. Had it done so, it might have advanced the proposition that **personal laws, if discriminatory, can be tested against the Constitution**<sup>6</sup> — a view still not uniformly accepted by Indian courts.

Until there is **explicit jurisprudence or legislative action**, Muslim women will remain subject to **unequal treatment based on religious identity**, contrary to the promises of the Constitution.

#### 5. Judicial Inconsistencies and the Burden of Interpretation

While the judiciary has played a crucial role in **extending the protective ambit of secular maintenance laws** to Muslim women, these interventions have often come in **piecemeal fashion**, lacking binding uniformity at the lower court level. As a result, the **disparity in interpretation** has itself become a **source of injustice**.

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<sup>5</sup> *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

<sup>6</sup> Madhavi Sunder, "Piercing the Veil", *Yale Law Journal*, Vol. 112, No. 6 (2003), pp. 1399–1472.

### 5.1 Fragmentation of Legal Remedies

Across different jurisdictions, magistrates and family courts have issued **conflicting rulings** on whether a Muslim woman divorced under religious procedure can:

- Apply under Section 125 CrPC / Section 144 BNSS, or
- Is required to go through the more limited scope of the **1986 Act**.

This means that **identical cases** can lead to **entirely different outcomes**, depending on the judge's understanding of:

- What constitutes “fair provision”,
- Whether religious law overrides secular law,
- Or whether personal law is protected under Article 25.

Such fragmentation undermines the **predictability and reliability** of the legal system, violating the basic tenet of **rule of law**, which demands **uniform application** of principles.

### 5.2 Procedural Delays and Litigation Fatigue

Women seeking maintenance often face:

- **Multiple hearings** to prove that they were denied adequate support under personal law.
- **Jurisdictional objections** by the opposing party, causing delays.
- Repeated demands to "exhaust remedies" under the 1986 Act before approaching the court under Section 125/144.

This burdens the victim rather than the system, leading to:

- **Litigation fatigue**, where claimants abandon cases mid-way.
- **Economic destitution**, since delays in maintenance directly affect daily survival.
- **Emotional exhaustion**, as women relive the trauma of abandonment and are forced to justify their “eligibility” repeatedly.

When a divorced woman, already economically vulnerable, is made to shuttle between legal forums to prove a basic right to sustenance, **access to justice becomes notional**. The system punishes her not for what she did but for **who she is** — a Muslim woman subject to legal contradiction.

### 5.3 Lack of Binding Precedent Below Supreme Court

Although judgments like *Danial Latifi* and *Shabana Bano* clarified that Section 125 CrPC (and by extension, Section 144 BNSS) can apply, the lack of a **binding constitutional bench ruling** or specific legislation enforcing this across all forums allows lower courts to **sidestep** these interpretations.



Judicial inconsistency in such fundamental rights issues is **more than a procedural lapse** — it constitutes **institutional failure**, one that erodes public trust in the system's ability to protect marginalized groups.

## 6. BNSS 2023: Continuity or Missed Opportunity?

The introduction of the BNSS 2023 was a moment of rare legislative overhaul — an opportunity to **correct colonial legacies, streamline procedure, and realign the criminal justice system with constitutional values**. However, in the specific context of **maintenance rights and personal laws**, the BNSS reveals a **deep conservatism masquerading as reform**.

### 6.1 Structural Silence as Legislative Abdication

Section 144 of BNSS re-enacts Section 125 of CrPC almost verbatim — a continuation, not transformation. It fails to:

- Define whether its provisions **override religious personal law** when there's conflict.
- Clarify **procedural pathways** for Muslim women who may be denied fair provision.
- Create **institutional mechanisms**, such as legal aid cells or fast-track benches, to ensure implementation.

By avoiding these hard questions, BNSS allows **old tensions to persist under a new name**. In essence, it is a procedural update, not a substantive reform.<sup>7</sup>

This silence cannot be dismissed as neutrality — it represents **legislative abdication** on a fundamental rights issue. When the legislature fails to intervene, it leaves women at the **mercy of judicial interpretation**, which, as discussed, is already inconsistent.

### 6.2 Missed Chance to Reconcile Equality and Pluralism

BNSS could have, without attacking religious freedom, done the following:

- Explicitly stated that **maintenance is a secular obligation**, regardless of religion.
- Created a **model code for maintenance**, applicable to all, with opt-out provisions only where a woman has demonstrably received equivalent protection.
- Introduced a **centralized authority or appellate board** to resolve disputes where personal law and BNSS intersect.

Such reforms would have struck a **balanced tone** — protecting pluralism while ensuring that

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<sup>7</sup> *Bharatiya Nyaya Sanhita, 2023, Act No. 45 of 2023.*

religious freedom is **not a license for gender discrimination**.

Instead, BNSS 2023 retains the **rhetoric of justice** without providing the **mechanism for its delivery**.

### 6.3 Reinforcing Inequality through Legislative Inertia

When the state codifies a law but refuses to address **known contradictions**, it does more harm than good. BNSS, by failing to clarify whether Section 144 applies universally, reinforces a structure where:

- Women from **majority religions** enjoy full and continuing maintenance rights,
- Women from **minority religions**, especially Muslims, face conditional, ambiguous access to the same.

Such a framework creates **graded citizenship**, where rights depend not on your need, but your religion. This **structural inequality** entrenches rather than erases discrimination.

In a country where legislative reform is infrequent and slow, missing this opportunity means condemning **millions of women to another generation of legal uncertainty**.<sup>8</sup>

## 7. The Debate on Uniform Civil Code (UCC): Constitutional Necessity or Cultural Imposition?

The discussion around the **Uniform Civil Code (UCC)** has gained renewed momentum with the introduction of **BNSS 2023** and a wider push for legal uniformity across India's pluralistic society. Article 44 of the Constitution urges the State to "**endeavor to secure for the citizens a uniform civil code throughout the territory of India**." While this provision is non-justiciable, it forms a part of the **Directive Principles of State Policy**, reflecting the framers' long-term vision of a modern, egalitarian legal structure.

However, the UCC debate is **not merely legal**—it is **deeply political, cultural, and emotional**, particularly for **religious minorities** such as Indian Muslims. When viewed in the context of **maintenance rights of divorced Muslim women**, the question arises: **Does the absence of a UCC perpetuate inequality, or does the push for it undermine religious freedom?**

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<sup>8</sup> Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (OUP India, 2001).

## 7.1. Argument in Favor of UCC: Uniformity for Justice and Equality

### *(a) Constitutional Morality Over Community Norms*

Proponents of UCC argue that **gender justice cannot be sacrificed at the altar of religious identity**. The existing personal laws, especially those governing Muslim women, often **contradict Articles 14, 15, and 21** of the Constitution.

As per *Shayara Bano v. Union of India*, the Supreme Court held that **personal laws can be tested on the touchstone of fundamental rights**.<sup>[^1]</sup> This shifts the jurisprudential position away from absolute deference to religion and toward **constitutional morality** — the idea that laws must reflect the foundational values of liberty, equality, and dignity.

### *(b) Equal Protection of Laws*

A uniform civil code would ensure that **all women, regardless of religion, have equal rights in marriage, divorce, maintenance, inheritance, and custody**. It would also eliminate the arbitrary distinction where, for example:

- A Hindu woman can claim lifelong maintenance,
- A Muslim woman is often restricted to *iddat* unless “fair provision” is proved.

This legal asymmetry is not only **discriminatory** but also contrary to the **spirit of secularism** as envisioned in Indian jurisprudence.

### *(c) Judicial and Legislative Efficiency*

Having **multiple personal laws** leads to **confusion in courtrooms, delays in justice, and forum shopping**. A uniform code would:

- Reduce judicial inconsistency,
- Improve predictability in outcomes,
- Facilitate faster adjudication of family disputes.

The **BNSS 2023**, while claiming to modernize criminal procedure, failed to integrate personal law reforms—leaving **maintenance provisions unclear for Muslim women**. A UCC could fill this void.

### *(d) International Human Rights Standards*

India is a signatory to multiple human rights conventions (e.g., **CEDAW**) that demand **elimination of gender-based discrimination**, including in personal and family law. A UCC would signal India’s **commitment to global norms of equality and non-discrimination**.

## 7.2. Argument Against UCC: Fear of Majoritarianism and Cultural Erosion

### *(a) Religious Freedom and Constitutional Pluralism*

Opponents argue that UCC, **if imposed unilaterally**, could be seen as an attack on **Article 25**



– the right to freedom of religion. Unlike Western secularism which separates religion from law, Indian secularism is **inclusionary**, recognizing that different communities have **unique cultural and spiritual frameworks**.

Muslim Personal Law is not merely a set of rules; it is **closely tied to religious belief and community identity**. The community may perceive the UCC as a **backdoor attempt to homogenize** India's diverse legal traditions under a **Hindu-majoritarian framework**.

*(b) Trust Deficit and Political Motives*

The demand for UCC often emerges in **politically charged environments**, where religious minorities feel **singled out or demonized**. There is a **trust deficit** between the Muslim community and the state, particularly when legal reforms appear to target one religion more than others.

Without **inclusive dialogue**, even a well-drafted UCC risks being viewed as **oppressive rather than liberatory**.

*(c) Internal Reform over External Imposition*

Critics suggest that **internal reform within religious communities**, supported by progressive voices and voluntary adaptation, is a **better alternative** than top-down imposition. For example:

- The reinterpretation of “reasonable and fair provision” in *Danial Latifi* shows how **Islamic principles and constitutional law can co-exist**.
- Efforts by organizations like the **Bharatiya Muslim Mahila Andolan (BMMA)** show a **community-led push for reform** without needing a UCC.

Thus, **plural reform, not uniform imposition**, is the way forward.

### 7.3. Reconciling the Two: Toward a Balanced Model of Reform

Rather than viewing the UCC as a binary — either implement or reject — a **graduated, consultative model** may offer a **middle path**:

- **Start with Uniformity in Procedural and Welfare Rights:** Focus first on aspects like **maintenance, adoption, guardianship, and domestic violence**, where constitutional values can be enforced without touching core religious rituals.
- **Model Drafting of Optional Codes:** The State can publish a **model gender-neutral civil code**, which individuals may **opt into voluntarily** — as seen in **Goa’s existing civil code**.

- **Dialogue-Based Consensus Building:** A UCC cannot succeed without **community dialogue, legal education, and transparent drafting**. The aim should be to **protect religious identity while removing inequality**.
- **Judicial Clarification in the Interim:** Until legislative consensus is reached, the **Supreme Court must clarify that laws like Section 144 BNSS override personal law when they protect fundamental rights**.

The debate on UCC vis-à-vis maintenance rights of Muslim women reveals deep **fault lines in India's legal philosophy**. While the demand for a uniform law is driven by the ideals of **equality and justice**, its execution must avoid **coercion, cultural alienation, or majoritarianism**.

For now, the **urgent need is not a blanket UCC**, but a **targeted intervention**—either through **legislative amendments to BNSS or constitutional reinterpretation of personal law limitations**—to ensure that **Muslim women are not second-class citizens in the eyes of law**.

## Conclusion

The persistence of dual legal regimes in matters of maintenance reflects a deeper constitutional tension between personal law pluralism and the imperatives of gender justice. BNSS 2023, by merely replicating Section 125 CrPC without resolving its interface with the 1986 Act, reveals a legislative reluctance to confront this conflict. This inaction perpetuates a jurisprudential burden on courts and a structural vulnerability for Muslim women. An effective legal framework must go beyond formal neutrality and engage substantively with inequality embedded in personal laws. Without explicit harmonization guided by constitutional morality, the law risks preserving discrimination under the guise of religious freedom.

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