



An Insight Towards The Legal Protection Of Muslim Women Through The Lenses Of Constitution Of India

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ABSTRACT:

Now a day's issues of Muslim woman's right in India is highly becoming a burning and rivalry issue, specially Muslim woman's rights relating to triple talaq, divorce inheritance, maintenance has got so much attention. On the other hand the Constitution of India has guaranteed equality and freedom from all forms of discrimination and further has confer safeguard to the all citizen of India irrespective of their religion, cast, sex etc. However, it is really very unfortunate for us still there are various practices which are based on religion and culture. All we knows that a large part of Muslim personal Law has not been in a codified form and this makes an actual problem whenever the question arises right of Muslim woman under the Muslim personal law. It is pertaining to see that on various aspect Muslim personal law is totally silent means whenever the question of divorce, inheritance, maintenance, talaq, are arising on this issue the present enactment totally unable to eradicate the problems of Muslim woman. Here the existing law which has been enacted for the benefit of Muslim Woman is not balancing or sufficient in another aspect we can say that the present law is suffering from various kinds of infirmities.

The topic of discussion or debate on the critically analysis of Muslim Woman's rights under the Muslim Personal Law with reference to the constitutional perspectives has both positive as well as negative aspects. There are certain cultural practices and right under the Islamic law are totally against the main spirit of the Indian Constitution.

On the scenario of present discussion and debate through the present research paper attempts have been made to critically analyze the rights of Muslim Woman under the Muslim personal Law with respect to the Constitution perspectives and further efforts are taken by the researcher how to upgrade the right of the Muslim Woman under the Muslim personal law under the shadow of the Constitution of India.

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I. INTRODUCTION

The story of Muslim woman's right and her liberty is one of the live and attractive issues being discussed over the last few years in the Eastern circles. Islamic countries are also faced with this debate, and different societies have different views in this regard positive as well as negative. Frequently the matter extends beyond the limits of a debate and quietly enters the field of action making some special appearances in the Islamic environment. This issue of freedom and equality of rights is occasionally extended to such lengths, rightly or wrongly, that it reaches sensational limits, sometimes to the extent of being dangerous and repulsive. The woman's position in Islam, it is noted that Islam regards the woman as an independent, perfect member of society and places no difference between her and man as far as human virtues go. Islam maintains that salvation will be attained only through piety, virtue knowledge and goods deeds. Therefore, Islam does not differentiate between the virtuous dutiful man woman possess the same qualities. In Islamic society, the woman has the right to own and sell property, to inheritance, to seek knowledge and even to engage in legitimate trade. The religious personal law and precepts do not only preserve the order of society and safeguard to material interests, but also

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take stock of the spiritual and intellectual aspects. It would be wrong to imagine that Islamic injunctions bother themselves with worldly interests.¹

The word Sharia law means commands of God, a code governing all human actions and beliefs. For all effects of individual and collective actions of humans causes are found in Sharia. All moral, legal ethical theological philosophical and political problems are dealt in Sharia and as such solutions of any problem are religious in nature and a very little part of Islamic civil law is applicable in India. The application of Muslim Sharia is allowed through legislation, named The Muslim Personal Law (Shariat) application Act, 1937. This legislation, though a short one restored Muslim Personal law in India, particularly in two ways namely, firstly it de-recognized the application of customs locally prevalent in different parts of India among different Muslim communities and secondly provisions of this legislation compelled different Muslim communities to “give up rights contrary to Mohammedan law, to merge into general Islamic community and to be governed exclusively by the laws of Shariat.”² Though much has been said or mentioned in Holly Quran but it is really very unfortunate that in the absence of the proper codified law in Muslim personal law women are at much disadvantage position, because of the in clarity on the various rights and interpretation of Quran. The present Muslim personal law has been enacted during the British ear. But after independence the terminology changed and the Mohammedan law in order to wipe out its colonial stamp came to be renamed as Muslim personal However, its contents did not change. Now time has been changed and presently we are living in acivilized society so as per the needs of Muslim women’s right and in order to upgrade the rights and status of Muslim woman in Indian society and further in order to bring them in the main stream of the society here is a need to change the law as per the existing needs and necessity of the Muslim woman in India.

PERSONAL LAWS AND THE INDIAN CONSTITUENT ASSEMBLY

Before and after independence the question of the position of personal laws got tangled into the vortex of national politics. On the floor of the Constituent Assembly, for about two years, the issue suffered convulsions caused by the utterances of progressive legislators, dissenting voices of their so-called conservative brethren, apprehensions echoed by the spokesmen of the minorities, and bricks and bouquets thrown from outside by laymen and law-men.³

The Constituent Assembly had its first meeting in December, 1946. Speaking on the report on minority rights in August 1947, PockerSaheb insisted that as far as Muslims were concerned election to the central and provincial legislatures should be held on the basis of separate electorates. Spelling out his reasons for the demand he said:

“The legislature is intended to make laws for the whole country and for all communities, and it is necessary that in that legislature the needs of all communities should be ventilated. I would submit that as matters stand at present in this country, it will be very difficult for members of particulars communities, say the non-Muslims, to realize the actual needs and requirements of the Muslims community. ... They will find it practically impossible to know exactly what the needs are. There may be legislation concerning wakfs, marriage, divorce, and so many other things of social importance.... Therefore I demand a principle to the effect that the best main in the particular community should represent the view of that community.”⁴

This proposal regarding separate electorates for Muslims which was advocated byPockerSaheb, however, met stiff opposition and thus any such possibility was ruled out by the Constituent Assembly. Among those who vehemently opposed it were, GovindBallabh Pant and Sardar Patel. The later opined:

“But in this unfortunate country if separate electorate is going to be persisted in even after the division of the country, woe betides the country; it is not worth living in.”⁵

As far as the issue of personal laws is concerned, it evoked considerable conflict of opinion amongst the members of the Assembly. It is interesting to note that “whilst all the Muslim speakers favored continuation of the British policy of neutrality, the Hindu speakers emphasized that the guarantee of religious freedom by draft article 19 did not exclude the jurisdiction of the state in matters of personal law”.⁶ The Muslim speakers argued that neither of the draft articles 19 and 35 empowered the state to legislate on personal laws.⁷ They stated that the secular state of India should not be endowed with the legislative powers of encroach upon the beliefs and practices of any religious community. Hindu speakers expressed contrary opinion.

¹ Law relating to Muslim Woman in India S.K Naqvi (Orient publishing company 27th April 2009)

² Principal of Muslim Law Shri. YawerQazalbash(Modern law house 2nd edition 2005)

³ Tahir Mahmood, Personal Laws in Crisis, p. 3 (1st Ed. New Delhi, 1986).

⁴ V Constituent Assembly Debates, p. 213 (1947).

⁵ V Constituent Assembly Debates, p. 225 (1947).

⁶ D.K. Srivastava, *Religious Freedom in India*, p. 240 (New Delhi, 1982).

⁷ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 543, (1949).

While presenting the draft-Constitution to the Constituent Assembly for discussion in November, 1948, Dr. Ambedkar observed:

*“The Draft Constitution has sought to forge means and methods whereby India will have a Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country”*⁸

Further, he pointed that the means adopted by the draft Constitution was “uniformity in fundamental laws, civil and criminal”.⁹ Accordingly, article 35 of the draft Constitution provided that “The State shall endeavor to secure for citizens a uniform civil code throughout the territory of India.”

Article 35 of the draft Constitution generated heated discussion in the Constituent Assembly when it debated the provision with Vice – President H.C. Mookerjee in the chair. Among those who sought amendments to articles 35 so as to exclude personal laws from the purview of the civil code were Mohammad Ismail, Naziruddin Ahmed, Mahoob Ali Beg, Pocker Saheb and Hussian Imam. On the other hand S.C. Majumdar, K.M. Munshi, Alladi Krishnaswamy Ayyara and Dr. Ambedkar opposed the desired amendments and insisted on the adoption of article 35¹⁰ by the assembly without any exemption of personal laws from the purview of the further civil code.

Following points were emphasized by Mohammad Ismail in his speech-¹¹

(a) The right of every community to follow its personal law is ‘a part of the fundamental rights to religious freedom’;

(b) Retention of personal laws is guaranteed by treaties or statutes in many countries, e.g., Yugoslavia; and

(c) For securing ‘harmony through unity’, it is not necessary to regiment the civil law of the people.

Naziruddin Ahmed wanted a guarantee that the personal law of the community would not be changed without the “previous approval of the community”. He stressed the following points¹² —

(a) The provision of Article 35 clashed with the fundamental right to religious freedom, a provision regarding which had already been adopted by the Assembly; it would encourage the state to break that guarantee.

(b) While regulating secular activities associated with religious practices in exercise of the right given to it by the provision guaranteeing religious freedom, the state could enact laws like the Transfer of Property Act and the Shariat Act; it could make registration of all marriages compulsory; but it should not enact any law, say relating to the validity of marriages and divorces, since they were regulated by religion; and

(c) Time was not ‘ripe for effecting uniformity in civil laws; the powers given to the state to make the Civil Code uniform was in advance of time’. The goal should be towards a uniform civil code, but it should be gradual and with the consent of the people concerned.

He concluded his speech saying :

*“What the British in 175 years failed to do or were afraid to do; what the Muslim in the course of 500 years refrained from doing; we should not give power to the state to do all at once”*¹³

Mahoob Ali Beg emphasized that the civil code spoken of in article 35 did not include family law and inheritance but since some people had doubts about it, it should be made clear by a proviso to the effect that the civil code would cover transfer of property, contract, etc., but not matters regulated by personal laws. He also claimed the secularism did not negative diversity in personal laws.¹⁴

Pocker Saheb laid emphasis on the following points¹⁵:

(a) One of the ‘secrets of the success’ of the British rulers and the basis of their judicial administration was retention of personal laws;

⁸ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 111, (1949).

⁹ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 111, (1949).

¹⁰ The present article 44.

¹¹ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp. 540-41, (1949).

¹² M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 541-43, (1949).

¹³ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 543, (1949).

¹⁴ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 543, (1949).

¹⁵ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 544-46, (1949).

(b) If the civil code was intended to supersede the provisions of the various civil courts laws guaranteeing application of personal laws to cases of family law and inheritance etc., article 35 should be termed as a 'tyrannous provision'; and

(c) No community favoured uniformity of civil laws; organizations both Hindu and Muslim questioned the competence of the Constituent Assembly to interfere with religious laws. Article 35 was, thus, antagonistic to religious freedom.

Hussain Imam, too, expressed similar sentiments and added that India was a country full of bewildering diversities which could not be put an end to at that stage. For effecting uniformity in civil laws, he said, time should be awaited when people became advanced, their economic conditions improved and mass illiteracy was removed.¹⁶

The above account of the opinions expressed by Muslim members shows two materially different attitudes. While Naziruddin Ahmed and Hussain Imam envisaged the possibility of having uniform family laws in some distant future, the other three speakers ruled out that possibility for all time to come.

Many Hindu members of the Assembly expressed opinions contrary of the views of Muslim members. Opposing Mahbood Ali Beg, M. AnanthasayanamAyyangar said that marriage in Islam was a contract and could, therefore, be regulated by the State.¹⁷ K.M. Munshi expressed the following views.¹⁸

- i. Even in the absence of article 35 it would be lawful for Parliament to enact a uniform civil code, since the article guaranteeing religious freedom gave to the state power to regulate secular activities associated with religion;
- ii. In some Muslim countries, e.g., Turkey and Egypt, personal laws of religious minorities were not protected;
- iii. Certain communities amongst Muslims, e.g., Khojas and Memons, did not want to follow the Shariat, but they were made to do so under the Shariat Act, 1937;
- iv. European countries had uniform civil laws applied even to minorities;
- v. Religion should be divorced from personal law; the Hindu Code Bill did not conform in its provisions to the precepts of Manu and Yajnavalkya;
- vi. Personal laws discriminated between person and person on the basis of sex, which was not permitted by the constitution; and
- vii. People should outgrow the notion given by the British that personal law was part of religion.

Alladi Krishnaswamay Ayyar¹⁹ joined K. M. Munshi and restricted some of the points made by the latter.

Muslim members moved that the following proviso be added to draft article 35:

*"Provide that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a personal laws".*²⁰

One other proviso was also sought to be added to article 35. It reads as follows:

*"The personal laws of any community which has guaranteed by the statute shall not be changed except with the previous approval of the community ascertained in such manner as the Union legislature determine by law."*²¹

Rejecting these amendments Dr. Ambedkar pointed out that if India could have uniform laws of crimes, contract, property, trade and commerce, it could have uniform laws of marriage and succession as well. He concluded the debate by saying that the Muslim members had "read rather too much into article 35" and gave assurance that the further parliament might enact a uniform civil code but would apply it only to those who voluntarily submitted to its provisions.²² Eventually the Constituent Assembly rejected all the amendments²³ and adopted article 35 (now art. 44) directing the state to endeavor to secular" a uniform civil code.

¹⁶ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 546, (1949).

¹⁷ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 543, (1949). p. 543

¹⁸ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 543, 547-48, (1949).

¹⁹ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 549-550, (1949).

²⁰ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 540, (1949).

²¹ M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 541, (1949).

²² M.A. Baig Sahib Bahadur's Speech in the Constituent Assembly, VII Constituent Assembly Debates pp 550-52, (1949).

Another effort to get Muslim law constitutionally protected was made during the debate on the final draft. On 2 December 1948, while article 13 (relating to scope of fundamental rights) was being finalized, Mohammad Ismail sought to secure a statutory right in favor of every citizen to follow his or her personal law.²⁴ C. Subramaniam opposed him saying that his would amount to negating the provision directing the state to endeavor to secure a uniform civil code, which the assembly had already adopted.²⁵ Ismail Saheb said that on the question of cow slaughter the minority communities had agreed to respect the feelings of Muslims regarding their personal laws.²⁶ He was strongly supported by Syed Kamaluddin who emphasized the religious origin and character of Muslim personal law.²⁷ Maulana Harsat Mohani, too, lent his support to the amendment moved by Mohammad Ismail Saheb and chose to declare in the House that “Mussalmans will not submit to any interference in their personal law” and those who tried to interfere will have to face “an iron wall of determination by Muslims to oppose them in every way”.²⁸

Opposing the proposed amendment, Dr. Ambedkar said that such a clause saving personal laws would disable the legislatures from enacting “any social measures whatsoever”.²⁹ He maintained that the personal law should be brought out of the purview of religion, since if personal law was a religious matter, “every aspect of life from birth to death” would be covered by religious conceptions.³⁰ Dr. Ambedkar, however, pointed out that the state was only claiming the “power to legislate” and not an “obligation” to do away with the personal laws. He concluded by saying :

“...Sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of the power must reconcile itself to the sentiments of different communities. No government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad Government if it did so. But that is a matter which related to the exercise of the power and not to the power itself.”³¹

On 6 December 1948, during the debate on article 19 (concerning religious freedom) Ismail Saheb made his last effort to secure a constitutional right in favour of the citizens to follow their personal law. He moved an amendment to article 19, seeking to qualify the states powers to regulate by law activities associated with religion by a safeguard that this power should not be exercise so as to take away from a citizen his right to adhere to his personal law.³² This time the assembly did not oblige Ismail Saheb and rejected his amendment. On 26th January 1950 the Constitution was adopted, incorporating a directive to the state to “Secure for the citizen a uniform civil code throughout the territory of India” and specifying under one or the other Legislative Lists matters traditionally regulated by personal laws.

CONSTITUTIONALITY OF MARRIAGE UNDER MUSLIM PERSONAL LAW

In Muslim law marriage is a contract having as its object, the procreation and legislation of children. Marriage contracts are often reduced to writing in the form of a Nikhanama. But failure to prove the Nikhanama cannot possibly be held to disprove the marriage. In the case of the marriage under the Muslim law, it is to be noticed that neither writing nor any religious ceremony is essential. All that is necessary is that there should be a

²³ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 552, (1949).

²⁴ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 721, (1949).

²⁵ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 721, (1949).

²⁶ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 721, (1949).

²⁷ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 721, (1949).

²⁸ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp. 761-62, (1949).

²⁹ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 781, (1949).

³⁰ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 781, (1949).

³¹ M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates pp. 781-82, (1949).

³² M.A. Baig Sahib Bahadur’s Speech in the Constituent Assembly, VII Constituent Assembly Debates p. 830, (1949).

proposal and an acceptance in the presence of witness.³³ The word marriage which has been define in the Muslim law is purely a contractual marriage on free consent in the form of consideration of Meher menace acceptance of said Meher by one party as proposes by other party. Moreover, in Muslim law during the time of Nikhaha if the groom is unable to pay the Meher the decided Mehar can be payable by him in due course and this become debt of bride on the groom. However, the idea of marriage with has been define in holly Quran actually and in practice in a very minimum form that is applied. After going through the personal law particularly in context of marriage in Muslim community like Muta marriage under Shia law and marriage under Sunni Muslim are very different from each other. Now one thing is very clear that if we see all this provisions which has been incorporated in the Muslim personal law or Shariya law are totally against the main sprit of the Constitution of India because in context of marriage under the Muslim law there is diversity and in some Muslim denomination the status of Muslim women in context of marriage is very unequal and derogatory and which is totally against the main sprit of the constitution of India.

CONSTITUTIONALITY OF TALAQ AND POLYGAMY:

The word Talaq is define in chapter number twenty eight of holly Quran, further the word Talaq means punishment to the relationship. Triple divorce and unregulated polygamy has often been the cause of attacks on otherwise quite progressive Islamic personal law. The word Talaq and Polygamy is cited in holly Quran with some substantial reasons and there is big history behind it. Now a days it is very difficult for us to abolished polygamy completely but strictly regulated as directed by the Quran. In fact both the verses on polygamy i.e 4:3 and 4:129 should be read together to understand the real intent of Quran. Even the first verse, i.e, 4:3 requires rigorous justice to all wives by warning that “if you cannot do equal justice then marries only one. The second verse, i.e, 4:129 makes it clear that equal justice is humanly impossible. With such warning polygamy should not be practiced unregulated. Other Muslim countries except Saudi Arabia and Kuwait have introduced strict measures to regulate it. Thus a draft law should introduce such regulatory measures and specify circumstances in which one could take a second wife. Those circumstances could be when the first wife is terminally ill or medically proved to be infertile or barren and that too with the permission of the first wife and the court of law.³⁴ Further, Quran permits polygamy to help women in distress like widows and orphans, not to do injustice with them. Thus there is crying need for codified personal law under the shadow of the Constitution of India, will become a model law for other Muslim countries who follow the Islamic law. Therefore, women in Islam can enjoy all the rights related to Talaq, marriage, property etc. Therefore, it is fallacy on the part of those who understand that polygamy is a fundamental right of a Muslim male. Polygamy is exception, but not a rule. The relevant Quranic verse on polygamy institution itself considers monogamous marriage as an ideal one. No doubt that there is misuse of this provision; this can be checked by providing effective machinery through legislation. Under the provision of the dissolution of Muslim Marriage Act 1939.³⁵

The other major problem is that of triple divorce in one sitting and in this context recently the Apex Court has given new dimension and has abolished the system of triple talaq. This form of divorce has indeed caused a lot of misery to a large number of Muslim women in India. What is worse, it is still in practice although it was disapproved of by the prophet himself. The Quran does not mention it at all. The Quranic divorce not only requires two arbiters, one from the wife’s side and one from the husband’s side, but also two reliable witness for pronouncing divorce. Thus the Quran says, and if you fear a breach between the two, appoint an arbiter from among his people and an arbiter from among her people. If both desire agreement, Allah will affect harmony between them.³⁶ The other major problem is that of triple divorce in one sitting.³⁷ Therefore, from above discussion it is every much clear that, Quran itself has laid down the proper procedure for divorce but still people are following very informal way to pronounce Talaq and left the Muslim women helpless. Therefore, Islam does not allow the husband or wife to use divorce as mockery and takes extra precaution for the welfare of wives. A former Supreme Court Judge Justice Krishna Iyer remarked that “a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. Moreover, recently the Supreme Court laid down judgment on August 22, 2017 in 3:2 majorities holding the practice of Triple Talaq is unconstitutional.

³³ Dr. Nanda Chiranjeevi Rao, presumption of marriage under Muslim Law, Indian bar review, page 133, Vol. 39, issue 4, 2012.

³⁴ Asghar Ali Engineer, Abolishing Triple Talaq what next?, Economic and Political Weekly, Vol 39, no 28, July 2004 page 3094.

³⁵ Khan Noor Ephroz, Women & Law Muslim Personal Law perspective, page 367, Rawat Publication, New Delhi 2003

³⁶ Asghar Ali, The Right of women in Islam, 1996, New Delhi page 159.

³⁷ Asghar Ali Engineer, Abolishing Triple Talaq what next?, Economic and Political Weekly, Vol 39, no 28, July 2004 page 3094.

The majority judgment was written by Justice Nariman for himself and on the behalf of Justice Lalit, while Justice Joseph concurred by the majority opinion Chief Justice Kehar for himself and on behalf of Justice Nazeer wrote the minority opinion. While the majority upon lengthy discussion came to the conclusion that Triple Talaq is not an essential religious practice but minority bench found this practice to be an essential religious practice. Under Article 25 of the Constitution the state cannot take away the essential religious practice of a person³⁸. A few distortions seem to have crept in dispensing justice in British India and even in the decision of Privy Council, which decreed Muslim husband's right to the opinion of ill-educated moulvis who had already been serving their clientele with their faulty understanding of the Quranic law of divorce³⁹.

PROPERTY RIGHTS OF INDIAN MUSLIM WOMEN THROUGH CONSTITUTIONAL PERSPECTIVE

The Muslim law of inheritance has always been admitted for its competences as well as for the success with which it has achieved the ambitious aim of providing not merely or the selection of a single individual or homogeneous of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relatives. The fabric of this law consists of two elements: the custom of ancient Arabia and the rules laid down by the Quran and the founder of Islam. The Prophet reformed certain social and economic practice. At present the Mohammedan law of inheritances differs from sect to sect. The two principal sects in which the Muslims are divided into Sunnis and Shia. Sunnis are further subdivided into four sub sects namely the Hanafis the Malkikis the Shafies and Hanabali.⁴⁰

Particularly rights of Muslim women, in context of Maher are an important concept in Islamic law which is directly connected with the right to property of the Muslim women and empowerment of the women. Mehir is basically is called as a gift which becomes due from a Muslim husband to his wife on marriage as a token of respect symbolizing his sincerity and love for her. The subject matter of mehir can be money or any other thing having value, depending upon the acceptance of the wife. Upon the object or property given as a mehir, the ownership lies exclusively with the women comparison to male. As we know Muslims personal law has not been codified their property rights of Muslim women are totally silent in Shias as well as in Sunnis. However, mehir is an important concept in Islamic law which is directly connected with the right to property of the Muslim women and empowerment of the women. The subject matter of mehir can be money or any other thing having value, depending upon the acceptance of the wife. Upon the object or property given as a mehir, the ownership lies exclusively with the women comparison to male. As we know Muslims personal law have not codified their property rights of Muslim women neither the Shias nor the Sunnis. Though the holly Quran says that in the eye of God all men and women are equal however, as per Shariya law the daughters have only half share in the property of their father whereas the son have right to claim full share on the property of their father and this makes differences between two and from the above observation here one this is very clear that in context of rights of Muslim women in the property of their father or husband has not given equal status to Muslim women their status in context of inheritance rights are secondary in nature in the personal law which is emerge from the custom and tradition has given secondary status to Muslim women particularly in context of inheritance right and if we see through the constitutional perspectives this law of inheritance under the Muslim personal law is totally against the basic concept of equality which is embodied in the constitution of India. Now a day's right to property becomes the fundamental rights after the 46th amendments in the Constitution of India on the other hand the personal law gives only half share to Muslim women in the property of her father and at the same time it gives full share to son in the property of their father and here the personal law makes discrimination between them and this is actually against the Constitutional provisions which provides or conferred equal right to all persons whosoever may be irrespective of sex.

MUSLIM PERSONAL LAW: THE RESPONSE OF THE JUDICIARY:

At the earlier stage response of the judiciary on the status of Muslim women among the Muslim community under the Muslim personal law has been found totally neutral and many of the cases give the impression that the role of our judiciary was not so active. However, after Shaha Bano case and just recently in Shairya Bano case the judiciary has given a very dynamic dimension and has played a very healthy and satisfactory vital role particularly in context of rights of Muslim women among Muslim community. In many cases Supreme Court has tested personal laws on the touchstone of fundamental rights and to make them consistent with fundamental rights. Whereas in some of the case court held the validity of the personal laws

³⁸ Shayara-Bano vs Union of India S.C 2017:357

³⁹ Saleem Akhtar and MohsWasimali, Repudiation of marital Tie at the Instance of Muslim Wife: Misgiving and Clarification, Journal of the Indian Law institute, Page 506, Vol. 45, issue 3 & 4, 2003

⁴⁰ Property position of the females: A comparative study under Hindu succession Act, 1956 and Muslim law of Succession AIR 2014 26 jour.

cannot be challenged on the ground that they are in violation of fundamental rights because of the fact parties in personal law is not susceptible to fundamental rights.

It is interesting to note that, there have been important judgments beneficial to Muslim women even though not in landmark category, but very significant in this concern. The Judiciary has played a very vital role in order to reforms the Muslim personal laws further in order to safeguard the rights of Muslim and to bring them in the main stream of the society. It is the judiciary who has taken the position of chief exponent for interpretation of personal law accordance with their vales and customs.

In the late 1950's when the former Justice V. R Krishna Iyer was law minister in Kerala, he had introduced a Bill seeking to amend the inheritance laws which discriminate against the Christian women in that State. He failed in his effort because he was opposed not only by the Christian establishment but also by Muslim leaders and other member of opposition. The reason is obvious. Any success in reforming the laws governing one religious community is bound to cover the way for similar reform in the laws applicable toother religion⁴¹. There is crying need for a comprehensive legislation to be drafted for the protection of women against the disparities of personal laws. Islamic law is so progressive that it can become basis for a Uniform Civil Code. However, conservative Muslim society dragged the Quran pronouncement to its own level and introduced, through human reasoning many measure, which curbed women's rights. Despite reforms in other countries women have not got full measure of equality, which the ulma theoretically concede.⁴²

Quran is the only unanimous divine source for Muslims and it remains most progressive in respect of women's rights. Ideally it grants equality between man and woman and should be the main source of legislation about women's right. The past interpretation of the Quran was constrained by socio economic condition and should not be binding on the present and the future generation of Muslims. All great Islamic thinkers have reputedly made this point and have accepted the central role of 'ijtihad (creative interpretation). It is the only our social conservatism, not lack of theological sanction, which prevents our ulama from exercising it.⁴³ Further, the issue of compulsory marriage registration is a one of the other step toward reformation in Muslim personal law.

In the year of 2006, the Supreme Court directed all States and Union Territories to notify rules for compulsory marriage registration. In July of the following year, the court was informed that some states had framed rules only for Hindu marriages. Therefore, in October 2007, the court ordered compulsory registration of marriages of couples of all religions and rules to be enacted to that effect within three months. While this was seen by the conservative sections in the Muslim community as interference in their personal laws, the liberal voices pointed to a very significant aspect: a marriage is a contract in Islam.

In fact, a member of the Law Commission of India and an expert on Islamic law, Tahir Mahmood, observed that, "*since parties to a Muslim marriage have full contractual freedom under Islamic law and can stipulate conditions of their choices that do not violate mandatory provisions of the shariat, the new Nikahnama is valid*". Critics also point out that the more liberal Islamic schools of shariat like the Shafi, Malik and Hanafi are ignored by the board.⁴⁴Therefore, it is clearly documented here that, there arevarious step has been taken for reformation of the personal law.

Judicial reforms towards protection of rights of Muslim women related to marriage, Maintance and divorce in India:

In **Mohd. Ahmad Khan v. Shah Bano**⁴⁵ the issue discussed was, up to what extent of Muslim husband's liability to maintain his divorced wife under Section 125 of the Cr.P.C 1973? In instant case court went into the details of various authorities and translation of the verses of the holy Quran in support of the view that a Muslim Woman who has been divorced by her husband has all right to be maintained even after the period of Iddat. Further court upheld that provision of the maintenance under section 125 of the Cr.P.C is not dependent on the religion of the spouses. It is a secular law applicable to all irrespective of the religion. Therefore, the judgment evoked unprecedented debate and controversy on the Muslim woman's rights to claim maintenance from the husband after divorce. It ultimately led to the enactment of the Muslim women (Protection of rights on Divorce) Act 1986.⁴⁶ Further in **DanialLatif V. Union of India**⁴⁷ case the constitutional

⁴¹ VimalBalasubrahmanyam, Women, Personal Laws and the struggle for secularism, Economic and Political Weekly, Page 1216, Vol. 20 no 30 (July 27, 1985).

⁴² Asghar Ali Engineer, Abolosing Triple Talaq what next? Economic and Political Weekly, page 3093 Vol. 39, no (28, July 2004).

⁴³ ibid

⁴⁴ Nikahnama for Muslim Women, Economic and Political Weekly, Vol. 43, No. 12/13 (Mar. 22 - Apr. 4, 2008).

⁴⁵ AIR 1985 SC 945

⁴⁶ Kusum, Cases and Material on Family law, page 413 & 414. Universal Law publishing co. 3rded. 2013.

⁴⁷ (2001) 6 SCALE 537.

validity of the Muslim Women (protection of rights on Divorced) Act 1986 was challenged on the ground that it infringed article 14, 15 and 21 of the Indian constitution. The court remarked that the “legislature does not intend to enact unconstitutional laws” but that per se is no ground for upholding an Act as Constitutional, through its unconvincing interpretation, Court imposed a seal of the constitutional validity of the statute. The hon’ble Supreme Court in **Bai Tahira v. Ali Hussein**⁴⁸ case held that, the payment of trifling amounts of mehr to divorced Muslim woman is no substitute for the maintenance.

In **Rashida Khatun V. SK Islam**⁴⁹, the Supreme Court provided clarity on the issue whether an assurance to marry be equated to an acceptance to marry so as to confer status of legal marriage? The parties to the proceeding are Mohammedans belonging to the Islamic faith and are governed by their personal law. In instant case as to the validity of the marriage, it was argued that in a Muslim marriage no rituals and functions are necessary and the Muslim marriage being a civil contract, consent of respondent to marry the petitioner and thereafter cohabitation with her was sufficient to prove her status as his wife. Therefore, court upheld that there was no acceptance of the offer to marry, but there was only an assurance to marry in the future and therefore mere cohabitation with such of assurance does not constitute the factum of marriage.⁵⁰

The issue of effectivity of instant talaq was addressed in the case of **Shamim Ara v. State of Uttar Pradesh**⁵¹. In instant case Court held that, Talaq to be effective, has to be explicitly pronounced. Further court held that, a mere plea taken in the written statement of a divorce having been pronounced sometimes in the past cannot by itself be treated as effectuating Talaq date of the delivery. Hence, judgment seeks to provide some norms and parameters within which the husband can pronounce a talaq. The very concept and right of unilateral triple talaq has being assailed. Recently in **Shayara-Bano vs Union of India**⁵² the Supreme Court laid down in 3:2 majorities that the practice of Triple Talaq is unconstitutional. The majority judgment was written by Justice Nariman for himself and on the behalf of Justice Lalit, while Justice Joseph concurred by the majority opinion Chief Justice Kehar for himself and on behalf of Justice Nazeer wrote the minority opinion. While the majority upon lengthy discussion came to the conclusion that Triple Talaq is not an essential religious practice but minority bench found this practice to be an essential religious practice. Under Article 25 of the Constitution the state cannot take away the essential religious practice of a person. Therefore, if a practice which is arbitrary and not an essential religious practice it will be hit by the exception laid down u/a 25. Therefore, the whole issue was whether or not the practice is an essential religious practice of Islam. Therefore, as per majority it was held that the Triple Talaq or Talaq-e-biddatis not protected by the exception laid down in Article 25 i.e. the court found the said practice not an essential element of Islamic religion. The court justified its point of view in the sense that although it is practiced by the Hanafi School but it is considered sinful in it. Triple Talaq is against the basic tenets of Quoran and whatever is against Quoran is contrary to Shariat therefore, what is bad in theology cannot be good in law.

Apart from this, recently the Kerala High Court held that the Muslim women have right to get Khulanama from her husband and for it assent of her husband is not the necessary factor for getting Khulanama from her husband further it is also not necessary for them to file the petition before the court under the Protection of Muslim women Right under divorce Act 1986.⁵³ Hence, from the above cases it becomes abundantly clear that court had played a very prominent role for the protection of the women’s rights under Muslim personal law.

II. CONCLUSION AND SUGGESTIONS

Now time has been change presently all we are leaving in a civilize society further in order to upgrade the status of Muslim women among the Muslim community here is need to change the existing Muslim personal law further here is also of exigencies of uniform civil code so that Muslim women may come in the main stream of the society. Further, the present excising personal law is suffering from various infirmities and is totally insufficient and most of the customs and tradition which are the base of the personal law are not in a codified form this entire make a great obstruction for the development of the right of Muslim women. Moreover, as key factor points in the 20th century, moreover, religious and political leaders as Zoya Hasan has argued, initiated state codification of Muslim personal law in the interest of the community unity and identity the landmark acts are the Muslim Personal Law (Shariat) Application act of 1937, the Muslim Dissolution of marriage Act of 1939 and most recently, the Muslim women’s (Protection of rights on Divorce) Act of 1986. This last, despite its name, prevented Muslim woman (who had been married under Muslim personal law and subsequently divorced)

⁴⁸ AIR 1979 SC 362

⁴⁹ AIR 2005 Ori 56

⁵⁰ Kusum, cases and Material on Family law, page 413 & 414. Universal Law publishing co. 3rd ed. 2013

⁵¹ (2002) 7 SCALE 183

⁵² S.C 2017:357

⁵³ Dainik Bhaskar daily news paper April 2021

from resorting to the criminal procedure code as women of other religions can do to secure minimal maintenance from their former husband.⁵⁴Hence, after the discussion of all above aspects we can say that, as per public views and demand here is need to take some coercive step and it is the judiciary who can play a very prominent role by favoring such liberal judgments and certain uniform codified laws in order to nullify to some extent the inequities in the existing personal Muslim laws like polygamy.

Moreover, time has been come and it is the demand of the time that an awareness campaign against the misuse of a various Muslim women rights relating to marriage, divorce, property rights etc. polygamy etc should be conducted. Further, after Nikhanama some protection should be given to Muslim wives if her husband going to marry with someone during the life time of his first wife should be penalize and section 494 of the Criminal Procedure Code should be categorized in to cognizable an offence by declaring non impoundable further making compulsion on Muslim women by maulives or mufti for Halala should be categorized in to criminal offence. Moreover, the standard of quantity of Mehir should be decided so that it may provide some economical security to the Muslim women at the time of her marriage.

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⁵⁴ Barbard D. Metcalf, Imrana Rape, Islamabad Law in India, Islamic studies, Vol. 45 No 3, 2006 available at www.jstor.org(last visited on April 11, 2013).