Gender Justice in Muslim Personal Law With Special Reference to Divorce

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THIS THESIS IS DEDICATED

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DECLARATION

I, **Vibha Tripathi**, hereby declare that this research work embodied in this Ph.D. thesis titled **"Gender Justice in Muslim Personal Law with Special Reference to Divorce"** has been carried out by me under the supervision of **Prof. Sudarshan Verma**, Former Dean, School of Legal Studies & Head, Department of Law, and co-supervision of **Dr. Sangeeta Krishna,** (Assistant Professor), Centre for the Study of Social Exclusion and Inclusive Policy (CSSEIP), Babasaheb Bhimrao Ambedkar University, Lucknow, 226025.

This Research work is an original work and it has not been previously submitted in part or full for any other degree or diploma in this or any other University. This is also to declared that the thesis is essentially free from all kinds of plagiarism.

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CERTIFICATE

This is to certify that the thesis titled **"Gender Justice in Muslim Personal Law With Special Reference To Divorce"** submitted by **Ms. Vibha Tripathi** is an original research work and has not been previously submitted in part or full for the award of any other degree or diploma to this or any other university.

This thesis submitted to Babasaheb Bhimrao Ambedkar University, Lucknow satisfies all the requirements as stipulated in the *Doctor of Philosophy (Ph.D.) regulations, 1999 as amended in 2013* and it is fit for submission and evaluation for the award of the degree of Doctor of Philosophy of the University.

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Vibha Tripathi

(Vibha Tripathi)

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ABBREVIATIONS

A.C	:	Appeal Cases
AIR	:	All India Reporter
AIR(SC)	:	All India Reporter (Supreme Court)
AIR (J)	:	All India Reporter Journals
AIMPLB	:	All India Muslim Personal Law
ALT	:	Allahabad Law Times
Alld.	:	Allahabad
A.L. J	:	Australian Law Journal
ALR	:	American Law Reports
AAL R	:	Anglo-American Law Review
All. E. R	:	All England Law Reports
All ER Rev	:	All England Law Reports Annual Review
All L J	:	Allahabad Law Journal
All L R	:	Allahabad Law Reports
All L T	:	Allahabad Law Times
Ala L Rev	:	Alabama Law Review
ALT	:	Andhra Law Times
A.L.J. R	:	Australian Law Journal Reports
Am U L Rev	:	American University Law Review
APEC	:	Asia Pacific Economic Corporation
APQ	:	American Philosophical Quarterly
Art.	:	Article.
ASIL	:	American Society of International Law
BLJ	:	Banaras Law Journal
BLR	:	Bombay Law Review
BJLS	:	British Journal of Law and Society
BMMA	:	Bhartiya Muslim Mahila Andolan

Bom.	:	Bombay
B.Y.I. L	:	British Yearbook of International Law
C.A	:	Court of Appeal
CEDAW	:	Convention the elimination of all forms of Discriminations against women
CESCR	:	Committee of Economic, Social and Cultural Rights
C.A. D	:	Constituent Assembly Debates
C.J. I	:	Chief Justice of India
CLT	:	Cuttack Law Times
Cal.	:	Calcutta
Cr. L. J	:	Criminal Law Journal
Cr. P. C.	:	Code of Criminal Procedure
Com	:	Committee
Del.	:	Delhi
Doc.	:	Document
e. g.	:	Example gratia (for Example)
Ed.	:	Edition
EPW	:	Economic and Political Weekly
E. R	:	English Reports
EWHC	:	High Court of England and Wales
FB	:	Full Bench
GA	:	General Assembly of the United Nations
H.C	:	High Court
HMA	:	Hindu Marriage ACT
HMGA	:	Hindu Marriage and Guardianship Act
HR	:	Human Rights
HRC	:	Human Rights Committee
HRQ	:	Human Right Quarterly
H.R.L. J	:	Human Rights Law Journal
Harv. L. R	:	Harvard Law Review
I.A.	:	Indian Appeals

Ibid	:	In the same place (Ibidem)
IBA	:	International Bar Association
IBR	:	Indian Bar Review
IC	:	Indian Cases
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural
ICJ	:	International court of Justice
I.E	:	Indian Express
i.e.	:	id est (that is)
IJIL	:	Indian Journal of International Law
IJPA	:	Indian Journal of Parliamentary Affair
IJPA	:	Indian Journal of Public Administration
ILI	:	Indian Law Institute
ILO	:	International Labour Organizations
ILR	:	Indian Law Reports
Infra	:	Below
IPPs	:	Information Privacy Principles
IPC	:	Indian Penal Code
JBCI	:	Journal of Bar Council of India
JCPS	:	Journal of Constitutional and Parliamentary Studies
J. C. L& Crim.	:	Journal of Criminal Law and Criminology
JILI	:	Journal of Indian Law Institute
JT	:	Judgement Today (SC)
j.	:	Journal
KLT	:	Kerala Law Times
Lit.	:	Litigation
LQR	:	Law Quarterly Review
LT	:	Law Times
MP	:	Madhya Pradesh
MPL	:	Muslim Personal Law

MLJ	:	Madras Law Journal
MLR	:	Modern Law Review
NGO	:	Non-Governmental Organization
NHRC	:	National Human Rights Commission
N. Y	:	New York
OIC	:	Organisation of Islamic Countries
P.C	:	Privy Council
Para	:	Paragraph
PIL	:	Public Interest Litigation
PLT	:	Political and Law Times
QB	:	Queen Bench
QBD	:	Queens Bench Division
R/W	:	Read with
Sec	:	Section
SC	:	Supreme Court
SCC	:	Supreme Court Cases
SCJ	:	Supreme Court Journal
SCR	:	Supreme Court Reports
SRS	:	Sex Assignment Resugery
Supp	:	Supplementary
Supra	:	Above
UCC	:	Uniform Civil Code
UDHR	:	Universal Declaration of Human Rights
UK	:	United Kingdom
UN	:	United Nations
UNC	:	United Nations Charter
UNGA	:	United Nations General Assembly
UOI	:	Union of India
UP	:	Uttar Pradesh
u/s	:	Under Section

USA	:	United States of America
Vs.	:	versus
viz.	:	namely
Vol.	:	Volume
w.e.f.	:	With effect from
WHO	:	World Health Organization
WLR	:	Weekly Law Reports
WTO	:	World Trade Organization
WLUML	:	Women Living under Muslim Law

CHAPTER-I

INTRODUCTION

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INTRODUCTION

1.1 Introduction

India is a land of diversity in religions. Hindu, Buddhists, Jains, Christians and Muslims all lives together in Indian society. Each community and religion has its own personal laws. All the individuals are free to be governed by their own personal laws in the matters of marriage, divorce, property, succession and other family matters and not the law which would be applied in the local territory. Under the Indian Constitution the state has distanced itself from the religion, but the Constitution has given protection to the different religions by including religious rights as fundamental rights. Under Article 25 of the Constitution all persons are declared equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Under Article 29 minorities have right to protect their language script and culture. At the same time Article 14 gives right to equality and Article 15 give protection from all kind of discriminations and these rights are available to all the persons irrespective of their religion. But it's a great challenge to Indian legal system to treat all the citizens fairly and equally. Major problem is due to various personal laws.

Nothing is static expect that which is dead and lifeless. Laws can never be static. Changing society needs changing laws. It is very unsafe for a country if law does not change as per the need and requirements of the society. This change comes either through peaceful process of legislation or by revolution. Society has seen various changes from time to time in Hindu law. Abolition of Sati (Prevention) Act 1987, Prohibition of Dowry Act 1961, Hindu Marriage Act 1955, Adoption and Maintenance Act 1956, Indian Succession Act 1956 and Domestic Violence Act 2005 are the examples of changes in Hindu Personal Laws. But the Muslim society has not brought changes as per the needs of the time and the society. As a result, we have seen discontent and unrest in Muslim society in case of female rights. From last two years there is a constant debate going on the issue of gender justice in Muslim Personal Law. For example, the case of triple talaq and the rights of Muslim women in case of unilateral triple talaq are the creating historical unrest among Muslim women.

Keeping in the mind the secondary treatment of women in Muslim society researcher decided to work on Gender Justice in Muslim Personal Law. And here comes the need of research and analysis of Gender Justice in Muslim Personal law with special reference to divorce.

The importance of study of Muslim Personal Law can be estimated from the fact that almost one sixth of total world population is following Islam. It is applicable to some15 crore Muslims in India, 12 crore in Pakistan and 13 crore in Bangladesh. There are various Muslim countries in the world. The development and transformation of Muslim Personal law has varied from country to country. The various stages of development reached in different countries of the world may be better understood by classifying these countries into three different groups: -

1. Countries where classical Muslim family law **remain unchanged** like; Saudi Arabia, Yemen, Bahrain, Kuwati, Somalia etc.

2. Countries where Muslim family law has been **completely abandoned** by modern law like, Turkey, Soviet Union, Tanzania, Kenya etc.

3. Where law is **reformed through legislative process** like-India, Pakistan, Malaysia, Indonesia, Iran, Iraq etc.

Law is practical orientation and Indian society is changing rapidly and there is need to do social engineering by balancing interest of individual and society and society need to do it in keeping pace with our Constitutional Law, Personal Laws and societal developments. So, what should be our personal laws, to what extent they need to codify and the extent to which society needs to change it? This is the high time to do research and analysis of our social fabric of laws, so that they can be made most useful for the society. Society needs proper and balanced law so there is need to work on Muslim Personal Law and gender justice.

Through the news gathered from different sources of print and electronic media, society has formed a general notion that Muslim Law treats women unequally and unfairly. To out rightly hold the view that Islam treats women unequally or unfairly and gender justice is not possible within Islamic law known as Shariah law would not be correct. This assertion is partly true and partly false. True as far as

Shariah Law is concerned, untrue as existing laws are written during 2nd and 3rd centuries of Islam when general perspective of women's rights was very different from today's perspective. The Quaranic verses which are quite fundamental to Islamic law were interpreted so as to be in conformity with the views about gender rights prevailing then. Islam speaks in terms of gender equality in the Holy Quran. In the Quran there are several verses to indicate that women are not inferior than men from socio-religious or economic point of view.

Those, who oppose any change in theological formulations and Shariah Laws are people, who are afraid of losing their dominant position and priesthood, who are interested in promoting their interest rather than spiritual source of inner enrichment. In Islam it is common belief that the Shariat Law is divine Law and hence not subject to any change. Whenever any measure for gender justice is proposed, one meets with the strong arguments**. It is important to note that Shariah though undoubtedly based on Holy Quran is the human endeavor to understand the divine will. It is an approach to, rather than divine will itself.**

The priesthood i.e. community of ulama projects it as divine end itself and hence refuse to admit any change. The Shariah is divine has become commonly accepted notion, thus, what was thought of women's rights during the early period of Islamic history has come to be final and unchangeable. Even to thinking of changing it is interfering with the divine and hence unpardonable sin. It is causing great deal of hardship to Muslim women everywhere. Even Muslim women are speaking out about several discriminations and are fighting for refraining from personal laws to promote justice and equality in the family.

So after analyzing the several facts it becomes imperative for the researcher to do research on such an emerging issue of rights of women in Muslim Personal Law. So, the researcher started the analysis of law **from Shah Bano 1985 to Shayrabano 2017.**

1.2 Statement of Problem

There is a big gap between Quranic pronouncements and Shariah laws. While Quranic pronouncements are purely transcendental in spirit the Shariah law has been influenced by human situation as well as human thinking on all related issues. Women

are in subordinate position in all the patriarchal society and this subordination came to be reflected in Shariat laws relating to their rights. The divine spirit was conveniently ignored and prevailing situation was rationalized, through contextual Quranic pronouncement. As pointed out above there is always a creative tension between what is and what ought to be. However, this is often resolved in favor of prevalent rather than emergent situation.

Combination of male dominated society, vote bank politics and economic realities has led to a refusal, to question the clerics on their interpretation of the Shariah. But society is changing with more education and exposure. More and more Muslim women are talking about these things and people have started saying that there is a need to change in Muslim Persona Laws. Women are not ready to accept old practice like triple talaq, polygamy, ban on entry in religious places etc. The most fundamental values reflected in Quaran are justice, benevolence and compassion. In Quranic terms these are called "adl', "Insan" & "Rahman". It is thus, the concern for justice which makes Quran show deep concern for weaker sections of society and women certainly belong to this weak category as for as the patriarchal society is concerned.

It is important to note that values like justice & compassion cannot be applied independent of age and time. It is different from what was in medieval period and what it is today. Quran supports gender equality in its various verses.

Rising literacy has impacted all sections of society. Huge changes in communication technology have allowed the Quran to be read on mobile phones, Muslim women have sought to reconcile feminism with Islam, progressive legislation such as the Protection of Women from Domestic Violence Act 2005 have left deep mark on Muslim community. As dissatisfaction with Family Courts (Dar-ul-Qaza) grew, A Muslim women's Personal Law Board came in to existence in 2005 and the number of women in the all India Muslim Personal Law Board became increasingly visible.

1.3 Review of Literature

In order to better understanding of topic and to find out the research gap researcher has gone through various books, articles and judicial decisions which were

related to the topic "Gender Justice in Muslim Personal Law with Special Reference to Divorce. Some of them are being mentioned here.

1.3.1 Books

Reform of Muslim Personal Law by H.A.Gani published by Deep and Deep publication Rajouri garden New Delhi 1989. This book tells all about Shah Bano controversy and the Muslim women (protection of rights on divorce) Act 1986.In this book the author elaborated in detail that how this controversy arose and how the Act of 1986 was enacted to pacify Muslim priestly class. The author is clear that all the noise and fuss that has been raised on Muslim Personal Law front from the day the Shah Bano case was decided until now is the work of few vested interests . **Women in Muslim Personal Law written** by Alka Singh and published by Rawat publication Jaipur /Delhi 1992. In this book the author has focused upon historical background of Islamic Law and culture, marriage, divorce, maintenance, inheritance and property rights of Muslim women. This book also presents the in-depth study about the status of Muslim Women in Muslim Personal Law. **The World of Gender Justice** is a book edited by Murlidhar C. Bhandare, published by Ashok Gosain and Ashish Gosain for Hard Anand publication Pvt Ltd. This book tells about the reality of gender justice in many parts of the world. It deals with Universal awareness of the equality of sexes and gender justice. The book **Religion and Personal Law in Secular India** is edited by Gerald James Larson and published by Social Science Press Delhi in 2001. This book throws light upon challenges to the Indian legal system to treat all the citizens fairly. This book is a collection of essays. It throws light on the subject that how it is a challenge to treat all the citizen fairly in Indian legal system. Book written by J.P. Bhatnagar, named as **The Muslim women and their rights**, which is published by Ashok Law House New Delhi, tells about the conflicts of General laws and Special laws. **Gender and Equality in Muslim Family Law**, edited by Ziba Mir –Hosseini, Kari Vogt Lena Larsen and Christian Moe, throughs light on Quran, Hadith, fatwa, mufti jihad and hujj**. Islamic Law and the Muslim world theories and practices,** by Zishan Misbahi is the book devoted to a discussion of Islamic law in its pre-modern natural habitat explains how the law was transformed and ultimately dismantled during the colonial period**.** It elaborately deals with the development of Islamic law in diffent phases of development of society**. Women and Law Muslim Personal Law**

perspective is the book written by Khan Noor Ephroz **,**Rawat Publications **,** Jaipur and New Delhi,2003 ,is wide in scope as it covers almost all the matrimonial areas relating to women and the reforms brought about by the Islam for improving their status. This book is an attempt to analyze the position of women in pre –Islamic Arabia along with the impact of Islamic Law in the area of marriage ,dower, divorce and maintenance. Book, **Family Law and Social Change** is a festschrift for Asaf A.A.Fyzee. This book is edited by Thir Mahmood and forwarded by N.A.Pakhivala and published in 1975 by N.M.Tripathi pvt. Ltd Bombay. This book consist of various articles and essays written by various eminent scholars of Muslim Personal Law.

1.4 Aim and Objective

The researcher, during her research work, through the extensive study, desired to achieve the following objectives**.**

1. To study and examine national and International Muslim Personal Laws in reference to gender justice particularly in matter of divorce and.
2. To understand the real social status of Muslim women in Indian society.
3. To find out changes brought in lives of Muslim women through legislation and judicial pronouncements in matters of divorce.
4. To analyse the historical and present position of divorce laws in context of Muslim Personal Laws in India.
5. To find out the ways to provide gender justice to Muslim women particularly in the matter of divorce.

1.5 Hypothesis of Research

Taking in to account the research problem and the objectives of the study, as stated above, the fallowing hypothesis have been formulated for this research study.

1. Constitution of India guarantees Gender Equality however, gender equality is not ensured to Muslim women in India.

2. There is rigidness in Muslim Personal Law in unilateral gender equality, divorce, polygamy, halala etc.

3. Slow and steady reforms in Muslim Persona Law in India.

1.6 Result of Hypothesis

1. The first hypothesis is that, the Constitution of India guarantees gender equality however, gender equality is not insured to Muslim women in India is the gist of the conclusion of the third chapter. Therefore the researcher reached the conclusion that the hypothesis of research is proved and it proves that irrespective of the constitutional guarantee of the equality, the Muslim women do not enjoy equal rights, equality of status and equal opportunity in India. They face so many biases and discriminations in every walk of their lives.

2. The second hypothesis is that there is Rigidness in Muslim Personal Law in unilateral gender equality, divorce, polygamy, halala etc is found proved as combined study of chapter 5, which is based on judicial pronouncements of Honorable Supreme Court and various High Courts and chapter 7 which is based on analysis of data collected from 300 respondents who belonged to Muslim community. Combined effect of chapter 5 read with chapter 7 a show that in Muslim Society right to give divorce is heavily tilted in favor of male. A woman faces discrimination due to acceptance of practice of polygamy. There are so many rules, restrictions, and procedures are provided by the Holy Quran for conducting second third or fourth marriage, and there is a proper procedure for giving divorce but these precious rules are not followed by the male members of the society. Therefore, the researcher reached on the conclusion that second hypothesis is proved that there is rigidness in Muslim Personal Law in unilateral gender equality, divorce, polygamy, halala etc.

3. The third hypothesis is that there are slow and steady reforms in Muslim Persona Law in India. It had been so long since when, women are fighting against this sinful but valid form of divorce i.e instant triple talaq. There are various pronouncements of Honourable Supreme Court and various High Courts from 1932 to 2018, which brought significant changes in law of instant triple talaq,

maintenance and right to mehar etc. in the case of ***Mohd. Ahmed Khan v.Shah Bano Begum AIR 1985 Hon'ble*** Justice Krishna Iyer pronounced that Muslim women are entitled to apply for maintenance under section 125 of the Code of Criminal Procedure. This right was earlier not available to Muslim women. Court also declared that this maintenance amount should be such, which should be sufficient for whole of the life of the respondent i.e. Muslim woman. Now in 2017 instant triple talaq was declared void and unconstitutional by the Court in case of ***In Re-Muslim Women's Quest for Equality v. Jamiat Ulma-i-Hind*.** After this, in 2019, The Muslim Women (Protection of Rights on Marriage) Act 2019 has enacted by the Indian Parliament, which, makes provision for protection of rights of women in case of instant triple talaq. This Act not only declares triple talaq void but also criminalizes it and provides punishment for it. Therefore this hypothesis is also proved.

1.7 Research Methodology

The topic of research that is "Gender Justice in Muslim Personal Law with Special Reference to Divorce" is a **socio-legal study**. Human society has an eternally dynamic structure. So to understand society, study of society is important and relevant. Without sociological enquiry or knowledge understanding of any problem is difficult therefore, researcher has adopted **doctrinal as well as non-doctrinal** method of research.

In Doctrinal Method **Primary and Secondary data s**ources like various Acts and statutes, Law Commission and various Committee reports , judgments of the Supreme Court and different High Courts, Lok Sabha and Rajya Sabha debates, books written by various authors and articles found in various journals, Legal Periodicals, Magazines have been collected and used. In empirical study **Questionnaires** and **Interview Method** have been adopted for collection of Data from male and female Muslims of different age groups in district Lucknow of Uttar Pradesh and district Chhatarpur of Madhya Pradesh .

For the purpose of elaborate analysis of data throw empirical study researcher has divided Muslims male and female in different age groups-

1) From 0 to 25 years.

2) From 26 to 45years.

3) From 46 to 60 years.

4) Above 60 years.

So that various aspects of Muslim law like literacy of parties, consent in marriage, their knowledge of option of puberty , their right to get Mehar etc can be studied properly.

1.8 Limitations of Research

1. There was limitation of research, as researcher belonged to a particular group and religion so respondents were hesitant and not willing to share information with the researcher. This impaled to take help of a girl of their community with whom they were comfortable.

2. Non willingness of sharing information despite being aware of the facts was another limitation.

3. Respondents don't want to give opinion against their religious belief.

1.9 Chapter Plan

The whole thesis **"Gender Justice in Muslim Personal Law with Special Reference to Divorce"** is divided into eight chapters.

Chapter I - Introduction

This chapter comprises introduction of the topic of research, importance of research topic, aim and objective of research, outlined research problem, hypothesis, research methodology and result of hypothesis testing. Brief of all the chapters is also included in this chapter.

Chapter II - History and Concept of Gender Justice and Divorce in Muslim Personal Law in India

This chapter dealt with the meaning of word gender and sex and in which reference these words are being used in our day to day life. What is the difference between word gender and sex? After dealing with it elaborately, the researcher has

given the history of gender justice in USA, UK and India. While giving the account of history of gender justice and how the progress is made in these regions the researcher has also elaborated the developments which took place in United Nations in the field of gender justice.

Chapter III- Gender Justice in Muslim Personal Law in International Perspective

The third chapter of the thesis deals with the condition and position of gender justice in Muslim Personal Law particularly in International legal system. Here the word "Personal law[1]" means legal principles applied on the basis of religious adherence. These are the matters which, believe to have a religious aspect of life like personal status, marriage, divorce, family relations, inheritance, gift, will, domestic obligations and endowments etc.

Dealing these matters in International perspective the researcher means "Islamic countries" or "Muslim states."Here Islamic countries mean those sovereign nations of the modern world which are ruled or otherwise dominated by the followers of Islam.

In third chapter while dealing and discussing the Muslim Personal Law in International perspective the researcher elaborated the developments and gradual reforms which took place in various Islamic countries and how these countries came in to present form of law. This chapter looks in to development and reform in Muslim Personal Law in International Perspective and discussed its development in three stages[2].

1. The first phase of personal law reform from 1911-1950
2. Second phase of reform 1951-1970
3. Third phase of reform 1971-1986

This chapter also elaborates that how the Universal Declaration of Human Rights played a very important role in protection and preservation of rights of

[1]In Islamic countries the term Muslim Personal Law is applicable to the laws of marriage, divorce, family relations, succession, will, gift, pre-emption and waqfs. Interchangeably this law is also described as "Islamic law", "Muslim law", "Sharia law" "Shari'at". All these expressions are in use also in the Muslim countries of SouthAsia and South East Asia.

[2]TahirMahmood , Personal Law in Islamic Countries{ History ,Text and Comparative Analysis} First edition 1987 , pub Academy of law and Religion,pg 4,5

individual male and female in various societies of the world. Various conventions have also been formed due to effect of Universal Declaration of Human Rights. In 1981 the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was adopted and this came into existence in 1985.

This chapter also dealt with the various laws of different Muslim countries which deal with the protection of rights Muslim women.

1. Pakistan
2. Bangladesh
3. Afganistan
4. Iran
5. Malaysia
6. Brunei
7. Indonasia
8. Somalia
9. Turkey
10. Algeria
11. Iraq
12. UAE

Chapter IV - Gender Justice under Indian Constitution with Reference to Rights of Muslim Women

The basic content of this chapter is based on various provisions of the Constitution of India which are provided in Preamble, Fundamental Rights, Directive Principles of State Policies, various reservations provided to women by Constitution of India and 73rd and 74th amendment of the Constitution of India. Besides these provisions this chapter also provides various legislations enacted by the Parliament of India for the welfare and protection of the women.

1. The Plantation Labour Act, 1951
2. The Family Courts Act, 1954
3. The Special Marriage Act, 1954
4. The Hindu Marriage Act, 1955
5. The Hindu Succession Act, 1956 with amendment in 2005

6. Immoral Traffic (Prevention) Act, 1956
7. The Maternity Benefit Act, 1961 (Amended in 1995)
8. Dowry Prohibition Act, 1961
9. The Medical Termination of Pregnancy Act, 1971
10. The Contract Labour (Regulation and Abolition) Act, 1976
11. The Equal Remuneration Act, 1976
12. The Prohibition of Child Marriage Act, 2006
13. The Criminal Law (Amendment) Act, 1983. 2005, 2013and 2019
14. The Factories (Amendment) Act, 1986
15. Indecent Representation of Women (Prohibition) Act, 1986
16. Commission of Sati (Prevention) Act, 1987

Here in this chapter an effort has been made to incorporate various judgments of different Courts in chronological order. These Judgments includes landmark as well as leading casses related to gender justice. This chapter also deals with the Constitution of India and right of Muslim women in detail.

Chapter V - Judicial Response towards Gender Justice in Muslim Personal Law

Here in this chapter researcher tried to incorporate various judgments of different Courts in chronological order. In tracing this chronology number of leading as well as important cases has been elaborated with their facts and judgments. This incorporates analysis of cases from 1932 to 2018 which brought significant changes in rules of instant triple talaq and issues of maintenance. Debate which took place while passing Triple Talaq Act 2019 in Parliament has also been incorporated. This chapter aims to trace the concept, origin & development of divorce law with regard to Muslim women and Muslim Personal Law. The take of judiciary in interpreting Muslim Personal Law and providing gender justice to Muslim women have been discussed and analyzed in this chapter.

It’s been so long since when women are fighting against this sinful but valid form of divorce which is known as instant triple talaq. Here the researcher tried to analyze relevant cases which brought significant changes in rules of instant triple talaq. Few important cases incorporated in this chapter are as follows:-

In 1932 in case of ***Rashid Ahmad v. AnisaKhatoon***[3] the court held that tripal talaq pronounced to please his father by the husband is valid divorce and it dissolves the marriage ties between husband and wife.

In 1971 in case of ***Yousuf Rawtherv. Sowramma***[4] Sowramma, a Hanafi girl, around 15, married in 1962 with Yusuf Rowther, nearly twice her age, but they live together hardly for few days and after that an action for dissolution was instituted by the wife against the husband. The husband having taken another wife and the later having wed again after dissolution was granted in appeal.

In 1985 a historic case came before the Apex Court in India which became the landmark in cases of divorce and maintenance laws. The name of the case was ***Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985***[5]**,** Further in 1994 in case of ***Rehmatullah v. State of UP***[6]Allahabad High Court held triple talaq unconstitutional but the judgment was reversed in appeal by Supreme Court.

The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act 1986 was challenged before Supreme Court in case of ***Danial Latifi & Anr v. Union of India, 2001***.

In 2002 in case of ***Shamim Ara v. State***[7] ***of UP*** the whole jurisprudence of tripal talaq has undergone a vast improvement particularly with regard to communication of pronouncement of talaq to wife and with regard to attempt of reconciliation before finalization of divorce.

In 2008 in case of ***Masroor Ahmed v. State (NCT OF DELHI)***[8] after Shamim Ara case, for effective talaq, pronouncement of talaq must be proved, reasonable cause must be shown, and also the attempt of reconciliation must be demonstrated to have taken place. This will apply to Ahsan talaq, Hasan talaq, and also on Talaq-e-biddat . Tripal talaq or talaq -e- biddat shall be treated as one revocable talaq. While it may not be essential that talaq has to be pronounced in the presence of wife. It is

[3] 1932 BOMLR 475
[4] AIR 1971 Ker 261
[5]Mohd. Ahmed Khan vs Shah Bano Begum And Ors 1985 AIR 1985 SCR (3)844
[6] AIR 1994 ALL H.C.
[7] AIR 2002 SC 3551
[8]2008 (103) DRJ 137 DEL.

essential that for such pronouncement to be effective is made known to her, communicated to her at the earliest.

During the continuance of the battle for justice in 2015 five women were fighting against the system of triple talaq in courts of different states. The cases were:-

1. Shayra Bano v. Union of India and others 2016
2. Afreen Rehman v.Union of India 2016
3. Gulshan Parveen v. Union of India and others2016
4. Ishrat Jhan v. Union of India and others2016
5. Atiya Sabri v. Union of India and others2017

This chapter talks all about how the honorable Supreme Court suo-moto took cognizance of all these cases together and gave it the name ***In Re-Muslim women's Quest for Equality v. Jamiat Ulma-i-Hind***[9]**.** Finally on 22 august 2017 the court set aside the tripal talaq and declared it unconstitutional and held that if a person gave tripal talaq in one go then it will not have any consequence on valid marriage i.e. it will not dissolve the marriage. Further in this case the S.C. directed the government to make law in this regard.

Chapter VI - Analytical Study of, "The Muslim Women (Protection of Rights on Marriage) Act 2019"

This chapter deals with the "The Muslim Women (Protection of Rights on Marriage) Act 2019". The main aim of this chapter is to analyze that how this Act of 2019 protects the rights of the Muslim female in the matter of her marriage and divorce. The preamble of the Act itself declares that this is, "An act to protect the rights of married Muslim women and to prohibit divorce by pronouncing instant triple talaq by their husbands and to provide for matters connected therewith or incidental there to"[10]. This Act of 2019 has declared the practice of instant triple talaq is void and illegal and has also laid down that any husband practicing such talaq would be liable to be punished with imprisonment up to 3 years. This chapter also deals with the issues of maintenance and custody of the children born to the husband and wife.

[9] Writ petition © no. 118 2015
[10] Introductory para of The Muslim Women (Proction of Rights on Marriage)Act 2019

This chapter focuses on the bone of contention in this Act as it is the criminalization aspect of the pronouncement of triple talaq, while the Act itself is civil in nature.

In this chapter the researcher tried to analyz how this enactment imposing penal and criminal consequences for a civil wrong. As it is well accepted that Marriage under Islamic law is a civil contract, the breach of it should not lead criminal punishment. As far as criminalization is concerned the state should adopt a modest approach. Putting the person behind the bars and Curtailing his liberty should be the last resort[11].Criminal law is only one of many mechanisms to censure and prevent deviant conduct. Only the most serious violations should attract the most coercive and condemnatory technique, i.e. criminalization[12].State must adopt a minimalistic approach in criminalization of offences because a stronger justification is required where an offence is made punishable with imprisonment[13].

This chapter throws light on the point that the main aim of the The Muslim Women (Protection of Rights on Marriage) Act 2019 is to prohibit instant triple talaq and to safeguard the rights of married Muslim women. It is important to note that if the husband will be imprisoned then it will be very likely that all his family members including the wife would become destitute. In addition to this when the act of pronouncement of triple talaq has itself been declared void by section 3 then such pronouncement would not have any legal consequence at all and would have no effect on the validity of marriage. The marriage would still remain valid in the eyes of law. However it is impracticable to expect that the marriage would not suffer. There is a possibility that if the husband is in prison then it would lead to irreconcilable differences among the husband and wife. After coming from the jail the husband might divorce his wife by following the proper Quranic procedure. Such imprisonment would result in to unfair denial of conjugal rights to the Muslim married couple. The apprehension of such adverse consequences would discourage the Muslim wife from complaining such incidents of triple talaq. It means that there would not be any deterrent effect of such a provision in the Act. So the women would not have any remedy at all.

[11]Andrew Ashworth, "Is the Criminal Law a Lost Cause?" 116 *LQR* 225 (2000)
[12]Andrew Ashworth, "Is the Criminal Law a Lost Cause?" 116 *LQR* 225 (2000
[13]Joseph Shine v. Union of India, 2018 (11) SCALE 556

This chapter also throws light on the point that while in his Act of 2019 the offence has been a cognizable offence, the police officers have the right to arrest husband without any preliminary investigation. The woman would have nothing to say in the procedure. Also neither the Courts nor the Shariat law has declared this practice to be a crime. The Hanafi School which recognizes this form of divorce, considers it to be sinful and Abominable[14].It is bad in theology, but not a crime. The punishment which is prescribed in the Act is not proportionate to the gravity of the wrong. Punishment of three years has been prescribed for much serious offences in Indian Penal Code which include sedition (124A), promoting enmity between classes of people, rioting armed with deadly weapon Section 148 of IPC etc. Imposing such a punishment for a civil act does not seem justified. Another aspects against the criminalization of instant triple talaq is that the Act discriminates between Hindu and Muslim males as it makes divorce a criminal act for the Muslim male while it as a civil act for the Hindus[15]. So it is against Art.14 of the Constitution.

Chapter VII - Social Impact of Triple Talaq Act 2019 on Muslim Women: A Field Study of District Lucknow (U.P.) and Chhatarpur (M.P.)

This chapter presents and analyses the data, related to the study in detail. The data has been presented in chart and tabular form followed by the detailed analysis. The data presentation is done in such a way that it will comprehensively present and analyse the data in the holistic perspective of the study.

For collection of data Questionnaires as well as **interview method** have been adopted from male and female Muslims of different age groups in district Lucknow of Uttar Pradesh and district Chhatarpur of Madhya Pradesh.

Aim of chapter VII is to analyse information gathered, to study about "Gender Justice in Muslim Personal Law with special reference to divorce". This chapter is very important part of this study. Through textual discussion, tabular and graphical presentation, the data is critically analysed and reported". The finding shows the information about the Gender justice in Muslim Personal Law with Special Reference

[14]Asaf A.A. Fyzee, Outlines of Muhammadan Law 147 (Oxford University Press, Oxford, 2008)
[15]Kavita Krishnan, "Civil Offence for Hindus, Crime for Muslims: The Triple Talaq Ordinance is PlainlyDiscriminatory", Scroll.in, September 24, 2018, *available at* https://scroll.in/article/895448/civil-offence-forhindus-crime-for-muslims-the-triple-talaq-ordinance-is-plainly-discriminatory (last visited September 10, 2019).

to Divorce. For better understanding of the work, the questionnaire has been divided in three parts i.e. part A, B and C. Part A tells about socio-economic profile of the respondent while part B deals with22 questions which forms the body of the questionnaire. Through these questions in this chapter, the knowledge of respondents regarding their right to equality in Constitutional Law, in their families and in society have been gathered .At the same time it was also tried to know that what is the impact of triple talaq Act in society and what are the opinion of male and females about the Act of 2019.

Part C of the Chapter deals with the comparison of opinion between male and females and how it affects the society at large.

Chapter VIII - Conclusion and Suggestion

This chapter is prepared on the basis of this research study, certain conclusions are drawn and some suggestions are also placed for consideration.

CHAPTER-II

HISTORY AND CONCEPT OF GENDER JUSTICE AND DIVORCE IN MUSLIM PERSONAL LAW IN INDIA

CHAPTER-II

HISTORY AND CONCEPT OF GENDER JUSTICE AND DIVORCE IN MUSLIM PERSONAL LAW IN INDIA

2.1 Introduction

"The fight is not for women's status but for human worth. The claim is not to end inequality of women but to restore universal justice"[1].

A woman represents more than half of the world's population. Most of them are engaged in various works in various walks of life which contributes to the life and the wealth of the nations. Still women all over the world are subjected to various kinds of discriminations and prejudices. This gender bias which is present in every country every society and in every nook and corner of the world prevents millions of women from obtaining education, health services, working opportunities, child care and legal status. Deep rooted social and religious tradition has affected the progress of women irrespective of the country and the society. Women issues have been a matter of concern from long time but have attracted attention only in the past few decades. In spite of radical changes which have been introduced in the social and legal structure of few countries women continues to face inequality and injustice at home, at work place, in society and in every walk of life.

The international community specially the United Nation has recognised that gender equality is an important aspect to enjoy human rights. Time to time various countries like USA and UK geared up to tackle and eliminate discrimination against women in all forms. In India also, women her liberty and equality have always remain a topic of great concern. In our country in one hand we worship female in form of goddess Lakshmi, Durga, Saraswati and Kali but on the other hand, society abuses the women by practicing several evils like child marriage, female foeticide, infanticide, domestic violence and dowry death etc.

In this chapter the researcher dealt with the meaning of word gender and sex and in which reference we use these words in our day to day life. What is the

[1]Justice Krishna Iyer, Law and Life, New Delhi Vikas Publishing House 1979

difference between word gender and sex? After dealing with it elaborately the researcher will give the history of gender justice in USA UK and India and while giving the account of history of gender justice and how the progress is made in these regions the researcher will also elaborate the developments which took place in United Nations in the in the field of gender justice.

After discussing the gender justice and its development in USA, UK and India In the present chapter the researcher elaborated and analyzed gender justice and divorce in Muslim Personal Law in India.

2.2 Sex and Gender

When we look back in history we find that Historically the terms "gender" and "sex" have always been used interchangeably but their senses became distinct so it is very important to understand the differences between the two. In common terms the word "sex" denotes to the biological differences between man and women such as the genitals and genetic differences. Defining the word "Gender" is more difficult but it can refer to the role of a male or female in society, known as a gender role, or an individual's concept of understanding themselves, or gender identity. Sometimes, a person's genetically assigned sex does not line up with their gender identity. These individuals might refer to themselves as transgender, non-binary, or gender-nonconforming.

Gender is the change brought about socially in women and men as they grow. This is the term used to understand the socially constructed differences between men and women. Boys and girls are brought up in different way in the society. Parents, relatives, neighbors, every institution in society like schools, police, courts etc have a fixed opinion about how a men and women should be. So gender refers to the socially constructed and culturally variable roles that women and men play in their daily lives[2]. So word Gender denotes the social and cultural role of each sex in their society. This role depends on their surroundings, like family interactions, the media, peers, and education the system of the family by which they are governed generally. It mainly depends on the norms of the society.

[2]Anikawasthy and Shikhabhandari, Human rights and gender justice, An analytical Study of Gender Justice in Indian Schenario, Aph publication New Delhi, pg no.279, 2012

The World Health Organization (WHO) defines gender as: -**"Gender refers to the socially constructed characteristics of women and men, such as norms, roles, and relationships of and between groups of women and men. It varies from society to society and can be changed[3]."** Gender roles are not set in a very strict manner. It varies from society to society. This role of each gender depends on degree of decision-making, liberty and freedom which can be enjoyed by a person in decision making, financial responsibility expected of each gender and the time that women or men are expected to spend on homemaking and rearing children varies in every society as per their culture and civilization. In many matriarchal societies, men are playing roles which traditionally seen as belonging to women, and women are playing the parts previously assigned mostly to the men. Gender roles and gender stereotypes are highly fluid and can shift substantially over time.

Another meaning of gender is an individual's view of themself, or their gender identity. **GLAAD**[4] (Gay & Lesbian Alliance against Defamation) describes gender identity as: "One's internal, personal sense of being a man or woman. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices. "Similarly, GLAAD describes gender expression as follows: "External manifestations of gender, expressed through one's name, pronouns, clothing, haircut, behavior, voice, or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine and feminine changes over time and varies by culture[5]."

As Indian law is binary in nature, it recognizes only male and female gender but in recent past in 15 April 2014 Honorable Supreme Court of India declared a third gender as transgender which is recognized as distinct from binary gender and known as the 'Third Gender' under the Indian Constitution and for the purposes of laws

[3]Definition as given by world health orgnisation
[4]GLAAD formerly known as the Gay &Lesbian Alliance Against defamation is an U.S. Non-governmental media monitoring organisation founded by LGBT people in media. Before March 2013 the name GLAAD has been an acronym for 'Gay & Lesbian Alliance against Defamation' but this became the primary name due to its inclusiveness of bisexual and transgender issues.
[5]Definition of gender as defined by GLAAD(Gay and lesbian alliance against defamation)

enacted by the parliament and state legislatures[6].Non-recognition of the Third Gender in the Indian legal framework has resulted in systematic denial of equal protection of law and widespread socio-economic discrimination in society at large as well as in workplaces. In the wake of the Nalsa Judgment, the Indian parliament recently enacted The Transgender Persons (Protection of Rights) Act, 2019. This Act defines 'Transgender' as all individuals whose gender does not conform or match with the gender assigned to them at birth and includes trans-man and trans-woman (whether or not they have undergone sex reassignment surgery ('SRS') and individuals with socio-cultural identities such as 'kinner', 'hijra', 'aravani' and 'jogta'[7]. To conclude, in general terms, "sex" refers to biological characteristics and "gender" refers to the individual's and society's perceptions of sexuality and the malleable concepts of masculinity and femininity[8].

Two words have been used in society with the word gender i.e. gender equality and gender justice. Equality cannot be defined in certain words. Equality means different things at different time and to different people. In legal parlance, it means those similarly situated are to be treated equally. This indicates that unequal cannot be treated equally; it means if persons are different then different treatment is justified .Supreme Court in its judgment holds that equality does not require the law to treat all individuals in the same manner. But if classification is made between individuals that should be reasonable, and should be found on "intelligible differentia" and that differentia must have a rational relation to the object shout to be achieved[9].

Equality means much more than treating all the persons in the same way. Equality is not sameness. Each sex has different attributes which, when combined allow a relationship to flourish. The gender based division of labour, which women being primarily responsible for reproductive work and work related to the family, and men for productive work, also contribute to the perpetuation of gender based inequalities. Equality means that the contribution made in the family or in the society, though they may be different, is of equal value. Equal treatment of person in unequal

[6]National legal service authority V. Union of India 2014 SC
[7] Definition of word Transgender as defines in Transgender Persons (Protection of Rights) Act, 2019.
[8] Tim newman, sex and gender what is the difference?https://www.medicalnewstoday.com /articles/ 232363.
[9]Naresh Kumar and Another vs. Union of India and Others 2004, P. Suseela And Others V. University Grants Commission and Others 2015 SC.

situations will operate to perpetuate rather than eradicate injustice. True equality can only emerge from efforts directed towards addressing and correcting these situational imbalances. In addition of demanding that women be accorded equal rights with men, The Convention on the Elimination of all Forms of Discrimination against women goes further by prescribing the measures to be taken to ensure that women everywhere are able to enjoy the rights to which they are entitled.

Without equality there is no justice. Justice has to be done without fear and favor, affection or ill-will or taking in to consideration such factors as race, cast, sex etc. In modern society one would expect every individual to have equal opportunity and equal chance and be able to lead a life of dignity so that one can realize his or her aspirations.

Gender justice is a wide term which takes in its sweep every facet of life. For centuries in fact, ever since known history, we have lived in a patriarchal and feudal society which has assigned to women a subordinate role. Women may be respected and loved but have been confined to the home and home –making, looking after children, the sick and elderly in the family. Most of the unpaid work of the world is done by women. Their socio-economic dependence leads to their exploitation. The new awareness about this exploitation and the need to restructure the society on a major just basis has led to serious attempts to reform and transform our social, moral, economic and political structure including our legal and constitutional framework[10].

The word gender-justice does not have any particular definition which exhaustively defines all the aspects of it but still it can be defined as "the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves, as well as the assessment of access and obstacles to the enjoyment of these rights for women, men, girls and boys. Adopting gender sensitive strategies for protecting and promoting them[11]. Thus in simple terms gender justice refers to equality between the sexes. Gender justice is a correlation of social, economic, political, environmental,

[10]The world of gender justice ,pub.by Ashok Gosain and AshishGosain,edited by MurlidharC.Bhandare, Justice SujataV.Manohar , Judiciary and Gender Justice,pg-39

[11] Pam Spees, gender Justice and accountability in peace support operations. International alert ,February 2004 available at http://www.internationalalert.org/gender_ justice _accountability _peace operations .pdf

cultural and educational factors. These precondition need to be satisfied for achieving gender justice[12]. The word gender justice is often used interchangeably with notion of gender equality, women's empowerment and women's rights. In fact it is often used to refer to emancipator projects that advance women's rights through legal change or promote women's interests in social and economic policy. Though it is difficult to give precise definition of gender justice this concept includes any of the fallowing three components i.e.

- Gender justice as entitlement of choice
- Gender justice as absence of discrimination and
- Gender justice as positive rights [13]

Recently, the issue of gender justice has emerged as major challenge, as it has been realized that no state can truly progress if half of its population is held back. March 8th has been observed all over the world as International Women's Day.

यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता[14]।

In Indian mythology women is placed in very high place. Saraswati - the Goddess of learning, Lakshmi - the Goddess of wealth, Parwati - the Goddess of power. Gargi and Maitri,[15] the great women philosophers and authorities on Rigveda and Yajurveda. They belonged to the time of Yagnavalkya. Name of women were used in first place and after that second name appeared were of men viz, Sita Ram, Radhey Shyam. Despite being given so much respect, power and privileges the women have been gifted with a history of discrimination, subjugation and suppression. In Vedic period, women enjoyed an equal status as men enjoyed in that period.

Mnu Smriti not only shows contempt for women but goes on to degrades them as well. Women were considered to be devoid of intellect and consciously denied any learning. They were denied right to property and were forbidden from performing

[12]ArvinthamComprative study on gender justice,available at http://www.lawyersclubindia.com/ articles
[13]www.egyankosh.ac.in/bitstream/12345678/36064 unit% 2018
[14]A sloka written in Manu Samhita which means where women are honoured, Gods feel delighted.
[15]Gargi and Maitri were both great women philosophers and authorities on Rigveda and Yajurveda.

sacrifices .The main reason of this discrimination was physical weakness of the women because of which they had to depend on men in early days when physical exertion was the main activity to meet the daily needs. Other than this reason there were tendencies to keep the family property within the family so women were not made owner of the property as they were considered as paraya-dhan i.e. someone else's property. A Hindu woman was given a right to, stridhan properties but not to the joint family property. In that property she has only right to maintenance. Her right to maintenance and property were extremely curtailed. A married woman was entitled to maintenance only as long as she lives with her husband and obeys his orders. Her status was determined according to the nature of relationship she had with the man. In law of adoption she was also in inferior position than her husband because she did not had power to adopt a child without the wishes of her husband and if she is a widow woman then she could not adopt without the authority of her husband which should have been given during the life of the husband.

It was later during the time of Vijnanesvera[16] that the,Smriti law was freed from the religious fetters and changed for the benefit of women. Thereafter social reformers like Raja Ram Mohan Roy, Lokmanya Tilak, Mahatma Phule, Agarkar and Mahatma Gandhi took up the causes of women in the promotion of female education, remarriage of widows, elimination of child marriage and against other derogatory practices against the women. In 1937 the concept of widow's estate was developed in respect of property inherited by her from her husband.

2.3 Position of Women in Present Time in India

It is a harsh reality that women have been ill-treated in every society for ages and India is no exception. The irony lies in fact that in India where women are worshipped as shakti, the atrocities are committed against her in all sections of life. She is being looked down as commodity or as a slave, she is not robbed of her dignity and pride outside her house but she also faces ill-treatment and other atrocities within the four walls of her house but she also faces ill-treatment and other atrocities within the four walls of her house. They are considered as an object of male sexual enjoyment and reproduction of children. They are real dalits (downtrodden) of the

[16]Vijnanesvera was the author of Mitakshra, the most celebrated and authoritative commentary on the YjnavalkyaSmriti in 11th century.

society. They are discriminated at two levels, firstly they suffer because of their gender and secondly due to grinding Poverty.

Women are deprived of economic resources and are dependent on men for their living. Women works are often confined to domestic sphere. She had to do all house hold works, which are not recognized and are unpaid. In modern times, many women are coming out to work but has to shoulder the double responsibility one she has to work where she is employed and secondly she also has to do all the house hold works, where she is employed and secondly she also has to do all the house hold works, moreover, She is last to be considered and first to be fired as she is Considered to be less productive than her counterpart. Her general status in the family and in the society has been low and unrecognized.

From the cradle to grave, females are under the clutches of numerous evils as discriminations, oppressions, violence, within the family, at the work places and in the society. The root causes of all the evil practices faced by the women are:

- Illiteracy
- Economic dependence
- Caste restrictions
- Religious prohibition
- Lack of leadership qualities and
- Apathetic and callous of males in the society

In our society girls are socialized from their tender age to be dependent on males. Her existence is always subject to men. In her childhood she is under the protection of her father, after marriage under the protection of her husband and in old age at the mercy of her sons.

The patriarchal system in India made women to live at the mercy of men who exercise unlimited power over them. In order to ameliorate the condition of who exercise unlimited power over them. In order to ameliorate the condition of women

in India Legislature exacted the large volume of enactments and many of legislations were enacted in colonial period.

After independence the founder father of the nation, wanted to reform the society and were keen to establish and egalitarian society. To achieve this en they used law as an instrument to check the gender discrimination, numbers of laws were enacted to meet this end but due to strong patriarchal mentality and unfavorable social environment they failed to accomplish their goal. The social engineering through law was not fully achieved, while some rights enshrined under the enactments were enjoyed and accepted by the society most of tehm remained only on papers due to lack of public support. Many evils such as bigamy, child marriage are still in practice, dowry demands are still on rise and women are still harassed for dowry.

In India, the most of the laws were not effective as they were ahead of public opinion and willingness of the people to change the society and give the women the status of equality in society too lacked, so in order to give women their respective position in the society strong public opinion should be created through education, position in the society strong public opinion should be created through education, seminars and by taking the help of various other instruments of the society such as media etc., so that the people of the society should get educated about and change their centuries old thinking and willingly implement the laws enacted for the emancipation for women. It must be asserted that social reforms is in social thinking behavior and law would be effective only if they are backed by major of the society [17].

2.4 Gender Justice and Position of Muslim Women

Muslims in India, as in other Islamic countries, are guided by their own Islamic laws with reference to their marriage, divorce, inheritance and property rights. The Shariat which contains the governing principles of law for defining and regulating the status of men and women in Islamic society has to be understood in the context of its own historical development and socio-political setting in India, keeping in view the various interpretations and commentaries on Muslim Personal Law.

[17] Vijay Pal Singh, Gender justice in India, Available at www.legalserviceindia.com

To analyze the position of women and gender justice in Muslim society a thorough analysis of the historical background is, therefore, necessary so that one can go into the depth of the matter in which the Shariat Law defined the husband and wife relationship, both in the contexts of its continuity as well as its breakdown. One has to examine further as to how far Islamic states, under different types of political systems, have initiated safeguards in the past as well as in the present on various complex questions such as marriage and divorce laws. Moreover, the basic principle of equality, under Islamic Law has to be worked out and practiced with special reference to marriage and divorce.

The recent controversy over various interpretation of maintenance for divorced or separated wife, particularly arising out of Shah Bano's case, has focused upon different facts and aspects of marriage laws under Islam. The question of alimony and maintenance under different laws in various countries has to be viewed in a socio-historical perspective.

The Muslim personal law had incorporated still more rigid and unfair practices like polygamy, unilateral divorce, non-maintenance of divorced wife and gender discrimination in matters of succession, halala [18] process is very inhuman and discriminatory provision for remarriage. In Muslim law, a male can marry to four wives at a time but the wife has not same option like her husband. There is no limitation regarding number of Muta marriages. The Muslim woman is entitled to receive maintenance only up to iddat period. Though a progressive step was taken by Hon'ble Supreme Court of India[19].But the Government of India for doing so-called justice with Muslim male community (but the main intention was to increase vote bank) passed the Muslim Women (Protection of Rights on Divorce) Act, 1986[20], to nullify the effects of shah Bano case[21]. According to this Act, a Muslim male is liable to maintain her divorced wife only up to iddat period unless both spouses submit to the court at the appropriate time that they would like to be governed by Criminal Procedure Code, 1973. Justice V. Krishna Iyer observed that the policy underlying the

[18] The divorced Muslim wife has to marry another person and get the marriage consummated thereafter the wife will take divorce from second husband and then she can be able to marry the first divorced husband.
[19]Mohd.Ahamed Khan v. Shah Bano Begum AIR 198 SC945.
[20] Act No. 25 of 1986.
[21] AIR 1985 SC 945

statute has betrayed the constitutional intention of enacting Uniform Civil Code and attainment of social justice[22]. The whole incident shows that the temporary will of the parliamentary majority is sometimes able to subvert the secular and egalitarian[23]. The aforesaid Act can be held unconstitutional on following ground[24].

- It discriminates divorced women on the ground of religion.
- Article 15 (3) directs that the special law made for women must be beneficial to them.
- Dignity of women, equality of status, equal opportunity for all and fraternity of the Constitution are not saved.
- It is violative of Articles 14 of the Constitutions as the classification is arbitrary, irrational and unreasonable.
- It is also inconsistent with the provision of article 39A of the constitution.

The Supreme Court of India has ruled that the liability of a Muslim husband to his divorced wife to pay maintenance is not confined to the iddat period only[25].

"Islamic law is not a systematic code, but a living and growing organism".[26] Islam observed the principles of human rights both for women and men. Islam is not against the parity of rights between women and men. Laws of the land is the binding force upon the people of that place. "As the gulf between the Muslim Law and the changing needs of a developing society widens, the need for judicial legislation increases."[27]

From time to time certain amendments have been carried out in the laws relating to marriage and divorce. It is equally important to ascertain as to how these laws have affected the status of Muslim women and what they think about such laws. The purpose of the study is, therefore, to focus upon the Muslim women who have

[22] Quoted in: ShahBano judgement19 85.
[23] Ibid.
[24] Bhagwati Prasad Singhal, "Unifrom civil code- Framing is Impreative" 1998 AIR (Journal) 164-167 at 168.
[25] DanialLatif v. Union of India (2001) 7 SCC 740.
[26] Schacht, J.Origine of Muhammadan Jurisprudence, Oxford 1950 pg 10
[27] Ghouse, M., Secularism Society and Law in India, Vikas Publishing House ,1973, p. 227

been directly affected by different legal and Constitutional controversies. Moreover, the silent majority which might not have sought to get the redressed of their grievances through the institution of justice and law of the land and consequently, may be suffering in isolation and silence, must be examined so that the debate about the Muslim Personal Law which has confined itself to the floor of parliament and intellectuals, whether fundamentalist or progressive, should be brought to the actual people, who are facing hardships under the heavy hand of law and its interpreters.

2.5 Gender Justice and Different Aspects of Muslim Personal Law

2.5.1 Marriage

In Islam marriage is an institution established and strongly recommended by Prophet Muhammad to his followers. This is the sunnat of prophet and is the universal phenomenon of Muslim society. The true concept of marriage in Islamic law is very often badly misunderstood. As per Quran marriage among Muslims is a solemn pact. The purpose of this pact is establishing family life and having children. Generally Muslim marriage is regarded as a contract in law. But it is not an ordinary civil contract. Islamic law does not regard it as sacrament as it is recognized in Hindu law. Nothing in Islamic law distract from the social sanctity of marital relationship. The Sharia Law gives stress on the point that sex is legal only in case of valid marriage and this becomes mutual right and obligation of married persons. The definition of marriage included in the personal law in Muslim countries, reflect various essential elements of marriage. But the different countries put focus on different elements. Like moral protection of spouse is main element of marriage in Algeria, In Indonesia, the foundation of the family is basic element of marriage. In Iraq and Syria life in partnership is the basic element of marriage. Jordan and North Yemen recognize family life as the basis of marriage. Morocco recognizes the need of discharge of family liabilities. Somalia and South Yemen recognize equality in rights and duties of the spouse as the necessity of marriage. In most of these countries perpetuation of lineage through the children is one of the object of marriage.[28]

[28]. Algeria 1984 Art 4,Indonasia 1974 Art 1,Iraq 1959 Art 3(1),Jordon1976 Art 2,Moroccon1958 Art 1, N.Yemen 1978 Art 1,Somalia 1975 Art. 4,S. Yemen 1974 Art 2,Syria 1953 Art 1

Four kinds of marriages are recognized in different Muslim countries as well as in India.[29]

1. **Valid (Sahi):-**When all the legal requirements are fulfilled and there are no prohibitions affecting the parties, then the marriage is correct or 'sahi'. The prohibitions can be permanent as well as temporary. In case of permanent prohibitions, the marriage will be void and if the prohibitions are temporary then the marriage is irregular.

Following are the consequence of a valid marriage in India.

i. Cohabitation between husband and wife becomes lawful.

ii. The children born out of a valid marriage are legitimate and they have right to inherit their parent's properties.

iii. Mutual rights of inheritance between husband and wife are established. That is to say, after the death of the husband, the wife is entitled to inherit the husband's properties and after the wife's death, husband may also inherit her properties.

iv. Prohibited relationship for purposes of marriage is created between the husband and wife and each of them is prohibited to marry the relations of the other within prohibited degrees.

v. The wife's right to claim dower is fully established just after the completion of marriage.

vi. The marriage gives to the wife the right of maintenance from her husband with immediate effect.

vii. After the dissolution of the marriage, the widow or the divorced wife is under an obligation to observe the Iddat, during which she cannot remarry.

[29]. TahirMahmood,Family Law and Social Change ,N.M.Tripathi Private Limited Bombay 1975 pg .75

2. **Void (Batil)-**The marriage being void ab-initio creates no rights or obligations and the children born out of such marriage are illegitimate. A marriage forbidden by the rules of blood relationship, affinity or fosterage is void. Similarly, a marriage with the wife of another or a divorced wife during iddat period is also void.

3. **Irregular (Fasid) -** Due to lack of some formality, or the existence of an impediment which can be rectified, a marriage becomes irregular. However this irregularity is not permanent in nature and can be removed. Thus, the marriage itself is not unlawful or void. It can be made valid once the prohibitions are rectified. Marriage in such circumstances or with following prohibitions is called 'Fasid':-

    1. A marriage contracted in absence of required number of witnesses;
    2. A marriage with women during her iddat period;[30]
    3. A marriage with women without the consent of her guardian when such consent is considered necessary;
    4. A marriage prohibited on account of difference of religion;
    5. A marriage with a woman who is pregnant, when the pregnancy was not caused by adultery or fornication;
    6. A marriage with a fifth wife.

4. **Mutah (Nikahmutah)-**The term literally means "pleasure marriage". Muta marriage is a temporary agreement for a limited time period, upon which both the parties agreed. There is no prescribed minimum or maximum time limit; it can be for a day, a month or for many years. The marriage dissolves itself after the expiration of the decided period, however if no such time limit was expressed or written, the marriage will be presumed permanent.

[30] .Delhi city Court ruled in the year 2017 that the marriage performed by a Muslim woman during the Iddat is not held as void. Dismissing a claim of a man who was accused of domestic violence by his wife saying their marriage was void as per the Muslim law and she has not even complete Iddat after getting divorce from her prior husband. Justice Bhupesh Kumar said that 'any marriage performed by a Muslim woman during Iddat period is an irregular marriage and not a void (Batil) marriage.

2.5.1.1 Promise to Marry

The Holy Quran places great importance to the fulfillment of the promise but in Muslim Personal Law a promise to marry has no legal recognition in India, Algeria, Iraq Jordan, Lebanon, Malaysia, Morocco, North Yemen, Somalia, South Yemen, Syria, Tunisia and Turkey.[31] A compromise between the two is reflected in the statutory provisions relating to engagement and it has been given great importance in forming mutual consent. The laws in all these countries make it clear that engagement or any other like formalities will not constitute a valid marriage. Most of these laws provide that the gifts exchanged in promise to marry shall be re-exchanged if the other party who gave the gift broke the engagement for no fault of other party. South Yemen altogether prohibits return of engagement gift. In Somalia this customary money is ordinarily not refundable in case of an engagement is broken. Few countries like Brunei and Malaysia also provide for reimbursement of expenses incurred in engagement. Turkey makes more stringent and strong law regarding this breakage of promise of marriage and it declares that damages should be paid to the aggrieved party in case an engagement is broken.

2.5.1.2 Age of Marriage

Age of puberty is the age of marriage in most of the Islamic countries. Attaining the age of puberty a person can marry by his own action. As a normal rule age of 15 years is considered the age of puberty. Below the age of puberty a person can be contracted into marriage by a marriage guardian. In India there is no minimum age of marriage. Personal law enactments of various Muslim countries discarded the rule of puberty and prescribed the minimum age of marriage. Most of these countries prescribed the age on attaining which, the parties of marriage can marry together. In most of the cases a man is allowed to marry in a higher age than women except in few countries where both are allowed to marry at the same age. For Algeria and Bangladesh a male of 21 and female of 18 years old can marry. In Libya Malaysia, Pakistan and South Yemen the age of marriage for male is 18 and for female its 16 years. Syria and Lebanon declares in their statutes the age of male for marriage is 18

[31]. Algeria 1984 Art.5&6,Brunei 1955 Art.136, Iraq 1959 Art 3(3),Jordan 1976 Art 3&4, Lebanon 1917 Art 1&2,Malasia 1984 Art 15,Morocco 1958 Art 2&3,N.Yemen1978 Art 2&3Somalia 1975 Art2, Yemen1974 Art 2&4,Tunisia 1956 Art.1&2,Turkey 1926 Art 82-87.

and for female its 17 years. In Iraq 18 years age is permissible age for marriage for both the parties male and female. In Indonesia a male of 19 years old and a female of 16 can marry together and in Tunisia a male of 19 years age and a female of 17 years can have valid marriage together. In North Yemen the valid age for marriage for both male and female is 15 years.[32]

In Algeria, Indonesia, Iraq, Lebanon, North Yemen, Somalia, Syria and Turkey marriage can be allowed by the court at the lower age as an exceptional case generally with the consent of the marriage guardian. Prior consent of court is necessary in Jordan and Syria also where there is an unusual age difference between the parties and in South Yemen where the difference of age is more than 20 years, while the woman is below 35 years of the age, the marriage is not permitted. In North Yemen marriage cannot be consummated until the girl completes the age of 16 years. A marriage in violation of these rules relating to age will be liable to annulment or dissolution in Indonesia, Iraq and Tunisia and punishable with imprisonment or fine in Bangladesh, Malaysia, Pakistan and North Yemen. In Egypt and Lebanon these marriages are not judicially recognized for the purpose of matrimonial relief. In India female can exercise the 'option of puberty'[33] on attaining age of puberty.

2.5.1.3 Role of Guardian in Marriage

All schools of Islamic law require guardian's consent for the marriage of a person below the age of puberty, while some of them like Maliki and Shafi school of Muslim Personal Law make it one of the condition for the marriage of girl irrespective of their age. Under the legislative enactment of Bangladesh, Malaysia and Pakistan a girl below the age of 16 contracted into marriage by her father or guardian can on attaining the age can exercise her option of puberty (khayal-ul-bulugh) to repudiate the marriage and seek a judicial divorce.[34] This is partially against the Hanafi law which allows such an action only if the marriage was contracted by guardian other than father or grandfather. In Jordan and Syria the original Hanafi law

[32]Algeria 1984 Art, 7 Bangladesh 1984 Art 2,Egypt 1923 Art 1, Indonesia 1974 Art 7 &22,Jordan 1976 Art 3&4,Lebnaon 1917 Art 4&7,Libya 1972 Art 1,Malasia 1984 Art 9 , Morocco 1958 Art 8, N.Yemen 1978 Art 19&20,Pakistan 1929 Art 2(a),Somalia 1975 Art.16,S.Yemen 1974 Art 7&9, Syria 1953 Art 16,18 &19

[33]. Under Mohammedan Law Option of puberty is a right available to repudiate a woman's marriage—if it occurred while she was a minor

[34] .Bangladesh 1939 Art 2(viii), Malaysia 1984 Art (1)(g), Pakistan 1939 Art 2(viii)

is retained by legislation.[35] In Brunei and Malaysia guardian's consent is necessary for the marriage of girls, but court can intervene in suitable cases and give consent to the marriage of a girl acting as wali raja[3637]. In Indonesia guardian's consent is now necessary only if a person marrying is under 21 years of the age. In Indonasia and also in Iraq and North Yemen no guardian can force the ward into marriage.[38] In Algeria, Iraq, Lebanon, Morocco, Somalia, Sudan and Tunisia parental objection to the marriage if unreasonable or unlawful can be overruled by the court.[39] In all countries the role of marriage guardian is now of a protector of the ward's interest. No arbitrary interference by the guardian with the ward's marital choice is allowed.

2.5.1.4 Mental capacity of Male and Female

The law in Iraq, Jordan and North Yemen empowers the court to allow the marriage of mentally ill person if it is medically certified to be of his or her manifest advantage and the other party willingly agrees to the marriage while in Tunisia in the same circumstances marriage of a mentally sick person can be allowed by guardian.[40] In nearly all Muslim countries undisclosed pre-marital insanity is a ground for judicial divorce. In India if the husband is insane for two years it gives wife an option to seek judicial divorce.[41] In Malaysia the law allows divorce at the wife's instance if at the time of marriage she was not mentally fit to give a valid consent to the marriage.[42]

2.5.1.5 Formalities for the Formation of Marriage

In Islam there are no legally prescribed ceremonies or formalities for the formation of marriage. It is very clear that it is contractual in nature. In traditional Islamic form of marriage there must be offer from one party and acceptance by the

[35].Jordan 1976 Art 6,Syria 1953 Art.18(2)
[36].Islamic Legal guardian
[37] .Brunei 1955 Art 139,Malaysia 1984 Art.13
[38] . Indonesia 1974 Art 6, Iraq 1959 Art 9, N. Yemen 1978 Art 7&15.
[39].Algeria 1934 Art 12, Iraq 1959 Art 9,Lebanon 1917 Art 8, Libya 1972 Art 2&3,Morocco 1958 Art 9, Somalia 1975 Art 17, Sudan 1960 Art 3&4, Tunisia 1956 Art 6 .
[40].Iraq 1959 Art 8, Jordan 1976 Art 8, Lebanon 1917 Art 9, Morocco 1958 Art 7, N. Yemen 1978 Art 8, Tunisia 1956 Art 7
[41] .Section 2(6) of Dissolution of Muslim Marriage Act 1939.Sec2 (vi)A woman is entitled to seek a decree for disolution of her marriage on the ground that the husband has been insane for a period of two years.
[42]. Malaysia 1984 Art 52 (1)(k)

other. Exchanged of offer from one party and acceptance by the other party in the presence of witness is either personally or through an agent is necessary. This is laid down as the basic marriage procedure by legislative enactments of all those Muslim countries where marriage law has been fully codified.[43] Presence of kazi to solemnize marriage is not necessary as per the old Islamic text. It is however nearly universal in the Muslim world. Legislative enactments of many Muslim countries now require that a marriage must either be solemnized by kazi or Sharia judge or later formerly registered. [44] This procedure of solemnization and registration of marriage is provided for, by the personal law enactments or in some countries by separate legislations. Solemnization of marriage without the intervention of the courts or kazi where this is obligatory and also failure to register it where the same is compulsory may entail panel consequences but will not vitiate the marriage.

2.5.1.6 Stipulations in Marriage Contract

Islam gives to the parties of an intended marriage freedom of mutually putting conditions on each other provided these conditions should not be un-Islamic. The condition should be that which are not repugnant to its law and social policy. The basic policy of law is not to impose on the parties everything by the force of law, but it follows rule of contractual freedom in which parties can prohibit each other for few things which are not permissible as per Quran. The doctrine of freedom of marital stipulation is especially recognized by legislation in Jordan Morocco, North Yemen, Syria and Tunisia.[45] All lawful conditions mutually agreed upon at the time of marriage also give an option to the wife to dissolve the marriage if any such condition is violated, are judicially enforceable in these countries.

2.5.1.7 Polygamy

As regard to polygamy Holy Quran says that if a man could do justice with more than one wife then he can marry with four wives at a time. If a man cannot treat his

[43]Algeria 1984 Art 9&10, Indonesia 1974 Art 10, Iraq 1959 Art 4,Jordan 1976 Art 14&15, Lebanon 1917 Art 33 to 35, N. Yemen 1978 Art 3-6, S. Yemen 1974 Art 5&8, Syria 1953 Art 5 to 12,Tunisia 1956 Art 9.

[44] .Bangladesh 1961 Art 5, Brunei 1955,Art 137,Indonesia 1974 Art 1, Iraq 1959 Art 10,Jordan 1976 Art 17, Lebanon 1917 Art 37, Malaysia 1984 Art 16-20, Pakistan 1961 Art 5, Somalia 1975 Art 5, S. Yemen11974 Art 6, Syria 1953 Art 40 &41, Tunisia 1956 Art 31to 39, Turkey 1926 Art 97 to 109

[45] .Jordan 1976 Art 19, Morocco 1958 Art 48, N. Yemen 1978 Art 4,

wives with equality and justice he should rest happy with a single wife. This would keep men away from doing injustice. So the permission for polygamy is conditional and not absolute right of a man and this can therefore be restricted by an agreement or by the law. In order to prevent misuse of the law on these subject further restrictions imposed in a number of Muslim countries.

In Jordan, Lebanon and Morocco legislation is specially recognizing the right of every woman to put condition on his husband at the time of marriage against her husband's possibility of second marriage while she remains his wife. Violation of this condition entitles her to seek divorce.[46] In some other countries this will be possible under the general rule of option of stipulation. In Algeria the law provides that the intended second marriage must be justified and the husband must be able to treat co-wives with equality and both the existing and intended wife must have agreed, either of them not having agreed to being a second wife will have the right to seek divorce from her husband.[47] In Egypt and Morocco the law requires every man getting married to provide to the marriage officials full facts of his existing marriage. The first wife can seek a divorce if the second marriage has caused any injury to her. In Egypt also the second wife can seek a divorce if she has not been treated equally and she feels that she has been deceived into a bigamous marriage.[48] In various countries like Indonesia, Iraq, Malaysia and Syria a married man want to marry again must obtain prior permission of the court. In Bangladesh and Pakistan if a man wants to marry again he must seek permission from the quasi- judicial body that is arbitration council in those countries. Arbitration council is constituted by the government officials having himself as a chairman and one nominee from each of the parties as members.[49] There are certain grounds on which this permission can be given; like in Bangladesh, Malaysia and Pakistan if proposed second marriage is necessary and just this permission can be given. In Iraq and Syria this permission can be given if reason is lawful. In Malaysia for giving permission of the second marriage to a man the court will further assured that the second marriage would not cause legal injury to the first wife. In Indonesia, Somalia and South Yemen the court can allow bigamous

[46]Jordan 1976 Art. 19(1), Lebanon 1917 Art 38, Morocco 1958 Art 31.
[47].Algeria 1984 Art 8
[48] .Egypt 1929 Art 11 (2), Morocco 1958 Art 30
[49].Bangladesh 1961Art 6 and Bangladesh 1939 Art 2(ii a),Indonesia 1974 Art 3 &4, Indonesia 1975 Art 40-44,Iraq 1959 Art 3(4)& Art 40 (5),Malaysia 1984 Art 23, Pakistan 1961 Art 6, Somalia 1975 Art 13, S. Yemen 1974 Art 11 &19 (2), Syria 1953 Art 17.

marriage only if the first wife is suffering from barrenness ,physical defect or an incurable form of disease and also if she fails to act as wife in Indonesia or has been imprisoned for over two years in South Yemen. In all these countries the permission for fresh marriage can be given only after a proper enquiry of financial implications. In Bangladesh, Iraq and Pakistan the first wife can seek a divorce where the second marriage has been unlawfully contracted. In Bangladesh, Malaysia and Pakistan the whole dower if unpaid will become immediately payable on account of bigamy. In Iraq, Somalia and South Yemen the option of divorce will be available to the first wife even where the second marriage has been duly permitted by the court. A second marriage in violation of law is panel but not void in these countries. The law in Morocco and North Yemen prohibited bigamy for a man who cannot do equal justice to more than one wives while those in Jordan, Lebanon and Syria provided that if a man does have two wives he must treat them with equality and justice as per Quranic injunction. In these countries the man cannot accommodate them in the same house except with their consent. In Bangladesh and Pakistan also failure to treat the wives equally as per Quranic injunctions is a ground for divorce.[50] In Turkey bigamy is altogether prohibited and the bigamous marriage is liable to annulment except if after its solemnization the first marriage has been dissolved. While in Tunisia bigamy is prohibited and if a bigamous marriage take place it will be invalid and panel consequences will be result.[51] The decision that whether a person does fulfill the Quranic conditions for bigamy which the ancient Muslim jurist had left to his own subjective satisfaction has now been vested in the court or another agency in a number of other Muslim countries. In Tunisia and Turkey the state has now ruled that nobody can fulfill those conditions in the modern social circumstances so bigamous marriages are prohibited altogether.

2.5.1.8 Prohibitions in Marriage

A very important aspect for validity in marriages is marriages in prohibited degree relations. In all those countries where marriage law has been fully codified legislative enactments provides detailed rules of prohibited degree in marriages. And

[50] .Bangladesh 1939 Art 2(viii)(f),Jordan 1976)Art 40 Lebanon 1917 Art 74, Morocco 1958 Art 30(1),N. Yemen 1978Art 8,Pakistan 1939 Art 2(viii)(f),Syria 1953 Art 68.
[51] . Tunisia 1956 Art 18,21&22, Turkey 1926 Art 93 ,112,114.

the law is that a marriage within prohibited degree shall be void.[52] The statutory provisions of almost all the countries by and large agree with the established Islamic law in prescribing the bars of affinity[53] fosterage[54] and consanguinity[55]. But the point to be noted is that marriage with all cousins (that is parental, maternal, parallel, cross) and with the former spouse of brother sister and uncle or aunt is permissible throughout the Muslim world. Prohibition of marriage on account of fosterage is the peculiarity of Muslim law recognized by the legislation in all countries. As regards adoption established Islamic law has no place for it and no prohibited degree flow from an informal adoption. Turkish law clarified that marriage will be prevail over adoption. In Somalia and Tunisia the laws now clear on this point that in its natural family the adopted child retain all the prohibited degrees in marriage.[56]

2.5.1.9 Marriage in Different Religions and Different Schools of Law

The established legal rule of Islam allows a marriage of Muslim man to kitabiya women, but vice versa is not recognized by the personal enactments of India, Iraq, Jordan, Malaysia and North Yemen. Laws in Algeria, Lebanon and Syria only say that marriage of a Muslim woman with a non-Muslim would be void.[57] Conversion to Islam by non-Muslim party of the marriage should be governed by Sharia rules on inter religious marriages in all the countries. Muslim following different schools of law can marry without any restriction or problem. The concept of caste and sect do not have any legal recognition in the Muslim word for the purpose of marriage.

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[52] .Algeria 1984 Art 25 &29,Indonesia 1974 Art 8, Iraq 1959 Art 12& 16, Jordan 1976 Art 24 &30, Lebanon 1917 Art.17-19, Malaysia 1984 Art 9 ,Morocco 1958 Art.26&28, N. Yemen 1978 Art 12 &14, Syria 1953 Art 33 to 35, Tunisia 1956 Art 14 to 17.

[53] . It means a person is prohibited to marry someone in close relations, for example, his wife's daughter, son's wife, etc. A man is restricted from marrying the persons who come under the foster relationship.

[54] . When a lady other than the mother, breastfed a child under the age of two years, the lady turns to be the foster-mother of the child. A man is restricted from marrying the persons who come under the foster relationship.

[55] . Consanguinity means blood relationship and bars a man from marrying: His mother or grandmother how highsoever, His daughter or grand-daughter how lowsoever, His sister whether full, consanguine or uterine, His niece or great niece how lowsoever, His aunt (fathers sister, mothers sister) or great aunt, how highsoever, whether paternal or maternal A marriage with a woman prohibited by reason of consanguinity is void. Issues from such marriage are illegitimate.

[56].Turkey 1926 Art 121,Somalia 1975 Art 114 ,Tunisia 1958 Art. 15

[57] .Algeria 1984 Art 31, Iraq 1959 Art 17, Jordan 1976 Art 32, Lebanon 1917 Art 58, Malaysia 1984 Art 10, N. Yemen 1978 Art 23 Syria 1953 Art 48 (2).

2.5.1.10 Effect of Marriage on Status of Parties

With regard to the effect of marriage on the status of parties after marriage, Muslim law is very different from Hindu law. Marriage in Islam has no effect on the individual status of parties. The men and women are treated in this respect with the perfect equality. The concept of merger of personalities of the husband and the wife is foreign to Islam and it is not known in any part of the world. A Muslim wife is neither the better half nor the half body of her husband. She retains her maiden name, her school of law, her independent legal status and her property and proprietary rights even after marriage. These features of Sharia are so firmly established in the Muslim world that the codification of personal law did not deem it necessary to reinstate them in laws which they have enacted. In very few of them we find specification of certain rights which of wife retains in marriage. The Tunisian law for instance declares that the husband shall not be the guardian of his wife's property and the Indonesian law clarifies that both parties shall have exclusive control over their respective properties.[58]

2.5.1.11 Mahr or Dower of Married Women

Mahr[59] is an essential element of Muslim marriage, which husband has to pay to his wife wholly and exclusively and it completely belongs to the wife. While there has to be mahr in every marriage the law allows specified and unspecified mahr in respect of its quantum of mahr, and prompt[60] and deferred[61] in respect of the time of its payment. In both matters the parties have freedom of contract. There are also settled legal rule of mahr applicable to the cases of unconsummated marriages and invalid marriages. In India mahr is an absolute right of the wife. Codified personal laws of Jordan, Lebanon, North Yemen and Syria, includes full chapters on mahr and most of these countries generally agree with the established law.[62] In these countries

[58] .Tunisia 1956 Art 24 , Indonesia 1974 Art 39

[59]. In Islam, a mahr is the obligation, in the form of money or possessions paid by the groom; to the bride at the time of Islamic marriage. While the mahr is often money, it can also be anything agreed upon by the bride such as jewelry, home, goods, furniture, a dwelling or some land. Mahr is specified in the marriage contract signed upon marriage.

[60].Payable at once at the demand of wife.

[61]. Payable after completion of Marriage.

[62] .Jordan 1976 Art 44to 65, Lebanon 1917 Art 80-90, North Yemen 1978 Art 30 to 40 Syria 1953 Art 52 to 61.

and in some other countries the following statutory principles relating to the mahr are notable

1. In the absence of any provision to the contrary in the marriage agreement regarding apportionment of mahr as 'prompt' and 'deferred' local custom shall prevail in India, Iraq and Syria. But the entire mahr shall be payable on demand in Bangladesh and Pakistan.[63]
2. Where the wife quotes a higher amount as a specified mahr but cannot prove her claim while the husband quotes an unusual low amount, proper mahr will be payable in Egypt, Jordan, Lebanon and Sudan. But in Morocco wife's claim will be decisive before consummation and husbands claim thereafter.[64]
3. The maximum amount of mahr cannot exceed local shillings 1000 in Somalia and local dinar 100 in South Yemen.[65]
4. In Brunei and Malaysia besides mahr, there is a practice to give to the wife optionally at the time of marriage some items of gift called pemberian.[66]

As mahr is translated into English as 'dower' may be confused with dowry which has no place in Islamic law. The anti-dowry law of Bangladesh and Pakistan clarify that their provisions will not apply to mahr.[67] The wholly un-Islamic practice of dowry money or valuable given to the groom by the bride's parents on demand or otherwise in consideration of marriage is a social evil in these countries. The concept of 'dahez' or 'jahej' in which household goods given to the bride by her parents which was once a harmless Muslim custom in the subcontinent reflecting parents nervousness for their daughter's comfort in her husband's home has been corrupted in to demand for dowry by the groom, the rate of which in the marriage market has been on a constant rise. To curb the evil, penal laws prescribing punishment for the offence of demanding dowry have been enacted in various countries. In Lebanon and Morocco the law specially prohibits demand of money by the bride's parents in consideration of her marriage and in South Yemen while expenses of marriage have

[63] . Bangladesh and Pakistan 1961 Act Art 10 Iraq 1959 Art 20, Syria 1953 Art 55
[64] . Egypt 1929 Art 19, Jordan 1976 Art 57&58, Lebanon 1917 Art 86 &87, Morocco 1958 Art 24, Sudan 1935 Art 10.
[65] .Somalia 1975 Art 24 (3), S. Yemen 1974 Art 18
[66].Brunei 1955 Art 136, Malaysia 1984 Art 21.
[67] Bangladesh 1980 Art 2, Pakistan 1976 Art 2(a)

to be shared by both parties a ceiling on gifts can be imposed by administrative regulation.[68]

Islam considers marriage a very serious commitment. It has prescribed certain measures to make the marital bond as permanent as humanly possible. The parties must strive to meet the conditions of proper age, general capability, free consent, honorable intention and judicious discretion. When the parties enter into marital contract, the intention must be clear to make the bond permanent, free from casual and temporary designations. For this reason, trial marriage, contract marriage and all marriages that appear experimental, casual or temporary are forbidden in Islam. To insist the permanent character of marriage does not mean that the marital contract is absolutely indissoluble. Islam is a religion with well balanced, well integrated system. This is quite clear in the case of marriage which Islam regards as neither a sacrament nor a simple civil contract. Rather, Marriage in Islam is something unique with very special features of both sacramental and contractual nature. The marriage contract should be taken as a serious, permanent bond, but if does not work well for any valid reason, it may be terminated in kindness and full honor with equity and respect.

2.5.2 Divorce

"Of all the permitted things divorce is the most abominable with God"[69]

Among these various discriminations faced by Muslim women the method by which a husband can give divorce to his wife by pronouncing triple talaq is highly discriminatory. In matter of divorce the position of Muslim women is most inferior and insecure as compared to the others. Today the issues of women rights in Muslim personal law are highly debatable specially women's rights relating to triple talaq, maintenance, inheritance, has got much attention. Guarantee of equality and freedom from discrimination on the basis of gender and religion are violated in the name of culture and social norms of the particular society. This all happens in the name of uncodified law .When it comes to interpretation of Muslim personal law authors and jurists have different opinions. Some says personal laws have given various rights to women such as choice in marriage, right to give free consent, right to repudiate

.[68]Lebanon 1917 Art.90, Morocco 1958 Art 19, S. Yemen 1974 Art 4&17.
[69] Abu DawudSulaiman bin al-Ashath, as cited in K.N.Ahmed Muslim law of divorce 3 (1978)

marriage, rights in inheritance etc, while some says that there are various practices are against Islam as they are interpreted by priestly class of the society as per their convenience and at the same time these practices are against the will of the constitution of India.

In Muslim culture men are presumed to be superior than women and women are supposed to submissive and docile to men because they depend on men. Being the head of the family men plays role of decision maker. Men are bread- winner and women have duty to bear the child. Men in Muslim society are superior to women because men have always dominated in the fields of religion, politics, family affairs, social rules etc. and at the same time in every aspect of Islamic culture women have been left with the household chores and child bearing.[70]

2.5.2.1 Quran and Divorce

The Prophet Mohammad who is head of the community declared that among all the permitted things in Muslim law divorce is worst. He declared it as the evil of highest degree, and suggested that it should be avoided by all means. But situations in which living together is not possible then it becomes necessity of life. In those situations it is better to separate from the spouse rather than to be in a surrounding which are full of agony and abhorrence. The basis of divorce in Islam is the inability of the spouse to live together for a genuine reason due to which living together is impossible. So it should not be at the whims and fancies if the individual either male or female. There are provisions guaranteed under the Islamic law to get divorce from both the side of husband and wife. The literal meaning of the word Talaq is "repudiation or release". Repudiation here means to repudiate wife or free her from the bond of marriage. It is an extinguishment of marital ties[71]. In pre Islamic era husbands has unlimited power of divorce his wife. He has power to divorce their wives at any time for any reason or even without any reason. The power of husband to divorce his wife was absolute and arbitrary. In Islam, the husband only has the right to get divorce through the method of talaq and the wife can get divorce by the judicial

[70] Hashmi,N.2000,Gender and discrimination, Muslim women living in Europe. Retrieved 4th May 2014 http://aei.pitt.edu/745/1/ICHashmi.pdf
[71] Syed Khalid Rashid, Muslim law, Edition third, 2002

orders from the court. Triple talaq, and more particularly instant triple talaq, is only one of the several forms of divorce under the Muslim law.

It is generally thought that Quran treats women unequally or unfairly and gender justice is not possible in Islamic law known as Sharia law. This assertion is partially true and partially untrue. True as far as Sharia law is concerned, untrue as existing laws are codified during second and third century of Islam when general perspective of rights of women in society were very different from today's perspective . It is important to note that Sharia law is based on holly Quran and there is no doubt in it but ultimately it is human endeavour to interpret and understand divine law. It is an approach to understand the law rather than divine will itself.

When it comes to divorce the holy prophet showed that he looked upon divorce with extreme disapproval. He unequivocally declared divorce to be the worst of all permitted things. The reforms of prophet Mohammed marked a new era in the history of eastern legislation.[72] An effective check placed by Islam on frequent divorce and remarriage was that, in case of irrevocable separation, it is essential for a remarriage that the wife should marry another man and this marriage should be consummated before divorce and the wife should observe the period of iddat[73]. Shia and Sunnies are two sects of Muslims and they have some differences in case of procedure of the divorce law.[74]

Shia Law

1. For divorce under Shia law the words used must indicate a clear and unambiguous intention to dissolve the marriage. They must be expressed like –I have divorce X forever and render her haram for me[75].

2. The talaq must be uttered in Arabic language in the presence of two witnesses who are Muslim, sound mind, major and under free will with clear intention to dissolve the marriage.[76]

[72] Khalid Rashid, Muslim law,edition third 2002
[73] Khalid Rashid, Muslim law,edition third 2002
[74]S.KrishnamurthiAiyar, Law of marriage, maintenance, separation and divorce, edition fourth 2012
[75]Saiyad Rashid Ahmad V.AnishaKhatun, AIR 1932 PC.
[76]DilshadMasoodV.GhMustaffa AIR 1986 J &K

Sunni (Hanafi law):-

1. Divorce can be given by husband to his wife at any time without assigning any reason.
2. The husband should be major and of sound mind at the time of divorce.[77]
3. The presence of witnesses is not required at the time of pronouncement of divorce.
4. The presence of wife is also not essential and no notice is to be given to her.[78]
5. No special form is needed for talaq.[79]

2.5.2.2 Classification of Divorce:-

All type of talaq and its methods can be divided in two categories:-

A. Divorce by the act of parties

B. Divorce by judicial process.

A. Divorce by the Act of Parties Can be further Divided in to Three Parts.

a) By Husband
b) By wife
c) By mutual consent

a. **Husband can Give Divorce by Four Ways**:- These four ways are 1-Talaq-ul-sunnat, 2- Talaq-ul-biddat , 3- Illa , 4- Zihar

1-**Talaq-ul-Sunnat:-**It is in conformity with the dictates of the Prophet. It has two modes Ahasan and Hasan.

[77] Ahmad KasimV.Khatoonbibi AIR 1933 ILR 59
[78]ManaliPathyal V. Moideen,AIR 1968 Ker 763
[79]MohdShamsuddinV.NoorJehan AIR 1955 HYD 144

Ahasan

In Ahasan talaq one single pronouncement made by husband during the wife's tuhr period80, followed by abstinence from sexual intercourse for the three tuhr that is three consecutive months and then has to wait till the iddat period is over. Iddat period for a woman who has been divorced by her husband is usually three months period during this time, she cannot marry another man. If before the completion of iddat, the husband resumes co-habitation with his wife or says that "I have retained thee", the divorce is revoked. In case the woman is pregnant, the iddat period continues till pregnancy of women i.e. until she gives birth to child.

Hasan-

"Talaq-e-Hasan" is the 'proper' form of talaq. In this form, three successive pronouncements of talaq are made by the husband in three successive tuhrsi.e in three succecive months. (when the woman is not menstruating). In case of a non-menstruating woman, its pronouncement may be made after the interval of a month or thirty days between the successive pronouncements. This form of talaq can be revoked any time before the third pronouncement. The iddat commences after the third pronouncement. So here talaq cannot be revoked during iddat period.

2-Talaq-ul-biddat (Tripaltalaq)

In this form of divorce three pronouncements of divorce are made in a single tuhr. Here talaq takes place with instant effect and at the same time it is irrevocable. This kind of instant and irrevocable talaq is known as triple talaq or Talaq-ul-biddat.

This is irrevocable and unapproved form of talaq. In this talaq women need not to observe waiting period and it irrevocably terminates the marriage. It may involve a declaration of talaq repeated three times or a different formula such as "you are haram for me" or I am giving you divorce thrice[81]. Talaq-ul- biddath reflects pre-Islamic divorce customs rather than Quranic principles, and it is considered to be a particularly disapproved, though legally valid form of divorce in traditional Sunni

[80]The period of purity, i.e., the period between two menstruations
[81]Abdar-Rahman I. Doi (2008). Shari'ah: Islamic Law (2nd ed.). Ta-Ha Publishers.p. 280.

jurisprudence[82] According to Islamic tradition, Muhammad denounced the practice of triple talaq, and the second caliph Umar punished husbands who made use of it[83].

3-Illa

In illa divorce an oath is taken by husband whereby he vows to refrain from sexual relations with his wife for at least four months. If he fulfils his oath, the marriage is dissolved; if he breaks it, the marriage continues.[84] This is known as Vow of continence.

4-**zihar**

This is known as Injurious assimilation. In this divorce man compares his wife with a woman who comes under absolute prohibition and with whom he cannot marry. This comparison should be with sexual connotation. A man declares that his wife is as sexually prohibited to him as his mother. The husband is able to break the oath and resume the marriage. Breaking either oath requires expiation by means of feeding the poor or fasting[85].

b. Talaq by Wife is Called Talaq-e-Tafwid i.e. Delegated Divorce

The husband can delegate the right of repudiation or right to give divorce to his wife[86]. This delegation can be made at the time of drawing up the marriage contract (nikah) or during the marriage, with or without conditions.[87] Many women included such terms in their marriage contracts. Commonly, the contract gave the wife the right to "repudiate herself" if the husband married a second wife[88].

[82]John L. Esposito, with Natana J. DeLong-Bas (2001). Women in Muslim Family Law (2nd ed.). Syracuse University Press. pp. 30–31.
[83]Abdar-Rahman I. Doi (2008). Shari'ah: Islamic Law (2nd ed.). Ta-Ha Publishers. p. 280
[84]Tillier,Mathieu;Vanthieghem,Naïm(2019-09-13). "Untraitéde droitmālikiteégyptienredécouvert :Aṣbaġ b. al-Farağ (m. 225/ 840) et le sermentd'abstinence". Islamic Law and Society. 26 (4): 329–373. doi:10.1163/15685195-00264P01. ISSN 0928-9380.
[85]The Oxford Encyclopedia of Islam and Women. Oxford: Oxford University Press. Archivedfrom the original on 2017-02-04
[86]MaaikeVoorhoeve (2013). "Divorce.Historical Practice". The Oxford Encyclopedia of Islam and Women. Oxford: Oxford University Press. Archived from the original on 2017-02-04
[87] John L. Esposito, ed. (2014). "Tafwid". The Oxford Dictionary of Islam. Oxford: Oxford University Press.
[88]MaaikeVoorhoeve (2013). "Divorce.Historical Practice". The Oxford Encyclopedia of Islam and Women. Oxford: Oxford University Press. Archived from the original on 2017-02-04

c. By Mutual Consent Divorce can be given by Two Modes

1- **Khula:-** this is a form of divorce in which both parties agrees with mutual consent to give divorce to each other, however the proposal of divorce comes from side of wife and she initiates the divorce. This is effected by the return of her husband's wedding gift that is Mahr.

2-Mubarat -Mutual agreement on the point of divorce is called Mubarat. As the aversion is mutual so both the parties of marriage desire separation. In this mode of divorce, the offer for divorce may come from any side i.e. either from side of wife or from the side of husband. When an offer of divorce is accepted, it becomes an irrevocable divorce. After divorce following the iddat period is necessary and neither party of divorce can marry during this period of iddat.

B. Divorce by Judicial Process

This process gives right to wife to give divorce to herhusband. It has two modes.

1- Lian:- It is an allegation of adultery to the wife by the husband which entitles her to file a suit for dissolution of the marriage and get a divorce if she proves the charge to be false. According to the Muslim law, till a decision is passed by the Judge, the marriage subsists and there are mutual rights of inheritance if, either should happen to die before the decree is passed. In order to dissolve such a marriage under the doctrine of Lian, the court has got to determine judicially whether a charge of adultery was or was not unjustly made and whether the husband has retracted from the allegations or not[89].

2-Fask (Annulment of Marriage by the Islamic Court)

Faskh-e-Nikah is the dissolution of a marriage by an Islamic Court or a Shariah Council when the wife wants to proceed with divorce but the husband

[89]https://blog.ipleaders.in/split-according-muslim-law.

unreasonably refuses to grant the talaq. This refusal by the husband is contrary to the spirit of marriage and divorce as set out in the Quran[90].

It is annulment of the marriage contract and dissolution of the marital bond completely as if it never happened, and this can only be done by means of the verdict of a qaadi (judge) or a shar'i ruling. Examples of reasons for which the marriage contract may be annulled (faskh) include the following:

- Lack of compatibility between the spouses according to those scholars who regard that as one of the conditions for the marriage contract to be valid.
- If one of the spouse apostatizes from Islam and does not come back to it.
- If the husband becomes Muslim and his wife refuses to become Muslim, and she is a mushrik (polytheist), not one of the people of the Book (i.e., Jewish or Christian).
- When lian occurs between the spouses[91]
- Financial difficulty on the part of the husband, and inability to spend on his wife's maintenance, if the wife requests annulment of the marriage[92].
- Presence of a defect in either spouse that prevents intimacy or creates revulsion between them

Triple Talaq with Aspect of Gender Justice

The most heinous form of tyranny to which Muslim women have been subjected to since time immemorial is the outrageous practice of triple talaq or more commonly known as instant divorce. According to Quran a person is not supposed to divorce his wife when she is menstruating[93].Though Shia and Sunni have different views regarding triple talaq, certain important things like rules of puberty of women, status of her virginity, waiting period as specified in Quran etc must be followed to validate any divorce.[94]

[90]https://www.familylaw.co.uk/news_and_comment/talaq-khula-faskh-tafweedh-the-different-methods-of-islamic-separation-part-1
[91]Lian is a process done where the husband accuses the wife of adultery and she denies it, and each swears oaths invoking the curse of Allah if he or she is lying.
[92]https://islamqa.info/en/answers/133859/the-difference-between-khul-talaaq-and-faskh-ways-of-ending-a-marriage
[93] Surah-al- Baqurah 2:222
[94]FaizurRahman, Instant divorce is alien to Islam's spirit ,Indian Express Kochi, June 17, 2008

This is the form of talaq which though valid but sinful. It becomes effective as soon as words are pronounced. In such kind of divorce there is no possibility of reconciliation between husband and wife. The Prophet never approved this kind of divorce. In this divorce three pronouncements are made in single tuhr[95] either in one sentence (I divorce you thrice) or in three sentences (talaq ,talaq ,talaq).Talaq becomes irrevocable immediately as it is pronounced. From the last pronouncement the period of iddat commences. This divorce cannot be revoked during the period of iddat[96]. This form of divorce is condemned. It is considered irreligious form of divorce because of its irrevocability.

It is a matter of fact that the concept of triple talaq never existed during the period of Prophet Mohammad, Caliph Abubakr and Caliph Umar. According to history it was introduced in the second half of Caliph Umar's regime who enforced it as temporary measure .It was Ommeyad king who introduced this kind of talaq.[97] The same became a general practice (customary law) to pronounce divorce three times in a single sitting. This replaced the revocable one with irrevocable divorce.[98]

Many Muslim countries have brought in large reforms in their personal laws so as to invalidate or repudiate what is known as triple talaq pronounced in one session. Considering the fact that triple talaq is Un-Islamic, negated by highly regarded Islamic scholars, such practice has been invalidated in many Muslim majority nations and that it bluntly violates provisions of constitution of India. The rights of more than 170 million Muslim women in India are at stake. Triple talaq is an inhuman practice that violates rights and dignity of the women.

The constitution of India under Art.25 confers right to freedom of conscience and free profession, practice and propagation of religion. The protection under article 25 and 26 extends guarantee to rituals, observances, ceremonies, modes of worship

[95]Tuhr is the period of wife's parity i.e. a period between two menstruations. As such, the period of Tuhr is the period during which cohabitation is possible. But if a woman is not subjected to menstruation, either because of old age or due to pregnancy, a Talaq against her may be pronounced any time.

[96] In Islam, iddah or iddat (period of waiting) is the period a woman must observe after the death of her husband or after a divorce, during which she may not marry another man. Its purpose is to remove any doubt as to the paternity of a child born after the divorce or death of the prior husband.

[97] A. M. Qureshi, Muslim law of marriage divorce and maintenance deep &deep new Delhi 1995

[98]Zeenat Shaukat Ali ,Marriage and Divorce in Islam

etc which are integral to the religion.[99] But to be considered as part of the religion, it is necessary that such practice be regarded by the said religion as an essential and integral part.[100]

2.6 Legal Consequences of Divorce Muslim Personal Law in India

The Consequences arising from the completion of divorce may be enumerated as under:

(i) The wife has to observe iddat of divorce if marriage was consummated.

(ii) The wife is free to marry another person after the completion of her iddat or immediately after divorce if the marriage was not consummated. The iddat period in case of divorce is nearly 3 months (3 menstrual periods) or in case of pregnancy after delivery of child.

(iii) The husband has to maintain his divorced wife till the expiry of iddat.

(iv) During the period of iddat, the wife is not free to remarry. Similarly, the husband also cannot marry fifth wife if he has four wives including the divorced.

(v) Sexual intercourse between the divorced couple become unlawful after the divorce has become irrevocable the offspring of such intercourse are illegitimate.

(vi) After iddat period either party is free to marry again. There is no legal obstacle to remarriage if the divorced was not given by the third pronouncement or irrevocable form.

(vii) Mutual rights of inheritance cease from the time when the divorce becomes irrevocable except where the divorce was pronounced during the husband's death illness (marj-ull-maut)[101] in which case the wife's right to inherit continues until expiry of iddat, unless she was repudiated at her own request. If divorce is revocable and one of the spouses dies, the surviving one is entitled to inherit as husband or wife as the case may be.

(viii) If the marriage was consummated both prompt and deferred dower becomes immediately payable, however the marriage was not consummated the wife is

[99] N. AdithyanV.TravancoreDevaswom Board ,2002 SCC 106
[100] M.P.Jain, Indian Constitutional law, seventh edition
[101] Death bed

entitled to only half of the specified dower, if the amount was specified in the marriage contract. If the amount was not specified she gets only a present of three articles of dress.

(ix) If divorce was pronounced during marj-ul-maut the wife is entitled to inherit if the husband dies during the period of iddat. But this rule does not apply in case in case of mubarat and khula.

(x) If the husband or the wife dies during the period of iddat following upon a revocable pronouncement of divorce, each is entitled to inherit from the other.

2.7 Misconceptions Regarding Law of Divorce in India

The Muslim law relating to divorce raises two questions for consideration. One relates to the method of divorce, i.e., 'triple pronouncement of divorce', and other to the problem of equality of rights of the both parties in respect of the right of divorce. These two questions are controversial and misunderstood not only by laymen but even by lawmen in our country. The concept of unilateral divorce is also confusing.

The very idea of unilateral divorce militates against the real spirit behind Islamic law of marriage and divorce. Divorce is permissible in Islam only in cases of extreme emergency when all efforts of reconciliation have failed.

It is the Islamic law of divorce, not polygamy which is the major cause of suffering to Muslim women. The Muslim wife indeed has always lived in a shadow of divorce. The verdicts of Muslim jurists regarding the propriety of unilateral divorce are not uniform. The eminent scholar and jurist Ameer Ali has said: “great divergence exists among the various schools regarding the exercise of the power of divorce by the husband by his own motion and without the intervention of the judge.”

Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principles of unilateral divorce, forces have been at work which have restricted and limited its free and unnecessary use. Abdur Rahim says:

“If the exercises of a particular right are likely to lead to abuses, the law would guard against such a contingency by imposing conditions and limitations. There are

certain limitations imposed by law upon the right of the husband to dissolve the marriage."[102]

It has rightly been pointed out by justice Krishna Iyer in ***Yousuf v. Swaramma[103].***There is a large and influential body of Muslim jurists who regard talaq emanating from the husband as really prohibited except for necessary and only with the sanction of a judge administering the Muslim law.

It is a popular fallacy that a Muslim male enjoys under the Quranic law, unbridled authority to liquidate the marriage. The view that Muslim husband enjoys an arbitrary, unilateral power to inflict divorce does not accord with Islamic injunction. However, Muslim Law, as applied in India has taken a course contrary to the spirit of what the prophet or the Holy Quran laid down, and the same misconceptions vitiates the law dealing with the wife's right to divorce.

It is said that the system of divorce among Muslims does not do justice to women. Those who criticize that man has monopoly in case of divorce are perhaps misinformed. Islam is based on natural justice. It always emphasizes that men and women are equal in many respect. Not only this, if we minutely observe or study the right of women in an Islamic society, we can easily conclude that in some spheres women enjoy more privileges than men. An in depth study on whole divorce law with its all forms reveals that Islam does not allow the husband or wife to use divorce as mockery and takes extra precaution for the welfare of wives[104]. But in the face of such provision of divorce and religion, if a person due to his misconduct and lack of knowledge does not act according to the tenets of Sharia, it is who is to be blamed and not the system itself. Justice Iyer must have had his eyes on these postulates, when he remarked "A deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce".

2.8 Distortion in Law relating to Divorce in MPL in India and Its Causes

No other aspects of Islamic matrimonial law have been as much distorted in this part of the world as its law on divorce. The reason for this distortion has been:

[102]AburbRahim, Mohammadan Jurisprudence,ed.1948,pg.333
[103] AIR 1971 Ker. 26.
[104]Furquan Ahmad, Understanding Islamic' Divorce in Indian Express (Augues1 , 1993).

(i) Judicial ignorance or irreverence.

(ii) The ill-educated maulvees of the mosques who misguided their followers by transmitting to them their own shamefully faulty understanding of a superb divorce law[105].

Following are the few decisions of Britirsh Indian Courts which are totally inconsistent with true Islamic law of divorce as per Justice Iyer's Observation given above:

(i) In ***AbmedKasimMolla v. KabtoonBibi*[106].** it was held that: Any Mohammedan may divorce his mere whim or caprice.

(ii) In ***Sarabai v. Rabiabai***[107] It was observed that an arbitrary divorce by a Muslim husband was good in law, though bad in theology.

(iii) In ***AsbaBibi v. KadirIbrabim*[108].** It was said: the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband.

However Sir Abdur Rahim, A brother judge added the following words: No doubt an arbitrary and unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran.[109]

(iv) The privy Council also in ***Rasbid Ahmed v. AnisaKhatoon*[110].** and in another case[111] took the same view. In the latter case it was held. According to that law (Muslim Law) a husband can effect a divorce whenever he desires.

To set a personal example the prophet never divorced any of his wives. Thus the law of divorce drawn from injunctions of Quran and the teachings of such a prophet can never be exported as a weapon for women with an arbitrary power of dissolving the marriage.

The schools of Muslim law which recognize the validity of divorce without intervention of Court have prescribed certain conditions imposed in the excise of the

[105]SEetahirMahmood, Personal laws in crisis ed. 1986pg.73-74,
[106]ILR 59 Cal. 533.
[107]ILR 20 Bom. 537.
[108]ILR 33 Mad. 22.
[109] Ibid
[110]36 CWN 305.
[111]ILR 5 Rangoon 18.

power by the husband. These conditions have been prescribed so that the interest of Muslim women should be protected as far as possible.

Intention is the necessary ingredient for the validity of a talaq. In the absence of intention a talaq cannot be held to be valid even thought it was pronounced in express terms. A divorce pronounced under mistaken belief is said to be valid divorce. Similarly a divorce pronounced under compulsion or jest or inadvertently or by mere slip of tongue is held valid by our courts.[112].

The Muslim law of India today needs judges like Balasubramaniam. J. of Maras High Court who a decade ago went straight to authentic treatise like Fath-al-Qadeer and SaheebBukhaaree to discover the true principles of Islamic law relating to minor children's right of mainteance[113].

2.9 Conclusion

Complete gender justice is complex to achieve typically in a country like India. The diversity of cultures, subcultures, is vast and there and there is a lot of rigidity in tradition and beliefs. Lack of education, Lack of development, Poverty, Improper enforcement of the laws, lack of awareness among women, deep rooted patriarchy, economic dependence of women, all lead to the subversive condition of women in our society. Gender hierarchies in Europe and USA are relatively more balanced than in India. Quite simply, most of their sex equality laws are mostly centered on employment and workplace. Not only that, their quality laws also explicitly include trans-genders and the rights have been extended to gay and lesbian communities which is unprecedented in India. Gender development in any sphere in any country is a key component of the development and overall welfare of any state. Various NGO's and government agencies, activists have been promoting gender right and vocal in their protest against discrimination. Even though, there has been progress in securing gender justice, there is still a lot to be done.

The true nature of Islamic law of divorce is that neither a husband nor a wife has an unbridled right to do away with an existing marriage unilaterally and

[112]Ibrahim Mollav.EnayturRahman 1869,Beng L R AC13 SC.
[113] Ibrahim Fatima v MohhammadSaleemA.I.R 1980,Mad 82

arbitrarily. But if either has a reasonably tenable ground to seek separation, there is no compulsion on him or her to remain united and in that case the alliance can be dissolved in a just and equitable manner. In this case Supreme court of India might have to consider the fallacy of old judicial opinion regarding true nature of the Islamic law of divorce. However we wish that instead of leaving this to the Supreme Court our ulama perform the important task of presenting Islamic law in its true perspective so long as they do not so act, the judiciary will have to step in.

The Muslim law applied in India may cause hardship and social inequalities and result into instability of family life. Some of its principles conflict with the mandate of constitution that, 'equality before law" and "equal protection of laws".[114] The personal law of Indian Muslims is lagging behind the progress made by the major part of the Muslim world outside India. For instance many wives found themselves triply divorced by husbands who had no desire to end the marriage relationship. The Legislative measures of Muslim countries with their approach may lead our country in order to solve the problem of 'triple talaq' with the help of enlightened Muslim jurists and scholars, like their counterpart in Muslim Countries, who have been the architects of modern personal law in their respective countries. The Muslim Women (Protection of Rights on Marriage) Act, 2019 is an Act of the Parliament of India criminalizing triple talaq and declaring instant triple talaq unconstitutional and void. Hope this will bring light in lives of thousands of Muslim women who are suffering from this inhumane practice since long ago.

[114]Article 14 Constitution of India

CHAPTER-III

GENDER JUSTICE IN MUSLIM PERSONAL LAW: INTERNATIONAL PERSPECTIVE

CHAPTER -III

GENDER JUSTICE IN MUSLIM PERSONAL LAW: INTERNATIONAL PERSPECTIVE

3.1 Introduction

The status of women in all countries across the world is same irrespective of the development and modernization of the countries. They face discriminations in name of gender and therefore considered as marginalized section of the society, particularly in Muslim countries. The custom and culture does not give voice to women easily. They have subservient status in society and in law too. In most Islamic countries women aren't allowed to travel either internationally or locally without the permission and accompany of a husband or male relative of the family. Veils (hijabs) are most of the time obligatory. Evening curfews for women are very common. "Moral policing" is a horribly common occurrence in which women are mistreated for not adhering to norms of the society. Prevalent gender segregation practices are still common in Islamic countries. Apart from the societal discrimination or struggle women face struggles within the legal system too. For example in Pakistan, the testimony of one man is equal to that of two women. Also women's evidence is not permissible in cases of adultery. Therefore it is very easy to convict a woman for adultery and it is common for a woman to be convicted for adultery in a rape case. Women have minority status and so are under the guardianship of their father or brother prior to marriage and after marriage they remain under the guardianship of their husband. Guardianship rights of men over women may take on a broader dimension and give all men a degree of control over women. Marriage practices in Muslim countries also marginalize and make her less significant as women in society. Women are allowed to have one husband though most of the Muslim countries permit men to have more than one wife. Husbands can physically beat their wives and so the legal system gives men the means to ensure a wife's obedience and assert his own control though women have no way to enforce their husband's obligations of support. A man can quickly divorce his wife out of court but if a woman seeks a divorce she must present a case with legitimate and legal grounds to a court.

The present chapter which is third chapter of the thesis deals with the condition and position of gender justice in Muslim Personal Law particularly at international level.

Here the word "Personal law[1]" means legal principles applied on the basis of religious adherence. These are the matters which believe to have a religious aspect of life like personal status, marriage, divorce, family relations, inheritance, gift, will, domestic obligations and endowments etc. While dealing with the state of women in Islamic countries in international perspective the researcher means "Islamic countries" or "Muslim states."Here Islamic countries mean those sovereign nations of the modern world which are ruled or otherwise dominated by the followers of Islam.

The contemporary Islamic world includes twenty two Arab and not less than eighteen non-Arab countries. Like the rest of the modern world in these countries also the process of codification and legislation has now been adopted as the means for the systemization, simplification and reform of the law. In most of these countries major branches of law civil and criminal, substantive and procedural are found in the form of codes, acts, enactments, ordinances, decrees and proclamations. The wind of codification and legal reform that begin blowing across the globe since the middle of the 19th century did reach also the Muslim world. In beginning the process of codification of the law kept confined to the branches of the legal system other than the personal law. Everywhere in the Muslim world people were extremely sensitive and for that reason the reformers abundantly careful in respect of personal law reforms.

All over the Muslim world Personal Law has been treated as a separate legal discipline different from other civil law, except in Turkey[2] where personal law has in the recent past been merged in to the countries imported civil code. The personal law has had a special place in the global Islamic society. This personal law is having around it and aroma of religious sanctity. In many parts of the world including the countries where the Muslims are in minority there has been popular concern for personal laws. This belief of sanctity of personal law is based on religious and divine

[1]In Islamic countries the term Muslim Personal Law is applicable to the laws of marriage, divorce, family relations, succession, will, gift, pre-emption and waqfs. Interchangeably this law is also described as "Islamic law", "Muslim law", "Sharia law" "Shari'at". All these expressions are in use also in the Muslim countries of South Asia and South East Asia.
[2]Turkey is the only considerably secular country in the Muslim world.

foundation of faith. Nevertheless in more than 22 Islamic countries personal law today is stand codified and reformed in part, if not in full.

While dealing and discussing the Muslim Personal Law in International perspective we need to know the developments and gradual reforms which took place in various Islamic countries and how these countries came in to present form of law. When we look in to development and reform in Muslim Personal Law in international perspective we found its development in three stages[3].

3.1.1 The First Phase of Personal Law Reform From 1911-1950

While tracing the personal law reforms in first phase we find that by the end of the first half of this century the Muslim world had the following legislations in force in the realm of personal law.

1. In Egypt, Iran and Sudan the locally enacted laws or judicial proclamations reforming or codifying particular aspect of personal law.
2. In Jordan, Lebanon, Palestine and Syria the Ottoman legislation of the imperial days that had been retained in force.
3. Turkey imported civil code incorporating new laws of family and succession
4. In Muslim territories of South East Asia administrative or regulatory laws enacted for time to time.

3.1.2 Second Phase of Reform 1951-1970

Second phase of reform was the end of Second World War and the global political development that brought into existence a large number of independent Islamic states in various parts of Asia and Africa. Pakistan was added by partition of Indian subcontinent in 1947. It was a major Islamic country. Most of the newly created or liberated states after breathing the air of nationalism, sovereignty and freedom, completely overhauled their legal and judicial systems. New national constitutions were promulgated. New civil code and law of citizenship crime and judicial procedure etc. were enacted in different countries one after another. As a part of this process of legal and jurisprudential nationalization codification and reform,

[3]Tahir Mahmood ,Personal Law in Islamic Countries{ History ,Text and Comparative Analysis} First edition 1987 , pub Academy of law and Religion,pg 4,5

new code or statues of personal law also came into force in some Muslim countriesof North Africa and West South East Asia.

The major legislations in area of personal law in forced in the Islamic world in this period may be summarized as follows:-

1. Jordan, Syria, Tunisia, Morocco and Iraq elected new comprehensive laws of family rights or personal statues.
2. Egypt and Tunisia abolished family waqfs and also scrapped their religious courts in 1955 and 1956.
3. Algeria briefly reformed its marriage law in 1959 and Sudan significantly modified its guardianship law in 1960.
4. Pakistan enlarged the scope of Islamic law and reformed some of its major aspect during 1961 to 1962.
5. Iran further formulated law on marriage and divorce in 1967
6. Indonesia extended the scope and jurisdiction of its pre 1950 regulatory laws.

3.1.3 Third Phase of Reform 1971-1986

In third phase of reform from 1971 to 1986 new personal laws were enacted and those in forced earlier extensively amended in number of Muslim countries. These sixteen years have in fact witnessed massive legislative activities in different parts of the world of Islam. While in many countries personal law has been further reformed in some of them there has been a movement towards restoration and protection of the traditional Sharia institutions. All this has completely changed the scene in the Islamic world in regard to personal law.

For better understanding of reform in Muslim Personal Law it would be better to understand how awareness and changes related to Human rights and its development at international level brought alertness in humans about their rights.

Beginning with the Universal Declaration of Human Rights in 1948 several humanistic conventions and covenants have been signed. In 1963 twenty-two developing and East European countries namely, Afghanistan, Algeria, Argentina, Austria, Cameroon, Chile, Columbia, Indonesia, Iran, Mongolia, Morocco, Pakistan, Philippines, Poland, Togo and Venezuela, put up a request to United Nation General

Assembly to draft a declaration on the Elimination of all Forms of Discrimination against Women. In 1970s a series of UN sponsored international conferences on women's rights, when the concept of women's right as human right emerged.

In 1981 the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) was adopted and this came into existence in 1985.

It is often seen that while some nations do not mind signing such UN conventions and resolutions but when it comes to co-ordinate national law in correspondence with UN conventions they drag their feet. These countries ratified it but with their limitations and reservations. However ratification with reservations is not limited to the Muslim majority countries alone.

In respect of women living under Muslim Personal Law across the world the international solidarity network of women living under Muslim Personal Laws (WLUML)[4] has been active since 1984 to make Muslim women aware of their rights. In 1986 WLUML drafted a plan of action highlighting the oppressive natural of Muslim law, which was mixture of canons drawn from the Quran and local practices. What worried the group the most was resurgence of Islamic fundamentalism in many parts of the world which was inherently anti women in nature[5].

The sections of Universal declaration of human rights of 1948 which are very important for protection and preservation of rights of individual male and female are as follows :-

1. Principle of non-discrimination
2. Equality before the law and equal protection of law
3. Protection of dignity and honor of individual
4. Social protection for life and dignity of human being

The ideas enshrined in the declaration were too desirable to be university implemented. Most of the third world countries which signed the declaration could

[4]WLUML i. e women living under Muslim Personal Law held its first exchange programme in 1988 in which the participants have to spend three months in a Muslim country other than their own. This was done with the objective of developing an international perspective on the status of Muslim Women across the world.

[5]Partha S. Ghosh, The Politics of Personal Law in South Asia, Routledge Taylor & Francis Group, 2007, pg no.41

not bring out corresponding social legislation in tune with those ideals because the reality of the political lives were quite at variance with them. The Muslim majority countries categorically distance them self from it, claiming that the basic Idea of the declaration was western or Christian which had very little relevance for Muslim societies or the societies which are dominated by Muslim population. Saudi Arabia did not sign the document. What particularly came in the way was the issue of gender equality, although some Muslim countries like Turkey during the period of Kemal Ataturk in the 1920 and Tunisia in 1950 had introduced for-reaching changes in the legal codes to ensure gender justice. The charter of Organization of Islamic Conference (OIC) which was found in 1973 presented the most expressed Muslim point of view on the matter. Though the preamble of the charter had reaffirmed the commitment of the members of the OIC to the United Nation and to the fundamental human rights the Cairo declaration of OIC[6] issued in 1990 underlined human right in Islam, which were at departure with international human rights. The increases in the Cairo declaration were on people's obligation and responsibilities and not on their rights. There was cosmetic reference to gender equality without clearly mentioning equality of right between the genders. Religious conversation was also to be discouraged which was in contravention of universal declaration of human rights. Freedom of speech and expression did not include the freedom to question Sharia Law. It was clearly laid down that Sharia is the only source of reference of the explanation or clarification of any of the various article of this declaration.

It is thus seen that whether it is Universal Declaration of Human Rights or the convention on Elimination of all forms of Discrimination against Woman, it is relatively easy to sign the document but not easy to bring out corresponding legislation to uphold the ideals enshrined in the documents.

3.2. Islamic Laws of Pakistan and Status of Gender Justice

Pakistan shared its legal history up to 14th august 1947 with India. At the time of its creation on that date it had inherited from the present state the following acts in the area of personal law.

1. Caste Disabilities Removal Act 1850

[6]Organisation of Islamic countries.

2. Divorce Act 1869 and Christian Marriage Act 1872
3. Guardians and Wards Act 1890
4. Musalman Waqf Validating Act 1913 to 1930
5. Musalman Waqf Act 1923
6. Child Marriage Restraint act 1929
7. Muslim Personal Law Sharyat Application Act 1937
8. Dissolution of Muslim Marriage Act 1939

Apart from the above mentioned law the interim constitution of the newly created state of Pakistan derived from the Government of India Act 1935 retained in force all the laws then operative in the territory until repealed or amended by the competent authorities of the Pakistan[7]. Between 1948 and 1952 new laws for the enforcement of Muslim Personal Law were enforced, on the lines of the NWFP[8] Shariat application act 1935, in the provinces of Punjab and Sindh and the princely states of Bhawalpur and Khairpur[9]. These local laws enlarged the scope of Muslim Personal Law in comparison with that allowed to it under 1937 Shariat Application Act of the British period.

The years following the independence and partition of Indian subcontinent witnessed for reaching changes in important areas of Muslim family law in Pakistan and Bangladesh. Here the superior courts boldly claimed and exercise the power of the "Ijtihad[10]" and openly asserted to rights which no court in other Muslim country had done. These rights are

1. Right to independent interpretation of the Quran.
2. Right to differ from the doctrines of traditionally authoritative legal text which are not based on any specific injunctions of Quran and Sunnat.

The superior court refused to follow the rules of interpretation of Muslim law as lay down by Privy Council on the ground that though the decision of the Privy

[7] C.W.Choudhary,Constitutional Developments in Pakistan ,Lahore 1969.
[8] North west frontier province.
[9] Punjab Muslim Personal Law(Shariat)Application Act 1948, Muslip Personal Law (Shariat) Application (Sindh Amendment)Act 1950, Bahawalpur State Shariat (Muslim Personal Law)Application Act 1951, Khhairpur State Muslim Females Inheritance (Removal of Customs)Act 1952.
[10]Ijtihad is an Islamic legal term referring to the independent reasoning or the thorough exercise of a juristic mental faculty in finding a solution to a legal question.

Council had the force of law in the subcontinent until 1947 but with the coming into being of Pakistan the situation has considerably changed. In first place the scope of Shariat law has been considerably enlarged by the Muslim Personal Law (Shariat) application act 1937, and in second place the constitution of 1956 and 1962 provided that Muslim citizen of Pakistan shall be enabled individually and collectively to regulate their lives in accordance with the injunctions of Quran and Sunnat and no personal laws shall be enacted which is repugnant to them and that all existing law shall be brought in conformity with them[11].

3.2.1 Muslim Family Laws Ordinance 1961]

In 1955 while the process of formulating a new Islamic Constitution of Pakistan was yet to be completed the government set up a commission charged with the work of serving the existing marriage and family laws with a view to recommending measures to ensure women their proper places in the society in accordance with the fundamentals of Islam. The seven member commission submitted its recommendations in July 1956. These recommendations remained the subject of countrywide debates many leading "ulama[12]" of the time expressing themselves against their acceptance[13].

The first constitution of Islamic republic of Pakistan promulgated in 1956 laid down that no law repugnant to the Islamic injunctions would be enacted in future and that the laws then in force would be reviewed and revised in order to be brought into conformity with those injunctions[14]. This constitution was abrogated in 1958 making room for its replacement by new constitution. While the 1956 the government of Pakistan promulgated the Muslim family laws ordinance 1961 which was based on some of the recommendations made in the report of the marriage commission referred above[15].

The Muslim Family Laws Ordinance short to secure compulsory registration of marriages, control polygamy and divorce, reform the principles relating to dower

[11]Mst. Khurshid Jan V. Fazal Dad, PLD 1964 (W.P.) Lahore 558 at 567
[12] A body of Muslim scholars who are recognized as having specialist knowledge of Islamic sacred law and theology.
[13]Among the leading opponents were the late Maulana Abu'l A 'la Maududi and Mufti Muhammad Shafi Deobandi.
[14] Constitution of Pakistan 1956, Art.198
[15]Ordinance 8 of 1961

and maintenance of wives and ensure inheritance right for orphaned grandchildren of deceased persons in their estate. It also amended child marriage restraint act 1929 and Dissolution of Muslim Marriage Act 1939, both in respect of age of marriage for female. The reforms introduced by the ordinance of 1961 were generally regarded by the ulma as an unnecessary interference with the Shariah.

3.2.2 Important Provisions of The Muslim Family Laws Ordinance 1961 which are Empowering Women

1- Mandatory Registration of Marriage

Registration of marriage has been made compulsory and it have been declared that every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance of 1961[16].

2- No Polygamy without Prior Permission in Writing of the Arbitration Council

The ordinance of 1961 tried to put a restriction on second marriage by making the provision of seeking written permission of Arbitration council mandatory prior to marriage. If any person performed second marriage without prior written permission of Arbitration council then such marriage will not be registered under this ordinance. The full procedure and competent authority have been provided in section 6 of the ordinance[17].

[16] (1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.
(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.
(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance be reported to him by the person who has solemnized such marriage.
(4). Whoever contravenes the provisions of such-section (3) shall be punishable with simple imprisonment for a term which may extent to three months, or with fine which may extend to one thousand rupees, or with both.
(5). The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of nikhanama shall be supplied to parties, and the fees to be charged thereof, shall be such as may be prescribed.
(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

[17] (1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

3- Written Notice of Talaq to Chairman of Arbitration Council

Section 7 of Muslim Family Laws Ordinance, 1961 deals with procedure of talaq. As per clause 1 of section seven a Muslim man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a written notice of his act of giving talaq to his wife, and shall supply a copy thereof to the wife. Sub clause 2 provides for punishment for contravening this provision. Sub clause 3 provides for period of limitation of 90 days from date of notice .This is the period for which talaq will not be effective. Clause four provides for attempt of reconciliation by Arbitration Council[18].

4- Delegation of Right to Talaq to Wife by Husband

In Muslim Personal Law there is a form of divorce known as delegated talaq. In this form of talaq husband delegated to his wife his right to give talaq to wife. This

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing
wife or wives has been obtained thereto.
(3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.
(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.
(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,
(a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and
(b) on conviction upon complaint be punishable with the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

[18] 7. Talaq.
(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.
(3) Save as provided in sub-section (5) Talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.
(4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

section provides that if husband has delegated his right to divorce to wife then all the provisions of section 7shall apply in case wife divorce to his husband.[19]

5- Wife's Right to Maintenance after Divorce

This section makes provision for Maintenance of wife and declares that wife has right to maintenance if husband fails to maintain her and if there are more wives than one then fails to maintain all of them equally. The wife or all the wives have right to get remedy in addition to seeking any other legal remedy available to them to apply to the Chairman of Arbitration Council who shall determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance to the wife or to the wives by the husband[20].

6- Fixation and Payment of Dower

Section 10 declares that where dower is fixed at the time of marriage of parities but mode of payment of dower is not fixed in marriage then the entire amount of the dower shall be presumed to be payable on demand. It means after marriage whenever wife will ask for dower it shall be duty of husband to pay the amount to wife then and there[21].

3.2.2 Shariat Application Act 1962

A new constitution was promulgated in Pakistan in 1962 once again mandating the state not to enact any law or repugnant to Islamic principles and more

[19] Dissolution of marriage otherwise than by talaq.
Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolves the marriage otherwise than by talaq the provisions of section shall, mutatis mutandis and so far as applicable, apply.
[20] Maintenance.
(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.
(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.
(3) Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue.
[21] Dower.
Where no details about the mode of payment of dower are specified in the nikahnama or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

or less repeating the Islamic provisions of earlier constitution[22]. During the same year came in force the new Shariat Act of the West Pakistan known as "The Muslim Personal Law(Shariat)Application Act 1962"[23]. It widened the scope of Shariat law on uniform basis for the whole of the West Pakistan and repealed all earlier legislation[24].During 1963-64 the above Shariat Act was amended in order to further enlarge the scope of Muslim Personal Law[25].All aspects of personal law were now onwards to be governed by shariat.

3.2.3 Law on Conversion, Family Courts and Dowry from 1963 to 1976 in Pakistan

In 1964 the Family Courts Act provided for the establishment of a network of family courts throughout Pakistan to decide cases involving matrimonial and family disputes. In order to curb disputes of matrimonial dowries the local legislature of Punjab and North West Frontier Province had enacted anti-dowry laws in 1967 and 1972 respectively[26].

Further the Dowry and Bridal Gifts (Restriction) Act 1976[27] was enacted and enforced in the whole country. The federal act was amended in 1980 in order to make its provisions more effective and stringent.

3.2.4 New Constitution and Influence of Islam on Laws from 1979 to 1987

In 1973 third Constitution of Pakistan was promulgated it declared that "all existing laws shall be brought in conformity with the injunctions of Quran and Sunnat and no law should be enacted which is repugnant to such injunctions".[28] After this in 1979 the government of Pakistan resolved to fully establishing the supremacy of Shariat in all branches of law. Soon after that Criminal Law was subjected to a massive change. After change it was developed in the line of Islamization. Penal code 1860 and Criminal Procedure code 1898 were changed to a great extent and this introduced Quranic Penal Lawson theft, fornication false accusation of unchastity and prohibition of alcohol. In 1980 Zakat and Ushr Ordinance was promulgated. This

[22]Constitution of Pakistan 1962, Articles 196-206
[23]West Pakistan Act 5 of 1962
[24]All Acts referred in note 8 supra and Shariat Act 1937 in its application to West Pakistan.
[25]Ordinance 39 of 1963 and Act 28 of 1964.
[26] Punjab Dowry (Prohibition on Display) Act 1967, NWFP Dowry Act 1972
[27]By Ordinance 36 of 1980.d
[28]Art 227 Constitution of Pakistan 1973?

process of Islamization continues until now. The Constitution has established a Fedral Shariat Court having the power to examine and decide if any law or provision is repugnant to Islamic injunction. The appeal against the Federal Shariat Court has to be heard by Shariat Appellate bench in Supreme Court.

Notable Provisions of Personal Law Enactments of Pakistan Regarding Gender Justice

- Compulsory registration of marriage[29].
- Requirement of prior consent of Arbitration Council for bigamous marriage[30].
- Three months-notice to be given to civil officials for enabling them to form an Arbitration Council for final decision on effectiveness of divorce[31].
- Settlement of family disputes by special family courts[32].

[29]Section 5 Muslim Family Law Ordinance 1961

[30] Section 6 Muslim Family Law Ordinance 1961 Polygamy.

(1) No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under Sub-section (1) shall be submitted to the Chairman in the prescribed manner together with the prescribed fee, and shall state reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under Sub-section (3), Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such condition if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall,

(a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with the simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

[31] Section 7 Muslim Family Law Ordinance 1961 7. Talaq.

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to thewife.

(2) Whoever, contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

(3) Save as provided in sub-section (5) talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under Sub-section (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

[32] Family Courts Act 1964

In case husband fails to maintain his wife adequately and if more than one wife then equally to all of them then wife may in addition to seeking any other legal remedy apply to chairman who shall constitute arbitration council to determine matter[33].

3.3 Gender Justice under Islamic Laws of Bangladesh

As Compared to Pakistan, Bangladesh appears to be in a happier position. Here the Ordinance does not face any serious threat, nor does the activist and liberal role of the Judiciary. The Ordinance remains in force in Bangladesh without any amendment or alternation. Though the Ulama continue to oppose it as un-Islamic and some of them have attempted to make it a political issue, none has so far challenged its legality in a court of law. True, the working of the Ordinance has not been able to fulfill the expectations of the educated women of Bangladesh, whether academic researchers and scholars of Muslim family law, human rights activists and NGO officers, social reformers and lawyers; yet, they continue to regard it as a symbol of their rights and defend it ardently against any hostile criticism. Bangladesh has demonstrated remarkable judicial maturity and activism regarding Muslim personal law. Since 1971, Bangladesh courts have accepted all the progressive interpretations and decisions of Pakistan courts given before the independence of Bangladesh in 1971. But it will be wrong to think that the Bangladesh courts have only blindly followed the decisions of the courts of Pakistan and made no independent contributions of their own to the modernization of Muslim personal law in the subcontinent. Researcher will analyze here a selection of case which will give a fairly good idea about judicial development and activism in Bangladesh in the field of family law.

[33]Section 9. Maintenance.
(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.
(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, to the Collector concerned and his decision shall be final and shall not be called in question in any Court.
(3) Any amount payable under Sub-section (1) or, (2) if, not paid in the due time, shall be recoverable as arrears of land revenue.

3.3.1 Marriage and Dower

The nature and essentials or formal requirements of Muslim marriage are well known, juristically, it is a contract and not a sacrament. Every Muslim of sound mind who has attained majority can enter into a contract of marriage. It does not depend for its validity on the observance of any ceremony. There are no special rituals, no ordained officials and no irksome formalities for it. Marriage being a contract, for its validity it is essential that there should be a proposal made by or on behalf of one of the parties and an acceptance of the proposal by or on behalf of the other in the presence and hearing of witnesses. The proposal and acceptance must both be expressed at one meeting.[34]Section 3 of the Muslim Marriages and Divorces (Registration) Act, 1974, which replaced section 5 of the Muslim Family Laws Ordinance, 1961, provides for compulsory registration of marriages. Questions often arise about the validity of marriage, either due to non-registration or other causes. In ***Dr A.L.M. Abdulla v. Rokeya Khatoon,***[35] a suit for restoration of conjugal rights and for permanent injunction restraining Rokeya Khatoon from marrying any other person, Dr Abdulla claimed that there was intimacy and love between them leading to their marriage in 1963 according to Muslim law, which Rokeya denied. The point for consideration was whether there was a valid marriage between the parties, and what the effect of non-registration of marriage was. The Court held that it must be established by clear, direct and specific evidence that Rokeya gave her consent to the marriage. As Dr Abdulla failed to establish it, there was no valid marriage.[36] Moreover, the alleged marriage did not conform to the provisions of Section 5 of the Muslim Family Laws Ordinance, 1961 which made it absolutely necessary that a marriage solemnized under Muslim law must be registered. In a clear and brief statement of law on the effects of non-registration of a marriage under the Ordinance, which has been frequently quoted by the courts of Pakistan and Bangladesh, Abdullah J. "The solemnization of marriage if validly affected might not be affected for non-registration of the marriage. But the non-registration of the marriage causes a doubt on the solemnization of the marriage itself.[37] As there was evidence of very close intimacy and cohabitation between the parties for a while, the Court was asked to

34. Mulla, Principles, 224.
35 DLR 1969,21, 213
36. Dr. A.L.M. Abdulla v. RokeyaKhatoon, 21 DLR (1969) 213 at 217.
35. Ibid

presume a valid marriage. The court held the marriage can be presumed from prolonged and continued cohabitation but this was not the case here. Accordingly, the Court held the there was no valid marriage.

Validity of marriage is also the theme of Anwar ***Hassain v. Momtaz Begum,***[38]**.** Here Momtaz Begum sued Anwar Hassain for prompt dower of Tk. 25,000 and maintenance at Tk. 500 a month Anwar Hassain denied any marriage between the two of them, there was no kabinnama or registration of marriage. The Court held the non-registration of marriage puts the party claiming marriage at some disadvantage and "at the same time strictly requires her to prove the factum of marriage. This is more so when the petitioner has denied the marriage." On the facts before the Court, it held that compliance with the requirements of a valid marriage has not been proved. Mere living together as testified by the witnesses does not bring the couple within the marriage bond. The Judge's observation on living together is reproduced here:

> "*Now-a-days the obnoxious alien culture of 'living together' has made its inroad into our society and this slowly is spreading its tentacles undermining our social values and the institution of marriage. This abnormal culture of 'living together' in essence means 'living together in adultery' by choice.*"[39]

The Court decided that a Momtaz Begum had failed to establish a valid marriage, she was not entitled to dower and maintenance. However, dower issues mainly arise in connection with restoration of conjugal right or divorce. In ***SalehaKhatun v. Saleh Ahmed,***[40] the wife's case was that in the marriage contract the husband delegated power to her to repudiate the marriage if he failed to pay prompt dower on demand. The husband failed to pay and she divorced herself and gave notice of the divorce to the local council in compliance with Section 8 of the Muslim Family Laws Ordinance. She prayed for a declaration that her marriage had been dissolved. The High Court held the divorce to be valid and said:-

Dower is the essential condition of Muslim marriage. To provide for the maintenance of the wife by the husband it is enjoined by the Muslim law, but to pay

[38] DLR 1999,444
[39] Anwar Hassain v. Momtaz Begum, 51 DLR (1999) 444.

[40] BLD, 2005, 324

prompt dower on demand is all the more enjoined by that law, the same being an essential condition of contract of marriage. There is no reason why the marriage cannot be lawfully repudiated by the wife in exercise of the delegated power in case of non-payment of prompt dower on demand. The exercise of such power by the wife on the husband's failure to pay the prompt dower does not appear to be against public policy or the principles of Muslim law.[41]

3.3.2 Polygamy

The Muslim law of polygamy in Bangladesh is relegated by Section 6 of the Muslim Family Laws Ordinance, 1961, which provides: "No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under the Muslim Marriages and Divorces (Registration) Act, 1974."The husband's application for such permission must state the reasons for the proposed marriage and whether the consent of the existing wife or wives to this marriage has been obtained. If the Arbitration Council is satisfied the proposed marriage is necessary and just, it may grant the permission requested for. In deciding whether the proposed marriage is necessary and just, the Arbitration Council may take into consideration such circumstances as sterility, physical infirmity and physical unfitness for conjugal relations, willful avoidance of a decree for restitution of conjugal rights of insanity on the part of an existing wife. For contracting a marriage without the previous permission of the Arbitration council, the husband shall be liable (a) to pay forthwith the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, and (b) to punishment with imprisonment or fine or both.

The vagueness of the provisions of the Ordinance raised a number of questions. What is, for instance, the legal effect of a marriage contracted in violation of section 6 of the Ordinance? In *Syed Ali Nawaz Gardezi v. Mumhammadyusuf*[42], which is also a precedent for Bangladesh courts, S.A. Rahman, J. held: "The Ordinance of course only penalize the person in respect of marriage, celebrated in contravention of the provisions of the Ordinance by making him liable to

[41] SalehaKhatun v. Saleh Ahmed, 25 BLD (HCD) (2005) 324 at 328.
[42] PLD ,1963, SC, 51,

imprisonment of fine or both but does not invalidate the marriage itself."[43] In ***Abdul Basher v. NurunNabi[44],*** one issue was whether the existing wife's consent was a prerequisite for contracting a second marriage. The Court held that the legislative intent of Section 6 was to restrict the practice of polygamy and to permit it only in cases where it appeared to be reasonable to the Arbitration Council. Section 6 provided for punishment of the husband for marrying without the previous written permission of the Arbitration Council but it did not contemplate any punishment for marrying without the consent of the existing wife. It may here be pointed out that, though failure to take the existing wife's consent does not make the second marriage invalid nor does it subject the husband to punishment with imprisonment of fine, her consent is still relevant in two ways firstly, it will make it easier for the husband to persuade the Arbitration Council that the proposed second marriage in necessary and just Secondly where the wife has withheld her consent and the husband has taken an additional wife in violation of section 6 of the Ordinance, she will have a right to seek dissolution of her marriage.

Can the second wife be convicted for abetting an offence under section 6 (5) (b) of the ordinance? The question was discussed at length in ***Makbul Ali v. Manwara Begum,[45]*** 181. Here the first wife, alleging that her husband, a wage-earner in London, came home, sent her to her father's house for recreationand in her absence took a second wife, filed a complaint both against her husband and the second wife under Section 6 (5) (b) of the Ordinance. The magistrate initiated proceedings against both. The second wife filled petitioned in the High Court for quashing the proceedings against her. The Court observed that the Ordinance did not prohibit polygamy altogether but allowed it with the previous permission of the Arbitration Council. Any man who contracted a second marriage without this permission was liable to criminal sanction. The Court held:-

Under sub-section (5) of Section 6 of the Ordinance criminal liability will thus be incurred by the husband being the "man" referred to in that sub-section and not by the woman whom he marries. The restrictions are put upon the man who wishes to contract another marriage with a woman during the continuance of the existing

43.The Arbitration Council consists of the Chairman of the local council, a representative of the husband and representative of the existing wife or wives

44 DLR 39 ,1987, 333

45 DLR ,39 ,1987,484

marriage, and nowhere the said Ordinance casts any such duty upon the woman who is married by a man already married either to apply for permission to marry or to suffer any imprisonment for the fault of her husband's taking her as a wife during continuance of her husband's existing marriage or marriages without permission nor she was obliged to undergo the punishment as in abettor.[46]

The High Court agreed to quash the proceeding against the second wife. This decision to exempt the second wife from any criminal liability has been welcomed.

The provision of the Muslim Family Laws Ordinance regarding polygamy is essentially a compromise between traditionalist and modernist views. The Ordinance does not prohibit polygamous marriages: it merely imposes some procedural restrictions on its unbridled exercise and punishment of the polygamous husband with imprisonment or fine for violation of the restrictions. So the scope for judicial discretion and activism is very much limited on the basic issue of prohibition of polygamy or desirability of its continuance on conditions. But a Division Bench of the High Court Division of the conditions. But a Division bench of the High court Division of the Supreme Court has challenged, arguing from an Islamic view point, the very concept of polygamy in sweeping and bold judgment in the case of *Jesmin Sultana v. Mohammad Elias*[47], Jesmin Sultana and Mohmand Elias were married in May 1992, and began to live separately since August 1992. In September 1993, the wife instituted a suit against the husband, claiming the stipulated prompt dower of Tk. 60,000 out of the total dower of Tk. 150,000 and also maintenance. The husband contested her claim of maintenance, alleging that she was living separately without any lawful cause. The trial court awarded the stipulated prompt dower and Tk. 500 as maintenance per month. On the husband's appeal, the lower appellate court reduced the prompt dower to Tk. 40,000. It was against this reduction of the dower money that the wife approached the High Court Division in 1995. The Court held that the lower appellate court had acted illegally in reducing the amount of the dower money. That should have been the end of the matter. But while disposing of the issue of dower, the Court noticed that in March 1996 the husband had applied under Section 6 of the Muslim Family Laws Ordinance, 1961 to the Union Council Chairman for permission to take a second wife on the plea that his existing wife Jesmin Sultana was sickly and

46.***Makbul Ali v. Manwara Begum***, 39 DLR (1987) 181 at 183
[47] BLD, 17, 1997,4.

incapable of performing her conjugal obligations. Though polygamy was not an issue in the case, the Court proceeded to examine the question whether Islam truly approved polygamy, and section 6 of the Ordinance was valid. The Court was of the opinion that "to be able to deal justly" between more than one wife, as ordained in the Polygamy Verse.17 of the Qur'an : IV:3, is a condition precedent to marry more than one wife. According to some commentators, the Court held, this expression implies equality in love and affection between the wives, and as such equality is impossible, the Verse virtually prohibits polygamous marriages. According to other, the expression only means equality in maintenance and lodging. Having regard to the hadith18 narrated in the Sahib Al-Bukhari, that the Prophet did not allow his son-in-law Ali to take a second wife because it would hurt his daughter Fatima- which the Court interprets as meaning the Ali "shall not be able to deal justly" with two women- the latter view cannot be accepted. Secondly, after the revelation of Verse19 XXXIII:52 in the seventh year of the Hijra, the Prophet did not marry again. Thirdly, polygamy is prohibited in Tunisia under its Law of Personal Status, 1957 on the ground that "to be able to deal justly" is a legally enforceable injunction and that, under the modern social and economic milieu, this condition is not capable of fulfillment. Therefore, the Court held, Section 6 of the Muslim Family Laws Ordinance, which instead of prohibiting polygamy allows it subject to the previous permission of an Arbitration Council, "is against the principle of Islamic law", and legislation should be enacted prohibiting polygamy altogether. The Court referred the judgment to the Ministry of Law for taking necessary action.

3.3.3 Restitution of Conjugal Rights

One branch of Muslim personal law, which appears frequently in Bangladesh, is the issue of restitution of conjugal rights. As in India, there are also differences of views among Bangladesh judges concerning the Constitutional validity and legal propriety of this law. According to some, it is reciprocal right: it is neither discriminatory nor repugnant to the fundamental rights guaranteed by the Constitution. It helps to protect family values, preserve the sanctity of marriage as an institution and prevent its break-up. According to others, it is inhuman and repressive, an engine of harassment of wives and a relic of a by-gone age. More importantly, it is inconsistent with the provisions relating to fundamental rights of citizens enshrined in

the Constitution: and it should be done away with. A Muslim Marriage is a civil contract, and in principle, a suit for restitution of conjugal rights is nothing more than an enforcement of the right to consortium under the contract. The court issues an order compelling the recalcitrant spouse to return to cohabitation with the complainant. But an analysis of case-law on the subject in Bangladesh shows that in most case it is the husband who seeks the remedy against his wife and he does it not out of genuine desire for restitution of his conjugal rights and reconciliation but to defeat the claim of the neglected, deserted or aggrieved wife to maintenance against her husband.

In ***HosneAra Begum v. RezaulKarim,***[48] being compelled by her husband's conduct to leave the matrimonial home with her children, the wife filed a petition in the Family Court claiming her prompt dower and maintenance for herself and the three children. As a counterblast, the husband brought a suit against her for restitution of conjugal rights. The Family Court found that the husband did not allow his wife to visit her parent's house, compelled her to do domestic work, which women of both the families were not used to, subjected her to physical and mental torture and did not make any attempt to bring her back.[49] The family Court granted maintenance to her and the children allowed her claim for payment of prompt dower and dismissed the husband's suit for restitution of conjugal rights. The lower appellate court disagreed with the findings and decision of the Family Court and sent the case back to it for retrial. On appeal, Kazi Ebadul Hoque, J. giving the judgment of the Division Bench of the High Court, severely criticized the lower appellate court for its archaic ideas on cruelty and restitution of conjugal rights:

The court of appeal below, it appears, was guided by the archaic concept of absolute dominion of the husband over the wife and children when the wife and children were treated as chattels under the Roman law and could be sold by the husband to pay his debt to the creditor and they even could be killed by him. Such absolute right of the husband is known as “patrea protest” under the Roman law. But the learned court of appeal below forgot that even under Muslim law several right have been recognized to the wife and she can refuse to subject to the conjugal dominion of the husband if he treats her with cruelty when it is of such a character as

[48] DLR 43,1991,543
49.***HosneAra Begum v. RezaulKarim***, 43, DLR (1991) 543.

to render it unsafe for the wife to return to her husband and her prompt dower is not paid on demand.[50]

The division Bench held that, in the context of the social realities and norms and the mode of living of the families of the husband and the wife, who were wealthy businessmen, compelling the wife to do domestic work constituted cruelty under Section 2 (viii) (a) of the Dissolution of Muslim Marriage Act, 1939, which defines cruelty as physical assault or making the life of the wife miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment. Physical and mental torture by the husband is not only an offence under the Cruelty to Women (Deterrent Punishment) Ordinance, 1983, punishable with imprisonment and fine, but also a valid ground for refusing restitution of conjugal rights to the husband and for allowing maintenance to the wife. This extension of the meaning of cruelty, under section 2 (viii) (a) of the Dissolution of Muslim Marriage Act, 1939, to include compelling the wife to do domestic work in well-to-do families and its application as a defense against a suit for restitution of conjugal rights has not escaped the notice of a keen observer of the very recent developments in Muslim Personal law of Bangladesh.

It will be very interesting to discuss here a few cases which hold that the law of restitution of conjugal rights violates the articles of the Constitution relating to fundamental rights of citizens. The husband instituted a suit for restitution of conjugal rights in ***Nelly Zaman v. Ghiasuddin Khan,[51]*.** At this the wife exercised her delegated power of divorce. Amending the plaint the husband sought a declaration that the divorce was illegal. The trial court declared this as illegal and ordered restitution of conjugal rights. S.M. Husain, J., held that the divorce was valid and the order for restitution of conjugal rights wrong. Before we discuss the ratio-decidendi of the case we should bear in mind that, though both the Muslim husband and wife are entitled to this remedy, in practice as we have noticed above, it is useless for a woman because the husband can always divorce her unilaterally Husain, J., finds the right to restitution of conjugal rights unacceptable for three reasons. First, by lapse of time and social development the very concept of forcible restitution of conjugal rights against a wife unwilling to live with her husband has become outmoded. Secondly,

50. HosneAra Begum v. RezaulKarim, 43, DLR (1991) at 546.
51 34 DLR 34, 1982,221

there is no mutuality and reciprocity between rights of the husband and the wife, since it "is not available to a wife as against her husband apart from claiming maintenance and alimony." Thirdly, it violates the fundamental rights-the judge used to expression "State and Public Principle and Policy"- Under Articles 27 (equality of all citizens before law), 28 (2) (equal rights of men and women in all spheres of the state and of public life) and 31 (rights to enjoy the protection of the law and to be treated in accordance with law, only in accordance with law). The Court forcefully asserts :- "A reference to Article 28 (2) of the Constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted State and Public Principle and Policy."

In ***Mst. NurAkhtar v. Md. Abdul MabudChowdhary,***[52] , the two lower courts had found that the wife was refusing to perform her marital obligations to the husband without any lawful cause and the husband was entitled to decree for restitution of conjugal rights. A Division Bench of the High Court reversed the decision. It pointed out that ordering and unwilling wife to live with her husband was criticized a hundred year ago as barbarous by Lord Herschel in the case of *Russell v. Russell, reported in.* The Court also cited a hadith of the Prophet to the effect that he did not decree restitution of conjugal rights to a husband because of the refusal of his wife to live with him.[53] In ***Khodeja Begum v. Md. SadeqSarkar[54],*** the Court held that where the wife refused to abide by decree for restitution of conjugal rights, her property may be attached. But in most cases she has no property and the decree against her becomes in fructuous. Therefore, restitution of conjugal rights is bad piece of law. Secondly, a suit for restitution of conjugal rights is always instituted to compel the unwilling wife to live with her husband and it is always repressive law. It is an inhuman act where a woman is considered as property. Thirdly, the Constitution is the supreme law of the land and if any other law is inconsistency, void. The Court held that the law of restitution of conjugal rights is a violation of the constitutional guarantees of life and

[52] BLD 16, 1996,396

53.This case has been treated by jurists as in instance of Khula divorce where the wife obtained divorce on restoration of the benefits received by her in consideration of the marriage.

[54] . DLR 50, 1998 ,181

liberty, freedom, equality, non-discrimination, and social justice as contained in the preamble and Articles 27, 28, 31, and 32 of the Constitution and is void.

3.3.4 Talaq under the Muslim Family Laws Ordinance1961 and the Tyranny of Fatwa

In Bangladesh, a husband's exercise of talaq is no longer unilateral, it is governed by Section 7 of the MFLO(Muslim Family law ordinance) which provides that a man who intends to divorce his wife must, after pronouncing talaq, give the Chairman of the Union Council notice in writing of his having done so. But the Ordinance does not say what would be the effect of his failure to notify the Chairman of the pronouncement of talaq. ***Ali Nawaz Gardezi v. Muhammad Yusuf,***[55]**,** which is the leading case on the point, decided that giving notice to the Chairman is mandatory and non-compliance with it amounts to revocation of the talaq which was pronounced by the husband, so that in the eyes of law the marriage between him and his wife subsists. The liberal and activist interpretation of law given in Gardezi's case is followed by Bangladesh courts. The first case reported on the subject in Bangladesh (then East Pakistan) is *Abdul Aziz v. ReziaKahtoon*[56], In this case the wife complained that she had been driven out of the matrimonial home by her husband and claimed maintenance under Section 488 of the Code of Criminal Procedure, 1898. The husband's defense was that he had divorced her and duly served notice of divorce on the Chairman and sent a copy to his wife, as required under Section 7 of the Muslim Family Laws Ordinance, 1961. As service of notice was not proved, the Court held that the alleged talaq, if it was pronounced by him, was not effective in law, so that in the eyes of the law the marriage between him and Rezia Khatoon subsisted and she was therefore, entitled to maintenance.[57]

This Case is also important for raising and answering another question regarding Section 7 of the Ordinance. Section 7 (4) makes it obligatory on the Chairman of the local council to constitute an Arbitration Council within thirty days of the receipt of notice of talaq and directs this Council to take all necessary steps to

[55] PLD 51,1963 ,SC

[56] DLR 21, 1,969, 733.

57. Strangely enough, the Court does not mention at all Ali Nawaz Gardezi v. Muhammad Yusuf which is the leading case on the effect of non-service of notice. Does it mean that the Court reached its decision independently of Gardezi's case?

bring about reconciliation between the parties. In ***Abdul Aziz v. Rezia Khatoon*** one of the arguments on behalf of the wife was that, unless an Arbitration Council was constituted and it failed to bring about reconciliation between the parties, a talaq could not be legally effective. The Court held that if the Chairman fails in his duty to constitute an Arbitration Council or the Arbitration Council fails to take necessary steps for reconciliation, the talaq, if otherwise valid, will be effective in law on the expiry of ninety days from the date of the receipt of notice of talaq by the Chairman.

Failure of the Chairman to constitute an Arbitration Council or that of a duly constituted Council to take necessary steps to bring about reconciliation is thus inconsequential. Once written notice of the pronouncement of a talaq in terms of sub-section (1) is delivered to the Chairman, the talaq, if otherwise valid, will be effective on the expiry of ninety days of the delivery of such notice. Thus, so far as talaqs are concerned the Arbitration Council has no function except to take steps to bring about reconciliation between the parties. Beyond this the Arbitration Council had nothing to do in this matter.[58]

In ***Safiqul Islam v. State,***[59] explaining the purpose and requirement of notice under Section 7 of the Ordinance, a Division Bench of the High Court maintains:-

Both under Muslim Personal Law and the Muslim Family Laws Ordinance no particular mode for pronouncement of divorce has been prescribed. A Muslim can pronounce a divorce either orally or in writing. However the Ordinance has made an inroad into this by providing machinery and a procedure for divorce to take effect after the lapse of a prescribed period. The object of section 7 is to prevent hasty dissolution of talaq pronounced by the husband unilaterally, without an attempt being made to bring about reconciliation between the parties. A divorce under the Ordinance is not a unilateral act of a person; rather it involves a public authority in the matter. It precludes a divorce or talaq from being effective for a period of ninety days from the date of the receipt of the notice by the Chairman. Consequently, it could be said that the marital status of the parties will not in any way change during that

58. Abdus Sobhan Sarkar v. Md. AbulGani, 25 DLR (1973) 227 at 229.
59 46 DLR 46, 1994, 700

period. The 90 days reconciliation period is to start from the date of receipt of the notice by the Chairman and not from the date when it was written.[60]

About the same time[61] another Division of the High Court disputed in ***Sirajul Islam v. Helana Begum[62],*** the legal assumption of the above decisions that notice of talaq is always essential and held that non-service of notice to the Chairman could not render ineffective a talaq, disclosed in an affidavit before a Magistrate and registered under the Muslim Marriages (Registration) Act, 1974.[63] In this case the parties married in 1983 and husband assaulted his wife and threw her and two minor children out of the house towards the end of 1987. On 11 April 1990 the husband swore an affidavit pronouncing talaq and sent a copy of the affidavit to the Nikah Registrar for registration of the talaq, but gave no notice to the Chairman and the, wife. In a suit filed by the wife on 3 June 1990 the Family Court allowed her claim for prompt dower and maintenance. The husband appealed to the lower appellate court and disclosed the matter of talaq by affidavit. The Court awarded his wife the entire dower, both prompt and deferred. On appeal, the husband's counsel contended before the High Court that, as no notice was served on the Chairman and the wife, the talaq was ineffective and the wife was not entitled to the deferred dower. The wife's counsel argued that swearing the affidavit by the husband and registration of the talaq showed that he definitely intended to sever the marriage tie with his wife and not to revoke it. Mere non-service of notice in such a case could not render the talaq ineffective and the decree for the entire dower was valid in law. On these facts and reasoning, the Division Bench held:

The intention of the legislature while enacting the said Ordinance 1961 was to prevent hasty dissolution of marriage and a duty is cast upon the husband to give notice under section 7 of the Ordinance. If he failed to do so intentionally the very object of the said section becomes redundant. In this case, the petitioner assaulted his wife, drove her out along with two minor daughters and did not care to maintain them. It further appears that the petitioner contested the suit but he remained silent as to the fact that he had already divorced his wife during the trial stage, when the decree was

60 . Safiqul Islam v. State, 46 DLR (1994) 700 at 701-02

61 . Safiqul Islam's case was decided on 15 August 1994 and Sirajul Islam's on 27 July 1994.

62 . DLR 48 ,1996, 48

63 . Section 6 of the Act provides that the Nikah Registrar my register a divorce effected under Muslim law within his jurisdiction on application being made to him for such registration.

passed against the petitioner then he disclosed about the divorce at the time of hearing of the appeal. It shows that he purposely avoided giving notice to the Chairman of Union Council under section 7 of the Ordinance 1961 and with an intention not to revoke it again. Be that as it may, we are however of opinion that mere non-service of notice upon the Chairman of the Union Council under section 7 of the Muslim Family Laws Ordinance cannot render the divorce ineffective if the conduct of the husband appears to be so.[64]

The Court cited the two High Court decisions of ***Chubar v. Mst. Ghulam Fatima***[65]**,** and ***Mrs. Parveen Chowdhury* v.*6th Senior Civil Judge, Karachi***[66]**,** from the Pakistan, jurisdiction and held that in view of the two decisions, the divorce given by the husband was valid and effective and the wife was entitled to the entire dower money.

Editor, The ***Banglabazar Patrika v. District Magistrate and Deputy Commissioner, Naogaon***[67] deals with the serious social problem of pronouncement of fatwa on divorce matters by people not properly qualified and having no legal, religious or moral authority to issue fatwas. Fatwas are specialist opinions of competent jurist consults on any legal or religious matter where die rules of law are not clear, or because the issue or situation is novel the existing rules do not provide an answer. The person who gives a fatwa is a mufti who must be of an unimpeachable character, have deep insight into Islamic theology, be well-versed in the original sources of law, and have mastery over the languages of the original works and competence to form an informed, independent judgment.[68]Fatwas are of an advisory and not a binding character. In Bangladesh fatwas were issued in the past on matters of divorce and inheritance. Now the rules of talaq and their effects are governed by Section 7 of the Muslim Family Laws Ordinance, 1961 which codified the Islamic law on the subject. Section 7 virtually makes the revocable ahsan form of talaq obligatory on any husband who intends to divorce his wife and unequivocally

64. Sirajul Islam v. Helana Begum, 48 DLR (1996) 48 at 51.
65 . PLD 1984 Lah, 234
66 . PLD 1976 Kar. 416
67 . Write petition No. 5897 of 2000, High Court Division of the Supreme Court of Bangladesh. Judgment of the Division Bench was delivered on 1.1.2001.
68 . SeeA.M. Serjuddin, "Family Law, Fatwa and Society in Bangladesh", in KaziShahidllah (ed.), Shabeed Intellectual Memorial Lecture, History Department, Dhaka University (Dhaka, 2004), 107.

abolishes the arbitrary and instantaneous talaq-i-bid'at or tripletalaq of the wife and allows remarriage between the couple after such a talaq without an intervening marriage with a third person, unless this is the third talaq pronouncement. A divorce now takes effect as irrevocable only if it has been given for the third time. Under traditional law a third divorce becomes effective as soon as it is pronounced and leaves no room for reconciliation between the spouses or for remarriage unless there is an intervening marriage of the wife with a third person. But, under Section 7 of the Ordinance a third divorce, too, will be effective only after ninety days have expired from the date of the receipt of notice of talaq by the Chairman of the Arbitration Council.[69] If there is any ambiguity in any statute, it is the court of law which alone has power, competence, and jurisdiction to decide the matter. The court can, of course, seek expert advice on the matter in arriving at its decision but is not bound by such advice. The Court's interpretation has removed whatever ambiguity had existed in the provisions of Section 7 of the Ordinance. In blatant disregard of this law a class of people have taken ituponthemselves (i) to issue fatwas declaring section 7 of the Ordinance as un-Islamic, and talaq-i-bid'at as dissolving a marriage irrevocably and hilah[70] marriages is absolutely necessary for legalizing remarriage with the first husband, (ii) to enforce these utterly unlawful acts, and (iii) to inflict corporal punishment for non-compliance with their directives. These fatwas[71]are mostly issued by semi-literate village maulvis, and the victims are almost invariably the poor and illiterate village folk. In the present case, the husband pronounced a talaqon his wife in anger and thereafter continued married life with her for about a year. Then one Haziazizul Islam issued a fatwa that the marriage had been dissolved and forced the

69. A.M. Serajuddin, Shari's Law and Society, 215-16

70 . When a wife has been divorced irrevocably, remarriage between the couple is only possible if the wife lawfully marries another husband and the second husband lawfully divorces her after the marriage has been consummated. This is known as halalah. But halalah is often misused as device to legalize remarriage of the "triply divorced wife" with her first husband without a bonafide intervening marriage. A man who divorces his wife irrevocably by uttering triple talaq often does so in a fit of anger or provocation and he often repents his hasty action. To wriggle out of this situation, with the blessings of the village mulla he arranges a marriage of convenience for his wife with a third person and a quick divorce and then remarries her. This device is know a hilah.

71. For the tyranny of fatwas in Bangladesh see Taj I. Hashmi, "Women as Victims of the Shalish: Fatwas, Mullas and the Village Community", in his book Women andislam in Bangladesh : Beyond Subjection and Tyranny (Basingstoke, Hampshire, 2000), 96-133: Ali Reaz, "The Tyranny of Salish and the Terror of Fatwa", in his book God Willing. The Politics of Islamism in Bangladesh (Lanham, MD, 2004), 74-88: and EloraShehabuddin, "Contesting the Illicit: Gender and the Politics of Fatwas in Bangladesh", in Therese Saliba, Carolyn Allen and Judith A. Howard (eds.), Gender, Politics, and Islam (Chicago and London, 200), 201-234.

wife to go through a bilah marriage.[72] Exercising suo-moto jurisdiction, a Division Bench of the High Court heard the case and found that talaq-i-bid'at is against the injunctions of the Qur'an and hadith as well as invalid in law under section 7 of the Muslim Family Laws Ordinance, 1961. The Court also cried an instance to show that the Prophet strongly disapproved of the capricious and irregular exercise of the power of divorce. The Court held that the fatwa was wrong; the marriage was not dissolved; and assuming that it was, there was no legal bar for remarriage of the couple without an intervening marriage. The Court further held that fatwa means legal opinion of a lawful person or authority. The legal system of Bangladesh empowers only the courts to decide on all legal questions. Therefore, fatwas including the instant one are unauthorized and illegal. The Court recommended that giving a fatwa by unauthorized persons be made a punishable offence by the Parliament.[73]

3.3.5 Maintenance of Wives

Under Muslim personal law, maintenance of the wife is an obligatory duty of the husband. If he neglects or refuses to maintain her without any lawful cause, she can sue him in a civil court claiming maintenance. But a serious defect of the Hanafi law is the unjust and inequitable rule that a court decree awarding maintenance to a wife is enforceable only from the date of the decree; she cannot claim it from the day the cause of action arose, unless there was a specific agreement between them. We have discussed the issue in detail while dealing with the situation in Pakistan. In Bangladesh until recently there were two conflicting High Court decisions on the neglected wife's right to past maintenance. In ***Rustom Ali v. JamilaKhatun,***[74] shortly after the birth of a son the husband assaulted his wife, drove her from the marital home and failed to provide her with any support. After waiting for ten years she applied to the Family Court for dissolution of her marriage and maintenance for herself and her minor son from the date of her expulsion from the conjugal home. The Family Court granted dissolution of marriage and past maintenance to her and the minor son and the Subordinate Judge upheld the decision. The husband challenged the

72. Two excellent collections of papers and opinions on fatwas against Bangladeshi women are Marie-Aimee Helie-Lucas and Harsh Kapoor (eds.), Fatwas Against Women in Bangladesh (Grabels: Women Living Under Muslim Law, 1996) and Faustina Pereira, "Dossier on fatwas in Bangladesh". Interventions : International Journal of Postcolonial Studies 4 : 2 (2002) : 212-244.
73. For an extended discussion on talaq-i-bid'at and fatwa see A.M. Serajuddin, "Family Law, Fatwa and Society in Bangladesh", 103-112.
74 DLR 43,1991, 301,.

decision granting past maintenance to the wife and minor son in the High Court. The husband's counsel relied on Section 278 of Mulla'sPrinciples which stated the law as follows: "Order for maintenance If the husband neglects or refuses to maintain this wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree, for, past maintenance unless the claim is based on a specific agreement."[75] He also cited the old case of ***Abdool FuttehMoulvie v. ZabunnessaKhatun[76],*** where the wife sued her husband for past maintenance and dower after dissolution of her marriage and a Division Bench of the High Court of Calcutta held:

"When a woman sues her husband for maintenance for time antecedent to any order of the Judge or mutual agreement of the parties, the judge is not to decree maintenance for the past." And the same rule is laid down in much the same terms in the Hedaya, Vol. I. Page 398, and quoted in the Tagore Law Lectures for 1873 p. 453. We think, therefore, that as in this case no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from the date of the decree.[77]

The wife's case was that since the term 'maintenance' has not been defined and has been left open in the Family Courts Ordinance, 1985 it must be deemed to include past maintenance as well. Agreeing with the decision in Abdool Futteh Moulvie's case, the Court held that the wife was not entitled to past maintenance. She could only be allowed maintenance from the date of the institution of the suit before the Family Court till three months of the decree of dissolution of the marriage. It is interesting to note that not a single decision of the High Courts and Supreme Court of Pakistan to the contrary in the last 25 years was cited in this case. Relying on the case of ***Mst. Ghulam Fatima v. Sheikh Muhammad Bashir,[78]*** the Court held that past maintenance was also not payable to the child.

The latest case on this subjectis*Kazi* ***RashidAkhterShahid v .Mst .Rokshana Chowdhury[79],*** where for no fault of the wife, the husband left her in her father's house

75Mulla, Principles, 236.
[76] . ILR 6, 1881 Cal. 631
77 . Quoted in Rustom Ali v. JamilaKhatun, 43 DLR (1991) 301 at 302.
[78] . PLD 1958 (W. P.) Lah. 596
[79] . BLD 26, HCD 2006,213

and refused to maintain her, and the Court held that it had jurisdiction to pass a decree for -pit maintenance in appropriate cases like the present one.

The traditional Hanafi law regarding past maintenance caused great financial hardship to neglected and deserted wives who in the overwhelming majority of cases, instead of going to court for maintenance, preferred to wait for reconciliation. Delay or reluctance in instituting legal proceedings for maintenance meant the certain forfeitureof the arrears of maintenance due to them from the date the cause of action arose to that of filing the suit. The progressive reinterpretation of the traditional Hanafi law by the courts has conferred on Hanafi wives a very important right which was unjustly denied to them by Hanafi jurists but always enjoyed by women of other Sunni schools. But, irrespective of school and sect, the destitute divorced wives are victims of the traditional law that following divorce maintenance is payable to the wife only for the duration of the iddat. This rule causes great hardship to women without jobs or other means of support. The Commission on Marriage and Family Laws, appointed by the Government of Pakistan in 1955 to suggest modification of existing laws "in order to give women their proper place in society", voiced their concern about the plight of divorced women thus: "that a large number of middle-aged women who are being divorced without rhyme and reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children. They proposed that courts should be vested with power to grant maintenance to the divorced wife for life or until her remarriage. The proposal did not make its way into the statute book of Pakistan or Bangladesh. As we have noticed, India solved the problem, of destitute divorced wives by enacting the Muslim Women (Protection of Rights on Divorce) Act1986 and by activist judicial interpretation of its provisions. While Pakistani legislators and judges have not so far shown any concern for these women, a valiant attempt was made by a Division Bench of the High Court Division of the Supreme Court of Bangladesh in *HefzurRahman v. ShdrrisunNahar Begum*,[80] to provide financial security to divorced women in impecunious circumstances by making the former husband liable for their maintenance until their remarriage. The facts of this important case are as follows. Three months after divorce the wife filed a suit in the Family Court claiming unpaid dower and maintenance for herself and a minor son at Tk. 1,000 per month for each.

[80]DLR 47,1995, 74,

The Family Court directed the husband to pay the wife Tk. 48,000 as the unpaid dower, Tk. 3,000 as her maintenance for three months' iddat period and Tk. 1,000 per month for the minor son's maintenance. On appeal by the husband the District Judge reduced the maintenance rate to Tk. 600 per month each for both the wife and the son. The husband petitioned the High Court for further reduction of the monthly rate of maintenance. The High Court found that the lower courts had not explained how the maintenance rate was fixed by them and considering the status and means of the husband, who was a typist in the Ministry of Finance, held that both the wife and the son were each entitled to Tk. 1,000 per month as maintenance and the District Judge had acted illegally in reducing the amount abruptly without giving any reason. After giving this decision, the Division Bench proceeded to take up suo-moto the legal query whether the divorced wife could have claimed maintenance beyond the period of iddat. In order to resolve the issue the Court felt that it would be necessary for it to assume jurisdiction to interpret the relevant Qur'anic verses. From the Verse: "And we have indeed made, the Quran easy to understand", which is repeated four times in Verses LIV: 17, 22, 32 and 40, the Court inferred that the "Quran prescribes rules of literal construction of its verses." "This rule", the Court said, "is a universal one. The first and elementary rule of construction is that it is to be assumed that the words and phrases have been used in a statute in their ordinary meaning and that every word in a statute is given a meaning." The Court observed that this rule of literal interpretation of the Qur'an is not accepted by a section of Muslims who insists on following the interpretation given by the recognized classical scholars. In *Aga Mahomed v. Koolsom Bee Bee* 1897 the Privy Council, instead of following the Quranic Verse II: 240 that a widow is entitled to a year's maintenance and residence out of her husband's estate adopted the contrary rule laid down in the **Hedaya Digest** and **Imamia** that she has no such right. The Court held that the rule of interpretation, as stated in this case a hundred years ago, that it would be wrong for the courts to put their own construction on the Quran in opposition to the express rulings of commentators of great antiquity and high authority could not be followed for three reasons. First the Privy Council judges were not Muslims and they were anxious to decide questions of Muslim law in accordance with the laws as propounded by the Muslim jurists rather than independently disregarding the Muslim jurists. Second Under the heading Fundamental Principles of State Policy Article 8 (IA) of the Constitution of Bangladesh provides that absolute trust and faith in the Almighty Allah shall be the

basis of all actions. "It indicates that Quranic injunctions shall have to be followed strictly and without any deviation." Finally the Quranic Verse II: 121[81] "directs continuous study of the Quran which is in conformity with the dynamic progressive and universal character of Islam." In support of this view the Court cited the following comments of Muhammad Shafi, J. in ***Mst. Rashida Begum v.Shahab Din,[82]*.** Reading and understanding the Quran is not the privilege or the right of one individual or two. It has been revealed in an easy and comprehensible language so that all Muslims can understand it and act upon it. The commentaries written by the classical scholars may be of valuable assistance in understanding the Quran but cannot be regarded as the last word on the subject. Reading and understanding the Qur'an also implies its interpretation and the interpretation must be in the light of the existing circumstances and the changing needs of the world. "If the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject," said Muhammad Shafi, J. "then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time.[83] On the grounds stated above, the Division Benchheld:

That a civil court has the jurisdiction to follow the law as in the Quran disregarding any other law on the subject, if contrary thereto even though laid down by the earlier jurists or commentators may be of great antiquity and high authority and though followed for a considerable period. Under the Hindu law clear proof of usage can outweigh the written text of law. But it is not in the case of Islamic law. For it is an article of faith of a Muslim that he should follow without questioning what has been revealed in Quran and disobedience thereof is a sin.[84]

Having thus established their jurisdiction to interpret the Quran, the Court proceeded to consider the literal meaning of the Quranic Verse II: 241 which was the Verse applicable to their query. Abdullah Yusuf Ali, the celebrated modern commentator of the Quran has translated it as: "For divorced women maintenance (should be provided) on a reasonable (scale). This is the duty on the righteous:" The Court accepted it as the correct translation of the Verse and said: "Considering all the

81.The Verse says : "Those to whom We have sent the Book study it as it should be studied: they are the ones that believe therein."

[82] PLD 1960 (WP.) Lah. 1142

83.Rashida Begum v. Shahab Din, PLD 1960 (W.P.) Lah. 1142 at 1153-54.

84.Hefzur Rahman v. Shamsun Nahar Begum, 47 DLR (1195) 54 at 56.

aspects we finally hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till the loses the status of a divorcee by remarrying another person." Accordingly, the Court decreed that Shamsun Nahar Begum would get maintenance at Tk. 1,000 per month from Hefzur Rahman until she remarried.

This is judicial activism, pure and simple and, very appropriately, the judgment has been hailed by scholars of Muslim law as courageous and enlightened, desirable and just, a major breakthrough in Islamic jurisprudence.[85] The leading British scholars of Muslim family law in South Asia have claimed that the decision confirms the recently established Indian law that there is actually no. real conflict between the Quranic foundations on the husband's obligations towards a divorced Wife& the modern welfare statutes obligating husbands to look after the future welfare of their divorced wives.[86]

3.4 Afghanistan

3.4.1 Laws on Marriage and Women's Rights in Afganistan

While trying to understand Afghanistan's legal system researcher has found that it has been shaped by its culture, multiethnic, broad-based and socially diverse population. It has and long history of its own. That system has historically based on two primary sources of law.1- customary tribal law and 2- Islamic law. Afghanistan is a highly segmented society, historically split along tribal and clan lines and more recently among rival political parties and armed fighting groups. Islamic law has long served the spiritual needs of Afghans for fourteen centuries and has historically been a unifying force and source of law for an otherwise disparate population. The current formal legal system aims to blend the customary and Islamic legal traditions within a constitutional order defined by civil codes and formal courts. Yet it struggles to establish a firm footing in administering and enforcing these laws, despite more than a

85.See Md. Mahiuddin Khalid and RidwanulHoque, "Right to Post-Divorce Maintenance in Muslim Law: The ShamsunNahar Revisited", The Chittagong University Journal of Law 4 (1999) : 10. This is a well-researched article on the two important decisions on post-divorce maintenance in Bangladesh-HefzurRahaman v. ShamsunNahar *Begum*, 47 DLR (1995) 54 and HefzurRahman v. ShamunNahar Begum, 4 MLR (AD) (1999) 41. For an interesting discourse on judicial activism and Muslim family law in Bangladesh see RidwanulHoque and Md. Morshed Mahmud Khan, "Judicial Activism and Islamic Family Law: A Socio-legal Evaluation of Recent Trends in Bangladesh", Islamic Law and Society 14 : 2 (2007) : 204-239.

86 . Pearl and Menski, Muslim Family Law, 205.

decade of effort. An overwhelming number of disputes in Afghanistan are still decided within the country's informal system of justice[87] [88]

A vast majority of the Muslims in the Republic of Afghanistan are Hanafi and, therefore, the Hanafi law has always been dominate in the Afghan territories. Until the end of World War I the country was under the British rule. During that period the British common law influenced the Afghan legal system which, however, still remained Islamic to a large extent. First Constitution of Afghanistan came in force in 1923 and the second in 1931, both recognized the supremacy of Islamic law. A large body of codified laws had came into existence. Most of these laws were derived from the parallel legislation promulgated in the Ottoman Empire, Egypt and Sudan. In 1930s a group of Afghan jurists had published an unofficial code titled Tamassuk-al-Qada (Judicial Compendium) and based on a selection of the Hanafi legal principles. The Fatawa-i 'Alamgiri[89] of India, which was always relied upon as an authority in Afghanistan, and the Turkish Civil Code of 1876 (Majullah)were used by them as their source-materials. Later, in the fifties of this century several new enactments were approved and enforced, including the Tijaratnamah of 1954 (commercial code), the Usullnamah of 1956 (labour code), the law on administration of Justice 1956 and the Law on Civil Procedure 1958.

[87].I borrow the definition of informal justice provided by Dr. Noah Coburn: "A series of mechanisms that are outside state control—though not necessary beyond its influence—and are used to resolve disputes and conflicts in a manner perceived to be legitimate by local communities." The UN definition encompasses the resolution of disputes by third party actors without recourse to formal state judiciaries and recourse to statutory law. See Noah Coburn, "Informal Justice and the International Community in Afghanistan," Peaceworks no. 84, U.S. Institute of Peace, Washington, DC, 2013, 11, available at www.usip.org/publications/informal-justice-and-theinternational-community-in-afghanistan (accessed February 11, 2015). See also Unicef, UN Women, and UN Development Programme, "Informal Justice Systems: Charting a Course for Human Rights Based Engagement," New York, 2012, available at www.undp.org/content/undp/en/home/librarypage/democratic-governance/ access_to_justiceandruleoflaw/informal-justice-systems/ (accessed February 11, 2015). Admittedly, no definition can be both very precise and sufficiently broad to encompass the range of systems and mechanisms that play a role in delivering rule of law and access to justice. As detailed below, informal justice venues vary considerably, encompassing many mechanisms of differing degrees and forms of formality. Degrees of formality vary with respect to legal or normative framework, state recognition, appointment and interaction, control and accountability mechanisms, and systems of monitoring and supervision, including the maintenance of case records and the implementation of referral procedures.

[88] .Special report, United State Institute of Peace,www.usip.org,20037 Washingoton D.C. By Hamid M. Khan

[89]. Al-Fatawa al-'Alamgiriyya or Al-Fatawa al-Hindiyya is a sharia based compilation on statecraft, general ethics, military strategy, economic policy, justice and punishment, that served as the law and principal regulating body of the Mughal Empire, during the reign of the Mughal emperor Muhammad Muhiuddin Aurangzeb Alamgir. Also called Fatawa-I Hindiyah, it was a code of Hanafi law prepared under the authority of Emperor Aurangzed (d.1707 *A.D.).*

3.4.2 Supremacy of Islamic Law in Constitution of Afganistan

Afghanistan attained a democratic political set up under its third Constitution promulgated in 1964. The new Constitution declared Islam as the "sacred religion of Afghanistan" and the Hanafi School of Islamic law the creed to be officially followed in religious matters.[90]It described the king [required to be Hanafi] as the "protector of the basic principles of the sacred religion of Islam".[91] The Chapter on Parliament (Shura) in the Constitution provided that it shall not enact any law "repugnant to the basic principles of the sacred religion of Islam"[92] and that the "Hanafi jurisprudence of the Shari'at of Islam" would be the law on any subject not provided for in the Constitution or a legislative enactment.[93]

In 1973 when the country became a Republic, the Republican Decree of that year did not change the constitutional status of Islam and its law.

3.4.3 Marriage Law 1971

The constitutional emphasis on the Hanafi school of Islamic law in Afghanistan did not block reform of personal law in the years that followed by the adoption and enforcement of non-Hanafi legal principles of the Shari'ah.

In 1350 A.H.(1971 A.D.) a Marriage Law “the Qanun-iIzdiwaj” came in force. It was based on the second Egyptian Law of Personal Status 1929 and also had some provisions similar to the Dissolution of Muslim Marriages Act enacted in 1939 in undivided India for the general enforcement of the Maliki law on women's right to judicial divorce. The brief provisions of this law read as an amendment of the locally prevailing practices relating to marriage and divorce.

3.4.3 Decree on Women's Rights 1978

In 1977 a new Constitution was adopted in Afghanistan. Next year in April following a coup de'tat it was repealed. Later a Revolutionary Council was set up enjoying wide legislative powers. Among the early legislative Decrees which the revolutionary Council promulgated there were:

90 . Constitution of Afghanistan 1964, art. 2.
91 . Arts. 7.8.
92 . Art. 54.
93 . Art. 69.

(i) The decree for the Prohibition of Riba(usury) dated 12 June 1978; and

(ii) The Decree on Women's Rights dated 17 October 1978.

The Women's Rights Decree of 1978 amended certain provisions of the earlier Marriage Law of 1971 and guaranteed better legal rights to Muslim women. Its provisions were reportedly drawn from similar laws enacted in some Arab countries and Iran.

3.4.4 Developments after 1980

The Story of Soviet military intervention in Afghanistan in December 1979 is well known. The "Fundamental Principles" adopted at the beginning of 1980 by the new regime declared the country to be a "sovereign and democratic state of all working Muslim people of Afghanistan"[94]adding that "the sacred religion of Islam is ensured respect and protection" and that "all Muslims are guaranteed full freedom to perform the religious rites of Islam", believers in all other faiths having similar freedom.[95] The "family, maternity and childhood" were placed by the Fundamental Principles under the "special protection of the state".[96] The "Programme of action" announced by the People's Democratic Party of Afghanistan at tis national conference in 1982 pointed to the possibility of modernization in all spheres of social life in the country.

3.4.5 Fallowing are the Notable Provisions under Various Enactments in Afghanistan

Notable provisions of the personal-law enactments in Afghanistan relate to the following:[97]

(i) Compulsory registration of marriages;

(ii) Family Court's prior permission for bigamy;

(iii) Judicial intervention for effecting a talaq or khul;

(iv) Availability of judicial divorce to the wife on a number of specified grounds;

(v) Divorced mother's right to custody of children; and

94 . Fundamental Principles of the Democratic Republic of Afghanistan 1980, art. 1.
95 . Art. 5.
96 . Art. 26.
97 . Source: "Further readings" listed in different enactments of this chapter related to laws in Afganistan.

(vi) Recognition of women's civil status on a footing of equality with men.

3.5 Iran and Position of Women in Its Family Laws

The historical development of laws related to women rights and family laws in Iran can be studied in two parts

1. Before 1975
2. After 1979

1. Before 1975

For long time in past Iran has been the accredited centre of the Shia Imamiyah branch of Islam. The uncodified Islamic law has been applied here in the past by the religious courts. The first constitution of Iran was promulgated in 1906. This has brought with it an era of massive legal reform and westernization of the law. After that A number of laws were enacted which included family law. In the 1930s, there were twelve laws of marriage, divorce, legitimacy, and custody of children that were included in the civil code of the country. These twelve laws were enacted and revised in the 1930s. Marriages and divorces had to be registered in state registries following passage of the Marriage Act of 1931 (Article 1041).[98]Despite a provision in Constitution of 1906 to the effect that the Islamic council of Iran could veto any unIslamic legislation The Penal Code was drawn on non-Islamic basis. During 1928-1935 The comprehensive Iranian Civil Code enacted in stages. This has reflected a combination of Islamic Law and French Civil jurisprudence. The law of Personal Status application regulation 1933 accorded statutory protection to the rights of the Sunni Muslims to be governed by their own schools of Islamic Law.

In 1962, Iranian law treated women as being in the same class as minors, criminals, and the insane: they could not vote nor stand for public office, were not allowed the guardianship of their own children, could not work nor marry without permission of their male "benefactors," could be divorced at any moment (with or without their prior knowledge, through the utterance of a simple sentence by the husband), and could be faced with the presence of a second, third, or fourth wife in

[98] . Article 1041 of THE CIVIL CODE OF THE ISLAMIC REPUBLIC OF IRAN - Marriage before the age, of majority is prohibited. Note -Marriage before puberty by the permission of the Guardian and on condition of taking into consideration the ward's interest is proper.

their home at any moment, with no legal, financial, or emotional recourse. They could not become guardians of their children even after the father's death. Women could not transfer their citizenship to their children; indeed their citizenship was in jeopardy if they married a non-Iranian. They inherited from a father's estate only half of what their brothers received and from a husband's estate only one-fourth when there were no children and one-eighth if there were children.[99] [100]

Marriage Laws and Position of Rights of Women 1931 -1938

In 1931 a new marriage law Qanun -e- Izdiwaz was enforced in Iran.[101] During 1937-1938nit was amended and supplemented with new provisions by two other laws.[102]In its concluding form it laid down fallowing rules.[103]

1. Registration of every marriage is compulsory and violation of this rule is punishable offence.
2. Child marriage would be an offence.
3. Stipulations in marriage contracts would be enforceable by the courts.
4. Concealment of earlier subsisting marriage would be an offence.
5. Husband's failure to provide maintenance to wife would be ground for divorce available to wife.

Family Protection Laws from 1967 to 1975

In 1967, two family protection bills were proposed. Majles[104] representatives, including Mehrangiz Dowlatshahi[105] presented the bill which would later become law[106]. Female Senator Manhouchehrian presented a more progressive bill which was signed by 15 senators. However, when some of the media presented an exaggerated

[99]Hinchcliffe, Doreen (1968). The Iranian Family Protection Act in International and Comparative Law Quarterly 17. pp. 516–521.
[100]Bagley, F.R.C. (1971). The Iranian Family Protection Law of 1967: A Milestone in the Advance of Women's Rights in Iran and Islam C.E. Bosworth (Ed.). Edinburgh: Edinburgh University Press. pp. 47–64
[101]Promulgated on 14 August 1931.
[102]Qanun –e- Izdiwaj (Amendment)Law of 19 May 1937 and law on production of Medical fitness for Marriage 1938.
[103]Thir Mahmood ,Family law reforms in the Muslim World, Delhi 1972, pp.159-160
[104].The Islamic Consultative assembly which is also called Iranian Parliament, the Iranian Majles is the national legislative body of the Iran.
[105] .She was an Iranian social activist and politician, who held significant position,including ambesdor if Iran to Denmark during the Pahlavi era.She also served as MP for three terms.
[106]. Oral History interview of Mehrangiz Dowlatshahi,Foundation of Iranian History

take on the progressive bill, Manhouchehrian had to leave Tehran until the publicity died down, and possible threats to her safety subsided. As a consequence, the family law articles on polygamy and child custody were not addressed until 1975. Nonetheless the Family Protection Law abolished extrajudicial divorce, greatly limited polygamy, and established special Family Courts for dealing with matters relating to the new personal status legislation[107].

The conservative clergy were vehemently opposed to the Family Protection Act and its goals. The Act removed a whole set of juridical issues in family interaction from clerical jurisdiction and handed it to family courts to decide. The clergy therefore lost much power and authority.

In June 1967 major reforms were introduced in matrimonial laws by the Qanun-i-Himayat Khaniwadah, Law on protection of Family. This law mainly contained fallowing rules.[108]

1. All the family disputes could be referred by the court for arbitration to the arbitrators.

2. For every valid divorce a certificate of irreconcilability by the competent court is a must.

3. Court will issue this irreconcilability certificate after exhausting all attempts to avoid a divorce.

4. Irreconcilability certificate could have been granted on the grounds of ,other parties imprisonment for five years, addiction with dangerous habits, bigamous marriage, desertion or conviction for an offence repugnant to the status of the family.

5. A married man who want to marry again could be given permission of the court subject to the fulfillment of Quranic conditions for bigamy.

In 1975 a new Law on Protection of Family replaced the old law of 1967[109].

[107].An-Na'im, Abdullahi A. (2002). Islamic family law in a changing world: a global resource book. Zed Books. ISBN 978-1-84277-093-1.
[108]Tahir Mahmood , Family law reforms in Muslim World, Delhi 1972 pp 160- 163.

2. After 1979

Post revolution developments

After 1979 Imam Khumaini's Islamic Revolution. The new regime declared Islam to be its creed, pledging that in future Islamic Law would be the only source of all legislation in the country. Affirming this decision the new Constitution of the Islamic Republic of Iran 1979 laid down as fallows.[110]

1. All civil, penal, financial, economic, administrative, cultural, military and political laws and regulations shall be based on Islamic precepts. This principle shall absolutely and universally control all the other provisions of the constitution as well as other rules and regulations to be made at the discretion of the fuqaha of the vigilance council.[111]

2. Recognizing that the family is the fundamental unit in an Islamic society all laws, regulations and administrative provisions must serve the purpose of facilitating the establishment of families and safeguarding the sacredness of the institution of family and strengthening family relations on the basis of Islamic law and ethics.[112]

3. The official religion of Iran is Islam of the Ithna Ashari school. This principal is unalterable in perpetuity. But the other school of Islamic Law Hanafi, Shafi, Maliki, Hanbali, and Zaidi are regarded with full respect and the followers off these enjoy complete freedom in performing the religious right according to their own jurisprudence and with respect to the religious instructions, personal status (including marriage ,divorce, inheritance and framing of wills),and their law relating thereto under these schools are considered to be official law in courts. In the regions where followers of any of these schools are in a majority, local laws will be enacted in accordance with the principles of the

[109]The Law on Protection of Family 1975 , Art-8-14.
[110]These below mentioned points have been translated by Tahir Mahmood from official Persian text in his book Family Law Reform in Muslim World , Delhi 1972 .
[111]Constitution of Islamic Republic of Iran 1979, Art.4
[112]Constitution of Islamic Republic of Iran 1979, Art.12

said school, the law in accordance with the principles of the followers of the other schools will be preserved.[113]

4. Irani Zoroastrians, Jews, and Christians are recognized minority religious groups and are free to perform their religious ceremonies .In personal matters and religious teachings they may act in conformity with the dictates of their own religious laws.[114]

5. The judicial authority shall be exercised by the courts which shall be established on the basis of Islamic precepts applicable to settlement of disputes protection of public rights, administration of justice and execution of Divine in junctions.[115]

6. The legislative assembly cannot pass laws in contravention of principles and precepts of constitution for the official religion of the country. The decision on this point shall lie with the vigilance council.[116]

7. All legislation passed by the assembly must be send to vigilance council for examination. The council in a maximum period of 10 days must ensure that the contents of the legislation do not contravene Islamic precepts and principle of the constitution. If there is any contravention they should return it to the assembly for re-examination if not, the legislation shall be enforceable. [117]

In 1982 the newly set up Supreme Judicial council issued a proclamation which specially directed that courts in country not to apply any un-Islamic legislation of the pre Islamic Revolution era.[118] The Islamic legal system as a whole is now being re-introduced in Iran. The uncodified Islamic personal law has now been restored both for Shia majority and Sunni minority

[113]Constitution of Islamic Republic of Iran 1979, Art.12
[114]Constitution of Islamic Republic of Iran 1979, Art.13
[115]Constitution of Islamic Republic of Iran 1979, Art.61
[116]Constitution of Islamic Republic of Iran 1979, Art.72
[117]Constitution of Islamic Republic of Iran 1979, Art.94
[118]Bakhshnamah dated 22 August 1982, Principle. 2

3.6 Gender Justice under Islamic Personal Law in Malaysia

Major parts of Malaysia are a strong centre of the Shafi School of Islamic law. In each constituent unit of the present-day Malaysia application and administration of Islamic law has since long been subject to regulation by the state. Muslims in Malaysia are governed by the Islamic Family Law system. For Muslims, family affairs are directly related to their way of life. This is due to its connection to areas like marriage and divorce, and matters arising there from such as maintenance, matrimonial property, custody and the relationship between children and parents. The Quran itself provides a detailed discussion. It is clear that this aspect of life is always given great importance. The matters pertaining to Islamic family law are practiced fully and executed in the daily life of the Muslim community in Malaysia since the 12th century when Islam was introduced to Malaysia. Early historical documents prove that Islamic family rules applied in Malacca. These laws are said to reflect the patterns and advancement experienced by the ancient Malay community. In these Laws there were 18 clauses that related specifically to Islamic family principles. These rules were adopted directly from the principles of the Shafie school of thought which was predominantly followed in spite of a number of mixed cultural influences. The influence of Islam on the lives of the Malay family is prominent. Even the presence of Western colonization was unable to separate family affairs in the Malay community from Islamic influences. Thus, rules pertaining to the Islamic family cannot be separated from the Malay community because the application of the laws was a personal matter that did not impact on colonial interests. There exists evidence showing that the British colonial authorities had codified several pieces of legislation related to family matters. During the British rule it took everywhere the form of a local legislative enactment dealing with the functions of the state in respect of the Islamic religion, establishment and processes of the Shariat courts to apply Islamic law and administrative regulation of Islamic socio-legal institutions like marriage, divorce and family obligations. This system continued until after the advent of freedom. Under the basic constitutional framework jointly adopted by the federating units in 1948 the placement of Islamic law and its administration in the jurisdiction of the states was given a formal recognition. Later the Malayan Federal Constitution of 1957 as well as the Malaysian Federal Constitution of 1963 while declaring Islam to

be the State religion retained the system without any change.[119] This legislation focused mostly on administration, and also on marriage and divorce registration. The situation of the Islamic community in Malaysia is constantly changing, and this posed challenges to the colonial-era family rules in addressing several problems occurring in the Malaysia's Islamic families. Thus, a detailed Islamic family law is needed. Finally, in the early 1980s, Malaysia introduced a special law pertaining to the Islamic family. It is more precise and detailed than its predecessors. These laws provide for the administration of marriages, the rights of a wife, protection for those who are victimized in the family Institution and the punishment for those who commit matrimonial offences. These laws were tilted toward women welfare and protection of their rights in family as well as society.

Islamic family law in Malaysia may be grouped according to the period in which they worked. The three periods are:

1. Pre-independence (which came to Malaysia in 1957);
2. Post-independence (the mid-1980s) and
3. From the mid-1980s to the present day

3.6.1 Administrative Legislation on Shariah from 1952 to1978

After 1951 new law on Sharia and its administration were enforced in eleven Muslim majority states of Malaysia with little difference in its name in different states like "Administration of Muslim Law Enactment"[120], " Administration of Islamic law Enactment"[121] or "Administration of the Law of the Religion of Islam Enactment"[122]. All these state laws of Malaysia included significant provisions related to Islamic family law aimed at enforcing that law meticulously and properly through the courts of kathis.[123]

119Federal Constitution of Malaya 1957, art. 2 and State list, sec. 1; Constitutions of Malaysia 1963, art.2 and State List, Sec.1

120 In state of Kedah, Mlacca,Negri Sembilan, Penang, Perak, Perlis and Selangor.

121Johore Law 14 of 1978, Trengganu Law 4 of 1955(amended in 1964).

122Pahang Law 5 of 1956 (amended in 1960 and 1963).

123 Tahir Mahmood, Family Law Reform in the Muslim World,Delhi 1972 pp 198-205.

3.6.2 Law Reform (Marriage and Divorce) Act 1976 and its Developments Till 1980

Before 1976 condition of women was not good polygamy and extra judicial divorce was very much prevalent in society. In 1976 the federal legislature of Malaysia enacted the Law Reform (Marriage and Divorce) Act. It altogether prohibited bigamy and extra-judicial divorce, besides introducing many other reforms in matrimonial law. While the Act as a whole was not to apply to the Muslims, one of its provisions said that if married person converted to Islam the non-Muslim spouse could seek a divorce on that ground under the Act.[124] This made the Act applicable, for a limited purpose, to convert Muslims. To settle the controversy that this aspect of the Act of 1976 raised an amendment was introduced in the Act in 1980 in order to confirm that despite its general inapplicability to the Muslims, following the conversion of a married person to Islam his or her pre-conversion marriage would remain subject to its divorce provisions for the purpose of enabling the court to dissolve it on the ground of conversion.[125] The Impact of the 1980 amendment was explained in 1984 by the High Court of Malaysia in the leading case of ***Letchumy v. R The Islamic Family Law Amadason.***[126]

3.6.3 Islamic Family Law [Federal Territory] Act 1984

During 1983-1985 there has been fresh legislation in Malaysia in the area of Islamic Personal Law. This is a bulky enactment containing 135 articles arranged into ten parts and a schedule. This Act has repealed the corresponding law under the enactment of 1952 in its application to the Fedral Territory. The Islamic Family Law (Federal Territory) Act 1984 is a bulky enactment containing 135 articles.

3.6.3 Notable Provisions of Malaysian Federal Territory Act of 1984 which are for the Protection of Rights of Females and Promoting Gender Justice are

(i) Raised age of marriage for males and females;[127]

(ii) Court's power to play the role of marriage-guardian in suitable cases;[128]

124 . Law Reform (marriage and Divorce) Act 1976, secs.3, 51.
125 . Sec. 3 (3), added by the Law Reform (marriage and Divorce) (Amendment) Act 1980.
126 . 1984 Mal LJ 143.
127 . Islamic Family Law (Federal Territory) Act 1984, sec.8.
128 . Sec.13.

(iii) Enforcement of the Shari'ah rule of halalah;[129]

(iv) Payment of expenses, etc. in case of breach of promise of marriage;[130]

(v) Requirement of Shari'ah court's prior permission for bigamy which can be given subject to specified conditions;[131]

(vi) Compulsory registration of marriages;[132]

(vii) Registration of delegated-divorce clause in marriage contracts;[133]

(viii) Punishment for forcing any person to marry or preventing him from getting married according to law;[134]

(ix) Requirement of court's order to confirm dissolution of marriage resulting from conversion;[135]

(x) Intervention of court to effect a single talaq and khul';[136]

(xi) Registration of revocation of divorce and punishment for restoration of marital-ties without such registration;[137]

(xii) Availability of judicial divorce at the instance of wife on a large number of specified grounds;[138]

(xiii) Provision for maintenance, accommodation and mut'ah in respect of divorced wife;[139]

(xiv) Provision for security and maintenance of children;[140]

(xv) Raised age of custody for male and female children;[141]

(xvi) Restrictions on the power of guardians of property;[142]

(xvii) Retention of the established Shafi'i law on the maximum period of gestation;[143]

(xviii) Punishment for desertion and ill-treatment of wife and for disobedience by wife;[144]

129 . Sec. 14 (2) (c)
130 . Sec. 15.
131 . Secs.23, 123.
132 . Sec. 25.
133. Secs.26, 50.
134. Sec. 37.
135. Sec. 46.
136 . Secs.47, 49, 124.
137 . Secs.51, 131.
138. Sec. 52.
139 . Secs. 55, 56, 71
140 . Sec. 25.
141 . Secs. 84, 86.
142 . Sec. 89.
143 . Sec. 110.
144 . Secs. 126-128.

(xix) punishment for pretended or bogus apostasy assumed for the sake of annulment of marriage;[145] and

(xx) Punishment for failure to comply with a maintenance order.[146]

3.7 Status of Women's Right under Laws of Brunei Darusslam

The sultanate of Brunei Darussalam shares its socio-legal culture with the neighboring Malaysia. Muslims in the Sultanate follow the Shafi'i school of Islamic law. Since 1988 it had been a "British-protected state" and, except for a brief spell of Japanese occupation in 1941-1945, remained so until recently. The legal and judicial system of the Sultanate was greatly influenced by the English common law during the days of British political domination. The Islamic personal law was, however, kept away from this process of westernization of law. The Shari'ah courts (locally called courts of kathis)have been traditionally administering the Shafi'i law in Brunei in all matters relating to marriage, divorce, family relations, succession and religious usages (including zakat fitrah, congregational Friday prayers, etc.). This system was never allowed to be disturbed by the British influence on the political and legal institutions in the Sultanate.[147]

3.7.1 Early Legislation 1898-1913

A Criminal Procedure Code (based on the British-Indian Criminal Procedure Code 1898) was enforced in Brunei by the British and it had a chapter on maintenance of wives children and parents.[148] The said chapter was, however, declared to be inapplicable of the Muslims by another local law. Attempts were periodically made in Brunei to Systematize and regulate the institutions of personal law by means of legislation of an administrative nature. In 1992 was enacted the Muhamadan Law Enactment, supplemented next year with the Muhamadan Marriage and Divorce Enactment 1913.[149] Taken together the two laws constituted the codified law Brunei for the regulation and administration of Islamic legal institutions.

145 . Sec. 130
146 . Sec. 132
[147]Tahir Mahmood, Personal Law in Islamic Countries [History Text and Comparative analysis] First edition 1987, Academy of Law and Religion new Delhi.
148 . Chapter XXXVII, having provisions similar to section 488 of the old Indian Criminal Procedure Code 1898.
149 . Cap. 21 and Cap.77 in the Revised Laws of Brunei 1951.

3.7.2 Law of 1955 and its subsequent amendments.

In 1955 the two laws of 1912 and 1913 were repealed and replaced with a new extensive law—"The Religious Council, State Customs and Kathis' Courts Enactment 1955". The new Brunei law of 1955 was later amended in 1956, 1957, 1960, 1961 and 1967.[150] The newly introduced provisions were generally borrowed from similar state enactments of Malaysia as amended from time to time.[151]

Under the provisions of the Enactment of 1955, as amended up to date, the Religious Council (Majlis) is the Supreme body of the state to aid and advice the sultan in all religious matters.[152] It has Legal Committee and a Judicial Committee the former to issue fatwas at the request of any individual or organization on any religious matter, and the latter to advise the civil courts on religious issues and hear appeals against the decisions of the religious courts if so directed by the Sultan.[153] The Council administers all was waqfs in the Sultanate [which from part of the general Endowment Fund maintained by it], collects zakat and fitrah and acts as the trustee of all mosques.[154]

All cases relating to personal law and religious offences are decided by the religious courts—the courts of chief kathi and kathis—whose powers, processes and procedures are enumerated at length in part III of the Enactment. [155] Substantive and procedural rules relating to various aspects of marriage divorce (in various forms) and maintenance of dependents, to be followed in these courts, are laid down in detail in the Enactment of 1955.[156]

3.7.3 Main provisions related to marriage, divorce maintenance etc. are given below

Damages for breach of promise of Marriage

Section 136 of the above mentioned act makes provision for breach of

150 . By Laws 21 of 1956, 4 of 1957, 1 of 1960, 12 of 1961 and 4 of 1967.
151. Tahir Mahmood, Personal Law in Islamic Countries [History Text and Comparative analysis] First edition 1987, Academy of Law and Religion new Delhi. Pg no 198
152 . Religious Council, State Customs and Kathis' Courts Enactment 1955, ss. 41-52.
153 . Secs.43-44, 49.
154 . Secs. 197-98; 114-120; 123-125.
155 . Secs. 45-96.
156 . Parts VI and VII.

marriage for both male and female and declares that if they enter in to marriage contract and subsequently breaks the contract then default shall be liable, if a male, to pay as damages the amount of the "mas-kahwin" which would have been payable together with other monies expended in good faith in preparation for the marriage, or if a female, to return the betrothal gifts.[157]

Consent in Marriage

A marriage shall be void and shall not be registered under the provisions of this Enactment unless both parties to the marriage have consented thereto.[158]

Divorce by Married Women

A married woman may apply to the kathi for a divorce in accordance with Muslim law.[159]

Divorce under Stipulation

A married woman may, if entitled in accordance with Muslim law to a divorce in pursuance of the terms of a suratta'alik made upon marriage, apply to a kathi to

[157]. Section 136. If any person shall, either orally or in writing, and either personally or through an intermediary, have entered into a contract of betrothal in accordance with Muslim law and subsequently refuse without lawful reason to marry the other party to such contract, such other party being willing to perform the same, the party in default shall be liable, if a male, to pay as damages the amount of the "mas-kahwin"which would have been payable together with other monies expended in good faith in preparation for the marriage, or if a female, to return the betrothal gifts. If any, or the value thereof and to pay as damages the amount of such other monies as aforesaid; and the same may be recovered by action in the court.

[158].Sec 139. A marriage shall be void and shall not be registered under the provisions of this Act unless both parties to the marriage have consented thereto, and either- (a) the wali of the bride has consented thereto in accordance with Muslim law; or (b) the Kadi having jurisdiction in the place where the bride resides or any person generally or specially authorised thereto by him has, after due enquiry in the presence of all parties concerned, granted his consent thereto as wali raja. Provided that sucjl consent may only be given wherever there is no wali available to act, or where the wali has refused his consent without sufficient reason.

[159]. Section 145. (1) A married woman may apply to a Kadi for in accordance with Muslim law. (2) In any such case the Kadi shall summon the husband before him and enquire whether he consents to be divorced, and if the husband so consents the Kadi shall on payment of the fees specified in the Third Schedule cause the husband to pronounce a divorce, register such divorce and issue certificates thereof to the parties to the marriage. (3) If the husband does not agree to be divorced by consent, but the parties agree to a divorce by redemption, or cherai tebus talak, the Kadi may assess the amount of payment to be made by the wife in accordance with the status and means of the parties and shall thereupon on payment of the fees specified in the Third Schedule cause the husband to pronounce a divorce by redemption and register and issue certificates of the same in manner aforesaid. (4) If the husband does not agree to divorce by redemption, the Kadi may appoint Hakam as provided in section 149.

declare that such divorce has taken place.[160]

Dissolution of Marriage

A married woman may apply by suit in the court of a kathi for a decree of dissolution of marriage, or faskh, in accordance with Muslim law.[161]

Gift to Divorced Wife

Woman who has been divorced by her husband may apply to a kathi for a consolatory gift or mut'ah and the kathi may after hearing the parties order payment of such sum as may be just and in accordance with Muslim law.[162]

Arbitration

It satisfied that there are constant quarrels between the parties to a marriage, a kathi may appoint in accordance with Muslim law two arbitrators, or hakims, to act for the husband and the wife respectively and in making such appointment the kathi shall, where possible. Give preference to close relatives of the parties having knowledge of the circumstances of the case.[163]

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[160]. Section 146. (1) A married woman may, if entitled in accordance with Muslim law to a divorce in pursuance of the terms of a sural taklik made upon marriage, apply to a Kadi to declare that such divorce has taken place. (2) The Kadi shall examine the instrument and make such inquiry as appears necessary into the validity of the divorce and shall, if satisfied that the same is valid in accordance with Muslim law, confirm the divorce, and upon payment of the fees specified in the Third Schedule, register and issue certificate of the same in the manner aforesaid.

[161]. Section 147. (1) A married woman may apply by suit in the Court of a Kadi for a decree of dissolution of marriage, or fasakh, in accordance with Muslim law. (2) In any such case the Court shall if possible serve the husband, or, if satisfied by evidence on oath or affirmation that the husband is not in Brunei or cannot be found, shall serve notice of the proceedings on the nearest male relative of the husband resident in Brunei, or, if no such person be known, shall cause notice to be posted on the husband's last known place of residence in Brunei. (3) No decree shall be pronounced save in accordance with the provisions of Muslim law and in pursuance of the evidence of the married woman and at least 2 witnesses given on oath or affirmation. (4) Upon pronouncing a decree of dissolution of marriage the Kadi shall register the same as a divorce and shall issue a certificate thereof in the form specified in the Third Schedule to the wife.

[162] .Section 148. A woman who has been divorced by her husband may apply to a Kadi for a consolatory gift, or mattaah, and the Kadi may after hearing the parties order payment of such sum as may be just and in accordance with Muslim law .

[163] Section 149. (1) If satisfied that there are constant quarrels between the parties to a marriage, a Kadi may appoint in accordance with Muslim law 2 arbitrators, or Hakam, to act for the husband and the wife respectively, and in making such appointment the Kadi shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case. (2) The Kadi may give directions to the Hakam as to the conduct of the arbitration and they shall conduct it in accordance with such directions and according to Muslim law. (3) If the arbitrators are unable to agree, or if the Kadi is

Maintenance according to Muslim Law

A married woman may be application in the court of kathi obtain an order against her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law.[164]

3.7.4 Other Salient Previsions which are Made for Welfare of Women are

For protection of rights of women in case of marriage and divorce etc fallowing main provisions were enacted in the Brunei personal-law enactment of 1955 the following provisions are Important.

(i) Payment of damages for breach of promise to marry.[165]

(ii) Qadis' power to play the role of marriage-guardian in suitable cases;[166]

(iii) Registration of marriage, Divorce and revocation of divorce;[167]

(iv) Enforcement of delegated divorce;[168]

(v) Payment of mut'ah to divorced wife'[169] and

(vi) Court's discretion to order maintenance even where the same is not otherwise payable.[170]

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not satisfied with their conduct of the arbitration, he may remove them and appoint other Hakam in their place. (4) The Hakam shall endeavour to obtain from their respective principals full authority, and may, if their authority extends so far, decree a divorce, and shall in such event report the same to the Kadi for registration. (5) If the Hakam are of opinion that the parties should be divorced but are unable for any reason to decree a divorce, the Kadi shall appoint other Hakam and shall confer on them authority to effect a divorce and shall, if they do so, register and issue certificates of the same in manner aforesaid.

[164] . Section158. (1) A married woman may by application in the Wives Court of a Kadi obtain an order against' her husband for the payment from time to time of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law. (2) A woman who has been divorced may by application in the Court of a Kadi obtain an order against her former husband for the payment in respect of the period of idah, if the divorce was by one or two talak, or in any case in respect of the period of her pregnancy by the former husband, of any such sums in respect of her maintenance as she may be entitled to in accordance with Muslim law. (3) A woman who has been divorced and who is not entitled to an Order for n1aintenance under subsection (2) may apply to the Court of the Chief Kadi and that Court may, if it is satisfied that it is just and proper so to do in view of all the circumstances of the case, make an order against the former husband for the payment by him of such sums for such period as the Court considers fit: Provided that no such order shall require the former husband to pay to his former wife any amount in excess of $1,500 per month.

165 . Section. 136.

166 . Section. 139

167 . Secs. 143-144

168 . Sec. 146.

169 . Sec. 148.

170 . Sec. 158

3.8 Gender Justice under Islamic Law of Indonesia

Indonesia officially called as The Republic of Indonesia. This country is situated in South East Asia and Oceania between the Indian and Pacific oceans. It consists of over seventeen thousand islands, including Sumatra, Java, Sulawesi, and parts of Borneo and New Guinea. Indonesia is the world's largest island country. This is the 14th-largest country by land area. Islam is the largest religion in Indonesia which is consists of 86.7% of Muslim population identifying themselves as Muslim .[171] The population of Indonesia has the largest numbers of Muslims in the world. This population consist of 99% Sunni and 1% Shia Muslims. Indonesia is governed by mixture of Islamic Law and Local customary law (adat).

Under the foreign rule of duch and Japanese, family relations and succession among the Muslims were regulated by the adat law .This was the law which was modified as per Shariah law to the extent it was received in Indonesia. In administration and application this law was used since 18882 by the royal decree on religious courts. The imported Civil Code of 1847 contained a chapter on family law and succession, but it was applicable to the Europeans and foreign orientals, (like Chinese) the native mostly the Muslims were not to be governed by it . The civil code was supplemented with laws on registration of Marriages enacted for European in 1849 and for the Chinese in 1971.[172]In 1929 Muslim marriage Ordinance came in force. Its provisions were related to marriage and divorce. After this the Muslim organizations and scholars began a movement for the enactment of Islamic Personal law in effect. In1945 A National Constitution was promulgated in Indonesia. It declared that the state shall be based upon belief in "One Supreme God".[173] This placed allegiance to Islam's basic dogma of oneness of God. It however guaranteed freedom to every resident to adhere to his respective religion and to perform its basic religious duties in conformity with that religion or faith.[174]

[171]. 2018 survey
[172]Law 25 of 1849, Law 130 of 1917.
[173].Art 29(1) Constitution of Indonasia 1945.
[174]Art.29(2) Constitution of Indonasia 1945.

3.8.1 Legislations which are Protecting Rights of Women and Promoting Gender Justice

In Indonesia, The Muslim Marriage and Divorce Registration law was enacted in 1946.[175] There was a provision of compulsory and official registration of marriage and divorce among the Muslims and they set up machinery for that purpose. In accordance with the Indonesian system of delegated legislation the Muslim marriage and divorce regulation was issued in 1947 by the ministry of religious affairs under law of 1946. Under this regulation child marriages and bigamy were to be discouraged by the registry registrar of marriage and efforts were to be made by them to effect reconciliation before registering a divorce.[176]In 1950 the Indonesian government set up a committee to draft a new comprehensive and uniform marriage bill for all Indonesian citizens. In 1952 the committee submitted a draft. It was rejected in response to the popular Muslim demand. The government asked for another bill that would retain the distinctive principles of Islamic law. During the pendency of reform of marriage law in 1954 the afore stated Marriage and Divorce Registration Law of 1946 was extended to whole of Indonesia. Following this development in 1955 the ministry of religious affairs issued a new regulation The Muslim Marriage Divorce and Reconciliation Regulation 1955 providing rules relating to the registration of talaq and revocation of talaq etc.[177]

During 1967- 68 two new marriage bills were discussed in Indonesian Parliament. One of these contained some basic principles of matrimonial law to be applied to all the Indonesian citizens. The other bill sought to codify the marriage law for Muslims. Several years of debate on these bills could not lead them to formal enactment. Provisions in the letter bill conflicting with the established Islamic law particularly those legalizing adoption were not acceptable to the Muslims. In July 1972 a fresh marriage bill was introduced in Indonesian Parliament. After 18 months of debate it was enacted on the second day of January 1974 under the title "The Law on Marriage".[178] The preamble of the new laws said that it was enacted in accordance with the philosophy of Panchsila and aspirations to promote a national law. It contains 67 articles arranged into 14 chapters.

[175]Law 22 of 1946
[176]Tahir Mahmood ,Family law reform in Muslim World, New Delhi 1972,pg no.196
[177]Supra note 169 pg 196-197
[178] .Law I of 1974.

Legislation on the marriage law of 1974 was followed by an implementing regulations promulgated in 1975.[179]It contained 49 articles arranged into 10 chapters. The provisions of this regulation were in fact more important than those of the main law. The Marriage Law of 1974 along with its implementing regulation came in force on the 1st October 1975.

3.8.2 Salient Feature of New Indonesian Marriage Law of 1974 -1975

1. Marriage should be in conformity of religion and belief of parties.[180]
2. For Court's prior permission in bigamous marriage was a condition precedent and it should be given only on specified grounds and subject to certain conditions.[181]
3. There was a provision for requirement of gardens consent for the marriage of persons under 12 years of age.[182]
4. Family members were given power to secure prevention of an intended unlawful marriage and annulment of such marriage.[183]
5. In maintaining matrimonial home and children equal rights and liabilities were given to the parties.[184]
6. Joint ownership was given to the parties of property acquired during marriage.[185]
7. Intervention of the courts in all cases was a condition precedent.[186]
8. In this act rules of enforcement of iddat were also provided .[187]
9. There were provisions for giving jurisdiction to Sharia court in all cases involving Muslims.[188]

[179]Regulation 9 of 1975
[180]Art .2 0f Law o Marriage 1974.
[181]Art 3 and 4 of Law on Marriage with art 40-44 of regulation 1975.
[182] Art 6 and 7 of law on Marriage with Art 11(2) of Implementing regulation 1975
[183] Art 13,14,22 and 23 of Law on Marriage
[184] Art 30-31 and 45
[185]Art 35-37
[186]Art.38 and Implementing Regulation 1975 Art 14-19
[187]Art 39 of Implementing Regulation 1975
[188]Art 65 of Law on Marriage 1974 and Art 1 of Implementing Regulation 1975.

3.9 Somalia and Its Law

The Somali Muslims have generally been following the Shafi school of Islamic law in the matters of personal status and family relations. At the same time the ancient African customary law has had a strong hold in the Somali society; it could often oust the application of Islamic law, especially in matters of inheritance. The British and the Italians during their dominance in the country had westernized its legal system without-as has been the usual practice of the colonial powers-directly touching the Muslim religious and personal laws. The British, however, treated the so-called Somaliland as if the Protectorate were the Presidency of Bombay[189],they imported into the territory a number of British-Indian enactments-including the Succession Act 1865, the Majority Act 1875 and the Civil Procedure Code 1908.[190] In 1928 they promulgated Native's Betrothal and Marriage Ordinance and in 1937 the Qadis' Courts Ordinance.

After a long spell of Anglo-Italian colonial rule Somalia appeared on the world map as an independent nation in July 1960. During the first decade following the advent of independence status quo was maintained in respect of the legal system after the socialist Revolution of 1969 the ruling party in Somalia leaned towards communism and its policy of restricting the sphere of religion and religious laws. Under the Ideological influence of the communist world the new government embarked upon a massive programme of law reform.

3.9.1 Family Code 1975

Debate on the need for reforming family law in accordance with the socialist policies newly adopted by the state began in 1972. An officially appointed commission then gradually prepared the draft of a new family law. With some significant changes made by the ruling socialist party this draft was enacted in 1975 under the title the Family Code of Somalia.[191]

It came in force on 11 January 1975. The Decree that promulgated the Code said that it was being enacted in accordance with the "First and Second Charters of

189 . The British Principal Order in Council 1929 for Somaliland art. 16.
190 . See chapters 15 and 20 supra.
191 . Law 23 of 1975.

Revolution" considering that its enactment was necessary "in order to create a healthy society". One of the main purposes of the new law was to abolish the archaic customary law which was regarded a repugnant to the policies of the new state. The Family Code of 1975 contained 173 articles.

In its chapters on marriage, divorce and filiation the Somali Code had a lot in common with the Syrian Code of Personal Status 1953 as amended in 1975, while in respect of intestate succession it had no parallel provision anywhere in the Muslim world except Turkey.[192]

3.9.3 Salient Features of Family Code 1975 Regarding Gender Justice in matters of Marriage and Divorce

1. If a Person promises marriage to another he is not bound to fulfill the promise. However, one who does not wish to fulfill a promise to marry must convey this clearly to the other party.
2. Marriage is a contract between a man and a woman who will have equal rights and duties. It is to be based on mutual understanding and reciprocal respect between the parties; its purpose being creation of family which is the corer-stone of the society. The husband is under law the head of the family.
3. No man shall marry a second woman unless he is formally allowed to do so by the district court having jurisdiction. The court shall not allow such a marriage except on any of the following grounds:–
   - **(i)** Sterility of the first wife certified by a panel of doctors, provided that the husband was not aware of it before the marriage;
   - **(ii)** Affliction of wife with chronic or contagious disease certified by a doctor if it is incurable;
   - **(iii)** Imprisonment of the wife for more than two years;
   - **(iv)** Absence of the wife from the matrimonial home for more than one year without a lawful reason;
   - **(v)** Any social necessity in which case permission is to be granted by an official authorized by the ministry of Justice and Religious Affairs.
4. It is unlawful for a man to remarry the woman he has divorced by three talaqs unless her 'iddat has elapsed after a valid and willful marriage with another

192 . See Chapters 10 and 22.

man duly consummated. Any person who violates these provisions shall be punished with imprisonment up to six month and fine.

5. A person can freely marry on completing the age of eighteen years. A girl of sixteen but below eighteen years of age can marry with her guardian's consent. If necessary the court can relax the condition of age for both parties.

6. The bride shall be entitled to dower as determined at the time of marriage. The upper limit for dower is SO sh. 1000 of value in kind.

7. The husband can divorce his wife after he is duly permitted by the court to do so. The court shall first appoint an arbitration committee and allow a divorce only if such a committee fails to effect reconciliation. But it shall not permit more than one talaq at a time.

8. (I) Either party to a marriage can file a petition for dissolution of marriage on any of the following grounds:

(i) That the other party is suffering from an incurable disease which makes cohabitation impossible or injurious, provided that the fact is proved by medical evidence;

(ii) That the whereabouts of the other party are not known for at least four years [if the missing party returns before the divorce is granted the petition will be before the divorce is granted the petition will be dismissed];

(iii) That the other party though able to provide maintenance persists in refusing it while the petitioner is indigent;

(iv) That both parties are indigent and neither can meet the cost of married life [the case is to be decided after six months form the date of the petition];

(v) That there is a serious discord between the spouses and a happy conjugal life is impossible [divorce is to be granted if an arbitration committee appointed by the court fails in its job];

(vi) That the other party in suffering from incurable impotency or sterility;

(vii) That the other party has been sentenced to imprisonment for a period exceeding four years.

(II) A wife may seek dissolution of marriage also on the ground that her husband has been permitted, under article13, to contract another marriage, provided that no children were born of the marriage sought to be dissolved.

9. In conformity with the principles of the First and the Second Charters of the Revolution men and women shall have equal right of inheritance.

10. Heirs entitled to inheritance will be surviving spouse, children and grand-children of either sex, father, grandfather, mother, grandmother and brothers and sisters by full, half and uterine blood.

Few other important provisions providing equal rights to women and promoting gender justice in society are as fallows

(i) Requirement of court's prior consent for bigamy which can be given only on a few specified grounds;[193]

(ii) Curtailment of marriage-guradian's powers;[194]

(iii) Ceiling on dower amount;[195]

(iv) Equal contribution by the parties to expenses of marriage and matrimonial home and the division of house hold goods between them on divorce;[196]

(v) Requirement of prior judicial authorization for talaq;[197]

(vi) Availability of judicial divorce on many specified grounds at the instance of either party;[198]

(vii) Fixation of 'iddah for non-pregnant divorced women at 90 days;[199]

(viii) Fixation of one year as the maximum period of gestation;[200]

(ix) Long duration of custody of children;[201]

(x) Permission for adoption of children of known or unknown parentage;[202]

(xi) Enforcement of the rules of "bequeathable third" and "no will for heirs";[203]

(xii) Equal rights of men and women under the rules of inheritance;[204] and

193 . Family Code 195, art. 13
194 . Arts. 16-17.
195 . Art. 24 (3)
196 . Arts.28-29, 31.
197 . Art. 36.
198 . Art. 43
199 . Art. 50.
200 . Art. 53.
201 . Art. 69.
202 . Art. 110.
203 . Arts.125, 141.

(xiii) Drastic curtailment of the list of heirs and application of new rules for the division of estate of deceased persons.[205]

3.10 Turkey and Its Pro-Women Laws

During the day of glory of the Ottoman Empire Turkey, the seat of the Empire, kept its legal and judicial systems in conformity with the Shari'ah-particularly the jurisprudence of the Hanafi School-which the courts were directed to apply in the decision of cases.[206] Later, in the nineteenth century custodians of the imperial power felt the stress of the changed social circumstances for the systematization and codification of legal and judicial systems of the empire. In 1839 an imperial Decree-Hatt-i-Sharif-laid down the foundation for modern legislative regime. New Commercial and Penal Codes-both derived partly from non-Hanafi Islamic laws and partly from the French law-were enacted by the imperial legislature in 1850 and 1858 respectively. The system of courts was secularized and non-religious (nizamiyah) courts were set up to administer various branches of the law. Codification on the modern pattern brought with it the wave of legal modernism and westernization. In 1876 was enacted in the Empire a new civil code called the Majallah al-ahkamal'Adliyah. This was the first modern civil code ever to have been enacted in the world of Islam. Based partly on provisions derived from various schools of the Shari'ah and partly on western legal materials, this code did not include matters relating to personal law which remained wholly uncodified and unreformed until well after the advent of the twentieth century.

3.10.1 Family legislation 1915 – 1917

In 1915 the locally prevailing version of the Hanafi matrimonial law was reformed by two imperial Decrees on Women's Right to Judicial Divorce. Provisions of both were derived from the Hanbali School of Islamic law and some lesser known opinions within the Hanafi school. The principle of takhayur (eclectic choice of principles out of the various schools of Shari'ah) was thus introduced into personal law. Under the two Decrees of 1915 women were enabled to seek judicial divorce (faskh) on the grounds of desertion and disease on the part of the husband.

204 . Art. 158.
205 . Arts. 159-169.
206 . See the Ta'limat-I Mahkamat, Istanbul, 1839.

Two years later a codified matrimonial law, titled Qanun-I QararHaquq al-'Ailah al-Uthmaniah, the ottoman government. Containing 156 articles, it dealt only with the law of marriage and divorce and had no chapter on succession. Its provisions were derived from the various schools of Islamic law picked up by the newly introduced legislative process of takhayur (eclectic choice). Enactment of this law was regarded throughout the Muslim world as a major achievement towards the codification and reform of personal law. The new enactment found warmer climes in the parts of the Empire outside Turkey-Jordan, Lebanon, Palestine and Syria where it remained in force for long even after the disintegration of the Empire.[207]It was, however, repealed in its application in Turkey in 1919.

3.10.2 Civil Code 1926

A Law reform Commission was set up in Turkey in 1923 to draft, on the basis of Islamic source-materials, a new comprehensive law of civil and personal status. Before the commission could come out with a draft the Islamic Caliphate was abolished and Turkey declared itself to be a Republic to mind in future its own business only to the exclusion of the lands formerly belonging to the Ottoman Empire. Under the rule of Mustafa Kamal Pasha Turkey completely changed its face. In 1924 a new national constitution was enforced providing, inter alia, for the adoption of a non-religious legal and judicial system.

In 1926 new Penal and Civil Codes were enforced in Turkey. The first of these was derived from the Italian Criminal Code of 1889 and the latter from the Swiss Civil Code of 1912-both adapted in certain matters to the Turkish social conditions. Adoption of a foreign Civil Code reflected Mustafa Kamal's despair with the internal differences of the religious jurists who bad failed in their long efforts to give him a code based on Shari'ah sources. The Turkish Civil Code of 1926 covered- besides contracts and obligations-Marriage, divorce and family relations. It also had a comprehensive chapter on succession.[208] The step represented abandonment of personal law as a separate religion-based entity and its merger into a modern civil code.

207 . See Chapter 6 supra for select text of this law.
208 . Arts. 439-617.

The Law relating to marriage, family and succession incorporated in the Civil Code of 1926 was later amended by the following laws:

(i) The Civil Code (First Amendment) Law 1933.[209]

(ii) The Civil Code (Second Amendment) Law 1938[210].

(iii) The Civil Code (Third Amendment) Law 1945.[211]

(iv) The Civil Code (Fourth Amendment) Law 1950.[212] and

(v) The Civil Code (Fifth Amendment) Law 1956.[213]

During the next about ten year some more changes were introduced into the Code-the last being enforced in 1965. The purpose of some of these amendments was to adapt the Code to certain Turko-Islamic traditions. One of these was meant to lower the age of marriage and another to confer ex post facto validity on certain marriages that were hit by the strict anti-polygamy provisions of the Code. Even after all these amendments the family and succession laws in-corporated in the Civil Code of Turkey represent a significant deviation from the established Islamic law. This is particularly of the Code's provisions relating to matrimonial property,[214] legitimation[215] and Succession[216]. The law of marriage and divorce under the Code is more or less the same as adopted by legislation in 1951 for the Turkish in the Turkish Cyprus[217].

The following provisions in the Turkish Civil Code of 1926-as amended until 1965 which deals with the Marriage, Age of Marriage its Registration etc.

These are very important laws which are protecting preserving and promoting rights of women

(i) Provision for the payment of expenses incurred, if any, and damages in suitable cases for breach of promise to marry;[218]

209 . Law 23 of 1933.
210 . Law 3453 of 1938.
211 . Law 4727 of 1945.
212 . Law 5524 of 1950.
213. Law 6552 of 1956.
214 . Art. 170-240.
215 . Arts. 247-252.
216 . Supra note 3.
217 . Turkish Family (Marriage and Divorce) Law 1951. Text of this law appears in my book Family Law Reform in the Muslim World(Delhi-1972) pp. 26-34
218 . Civil Code 1926, arts. 82-87

(ii) Raised age of marriage for both sexes in normal conditions and the court's power to allow a marriage below this age in exceptional cases;[219]

(iii) Recognition of fosterage as a bar to marriage on par with consanguinity but not a strict prohibition of marriage within relations created by adoption so that marital relationship would supersede adoptive relation;[220]

(iv) Strict prohibition of and penalty for bigamy but not compulsory annulment of a bigamous marriage if the first marriage has in the meanwhile come to an end;[221]

(v) Provision for annulment of marriage at the option of an aggrieved spouse if he or she had not given free consent for the same;[222]

(vi) Recognition of legitimacy of children born in a void or voidable marriage;[223]

(vii) Recognition of the remedy of judicial separation, abolition of all forms of extra-judicial divorce and availability of judicial divorce on specified grounds at the option of either party;[224]

(viii) Provision for payment of compensation to the aggrieved spouse in the case of divorce if the facts and circumstances justify it:[225]

(ix) Introduction of nuclear family norm and equal rights for men and women in matters of succession.[226]

3. 11. Status of Women under Family Law of Algeria

Algeria is Africa's largest country by land area and extends from the Mediterranean to the Sahara. Roughly 90% of the population of about 40 million live in the coastal zone in the north and are particularly concentrated in Tell-Atlas, the most fertile agricultural region in the country. Large parts of the southern regions, especially south of the Atlas Mountains, are only sparsely populated.[227]

219 . Art. 88, as amended in 1938.
220 . Arts.92, 121.
221 . Arts.93, 112, 114.
222 . Art. 115-120.
223 . Art. 125.
224 . Arts. 129-138.
225 . Art. 133.
226 . Supra note 3.
227. This information in this chapter is taken from the Country Guide (undated).

Algeria had been under a long spell of French colonial rules before attaining independence in July 1962. The Democratic and Popular Republic of Algeria is predominantly inhabited by the followers of Maliki School of Islamic law. The French men had westernized the legal system of Algeria by introducing the principles of French civil and criminal law and judicial administration. A body of French-Algerian law had come into existence in the course of time. It had basically a mixture of Islamic and western legal principles. So this process did not displace the locally prevailing Maliki and Ibadi[228] law of family and succession. While the country was under French rule time to time attempts were made to systematize and codify the parts of personal law under guidance of local Muslim jurist. In 1906 a French jurist Marcel Morand was deputed to prepare a draught code of Muslim law.[229]

The Algerian laws are based on French law and Islamic law (Shari'a). Despite the progress made in reforming discriminatory laws, the family code in particular still contains provisions that give women and men unequal rights. A woman is not always considered a full person before the court. In criminal cases the testimony of two women are equal to the testimony of one male witness.[230]

3.11.1 Algerian Family Law

The Algerian legal system is based on French and Islamic law. Algeria remained under French rule for 132 years, constituting the longest direct European colonization of any region in North Africa. After a brutal eight-year struggle for independence, Algeria became a sovereign state in July 1962[231]

Under French rule, courts applied Maliki principles in matters relating to personal status and succession (unless the parties were Ibadi). Commentators note that the process of adjudication and interpretation in the Franco-Algerian courts led to distinctive developments in the area of family law. In 1916, a commission headed by the French jurist Marcel Morand was appointed to formulate a draft code of Muslim

[228] . Historically, the early medieval Rustamid dynasty in Algeria was Ibadi, and refugees from its capital, Tiaret, founded the North African Ibadi communities, which still exist in M'zab. The Mozabites, a Berber ethnic group in M'zab, are Ibadis

[229].Tahir Mahmood ,Personal Law in Islamic Countries [History Text And Comparative studies],1987, Academy of Law and Religion New Delhi Algeria pg no. 13

[230] . Freedom House,Women's right in Middle East and North Africa 2010(REPORT,online Verson www.freedom house .org.)

[231]Islamic Family Law:Possibilities of Reform Through Internal Initiatives https://scholarblogs.emory.edu/islamic-family-law/home/about accessed on 3 feb 2021

law. The draft code, was mainly based on Maliki principles but incorporating some non-Maliki (mainly Hanafi) provisions, was never formally passed into law although it did influence the application and administration of family law in Algeria. The government eventually issued a Marriage Ordinance in 1959, enacting some Maliki principles relating to family matters; the Ibadi minority was initially exempted from the Ordinance. The legislation may have been inspired by the codification of family law in Tunisia and Morocco in 1956 and 1958 under newly-independent national governments. Though the Marriage Ordinance did not introduce substantial changes to family law, there were some provisions based on Hanafi principles. The Ordinance established rules for solemnization and registration of marriage, raised the minimum marriage ages for both parties, and established certain regulations relating to judicial dissolution and court orders for post-divorce reliefs.

The first Constitution promulgated in 1964 declared Islam the state religion. The new regime also amended the Marriage Ordinance of 1959, repealing or amending certain provisions such as the exemption of Ibadi marital relations from the terms of the Ordinance and the minimum marriage-age. The second Constitution adopted in 1976 reaffirmed Islam as the state religion. Periodic demands for comprehensive codification of personal status and inheritance laws eventually led to a draft code being presented to the National Assembly in 1980. After several years of debate, discussion and protest, the Family Code was enacted in 1984.[232]

The Family Code 1984 has often codified the ownership of wives and children by fathers or husband. According to the provisions of the Family Code it is a legal duty of Algerian women to obey their husbands, and respect and serve them, their parents, and relatives.[233]This code institutionalized polygamy and made it the right of men to take up to four wives.[234]Women do not have right to organize their own marriage contracts unless represented by a matrimonial guardian.[235] They have no right to apply for divorce. Divorce is made a most difficult thing to be obtained by women while a man needs only to desire for divorce. Women may obtain divorce

[232]Ibid note .236
[233]Article.39 The Family Code 1984.
[234]Article 8 The Family Code 1984.Article 8. It is permitted to contract marriage with more than one wifewithin the limits of the Shari'a, if there is a just ground and the conditions and intentions of equity can be fulfilled.
[235]Article 11. An adult woman concludes her marriage contract in the presence of her "wali" [guardian] who is her father or close male relative or any other male of her choice.

only by way of practice of khula form of divorce[236], which allows women to divorce on the condition that they give up any claim to alimony. Khula is the ransom that women must pay for their freedom just like slaves. The Family Code assigns the role of procreator to women, making it a legal duty for her to breastfeed their children and care for them until adulthood (Article 48).But women are not responsible for children's education (Article 63). Women have no right to pass their name, nationality, or religion to their children, and if they marry a foreigner there names would be deleted from the country's registration books altogether. The consequences of divorce are dramatic for both women and children. Wives and mothers have no right to the family home, since this is automatically awarded to the husband. Moreover, the state does nothing to provide housing or financial support for divorced women. Consequently in the absence of assistance from parents or other relatives, divorced women often find themselves in condition of vagrancy and destitute. There remains nothing in their possession for survival. After divorce the mother cannot decide the career of her children unless their father agrees to it. The mother cannot teach her children, and the father's consent and permission are needed for the most basic needs of the child, including registering him or her at school, and even approving the child's participation in school activities.[237] On the other hand, there is no provision for punishment of the father if he decides not to provide maintenance and education arrangements for his children. In the 19 years since the Family Code came into force, Algeria has seen increasing levels of homelessness among women and children. Thousands of mothers wander the streets with their children. They are left with the option to sell their labor as domestic servants who are not skilled so they work at very cheap rates. The streets of Algeria's major cities are the homes of many desperate divorced women, who are in very bad condition. Few of them use to found shelter in the slums; others have sought refuge in the hostels run by the different social workers organizations who work to help the women in distress. Although the authors of this Code claim it to be merely based on the teachings of Sharia law but it is clear from text of the code that its provisions for Algerian women, citizenship, emanate from a tradition of patriarchy and misogyny in Algeria. A clear example comes in Article 38. The content of this article relates to married women's rights in

[236]Article 54. A wife can get separated from her husband only by way of khula.In case of disagreement by the husband the court may pass a decree of Khula for a consideration to be given by the wife not exceeding the value of her dower.
[237] Articles 52, 62, 65 The Family Code 1984.

wedlock: a wife has the right to visit her parents, and they the right to visit her according to local custom. In post-colonial Algeria, women were seen (as in the pre-revolutionary period) as the repositories of men's honour, as protector of the customary values which had been disrupted and devalued by the colonial presence. Hence, the Family Code placed limits on women's mobility. Some articles in the Family Code reflect the economic crisis in Algeria in the mid1980s. An example is Article 52, which relates to the family home in case of divorce. The article states clearly that the husband may allow his wife and children to live in the family home if he possesses more than one house, which is a scarcity in a country where housing shortages are a major problem. Also, this is in the hands of the manto show kindness or not. Once again women are dependent on male whims. In her book, Women and Islam, **Fatima Mernissi** states: 'If women's rights are a problem for some modern Muslim men, it is neither because of the Quran nor the Prophet, nor the Islamic tradition, but simply because those rights conflict with the interests of a male privileged.

3.11.2 Women's Response to the Family Code

Since 1984, war veterans and younger feminists have joined together to protest without a break against legislation that proclaims men to be superior to women and codifies women's subordination. After many disappointments, the women of Algeria had come to understand that no one else would help them seek liberation.

The family law adopted in 1984 and last amended in 2005, governs marriage, divorce, legal guardianship and inheritance. The family law is the only law in today's Algeria that is based on Islamic law. Other laws are mainly based on French law and judicial precedent. The law is considered conservative in a North African context, especially compared to the more progressive family laws in Tunisia (1956) and Morocco (2004). When the family law was passed in 1984, in Algeria there were a deep split between Islamists and secularly oriented groups. This conservative family law of 1984 was a finding the middle ground between the two commands.

The family law was amended in 2005 to the limited extent. As the law regulates relationships of great value and symbolic significance, such as gender roles and the organization of family life, the changes in the direction of more rights for

women were controversial and sensitive. In order to avoid a disruptive and divisive debate in Parliament, the amendments were adopted as a provisional instrument in the Council of Ministers and not as a bill that would have to be adopted by Parliament.

3.11.2 Major Amendments in Family Code 2005

The lowest permitted marriage age is 19 for both sexes (formerly 18 for women and 21 for men). The marital age has increased strongly in Algeria in recent decades. While the average marital age in the 1960s was around 18, it is today around 29 for women and 33 for men. The number of persons, both men and women who never marry, has also increased in recent decades[238]. The most important explanation for the rise in marital age is the lack of financial resources and capacity to provide among men. A wedding is very expensive and requires many years of saving for those who are lucky enough to have an income. When the expenses of the wedding are covered, the man is expected to support his family and provide housing, to put food on the table and to cover other running expenses for the family. High unemployment, low wage levels and in particular housing shortages mean that many men do not have the necessary financial resources to get married and support a family. Many men get married late in life, and some never get married[239]. Increased marital age among men propagate further, leading also to an increase in average marital age for women. But women and their families also have their own expenses for marriage, for example, for the equipment she will bring into the marriage, which may take a long time to earn back. If there are many sisters in a family, it may take a long time for the family to "recover" financially from the previous wedding and it may take time before the family has economic ability to pay for the next one. But other factors, such as a higher level of education among women, also help increase the marital age for them.

3.11.3 Age Difference between Spouses

The age difference in the man's favor is strongly rooted in Algerian (and North African) culture, reflecting the traditional gender role model characteristic of the Algerian family. As mentioned earlier, Algerian family structure is based on a patriarchal model in which gender roles are clearly defined and complementary. The

[238]. Ouadah-Bedidi & Saadi 2014, p. 14
[239] Ouadah-Bedidi & Saadi 2014, p. 14

man has responsibility for providing for the family, while women are responsible for children and domestic matters. In this perspective, it is convenient for a woman to marry early in terms of fertility, whereas the husband's capacity to provide is likely to increase with age. There is thus a clear expectation in Algerian culture that the man should be older than the woman when they marry. Marriages where the woman is older than the man, and especially if she is divorced and has children, has a low status in the Algerian context. In the Algerian context, the central purpose of marriage is to create a legal context for establishing a family. There is also a clear expectation of reproduction when the marriage is entered into, and the spouses' social position is linked to the roles of father and parent, mother and caregiver, respectively. In this perspective, first-time marriage with a woman over fertile age is very unusual. It is unlikely that a man will refrain from establishing his own family in order to marry a woman past fertile age, and such marriages seem to occur primarily in connection with migration, and not among two Algerians who will live together in Algeria.[240]

3.11.4 Marriage by Proxy is No Longer Possible

With the amendment of the family law in 2005, the possibility of getting married by proxy was removed. However, in practice, this only applies to men's right to marry by proxy. Women can, according to information from the Algerian Consulate General in Paris give prior consent to marriage, and let a guardian conclude the marriage on her behalf afterwards. In such cases, the woman is not personally present during the actual marriage in Algeria, but is represented by her guardian, who gives a statement of consent on her behalf. In order to obtain such a declaration of consent, the woman and her guardian must meet personally at the embassy and submit the following documentation:

1. The guardian's ID documents (ID card, passport)
2. The woman's ID documents (ID card, passport)
3. The woman's birth certificate
4. The family book

[240].Consular source A, meeting in Algiers in November 2017.

3.11.5 Provision for Civil Contract before Religious Marriage and Procedure for Entering Marriage

Following the change of the family law in 2005, marriage must be entered into before the civic authorities to be valid by law. It is very widespread, but not mandatory, to have a religious marking of the marriage after the civil marriage. The authorities have instructed all the country's imams that they may only carry out a religious ceremony if the spouses have submitted documentation (marriage certificate or family book) confirming that they have previously entered into a civil marriage. This is to ensure that the marriage is legally valid before the religious ceremony is conducted. The new code prevents imams from conducting religious marriage ceremonies unless the spouses submit a civil contract first; some couples try to avoid this requirement. When such marriages end in divorce, women lack the protections of a marital contract. Article 34 of the constitution prohibits all violations of human dignity, while Articles 342 and 343 of the penal code criminalize most forms of sex trafficking and exploitation of minors.

3.11.6 Marriage Registration

Obligatory registration of marriage was governed by Civil Status Code; unregistered marriage may be validated by courts judgment. Algeria recognizes marriages concluded under other countries' family legislation, provided it does come into direct conflict with Algerian law. An Algerian citizen who is married in Norway can register the marriage at the Algerian Embassy in Oslo and receive a family book (Algerian Embassy in Norway, meeting in May 2015). To get the marriage entered in the Algerian registry, the spouses submit the marriage certificate, Algerian ID document (passport or national ID card) and possible confirmation of conversion to Islam (Algerian Embassy in Norway 2015).[241]

3.11.7 Offer of Marriage Always From Side of Groom

As mentioned earlier, the capacity to provide maintenance for his spouse is a precondition for a man to conclude marriage. The search for an appropriate marriage candidate therefore begins only when the man is ready to take on the financial

[241] Landinfo country of origin Information center,Translation provided by the Office of the Commissioner General for Refugeesand Stateless Persons, Belgium

obligations a marriage entails. It is always the man, and possibly his family, who takes the initiative to marriage, never the woman or her family, although they can of course make it known that they are open to suggestions. Whereas the family chose spouses for their sons in the past, and the woman's family accepted or rejected the marriage offer on her behalf, it is common practice today that the man chooses a spouse without direct interference from his family and that the woman herself chooses whether she will accept the marriage offer. Nevertheless, there is a clear expectation that the spouse will be chosen according to the advice of the family, or at least with the family's blessing. It is in particular the mother who is involved in the process of finding and approving her son's future spouse. If she is excluded from the process, it will be perceived as a humiliation for her[242]. It is increasingly common for the man himself to choose a spouse, but within the context of what is acceptable to the family. The final choice must be approved by the parents. The woman is usually free to accept or decline an offer of marriage, and her father no longer has a unilateral right to choose a spouse for his daughter (jabr), as he has previously had in traditional Algerian culture. Nevertheless, parental consent is still important for the woman, and few will want to force through with a marriage that the family is opposed to. In choosing, ideal spouse, women and men priorities different factors. For women, the spouse's capacity to provide for his spouse is the most important condition when choosing. A man will pay particular attention to the woman's background whether she comes from a well-reputed family, age (there is an expectation that the woman is younger than the man at the time of marriage) and impeccable behavior. There are still strong expectations that a woman is a virgin when entering into marriage and it is not uncommon for the man to require a certificate confirming this.[243]. However, for many Algerian women the fear of not getting married is greater than the fear of not finding the ideal partner. The fear of not getting married "before it is too late" leads some women to accept marriage offers of marriages from suitors who, objectively speaking, are not "ideal", such as men with inadequate capacity to provide, divorced men or widowers, or as spouse number two in a polygamous marriage. A man does not have the same challenges on the marriage market and can choose his spouse relatively free as long as he can support his family.

[242] . Ouadah-Bedidi & Saadi 2014, p. 14
[243] . Algérielle 2016; Ferhati 2007

3.11.8 Autonomy, Security, and Freedom of the Person[244]

Algerians have begun to enjoy an improved sense of personal security, but most of them remain preoccupied about their safety. Women were given freedom to travel freely in most places, though freedom of movement is sometimes controlled for women as a practical matter. While the 2005 amendments to the family code granted new rights to women and more assertively acknowledged their autonomy, the code retains restrictions that present major obstacles to the realization of gender equality. Muslim women may only marry Muslim men for their marriages to be legally recognized, whereas Muslim men are free to marry Muslim, Christian, or Jewish women.

3.11.9 Freedom of Movement

Women are permitted to travel freely, and freedom of movement for all Algerians has appreciably improved in the past 10 years. Algerian women are able to obtain their own passports and leave the country without their husbands' permission, but a woman cannot leave with her children without authorization from the husband. Moreover, female workers who migrate within the country to find a job or women who travel alone sometimes face condemnation, particularly in the rural areas.

3.11.10 The Legal Age of Capacity for Marriage

The legal age of capacity for marriage changed from 21 for men and 18 for women to 19 for both sexes[245]. In addition, proxy marriages are now prohibited. This practice, in which a prospective spouse could be represented by a proxy during a marriage ceremony, facilitated forced marriages and was especially common in rural areas. In some cases a bride might not even be aware of her marriage. Despite these amendments, many believe that the family code remains too ambiguous on several central issues and retains a number of discriminatory provisions.

The woman herself can choose her guardian (wali) when she is to enter marriage.

[244]Nadia Marzouki,Algeria, This report is a chapter in Women's Rights in the Middle East and North Africa: Progress Amid Resistance, ed. Sanja Kelly and Julia Breslin (New York, NY: Freedom House; Lanham, MD: Rowman & Littlefi eld, 2010), available in paperback, as a CD-ROM, and online at http://www.freedomhouse.org

[245]. Marriage under Article 7 of the amended code

A bride's wali[246] must be present when she concludes her marital contract, though he is now reduced to an honorary role and defined as her father, a relative, or "any other person of her choice." A wali cannot force a woman to marry someone against her will or oppose the marriage.[247] Given this reduced authority, some women's rights advocates defend the decision to retain the wali institution because it acts mainly as a tribute to Islamic culture without obstructing women's autonomy. Others feel that the practice contradicts the amendment raising the marriage age to 19 for women and does not fully recognize women's autonomy. They note the inconsistency of a code that retains the requirement that wali be present while simultaneously allowing women to freely choose their wali.

3.11.11 Polygamy is only Allowed after Permission from a Judge, and Only under Certain Conditions.

Polygamy remains legal under Article 8 of the family code, although it is now subject to several conditions. The court must certify that there is "justified motivation" behind the decision to take more than one wife, that the man is able to take care of an additional spouse, and that all of the spouses involved consent to the marriage. Currently, only 3 percent of Algerian households are polygamous. However, single and divorced women are increasingly marginalized by society. A 2006 nationwide survey showed that 55 percent of the sample of women (whose average age was 33) was single, 36 percent were married, 6 percent were widows, and 3 percent were divorced.[248] Consequently, becoming someone's second wife is an increasingly attractive option when the alternative is to remain single. The supporters of polygamy argue that because most people who disappeared during the Black Decade were men, there are more women than men of marrying age. Now that the approval of the first spouse is mandatory, the husband often chooses to divorce the first spouse if she rejects his request for a second wife. If he and the first wife were childless or if their children are adults, the divorced wife has no right to the marital home or alimony. Consequently, women over the age of 60 increasingly find themselves divorced and homeless as their ex-husbands take new wives. This

[246]. marriage guardian, usually her closest male relative
[247] .The judge will act as wali for any bride who has none.
[248]. Synthése de l'enquête nationale sur l'intégration socio-économique de la Femme [Synthesis of the National Survey on Socio-Economic Integration of Women] (Algiers: Ministry Delegate for the Family and the Status of Women, 2006),http://www.ministere-famille .gov.dz/ ?page=Synthese.

illustrates the hard task of reconciling civil law and Islamic law, under which polygamy is conditioned not on the consent of the first wife, but on the ability of the husband to care, materially and morally, for all of his spouses.[249]

Some maintain that these are more sensible conditions than those included in the new law, but most women's rights activists argue that polygamy should be banned altogether. Although these conservative provisions regarding polygamy and the necessity of a wali have been widely criticized, it seems that the government is reluctant to change them further due to pressure from conservative Islamist groups and their constituents.[250]

3.11.12 Wife's Duty to Obey Her Husband, Removed

Article 19 of the amended family code legally entitles both spouses to make stipulations, either within the marital contract or in another instrument, that guarantee them certain rights within the marriage. The article specifically mentions the right to set conditions regarding polygamy and the right to work.[251] The marital rights and duties of men and women differ, although the duty of a wife to obey her husband has been removed from the new code.[252] Article 78 requires men to provide financial maintenance for their wives. For their part, wives must breastfeed and nurture the children.

3.11.13 Parental Obligation on Divorce

Upon divorce, however, the parental authority of a mother with custody of her children is fully acknowledged under Article 87. Despite this change, many administrative agents still refuse to let such women travel abroad with their children without the father's authorization. The new code allows paternity to be established through DNA testing, and if a couple was married at the time of the child's conception, the husband is obliged to acknowledge paternity. Article 64 grants the

[249]. This report is a chapter in Women's Rights in the Middle East and North Africa: Progress Amid Resistance, ed. Sanja Kelly and Julia Breslin (New York, NY: Freedom House; Lanham, MD: Rowman & Littlefi eld, 2010), available in paperback, as a CD-ROM, and online at http://www.freedomhouse.org..

[250] . Florence Beaugé, "En Algérie, le code de la famille maintient la femme sous tutelle" [In Algeria, the Family Code Keeps the Woman Under Guardianship], Le Monde, February 25, 2005.

[251]. Under Article 35, if the marriage contract contains stipulations that contradict the contract, the stipulation is void and the contract is valid. Moreover, stipulations may not contradict the law.

[252]. Prior to the 2005 amendments, the duty to obey was found in Article 39 of the family code.

mother custody of male children only until age 10 and of female children until they reach marriage age.

3.11.14 Women are Given Greater Access to Divorce

While men may initiate divorce without explanation, women filing for divorce must generally cite one or more of 10 specific reasons, such as abandonment for a year without justification.[253] Should a woman wish to initiate a divorce for other reasons, her only option is khula, the traditional Islamic practice that permits a woman to unilaterally initiate divorce if she pays the husband a sum of money.[254]

3.11.15 Property Rights Which Promote and Provide Gender Justice

Under Article 37 of the family code, each spouse retains his or her own property upon marriage, and they can agree to hold their new property in common or determine their respective shares through stipulations in the marriage contract or a separate document. Household properties in dispute upon divorce are divided according to rules specified under Article 73. The law entitles husbands to keep property that is "for exclusive male use," and wives to keep exclusively "female" items, without specifying how such items are to be defined. While men are automatically granted the "male" objects, in practice judges may arbitrarily require women to prove that they bought the "female" items over which they claim ownership.

3.11.16 Right to Live in Matrimonial Home

Article 72 of the family code guarantees that, upon divorce, women who retain primary custody over their children will receive proper housing. This is a major improvement from the 1984 code, under which men kept the marital home upon

[253]. A woman can initiate a divorce for the following reasons: the husband fails to pay financial maintenance during the three-month period before a divorce initiated by him is finalized; the husband cannot have children; the husband refuses to sleep with his wife for more than four months; the husband has been convicted of a crime; the husband has been absent for one year without giving any reason or without giving any money to the family; any form of "moral mistake"; a continuing disagreement between the spouses; the provisions stipulated in the marriage contract are broken; Article 8 of the family code, which sets the rules for polygamy, is violated; any form of legally acknowledged prejudice.

[254] Article 54 of the family code allows for khula but leaves the parties to decide the sum owed by the wife to her husband. If they are unable to agree to a sum, the judge will order payment that does not exceed the worth of the proper dowry.

divorce, often forcing divorced women and their children onto the streets. However, because of the current housing crisis, many judges allow divorced men to keep the house if they offer equivalent funding to their ex-wives and children. Consequently, unemployed men or those with low incomes provide too little money to allow their ex-wives and children to find decent housing. Some argue that this new rule encourages divorced men to more vehemently invoke their custody rights, because divorced women who do not retain custody of their children (and those without children) are not entitled to alimony or housing. Women who remarry after divorce lose custody of their existing children.

3.12 Iraq and Its Gender Laws

In most Muslim countries, family or personal status legislation related to marriage, divorce, child custody and inheritance is based on Islamic Shari'a Law. This legislation which has a direct impact on the lives of women and men in Arab countries is usually determined by religious courts and clerics. However, in 1959, Iraq contrary to most Arab countries passed a Personal Status Law by which the old sharia courts were replaced with government-run personal status courts that passed judgments based on the new codified state law. While the law is based on religious sources, it is an amalgamation of the most liberal Islamic rules as well as some divergences. It restricts child marriages by setting the legal age of marriage at 18 years, bans forced marriages and restricts polygamy. It curtails men's prerogatives in divorce, expands women's rights in divorce, extends child custody to mothers, and improves inheritance rights for women. It remains one of the most liberal law in the Arab world with respect to women's rights. Since it was passed, the Iraqi personal status law has been opposed by many religious leaders, who believe that it contradicts Islamic Shari'a Law, and who object to the standardization of personal status laws to cover all sectarian communities. They consider that personal status matters should be dealt with by clerics and not civil servants. Clerics, seeking to gain autonomy to implement Shari'a Law within their religious communities, don't give importance to

women rights. They aim to transform state courts which currently rule on personal status matters to shari'a courts controlled by clerics.[255]

3.12.1 Relevant Legislation

Iraq has a mixed legal system that applies on both Sunni and Shia the law applied in Shariat courts. The legal system as a whole also includes constitutional law, legislation and statutory provisions, usage and custom, judicial precedent and authoritative juridical opinion. Matters regarding marriage and family relations of the Muslim majority population in Iraq are mainly governed by the Iraqi Personal Status Law No. 188/1959 (IPSL).[256]The Kurdistan Region has its own Personal Status Law – Act No. 15/2008.[257][258] Most important legislation is Code of Personal Status 1959, which is amended in 1963 and further in 1978. Amendment of 1963 added chapter on inheritance and amendment of 1978 added women's rights on marriage and divorce.

The IPSL confers many rights for women in marriage, divorce, custody and inheritance. However, after 2003,[259] due to the fragile security situation in Iraq, the weaknesses in law enforcement and the dominance of tribal customs and religious edicts, women's organizations have documented breaches of the law.[260]

[255] Hanaa' Edwar, Secretary General of the Iraqi Al Amal Association and Judge Salem Rawdan Al-Moussawi, Iraqi Women and the National Personal Status Law - Statehood & Participation, published on 3rd march 2014

[256]Personal Status Law (1959), https://docs.google.com/file/d/0B8ITLJi5y4TKcXF3MFJnUTFwUmc/view

[257]Personal Status Law in Iraq Kurdistan Region (2008), http://www.ekrg.org/files/pdf/personal_status_law.pdf Iraq State party report, U.N. Doc. CEDAW/C/IRQ/4-6 (2013), paras. 234-235, http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

[258]Two major attempts have been made to circumvent the rights available to women under the IPSL. Thus far, they have not been successful - On 29 December 2003, the Iraqi Governing Council (IGC) passed Resolution 137 to abolish the Personal Status Law. The Resolution states that *Shari'ah*principles shall apply to matters relating to marriage and adjudication by the religious authorities of the various sects in Iraq. After a fierce fight by activists, the Resolution was repealed two months later. Kelsey Cherland, "The Development Of Personal Status Law In Jordan & Iraq," CMC Senior Theses, 2014, 89, http://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1926&context=cmc_theses

[259]Iraqi Women Network, Rafidain Women Coalition, Gathering of "No to violence etc., "Iraqi women in armed conflict and post conflict situation" Submission tothe CEDAW Committee for the mid-term review of the Concluding observations issued by the Committee after the 57th Session, 2016, pp. 12-13 http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/IRQ/INT_CEDAW_NGS_IRQ_25070_E.

[260]Following the repeal of Resolution 137, Article 41 of the Constitution was adopted by referendum in 2005. This is functionally equivalent to Decree 137. Article 41 states that Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall

Despite the equality guarantees under the Constitution, the IPSL provides for a marital framework based on 'reciprocal' or 'complementary' rights (as opposed to 'equal' rights) between the two spouses, whereby in return for maintenance and protection from her husband, a wife is expected to obey him to a certain extent.[261]

Furthermore, Article 25 states that a wife is no longer entitled to financial maintenance If she leaves her husbands home without his permission.[262]

3.12.2 Salient Features of Personal Status Lawsif Iraq

1- Marriage

Minimum age is 18 for both men and women. In certain cases if parties of marriage are physically fit then judicial permission for marriage may be granted at 15 years of age. Provided consent of guardian should be there. The ages of both parties are verified before a marriage is concluded by the appropriate officer in a competent court. The parties are required to submit a statement showing their age as a condition of marriage of registration.[263]The Personal Status (Jafari) Bill proposed in 2014 threatened to allow for the marriage of girls as young as nine years old in exceptional circumstances.[264]

2-**Temporary Marriages**

Temporary marriage is neither legally recognized nor is it socially acceptable.

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be regulated by law."[260] This article makes it possible for Iraq to propose communal based family law such as the Personal Status (Jafari) Bill.

[261].Thus, Article 3 of the IPSL defines marriage as a contract between a man and a woman who is lawfully permissible to him, the purpose of which is to establish a bond for a mutual life and procreate children.[261] Article 23 provides that the wife is entitled to financial maintenance from the husband even if she was staying at her parent's house, unless the husband asks her to move to his place and she abstains unrightfully. Her abstention is considered rightful if the husband did not pay her the immediate dower or as long as he is not spending on her.

[262]. Article 25 states that a wife is no longer entitled to financial maintenance if: (i) she leaves her husband's home without his permission and without legitimate reason; (ii) if she refuses to travel or move with her husband; or (iii) if she is convicted and imprisoned for a crime or debt. However, Article 25 also stipulates that: A wife shall not be bound to obey her husband if the husband is arbitrary in his demands for obedience, intending to injure or oppress her. The court must give due consideration in issuing a ruling for the disobedience of the wife before ruling that a wife is disobedient. It must understand the reasons for her refusal to obey her husband and do its utmost to remove the causes of a wife's disobedience

[263].Article 10 of the Personal Status Law (1959),https://docs.google.com/file/d/0B8ITLJi5y4TKcXF3MFJnUTFwUmc/view

[264].Jamie Tarabay, "Iraqi law would legalize marital rape, child marriage for country's Shia", *Aljazeera*, 27 April 2014, http://america.aljazeera.com/articles/2014/4/27/iraqi-shiites-protestproposedfamilylaw.html

[265]These temporary marriages are not legally codified. Mostly these marriages take place outside the courts through certain 'clerical offices' set up to arrange such marriages.[266] The temporary marriage contracted by the parties do not guarantee the rights of either the wife nor subsequent children because they are informal contracts and are not recognized by law unless ratified by the court. In cases where the couple seeks to get court recognition, the women/girl in many cases faces consequences in the event she married without the consent of her male guardians.[267]Women from the rural and poor areas are particularly susceptible to unregistered marriages and their adverse impact. Their marriages are conducted by local clerics without the women being aware of the need to go through official channels to register their marriages. The non-registration of their marriages causes complications for themselves and their children, particularly in instances where their husbands travel, die, or initiate a divorce.

3-Polygamy

Polygamy was permitted only by judicial permission, to be granted on two conditions: financial ability and lawful benefit; permission not to be granted if judge fears unequal treatment of co-wives. ILPS provides penalties of imprisonment or fines or both for non-compliance.

4-Divorce

Divorce must be confirmed by Sharit Court's judgment or registered with Court during period of iddat. Divorce by man who is intoxicated, insane, feeble-minded, under coercion, enraged or seriously ill or, as is divorce that is not immediate or is conditional or in form of an oath, all such divorces deemed single revocable (except third of three) divorce, Wife may obtain khula form of divorce from husband in return for consideration that may be more or less than her dower.

[265].However, according to women's rights advocates, it is on the rise in recent years, including in universities. Reasons include destitution, increase in the number of widows and young people preferring to be in a temporary as opposed to a permanent marriage.

[266].Iraqi advocates note that majority of marriages outside the courts occur to girls without any age-specific conditions and / or a medical examination with regard to genetic or sexually transmitted diseases.

[267].There have been cases where the woman/girl has faced violence from her family. Since Personal Status Court judges are allocated anywhere from 1,000 – 9,000 cases per year, efforts to register an unregistered marriage may be extremely delayed. Judges have the final decision and significant discretion when it comes to these cases.

5-Judicial Divorce

Wife entitled to request dissolution if husband does not fulfill any lawful condition stipulated in marriage contract. Either party may request dissolution upon following grounds:

1. Such harm as makes continuation of marriage impossible.
2. Marital infidelity.
3. If marriage was contracted without judicial permission before either party attained 18 years.
4. If marriage was concluded outside court by coercion and was not consummated
5. If husband do polygamy without judicial permission.
6. And if any of above grounds are not proven, on grounds of discord (in which case courts initiate reconciliation procedures. If reconciliation efforts fail and husband refuses to pronounce talaq, courts may grant judicial divorce.

if wife is found to be at fault, her financial rights are forfeited.

Wife may request judicial divorce upon following grounds:-

1. If husband is imprisoned for three or more years.
2. If husband abandons wife for two or more years without lawful reason.
3. If husband does not consummate marriage within two years of contract.
4. Husband's impotence or affliction (if after consummation, must be confirmed by medical report).
5. Husband's infertility if wife has no living son by him.
6. Husband's serious illness which would cause harm to wife.
7. Non-maintenance after grace period of up to 60 days.
8. Non-maintenance due to husband's absence, disappearance, concealing his whereabouts, or imprisonment for more than one year; and if husband refuses to pay maintenance arrears after 60-day grace period.

Wife may also request judicial separation before consummation in return for any dower and proven expenditure on husband's part for purpose of the marriage

6-Post-Divorce Maintenance/Financial Arrangements

Husband obliged to maintain divorced wife during idda. 1983 legislation provides that repudiated wife has right to continue residing in marital home without husband for three years, so long as she was not disobedient, did not agree to or request divorce, and does not own house or flat of her own.

7-Child Custody and Guardianship

A divorced wife is entitled to custody of boys or girls until age of 10 years, extendible to 15 years at which time ward may choose with which parent she wishes to live.

8- Law on Divorced Wife's Residence 1983

Law of the right of divorced wife to housing No. (77) of 1983 was passed and named "the right to housing". This law enables the divorced wife to house at the husband's expense to prevent her from the risk of being homeless after divorce but law requires that the divorce must be revocable or the wife obtains the judicial separation. Many of people think that the housing of wife is permanent right or the divorced husband must provide the house or must pay the rent allowance for whom who doesn't own real estate.

3.13 United Arab Emirates and Position of Women Oriented Laws

The United Arab Emirates (UAE) was formally established on 2 December 1971 and is a federation of seven emirates:

- Abu Dhabi.
- Dubai.
- Sharjah.
- Ajman.
- Umm al-Quwain.
- Ras al-Khaimah.
- Fujairah.

It's legal system is founded on two basis-

- Civil law principles
- Islamic Sharia law, the guiding principle

UAE legislations are formulated into a number of major enactments providing the general principles of law with a significant amount of secondary legislation. Over the past 30 years the UAE has comprehensively expanded its legislations.

3.13.1 UAE,s family law contains:-

- Federal Law No. 28 of 2005 (Personal Status Law), as amended by Federal Decree No. 8 of 2018.
- Federal Law No. 11 of 1992 (Civil Procedure Code), as amended by Cabinet Resolutions No. 57 of 2018 (Resolution 57) and No. 33 of 2020 (Resolution 33).
- Federal Law No. 5 of 1985 (Civil Transactions Code).

3.13.2 Personal Status Law 2005

This law is guiding light in matters of marriage, divorce, succession and child custody, maintenance and guardianship within the UAE (in particular, Articles 142, 143, 144, 149 and 150). This Personal Law Status is based on the Sharia, that is the interpretation of the Quran and the traditions of the Prophet. The Personal Status Law applies to the seven emirates of the UAE. It also applies to both Emiratis and non-Emiratis. Non Emiratis have option to chose their own countries law.[268] To safeguard the rights of non-Muslim Emiratis, there are special regulations relating to their religion and sect.[269]

Marriage

Foreign marriage contracts, divorces or annulments and civil partnerships are valid in most cases. For recognition, the original certificates must be confirmed as legal by the Ministry of Foreign Affairs. Translated into Arabic by an official translator and then it must be attested by the Ministry of Justice. Certain marriages and civil partnerships are not recognized in the UAE because of Sharia law. These

[268]. Article 1 of Personal Law Status Law
[269] .Article 1.2, Personal Status Law

are: Marriage between partners of the same sex, Marriage between a Muslim woman and a non-Muslim man. Marriage of a Muslim man with a woman of another religion, who is not Christian or Jewish. Only religious marriage ceremonies between Muslims are recognized. The court can nullify a marriage contract because of conflict with public policy or Sharia law (for example, if the parties entered into a marriage agreement in the absence of the female's guardian, or if a Muslim female married a non-Muslim male). The Personal Status Law provides that a contract can be nullified in the following circumstances:

- A marriage in the absence of the wife's guardian. If the marriage has been consummated the spouses are separated.[270]
- If the woman is permanently or provisionally prohibited to the man.[271]
- If the court nullifies the marriage contract, the marriage is severed and the parties return to their previous status.

Gay and Homosexual Marriages not Allowed

Same-sex marriages are not allowed or accepted in the UAE even if a marriage contract was issued in the country where the marriage took place. Civil partnerships as it is accepted in various countries are not acknowledged in the UAE as they are not marriages in the eyes if law of UAE. However, non-Muslims' civil marriages conducted abroad are recognised provided the marriage certificate has been attested by the competent authorities.

Divorce

The divorce process can start by either party by opening a file at court asserting their decision to sever the marriage. After this conciliation proceeding starts. The conciliation is mandatory condition in divorce proceedings.[272] This court is the place for the spouses to raise their voices concerns about the marriage and its problems. For this they don’t need legal representatives. The conciliation procedure provides both the parties the opportunity to discuss their issues and attempt to resolve them.

[270] . Article 39
[271] Article 40
[272]. Article 98, Personal Status Law

At this stage, an amicable divorce can be concluded and the parties draft a settlement agreement. This settlement does not need to comply with UAE law and Shariat regulations, and can be based on terms mutually agreed by the parties. The conciliator can comment on the settlement agreement's terms to make them more likely to be approved by a judge. The parties sign it before the conciliator and the judge executes it and issues it as a judgment. The parties obtain the certificate of divorce and the attested settlement agreement. If the parties fail to reach an agreement before the conciliator, the conciliator provides the claimant with a referral letter valid for three months, permitting the claimant to proceed before the court to conclude the divorce case. The particulars of the divorce case are subject to the court's discretion and the onus is on the parties to provide evidence to support their claims against one another, and their own defense. Non-Muslims can petition for the law of their home country to be applied before the court.[273]. However, if the law of the parties' home country fails to cover an aspect of the divorce, the courts have the discretion to apply UAE law. Foreign law is not applied when:1-It is contrary to public order, morals or Islamic Sharia.2-Its effect cannot be determined 3-Its application is requested by a party who has dual nationality or whose nationality is unknown.[274]

There are two types of divorces recognized by Islam and the law:

- Revocable divorce.
- Irrevocable divorce.

In UAE women can start divorce proceedings against their husbands who are not in the UAE.[275] This usually applies to women whose husbands have either Abandoned them or been deported .If the UAE courts have jurisdiction; they will ignore a choice of jurisdiction clause. The Personal Status Law applies to all citizens and residents in the UAE, unless they choose their own country's law. If a foreign national wishes to apply their country's laws, they must provide the relevant laws attested and translated into Arabic for use in the courts.[276]Expatriate foreign nationals seeking divorce in the UAE must follow the same process as UAE citizens.

[273] Article 1, Personal Status Law
[274]. Article 27, 28 &24 Civil Procedures Law
[275].Article 6.2, Personal Status Law
[276].Article 1, Personal Status Law.

Dissolution of a marriage contract in a legally prescribed form is divorce.[277] It can be oral or in writing. A oral divorce must be proved in court by witnesses or by oath and a court judgment issued approving it. Divorce can be demanded by either:

1- The wife, divorcing her husband in return for monetary compensation paid by her to him.[278]
2- Separation by a court order.

The statutory grounds for divorce are:

- Physical or mental conditions, for example serious mental health problems, leprosy, impotence or vaginal occlusion.
- Failure to pay the dowry promptly.
- Prejudice and dissension.
- Non-maintenance.
- Absence and loss.
- Detention, for example, a jail sentence.
- Ila'a, where the husband swears not to have sexual intercourse with his wife for four months or more unless he goes back on his oath before the four months lapse. Divorce because of *Ila'a* is irrevocable
- Zihar, where the husband compares his wife's body to that of another woman who he is forbidden to marry (for example, her mother or sister).[279]

This list of grounds for divorce is not exhaustive it is only illustrative. A woman requesting a divorce must demonstrate that she has been injured. Damage is generally considered as a husband's failure to maintain his wife, home and children or if he has been brutal or cruel. Recent amendments to Articles 117 and 118 of the Personal Status Law by Federal Law Number (8) of 2019, and Article 120 of the Personal Status Law by Federal Decree No. 5 of 2020, have restricted the ability of a woman to file for divorce since the amendments give the court the right to reject a divorce application. There is no listing of grounds for a man to apply for divorce. A Muslim man does not need a ground or his wife's consent to divorce her.

[277] Article 99.1, Personal Status Law.
[278]. Al Khol'e i.e. known as khula form of divorce which is demanded by wife from husband and return she leave her claim of mehar.
[279]. Articles 110 to 135, Personal Status Law.

On the 19 April 2020, the Dubai Personal Status Court introduced online smart applications, and court sessions resumed through online platforms and video conferencing. It is anticipated courts will resume normal functions within the next few weeks. Divorce cases that were already registered for conciliation are now preceding either by telephone or video call or they have been postponed and rescheduled to later dates. Parties can still register to file for divorce online; however the time period before the first appointment with the conciliator is significantly longer than before-COVID-19.[280]

Judicial separation

There is no provision for Judicial separation in UAE. Separation by court order is considered a divorce.

Pre- and post-nuptial agreements and its validity

There is no concept of pre- and post-nuptial agreements in UAE law. However, for Muslims, it is customary that the groom gives the bride a " dowry" i.e. mehr which is an amount of money or possessions as a financial backup if he divorces her or dies. The dowry should be given to the woman if it is specified in the marriage contract.[281]In general Dowry agreements must be given priority over inheritance and. Any property that is owed to the deceased's wife i.e. to the married woman who is widow now must be transferred to her before distributing the rest of the estate it means her right to mehr should be given priority. The specified dowry is a binding contract and instantly enforceable on divorce unless disputed by the husband himself.

The requirements of a pre-nuptial agreement may be acknowledged and enforced, if the applicable foreign law recognizes it as valid agreement provided that it is not in conflict with UAE law. Pre-nuptial agreements are rendered void or voidable when they are in conflict with Islamic Sharia, Law.[282]The courts only enforce pre-nuptial agreements as a part of divorce agreements. Divorce agreements are entered into before the conciliation process through a process of attestation and

[280] . Diana Hamadé AlGhurair, Family law in the United Arab Emirates: overview https://uk.practicallaw.thomsonreuters.com/4-612 5426?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed on 6 march 2021
[281] Article 51.1, Personal Status Law.
[282] Article 27, Civil Transactions Code.

issued by the court as a judgment. Getting it attested by the UAE Embassy in the country of origin.[283] Pre-nuptial agreements cases will not be considered by the courts independently of a divorce case. Although the UAE courts can be involved in post nuptial agreements at the conciliatory level with these agreements, they will not issue them as judgments. Therefore, they may not be enforceable in the UAE even if they are valid under the applicable foreign law.

Maintenance

A judge orders maintenance (Nafaqa) on a temporary basis before the divorce is finalized and the case is pending before the courts. Usually, temporary maintenance for a wife and her children is quite minimal[284]. On a wife's request, the judge can use their discretion to order a greater amount of temporary maintenance.

There is no spousal support on separation under Sharia and UAE law. There is no provision for the sharing of assets, wealth or income on divorce.A father cannot claim spousal maintenance from his ex-wife even if he is granted custody of the children.

A father is liable for his children's education and living expenses, including rent and domestic employees' salaries. These payments are assessed and determined according to the father's income and limited to 30% of his income. However, a father can choose to pay more.

A wife must be supported by her husband for three months (Iddat period) following a revocable divorce. During this time, she cannot remarry because of the paternity of any child would need to be verified.[285]

A personal status guidance chart has been issued by the Abu Dhabi Judicial Department and it is applicable in other emirates. It assesses the maintenance payments based on the father's income and number of children.

[283] . Diana Hamadé AlGhurair, Diana Hamade Attorneys at Law, Family law in the United Arab Emirates: overview, https://uk.practicallaw.thomsonreuters.com/4-612-5426?transitionType= Default &contextData=(sc.Default)&firstPage=true , accessed on 20 5 2021
[284]Article 68, Personal Status Law
[285]Article 69, Personal Status Law

The Courts of First Instance are not capable of complex asset separation and support orders. However, higher courts can consider a more structured and complex maintenance order. The lower courts will not rule on the matter, leaving the parties to appeal to a higher court.A father is responsible for a boy's maintenance until they complete their education, and for a girl's until they marry.A child can make a claim for their education costs against their father, as maintenance should be paid until the child has completed their education.

Child support covers all expenses required to care for the child. Therefore, child maintenance comprises several components including:

- Housing.
- Food.
- Clothes.
- Education.
- Extracurricular activities.
- Medical expenses.
- Domestic employees.
- Flight tickets.
- Transportation (for example, school bus costs or provision of a vehicle or a driver).

A father is responsible for providing this maintenance to his child following divorce. The child’s standard of living must be as close as possible to that which the child was accustomed to during the marriage. The objective is to minimize disruption to the child’s life.A father is not required to transfer capital to his child, provided that he pays for the child's maintenance. A father can transfer capital to his child, but the courts will still make an order for structured child maintenance payments.

3.14 Conclusion

The legal systems under which women live in Muslim countries are mostly dual systems. They consist, on the one hand, of civil law, which is indebted to Western legal systems, and on the other hand, of family or personal status law, which is mainly built upon Sharia, Islamic religious-based law. The civil law as well as the constitutions of many Muslim states provide for equal rights between women and

men. However, Islamic family law as variously manifested in Muslim nations poses obstacles to women's equality.

Islamic family law, which addresses marriage, divorce, child custody, and inheritance, has long been a target for reform. Many state elites have pressed for family law reform to further state interests by removing hindrances to women's full participation in the labor force and politics.

In many Muslim states, the substance of family law and its actual implementation differ in ways that somewhat mitigate the gender imbalance of the laws on the books. Women are able and sometimes officially encouraged to oppose discriminatory provisions in the law. Women can, for example, write clauses into marriage contracts that make taking another wife grounds for divorce and for post-divorce division of marital assets

It has been found by analyzing Muslim Law in various Muslim countries that, discriminations and prejudices against women has found in various forms. In 2014 a British newspaper[286] published that "In law of various Muslim Countries the women are silent victims of violence against women. Law will allow men to attack their wives, children and sisters without fear of judicial punishment, undoing years of slow progress in tackling violence.

The study of law of various Muslim majority countries has shown that discrimination against women is widely accepted among these countries. The researches show that 85% of Muslims believe that wives should always be subservient to and obey their husbands[287].In a survey from the University of Michigan's Institute for Social Research, conducted in seven Muslim-majority countries, some one half of the respondents in Tunisia, Turkey and Lebanon replied that women should be permitted to decide for themselves what to wear. In Iraq, Pakistan and Egypt, 27%, 22%, and 14%of the respondents agreed that women should be permitted to decide for themselves what to wear.[288]The study of Constitutions of various Muslim - majority countries find that discrimination against women is more

[286] British newspaper The Gardian, 4 February 2014
[287]http://www.pewforum.org/2013/04/30/infographic-the-worlds-muslims-religion-politics-andsociety
[288]http://www.pewresearch.org/fact-tank/2014/01/08/what-is-appropriate-attire-for-women-in-muslim-countries

prominent in countries where Islam is the source of legislation. Women and girls have been facing discrimination in matters of education, labor market, employment opportunities and electoral participation etc. There have been seen various changes in laws of these countries over the time.

Government of few countries increased the degree of supremacy of Islam in their laws while few countries like Turkey and UAE decreased the degree of supremacy of Islam in their laws.

Before the ratification of the 2005 constitution, Iraqi women had enjoyed some of the most modern legal protections in the Arab and Muslim world, under a civil code that prohibits marriage below the age of 18, arbitrary divorce and male favoritism in child custody and property inheritance disputes. However, article 41 of Iraq's 2005 Constitution allowed each religious group in Iraq to govern its own personal status matters. As a result, the situation of Iraqi women still very much depends on the implementation of Islamic law and on the priorities of male religious authorities. When the security situation in Iraq deteriorated, violence against women became more pronounced, especially rapes, honor killings, and kidnapping, forcing women to stay at home and limiting their educational and employment and opportunities.

Many Islamic scholars propose that there is no discrimination against women in Islam. But in contrast, the analysis of laws in various Muslim-majority countries done in this chapter corroborate that Shariat law is incompatible with the human rights of women as pertaining to gender equality.

CHAPTER-IV

GENDER JUSTICE UNDER INDIAN CONSTITUTION WITH REFERENCE TO RIGHT OF MUSLIM WOMEN

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The Constitution is the backbone of every democratic and secular fabric of the nation that's why it is called as ground norm[1] in almost all the countries. The Constitution of India[2] is the longest Constitution in the world, which ,not only describe the political structure, political principles, procedures and powers of the government but also guaranties to its citizen Justice, Equality, Liberty and Fraternity which are woven by golden threads under part III and part IV of Constitution.

Not only the government but citizens of India are also governed by the Constitution. It confers fundamental rights to the people/ citizen[3] irrespective of gender. The objective of the Constitution of India is to provide Justice, social, economic and political Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity to both men and women irrespective of caste, class and gender etc. The Constitution of India in this way guarantee equality of status and opportunity to women too as they are also citizen of India.

One of the fundamental principles of the Indian Constitution is eradicating gender bias or gender discrimination. For this Constitution gives power to states to positively discriminate in favor of women so that they could be empowered in respect of their male counterparts. Our Constitution has provided magnificent provisions to ensure gender justice.

[1] The ultimate, foundational principle from which the validity of all laws can be drawn.

[2] The Constitution of India was framed by a Constituent Assembly which was established in 1946. Dr. Rajendra Prasad was elected President of the Constituent Assembly. A Drafting Committee was appointed to draft the Constitution and Dr B.R. Ambedkar was appointed as the Chairman of this committee. The making of the Constitution took a total 166 days, which was extending over a period of 2 years, 11 months and 18 days. Some of the salient features of the British, Irish, Swiss, French, Canadian and the American Constitutions were incorporated while designing the Indian Constitution.

[3] Where ever applicable.

4.1 Gender Justice under Constitution of India

The Preamble to the Indian Constitution itself assures justice, social, economic and political, and equality of status and opportunity and dignity of the individual[4] to its citizens irrespective of gender. The Preamble of our Constitution is "a key to open the mind of the makers of the Constitution", which may show the general purpose for which they make the Constitution.[5] It declares the rights and freedoms which the people of India intended to secure to all citizens, both men and women. The Preamble begins with the words "WE, THE PEOPLE OF INDIA", which include men and women of all castes, religions, etc. It wishes to render "EQUALITY of status and opportunity" to every man and woman. The Preamble again assures "dignity of individuals" which includes the dignity of men and women. Based on the Preamble of the Indian Constitution several important enactments have enacted by our parliament. They are related to every walk of life of the people of the nation. They are related to Family, Adoption, Succession, Guardianship, Employment, Domestic violence, Dowry prohibition and Sexual harassment at work place etc. These enactments aimed to provide strength and protecting the status, rights and dignity of women. The framers of the Indian Constitution were inspired by the Universal Declaration of Human Rights and they tried that the essence and the spirit of the Universal Declaration was incorporated in the Constitution of India.

4.2 Part III of the Constitution

Part III of the Constitution of India stated about the fundamental rights of the people/citizen. Initially seven Fundamental Rights were enshrined in the Constitution of India. However now only six fundamental rights in Constitution of India[6]. Which are:-

1. Right to Equality (Article 14 to Article18)
2. Right to Freedom (Article 19 to Article 22)
3. Right against Exploitation (Article 23 and Article24)
4. Right to Freedom of Religion (Article 25 to Article28)

[4]Preamble of the Constitution of India
[5] Earnest Barker.
[6] Right to Property was removed from the list of Fundamental Rights by the 44th Amendment Act of the Constitution in the year 1976. Since then, it has been made a legal right

5. Cultural and Educational Rights (Article 29 and Article30)

6. Right to Constitutional Remedies (Article 32)

These Fundamental rights are available to all the citizens of India irrespective of their gender and prohibits any kind of discrimination in the name of gender.

1-Right to Equality

Article 14[7] of the Constitution of India confers fundamental right to equality before the law and equal protection of law.

Equality before the law means both men and women are treated equally and there shall be no discrimination on the basis of gender. In this way Art.14 guarantees equality of status to women also.

In judgment of ***Ms. Githa Hariharan v. Reserve Bank of India***[8] The honorable Supreme Court held that **Mother can act as a natural guardian during the life time of father who would be deemed to be absent.** The court declared that the father cannot claim that he alone was the natural guardian and his wife could not take decision without his permission. It was held that the mother of a minor was relegated to an inferior position on the ground of sex alone since her right as a natural guardian is made cognizable after the father, which was violation of Articles 14(i.e. right to equality) and Article 15(i.e. discrimination on the ground of sex)of the Constitution. Hence, the mother can act as a natural guardian of the minor during the life time of the father who would be deemed to be absent. In the present case of Geetha Hariharan the court observed that the expression "**natural guardian**" is defined in Section 4(c) of the Hindu Minority and Guardianship Act 1956 as any of the guardian mentioned in Section 6[9]. The term '**guardian**' is defined in Section 4(b) of the Hindu Minority and Guardianship Act as a person having the care of the person of a minor or of his property or of both, his person and property and includes a natural guardian[10]. Thus, it is seen that the definitions of 'guardian' and 'natural guardian' do

[7] Article 14 of the Constitution provides - Equality before law-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
[8] AIR 1999 SC 1149: 1999 (2) SCC 228.
[9] Section 4(c) of The Hindu Minority and Guardianship Act 1956.
[10] Section 4(b) of The Hindu Minority and Guardianship Act 1956.

not make any discrimination against the mother and she is being one of the guardians mentioned in Section 6 of the Hindu Minority and Guardianship Act would undoubtedly be a natural guardian as defined in Section 4(c) of the said Act. The only provision to which exception is taken is found in Section 6(a) of the Act which reads "the father, and after him the mother". The phrase does give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the lather. In fact, that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court where to do so would be in the interest of the welfare of the minor. Therefore, the Reserve Bank of India was not right in denying the mother in agreement with the father opening from deposit account in favor of her minor son. The father cannot claim that he alone was the natural guardian and thus, the wife cannot take a decision without his prior permission.

In the landmark judgment of ***Vishaka v. State of Rajasthan***[11]The honorable Supreme Court observed that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the work place. In this case the Supreme Court has issued guidelines to ensure that the women have equal working conditions and are protected from sexual harassment.[12].[13]

[11]AIR 1997 SC 3011

[12] Vishaka was a Non-Government Organization (NGO) which was working for gender justice and equality. This NGO was working for preventing sexual harassment at work place of all working women, so they brought an action through PIL seeking enforcement of fundamental rights of working women under Article 14, 19, and 21 of the constitution[12]. Their claim was that while working women remained vulnerable due to this sexual harassment neither the competent legislature nor the authorized executive officer were taking any helpful preventive measure, in this regard. Therefore, the plaintiffs approached the apex court for the enforcement of the fundamental rights of the working women as guaranteed by the Constitution.

The Supreme Court laid down the fallowing guidelines which should be followed in absence of enacted law to provide for effective enforcement of basic human rights of gender equality.

1-All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps-

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The rules/regulations of Government and Public Sector bodies relating to conduct and discipline should include rules and regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers' steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

Article 15-Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place Of Birth[14]

Though Art.15 prohibits discrimination on the ground of sex but our Constitution makers were very much aware about the discriminations and biases prevalent against the women in Indian society and they also knew that these discriminations and biases either social or legal are so strong which cannot be removed through making provisions under Indian Constitution therefore they empowered the state to take affirmative action in favor of women.

So Article 15 of the Constitution specifically provides for affirmative and positive action in favor of women by empowering the state to make special provisions for them. Article 15 (3) empowers the state to make special provision for women and children, the reason is that "women's physical structure and performance of mental functions place her at disadvantage in the struggle for subsistence and her physical wellbeing becomes an object of public interest and care in order to preserve her strength and vigor of the race"[15].

Article 15 of the Indian Constitution empowers the states to make special provisions for women and children. Various acts and provisions of the various laws derive their constitutionality and legality from this Article. Few examples of

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

2-Criminal Proceedings can be initiated against the offender, where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

3- In particular, it should ensure that the victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer

[13]Vishakhav.State of Rajasthan AIR 1997 SC 3011

[14] Article15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

2-No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

a-access to shops, public restaurants, hotels and palaces of public entertainment; or

b- the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

3- Nothing in this article shall prevent the State from making any special provision for women and children.

[15]Muller v. Oregon 52L.ED.551

enactments and constitutional validity of the various provisions empowering women are given below.

1-Non-discrimination on the Ground of Sex

In judgment of ***Smt. Savitri v. Bose***[16]The Allahabad High Court has held that Article 15(1) of the Constitution protects women from being discriminated on the ground of sex. So in this case the decision of the excise authorities to prefer men over women in granting licenses for opening of liquor shops was struck down as violative of Article 15(1) of the Constitution of India. It was further held that such discrimination was not permitted under Article 15(3) of the Constitution which authorizes the State government to make special provisions or laws for women for giving some benefits to women and cannot be detrimental for them.

2- Declaration of Constitutional validity of Section 437 of the Code of Criminal Procedure, 1973[17]

The mandate of Section 437 clause 1 sub clause (ii)of the Code of Criminal Procedure permits positive discrimination in favor of woman even if they appears to have been guilty of an offence punishable with death or imprisonment for life. In other words, this section prohibits release of a person accused of a capital offence on bail except women and children under 16 years age or sick or infirm persons.

[16]AIR 1972 All. 305

[17] Section 437 is a provision which declares conditions when bail may be taken in case of non- bailable offence-

1- When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non- bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail it such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason: Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court

In ***Choki v.State of Rajasthan***[18]the Rajasthan High Court has held that it is valid and constitutional on the ground that it makes special provision for women and therefore it is protected under Article 15(3) of the Constitution.

3-Reservation of Seats for Women in College

In case **of *Dettatreya v.State of Bombay***[19] High Court of Bombay has declared that in women colleges reservation of some seats in college is not unconstitutional and violative of law. The court observed that establishment of educational institution exclusively for women is not hit buy Article 15 of the Constitution.

4-Women Reservation in Jobs

Mrs. Raghubons v. The State of Punjab[20]the Punjab and Haryana High Court has declared that a Government order that has declared women as not entitled for the post of a warden in all men's jail is not violation of Article 15(1) of the Constitution. Art.15 prohibits discrimination on the ground of sex. But here in this case the reason that if a woman has been employed as a warden, her position would have become worst and risky while maintaining discipline over habitual offenders who have been kept in the jail. This decision seems to be reasonable because it involved with the physical safety of women and is for her wellbeing.

5-Women's Reservation in Election to Local Bodies

Reservation of seats for women in local bodies and in educational institutions cannot be taken to mean as discrimination of ground of sex. The Supreme Court in ***T. Sudhakar Reddy v. Govt. of Andhra Pradesh***[21]has declared that reservation of seats for women in local bodies cannot be taken as discriminatory on the ground of sex. The apex court relied upon the mandate of Article 15(3) of the Constitution. The Supreme Court upheld the validity of these provisos on the ground that Article 15(3) of the Constitution permitted the making of special provisions for women.

[18]AIR 1971 Raj 10.
[19]AIR 1953 Bomb. 311.
[20]AIR 1972 P. & H 117.
[21]1993 Supp. (4) SCC 439.

6-Scope of Article 15(4) of the Constitution

In ***Dr. Preeti Srivastava v. The State of Madhya Pradesh***[22]The Supreme of India explained the scope and ambit of Article 15(4) of the constitution. This clause was added by the Constitutional first Amendment of1951.This clause enables the State to make special provisions for the advancement of women, Scheduled castes and Scheduled tribes. The working of Article 15(4) is similar to that of Article 15(3). It enables the authorities to make special provisions for women and children notwithstanding Article 15(1) which imposes the mandate of nondiscrimination on the ground of sex. This is an enabling provision which works as a method of protective discrimination. This same protective discrimination was extended by Article15 (4). As a result of the combined operation of these Articles, an array of programmes of compensatory or protective discrimination has been pursued by the various states and Union Government. Since every such policy makes a departure from the equality norm, though in a permissible manner for the benefit of the backward, it has to be designed and worked in a manner conducive to the ultimate, building up of an egalitarian nondiscriminatory society

Article16- Equality of Opportunity in Matters of Public Employment[23]

Article 16 of the Constitution provides equality of opportunity to all, in matters relating to public employment or appointment to any office and specifically forbids discrimination inter-alia on the ground of sex. Article 16 (1) guarantees that there shall not be any discrimination against any citizen in respect of any employment or office under the state on the ground of religion ,race, caste, sex or place of birth. This means Article 16 specifically prohibits any discrimination on the basis of sex i.e. gender in employment opportunity or in promotion. In case *of* ***C.B. Muthamma v. Union of India***[24] a provision in the service rules requiring a female employee to obtain the permission of the government in writing before her marriage is solemnized

[22]1999 (7) Supreme 81.

[23] Article 16 of The Constitution of India-

1- There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

2- No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State

[24]AIR 1979 SC 1869

and denying her the right to be promoted on the ground that the candidate was married women was held to be discriminatory against women and hence unconstitutional[25].

In ***Air India v. Nargeshmerza***[26] the Supreme Court struck down discriminatory service conditions requiring female employees to obtain government permission before marriage and denying married and pregnant women the right to be employed. In this case S.C. held that provisions on pregnancy bar and retirement on the age of 35 are violative of Article 14, 15 and 16 of the Constitution.

2-Right regarding Freedom of Speech[27]

Article 19 of the Constitution of India gives right of freedom of speech and expression and freedom to practice any profession or to carry out any occupation ,

[25]Dr.J.N. Pandey The Constitutional law of India Edition 50 2013

[26]AIR1981 SC 1829

[27] Article 19 of the Constitution of India 19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

trade or business to all the Indian women irrespective of their cast creed or religion. Despite these outstanding advances, women in the region still face structural obstacles and discriminatory practices that exclude many women from public debate and prevent them, forcibly and persistently, from exercising their right to express their ideas and opinions publicly and to receive information on an equal footing with men. Many of these obstacles and practices are manifestations of gender-based discrimination, in addition to other factors, such as race, ethnicity, religion or belief, age, class, sexual orientation, and gender identity, those women in the region face, and they continue to create disparities in women's exercise of the right to freedom of expression in comparison to their male counterparts.

Indira Gandhi, Sarojini Naidu Pratibha Patil, Shabana Azmi, Shusmita Sen, Kangna Ranout , Sania Miza , Mary Com and Arundhati Roy are some of few women who constantly use to raise their voices .Whether criticized or praised ,these are the voices which are heard and have impact on the society.

When this right of freedom of speech comes in reference of Muslim women one can find that these women are doubly attacked for exercising freedom of expression and because of their gender. In addition to the risks of threats and violence faced by the Muslim women who raise their voices against stereotypes of society, women belonging to these groups are exposed to additional or specific risks. By challenging chauvinistic stereotypes that disapprove their participation in public life, they face a situation of violence and gender-based discrimination against them. At the same time, they face a lack of protection and obstacles to access to justice that are also differentiated from their male counterparts.

3-Right to Freedom of Religion[28]

Constitution of India guarantees right to freedom of religion to all the persons equally[29]. This right is available to the entire male as well as to female of India. There

[28] Article 25 to 28 of the Constitution of India provides for freedom of religion.

[29] 25. Freedom of conscience and free profession, practice and propagation of religion
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

is no discrimination on the basis of religion or caste while securing this right to people.

Inherent in religious freedom is the right to believe or not believe as one's conscience leads, and live out one's beliefs openly, peacefully, and without fear. Freedom of religion or belief is an expansive right that includes the freedoms of thought, conscience, expression, association, and assembly. Though the Constitution of India guarantees right to religion to all people irrespective of gender but social structure of the Indian society imposes several restriction on the women in the name of religion like Hindu society imposes restriction on the women to inter to a temple, similarly Muslim women are also not allowed to enter to a Mosqe for pyayer. Various temples in India do not do equality while providing this right to women. They impose various kind of restriction on women for entering in temple and worshiping there. These restrictions are not reasonable. Example of such kind of restriction is Sabrimala temple of Kerala, where women were not permitted to enter in temple if they are between the age group of 10 to 50. In 2018, honorable the Supreme Court opened the doors of Sabarimala temple in Kerala for women of all age groups including those in menstruating phase of life. Earlier, temple entry rules in Kerala prohibited women aged 10-50 from entering the Sabarimala temple. Earlier Muslim women were not allowed to enter in to Mosque and offer Namaz inside a mosque. But now the when a petition has been filled by a couple of Pune regarding the right of Muslim Women to enter in to Mosque for offer Namaz it is said by the MPLB on affidavit that "A Muslim woman is free to enter Masjid for prayers. Still there are various restrictions on Muslim women regarding their religious rights like they cannot lead the Namaz in Maszid as their male counterpart do. There are certain other restriction like women have to wear certain dress and they cannot manage religious

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

affairs related to religion while Article 26 gives freedom to male as well as to female to manage religious affairs[30].

4.3 Gender Justice under Directive Principles of State Policy and Women[31] -Part IV

Apart from the fundamental rights guaranteed in part III of the Constitution in the Constitution of India, imposes some directives on the states under the head of DPSP which state should fallow in governance of the country and policy making. Some of the directives are gender neutral in nature but as our constitution makers were aware about the gender discrimination existed in the society they also made the special directives for protection of the women. These policies envisaged equal rights to work, equal pay for equal work, adequate means of livelihood to both men and women, decent and dignified life for both of them, and these are the directives which are goals to be achieved by the government as stated under the directive principles of state policy.

Article 38 of the Constitution of India

Article 38[32] of the Constitution of India has imposed a duty on the state to maintain and secure a social order in which justice social, economic and political shall be ensured for the promotion of welfare of the people. The word people include men women and transgender. It requires the state to strive to promote the welfare of the people and to eliminate inequalities in status, facilities and give equal opportunities to all. Clearly the intention of the makers of the Constitution has been to ensure that

[30] Article 26 of Constitution of India. Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law

[31] here in after called DPSP

[32] Article 38 0f the Costitution of IndiaState to secure a social order for the promotion of welfare of the people
1- The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life
2- The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations

equality would not have been only seen but equal opportunity to all the people should be made a reality.

Article 39[33] **of the Constitution of India** lays down the principles of policy to be followed by the state which has included that the state should direct its policy toward securing the right to an adequate means of livelihood for both the men and the women. As per Article 39 (d) there should be equal pay for equal work for both men and women. Article 39(e) declares that the health and strength of workers men and women shall not be abused and that citizens should not have been forced by economic necessity to enter a vocation unsuited to their age or strength. All these provisions are equally available to Muslim women.

1-Principle of Equal Pay for Equal Work for Both Men and Women

The Supreme Court of India in ***Randhir Singh v. Union of India***[34]**was of the o**pinion that the principle of 'equal pay for equal work' is not declared in the Constitution as fundamental right but it is certainly a constitutional goal, and this is the reason why it has been kept in DPSP of the Constitution. Article 39 (d) the principle of equal pay for equal works is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though, those drawing the different scales of pay do identical work under the same employer. In the present case the Supreme Court has held that the principle of 'equal pay and equal work', though not a fundamental right, is certainly a Constitutional goal and therefore, capable of enforcement through Constitutional remedies under Article 32 of the Constitution. The doctrine of 'equal pay for equal work' is equally applicable to both men and women, even the daily

[33] Article 39-: Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing
a- That the citizens, men and women equally, have the right to an adequate means to livelihood;
b- That the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
c- That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
d- That there is equal pay for equal work for both men and women;
e-That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
f- That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment[33]
[34]AIR 1982 SC 879.

wagers are also entitled to the same wages as other permanent employees in the department employed to do the identical work.

State of Haryana v. Rajpal Sharma[35]the Supreme Court has held that the teachers employed in privately managed aided schools in the state of Haryana are entitled to the same salary and dearness allowance as paid to teachers employed in other Government schools of Haryana state. But, in case work is of the same type both men and women should be paid equally, without any discrimination.

2- Workers to be Protected Equally Whether They are Men and Women

According to Article 39(e) of the Constitution of India the health and strength of workers i.e, men and women and of the children should be protected equally. They should not be forced to work under inhuman and hazardous condition. In view of this Article the State have been directed to make its policy towards securing the health and strength of workers (men and women) and the of under age children. They should not be forced to work in inhumane conditions and to work in vocation unsuited to their age and strength due to economic necessity.

3-Equal Justice and Free Legal Aid-Article 39A

This very important Article of the Constitution provides equal justice and free legal aid. The State shall ensure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid by appropriate legislation of schemes or in any other way to ensure the existence of opportunities for securing justice. On several occasions it has been held by the Apex Court that legal aid and speedy trial have now been treated as fundamental rights under Article 21of the Constitution available to all prisoners and enforceable by the courts. The State is under a duty to provide lawyer to a poor person and it must pay to the lawyer his fee as fixed by the court.[36]

[35]AIR 1997SC 449.
[36]AIR 1978 SC 1548 and also see AIR 1979 SC 1322

4-Article 42- Provision for Just and Humane Conditions of Work and Maternity Relief

The State shall make provision for securing just and humane conditions of work and for maternity relief. Article 42 requires the state to make provision for securing just and humane conditions of work and for maternity relief. In ***Apparel Export Promotion Council v. A. K. Chopra***[37] in which disciplinary proceedings for sexual harassment leading to dismissal from service were upheld by the Supreme Court. In cases relating to public employment the courts have quashed the discriminatory provisions that gave advantages to men and imposed disabilities on women.

5-Uniform Civil Code- Article 44

As per Article 44 of the Constitution of India is that **state shall endeavor to secure for the citizen a Uniform Civil Code throughout the territory of India**[38]**.**The founding fathers of the Constitution were aware of the condition and situation of gender justice and sexual inequalities of women and so to change the scenario and condition of women in Indian society they incorporated Article 44 of the Constitution. The main aim of the Article was that it may be exercised in future at appropriate time. It is really unfortunate and heart breaking that even after 70 years of independence the State did not find the path to enact it. There could not be seen any serious endeavor to fulfill this constitutional obligation. Regarding the enactment of Uniform Civil Code in a land mark judgment of ***Sarla Mudgal v. Union of India***[39]the Supreme Court has passed direction to the Central Government to take a fresh look at Article 44 of the Constitution which enjoins the State to secure a Uniform Civil Code.

The Supreme Court held that this is imperative on the part of state to implement it for the protection of the oppressed class as well as promotion of national unity and integrity. The above direction was given by the Court while dealing with the question that whether a Hindu husband married under Hindu law, who has converted to Islam, without dissolving the first marriage, can solemnize a second marriage. It has been declared by the Supreme Court that such marriage will be illegal, and the

[37] AIR 1999 SC 625.
[38]Article 44 of the Constitution if India.
[39](1995) 3 SCC 635.

husband can be prosecuted for bigamy under Section 494 of the Indian Penal Code 1860 and will be punished accordingly. The Court further held that there is no automatic dissolution of Hindu marriage and a Hindu marriage continues to exist even after one of the spouses converted to Islam. A Hindu marriage can only be dissolved by a decree of divorce on any of the ground mentioned in Section 13 of the Hindu Marriage Act 1955. Accordingly, the second marriage of a Hindu husband after his conversion to Islam was declared void, and the husband was held liable for the prosecution of bigamy under section 494 0f Indian Penal Code.

As to the question regarding Uniform Civil Code the division bench (Justice Kuldip Singh and R. M. Sahani), in the aforesaid case observed that since 1950 a number of governments have come and gone but they all have failed to make any solemn attempt towards implementation of Article 44 of the Constitution. The result is that even today many Hindus use to marry again after converting to Islam only for the purpose of escaping the consequence of offence of bigamy. This is so because Muslim Law permits four wives at a time.

In case of ***Prgati Varghese v. Cyril George Varghese***[40] Bombay High Court has ordered deletion of Section 10 of the Indian Divorce Act. In this act when a Christian wife want to take divorce from her husband then she has to prove adultery along with cruelty or desertion. It infringes the fundamental right of a Christian woman to live with human dignity as provided under Article 21 of the Constitution. In the present case the court observed that Section 10 of the Indian Divorce Act compels the wife to continue to live with a man who has deserted her or treated her with cruelty. Compelling a woman to live such life is inhuman and barbaric.

Another important question came in front of Supreme Court in 1997 was that whether the children of Muslim divorced woman are entitled to claim maintenance for themselves under Section 125 of the Code of Criminal Procedure, 1973inspite of the legal position that they are governed by the Muslim personal Law i.e. Muslim Women (Protection of Right on Divorce) Act. 1986. This problem was solved In case of ***Noorsabakhatoon v. Mohd. Quasim***[41]**.** Honourable Supreme Court has held that a divorced Muslim woman is entitled to get maintenance for her children till they

[40]AIR. 1997 Bom. 349.
[41]AIR 1997 SC 3280.

become major. The Court further held that both under the Muslim Personal Law and under Section 125 of the Code of Criminal Procedure, 1973 the obligation of the father has been declared absolute when the children have been living with the divorced wife. The Court makes it clear that the children of Muslim parents are entitled to claim maintenance under Section 125 of the Code of Criminal Procedure 1973 for their maintenance till they obtain majority or are able to maintain themselves by their own earnings, whichever is earlier and in case of female, till they get married. In the aforesaid case the Supreme Court said that "We have opted for a secular republic, secularism under the law means that the State does not owe loyalty to any particular religion and there is no state religion. The Constitution gives equal freedom to all religion and everyone has the freedom to follow and propagate their own religion. But, the religion of individual has nothing to do in the with the socio-economic laws of the State."

In view of the above mentioned judgment of the Supreme Court, now it is the Constitutional duty of the Government to make the uniform civil code to remove inequalities and oppressive mentality of society for the women especially in matrimonial and family matters. The concept of religion cannot be allowed to be used as a tool to abuse and exploit women. Thus, the need of uniform civil code is most warranted to achieve constitutional mandate which have been enshrined under Article-44 of the Constitution. It have been very unfortunate to point out that the State has not yet made any efforts to introduce uniform application of civil laws i.e. Uniform Civil Code which will govern the rules of adoption, marriage, succession and maintenance etc[42].It is time and again proved fact that gender justice cannot be achieved in its true and full sense, unless a uniform civil code containing the best provisions which must have been taken from all the religions is enacted. The concept of Uniform Civil Code does not mean to modify the law to unreasonable and impracticable extent. In reality the concept of Uniform Civil Code connotes basics uniformity on the subjects of marriage, maintenance and divorce succession, inheritance etc. A logical and systematic combination of all religions should be the bedrock of the Uniform Civil Code. It is to be restated that in India the Supreme Court has taken note of injustice faced by the women particularly in matters of personal laws.

[42]AIR 1999 SC 1531; (1995) 3 SCC 635.

In landmark and most cherished judgment of ***Mohd. Ahmed Khan v. Shah Bano Begum***[43]29the Supreme Court decides on the matter relating to the Muslim husband's liability to maintain his wife beyond "Iddat". Here wife means wife who is unable to maintain herself. The court held that Section 125 of the Code of Criminal Procedure1973 which imposes a legal obligation on all the husbands to maintain their wife is of secular nature and is applicable to all persons irrespective of their religions. In this case the Supreme Court emphasized the need for codifying a common civil code for people of all religion and said, "A Common Civil Code will help the cause of national integration by removing different loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous consensus on this issue. It is the State which is charged with the duty of securing a Uniform Civil Code for the citizens of the country and unquestionably, it has the legislative competence to do so. It is unfortunate to note that there is no Uniform Civil Code in India; however, there is a Uniform Criminal Code which is very much in existence. Consequently, the criminal law is applicable to all citizens irrespective of the fact that by what religion they belong. There is no uniformity in Civil Laws pertaining to divorce, maintenance, marriage, adoption and succession governing the Hindus, Muslims, Christians and Parsees etc. There are different laws like the Hindu Marriage Act 1955, The Hindu Minority and Guardianship Act1956, Hindu Succession Act 1956, the Hindu Adoption and Maintenance Act 1956governing the personal matters of Hindus. Whereas Muslims are governed by their personal laws like the Shariat Act, the Dissolution of Muslim Marriage Act and the Muslim Women (Protection of Rights on Divorce) Act etc. Similarly, the Christians in India are governed by the Indian Christian Marriage Act, the Indian Divorce Act and Chochin Christian Succession Act etc. Parsis are governed by a different set of their personal laws. Thus, it can be said that there is no uniformity in these personal laws based on different religious belief. Article 44 of the Constitution of India, in its Part IV directs the State to make a Uniform Civil Code which should be applicable throughout the territory of India. Since, Directive Principles of State Policy cannot be enforced by the court of law so no gender justice or gender equality can be achieved in its true sense, without

[43]AIR 1985 SC 945.

making a Uniform Civil Code containing the provisions derived from all the religions. It should be enacted immediately."[44]

Conversion does not Give Right to Marry Again

It is settled legal preposition that no right is conferred on the husband regarding plurality of marriages without any condition. In ***Lily Thomas etc v. Uuion of India***[45] wherein a man who was Hindu by religion converted into Muslim religion and solemnized the second marriage. It was held by the court that this second marriage will not dissolve the first marriage and his second marriage will be bigamous marriage. In this case the Supreme Court declared that mere conversion to another religion will not dissolve the marital ties. For dissolution of the first marriage a decree of divorce must be obtained from the competent court. Till a decree is passed marriage subsists with all its legal consequences. Any other marriage during the continuation of first valid marriage would constitute an offence under Section 494 of the Indian Penal Code1860 read with Section17 of the Hindu Marriage Act 1955.The person who solemnized the second marriage after conversion to some other religion would be liable to be prosecuted and punished for the offence of bigamy. So long as that first marriage subsists another marriage cannot be performed, under any other personal law. And if such marriage have been performed the person would be liable to be prosecuted for the offence under Section 494 of the Indian Penal Code.

Protection and Rehabilitation of Prostitutes and their Children

On this point we have a very important and landmark judgment of ***Gaurav Jain v. Union of India***[46].in which the Petitioner who was a public-spirited advocate named as Gaurv Jain filed a petition in court by way of public interest litigation seeking appropriate directions to the Government for the improvement of inhumane condition in which they are living and other plights of prostitutes and their children. He was moved by reading an article entitled "A red light trap" "Society gives no chance to prostitutes offspring", which was published in India Today on July 11, 1988. In this PIL The Supreme Court has issued a number of directions to the government and all, social organizations to take upon appropriate measures for

[44]Ibid
[45]AIR 2000 SC 1650: 2000 (6) SCC 224
[46]AIR 1997 SC 3021.

prevention of women in various forms of prostitution and to rescue them from falling them again into the trap of red-light areas and to rehabilitate their children through various welfare measures so as to provide them with dignity of person means of livelihood and socio-economic improvement. The Court has issued the following directions:-

(i) That it is the duty of Government and all voluntary non-governmental organizations (NGOs) to take necessary measurer for protecting these females from prostitution and to rehabilitate them so that they may lead a life with dignity.

(ii) The Court directed that they should be provided opportunity for education, financial support, developed marketing facilities for goods produced by them. If possible, their marriages may be arranged so that the problem of child prostitution can be eradicated. Marriage would give them real status in society. They should be given housing facilities, legal aid, free counseling assistance and all similar aids and service so that they do not fall into the trap of red-light area again.

(iii) The Court held that economic empowerment is one of the major factors that can prevent the practice of dedication of the young girls to the prostitution as Devadasis, Joginees or Venkatasins. Referring the various measures taken up by different states, the Court directed that the social welfare Department should undertake similar rehabilitation programs for the fallen victims so that the foul practice can be totally eradicated, and they are not again trapped into the prostitution. The Court gave example of State of Andhra Pradesh where the state Government is providing housing facilities, free treatment in hospitals and pension to devadasis. These women are being helped by Non-Governmental Organizations (N.G.Os.) in the States of Maharashtra, Karnataka and Andhra Pradesh.

(iv) The Court directed that the rescue and rehabilitation of the child prostitutes and children should be kept under nodal department, namely, Department of Women and Child Development under the Ministry of Welfare and Human Resources, Government of India, which will, devise suitable schemes for proper and effective implementation. The Court directed the Ministry of Welfare, Government of India of the establishment of juvenile homes.

(v) The Court directed to constitute a Committee within a month from the judgment which would make an in-depth study into these problems and evolve suitable schemes as are appropriate and consistent with the directions given above. It shall submit its report within three months.

On the basis of its report, direction would be given to the State Governments for effective implementation of the schemes. The Nodal Department would enforce and regularly be supervised by the Ministry of Welfare. A permanent Committee of Secretaries should be constituted to review the progress of the implementation on annual basis and to take such other steps as may be expedient in the effective implementation of the Schemes. Periodical progress as to funding and enforcement of the scheme should be submitted with Registry of the Supreme Court. 'It is hoped', the Court said, the above law and direction would relieve the human problem by rehabilitation of the unfortunate fallen women caught in the trap of prostitution, theirchildren would be brought into the mainstream of the social order. These directions would enable them to avail the equality of opportunity and of status with dignity of person which is the arch of the Constitution.

The Court held that under Article 32 of the Constitution the Court has power to adopt such procedure as is expedient in a given fact and situation and deal with the matter appropriately therefore the rigors of the pleading or the reliefs sought for on adversarial litigation has been soften, new methods, tools and procedures have been evolved to meet out justice and to enforce fundamental right.

6- Article 46 -The State Shall Promote with Special Care the Educational and Economic Interests of the Weaker Sections of the People

This Article requires the state to promote with special care the education and economic interest of the weaker sections of the citizen. And certainly, women are weaker section of the society in India. So here the clear objective is to strive towards a gender just society in which weaker sections are given special privileges and protections.

4.4 Gender Justice and Fundamental Duties Part- IVA

Part IVA of the constitution incorporated through 42nd Amendment Act in 1976, our natural obligation to renounce practices derogatory to the dignity of women has been elevated to the status of fundamental duty by article 51A.

Whether Beauty Contests are Violation of Constitutional Provisions:-

In ***C. Rajakumari v.Commissioner of Police, Hyderabad.***[47] the question before Andhra Pradesh High Court was raised that whether beauty contests are violative of constitutional provisions . It has been held that if a beauty contest indecently represents any woman by depicting in any manner the figure of woman, form, body or any part thereof in such a way so as to have the effect of being indecent, or derogatory to or degrading women, or likely to deprive, corrupt an injure the public morality would be volatile of the provisions of the Indecent Representation of women (prohibition) Act, 1986 and also unconstitutional as it violates Articles 14,21, and 51A of the Constitution of India.

There are various enactments which owe their existence to the above mentioned various provisions of the Constitution of India are: -

1. The Plantation Labour Act, 1951
2. The Family Courts Act, 1954
3. The Special Marriage Act, 1954
4. The Hindu Marriage Act, 1955
5. The Hindu Succession Act, 1956 with amendment in 2005
6. Immoral Traffic (Prevention) Act, 1956
7. The Maternity Benefit Act, 1961 (Amended in 1995)
8. Dowry Prohibition Act, 1961
9. The Medical Termination of Pregnancy Act, 1971
10. The Contract Labour (Regulation and Abolition) Act, 1976
11. The Equal Remuneration Act, 1976
12. The Prohibition of Child Marriage Act, 2006
13. The Criminal Law (Amendment) Act, 1983

[47] AIR 1998 AP 302.

14. The Factories (Amendment) Act, 1986
15. Indecent Representation of Women (Prohibition) Act, 1986
16. Commission of Sati (Prevention) Act, 1987

4.5 Women reservation in Punchayats and Municipalities (73rd and 74th Amendments Act of 1993)

Women have had a long history of being discriminated against and exploited in Indian society. The 73rd constitutional amendment introduces the measures to reserve these indignities. Yet, there remains strong resistance against their participation in the public sphere.[48]

Promulgation of 73rd and 74thamendment in 1993 have been landmark for two reasons

1. Local-governance empowerment
2. Women empowerment

These amendments gave constitutional status and fair amount of autonomy to women. This amendment empowered women by providing them one-third reservation in election and there is also a one-third reservation for women of posts of chairpersons of these local bodies. As a result about one million women stand elected in countries three tier rural panchayats. It was said that this reservation has caused a "silent revolution to the process of decentralization of parliamentary democracy"[49]in the country.

Following are the Articles of Constitution of India which are supplemented by 73rd and 74rth amendment

1. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat -Article 243 D(3)

[48] N. Sivanna, The Punchayat and women's empowerment, Geography and you, vol.14, issue 87, nov-dec 2014.
[49] The Hindu, Amendments to empower women, new Delhi, November 9, 2010.

2. Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women -Article 243 D (4)
3. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality -Article 243 T (3)
4. Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide -Article 243 T (4)

However, it must be kept in mind that guaranteeing a right by making law does not ensure the ability to access the right in reality. The fact that the historical subjection of women has not come to an end is constantly before us. The example of this is that the continuous reduction in number of women in each census. It is falling at an alarming rate and it's a matter great concern. At the same time crimes against women have been on the increase. Incidents of rape, sexual assault, sexual harassment, stalking, voyeurism, domestic violence, cybercrimes and cheating etc. have been growing not only in numbers but also in intensity and brutality. Every year the statistics provided by the Crime Bureau of India (C.B.I.) brings this before us every year. These statistics only reveal the numbers of reported cases and not the offences which have never been reported. Anyone can easily imagine how much bigger the number would have been if we have to take into account the numerous unreported cases.

4.6 Constitutional Validity of Section 497(Adultery) of the Indian Penal Code 1860

The history of section 497 clearly provides that adultery law was always in favor of husband. He always had ownership over sexual relationship of wife. It was never for benefit of wife. As per this section wife have been always considered as object because, any man who engaged in sexual relation with another's wife and husband of that women gave consent for it then this act would not amount to be adultery. This clearly shows that how women are shown as an object in the hands of husband.

Section497 is, "whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man without the consent or connivance of that man, such sexual intercourse not amounting, to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both"[50].

As per the provision in cases of adultery the wife shall not be punishable as an abettor. A bare reading of Section 497 of the Indian Penal Code 1860 shows that this section punishes the offence of adultery committed with a married woman without the consent or connivance of her husband. The offence of adultery Section 497 of the Indian Penal Code, 1860 punishes only the male counterpart and exempts the women from punishment.

In 1954 for the first time the Constitutional Validity of Section 497 I.P.C[51] was challenged in ***Yusuf Abdul Aziz v. State of Bombay***[52]on the ground that it is violative of Articles 14 and 15 (1) of the Constitution. The Honorable Supreme Court upheld the validity of the provision on the ground that the Classification was not based on the ground of sex alone. The court relied upon the mandate of Article 15(3) of the Constitution to uphold the validity of the said provision of the code.

It is not required for an offence under this section that the offender should know whose wife the woman is, but he must know that she was a married woman[53].

In 1985 in another case of ***Sowmithri Vishnu v. Union of India***[54]it was again contended that Section 497, I. P. C. is violative of Articles14 and 15 of the Constitution on the ground that it makes an irrational classification between men and women. In that case it was contended that:-

(i) It confers upon the husband the right to prosecute the adulterer, but it does not confer any right upon the wife to prosecute the woman with whom her husband has committed adultery;

[50]Section 497 Indian Penal Code 1860.
[51] Indian Penal Code
[52] 1954 SCR 930.
[53]MadhubChanderGiri,(1873) 21 WRcon.13.
[54]1985 supp.SCC 137

(ii) It does not confer any right on the wife to prosecute the husband who has committed adultery with another woman and

(iii) It does not take in cases where the husband has sexual relation with an unmarried woman with the result that it amounts to having a free license under the law to have extra marital relationship with unmarried woman.

Again, the Apex Court rejected these aforementioned contentions and held that it cannot be said that in defining the offence of adultery so as to restrict the class of offender to men any constitutional provision is violated. It is commonly accepted that it is the man who is seducer and not the woman. In this case the Apex Court observed that this position may have undergone some change over the years that women may have started seducing men, but it is for the legislature to take note of this transformation and amend Section 497 appropriately.[55]

In this case it was also contention of the petitioner that since Section 497 does not contain provision for hearing wife, therefore with Article 14 and 15(1) it is also violative of Article 21 of the Constitution i.e. freedom of personal liberty. Answering this question, the Court observed that this section is not violative of Article 21 because although this section does not contain provision for hearing of married women with whom the accused is alleged to have committed adultery but if wife makes an application in the trial court that she should be given an opportunity of being heard, she would be given that opportunity. Neither substantive nor adjective criminal law prohibits the court from providing a hearing to a party which is likely to be adversely affected by the decision of the court directly or indirectly[56].

After this case in 1988 this section 497 was again challenged in case of ***V. Revathi v.Union of India***[57]the court held that this section does not permit either the husband of the offending wife to prosecute her nor it permits wife of offending husband for being disloyal to her. Therefore, since neither of the spouse can bring a charge against their disloyal partner of offending spouse hence, this section does not discriminate on the basis of the sex.

[55]Ibid.
[56]Ibid
[57]1988(2) SCC 72

In 2018 once again, the constitutionality of Section 497 was challenged in case of *Joseph Shine v. Union of India*[58]2018 SC 1676.

Facts of the Case

Joseph Shine was an hotelier. He challenged the constitutionality of the section 497 of IPC 1860. His purpose behind this was to shield Indian men from being punished for extra marital relationship by revengeful women or their husband. He was motivated by the incident in which his close friend in Kerala committed suicide because a women co-worker made false rape charges on him.

The main issue raised in this case was that-

1-Whether section 497 of the Indian Penal Code is unconstitutional?

In this case the petitioner wanted the fallowing issues to be addressed-

(a) Adultery law provides that man to be punished in case of adultery but no action to be suggested for women.
(b) There is no legal provision that a woman can file a complaint of adultery against her husband.
(c) According to section 497 if the husband gives his consent for such an act then such act no more remains a crime. Therefore, women are treated as an object in adultery.

A five judge's Constitutional bench decided the case. The bench was comprised of CJ Dipak Mishra, Justice R.F.Nariman, Justice A. M. Khanwilkar, Justice D.Y. Chandrachud and Justice Indu Malhotra.

The court has observed that law is based on certain social presumptions. The court declared in this judgment that **husband cannot be the master of his wife**. The court declared the fallowing things:-

1. Section 497 is archaic and is constitutionally invalid.
2. Adultery is no longer a criminal offence.
3. Husband is not the master of the wife.

[58]2018 SC 1676.

4. Section 497 is arbitrary.

Deletion of these provisions does not mean that there are no legal consequences for engaging in adultery. These consequences need not be criminal, and a remedy may be found in civil law, where adultery already has a place. It is a ground for divorce in personal laws. Such an approach is also in conformity with the right to privacy and does not require the state to expend its resources. Cruelty as under section 498Aalong with the definition of domestic violence under domestic violence Act 2005 can cover the mental trauma caused to a woman by a husband's adulterous relationship[59].

4.7 Constitution of India and Rights of Muslim Women

The Constitution of India guarantees to all citizens the fundamental right to equality under Article 14, and the fundamental right to freedom from discrimination on the grounds of religion and sex under Article 15. In recognition of the conflict between the principle of equality and the discrimination sanctioned by personal law, Article 44 of the Constitution directs the state to enact a Uniform Civil Code (UCC). The Constitution also guarantees the fundamental right to freedom of religion under Article 25. This right seeks to affirm the state's commitment to safeguarding the rights of women whether they are Hindu or Muslims.[60]

Despite these constitutional rights the harsh reality is that women in India, at almost every level of society, are less well educated and poorer than men. They do not get equal pay for equal work, despite various labour laws. Despite equal voting rights they are politically ineffective, the development process itself has often worsened their relative position and either pushed them out of the economic mainstream where they previously had a place or prevented them from entering it. Constitutional guarantees in favour of women in India and laws enacted for their benefit and

[59]https://lawcorner.in/case-analysis-joseph-shine-v-union-of-india-adultery-is-no-longer-be-a-criminal-offence

[60]VrindaNarain, Gender and community: Muslim women's rights in India,university of Toronto press,pg 192,2001

protection have not had much impact on women's lives, though judicial activism has provided weapons for social activists and reformers[61].

Whereas the Constitution of India guarantees equality rights to all women, irrespective of religious affiliation, Muslim Personal Law explicitly discriminates on the basis of an individual's sex. The status of women in Muslim society in India has always been in controversy and debate. This is not only a matter of gender justice but also religious freedom, minority rights, and state policy regarding position of women in law to get justice.

In India the Constitution in part IV Article 44 directs that the state to provide Uniform Civil Code throughout the territory of India though in case of personal law there is no uniformity. The law relating to marriage, divorce, maintenance, guardianship and succession governing the Hindu, Muslim and Christian etc is different in different religion. There are different laws which govern the personal laws of the Hindus. These laws are Hindu marriage Act 1955, The Hindu Succession Amendment Act 2005, The Hindu Minority and Guardianship Act 1956 and The Hindu Adoption and Maintenance Act 1956. In the same way we have various laws which govern the personal laws of Muslims. They are The Shariat Act 1937, The Dissolution of Muslim Marriage Act 1986, The Muslin Women Protection and Rights on Divorce Act 1986 etc. So, it is very clear that there is no uniformity in matters of personal laws.

When we look at these personal laws and compare the status of men and women very easily it becomes visible that women have been conferred an inferior status in most of the personal matters and Muslim Personal Law is not an exception to it.

4.7.1 Inequalities in Muslim Personal Law

Muslim women come across discrimination in a variety of domains in their life. These discriminations are related to their right to marry, maintenance, sexuality, religious life, clothing, education, domestic violence etc. When anybody raises their

[61]Soli J Sorabjee, Women Constitution and Courts, edited byDr.ShamsuddinShams,Ashish publishing house

voice against these discriminations against women, then religion continues to be used as an excuse for these discriminatory acts.

In Muslim culture men are superior to women and women are supposed to submissive and docile to men because they depend on men. Being the head of the family men plays role of decision maker. Man is bread- winner and woman have duty to bear the child. Men in Muslim society have continued to be seen as superior to women because men have always dominated in the fields of religion, politics, family affairs, social rules etc. and at the same time in every aspect of Islam culture woman have been left with the household chores and child bearing.[62]

4.7.2 Inequalities in getting education and job opportunities

Very often in Islamic culture and tradition, girls have been denied opportunity to get education. In Muslim society there remain high population of uneducated women who did not get opportunity to go to school and colleges to get proper education. And if they get chance to educate themselves, then they face discrimination in job opportunities. Both male and female have been permitted to work, but there has been discrimination as men always get the jobs which best suited to their educational qualification or skills and women get low salary jobs due to various restrictions and working conditions. Women have been allowed to work only if the job does not interfere with her roles of taking care of the husband, children and other family affairs. They have never been allowed for jobs which demands long working hours and dedication towards work[63].

4.7.3 Domestic violence

In many Muslim family's women use to face domestic violence because this have been allowed, permitted and encouraged by some of the Islamic teachings that allow domestic violence against women. These discriminatory teachings give men authorization to teach discipline or beat their wives if they are breaking the rules of the society and family. As per the Muslim Law women are supposed to be obedient

[62] Hashmi,N.2000,Gender and discrimination, Muslim women living in Europe. Retrieved 4th May 2014 http://aei.pitt.edu/745/1/ICHashmi.pdf

[63]Iyad Alharafesheh, University of New England, Global Journal of Arts, Humanities and Social SciencesSciences Published by European Centre for Research Training and Development UK, ISSN: 2052-6350(Print) ISSN: 2052-6369(Online), Vol.4, No.8, pp.43-47, August 2016

and follow their husbands without questioning them. Muslim community does not believe in legal process which deals with the cases related to domestic violence. Consequently, absences of such protection mechanism make the men violent culprits who don't mind women beatings.

4.7.4 Sexuality

Indian Constitution does not discriminate any person on the ground of sex but Muslim women have always been discriminated in matters of sexuality. Where Muslim man has been permitted to marry more than one wife at a time, but Muslim women can marry only one man who is her husband.

Islam requires women cleanse their bodies by washing with water and recite prayers seeking forgiveness and purification after engaging in sex. According to Muslims culture, a woman is considered impure religiously after sex and during menstruation. There is discrimination against women, as men are not considered impure even after having sex with different women[64].

In various sects of Muslims women also suffer female genital mutilation or rather permanent cutting of the genitals in women. In Islam religion and in their Holy book Quran, there is no mention of female or male circumcision. These are pre-Islamic practice. Female circumcision also known as female genital mutilation. The main reason according to Muslims why they carry out the practice is to control women's sexuality[65] Virginity is very important and is valued greatly for marriage. Purity of a woman or girl brings honor to a woman in a community. Female genital mutilation is defended by Muslim communities because they believe it helps in reducing a woman's sexual desire thus lessening chances and temptations to have extramarital sex and therefore preserving a girl's purity. This is discriminatory and against right to equality among men and women as Muslims men do not undergo any ritual that is aimed at keeping them pure and also preventing them from engaging in extramarital sex. This shows that women are discriminated in that their sexual

[64]Ibid
[65]B.Warner, The submission of Women in Islam,http://wwwnewenglishreview.org/bill accessed may 2018

behaviors are controlled while men are left to do their will and they are never regarded as unclean[66].

4.7.5 Discrimination faced by females in marriage

Another area in which Muslim women face discrimination is marriage. This is against the principle of gender equality and violating the constitutional right to equality which is soul of the Constitution of India and given to all women of India irrespective of their religion. In Muslim religion marriage is a contract and the object of this contract is procreation and legalization of children born out of marriage. There must be offer and acceptance in Muslim marriage. Free consent of bride has always remained the most important condition of the valid marriage. She has absolute right to accept or to reject the marriage. Sometimes this consent has been obtained by means of force by the family. 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 proposal and an acceptance in the presence of witness[67]. Another discriminatory aspect of marriage is that after marriages the rights to equality of Muslim women have always remain on stake by her husband because in Islam polygamy is permitted. A male can marry four women at the same time consequently few Muslim men are polygamous. This again becomes reason of discrimination by husband as this has resulted lack of attention towards first wife as after marriage to new women husband spend maximum of his time with new wife. She enjoys sexually, and she gets much financial support by his husband[68]. Muslim men also have option of Mutah marriage[69] which is a form of temporary marriage. This is referred as marriage for pleasure. In these short-term marriages, a man has to pay some money or sometimes in exchange for a temporary marriage relationship. These temporary marriages are legal in Islam. This form of marriage triggered debate that men who practices this form of marriage they legalize a form of prostitution.

[66] ibid
[67] Nanda Chiranjeevi Rao, presumption of marriage under Muslim Law, Indian bar review, page 133, Vol. 39,
issue 4, 2012.
[68] M.Keet,Women's Rights in Islamic Marriage fromhttp://www.meteck.org/islam_marriage.html
[69] Marrige for pleasure.In this form of of marriage duration of marriage is fixed by the parties before marriage.

In Islam Muslim women are not permitted to marry a Non-Muslim. Additionally, a Muslim woman is not allowed to denounce Islamic culture or religion in order to get married by a Non-Muslim man. This is because leaving Islam is not allowed and is considered a religious crime which can lead death as a punishment. Men on the other hand have been allowed to marry Non-Muslim women. This has resulted an unequal relationship where women are treated unfairly similar to salves, who must be submissive and obedient to the master.[70]

4.7.6 Talaq

It has always been believed by Muslim community that Muslim women have been given the equal right to divorce as a Muslim man has. Yes, they are having such rights. But to procure those rights or to enforce those rights, women need freedom in which they can easily exercise such right without having any restraint or fear with regard to any future happening against them. Talaq by way of triple talaq have always been misused by the man at their whims and fancies. Quran itself has laid down the proper procedure for divorce but still people are following very informal way to pronounce the 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. A few distortions seem to have crept in dispending justice in British India and even in the decision of Privy Council, which decreed Muslim husband's right to divorce his wife at whim. Such misguided views have had sustenance in the opinion of ill-educated moulvies who had already been serving their clientele with their faulty understanding of the Quranic law of divorce[71].

[70]Iyad Alharafesheh, DISCRIMINATION AGAINST ISLAMIC WOMEN, Global Journal of Arts, Humanities and Social Sciences Published by European Centre for Research Training and Development UK, ISSN: 2052-6350(Print) ISSN: 2052-6369(Online), Vol.4, No.8, pp.43-47, August 2016

[71]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

But now the practice of instant triple talaq , is declared unconstitutional and became irrelevant. Now has come as blessing for many abused Muslim women.

The ideology behind the concept of triple talaq which has been disfigured by the people now-a-days is not something in tune with what Quran has provided for the justifiability of triple talaq has been fade away by the people in present times. To go on harping on triple talaq as though it is the monster that breaks marriages and oppresses women is ridiculous. Men and women who simply do not agree to live together break marriages.[72]'.

With the passing of The Muslim Women (Protection of Rights on Marriage) Act 2019 triple talaq came to an end and became a punishable offence. Section 4 of the Act of 2019 lays down the punishment for declaration of triple talaq by a husband is imprisonment up to three years and fine. So now Muslim women is safe from this discriminatory practice.

4.7.7 Religious life

Constitution of India guarantees freedom of religion to every person, but Muslim women have been discriminated in the name of religion. In Muslim religion God equally treats men and women. They both receive rewards for good deeds done and also receives punishments for their bad conduct. Women are permitted to be in the places of worship that is mosques. However usually they don't use to go to mosque as per traditions fallows by various Muslim families and society. The few who go to the mosque, worship separately because men believe women will distract them during worship. Women have never been given right to become imams. The role of an imam is that of spiritual leader in the mosque, to lead people attending worship during prayer. In addition, women cannot all lead prayers in the mosque because of issues of unchastely caused by engaging in sexual behavior. Thus, women have been discriminated also in religious leaderships as they are regarded as unchaste[73].

[72]priyachaudhary16pri,The Struggle for Human rights plight for Muslim Women, www.Legal servicesindia.com/article/2323 , accessed at 23/6/2020
[73]A.Stacey 2013 http://islam.ru/en/content/story/dress-code-muslim-women

4.7.8 Clothing

A Muslim woman doesn't have freedom of choice in case of her clothing. They are supposed to wear clothes which do not reveal any part of their body. The husband is the only person who can see any part of body of the woman. Covering the head with hizab (head cover) is mandatory for Muslim women. This practice of covering women in veils and preventing them from being seen in public is known as "parda" [74].By the practice of parda women are isolated from the common Muslim gatherings and they cannot go in public. Thus they have been discriminated as men in Muslim society have freedom to wear anything like suits, jeans, trousers or any kind of clothes. Even though certain type of dress is prescribed by religion for them, but they are not bound to wear it, while in case of women they don't have freedom of choice of dress. At least in public places they have to follow certain dress code which must cover her whole body except face.

4.8 Conclusion

Rights of females are an integral part of the concept of human dignity which is protected by different provisions of the Constitution of India. It is harsh and bitter reality that females have always been ill-treated in every society and we the Indians are not an exception to it. The irony lies in the fact that in our country women are worshipped as 'Devi', and at the same time the violence is committed against them in all sections of the society. Her position is not good, and she is being looked down as commodity or as a slave, she has not only deprived of her well-deserved dignity and pride outside her house but also faces ill-treatment and other atrocities within the four walls of her own house. The women are treated as an object of male sexual enjoyment and reproduction of the children. Women are deprived of power of earning by doing work of their own choice and for this they are dependent on men for their livelihood. Women's works have been very often confined to their domestic sphere and it is presumed that she should do all house hold works which are not recognized as work even and that always remains unpaid work. In modern times when many women are coming out for professional work and earning their livelihood like their male counterparts then they face double responsibility. One she has to work equal to man at

[74]A.Stacey, Dress code of Muslim women,http://islam.ru/en/content/story/dress-code-muslim-women,accessed 4rth may 2018

the place where she is employed and secondly, she also has to do all the house hold works in her home without any support of male counterpart. Moreover, after successfully facing double responsibility she remains the last to be considered for promotion and first to be fired as she is considered to be less productive than her male counterpart. Her status in the family and in the society has remained low and unrecognized since ages.

Law and rules cannot change a society at once, but undoubtedly it can make sure that the people who are not in a strong position to protect their own rights can be protected by law and nobody could place them in disadvantageous position. In India judiciary has always remain very sensitive towards women and women related issues. The Supreme Court has always taken special care and interest in discharging its obligations and safeguarding the rights and interests of women in changing scenario and changing societal demands. Constitutional provisions, various other laws and judgments of different courts have made their own contribution for securing gender justice. However, the work and role of social reformers who try to change the mindset of people in orthodox society and endeavor to reform social, economic and educational position of the women in different societies. These social reformers try to address vital issues of, giving maternity leave, creating maternity fund, banned sex determination, reservation of women in government jobs, prohibiting bride burning and dowry death cases. They demanded from government to make provisions of public toilets and smokeless chulhas in villages, proper hostel facilities for single women who are living alone in urban areas, making them joint owners of house and land and making women co-sharers in the wealth and incomes of their husbands to bring women at par with men in the real sense.

The Constitution of India has discarded all sex discrimination and gender equality and liberty has been made a fundamental right. States are directed to remove all gender based inequalities and implement their personal liberty. Various Articles of the Constitution of India protects the rights of women of all religion. Directed and guided by the Constitution various revolutionary laws giving equal status to women with men have been enacted in order to remove all disparities, dissimilarities and discriminations against women. Despite all the constitutional protection there have been many instances showing how Muslim women have continued to be

discriminated and have faced opposition from participating in public life. In Islam religion has continuously being used by Muslim to justify their reasons for discriminating women in public sphere. If we look back at history, we find that Muslim Personal Law is not stagnant concept on entity. The only explanation for the existence of a number of schools of Muslim personal law, such as Hanafi, the Malaki, the Shahfi, the Hunbli , the Ithna Ashariya or the Shia school etc is that the law was adopted and even modified to meet the requirements of various people.[75]

Muslim conservatives must also be reminded that Muslim women constitutes 47 to 49 % Of the Muslim community and no progress economic, social or political is possible without their whole hearted co-operation and participation. Such male chauvinism as has been widely demonstrated by the conservative Muslim leadership without in any way addressing the problem that women face, can only create a breach within the community which itself defeats the wider purpose of unifying the community[76].

In society there is legal equality but not the real equality. In every walk of life women are discriminated. These discriminations and biases always restrict the growth of the female. They are discriminated in matter of Employment. Generally it is presumed that they are not equally productive as their male counterparts are because they pay more attention toward their home and children. To some extent it is true but the reason is that male members of the family are not ready to help them by sharing household work. In some cases it has been seen that if a male member helps her wife in household works then he become part of mockery by society as well as other female members of the family.

For advancement in position of women in society the nature of women's issues and its diversity there are five major groups of strategies through which women's state of nutrition and health as well as their social and economic position could be improved. These strategies are being advanced as a response to the major women's issues discussed earlier in this chapter. They are expected to remove barriers to advancement of women and enhance their health and well-being. These are as follows:

[75] H.A.Gani, Reforms of Muslim personal law, 147, Deep and Deep publication New Delhi, 1988
[76] H.A.Gani, Reforms of Muslim personal law, 141, Deep and Deep publication New Delhi, 1988

1. Reduce the burdens of reproduction.
2. Reduce the burdens of child care.
3. Improve their access to maternal health and nutrition care
4. Enhance their position in food production and farming.
5. Elevate and improve their position in society.

These strategies cover a wide spectrum of options all the way from the household level to the community life and further to the long-term issues in society.

CHAPTER V

JUDICIAL RESPONSE TOWARDS GENDER JUSTICE IN MUSLIM PERSONAL LAW

CHAPTER-V

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Law is omnipresent and it impacts different aspects of people's lives. The significance of law and rights in affecting people's lives is increasing with the expansion of the legal domain into public and private spheres. Law helps an individual by providing them the right to enjoy their life lawfully and to live as free and autonomous agents of society. Disparities in access to rights are redressed through rules and institutions established or resulting from such rules, be they social or legal. However, these disparities affect both men and women but women are lagging behind men in many fields. These inequalities could be refusing women the right to acquire, manage, and dispose of assets in their name which restricts their financial opportunities, economic productivity, and bargaining power in the household. Law needs to take into contemplation how differences in women's and men's social, economic, and legal rights affect the way they experience law and justice in their lives.[1]

5.1 Role of Judiciary in Providing Gender Justice

The judiciary can bring important changes in society when the judiciary operates without gender bias and supports gender equality. The decisions given by the judiciary becomes a norm for all the people in the society through established mediums of state-citizen engagement and the influence of the court goes beyond those who come in direct contact with them.

The Indian Judiciary has an important role to play in empowering women and establishing gender fairness in a country where gender disparity is prevalent in almost all sectors of society. The Indian Judiciary through his judicial decisions has helped women to get her what is due to her as a matter of right and has shown that discrimination against women in Indian society won't be tolerated at all.

[1] https://blog.ipleaders.in/role-of-judiciary-in-maintaining-a-gender-just-world/ accessed on march 20 2021

The Principle of equality is enshrined in the Indian Constitution and various other legal provisions which promote gender justice in Indian society. However, there still exists a very wide gap between the goals enunciated in the Constitution and various legal provisions on the one hand and the situational reality of the women on the other hand [2]. There are many instances where the ability of women is doubted and they are treated with discriminations. The non-implementation of the laws as well as the lack of gender sensitivity in the society prevents the dream of Constitution makers from becoming a reality. The Indian judiciary has realized that these provisions reflect only de jure equality to women. They have not been able to accelerate de facto equality to the extent the Constitution intended. This concern was raised by the judiciary in *Dimple Singla v. Union of India*[3] wherein the court observed that there is still a considerable gap between constitutional rights and their application in the day-to-day lives of most women. Unless attitudes changes, elimination of discrimination against women cannot be achieved[4]. This concern of the India judiciary has found expression in the numerous innovative and dynamic interpretations given by the judiciary. The liberal and expansive provisions has paved the way for protecting rights of women and contributed significantly towards ensuring and achieving the gender justice.

In CB ***Muthamma v. Union of India*** [5] honorable Supreme Court gave a landmark judgment to promote the constitutional goal of gender equality by protecting the equal right. The constitutional validity of rule 8(2) of the Indian Foreign Service (Conduct and Discipline) Rules, 1961 and rule 18(4) of the Indian Foreign Service (Recruitment, cadre, Seniority and promotion) Rules, 1961 was challenged before the Supreme Court. The impugned provision rule 8(2) requires a women member of the service to obtain permission of the Government in writing before her marriage is solemnized and any time after her marriage, a women in service may require to resign from the service if the government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. Further, rule 18(4) also runs in the same prejudicial strain, which provides that no married woman shall be

[2] J N Bhatt , Gender Equality : Turmoil or Triumph? AIR 1998, 53.
[3] (2002) 2 AISLJ 161.
[4] Mamta Rao Law Relating to Women and children (Lucknow: EBC 2005) at 53.
[5] 1979 (4) SCC 260.

entitled as a right to be appointed to the service. The petitioner complained that under the guise of these rules, she had been harassed and was discriminated by the chairman, UPSC from the joining stage to the stage of promotion. The Hon'ble Supreme Court held that these Rules are in defiance of article 14, 16 and 21 of the Constitution and Krisnha Iyer. J. pronounced, "that our founding faith" enshrined in articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz, our women, is sad reflection on the distance between the Constitution in the book and the law in action" [6].

The ***Air India v. Nargesh Meerza*** [7]**,** is another case in which the Supreme Court struck down the Air India Regulations relating to retirement and the pregnancy bar on the service of Air hostesses as unconstitutional on the ground that the conditions laid down therein were entirely unreasonable and arbitrary and volatile of article 14 of the Constitution.

In ***Mrs. Mary Roy v. State of Kerala and Ors***[8] the Supreme Court pronounced a landmark judgment promoting the constitutional goal of gender equality by protecting the equal rights of Christian woman over family property. In this case Mary Roy Challenged the century's old practice of Keralaite Syrian Christian community, which bequeathed only a minor portion of the family property to women members, under the Travancore Syrian Christian Succession Act, 1916 and Cochin Succession Act 1921 as violative of Constitutional provisions relating to gender equality. The Apex Court over-ruled the impugned two Acts and upheld the supremacy of the Indian Succession Act of 1925. This decision heralded a new era in the sphere of property rights of woman and gender equality[9].

In ***Ari India Cabin Crew Association v. Yeshaswinee Merchant***[10]**,** the Supreme Court held that the twin articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment to women, which is a positive measure in their favor. The Constitution does not prohibit the employer to consider gender while making the employment decisions, where this is done present to a

[6] Sheetal Mishra Gender Justice : The Constitutional & the Judicial Approach, Ed. 1997 : pg. 97
[7] (1981) 4 SCC 335
[8] 1986 AIR 1011,, 1986 SCR (1) 371
[9] Aneesh V. Pillai, Dichotomy between constitutional Morality and public morality :the judicial Ethics and Justice Delivery System organized by nationl law University Orissa on 22-22 of Jauary 2012.
[10] AIR 2004 SC 187

properly or legally chartered affirmative action plan. further in ***"Vijay Lakshmi v. Punjab University[11]"*** it has been observed that Rules 5 and 8 of the Punjab University Calendar, Vol. III providing for appointment of a lady principal in a women's or a lady teacher therein cannot be held to be violative of either Article 14 or Article 16 of the Constitution, because the classification is reasonable and it has a nexus with the object sought to be achieved, in addition, the state Government is empowered to make such special provisions under Article 15 (3) of the Constitution. This power is not restricted in any manner by Article 16. In this way, the Indian Judiciary has played a positive role in preserving the right of women in the society.

Again in ***Dattatraya v. State of Bambay [12],*** the court held that legal provisions to give special maternity relief to women workers under Article 42 of the Constitution do not infringe article 15(1). Further, in the case of ***Municipal Corporation of Delhi v. Female Workers (Muster Roll)[13],*** the Supreme Court held that the benefits under the Maternity Benefits Act, 1961 extend to employees of the Municipal Corporation who are casual workers or workers employed on daily wages basis. Upholding the claim of non-regularized female workers for maternity relief, the court has stated that "Since Article 42 specifically speaks of just and humane conditions of works and maternity relief, the validity of an executive or administrative action in denying maternity benefit has to be examined on the basis of Article 42 which though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of".

In its significant decision in ***Bhagwan v. Kamla Devi[14],*** the Supreme Court held that a working woman can claim maintenance from her estranged husband, if her monthly income is not enough for her maintenance. Further the court clarified that the term 'Unable to maintain herself' does not require a woman to be absolute destitute her for maintenance.

Women are eligible to get equal pay for equal work and employer cannot discriminate women on the basis of gender only. In the case ***Randhir Singh v.***

[11] AIR 2003 SC 187
[12] AIR 1952 SC 181
[13] AIR 2000 SCC 1274
[14] (1975) 2 SCC 386

Union Bank of India [15]**,** Supreme Court held that equal pay for equal work is a constitutional goal and is capable of being enforced. Through this landmark decision, the Apex Court raised the status of Directive Principle of State Policy to an enforceable fundamental right.

In "***Mrs. Neera mathur v. Life Insurance Corporation of India***[16]**"** the supreme Court recognized the right to privacy of female employee and observed that seeking information from a female while joining, regarding the dates of her menstruation and past pregnancies was violative of Article 21 which guarantees right to Life and Personal Liberty.

In ***Nilabathi Behra v. State of Odisha***[17]**,** the court referred to ICCPR[18] and observed that international convention and norms can be used for construing the fundamental rights expressly guaranteed under the Constitution of India, which embody the basic concept of gender euality in sphere of human activity[19]. Thus, in the landmark decision of ***Vishaka and Ors v State Rajasthan*** [20]**,** the Supreme Court declared that sexual harassment in working place is a violation of individual liberty and dignity of a woman. It further held that gender, includes protection from sexual harassment and right to work with dignity which is a basic human right. Therefore in the absence of domestic law, the court referred to the CEDAW[21] and its provisions which were consistent with the provisions of the Indian Constitution and therefore read those provisions into the fundamental Rights interpreting them in the broader context of the objective contained sexual harassment in women at work place.

In ***Bodhissattwa Goutam v. Subhra Chakraborty***[22]**,** Supreme Court declared that rape is not only an offence under the Penal Code but was also a violation of a women's right and is also violative of victims most cherished fundamental rights i.e., the right to life contained in Article 21. In another Landmark judgment of

[15] AIR 1982 SC 879
[16] (1992) SCC (1) 286
[17] 1993 (2) SCC, 746
[18] The International Convention on Civil And Political Rights.
[19] Plok Basu, Low relating to ptrotection of Human Rights ,Allahabad : Modern law publication 2006,Pg.101
[20] AIR 1997 SC 3011
[21] Convention on the Elemination of All Form of Discrimination Against Women.
[22] AIR 1996 SC 922

Chandrima Das v. Chairman, Railway Board [23]**.** The honorable Supreme Court observed that the word life as used in the Universal Declaration of Human Rights must get the same meaning as in Article 21. Its meaning cannot be narrowed down and the court declared that rape is a violation of right to life.

In *State of Maharastra v. Madhukar Narayan* [24]**,** the Supreme Court propounded that even a prostitute has a right to privacy under Article 21 and no person can rape her just because she is a woman of easy virtue.

Again in ***Githa Hariharan v. Reserve Bank*** **of *India*** [25]**.** A three judge Bench of the Supreme Court considered the constitutional validity of section 6 of the Hindu minority and Guardianship Act. The challenge was on the basis that the section discriminates against women as the father is the natural guardian of a minor and not the mother The court did not reject the petition on the ground that it could not go into bring it in consonance with articles 14 and 15 The court observed that the mother can act as a natural guardian even when the father is alive. The word 'after', in Section 6(a) of HMGA 1956 was read to mean 'in the absence of father'[26]. It is to be noted that, though apparently section 6 is violative of Articles 14 and 15 of Indian Constitution, the Supreme Court has not struck it down as invalid. However, the court expressed its concern towards ensuring gender equality, which is one of the basic principles of our Constitution.

It is to be noted that in all these cases a balancing approach was taken by the judiciary for safeguarding public interest.

5.2 Judicial Response towards Promoting Gender Justice in Muslim Personal Law

Justice means –"putting everything in its rightful place" and in the context of Shariat Law -„giving everyone his or her entitlement". Quranic conception of justice is neither rigid nor rule-bound but open to variety of considerations."[27]

It was always a question of debate that is there gender equality Muslim

[23] AIR 2000 SC 988
[24] AIR 1991 SC 207
[25] (1992) 2 SCC 228
[26] See mamt Rao, Law Relating to women and children (Lucknow : EBC 2005) at 57
[27] Mohammad Hashim Kamali, Shari'ah Law An Introduction, chapter 10 Ed.I.

Personal Law? Certain areas in Islamic law are apparent to be unable to coexist with universal standards of women's rights and gender equality, especially the areas of divorce, maintenance, polygamy, child custody, inheritance etc. By reviewing the status of women in contemporary Muslim societies, it can be argued that women are suppressed and treated as inferior to men. Although women's rights in non-Muslim societies are not totally fulfilled but implementation of women's rights in Muslim societies is unique in its application.

Gender inequality is primarily done in the name of Islam. These communities claim that certain discriminatory practices are in conformity with Shariat law. By doing so Muslim societies give a holy justification for any discrimination or inequality which is in existence or that couldbe stipulated in the future. Although the billions Muslims around the world share some common values, beliefs, and codes of ethics, their socioeconomic, political, and cultural realities fluctuate significantly. These differences in practices have given rise to different norms of Islam, different interpretations of laws, and different practices. Religion provides society the moral and ethical guidelines, but it is up to the members of the societies to interpret them and to apply them according to its socioeconomic and political conditions, culture, and historical consciousness of the society. Any discussion which is related to women in Muslim societies and gender equality has to take in to consideration Islamic law (Shariat)[28] to show that whether the Islam does or does not give women certain rights. Whether that particular right exists in favor of women or not? It is clearly accepted in Holy Quran that men and women have equal religious duties, rewards, and punishments before God. Notwithstanding these Quaranic norms we find many instances of inequity against women in contemporary Muslim legislations. The Holy Quran does not make mention of such crimes but in reality these practices actually run against the spirit of Islam and justice.

The Rights of women in many Islamic countries has nothing to do with their Islamic nature and that most of the gender inequalities are not based on Islam but are mainly the consequence of traditional, patriarchal male-dominated society that aim to rule over the women and to find any excuse to suppress them. These

[28] Sharia means" the way" or" the path". It is a set of religious principles which form part of Islamic culture.

societies are in search of justifications by applying conventional and literal interpretations of various Quranic texts. Quran points towards the ultimate equality between the sexes, and manifests this equality in religious duties and rewards and that these early revolutionary rights were just the beginning, paving the path for more rights in the future when social conditions would permit[29].

Islam provides clear guidance with regard to marriage and divorce. Islamic law obliges both husband and wife to fulfill their rights and obligations for each other and to maintain marriage as an institution for social purpose. Islam considers that marital discord is not a rift between individuals, but is a reflection of different thought process, feelings or perception which are attributable to variety of factors. It is inherent in human to have conflict of perception and disparities in outlook. Islam thus allows divorce, if husband and wife are unable to reconcile after due process[30].

The study of present scenario shows that there is a huge difference between the theoretical laws and practice of divorce, especially triple talaq. There are various evidences to showthat the process of triple talaq is used by a husband to get rid of an unwanted wife without assigning any reason. It is the most common form of talaq which is prevent in various groups, irrespective of differences in level of education, social status or rural or urban background. In 88% cases divorce took place through the pronouncement of talaq. Out of which 84.7% were through triple talaq.[31] The same analysis was used by various courts in India in deciding cases on points of rights of women in case of talaq, maintenance of herself and her child, rights incase of polygamous marriage, right to dower and mehr etc.

While deciding cases the courts kept in minds that Sharia is not static but rather evolving as per changing time and societies and responding to the needs of the society and coping with social changes[32]. By applying there logic and analogy courts constantly tried to fulfill the needs of the changing societies in Muslim

[29] "Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt" ,Amira Mashhour Vol. 27, No. 2 (May, 2005), pg.562-596
[30] Nazeer vs.Shemeema 2016 Kerala H.C. Para. 63
[31] Supreme Court Triple Talaq Cases ,EBC Publication 2017 pg334
[32] Women in Islamic societies:A selected review of social scientific literature , Author- Priscilla Offenhauer,November 2005

communities and pronounce the judgments which are, based on justice and gender equality which is the core value of Islam. In this context, the present chapter analyses various judicial pronouncements related to the current position of women in society and its changing scenario in regard to gender equality.

"Talaq literally means setting free".[33] Triple talaq i.e. Talaq-e- biddat is a form of talaq which though valid but sinful. It is an unusual form of talaq. It becomes effective assoon as words are pronounced. In such kind of divorce there is no possibility of reconciliation between husband and wife. The prophet never approved this kind of divorce.

In this divorce three pronouncements are made in single tuhr[34] either in one sentence (I divorce you thrice) or in three sentences (talaq ,talaq ,talaq). Talaq becomes irrevocable immediately as it is pronounced. From here the period of iddat[35] commences. This divorce cannot be revoked during period of iddat. This form of divorce is condemned. It is considered irreligious form of divorce because of its irrevocability.

The most heinous form of tyranny to which Muslim women have been subjected, is the outrageous practice of triple talaq or more commonly known as instant divorce. According to Quran a person is not supposed to divorce his wife when she is menstruating. Certain important things like rules of puberty of women, status of her virginity and waiting period as specified in Quran etc. must be allowed to validate any divorce.[36]

It is a matter of fact that the concept of triple talaq never existed during the period of Prophet Mohammad, Caliph Abubakr and Caliph Umar. According to history it was introducedin the second half of Caliph Umar"s region who enforced it as temporary measure .It was Ommeyad king who introduced this kind of talaq.[37] As per Dr. Thahir Mahmood, "There is no verse in Quran that can be interpreted or

[33] Basheer Ahamd Mohyidin,Quran:The Living Truth, Manas edition pg. 49
[34] Tuhr:-Tuhr is the period of wife's parity i.e. a period between two menstruations. A period during whichcohabitation is possible. This is also called the period of purity.
[35] Iddat:-In Islam,iddat is the period which a woman must observe after the death of her husband,or after divorce,during which she may not marry another man. Its purpose is to ensure the parentage of the child. Theperiod of iddat varies in different circumstances.
[36] Faizur Rahman, Instan t divorce is alien to Islam's spirit ,Indian Express Kochi, June 17, 2008
[37] A. M. Qureshi, Muslim law of marriage divorce and maintenance deep &deep new Delhi 1995

stretched to mean approval of the so-called triple talaq. As regard the Hadith the Prophet was infuriated when somebody pronounce triple talaq and had condemned it as "playing with the book of God while I am still alive". Years after Prophet's demise, his second Caliph, Umar gave effect to triple talaq in some cases at the instance of wife, but after inflicting on the husband the traditional punishment of flogging.[38]

The same became a general practice (customary law) to pronounce divorce three times in a single sitting. This replaced the revocable one with irrevocable divorce.[39]

Many Muslim countries have brought large reforms in their personal laws so as to invalidate or repudiate triple talaq issued in one session. Considering the fact that triple talaq is un-Islamic and it has been negated by highly regarded Islamic scholars, such practice has been invalidated in many Muslim majority nations. In India this practice of instant triple talaq bluntly violates the provisions of Constitution of India. The rights of more than 170 million Muslim women in India are at stake. Triple talaq is an inhuman practice that violates rights and dignity of women.

The constitution of India under Art.25 confers right to freedom of conscience and free profession, practice and propagation of religion. The protection under article 25 and 26 extends guarantee to rituals, observances, ceremonies, modes of worship etc which are integral to the religion.[40] But to be considered as part of the religion, it is necessary that such practice beregarded by the said religion as an essential and integral part.[41]As it has been seen that the practice of triple talaq is not an integral part of Muslim Personal Law, so its constitutionality can be challenged

Judiciary has played an active role in strengthening and supporting Muslim women in her quest for justice. Judges are applying their discretionary power in providing justice to Muslim women for protection of their social, economic and

[38] Dr Thahir Mahmood, Muslim law in India and Abroad pg. 132, Edi. I
[39] Zeenat Shaukat Ali ,Marriage and Divorce in Islam.
[40] N. Adithyan V.Travancore Devaswom Board ,2002 SCC 106
[41] M.P.Jain, Indian Constitutional law, seventh edition

political rights. When it came to matrimonial cases judges of different courts in India whether its lower courts , High Courts or Supreme Courts they all stood by the Muslim women for protection of their right to maintenance, custody of child , right to mehr, dower or rights in case of talaq. Judges in India always tried to interpret laws in consonance with international treaties and conventions in favor and support of Muslim women.

After analyzing plethora of cases the study found that before 1932 majority of judges gave decisions according to the strict interpretation of Shariyat law and Quranic injunctions but after 1932 study found that a number of liberal interpretations have been done by Judiciary. Judicial officers tried to interpret Shariyat law for welfare of women which is manifested in various Quranic injunctions. Judiciary has pronounced judgments on various aspects of triple talaq which are related to importance of procedural formalities for validity of triple talaq, what is the requirement of communication of divorce to wife for its effectiveness, when remarriage can be done after completion of divorce and what will be the position of unintended divorce.

5.2.1 Procedural Formalities for Validity of Divorce

In the decision of the Bombay Height Court in ***Sara Bai v. Rabia Bai,***[42] The court recognizes the triple talaq as irrevocable divorce and held that divorce should have been pronounced three times in one sitting. Mr. Justice Batchelor further held that a talaq-ul-biddat (baain talaq) in this case took effect immediately, on the mere pronouncement.

The Lordships of the Privy Council in case ***Mst. Aneesa Khatoon v. Rasheeb Ahamad.***[43] observed that the pronouncement of the "triple talaq" constitutes an immediately effective divorcee, the validity and effectiveness of the divorce would not be affected by mental intentions. In Cases of ***Amiruddin v. Mst. Khatoon Bibi***[44]**,** it was laid down by honorable Allahabad High Court that revocation of divorce is not permissible except when the divorce is raja*i* (revocable). Where a husband

[42] ILR 1906 30 BOM.537
[43] AIR 1932 P.C. 25,36 CWN 305
[44] AIR1917 All.343.

pronounces a divorce in the form, same time in three separate sentences the divorce is in the form irrevocable divorce and the husband has no right to revoke it.

Bombay High Court in ***re-Abdul Ismailji and bis Hussenbi*** [45]**,** declared that "talaq -ul-bidat" or irregular divorce, which is effected by three repudiations at the same time, appears form the authorities to be sinful, but valid, and it was recognized.

Again in ***Saliba Bi v. Shikh Gulla***[46]**,** Madhya Pradesh High Court, observed, that "it is well settled that under the Mohammedan Law in order to divorce a wife, the pronouncement has to be made thrice. If this was not done, it is difficult to hold that it's a valid divorce. Madhya Pradesh High Court in restoring the decree passed by the learned trial judge held that talaq-ul-biddat, is a recognized form of divorce among the Hanafee's, effected by clear words of marriage dissolution intent address to wife . Triple repetition is not a necessary condition for irrevocability.

It was held in ***Aisha Bibi v. Qadir Ibrahi***[47] that even the absence or presence of wife does not affect the irrevocability of tirple talaq in one sitting.

5.2.2 Communication of Divorce to Wife and Effect of Non-Communication

In 1931 the Mardras High Court took another view in ***katbiyumma v. Uratbel Marakkar***[48]**,** and declared that there could be a valid talaq in the absence of the wife but it would come into operation only from the date on which the wife comes to know of it. And in this connection learned judge referred a passage from Ameer Ali's book as:

It is not necessary for the husband himself to pronounce the talaq in the presence of the wife, but it is necessary that it should come to her knowledge. If a talaq is given by a letter, it will take effect on the receipt of the letter by the wife. If the letter reaches father and he tears it to pieces, there will be no talaq unless the father transacts all her business, in fact, he is agent and resides in the same house with her. If the father inform the wife about the receipt of the latter and deliver to her the torn pieces thereof, the talaq will take effect only if the letter can be read and

[45] Bom. HC.1871,Rep.95Cr. Ca.
[46] AIR 1973 M.P. 207
[47] ILR 1910 33 Mad. 22
[48] AIR 1931 Mad.647

understood. In this way information that husband has given divorce to wife became necessary for effectiveness of divorce.

5.2.3 Remarriage after Divorce

In case of ***Khadisa v. Mubammed***[49]**.**before the Kerala High Court the learned Judge Narayana Pillai observed that a remarriage without conducting and intermediate marriage is only an irregularity and therefore, does not render the marriage as void.

5.2.4 Position of Unintended Divorce

As it is well known, in the Indian subcontinent followers of Hanafee law are in a dominant majority. So the traditional Hanafee law on unintended divorces is fully in force in the Indian Courts. So the traditional Hanafee law on unintended divorces has been faithfully enforced by the Indian courts. There are various decisions on record confirming the effectiveness of divorces under compulsion, duress and intoxication. It means if divorce is given in compulsion, duress and intoxication it will be valid divorce. In British period the courts followed this policy. The Courts in post independent India in its early days also followed the British Indian Judges. However in latter decades a young Muslim Judge of the Kerala High Court, V. Khalid had Pronounced on the effectiveness of unintended divorces[50] and he gave his opinion that the said law disturbed his "Judicial conscience" but expressed his helplessness in the matter by invoking conscience of the leader of public opinion[51].

It has been so long since when women are fighting against this sinful but valid formof divorce. From 1932 to 2018 there have been found significant changes , which brought meaning full practices in rules of instant triple talaq.

In 1932 in case of ***Rashid Ahmad V. Anisa Khatoon***[52] the court held that triple talaq pronounced to please his father by the husband is valid divorce and it dissolves the marriage ties between husband and wife. The S.C. was of the opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, they are of opinion that the validity and

[49] K.L.T. 1979.878
[50] Mohd Hanifa v. Pathummal 1972 K.L.T. 512
[51] Ibd
[52] 1932 BOMLR 475

effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention. Talaq pronounced under compulsion or in jest is valid and effective.[53]

In 1971 in case of ***Yousuf Rawther V. Sowramma***[54] Sowramma, a Hanafi girl, around 15, married in 1962 Yusuf Rowther, nearly twice her age, but they live together hardly for few days and after that an action for dissolution was instituted by the wife against the husband. The husband having taken another wife and the latter having wed again after dissolution was granted in appeal. The court held in this case that it is clear, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes." We have to examine whether the Islamic law allows the wife to claim divorce when she finds the burden difficult to bear "for such is marriage without love, a hardship more cruel than any divorce whatever"

Justice V. R. Krisna Iyer in this decision of Kerala High Court held that instant divorce is a proper divorce but the proper procedure as per Quran should be fallowed.

In 1985 a historic case came before court in India which became landmark in relation to divorce and maintenance laws. The name of the case *was* ***Mohd. Ahmed Khan vs Shah Bano Begum AIR 1985***[55]

After the decision of this case the true position is that:-

1. If the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat.

2. If she is unable to maintain herself, she is entitled to take maintenance under sec.125 of the Criminal Procedure Code.

[53] Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. 2, p. 518; Hamilton's Hedaya, vol.1, p. 211
[54] AIR 1971 Ker 261
[55] Mohd. Ahmed Khan vs Shah Bano Begum And Ors 1985 AIR 1985 SCR (3)844

Thus there is no disagreement between the provisions of sec. 125 Cr.P.C. and the Muslim Personal Law on the point of the Muslim husband's obligation to provide maintenance to the divorced wife who is unable to maintain herself.

In this case court also cleared difference between dower, mehar and maintenance

3. Here honorable court while clearing the difference between Mehar, dower and maintenance held that mehar is not the amount payable by the husband to the wife on divorce but it is a mark of respect for wife which arises on marriage not on divorce and therefore, does not fall within the meaning of section 127 (3) (b) of the Criminal Procedure Code.

4. As per the Muslim Personal Law, the amount of Mehar is normally of Two types 'prompt" which is payable on demand and "deferred", which is payable on the dissolution of the marriage by death or by divorce. The fact that deferred mehar is payable at the time of the dissolution of marriage, cannot justify that it is payable 'on divorce'.

Therefore the amount which is payable in lieu of the marriage cannot possibly be described as an amount payable in consideration of divorce. A man may marry a woman for love, looks, learning or nothing at all. And, he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to her out of respect cannot be a sum payable on divorce'.

Similarly, the provision contained in section 127 (3) (b) may have been introduced because of the misconception that dower is an amount payable 'on divorce.' But, that again cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce. The above mentioned decision of Shahbano Begum was criticize by the conservative Muslim society and it was said that it is an attack on Muslim Personal Law.

Due to opposition that is followed by the decision of the case, the Rajiv Gandhi government came up with enactment known as **Muslim Women (Protection of Rights on Divorce) Act, 1986.** This was done to appease the conservative Muslims. As a legislative response, it passed the Muslim Women (Protection of Rights on Divorce) Act 1986, which was marketed as a roll back of the Shah Bano Judgment.

To clear this confusion, Danial Latifi, Shah Bano‟s lawyer, filed a writ petition in the Supreme Court. In his petition he challenged the enactment of 1986 anddemanded the law to be struck down as unconstitutional if it denies the alimony to Muslim women. In 2001, the Supreme Court reaffirmed that nowhere does the Muslim Women Act deny women alimony and held that though it may look contradictory but the enactment MuslimWomen (Protection of Rights on Divorce) Act 1986 is in reality based on the decision of Shah Bano‟s case. It actually codifies the rational contained in the decision of the case. After this comes the case of Danial Latifi.

Danial Latifi & Anr v. Union of India, 2001

The constitutional validity of the Muslim Women (Protection of Rightson Divorce) Act 1986 was challenged before Supreme Court in these cases.

This Court, after referring to the various text books on Muslim Law, held that the divorced wife‟s right to maintenance ceased on expiration of iddat period but this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it wasstated that it would be not only be incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This court concluded that these Ayats [the Holy Quran, Chapter II, Suras 241-242] leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make

provision foror to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran.[56]

While upholding the validity of the Act, the court summed up its conclusions:-

i. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1) (a) of the Act.

ii. Liability of Muslim husband to his divorced wife arising under Section 3(1) (a) of the Act to pay maintenance is not confined to iddat period.

iii. A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Boardestablished under the Act to pay such maintenance.

iv. The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.[57]

Further in 1994 in case of ***Rehmatullah V. State of UP***[58] Allahabad High Court held triple talaq unconstitutional but the judgment was reversed in appeal by Supreme Court andSupreme Court declared it constitutional. While pronouncing its judgment High Court gave fallowing reasonings for declaring triple talaq unconstitutional.[59]

[56] Danial latifi and another vs. union of india 2001 SC
[57] ibd .
[58] AIR 1994 ALL H.C.
[59] Decision of high court
(1)That the High Courts in our country are established under the Constitution of India. High Courts being superior by and under the Courts of record and constituted Constitution, as such, the High Courts do not have limited jurisdiction. The High Courts have got unlimited jurisdiction and are repository of all judicial powers under the Constitution. No matter is beyond their jurisdiction as a superior Court of record unless it is expressly shown to have been excluded under the provisions of

It was observed by the court that the need of the time is that the codified law on the subject matter of Muslim marriage, divorce and other allied matters

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the Constitution. In absence of any express provision in the Constitution the jurisdiction of the High Courts as a Court of Record is over every matter and if there is any doubt the High Court has got power to determine its jurisdiction. No, doubt, such determination is always subject to the appellate jurisdiction of the Supreme Court under the provisions of Articles 133 and 136 of the Constitution.
2-That expression wife used in Section 3(7) of the dissolution of Muslim marriage Act means and includes in itself a woman married to a tenure-holder whose husband is alive and who has not been divorced by her husband and a woman who has been divorced in accordance with law is not included within the expression of wife in the matter of definition of family i.e. a divorced wife or a divorcee is not included and is not taken to be member of the family of her former husband, the tenure-holder for the purpose of ceiling and vice versa.3-That the expression "judicially separated wife" and the husband connote the idea of separation amongst husband and wife whose marriage has not been dissolved by divorce etc. but who live separately from each other under the decree of judicial separation granted under the law applicable to the party.4-That under Section 2 of the Shariyat Application Act the provisions of Shariyat Act will apply to the subjects mentioned therein and shall be deemed to have been continuing to be in operation only to the extent the provisions of Shariyat Law do not come in conflict or at variance with the provisions of the Constitution or any provision of the Constitution including the preamble as well as provisions of Articles 14, 15, 21, 23 or those contained in the Directive Principles i.e., Part IV and also those which are covered under head fundamental duties as any provision of law running counter to the provisions of fundamental duties if it comes in conflict to the provisions of Constitution or any of the above mentioned provisions of the Constitution, the codified law or uncodified law of customary law made applicable either under Muslim Personal Law Shariyat Application Act or under section 29 of the Hindu Marriage Act will not prevail nor be operative.so in nutshell any customary law either of Hindus or Shariyat Law or Muslim Law running counter to the provisions of the Constitution is not to prevail and is not to be operative.5-That any customary or codified law if it perpetuates against the dignity of woman and runs counter to the fundamental duty imposed on every citizen to denounce or to renounce. Practices derogatory of the dignity of woman or some other duties enjoined and imposed on a citizen under that article then in that case the law being in conflict with the provision of the Constitution, the said law cannot be deemed to be operative as in case of conflict between the constitutional provisions and other provision i.e. statutory or otherwise, the constitutional provision is to prevail.6-That Talaq-ul-Bidaat or Talaq-i-Bidai i.e., giving an irrevocable talaq atonce or during one Tuhar or at one sitting has been regarded by all under Islam-Sunnat to be sinful and to be against the mandate of Holy Quran.7-That the mode of Talaq as referred to in Rasheed Ahmad's case AIR 1932 PC 25 and Talaq-i-Bidai in particular, conferring unbridled power to the husband empowering him to divorce by Talaq the wife without reason and to this extent that husband can pronounce Talaq thrice in one sitting or during one Tuhar in irrevocable form cannot be deemed to be operative or be considered to be continued under Section 2 of Shariyat Application Act 1937 read with Art-372 of the Constitution of India as the same has the effect of perpetuating discrimination on the ground of sex that is Male authoritarianism without rhyme or reason as well as, such system appears to be encouraging and allowing the doing of something and some Act that prima facie appears to be derogatory of dignity of individual as well as derogatory of dignity of women i.e. doing of something in breach of the mandate of Constitution contained in the preamble and in Art 51A(a), (e),(f) and (h) which impose fundamental duty on every citizen of India to renounce the practices derogatory of the dignity of women apart from imposing the duty to abide by the Constitution and its ideals, and to develop scientific temper and humanism etc. (9) That even if it be taken for a moment that the evidence relied on by the petitioner proved the recitation of three talaqs, the pronouncement of three talaq at one sitting on 15-6-69 as claimed by the petitioners, neither the period of Iddat being allowed before its becoming irrevocable nor there being proof that there had been no Rusu or sexual intercourse between the two between the period of three Tuhars instead talaq in irrevocable form has been pronounced at that very day i.e., 15-6-69 and that mode of talaq not being constitutionally operative in India under Article 372 of the Constitution of India read with Section 2 of the Shariyat Application Act, as held above, the petitioners have failed to make out a case for interference and in my opinion the order of the Prescribed Authority and that of the appellate authority do not suffer any error of law apparent nor from that jurisdiction, so do not call for any interference.

should be enacted keeping pace with the aspiration, of the Constitution and its provisions including those contained in parts III, IV and IV-A thereof in the form of enactments such as Special Marriage Act 1954, Indian Divorce Act or Dissolution of Muslim Marriage Act, 1939, Hindu Marriage Act 1956 or the like, so as to avoid the harping in darkness on account of uncodified law. Here High Court quoted Hon'ble Krishna Iyer, J., when he observes at pg. 79 of his book 'The Muslim Women Protection of Rightson Divorce Act as under:--

"Reform of the law of marriage and divorce for Muslims as for others must be guided by right principles. In any matter of family law reform there are, I think, three clear competing issues, all of which have to be weighed. First and foremost there is the strong interest of society generally that everything be done to encourage and maintain the stability and permanence of family unit not only for the sake of husband and wife, but even more urgently for the sake of children. Secondly there is public interest in allowing marriage which has hopelessly broken down to be decently and rationally dissolved. Thirdly there is public interest that in any matrimonial dispute justice should be seen to be done so that clearly guilty party should not be permitted to profit from a situation which he and he alone has been instrumental in creating."

It is also to be kept in view that according to Holy Prophet of all the things which have been permitted to men, divorce is the most hated by Allah. So finally both the writs were dismissed by honorable High Court and divorce was declared unconstitutional.

Unfortunately Honourable Supreme Court has reversed the decision and declared triple talaq constitutional and valid.

In 2002 in case of ***Shamim Ara v.State of UP***[60] The whole jurisprudence of talaq has undergone a vast improvement particularly with regard to communication of pronouncement of talaq to wife and with regard to attempt of reconciliation before finalization of divorce. In this case it was held that in order to be effective the talaq should be pronounced. A mere plea taken inwritten statement that divorce

[60] AIR 2002 SC 3551

have been pronounced some time in past cannot be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. So in this case it is most manifestly said that proper procedure as per Quran should be fallowed and as per this procedure efforts of reconciliation between husband and wife is must. Otherwise divorce will not be valid divorce.[61]

The words of divorce must indicate an intention to dissolve the marriage. If they are express e.g., "I have divorced thee," or "I divorce my wife forever and render her haram from me"[62] But if they are ambiguous e.g., "Thou art my cousin, the daughter of my uncle, if thou goest" or "I give up all relations and would have no connection of any sort with you"[63] the intention must be proved.

Pronouncement of the word talaq in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential.[64]

Kathiyumma v. Urathel Marakkar[65] The statement of law by Mulla as contained in para 310 and footnotes there under is based on certain rulings of Privy Council and the High Courts. The decision of A.P. High Court in (1975) 1 APLJ 20 has also been cited by Mulla in support of the proposition that the statement by husband in pleadings filed in answer to petition for maintenance by wife that he had

[61] Shamim Ara the appellant and Abrar Ahmad, the respondent was married in 1968 according to Muslim Shariyat Law. They had four sons, the appellant, filed an application on behalf of herself and for her two minor children under Section 125Cr.P.C. She complaint on ground of desertion and cruelty. Family Court at Allahabad refused to grant any maintenance to the appellant on the ground that she was already divorced by the respondent and hence not entitled to any maintenance. However, maintenance at the rate of Rs.150/- per month was allowed for one minor son for the period of his minority.The respondent also claimed protection of the Muslim Women (Protection of Rights on Divorce)Act 1986 and submitted that he had purchased a house and delivered the same to the appellant in lieu of Mehar (Dower) and therefore the appellant was not entitled to any maintenance. The appellant denied having been divorced at any time.The Family court Judge concluded that the appellant was not entitled to any maintenance in view of her having been divorced. The appellant preferred a revision before the High Court. The High Court held that the divorce which is alleged to have been given by the respondent to the appellant was not given in the presence of the appellant and it is not communicated to her. The communication completed when the respondent filled the written statement in the present case. Therefore the High Court held that the appellant was entitled to claim maintenance from 1.1.1988 to 5.12.1990 .The High Court granted 200rs/as maintenance. The appellant has filed this appeal by special leave. The singular issue arising for decision is whether the appellant can be said to have been divorced and the said divorce communicated to the appellant so as to become effective from 5.12.1990, the date of filing of thewritten statement by the respondent.

[62] Rashid Ahmad v. Anisha Khatun 1932

[63] WazidAli v.Jafar Husain 1932 Luck430,136 I.C.

[64] Ghansi Bibi v. Ghulam Dastagir (1968) 1 Mys. L.J. 566.

[65] Kathiyumma v.Urathel Marakkar 1931 A.M.647

already divorced the petitioner (wife) long ago operates as divorce.

In an illuminating judgment, virtually a research document, the eminent judge and jurist **V.R. Krishna Iyer,** as His Lordship then was, has made extensive observations. The judgment is reported as A. ***Yousuf Rawther Vs. Sowramma, AIR 1971 Kerala 261***.[66] It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship:-

"The interpretation of legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute. (para 6) "Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture law is largely the formalized and enforceable expression of a community's cultural norms cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions." (para 7) "It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them'." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, noman can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." (para 7) "Commentators on the Quoran have rightly observed and these tallies with the law

[66] Yousuf Rawther V.Sowramma AIR 1971 Kerala 261

now administered in some Muslim countries like Iraq that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing withthe wife's right to divorce." (para 7) "After quoting from the Quran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting reconciliation have failed, the parties may proceed to dissolution of the marriage by 'Talaq' or by 'Khola'. Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Khola she has to surrender to the husband her dower or abandon some of her rights, as compensation." (para 7) There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in ***Sri Jiauddin Ahmed v. Mrs. Anwara Begum, (1981) 1 GLR 358*** and later speaking for the Division Bench in ***Must. Rukia Khatun Vs. Abdul Khalique Laskar, (1981) 1 GLR 375***. In Jiauddin Ahmed's case a plea of previous divorce, i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim Law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. **The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife** by two arbiters one from the wife's family and the other from the husband's; if the attempts fail, talaq

may be effected. (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his side. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.[67]

The court was of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally. In the present case there is no proof that talaq have been taken place on 11.7.1987. The High Court has upheld that talaq has taken place when the written statement is communicated to the wife by delivering a copy of the writtenstatement on 5.12.1990. Mere plea taken in the written statement that divorce has been pronounced sometime in the past by itself cannot be treated as effectuating talaq.

So in present case neither the marriage between the parties stands dissolved on 5.12.1990 nor does the liability of the respondent to pay maintenance comes to an end on that day. The respondent shall continue to remain liable for payment of maintenance until theobligation comes to an end in accordance with law.

Khatoon Nisa v.State Of U.P. and Ors. on 14 August, 2002[68]

The question which was raised in the present case was whether a magistrate is entitled to exercise his jurisdiction under Section 125 of the Code of Criminal Procedure to grant maintenance in favour of divorced Muslim women.

After the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 it was considered that the jurisdiction of the magistrate under Section 125 Cr. P.C. can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with. This condition is that on the first hearing of the application both the parties of the marriage has to file an affidavit and declare in

[67] Jiauddin Ahmed Vs. Mrs. Anwara Begum, (1981) 1 GLR 358

[68] SC, JT 2002 (7) SC 631, 2002 (6) SCALE 165

writing that they would prefer to be governed by the provisions of the sec.125 to 127 of CR.P.C. In the present case the magistrate came to a know that there has been no divorce in the eye of law and as such,and the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr. P.C. This finding of the magistrate has been accepted by the High Court. The constitutionality of the Act of 1986 was under consideration before the Constitutional bench in the case of Danial Latifi and Anr. v. Union of India 2001. The validity of the Act has been upheld and the magistrate under the Act has the power to grant maintenance in favour of a divorced wife, and the parameters and considerations are the same in section 5 of 1986 act as those in Section 125 Cr. P.C. It is certainly true that in the case in hand, Section 5 of the Act has not been invoked. Therefore, the magistrate has exercised his jurisdiction under Section 125 Cr. P.C. But, since the magistrate retains the power of granting maintenancein view of the constitution bench decision in Danial Latifi's case under the Act and so the parameters for exercise of that power are the same as those contained in Section 125 Cr. P.C. So there is no ground to obstruct with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman.

In 2008 in case of *Masroor Ahmed V.State (NCT OF DELHI)*[69] after shamim ara case, for effective talaq pronouncement of talaq must be proved ,reasonable cause must be shown, and also the attempt of reconciliation must be demonstrated to have taken place. This will apply to Ahsan talaq , hasan talaq, and also on Talaq-e-biddat . tripal talaq or talaq -e- biddat shall be treated as one revocable talaq. While it may not be essential that talaq has to be pronounced in the presence of wife. It is essential that forsuch pronouncement to be effective is made known to her, communicated to her at the earliest.

Facts of the case

Aisha Anjum who was the respondent in the present case was thrown out of her marital house after two years of marriage by her husband Masroor Ahmed the petitioner. She had a two year daughter by the same marriage. Husband thrown out Aisha out of his matrimonialhome because of non fulfillment of demand of dowry.

[69] 2008 (103) DRJ 137 DEL.

In 2006 Ahmed filed a petition for restitution of conjugal rights and when Aisha returned home after six days she came to know that her husband had already divorced her in the presence of his brother-in-law and another man by pronouncing triple talaq. She alleged that her former husband had committed rape on her as during that period as she was not the legally wedded wife. She further alleged that her in-laws were also involved in this crime as they were aware of the divorce given by her husband. Anjum filed a complaint against Ahmed charging him of rape under Section 375 of the Indian Penal Code, 1860. She further added that her former husband had unlawful relations with her and he concealed the fact of divorce from her and if she would have been aware of the fact of divorce she would have never consented for conjugal relations. So she alleged that her consent was taken by fraud in which her former husband and other in-laws were also party of the fraud. So she requested for legal action against all the parties involved in fraud and instituted case under section 376/34 of IPC.

The prosecution case was that sexual intercourse between petitioner and complainant constituted offence of rape under section 375 of IPC as complainant was deceived by the fact of lawful marriage between both of them. So fraud was committed by petitioner and his family members. It was held by the court that in matrimonial cases it becomes the duty of the court to encourage genuine settlement of matrimonial dispute. So in this case it was right to quash the FIR because the parties have settled their disputes.

For the ends of justice such cases should be decided as soon as possible. So several questions have arisen in this case were:-

1. What is the legal effect of triple talaq?

2. Does the talaq given in fit of rage dissolve the marriage?

3. What will be effect of non-communication of talaq on wife?

1. While answering the first question the court held that the triple talaq in single sitting for SunniMuslims could be regarded as one revocable talaq .this will give husband time to revoke talaqand reconcile during Iddat period. Efforts of reconciliation are must by family members

2. In answer of second question the court held that the talaq pronounced in extreme anger would not be effective and valid as husband lost control over himself.

3. The talaq which is communicated to wife shall take effect on the date when it is so communicated. However if not communicated it would not take effect.

So it was held by the court that as in the present case the talaq was pronounced in extreme anger and not communicated to wife and no efforts of reconciliation were done by families of both the parties so it‟s not valid talaq. In consequence of existing marriage this cannot be the case of rape. Court held that for a valid talaq-

1. talaq must be for a reasonable cause.

It must be preceded by attempt of reconciliation between husband and wife by two arbitrators, one by each side. If their attempt fails then talaq may be effected.

So in present case marriage is not dissolved and liability of husband to pay maintenance continues.

Dagdu S/O Chotu Pathan, Latur vs Rahimbi Dagdu Pathan, Ashabi 2002[70]

IN 2002 Dagdu S/O Chotu Pathan,Latur vs Rahimbi Dagdu pathan was another important case regarding triple talaq. As per the facts of the case the Petitioner Dagdu was married to the Respondent Rahimbi and they had three children . He again married to one Khamrunbee .They also had children together. After he married to Khamrunbee h neglected the applicanr and her children and refused to maintain them during the last three years before she approached the learned Magistrate.[71]

[70] 1993 (3) Mh.L.J. 964

[71] Facts of the case When the case being filled and on receipt of summons the Petitioner appeared before the Magistrate and filed a written statement in which he opposed the claim made by the Applicants. He claimed that he had given Divorce to the Respondent on 24th February 1996 in the presence of Qazi and two witnesses among them one was Hindu and other was a Muslim male and thereafter he had performed the second marriage with Khamrunbee. So he prayed that the application

The learned Magistrate held that the fact of Talaq must be proved and it cannot be accepted by the Court merely on pleadings in the written statement. In this regard, the learned Magistrate relied upon a judgment of this Court in the case of ***"Mehtabbi W/o Shaikh Sikandar V/s Shaikh Sikandar" 1995 (3) Bombay C.R. 433***. This order, passed by the learned Magistrate, has been impugned in the instant Petition.[72]

In the case of **"*Jaitunbi Mubarak Shaikh V/s Mubarak Fakruddin Shaikh*"** 1993 (3) Mh.L.J. 964 had held that the view taken by the learned Single Judge in the case of Mehtabbi was not a good law and when a plea of Talaq is taken in the written statement filed before the Court, the wife is deemed to have been divorced from the date such a statement was made in the written statement though the husband takes the plea of Talaq on any date earlier to the filing of such a written statement and was not required to prove the factum of divorce by leading evidence before the Court.[73]

In the case of Jaitunbi (supra) the wife had moved an application under section 125 of the Criminal Procedure Code and the maintenance amount came to be fixed at Rs.60/- per month by order dated 26th June, June, 1981 passed by the learned Magistrate. Subsequently, the wife filed maintenance application No. 297 of 1986 under section 127 of the Code for enhancement of the maintenance amount. In reply to this application the husband filed his written statement on 1st November, 1987 and contended, inter alia, that he had already given Talaq to the claimant on 29th October, 1987 and, therefore, in view of the provisions of The Muslim Women (Protection of Rights on Divorce) Act, 1986 the application filed in the Magistrates Court was not maintainable. The Division Bench framed four issues forconsideration and the first two issues are relevant in deciding this reference and, therefore, they are reproduced, as under.[74]

filed under section 125 of the Criminal Procedure Code be dismissed. His plea was rejected By Judicial Magistrate First Class at Latur in November, 1998 and the maintenance application filed by the Respondent was allowed.

[72] Mehtabbi v. Shaikh Sikandar 1995 Bombay C.R. 433

[73] Jaitunbi Mubarak Shaikh v.Mubarak Fakruddin Shaikh 1993 Mh.L.J. 964

[74] ibid

The first relevant issue was that in proceedings for maintenance instituted by a Muslim wife, if a Muslim husband takes a plea in his written statement that his marriage had been dissolved at an earlier date in the Talaq form, even assuming that the fact of such dissolution at an earlier date is not proved, whether the filing of the written statement containing such a plea of divorce in the Talaq form amounts to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made. In reply to the first issue the Division Bench held that the pronouncement by a husband inhis written statement that he has divorced his wife earlier though such a fact is not proved would operate as a divorce in the Talaq form at least from the date of filing of the written statement and such a contention made in the written statement would operate as an acknowledgment of a divorce by him and a declaration of divorce from the date on which the statement was made.

M/S Shabnam Hashmi vs Union of India & Ors 2014 S.C.[75] was a leading case In 2014. This case was before honorable Supreme Court regarding right of adoption by a muslim women.In this case it was held by J Ranjan Gogoi of the Supreme Court of India that personal law would not bar Muslim Women from adopting under juvenile justice act.[76]

[75] Facts of the case The petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

[76] M/S Shabnam Hashmi vs Union Of India & Ors on 19 February, 2014 SC

During the continuance of the battle for justice in 2015 five women were fighting against the system of triple talaq in courts of different states. The cases were:-

1. ***Shayra Bano V. Union of India and others 2016***

2. ***Afreen Rehman V.Union of India 2016***

3. ***Gulshan Parveen V. Union of India and others2016***

4. ***Ishrat Jhan V. Union of India and others2016***

5. ***Atiya Sabri V. Union of India and others2017***

The honorable S.C. suo moto took cognizance of all these cases together and gave it the name **In *Re-Muslim women's Quest for Equality V.Jamiat Ulma-i-Hind*[77].** Finally in 2017 in this case on 22 august 2017 set aside the tripal talaq and declared it unconstitutional and held that if a person gave tripal talaq in one go then it will not have any consequence on valid marriagr i.e. it will not dissolve the marriage. Further in this case the S.C. directed the government to make law in this regard.

In this type of Talaq which was given to wives in present case the husband does not follow the approved form of Talaq i.e. talaq-ul-sunnat and he neither waits for iddat period nor to the refraining from sexual intercourse. This was an method developed by the Islamic patriarchal society to stay away from their marriag In this form of Divorce husband repudiates his wife by three divorces in one sentence. The biggest problem with this type of talaq is that it is one of irrevocable nature. Apeal was filed in the Supreme Court by Shayara Banoa victim of this practice. She claimed the enforcement of her Fundamental Rights mentioned under Article 14. In the mean- time there were numerous petitions challenging the same issue therefore, SC clubbed all the petitions in one and heard it.

[77] Writ petition © no. 118 2015

There were two issues in this case to be decided by the Honourable Supreme Court

1. The validity of triple talaq.

2. Whether triple talaq is an essential religious practice?

On August 22, 2017 in this land mark case the Supreme Court laid down by 3:2 majority his judgment and held this practice of triple talaq unnconstitutional. 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 behalfof Justice Nazeer wrote the minority opinion. Majority upon extensive discussion came to the conclusion that Triple Talaq is not an integral part of Qoran and not the essential religious practice but minority bench found this practice an essential religious practice.

Article 25 of the Constitution do not gives the state right to 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 under Article -25. Therefore, the whole issue was whether or not the practice is an essential religious practice of Islam.

The majority held that "the **Triple Talaq i.e. Talaq-e-biddat is not protected by the exception laid down in Article 25 i.e. the court found the said practice not an integral part 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 itself. 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."[78]

The majority bench relied on its decision Shamim Ara which held that this practice of Triple Talaq is against both theology and law and just because it is followed by a large number of people it cannot be validated. Therefore, such practice is declared unconstitutional and set aside.

[78] In Re-Muslim women's Quest for Equality V.Jamiat Ulma-i-Hind Writ petition © no. 118 2015

This judgment is extensively appreciated throughout the country. The majority Judges on the face of it condemned the government for not making relevant laws to prohibit such a regressive practice. This form of talaq allowed the husband to end the marital tie on his whims and fancies, thereby making the life of the women hell. Since many years Muslim women are demanding the protection from such a regressive and bad practice and finally it was the Supreme Court which gave them the remedy.

Justice Nariman said whenever he would find any violation of Fundamental Right, he will strike down the practice .Majority of Islamic nations have already banned the practice and in India only Hanafi School practices it. Therefore, it cannot be said that the practice is one of religious importance. The majority finding the said practice in violation of Article 14 as well as of the exceptions laid down in Article 25(1) struck down the regressive act with 3:2 majorities. The bench observed that merely because the practice is widespread and continuing from time immemorial it cannot be held as an essential religious practice. Hinduism also after finding *S*ati Pratha regressive removed it from the religion. Sati was also practiced widespread and practiced since time immemorial. Therefore, the court arrived at a very correct judgment. The majority started its judgment by the phrase "what is bad in theology cannot be good in law". This statement makes it clear the stance of the majority bench on the impugned act. One does not need to dwell down into the details and should understand that if triple talaq had been a essential religious practice of Islam then in that case it would not have been banned in almost all Islamic nations. Further, the said practice is only practiced in Hanafi School who itself considers it sinful. Therefore, the majority bench correctly held such practice as unconstitutional

As the result of this case the Muslim women (proctection of rights on marriage) bill 2017 was introduced in parliament. Which was later on converted in to The Muslim Women (Protection of Rights on Marriage) Act 2019.

5.3 Conclusion

An analysis of the judicial decisions reveals that judiciary has played a commendable role for protecting and ensuring the rights of women and achieving the

goal of gender justice. It is to be noted that complete gender justice is difficult and complex to achieve in a multi religious and pluralistic country like India. This is mainly because of the diversity of tradition, cultures and practices along with socioeconomic factors like poverty, lack of education to realize that mere constitutional and legislative provisions as well as judicial pronouncements cannot achieve gender justice. The attitude and approach of the society towards the women should also change. This is possible only through a concerted action by the State and with the cooperation of each every individual in society.

CHAPTER-VI

ANALYTICAL STUDY OF “THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT 2019”

CHAPTER-VI

ANALYTICAL STUDY OF, "THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT 2019"

6.1 Introduction

During the period of 1827 to1887 most of the matters of Muslims were governed by custom and usage of personal law. This recognition of usage and customs gave sanction to the customary laws. Few of these customs were in conflict with the Islamic/Quranic law under which a Muslim were bound to accept Islamic/Quaranic laws and could not be permitted to stick on to a contrary custom or usage. Progressive Muslim leaders all over the country felt that the situation has arisen where people need a uniform codified legislation on the line of Quranic Law and abandon the customary law. Prior to the independence various Indian Muslim women organizations condemned the customary law and number of Muslim women claimed that they should be governed by the Muslim Personal Law and not by the customs or usages. As a result of which Muslim Personal Law (Shariat) Application Act 1937 was passed.

Before this legislate on personal affairs of the Muslims were regulated by custom and usage wherein the status of Muslim women was oppressive in nature. After the passing of that Act Muslims in India are governed by"The Muslim Personal Law (Shariat) Application Act, 1937". This is also called Muslim Personal Law in India. This is the first enacted law in India for Muslims. It has been passed after Government of India Act 1935.It became binding on all the Muslims in India. The preamble of this Act declares that "An Act to make provision for the application ofthe Muslim Personal Law (Shariat) to Muslims."[1] The aims and objective of this Act has stated that the customary laws were misnomer; these laws do not have any sound basis to stand upon, and were liable to frequent changes. These customary practices

[1] Muslim personal law (Shariat)Application Act 1937 preamble.

were not definite and certain. So to ensure the certainty and definiteness in the mutual rights and obligations of public the Shariat law 1937 has been enacted.[2]

This law deals with marriage, succession, inheritance and charities among Muslims. Section **2** of the Act declares as follows-

6.2 Application of Personal Law to Muslims

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."[3] The Shariat law has always remained open to interpretation by the Ulama[4]. The Ulemas of Hanafi Sunnis sect of Muslim religion consider this form of divorce binding provided the pronouncement was made in front of two male Muslim witnesses and later confirmed by the Sharia court.

Triple talaq which is also known as talaq-e-biddat is a form of instant divorce. This is irrevocable form of talaq. In this form of talaq husband is allowed to divorce his wife by pronouncing the word talaq three times in oral, written or, more recently, electronic form. Triple talaq is not found in the Quran. It is disapproved form of talaq which is not recognized by various Muslim legal scholars. Many Islamic nations have barred the practice of triple talaq. These nations include our neighboring countries Pakistan and Bangladesh. This practice is also banned in the Muslim-majority countries like Saudi Arabia, Morocco, and Afghanistan. Triple talaq in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds. This form of talaq which is known as talaq-e-biddator instant triple talaq in India has always been a subject of controversy and debate. Those persons who question this practice use to raise issues of gender equality, justice, human rights

[2]Shayara Bano v.Union of India 2017
[3] Sec 2 Muslim personal law (Shariat) Application Act 1937.
[4] The Ulamaare the guardians,transmitters and interpreters of religious knowledge in Islam, including Islamic doctrines and law. They are educated in religious institutions.

and secularism. This debate has involved the Government of India and the Supreme Court and is also related to the debate about the Uniform Civil Code (Article 44), which is one of the directives for the state to be implemented in the country for protection of the gender justice as a constitutional mandate. Though due to politics in religion or religion in politics the conatitutional mandate of Common Civil Code, could not be achieved by the Indian Government. After a long battle for gender justice the Government of India enacted law to deal the issue of triple talaq and to provide justice to the aggrieved women in the form of two ordinances[5] and finally in the form of Act which is known as The Muslim Women (Protection of Rights on Marriage) Act, 2019.

6.3 History of Enactment of the Act of 2019

This practice of instant triple talaq faced opposition from Muslim women almost all over India. Few of them filed public interest litigation in the Supreme Court against this practice, terming it regressive. The petitioners asked the Honorable Supreme Court for section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 to be declared unconstitutional by describing it as being against Article 14 of the Constitution i.e. Equality before the Law. On 8 December 2016, The Allahabad High Court has declared the practice of instant triple talaq unconstitutional and violative of the rights of Muslim women.[6]In March 2017, over 1 million Indian Muslims, a majority of whom were women, signed a petition to end instant triple talaq. The petition was started by the Muslim Rashtriya Manch, an Islamic organization affiliated to the right wing Hindu nationalist organization Rashtriya Swayamsevak Sangh.[7] The petitioners against instant triple talaq have given evidence showing how instant triple talaq is simply an innovation that does not have much to do with Quranic believe. This is supported by the interpretation of Quranic text by many Islamic scholars, historical evidences and legal precedent.[8]On 10 May 2017, senior cleric Maulana Syed Shahabuddin Salafi Firdausi denounced triple talaq

[5]The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019

[6]Rashid, Omar (8 December 2016). '"Triple talaq' a cruel and most demeaning form of divorce practised by Muslim community: HC". The Hindu. Retrieved 21 April 2017

7Suri, M.anveena (17 March 2017) "Triple talaq: 1 million Indian Muslims sign petition against divorce practice"CNN.

8"The case against Triple talaq". Livemint. 16 May 2017

and nikah halala, calling them un-Islamic practices and instruments to oppress women.[9] The practice was also opposed by Hindu nationalists and Muslim liberals.[10]

The practice of triple talaq has been supported by the All India Muslim Personal Law Board (AIMPLB), a non-governmental body that supervises the application of Muslim Personal Law. As per the Muslim Personal Law Board the state government does not have any right to interferein the religious matters of the Muslim community

In the month of April 2017, AIMPLB[11] claimed on behalf of report prepared by Muslim Mahila Research Kendra and Shariah Committee for Women that Muslims have a lower rate of divorce compared to other religious communities. AIMPLB also claimed that it had support of 35 million Muslim women across the country which is of the view that Shariat and triple talaq should be applicable in Muslim religion and Muslim women should be governed by that law.

AIMPLB issued a code of conduct in April 2017 regarding talaq in response to the controversy over the practice of triple talaq. It also warned that those who divorce for reasons not prescribed under Shariat will be socially boycotted in addition to calling for boycott of those who use triple talaq recklessly and without justification.[12] It has also been stated that it should be delivered in three sittings with a gap of at least one month each.[13]In spite of this declaration of AIMPLB, large number of Muslim women in India has been demanding a ban on practice of triple talaq for more than a decade. Due to this barbaric practice since decades Muslim women in India have been living in perpetual fear of being thrown out of their matrimonial homes within seconds. This heinous practice is feasible because a Muslim man can end years of marriage by just saying the word "talaq" three times.

This fight of decades and struggle of numberless Muslim women got recognized In the year of 2017 when Shayara Bano a 35-year-old mother-of-two children reached the Supreme Court in quest of justice. In February 2016 Shayara

[9]"Cleric: Triple talaq is a mockery of Islam". The Times of India. 10 May 2017.
10"India bans a Muslim practice of instant divorce". The Economist. 26 August 2017
[11]All India Muslim Personal Law Board.
[12]Shaurya, Surabhi (17 April 2017). "Triple Talaq: All India Muslim Personal Law Board issues code of conduct; here's what it says".India .com.
[13]Bajpai, Namita (16 April 2017). "All India Muslim Personal Law Board announces code of conduct for triple talaq".The new Indian express

Bano filed a petition in which she claimed that she visited her parents' home in Uttarakhand for medical treatment. There she received talaqnama which was in the form of a letter in which her husband told her that he has divorced her. After that she tried to reach her husband but she could not. After sending the talaqnama to Shayara Bano her husband switched off his phone. In the month of February Shayara Bano filed a petition in the Supreme Court demanding a total ban on triple talaq which she says allows Muslim men to treat their wives like "chattels".Modern technology has made it even easier for unscrupulous men to dump their wives using text messages as well as post and the telephone to pronounce divorce. There have also been instances where men have used Skype,Whats App or Facebook for the purpose[14].

In November, the Mumbai-based Bharatiya Muslim Mahila Andolan (BMMA - Indian Muslim Women's Movement) released a report chronicling nearly 100 cases of triple talaq. Professor Zakia Soman, a social activist and founder of Bharatiya Muslim Mahila Andolan (BMMA) says that, "Since 2007 society has witnessed thousands of cases of oral triple talaq rendering women destitute with nowhere to go." In a majority of the cases, compiled by the BMMA, the divorced women were from poor families and most of them said that their husbands did not honor their obligations to pay maintenance, forcing them to return to their parental homes or fight for themselves.

This battle goes off and on since long time and various women became victim and suffered their whole life without any relief or respite. But with passes of time Indian courts always tried to make balance and do justice to aggrieved women while doing progressive interpretation of the personal laws and by secular application and interpretation of the common laws.

During the continuance of this battle for justice in 2015 five women started fighting against the system of triple talaq in courts of different states. The cases were:-

1. ***Shayra Bano V. Union of India and others 2016***

2. Afreen RehmanV.Union of India and others 2016

[14]PandeyGeeta (11 april 2016)Triple talaq: India's Muslim women fight against instant divorce. BBC.com

3. Gulshan Parveen V. Union of India and others 2016

4. Ishrat Jhan V. Union of India and others 2016

5. Atiya Sabri V. Union of India and others 2017

The Honorable S.C. suo-moto took cognizance of all these cases together and gave it the name ***In Re-Muslim women's Quest for Equality V. JamiatUlma-i-Hind SC 2016.*** As a result of this case on 22 August 2017, the Indian Supreme Court declared instant triple talaq unconstitutional. The Honorable Supreme Court by 3:2 majorities declares that the practice of triple talaq is unconstitutional. The two judges declared the practice to be constitutional while simultaneously asking the government to ban the practice by enacting a law. In a 397-pages judgment though two judges upheld validity of instant triple talaq (talaq-e-biddat) the three other judges held that it was unconstitutional, thus barring the practice by a 3:2 majority. One judge argued that instant triple talaq violated Islamic law. The bench asked the Central Government to promulgate legislation within six months to govern marriage and divorce in the Muslim community.[15] The court said that until the government formulates a law regarding instant triple talaq there would be an injunction against husbands pronouncing instant triple talaq on their wives[16].

On 30th July 2019 Parliament of India declared the practice of triple talaq as illegal, unconstitutional and made it punishable act from 1st August 2019 by the enactment of "The Muslim Women (Protection of Rights on Marriage) Act 2019,which is deemed to be in effect from 19th September 2018.Before the final enactment of this act i.e. The Muslim Women (Protection of Rights on Marriage) Act 2019 two Bills named The Muslim Women (Protection of Rights on Marriage) Bill, 2017 and The Muslim Women (Protection of Rights on Marriage) Bill, 2018 were introduced and passed by the Lok Sabha and stalled in The Rajya Sabha. As a consequence two ordinances i.e. The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 and The Muslim Women (Protection of Rights on

[15]Mahapatra, Dhananjay (22 August 2017). "Supreme Court declares triple talaq unconstitutional, strikes it down by 3:2 majority". The Times of India.

[16]"This Is What Supreme Court Said in Triple Talaq Judgment". LiveLaw.in. 22 August 2017.

Marriage) Ordinance, 2019 were promulgated by The President of India. Chronological order of passing of the Bill and ordinances are discussed bellow.

6.3.1 The Muslim Women (Protection of Rights on Marriage) Bill, 2017

On 28 December 2017 government introduced "The Muslim Women (Protection of Rights on Marriage) Bill 2017 in Parliament after citing the Supreme Court judgment in Sayra Bano case 2017. This Bill proposed the triple talaq to be declared illegal and void in all of its forms.It was not important that in what form and in what manner talaq was given. Spoken, written or by electronic means all forms of instant triple talaq were proposed to be declared illegal and void. In case of breach of law three years imprisonment was provided .The bill was passed by TheLokSabha on the same day but stalled by the Rajya Sabha. The Communist Party of India (Marxist) , Rashtriya Janata Dal, All India Majlis-e-Ittehadul Muslimeen, BijuJanata Dal, All India Anna Dravida Munnetra Kazhagam and Indian Union Muslim League opposed the Bill, calling it arbitrary and faulty, while Indian National Congress supported the Bill.[17]

6.3.2 The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018

On the grounds that practice of instant triple talaq was continuing unabated despite the Supreme Court striking down it, the government issued an ordinance to make the practice illegal and void.[18]

The provisions of the ordinance were as follows:-[19]

- Instant triple talaq remains cognizable offence with a maximum of three years imprisonment and a fine.
- Only complaint with the police by the wife or her blood relative will be recognized.
- The offence is non-bailable i.e. only a Magistrate and not the police can grant bail. Bail can be granted only after hearing the wife.
- Custody of the minor children from the marriage will go to the mother.

[17]Sharma, Sandipan (28 December 2017). "Congress' backing of triple talaq bill indicates it's gradually withdrawing from Muslim appeasement politics". Firstpost
[18]"President Promulgates Triple Talaq Ordinance". LiveLaw.in. 20 September 2018
[19]"Triple talaq passed. What are the provisions". Indian Express Website. 19 September 2018.

- Maintenance allowance to the wife is decided by the magistrate.

The ordinance was promulgated by the President of India on 19 September 2018.[20]

6.3.3 The Muslim Women (Protection of Rights on Marriage) Bill, 2018

As the triple talaq ordinance of 2018 was to expire on 22 January 2019 the Government again introduced a fresh Bill named The Muslim Women (Protection of Rights on Marriage) Bill, 2018 in the Lok Sabha on 17 December 2018 to replace the ordinance.[21]

The provisions of the said Bill were as follows:[22]

- All declaration of instant triple talaq, including in written or electronic form, to be void (i.e. not enforceable in law) and illegal.
- Instant triple talaq remains cognizable offence with a maximum of three years' imprisonment and a fine. The fine amount is decided by the magistrate.
- The offence will be cognizable only if information relating to the offence is given by the wife or her blood relatives.
- The offence is non-bailable. But there is a provision that the Magistrate may grant bail to the accused. The bail may be granted only after hearing the wife and if the Magistrate is satisfied with reasonable grounds for granting bail.
- The wife is entitled to subsistence allowance. The amount is decided by the magistrate.
- The wife is entitled to seek custody of her minor children from the marriage. The manner of custody will be determined by the Magistrate.
- The offence may be compounded (i.e. stop legal proceedings and settle the dispute) by the Magistrate upon the request of the woman (against whom triple talaq has been declared).

Again the Bill faced the same consequences, passed by the Lok Sabha on 27 December 2018[23] and stucked in the Rajya Sabha due to the opposition's demand to send it to a select committee.[24]

[20]"President signs instant triple talaq ordinance". Times of India Website. 19 September 2018.
[21]Kaushal, Pradeep (18 December 2018). "Fresh triple talaq Bill introduced in LokSabha". Indian Express Website.
[22]Kaushal, Pradeep (18 December 2018). "Fresh triple talaq Bill introduced in LokSabha". Indian Express Website.

6.3.4 The Muslim Women (Protection of Rights on Marriage) Ordinance, 2019

As The Triple Talaq Ordinance of 2018 was to expire on 22 January 2019 and the Triple Talaq Bill 2018 could not be passed in the Parliament session, the President of India had to promulgate a fresh ordinance 2019 in this regard.[25]

6.3.5 The Muslim Women (Protection of Rights on Marriage) Act, 2019

Finally after the long battle, The Muslim Women (Protection of Rights on Marriage) Act, 2019 became a law on 31 July 2019, replacing the earlier ordinance. Before passing of this Act the Lok Sabha witnessed a strong debate over the triple talaq Bill. In this debate opposition charged the Government for targeting one community with the proposed legislation and the government asserted that the draft of the proposed Act is meant for gender justice. While opposing the Bill the opposition claimed that there are nine types of talaq in the Islamic Law and this is not the only way which a person is bound to adopt and follow. The Bill is also opposed on the ground that if the husband has been jailed, how he will be able to pay the maintenance while sitting in the jail. The opposition also claimed that when the court has banned the instant triple talaq then what is the need to jail the man. They also asked that the Supreme Court banned the triple talaq by declaring it unconstitutional but did not ask the government to make it criminal offence[26]. The opposition members also opposed the Bill on the ground that now the condition of the Muslim women will be more pathetic in the society because now men will abandon them without giving them talaq due to fear of jail. The ruling party also put forward the strong points in support of the Act. They backed it by saying that prevention is better than cure and the proposed legislation is seeking to do the same. They also said that the Bill is not only about empowerment of women but also in consonance with government's motto of 'Sabka Saath, Sabka Vikasaur SabkaVishwas'.[27] The practice of triple talaq violates human rights. It is also a regressive notion of patriarchy which treats women in an undignified manner and there is no convincing logic in opposing the legislation.[28] The

[23]"LokSabha debates Bill 'criminalising' instant triple talaq: Who said what". The Times of India. 27 December 2018.
[24]"Triple talaqBill in RajyaSabha on Monday; Congress, others set to oppose". The Times of India. 30 December 2018.
[25]"President Kovind approves ordinance to criminalise triple talaq". India Today. 12 January 2019.
[26] Gist of debate by AsaduddinOwaisi(AIMIM) In LokSabha.
[27]PoonamMahajan (BJP) in LokSabha
[28]AprajitaSarangi(BJP) In LokSabha.

triple talaq Bill introduced in the Lok Sabha and passed by the house, without much trouble, because the government enjoys comfortable majority in the lower house.

The said Bill tabled in the Rajya Sabha, where the government needed approval of the upper house of the Parliament. Although the ruling party does not have a majority of its own in the Rajya Sabha, but due to the support of few members and due to absenance of few members from voting, finally the Bill was passed by the upper house of the Parliament. The Bill has been passed by the upper house with 99 votes in favour and 84 in against, as the ruling party which lacks majority in the upper house has been helped by the absence of some members of the opposition parties like Congress, SP and BSP as well as six members of Telangana Rashtra Samithi and two MPs of YSR-Congress.

The President of India has given his assent to the Bill passed by the both houses of Parliament; hence it turned into a law. The law which makes the practice of instant divorces among Muslims a punishable offence. The Act has replaced earlier ordinance. The new law The Muslim Women (Protection of Rights on Marriage) Act 2019 makes talaq-e-biddat or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband void and illegal.

6.4 Salient Features of the Muslim Women (Protection of Rights on Marriage) Act 2019

It is very clear from the title of the Act that the main aim of the Act of 2019 is to protect the rights of the Muslim female in case of her marriage. The preamble of the Act itself declares that this is -"An act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide formatters connected therewith or incidental there to".[29]This Act of 2019 is declared the practice of instant triple talaq void and illegal and declared such act as punishable offence with the imprisonment of tree years. It also deals with the issues of maintenance and custody of the children born to the husband and wife. The bone of contention in this Act has been the criminalization aspect of the Act while the Act itself is civil in nature.

[29] Introductory para of The Muslim Women (Proction of Rights on Marriage)Act 2019

In Islam marriage is a social contract and divorce is natural consequence of marriage if parties to the marriage are not able to live together peacefully. Divorce is considered as a necessary evil which should be employed only as a last resort. In case of ***Yousuf Rawther v. Sowramma*** the court held that, "it is clear, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and thus to accommodate themselves more comfortably in their new homes."[30]

The said Act has been divided into three chapters

(i) Preliminary

(ii) Declaration of talaq to be void and illegal

(iii) Protection of rights of married Muslim women

6.4.1 Chapter I - (i) Preliminary

Chapter I of the Act 2019 deals with section 1 and section 2 of the Act. Section one declares short title, extent and commencement of the Act and declares that this Act will be called The Muslim Women (Protection of Rights on Marriage) Act 2019.It will be applicable to the whole of the India except the state of Jammu and Kashmir. It shall be deemed to have come into force on 19 September 2018.

Section 2 of the Act[31] defines various terms which shall be taken in the sense in which they are defined in the Act in definition clause. This definition clause defines the words "Electronic form", "Magistrate"[32], and "Talaq"[33].

6.4.2 Chapter II - Declaration of Instant Triple Talaq to be Void and Illegal

The second chapter of the Act consists of section 3 and section 4.Section 3 declares the pronouncement of talaq by a Muslim husband upon his wife as void and

[30] AIR 1971 Ker 261

[31] Section- 2(c) of The Muslim Women (Protection of Rights on Marriage) Act, 2019.

[32]The magistrate empowered in this act is magistrate of first class.

[33]The world Talaq as defined in this Act clearly declares that " talaq means talaq-e-biddat or any other similar form of talaq having effect of instantaneous and irrevocable divorce pronounced by Muslim husband"

illegal[34]. However, it is not that much simple because even if a marriage is a social contract but it has a sacrosanct position in the society and is treated as such. The practice of triple talaq has been common and recognized in the Muslim society for centuries and is deeply embedded in their thinking. Thus just a declaration of it being void by the law doesn't change the state of affairs immediately. A woman who has accepted the idea of divorce by triple pronouncement believe it to be haram to live with her husband in spite of it not being acknowledged as divorce by the law. The society may still continue to treat instant triple talaq as valid. This is the reason that generally it is argued that a reform in personal law must come from within the religious community rather than the law commanding it from the outside.

Flavia Agnes has rightly observed that -"Several studies have shown that rather than approaching the formal structures of law, women from marginalized sections use informal community based mechanisms to negotiate for their rights. Women find the religion-based dispute resolution fora such as darulqazas more accessible than courts and police stations as there is a general fear among the poor of accessing these formal structures.[35]"Anindita Chakrabarti and Suchandra Ghosh, have gathered comprehensive practical experience, doing fieldwork at a sharia court in a large Muslim ghetto in Kanpur for two years. They have argued that in issues related to family disputes, women are mostly concerned with kinship rules, household economies, and family intrigues.[36] In such scenario, the blunt device of law rarely works. As observed in the case of ***Harvinder Kaur v. Harmender Singh Chaudhary***[37] by the Delhi High Court, introducing Constitutional law in a matrimonial home is like "introducing a bull in a china shop."

Criminalization of Talaq

Section 4 of the Act of 2019 lays down the punishment for declaration of triple talaq by a Husband i.e. imprisonment up to three years and fine.[38] This provision has

[34]Section-3 Any pronouncement of talaqby a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.
[35]Flavia Agnes, "The Politics Behind Criminalizing Triple Talaq", 53 Economic & Political Weekly13 (2018).
[36]AninditaChakrabarti and SuchandraGhosh, "Judicial Reform vs Adjudication of Personal Law," 52 Economic &political Weekly 12-14 (2017).
[37] AIR 1984 Delhi 66.
[38] Section-4Any Muslim husband who pronounces talaqreferred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

mainly became the bone of contention in this Act of 2019. There are convincing arguments on both sides of the debate. Few people support that there should be punishment for utterance of triple talaq while others are of the view that there should not be any space for punishment in a law which is civil in nature. Human conduct is regulated by various means. While civil means are enough to regulate most of the human behavior, sometimes deterrence is required where civil law fails to regulate such behavior which shows serious departure from norms and is capable of infringing on the lives of other citizens.

The main problem related to the criminalization of the pronouncement of instant triple talaq is that by declaring it a criminal offence the legislature imposed penal and criminal consequences for a civil wrong. Marriage under Islamic law is a contract. The breach of a contract should not lead to the criminal sanction. As criminalization of instant triple talaq is concerned the state should adopt a modest approach. Curtailing the liberty of a human being should be the last resort for the state. Criminal law is only one of the many mechanisms to condemn and prevent wrong conduct. Onlythe most severe violations of law should attract the coercive and condemnatory technique i.e. criminalization.[39] State must adopt a minimalist approach in criminalization of offences because a stronger justification is required where an offence is made punishable with imprisonment.[40]

6.4.3 Chapter III - Protection of Rights of Married Muslim Women

The third chapter of the Act consist section 5 to section 8.

6.4.3.1 Maintenance

Section 5 of the Act ensures that the woman on whom triple talaq has been pronounced will be entitled to subsistence allowance from her husband as determined by the magistrate. [41]

The language of this section ensures only a "subsistence allowance" and not "maintenance" as under other laws related to women's rights. Maintenance means the

[39]Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' 116 LQR 225 (2000).
[40]Joseph Shine v. Union of India, 2018 (11) SCALE 556.
[41]Section 5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom talaqis pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

amount of money which is necessary for living according to a person's status in the society, while subsistence allowance is the minimum amount which is required to meet the daily expenses of life. However the provision is "without prejudice to the provisions contained in any other law." This means that the woman is still free to initiate proceedings for maintenance under section 125 of the Criminal Procedure Code 1973. A married Muslim woman is also entitled to maintenance irrespective of the fact that whether she has been able to maintain herself or not.

Another question that has been arisen is due to the fact of punishment which has been given to husband under this Act. This Act criminalizes the pronouncement of triple talaq and at the same time entitles the divorced woman to subsistence allowance. In a case where the husband is reported and sentenced to imprisonment, from where the proposed maintenance allowances will come from?

6.4.3.2 Custody of Children

Section 6 of the Act makes the provision that a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband[42]. Thus, she is entitled to such custody as a matter of law. The first and the foremost important question which arises is about the need for the provision for custody of child when the marriage is still subsisting and no divorce has taken place. Making such a provision mandatory is not reasonable. In other statutes governing divorce the custody of children is left to be determined by the courts. Fewother factors such as best interest of children are given paramount consideration. This provision does not provide for exceptions and no proper criteria have been given to determine the custody of the children. There might be cases where the mother herself is not financially or mentally fit to take care of the children, or the children do not want to live with their mother. Such exceptional situations have not been taken into account while drafting this provision of the Act.

6.4.3.3 Offence to be Cognizable, and Compoundable

Section 7 of the act declares that, if information regarding offence of instant triple talaq is given to officer in charge of the police station by divorced women or

[42]Section 6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq*by her husband, in such manner as may be determined by the Magistrate.

any other person related to her by blood or marriage then offence punishable under this act shall be cognizable offence[43].The divorced women can compound the offence with the permission of magistrate. If accused person applied for bail the bail can be granted only after hearing the divorced Muslim women.

By section 8 of this Act, The Muslim Women (Protection of Rights on Marriage) second Ordinance, 2019 is repealed.

6.4.3.4 Analysis of the Act

In the process of analyzing the Act the main problem which have been found is criminalization of the instant triple talaq because by doing so the competent legislature is imposing penal and criminal consequences for a civil wrong. As it is well accepted that the Marriage under Islamic law is a civil contract, the breach of which should not lead criminal punishment. As far as criminalization is concerned the state should adopt a modest approach. Putting the person behind the bars and Curtailing his liberty should be the last resort.[44]Criminal law is only one of many mechanisms to censure and prevent deviant conduct. Only the most serious violations should attract the most coercive and condemnatory technique, i.e. criminalization.[45] State must adopt a minimalistic approach in criminalization of offences because a stronger justification is required where an offence is made punishable with imprisonment.[46]

Jeremy Bentham, in his book "An Introduction to the Principles of Morals and Legislation" mentioned four conditions where an act should not be classified as a criminal offence. Firstly,

Where it is groundless, which means that there is no mischief which needs to be prevented. As far as instant triple talaq is concerned, criminalization of it seems to be groundless because the act is void and so it does not have any consequences. Secondly where it is inefficacious, and thus it won't be able to prevent the mischief. In case of instant triple talaq putting the husband behind bars might aggravate the

[43]Offence in which police officer can arrest without warrant.
[44]Andrew Ashworth, "Is the Criminal Law a Lost Cause?" 116 *LQR* 225 (2000)

[45]Andrew Ashworth, "Is the Criminal Law a Lost Cause?" 116 *LQR* 225 (2000)

[46]Joseph Shine v. Union of India, 2018 (11) SCALE 556.

marital dispute and thus desensitize the wife from reporting the incident. And if it is not reported, there would hardly be any deterrent effect. Thirdly, where it is unprofitable, which means that the harm produced would be greater than the gain. Lastly, where it is needless, which means that the problem can be addressed through other means.[47]

The main aim of the "The Muslim Women (Protection of Rights on Marriage) Act 2019" is to prohibit instant triple talaq and to safeguard the rights of married Muslim women. It is important to note that if the husband will be imprisoned then it will be very likely that all his family members including the wife would become destitute. In addition to this when the act of pronouncement of triple talaq has itself been declared void by section 3 then such pronouncement would not have any legal consequence at all and would have no effect on the validity of marriage. The marriage would still remain valid in the eyes of law. However it is impracticable to expect that the marriage would not suffer. There is a possibility that if the husband is in prison, it would lead to irreconcilable differences among the husband and wife. After coming from the jail the husband might divorce his wife by following the proper Quranic procedure. Such imprisonment would result into unfair denial of conjugal rights to the Muslim married couple. The apprehension of such adverse consequences would discourage the Muslim wife from complaining such incidents of triple talaq. It mean that there would not be any deterrent effect of such a provision in the Act. So the women would not have any remedy at all. On the other hand as the offence is a cognizable offence the police officers have the right to arrest husband without any preliminary investigation. The woman would have nothing to say in the procedure. Also neither the Courts nor the Shariat law has declared this practice to be a crime. The Hanafi School which recognizes this form of divorce, considers it to be sinful and Abominable.[48] It is bad in theology, but not a crime. The punishment which is prescribed in the Act is not proportionate to the gravity of the wrong. Punishment of three years has been prescribed for much serious offences in Indian Penal Code which include sedition (124A), promoting enmity between classes of people, rioting armed with deadly weapon (148) of IPC etc. Imposing such a punishment for a civil act does not seem justified. Another aspect against the criminalization of instant triple

[47]Jeremy Bentham, "An Introduction to the Principles of Morals and Legislations"134 (Clarendon Press, Oxford1907).
[48]Asaf A.A. Fyzee, Outlines of Muhammadan Law 147 (Oxford University Press, Oxford, 2008)

talaq is that the Act discriminates between Hindu and Muslim males as it makes divorce a criminal act for the Muslim male while it as a civil act for the Hindus.[49]So it is against Art.14 of the Constitution.

6.5 Conclusion

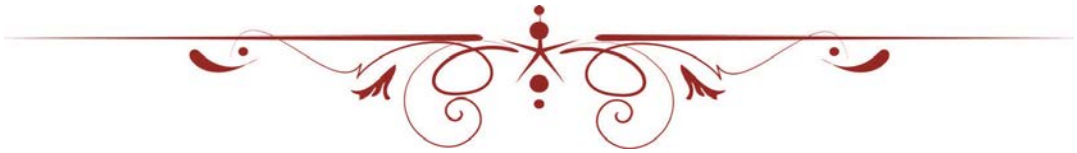
The Act, with all its good and bad consequences is still a bundle of contradictions and procedurally Contradictory rules. It is a case of two steps forward and one step back. It is surely a hurried piece of legislation with conflicting interests. The importance of the whole Act has been lost in political interests. Still at least it exists as a small step forward in the direction of women's liberation. At the end any law is only as good as the institutions that implement it. It is witnessing more violation than its compliance. It is observed that, entrenched patriarchy is a great stumbling block that repeatedly comes in the way of the implementation of even the best designed legislation. Patriarchy affects not only most of our citizens but also institutions like the government, administration and judiciary, which are invested with the responsibility of Implementation of this and other laws[50].

[49]Kavita Krishnan, "Civil Offence for Hindus, Crime for Muslims: The Triple TalaqOrdinance is PlainlyDiscriminatory", Scroll.in, September 24, 2018, *available at* https://scroll.in/article/895448/civil-offence-forhindus-crime-for-muslims-the-triple-talaq-ordinance-is-plainly-discriminatory (last visited September 10, 2019).

[50]Subhashini Ali, "The Triple Talaq Ruling is a Step Forward, but There is a Long Way to Go for Gender Justice Laws", The Wire, August 24, 2017, available athttps://thewire.in/communalism/triple-talaq-uniformcivil-code-gender-justice (last visited on September 10, 2019).

CHAPTER-VII

ANALYSIS OF DATA COLLECTED FROM DISTRICT LUCKNOW (U.P) AND DISTRICT CHHATARPUR (M.P.) AND SOCIAL IMPACT OF TRIPLE TALAQ ACT ON MUSLIM WOMEN



CHAPTER–VII

SOCIAL IMPACT OF TRIPLE TALAQ ACT 2019 ON MUSLIM WOMEN: A FIELD STUDY OF DISTRICT LUCKNOW (U.P.) AND CHHATARPUR (M.P.)

This chapter presents and analyses the primary data, collected from the various stake holders in the district Lucknow of Uttar Pradesh and district Chhatarpur of Madhya Pradesh.

In this chapter the researcher has tried to provide an idea regarding the status of Muslim women in Muslim family and the position of gender justice in society through data analysis in form of chart and tabular representation.

The researcher has tried to evaluate and examine position of women in Muslim society and effect of "The Muslim women (Protection of Rights on Marriage) Act, 2019"on the Muslim Women on their rights and position in society, particularly their right to divorce after the Act of 2019.

To draw the inference, the researcher has collected the data through questionnaire and interview. About 300 questionnaires have been filled by 300 Muslim male and female of different age groups and they are interviewed.

Through textual discussion, tabular and graphical presentation, the data is critically analyzed and reported".

The finding shows the information about the gender justice in Muslim Personal Law with Special Reference to Divorce. On the basis of analysis, results and inferences were drawn. The survey was conducted by means of a structured questionnaire circulated among 300 respondents of Muslim community from the different societies. The responses of 300 respondents have been considered for the study with the rate of 100.0 percent. Such a response ratio has been regarded as encouraging in the earlier research and studies on the sector and the aspects of the topic assumed for research activity.

A random sample method was used for the selection of respondents and interaction with those who were available in the society during the survey. A detailed questionnaire survey was conducted during October 2020 to March, 2021 across the selected areas. The questions were designed with the intention to know the awareness of Muslim females and males towards their rights, different concepts of Muslim Personal Law and position of gender justice in society. It was very difficult for researcher to get questionnaire filled from the respondents. Level of difficulty was same whether the respondent was male or female. Male members were not willing to participate in such kind of survey while females were willing to fill the questionnaire but were not allowed by the male member of the family. In one incident researcher got 5 questionnaire filled from female member of the particular family .At the time of getting it done male headman of the family was not present in home. As the male member of family came he started scolding females of the family and snatched all the responses from the researcher. This was not the only incident but like this few other families neither filled questionnaire nor allowed other members of the family to fill the same.

Various respondents were hesitant in giving their responses to researcher as researcher belonged to different religion. For overcoming this problem researcher took help of a girl who belonged to the religion of the respondents. Because of her help the work of collection of data became possible.

After collection of data, the responses received from the respondents are presented in the form of tables, figures, analyzed and interpreted by using a simple method of calculation. This chapter provides a brief discussion of obtained results. Based on the findings of the present research, the conclusion and suggestions were drawn, which are summarized in the next chapter.

For proper of evaluation of data, questionnaire has been divided in three parts i.e. part A, part B and part C. Part A tells about the socio-economic profile of the respondents. Part B consists of 22 questions with space for suggestions from the respondents. Part C deals with comparative study between male and female respondents of few questions of part B.

7.1 Section- A

Socio-Economic Profile of Respondent

1. Gender Wise Distribution Pattern of Respondents

Table.7.1

S. N.	Gender	Frequency	Percent
1	Male	108	36.0
2	Female	192	64.0
	Total	**300**	**100.0**

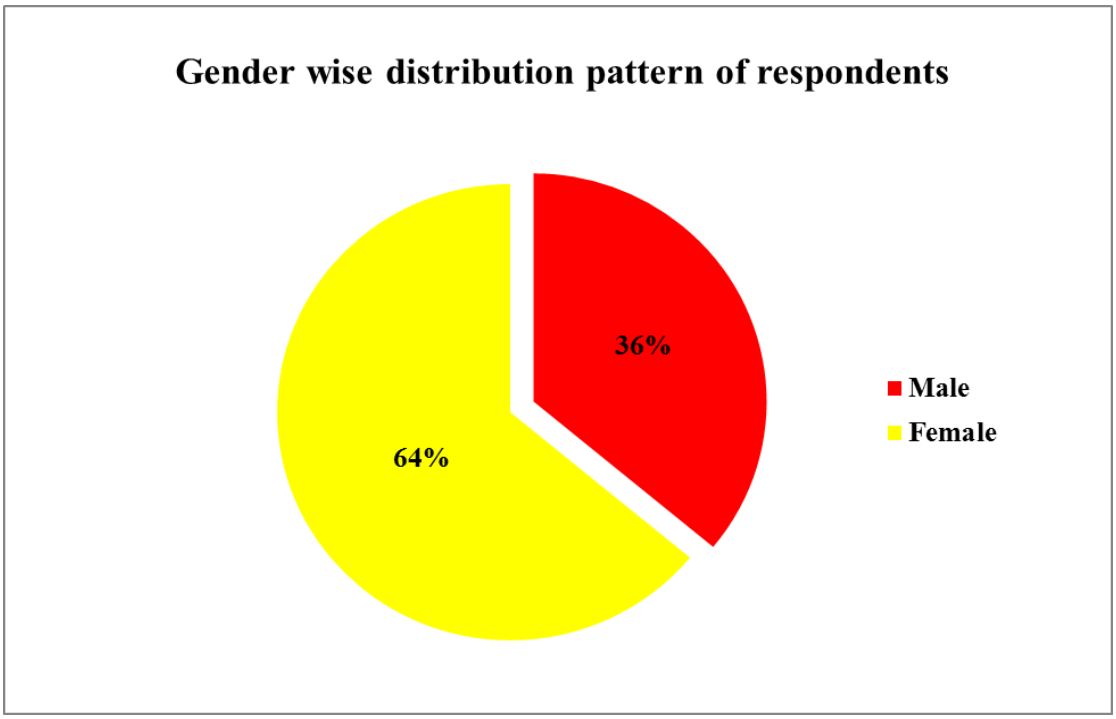


Figure.7.1

Table and fig 7.1 gives brief information about gender wise distribution pattern of respondents of the study field. The findings of the study shows that 192 (64.0 %) respondents were female and 108 (36.0%) respondents were male out of 300 respondents.

2. Age Wise Information of Respondents

Table.7.2

S. No.	Age	Frequency	Percent
1.	0 to 25 Year	131	43.7
2.	26 to 45 Year	128	42.7
3.	46 to 60 Year	32	10.6
4.	Above 60 Year	9	3.0
	Total	**300**	**100.0**

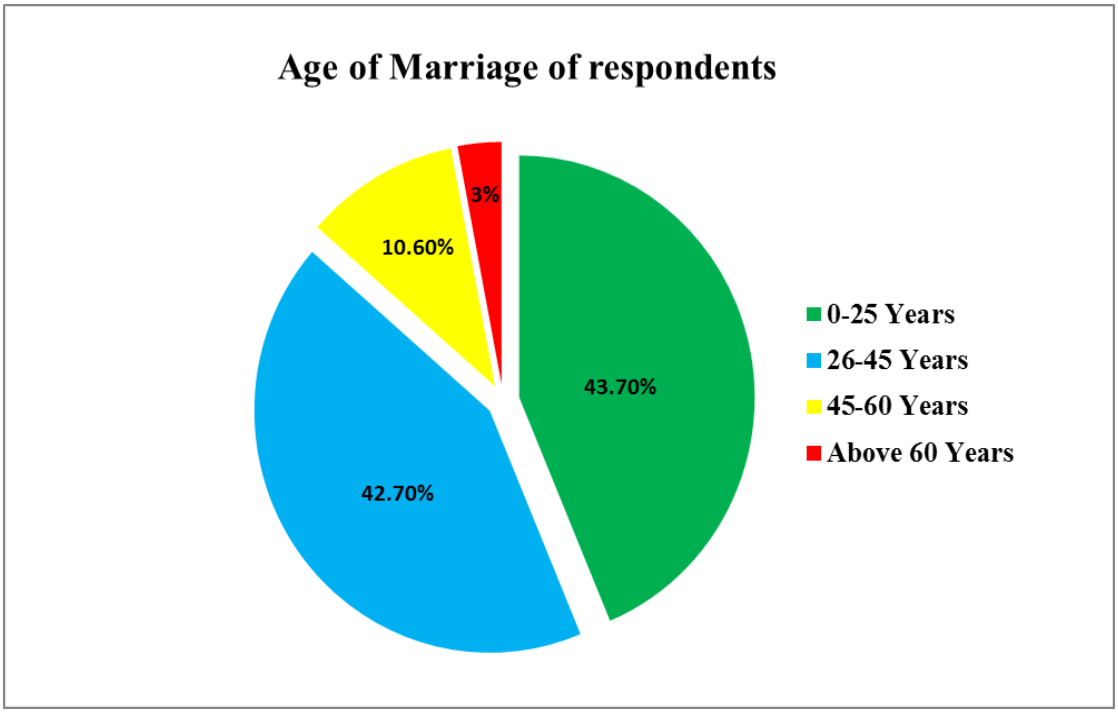


Figure.7.2

This study has focused on age wise information of respondents. Table and figure 7.2 shows the age of respondent. Out of the total 300 respondents, an overwhelming majority of the 131 (43.7 percent) respondents were in the age group of 0 to 25 years and other 26 to 45 Years respondent group shows 128 (42.7%), 46 to 60 years respondents group shows 32 (10.6%) and 9 (3.0%) respondents shows age, above 60 years.

3. Marital Status of Respondents

Table.7.3

S. No.	Marital status	Frequency	Percent
1	Married	169	56.3
2	Unmarried	128	42.7
3	Divorced	3	1.0
	Total	**300**	**100.0**

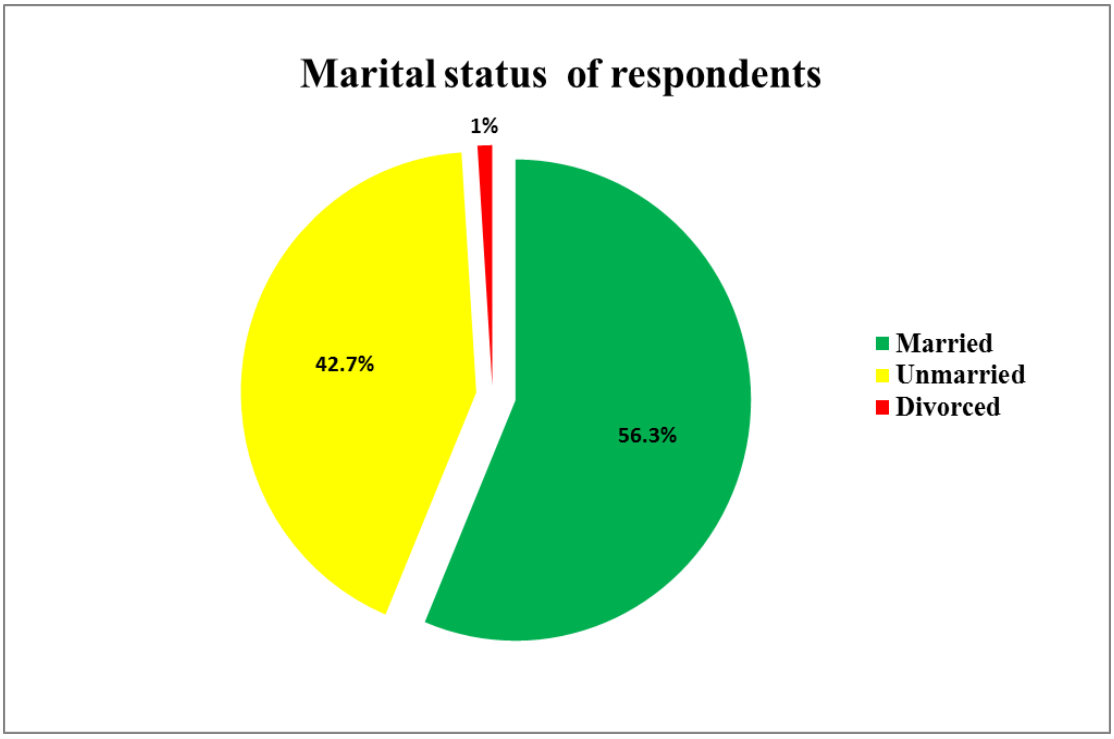


Figure.7.3

The above table and Figure 7.3 show the marital status of the respondents. The data shows that in most of the respondents, 169 (56.3%) were married, 128 (42.7%) respondents were unmarried and the remaining 3 (1.0%) respondents were divorced.

4. Age of Marriage of Respondents

Table.7.4

S. No.	Age of Marriage of respondents	Frequency	Percent
1	0-15 Years	18	6.0
2	16-30 Years	134	44.7
3	30-45 Years	20	6.6
4	Not Applicable (Unmarried)	128	42.7
	Total	**300**	**100.0**

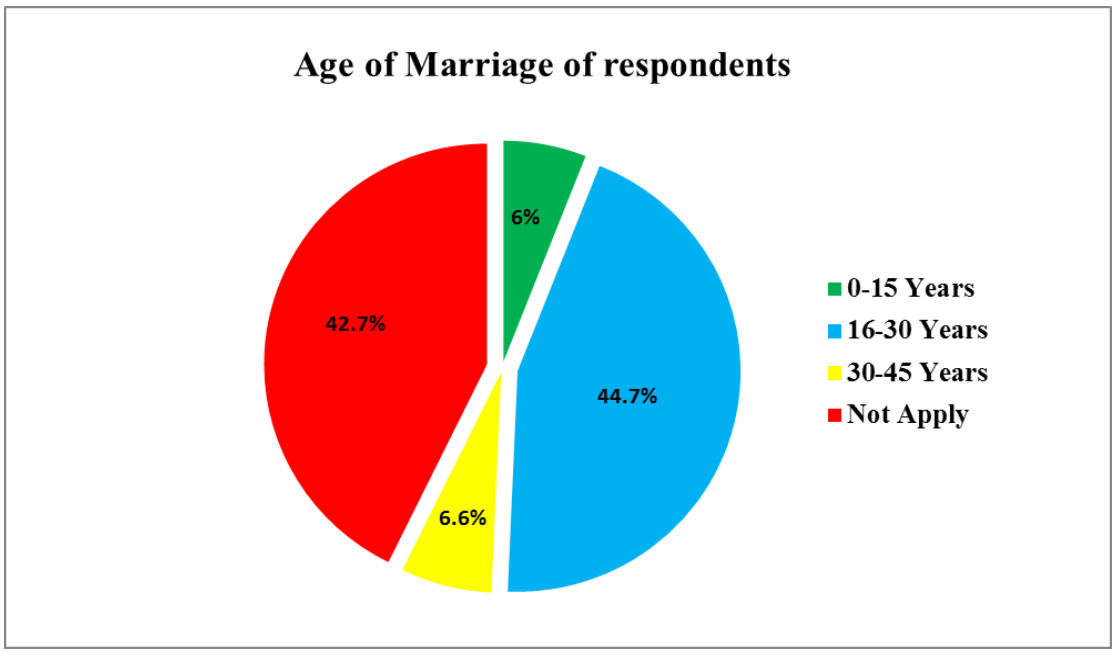


Figure.7.4

This study has focused on age of marriage of respondents. Table and figure 7.4 shows the age of marriage of respondents. Out of the total 300 respondents, an overwhelming majority of the 134 (44.7%) respondents marriage age was 16 to 30 years and 128 (42.7%) respondents was unmarried, 20 (6.6%) respondents marriage age was 30-45 years and 18 (6.0%) respondents marriage age was 0 to 15 years. Age of 15 years is very important in Muslim Personal Law as this is the age of puberty according to personal law of the respondent. This is the age where person is considered capable to give valid consent for marriage and at this age female ,who got married before age of 15 years, get option of puberty (option to repudiate their marriage if marriage is not consummated).

5. Education Wise Information of Respondents

Table.7.5

S. No.	Education	Frequency	Percent
1	Literate	58	19.3
2	Illiterate	5	1.7
3	up to high School	62	20.7
4	up to Intermediate	27	9.0
5	Graduate	95	31.7
6	Post Graduate	53	17.7
	Total	**300**	**100.0**

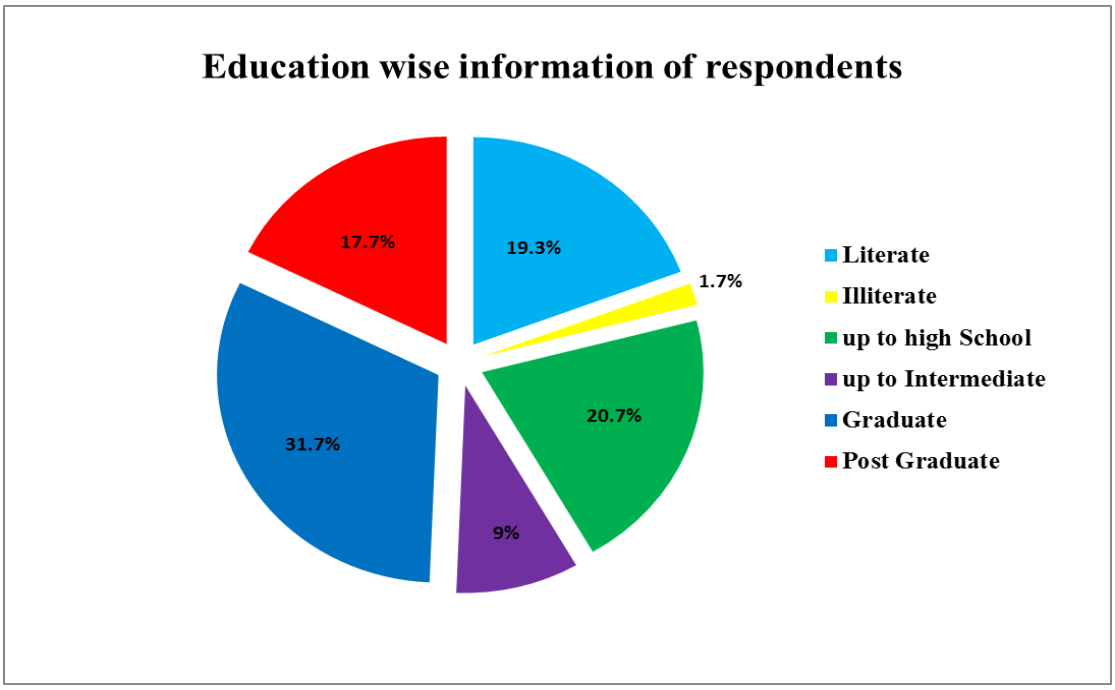


Figure.7.5

The aforesaid table and figure 7.5 showed educational qualifications-wise breakup of the respondents. Out of 300 respondents, 95 (31.7%) were get education up to graduation and 62 (20.7%) respondents were get education up to high school, 58 (19.3%) respondents were literate only, 53 (17.7%) respondents were post graduate, 27 (9.0%) respondents were get education up to Intermediate and 5 (1.7%) respondents were Illiterate. The table shows that the graduation was completed by a large proportion of the respondents.

6. Occupation of Respondents

Table.7.6

S. No.	Occupation	Frequency	Percent
1	Student	93	31.0
2	Government Jobs	19	6.3
3	Private Jobs	20	6.7
4	Self –Occupation	53	17.7
5	Agriculture	118	39.3
6	Others (Home makers, Mali etc.)	90	30.0
	Total	**300**	**100.0**

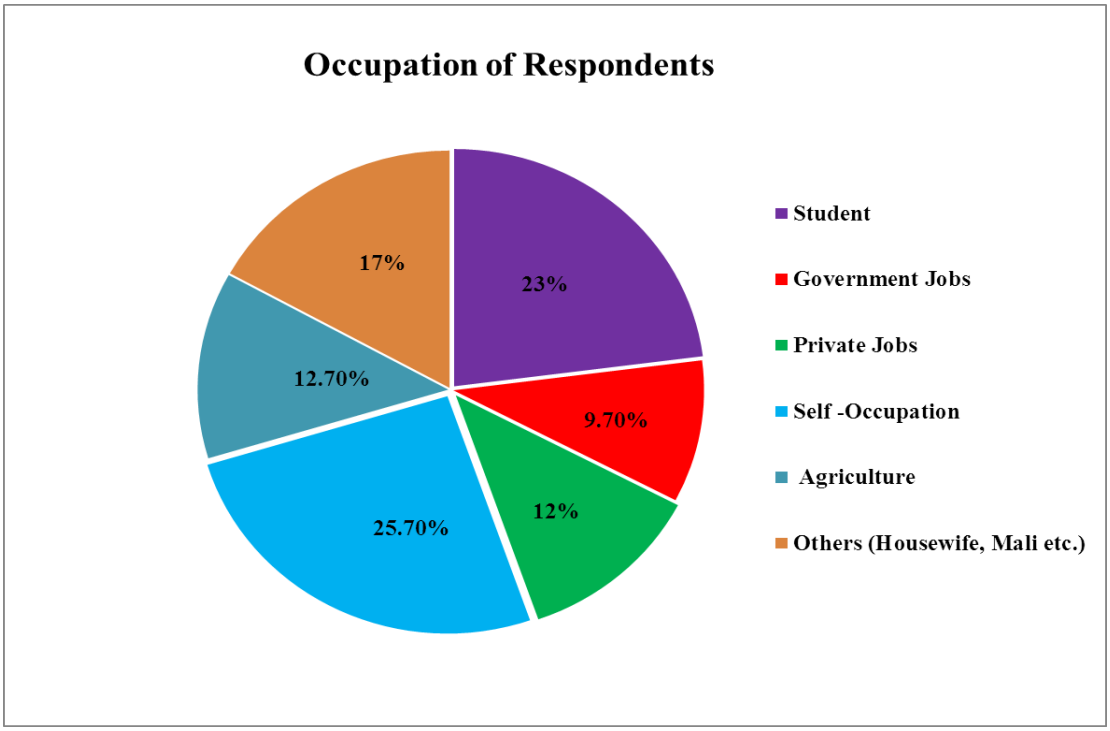


Figure.7.6

Occupation-wise breakup of the respondents shown in the above table and figure 7.6 explains that majority of the respondents' were agriculturist and they constitute 118 (39.3%). The study also shows that 93 (31.0%) respondents were students, 90 (30.0%) respondents were belonging to others category (house wife, Mali), 53 (17.7) respondents have self-occupation, 20 (6.7%) respondents occupation were private jobs and 19 (6.3%) respondents occupation were government jobs.

7.2 Section- B

Question.1 In family who is deciding authority in matters of-

A. Education

Table.7.7

S. No.	Deciding authority in matters of education	Frequency	Percent
1	Father	201	67.0
2	Mother	27	9.0
3	Individual Concern	21	7.0
4	Both (Father & Mother)	46	15.3
5	Other	5	1.7
	Total	**300**	**100.0**

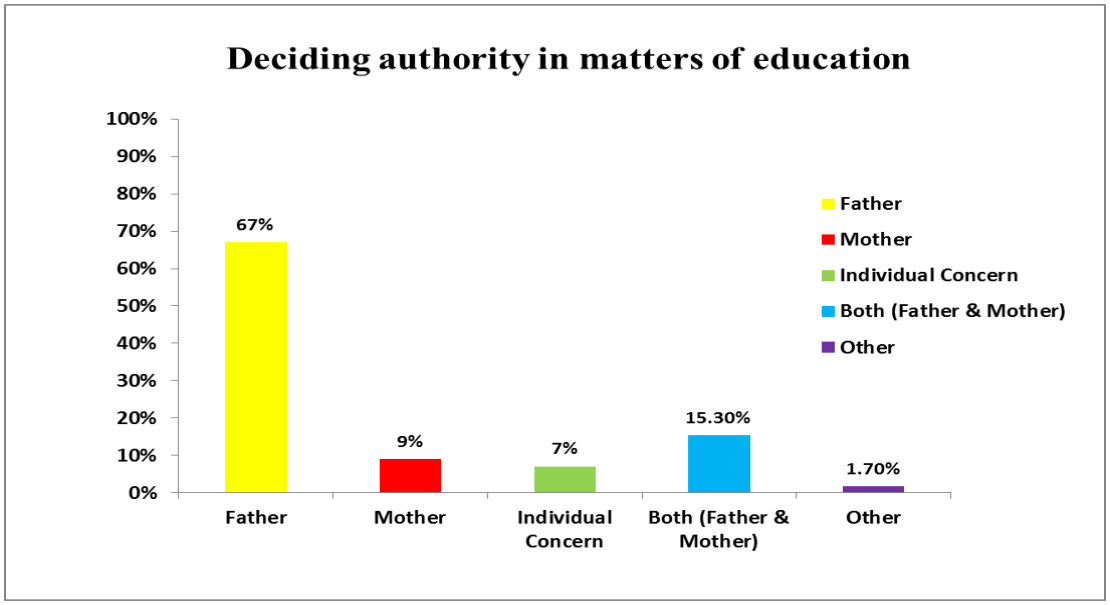


Figure.7.7

The above table and figure 7.7 provide information about the deciding authority in matters of education. 201 (67%) respondent has answered that in his/her family, father has decided all matters related to education while 46 (15.3%) respondent said that both (Father & Mother), 27 (9.0%) respondents said mother, 21 (7.0%) respondent said taken decision by individual concern, and only 5 (1.7%) respondents said that other relatives members decided all matters related to education. This study has proved that in most of family patriarchal system is present where male is dominant authority for decisions.

B. Marriage

Table.7.8

S. No.	Deciding authority in matters of Marriage	Frequency	Percent
1	Father	187	62.3
2	Mother	41	13.7
3	Individual Concern	17	5.7
4	Both (Father & Mother)	51	17.0
5	Other	4	1.3
	Total	**300**	**100.0**

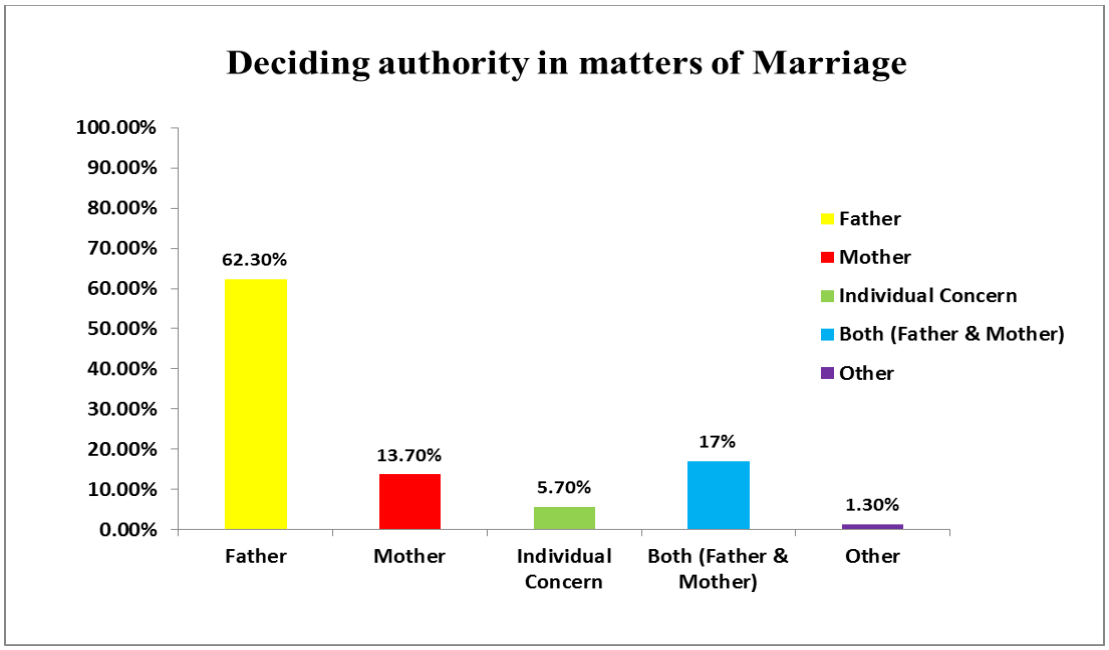


Figure.7.8

The aforesaid table and figure 7.8 illustrate the information about the deciding authority in matters of marriage. The highest proportion 187 (62.3%) respondents were answered that father is the deciding authority in matters of marriage, 51(17%) respondents said that both (Father & Mother) are the deciding authority in matters of marriage, and remaining 41 (13.7%) respondents said mother, 17 (5.7%) respondent said taken decision by individual concern and only 4 (1.3%) respondents said that other relative decided all matters related to marriage. From the above data it appears that male(father) is main deciding authority in most of families, for decisions related to marriage but there are some exceptions where both male and female decides together .This have been found in 17 % cases.

C. Life Style

Table.7.9

S. No.	Deciding authority in matters of life style	Frequency	Percent
1	Father	180	60.0
2	Mother	34	11.3
3	Individual Concern	32	10.7
4	Both (Father & Mother)	51	17.0
5	Other	3	1.0
	Total	**300**	**100.0**

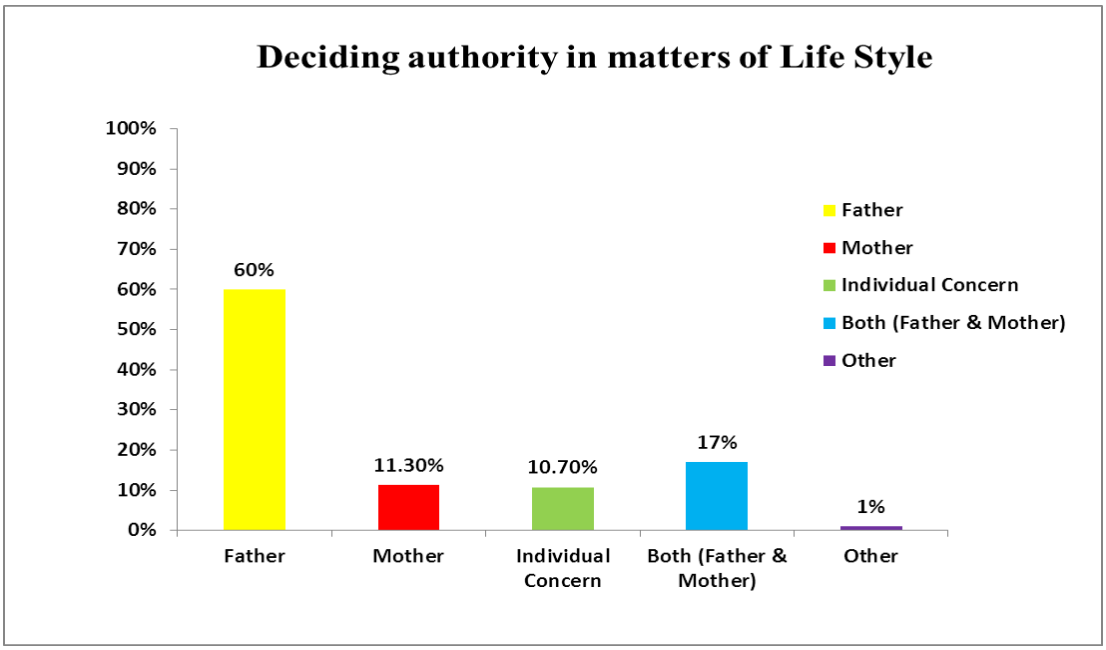


Figure.7.9

The above table and figure 7.9 reveals information related to deciding authority in matters of life style. Here life style means, what to wear, how to behave with others, friendship with others, restriction regarding time of coming and going from home etc. 180(60%) respondent was answered that in his/her family, father has decided all matters related to life style while 51 (17 %) respondents said Both (Father & Mother), 34 (11.3%) respondents said mother, 32 (10.7%) respondent were taken decision by individual concern, and only 3 (1.0%) respondents said that other relatives decided all matters related to life style. The outcomes of this table also have shown that in most of family, father is dominant authority for decision making.

D. Property

Table.7.10

S. No.	Deciding authority in matters of property	Frequency	Percent
1	Father	244	81.3
2	Mother	11	3.7
3	Individual Concern	5	1.7
4	Both (Father & Mother)	38	12.7
5	Other	2	0.7
	Total	**300**	**100.0**

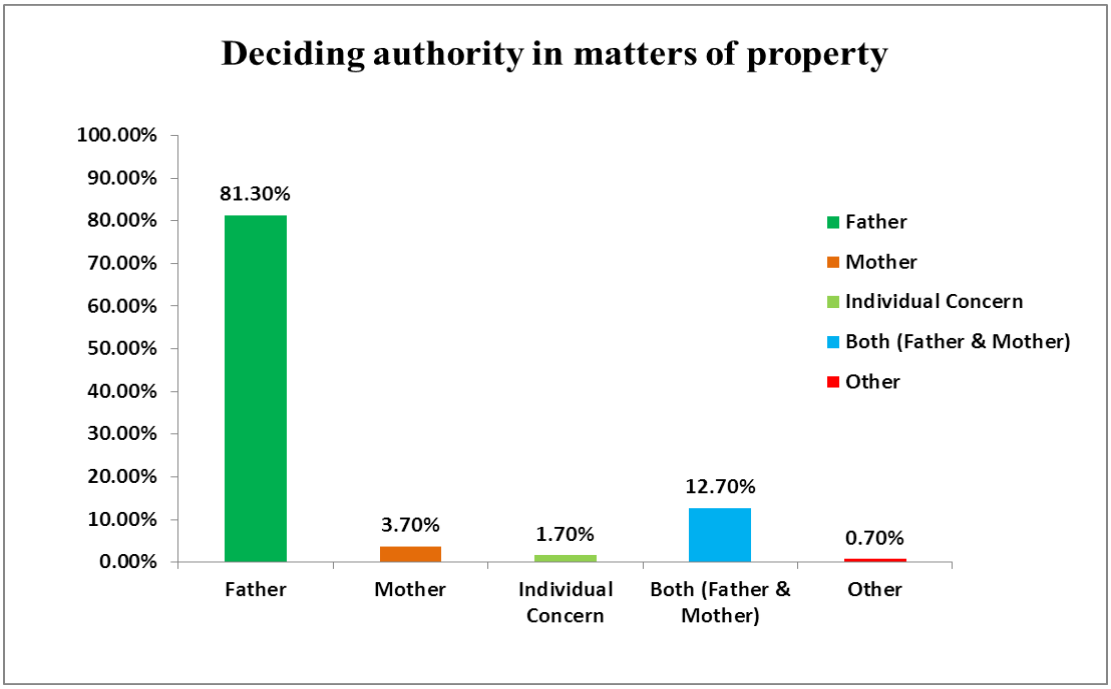


Figure.7.10

The above table and figure 7.10 reveals information related to deciding authority in matters of property. 244 (81.30%) respondent answered that in his/her family, father has decided all matters related to life style while 38 (12.70%) respondents said Both (Father & Mother), 11 (3.7%) respondents said mother, 5 (1.7) respondents taken decision by individual concern, and only 2 (0.7%) respondents said that other relatives decided all matters related to property. The result of this table shows that in most of family, father has deciding authority related to all matters of property.

E. Other Family Issues

Table.7.11

S. No.	Deciding authority in matters of other family Issues	Frequency	Percent
1	Father	178	59.3
2	Mother	25	8.3
3	Individual Concern	28	9.7
4	Both (Father & Mother)	57	19.0
5	Other	12	4.0
	Total	**300**	**100.0**

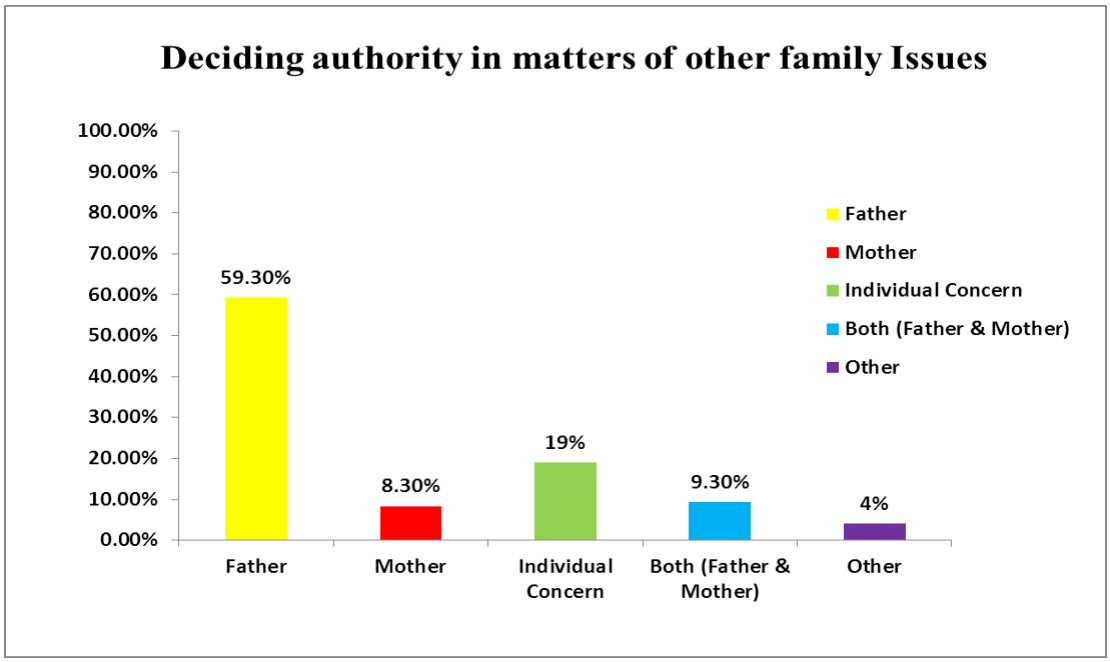


Figure.7.11

The above table and figure 7.11 shows information related to deciding authority in matters of other family issues. 178 (59.3%) respondent answered that in his/her family, father has decided all matters related to other family issues while 57 (19.0%) respondents said Both (Father & Mother), 28 (9.7) respondents taken decision by individual concern, 25 (8.3%) respondents said mother, and only 12 (4.0%) respondents said that other relatives decided all matters related to other family issues. The result of this table also shows that in most of family, father was decision authority related to all matters of other family issues.

Question.2. Do you know about the following concepts?

A. Right to give or withdraw consent in Marriage

Table.7.12

S. No.	Know about the right to give or withdraw consent in marriage	Frequency	Percent
1	Yes	284	94.7
2	No	10	3.3
3	Can't Say	6	2.0
	Total	**300**	**100.0**

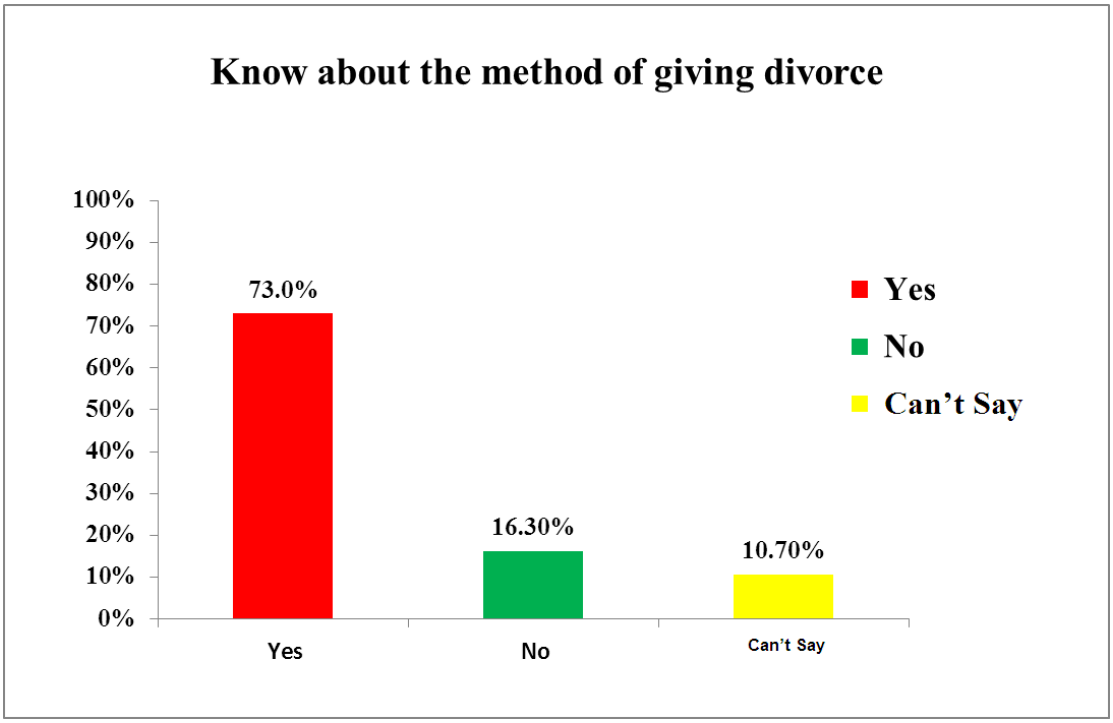


Figure.7.12

The above mentioned table and figure 7.12 give information of respondents who know about the right to give or withdraw consent in marriage. Table reveals that 284 (94.7%) respondents said yes and 10 (3.3 %) respondents said no and remaining 6 (2%) respondents said that they can't say anything. The result shows that most of respondents were aware about the right to give or withdraw consent in marriage.

B. Right to get mehr in marriage

Table.7.13

S. No.	Know about the right to get mehr in marriage	Frequency	Percent
1	Yes	285	95.0
2	No	12	4.0
3	Can't Say	3	1.0
	Total	**300**	**100.0**

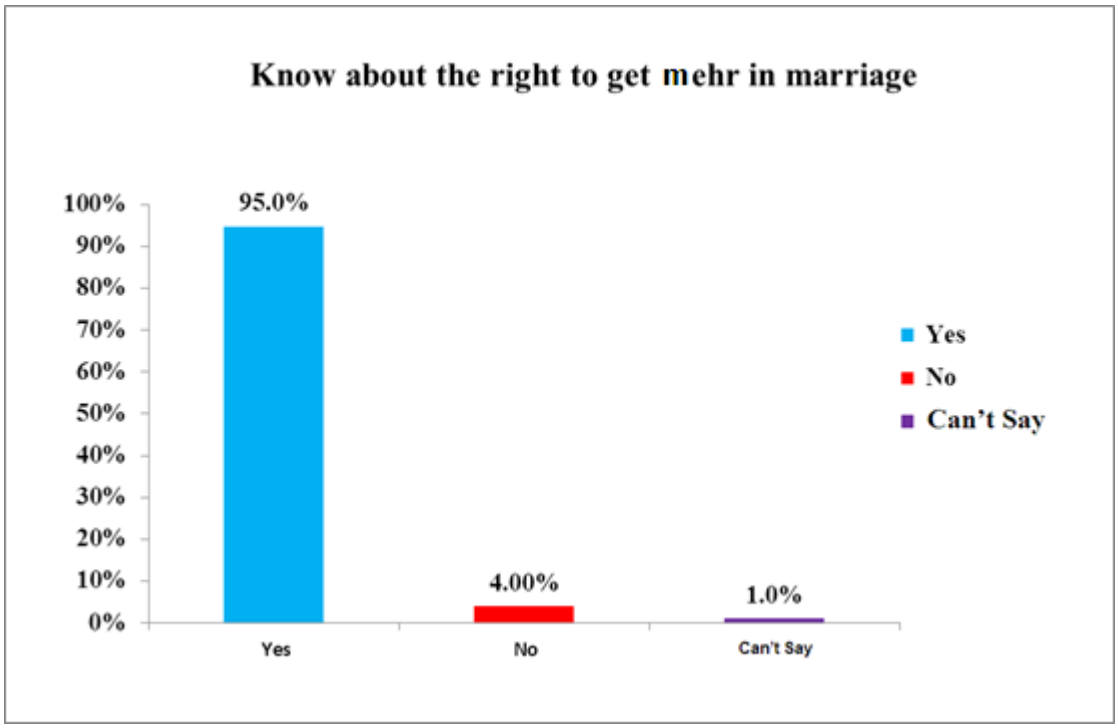


Figure.7.13

The aforesaid table and figure 7.13 give information of respondents who know about the right to right to get Mehr in marriage. Table shows that 285 (95.0%) respondents said yes, 12 (4.0%) respondents said no and remaining 3(1%) respondents said that they can't say anything. The result shows that most of respondents were aware about the right to get Mehr in marriage.

C. Right to give divorce

Table.7.14

S. No.	Know about the right to give divorce	Frequency	Percent
1	Yes	266	88.7
2	No	25	8.3
3	Can't Say	9	3.0
	Total	**300**	**100.0**

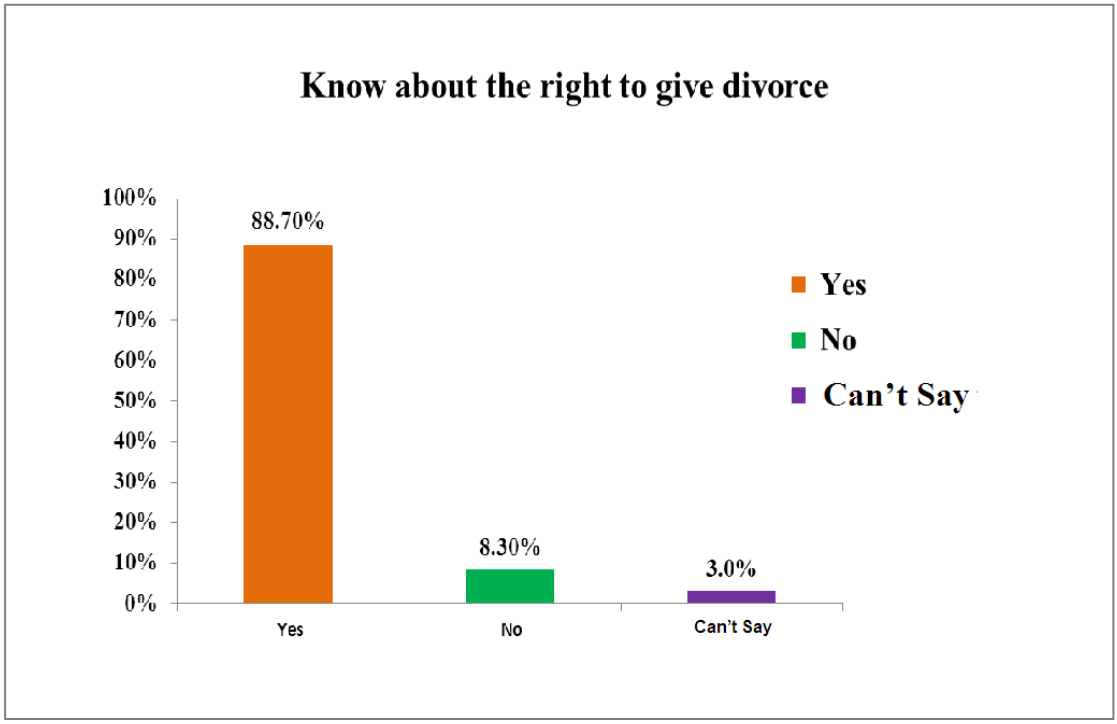


Figure.7.14

The aforesaid table and figure 7.14 give information of respondents who know about the right to give divorce. Table shows that 266 (88.7%) respondents said yes, 25 (8.3%) respondents said no and remaining 9 (3%) respondents said that they can't say anything. The results shows that most of respondents were know about the right to give divorce.

D. Method of giving divorce

Table.7.15

S. No.	Know about the method of giving divorce	Frequency	Percent
1	Yes	219	73.0
2	No	49	16.3
3	Can't Say	32	10.7
	Total	**300**	**100.0**

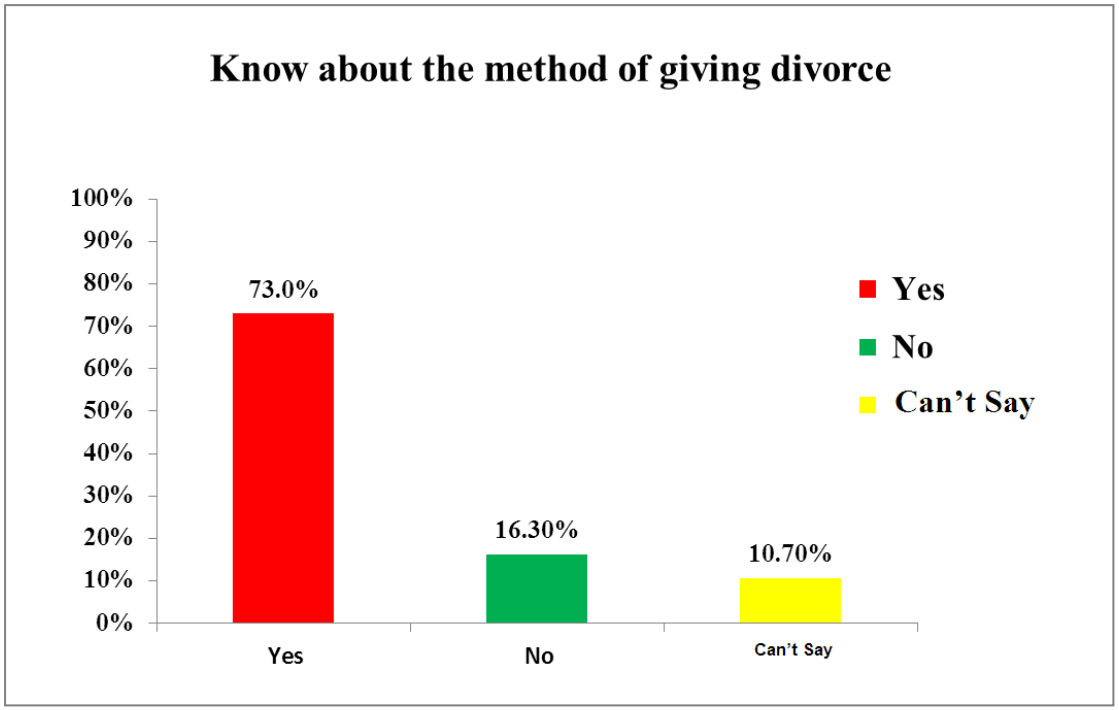


Figure.7.15

Above table and figure 7.15 provide information of respondents who know about the method of giving divorce. Table shows that 219 (73.0%) respondents said yes, 49 (16.3%) respondents said no and remaining 32 (10.70%) respondents said that they can't say anything. The result shows that most of respondents were aware about the method to giving divorce.

E. Option of Puberty

Table.7.16

S. No.	Know about the option of puberty	Frequency	Percent
1	Yes	174	58.0
2	No	70	23.3
3	Can't Say	56	18.7
	Total	**300**	**100.0**

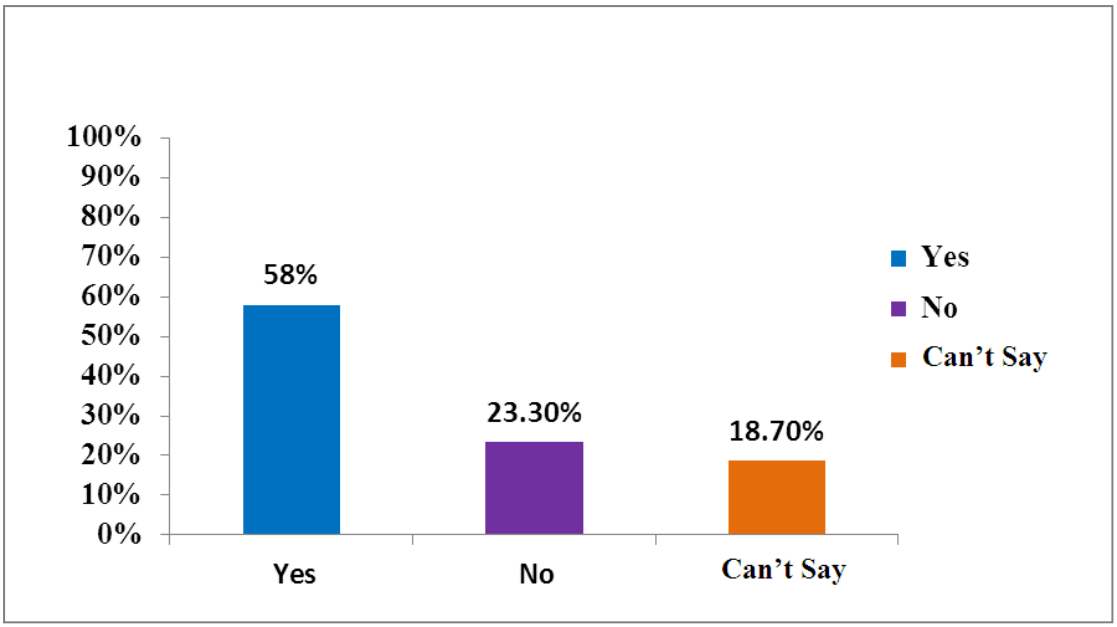


Figure.7.16

The aforesaid table and figure 7.16 give information of respondents who know about the option of puberty. Table shows that 174 (58.0%) respondents said yes, 70 (23.3%) respondents said no and remaining 56 (18.70%) respondents said that they can't say anything. The results show that most of respondents were acquainted with the fact of option of puberty. Option of puberty means option to repudiate marriage on attaining age of 15 years by female, provided marriage is not consummated and dower is not demanded.

F. Process of Halala

Table.7.17

S. No.	Know about the process of Halala	Frequency	Percent
1	Yes	213	71.0
2	No	45	15.0
3	Can't Say	42	14.0
	Total	**300**	**100.0**

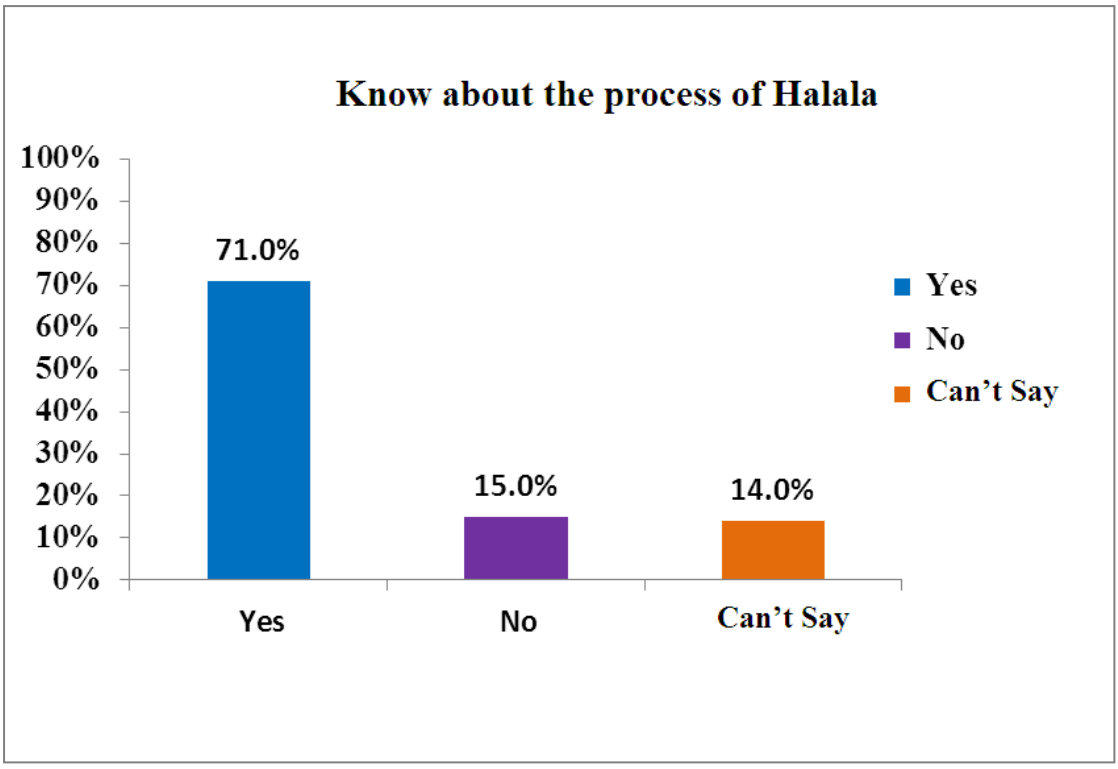


Figure.7.17

The above mentioned table and figure 7.17 reveals the information of respondents who know about the process of Halala. Table shows that 213 (71.0%) respondents said yes, 45 (15.0%) respondents said no and remaining 42 (14.0%) respondents said that they can't say anything. The results show that most of respondents were known about the process of halala. **Nikah halala** also known as tahleel marriage, is a practice in which a woman, after being divorced by triple talaq, marries another man, consummates the marriage, and gets divorced again in order to be able to remarry her former husband.

Question.3. Do you know Constitution of India gives equal rights to both male and females?

Table.7.18

S. No.	Do you know Constitution of India gives equal rights to both male and females?	Frequency	Percent
1	Yes	278	92.7
2	No	17	5.7
3	Can't Say	5	1.7
	Total	**300**	**100.0**

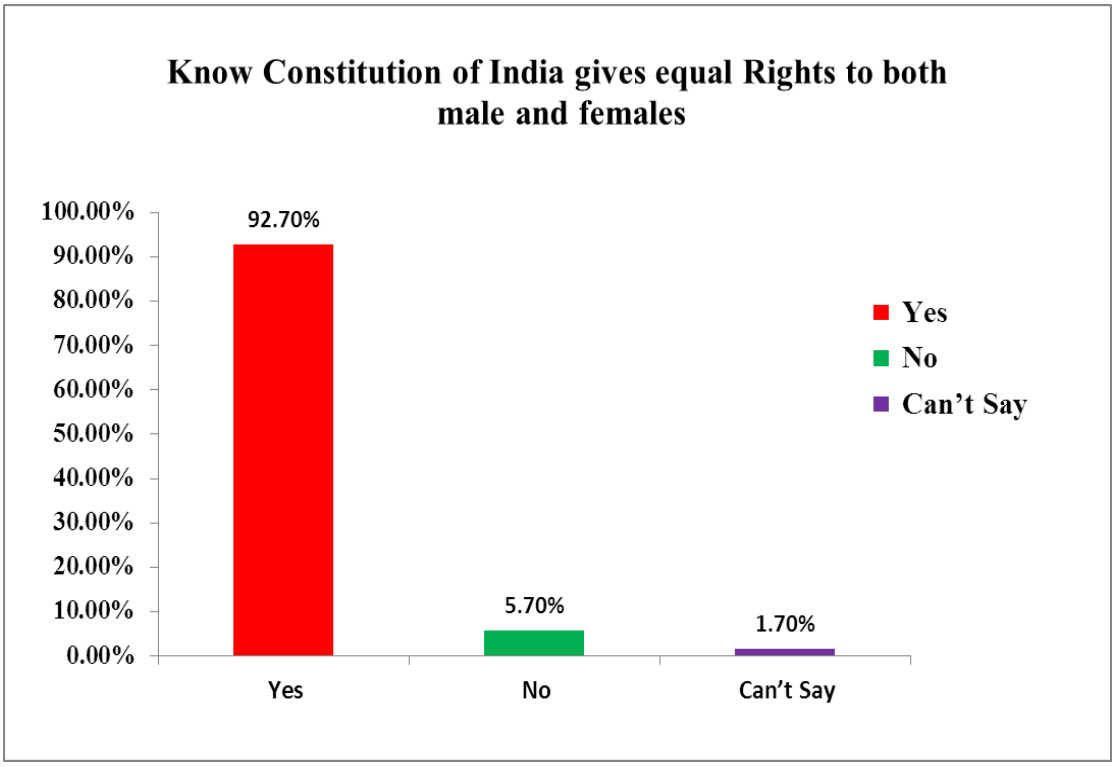


Figure.7.18

The above mentioned table and figure 7.18 explore the breakdown of respondents, who know constitution of India gives equal rights to both male and females. Table illustrate that 278 (92.7%) respondents said yes, 17 (5.7%) respondents said no and remaining 5 (1.7%) respondents said that they can't say anything. The study proves that most of respondents were know that the constitution of India gives equal rights to both male and females.

Question.4. Do you know privileges and protections given to all the females by Constitution are equally available to Muslim women?

Table.7.19

S. No.	Do you know privileges and protections given to all the females by Constitution are equally available to Muslim women?	Frequency	Percent
1	Yes	269	89.7
2	No	29	9.7
3	Can't Say	2	0.7
	Total	**300**	**100.0**

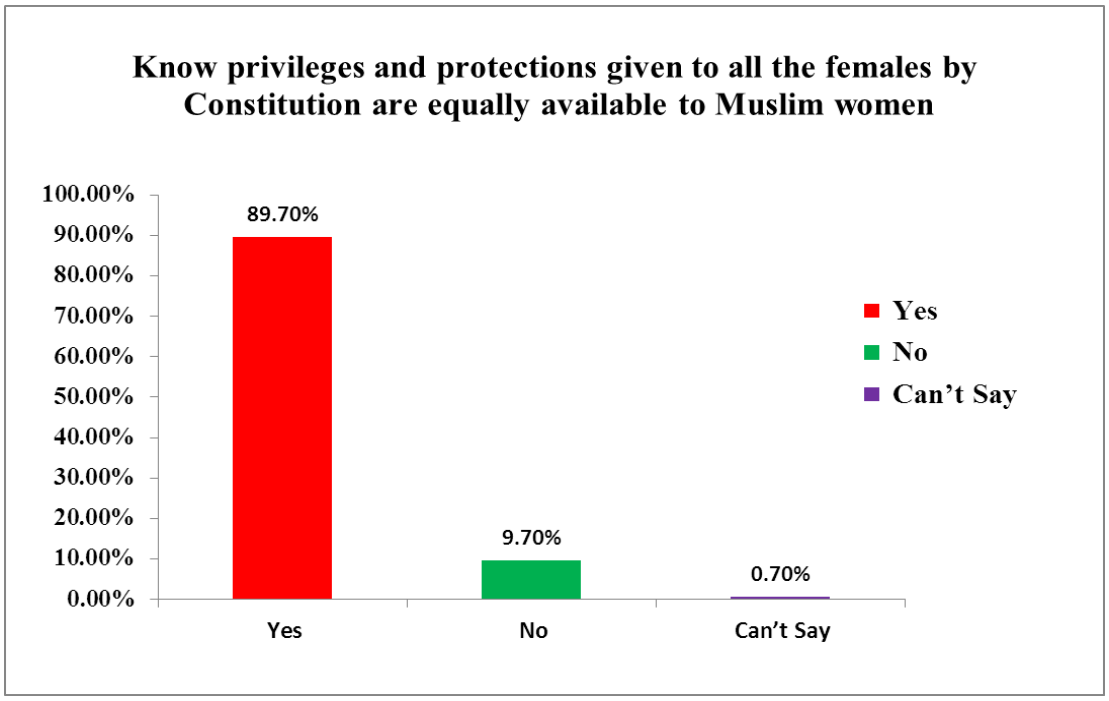


Figure.7.19

The aforesaid table and figure 7.19 explore the breakdown of respondents, who know privileges and protections given to all the females by constitution are equally available to Muslim women. Table explain that 269 (89.7%) respondents said yes, 29 (9.7%) respondents said no and remaining 2 (0.7%) respondents said that they can't say anything. The study proves that most of respondents were aware about the privileges and protections given to all the females by constitution are equally available to Muslim women.

Question.5. Do women have equal right as a man have in your personal law?

Table.7.20

S. No.	Do women have equal right as a man have in your personal law?	Frequency	Percent
1	Yes	208	69.3
2	No	83	27.7
3	Can't Say	9	3.0
	Total	**300**	**100.0**

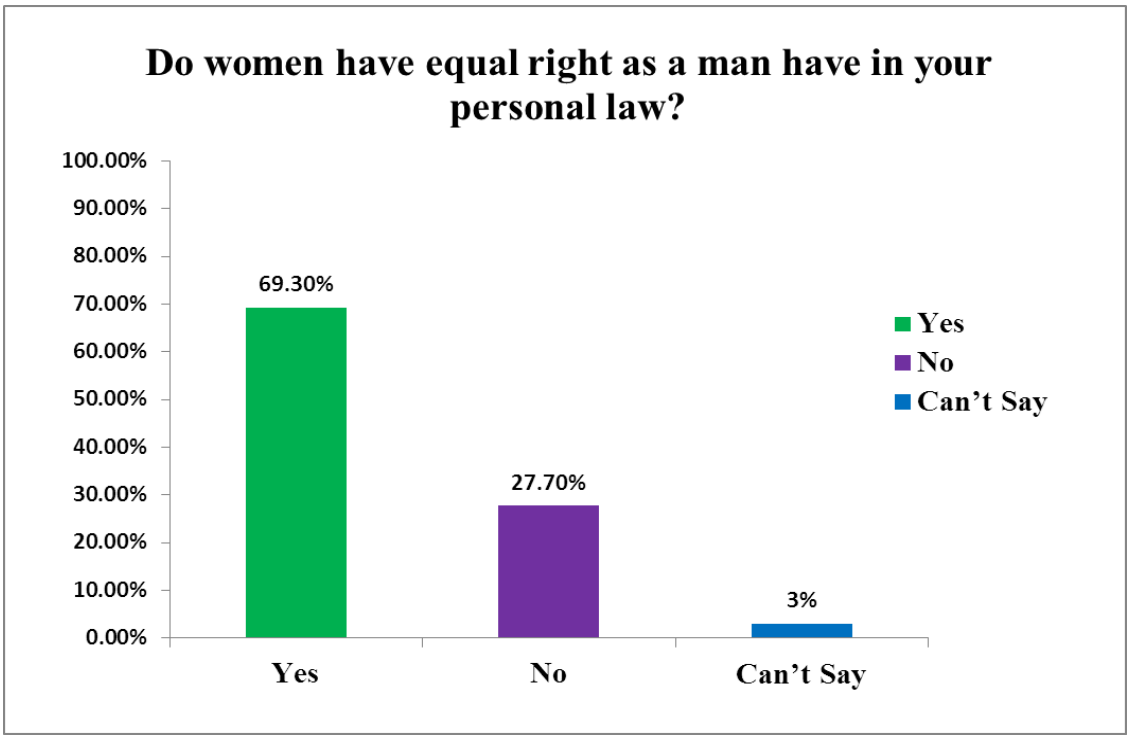


Figure.7.20

The aforesaid table and figure 7.20 explore the breakdown of respondents, who know that women have equal right as a man have in your personal law. Table shows that 208 (69.3%) respondents said yes, 83 (27.7%) respondents said no and remaining 9 (3.0%) respondents said that they can't say anything. The study shows that most of respondents were known that women have equal right as a man has in your personal law.

Question.6. Do male and female has equal rights in your family?

Table.7.21

S. No.	Do male and female has equal rights in your family?	Frequency	Percent
1	Yes	212	70.7
2	No	87	29.0
3	Can't Say	1	0.3
	Total	**300**	**100.0**

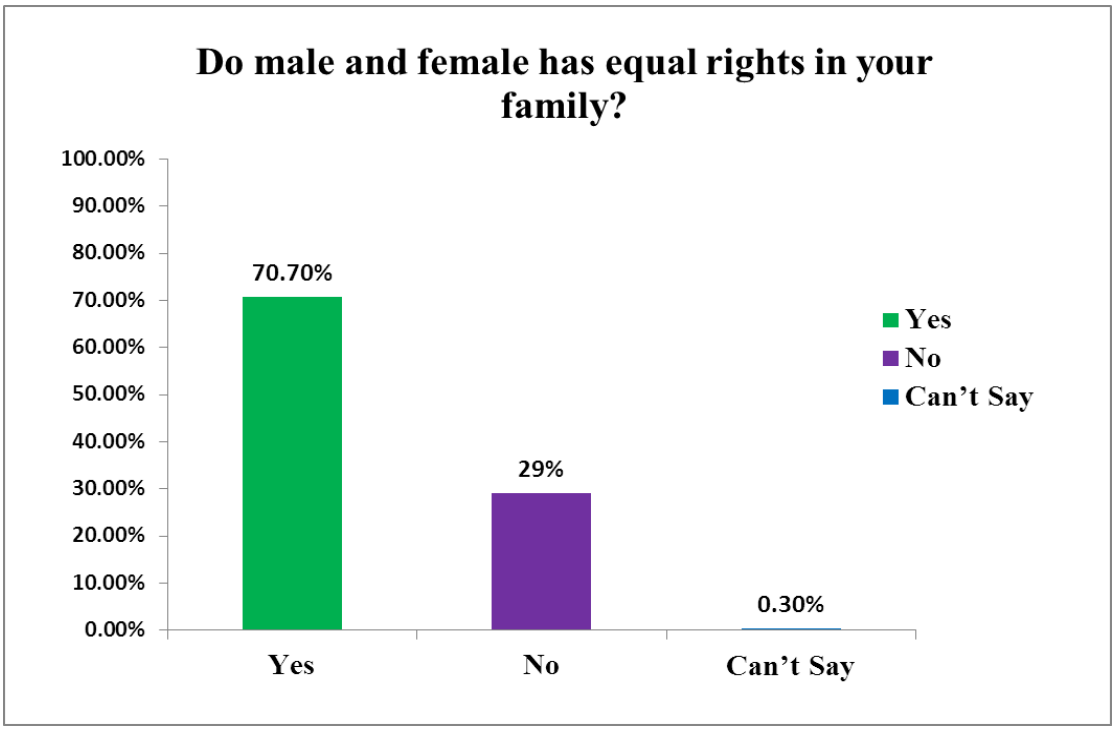


Figure.7.21

Above table and figure 7.21 explore the breakdown of respondents, who know that male and female has equal rights in your family. Table shows that 212 (70.7%) respondents said yes, 87 (29.0%) respondents said no and remaining 1 (0.3 %) respondents said that they can't say anything. The study shows that most of respondents think that male and female has equal rights in your family.

Question.7. Do you know a male can marry four wives at the same time?

Table.7.22

S. No.	Do you know a male can marry four wives at the same time?	Frequency	Percent
1	Yes	231	77.0
2	No	45	15.0
3	Can't Say	24	8.0
	Total	**300**	**100.0**

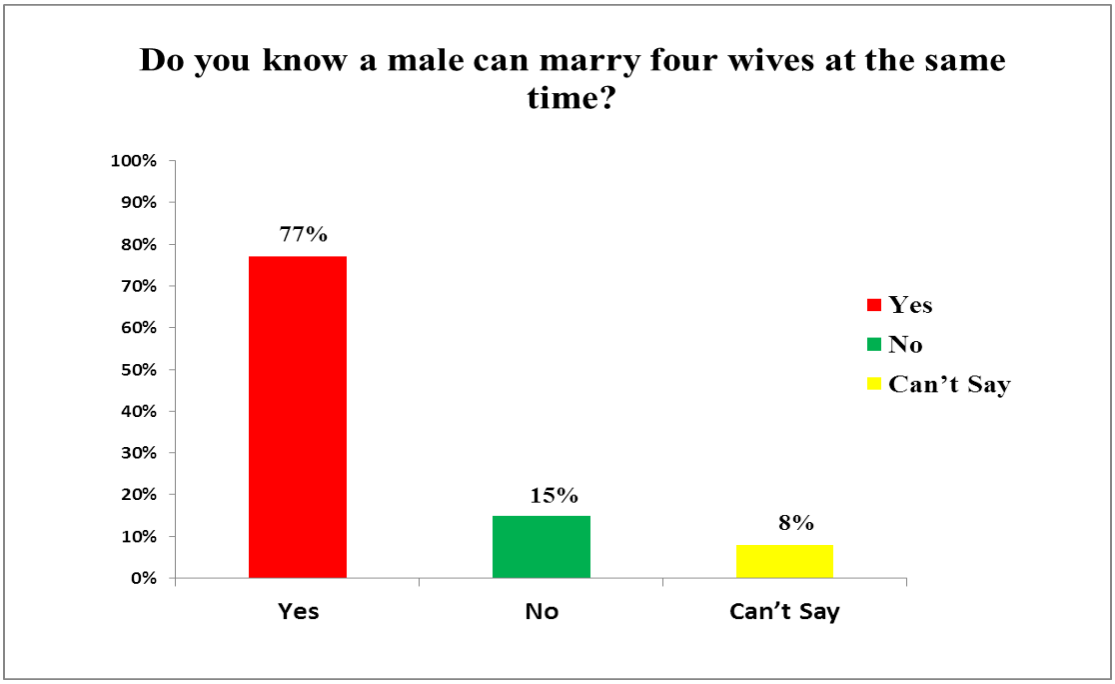


Figure.7.22

The above mention table and figure 7.22 explore the breakdown of respondents, who know that a male can marry four wives at the same time. Table shows that 231 (77.0%) respondents said yes, 45 (15.0%) respondents said no and remaining 24 (8.0%) respondents said that they can't say anything. The study shows that most of respondents accepted that a male can marry four wives at the same time. But in reality it is found that in majority families don't have four wives. This is found exceptionally in those cases where due to illness, poverty or where first wife don't have any child, then husband do second marriage. I dint found any family during my research where husband have four wives. In exceptional cases I found husband with two wives.

Question.8. Do female also has this right?

Table.7.23

S. No.	Do female also has this right?	Frequency	Percent
1	Yes	73	24.3
2	No	197	65.7
3	Can't Say	30	10.0
	Total	**300**	**100.0**

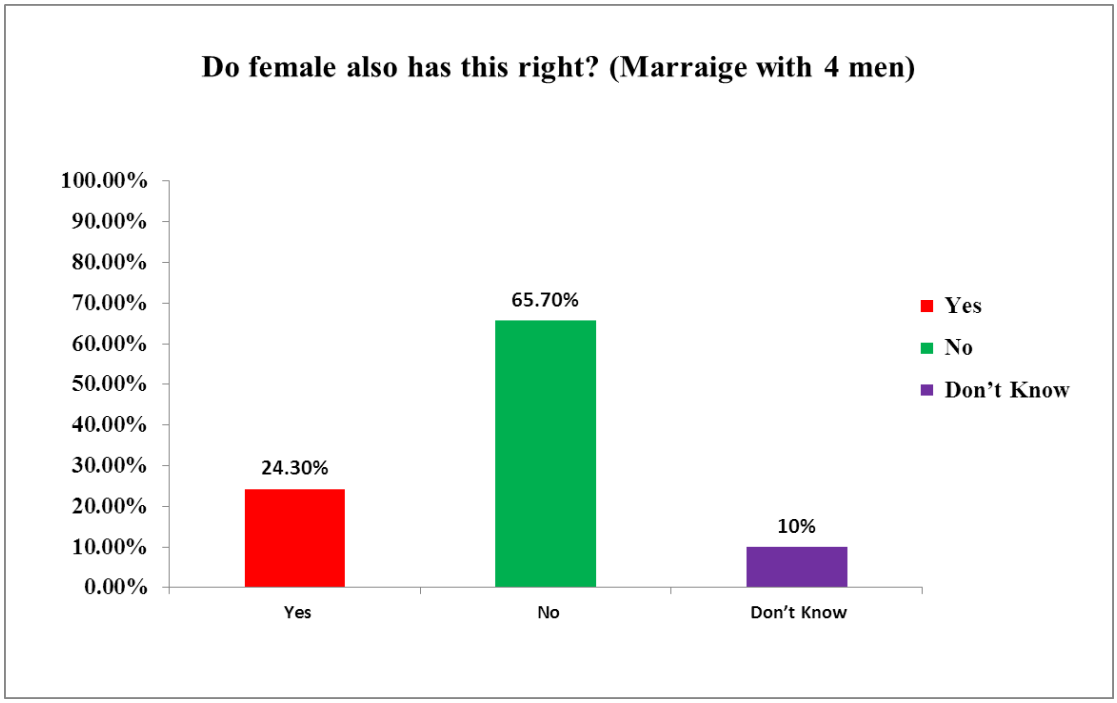


Figure.7.23

The aforesaid table and figure 7.23 shows the breakdown of respondents, who know that do female can marry with four men at the same time. Table shows that 197 (65.7%) respondents said no, 73 (24.3%) respondents said yes and remaining 30 (10%) respondents said that they can't say anything. The study shows that most of respondents said female has not right to marry with four men at the same time.24.30 % people who says yes wife can marry four husband at the same time are wrong as this practice is not recognized in Islamic Law, and 10% respondents who says they don't know are those people who don't want to reply this question. Majority of respondents i.e. 65.70% accepted that a women cannot marry with four people at the same time.

Question.9. Have your proper consent was taken in your marriage?

Table.7.24

S. No.	Have your proper consent was taken in your marriage?	Frequency	Percent
1	Yes	178	59.3
2	No	47	15.7
3	Can't Say	75	25.0
	Total	**300**	**100.0**

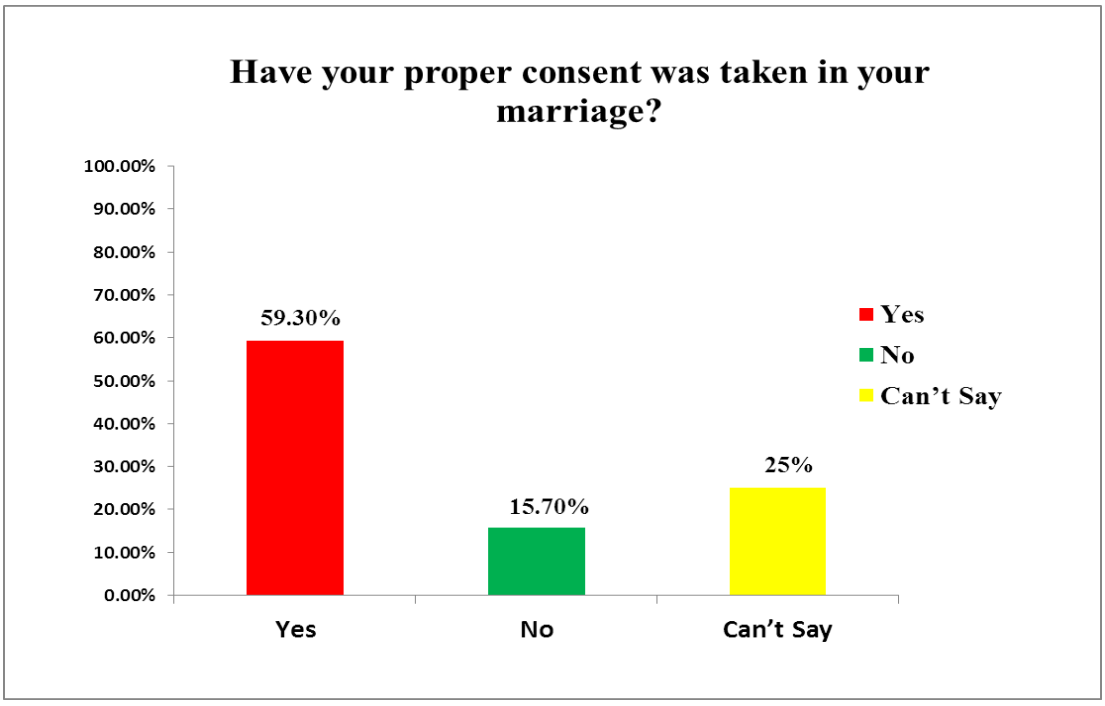


Figure.7.24

The above table above and Figure 7.24 show the division of the respondents, whose proper consent was taken in the marriage. Table shows that 178 (59.3%) respondents said yes, 75 (25.0%) respondents said that they can't say anything and remaining 47 (15.7%) respondents said no. The study shows that 59.30% respondents said yes their proper consent was taken in marriage, while almost 40% respondents are said that their consent was not taken or they are not aware about the fact that their consent was take or not taken in their marriage.

Question.10. Have you got or given mehr in your marriage?

Table.7.25

S. No.	Have you got or given mehr in your marriage?	Frequency	Percent
1	Yes	163	54.3
2	No	37	12.3
3	Can't Say	100	33.3
	Total	**300**	**100.0**

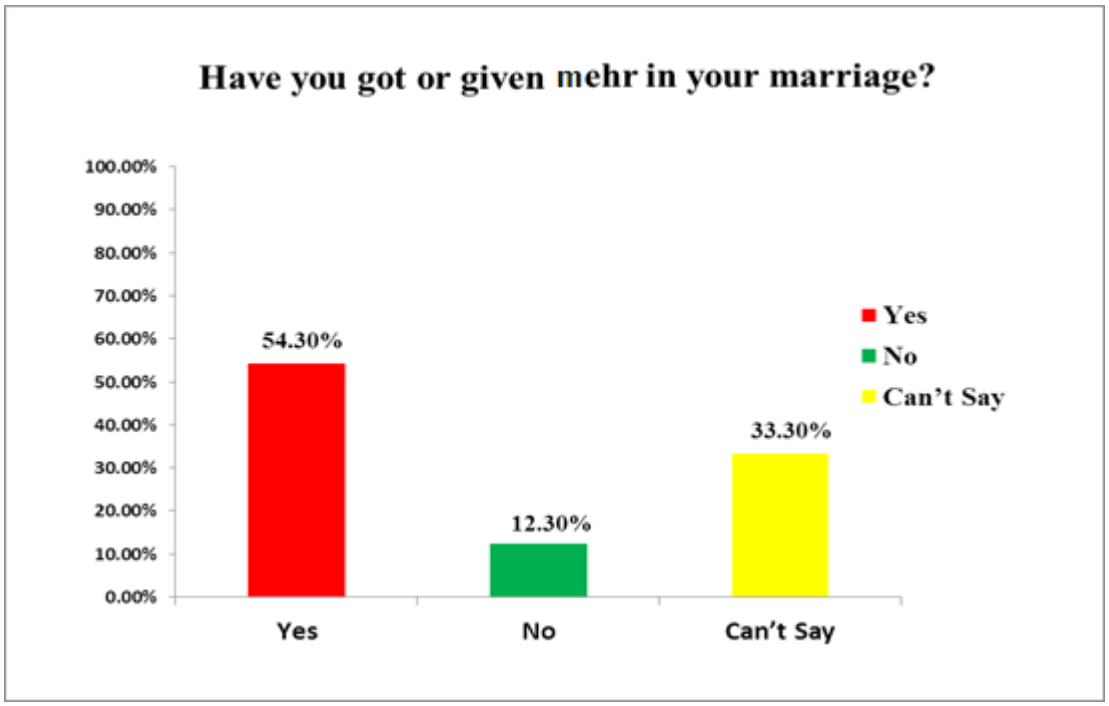


Figure.7.25

The aforesaid table and figure 7.25 shows the breakdown of respondents, who got or given mehr in their marriage. Table shows that out of total 300 respondents, 163 (54.3%) respondents said yes which mens either they have given or received mehar in their marriage, 100 (33.3%) respondents said that they can't say anything and remaining 37 (12.3%) respondents said no. The study shows that most of respondents(54.3) said yes, they got or given mehr in their marriage while 42.60% respondents said that either they did not given or received mehr or they can't say anything about it.

Question.11. Do you know about the right of maintenance of a divorced woman and her children?

Table.7.26

S. No.	Do you know about the right of maintenance of a divorced woman and her children?	Frequency	Percent
1	Yes	156	52.0
2	No	87	29.0
3	Can't Say	57	19.0
	Total	**300**	**100.0**

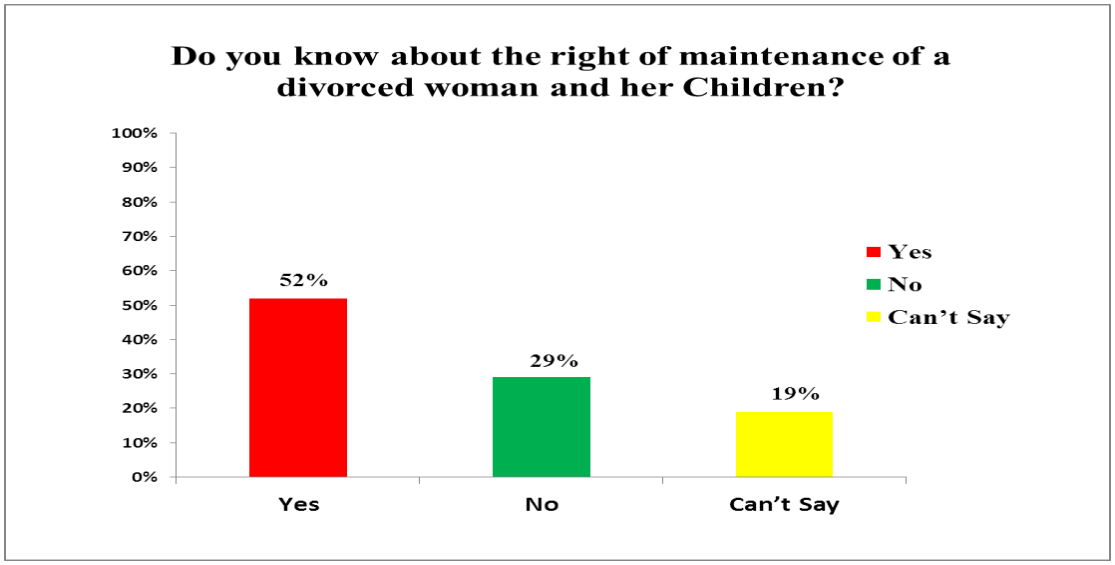


Figure.7.26

The right of maintenance plays an important role in life of divorced women and their children and the reason behind asking this question is to find out the awareness of Muslim women about right of maintenance of a divorced woman and her children. The responses of respondents have shown in above table and figure 7.26. Out of total 300 respondents, 156 (52.0%) respondents answered yes. However substantial number of respondents 87(29.0%) replied no. Moreover, 57 (19%) respondents said that they can't say anything about the rights of Maintenance. The outcomes explore that a majority of respondents know about the right of maintenance of a divorced woman and her children. But when we combined answers in no and those respondents who says that they don't know then we find that together these respondents form a considerable percentage which is 48% which is a significant number which shows that almost 48% respondents don't know that divorced women and their children have right to get maintenance.

Question.12. Do male and female has equal rights in case of divorce?

Table.7.27

S. No.	Do male and female have equal rights in case of divorce?	Frequency	Percent
1	Yes	117	39.0
2	No	134	44.7
3	Can't Say	49	16.3
	Total	**300**	**100.0**

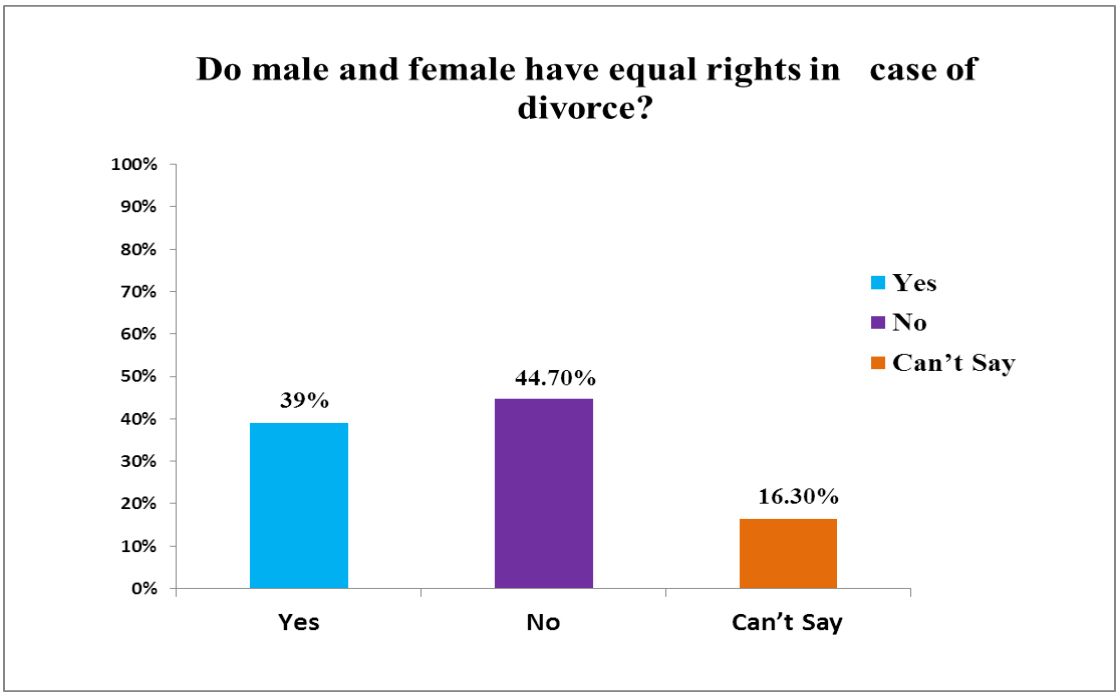


Figure.7.27

This research work which is related to gender justice in Muslim Personal Law deals with it with special reference to divorce .So this is very important question in this analysis. The aforesaid table and figure 7.27 notice the answers of the respondents on the question whether men and women have equal rights in the matter of divorce. Out of total 300 respondents, 134 (44.7%) respondent's gives negative response and said no, however substantial number of respondents 117 (39%) respondents replied yes. Moreover, 49(16.3%) respondents said that they can't say anything about whether male and female have equal rights in case of divorce or not. The outcome of Reponses of this question is that a majority of respondents accepts that the male and female do not have equal rights in case of divorce.

Question.13. Can a female give triple talaq to male?

Table.7.28

S. No.	Can a female give triple talaq to male?	Frequency	Percent
1	Yes	87	29.0
2	No	189	63.0
3	Can't Say	24	8.0
	Total	**300**	**100.0**

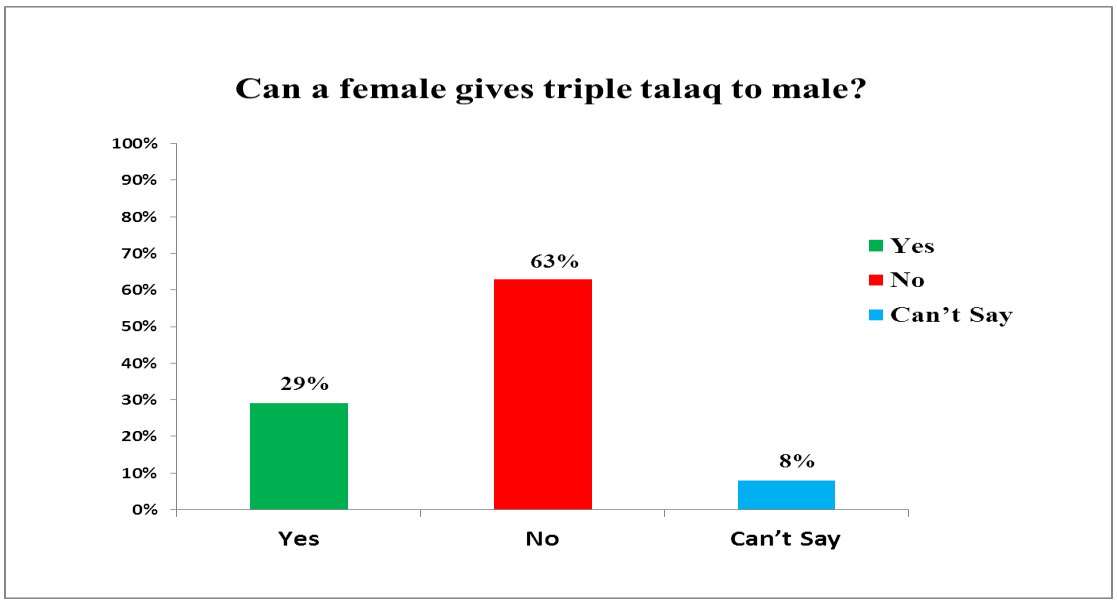


Figure.7.28

Marriage is a contract in Muslim law which can be broken in certain conditions. Divorce is a right which is available to both male and female in Muslim personal law. But whether this right is equally available to both male and female or not is the point of concern in this question. Therefore, it becomes very important to analyze the perception of respondents on this question. Hence, with the purpose of examining the perception of individuals towards life of Muslim women, the question was placed in the questionnaire. Above table and figure 7.28 recognized that out of total 300 respondents, 189 (63.0%) respondents said no, a female can't give triple talaq to male. However substantial number of respondents 87 (29.0%) replied yes and a small portion 24 (8.0%) of respondents said that they can't say anything. The majority of respondents answered that a female can't give triple talaq to male which shows there is gender discrimination in respect of rights of female in case of triple talaq .

Question.14. Do you know about "The Muslim Women (Protection of Rights on Marriage) Act, 2019?

Table.7.29

S. No.	Do you know about "The Muslim women (Protection of Rights on Marriage) Act, 2019?	Frequency	Percent
1	Yes	216	72.0
2	No	50	16.7
3	Can't Say	34	11.3
	Total	**300**	**100.0**

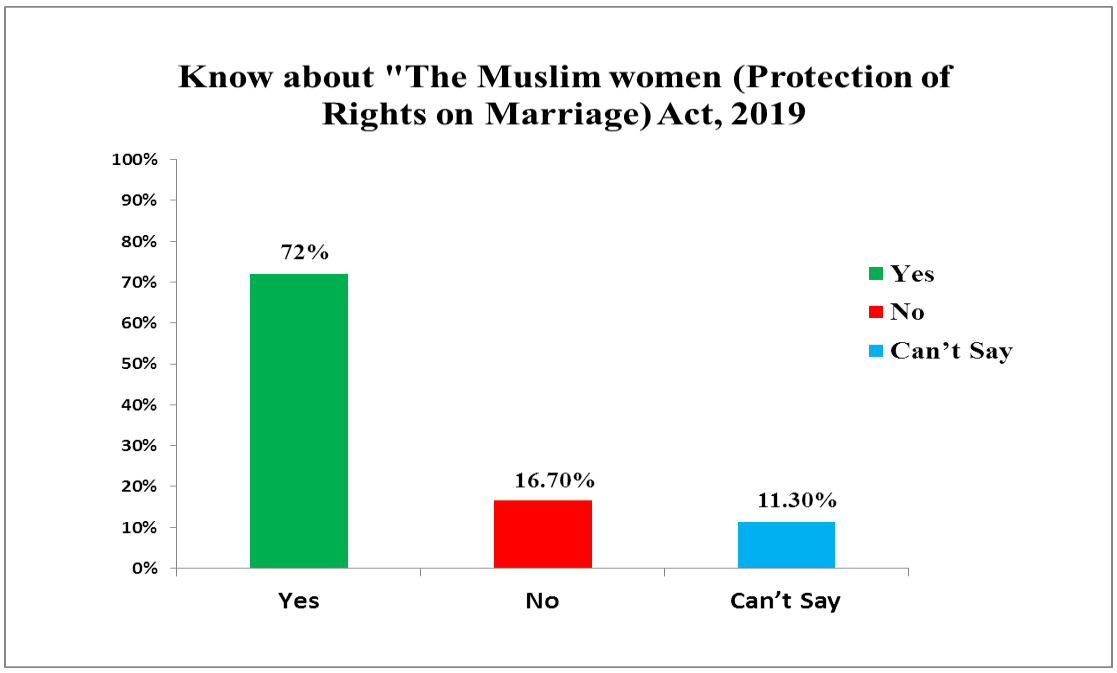


Figure.7.29

The Muslim Women (Protection of Rights on Marriage) Act, 2019 is an Act passed by the Parliament of India which makes instant triple talaq unconstitutional and hence void .It also criminalizes triple talaq. In August 2017 the Supreme Court of India declared instant triple talaq, unconstitutional. Hence, it was necessary to add this question in questionnaire to know the responses of respondent that do you know about "The Muslim Women (Projection of Rights on Marriage) Act, 2019. Above table and figure 7.29 explore that out of total 300 respondents, 216 (72.0%) respondents said yes, they know about this Act. However substantial number of respondents 50 (16.7%) replied no and a small portion of 34 (11.3%) respondents said that they can't say anything. The results shows that a majority of respondents answered that they know about "The Muslim Women (Protection of Rights on Marriage) Act, 2019.

Question.15. Do you know this Acts abolish triple talaq and criminalize it?

Table.7.30

S. No.	Do you know this Act abolish triple talaq and criminalize it?	Frequency	Percent
1	Yes	199	66.3
2	No	64	21.3
3	Can't Say	37	12.3
	Total	**300**	**100.0**

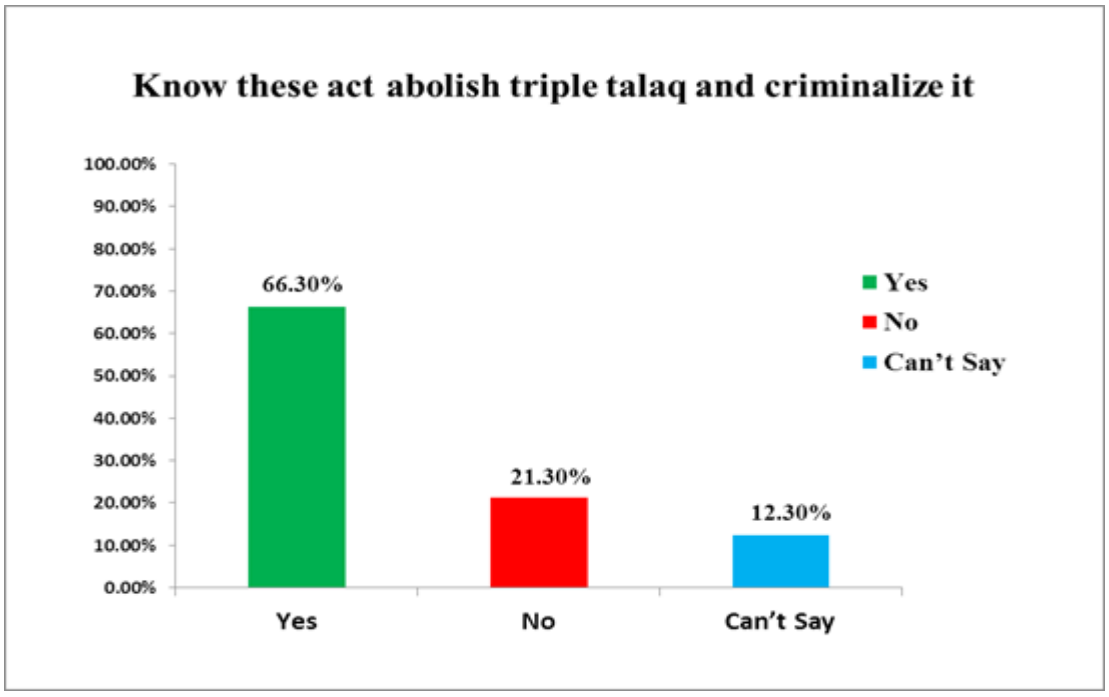


Figure.7.30

The above mention table and figure 7.30 shows the reactions of respondents that do you know these acts abolish instant triple talaq and criminalize it. Out of total 300 respondents, 199 (66.3%) respondents said yes, they know about the provisions of the Act. However substantial number of respondents 64 (21.3%) answered no and a small percentage 37 (12.3%) of respondents said that they can't say anything. The result shows that a majority of respondents reacted and said that these acts abolish triple talaq and criminalize it.

Question.16. Do you know any woman who got divorced by method of triple talaq?

Table.7.31

S. No.	Do you know any woman who got divorced by method of triple talaq?	Frequency	Percent
1	Yes	92	30.7
2	No	156	52.0
3	Can't Say	52	17.3
	Total	**300**	**100.0**

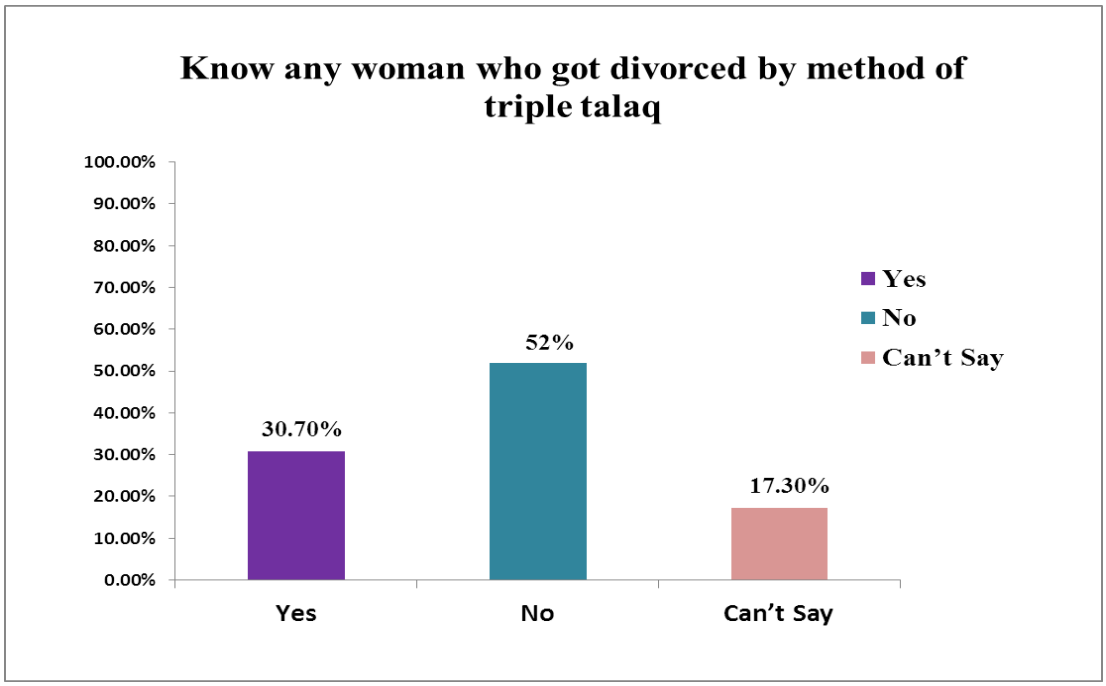


Figure.7.31

BY the aforesaid table and figure 7.31 the researcher tried to know the answers of the respondents on the question whether respondents know any woman who got divorced by method of triple talaq. Out of total 300 respondents, 156 (52.0%) respondents' gives negative response and said that they don't know any women who got divorced by method of triple talaq. However significant number of respondents 92 (30.7%) replied in yes. Besides, 52 (17.3%) respondents said that they can't say anything. So these responses show that this is prevalent in society that's why people know about the women who were being divorced by method of triple talaq.

Question.17. Do this law will bring change in life of women?

Table.7.32

S. No.	Does this law will bring change in life of women?	Frequency	Percent
1	Yes	134	44.7
2	No	36	12.0
3	Can't Say	130	43.3
	Total	**300**	**100.0**

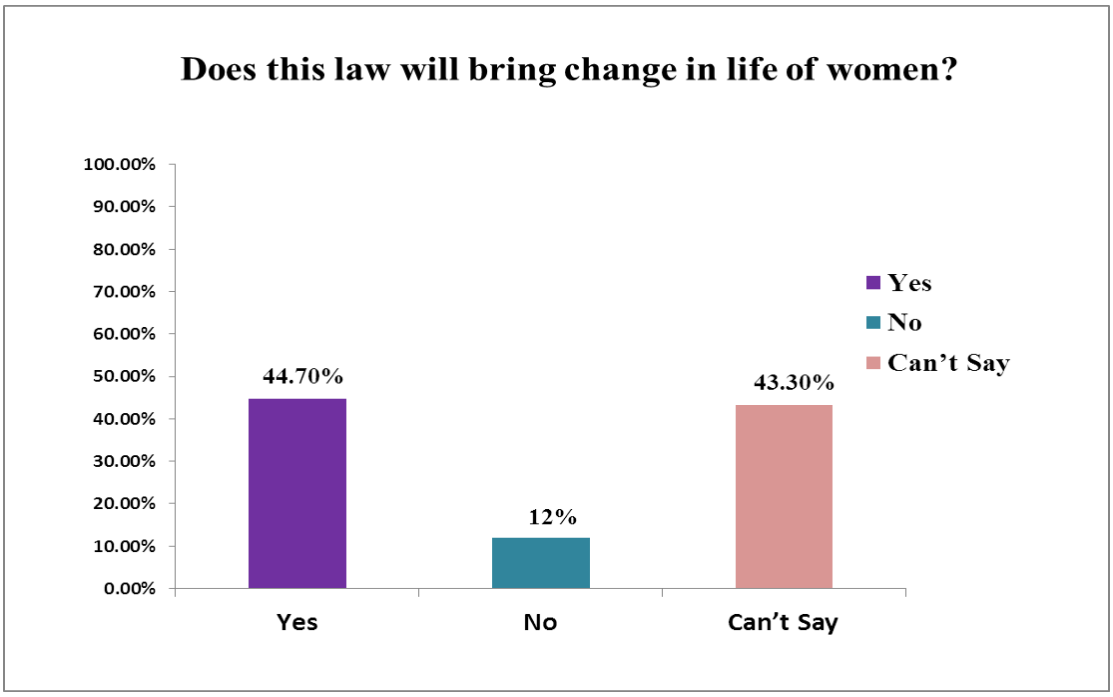


Figure.7.32

The aforesaid table and figure 7.32 notice the reactions of the respondents on the question that does this law will bring change in life of women? Out of total 300 respondents, 134 (44.7%) respondents' gives positive response and said yes. However significant number of respondents 130 (43.3%) answered that they can't say anything. Further, 36 (12%) respondents said, no. The result shows that society is divided in regard to answer this question. Only 44.70% respondents said that they think this law will bring change in society while 12% respondents clearly said that they that that this law will not bring any change in society.43.30% respondents who say that they can't say anything about this legislation are those who believe that this law will not bring any change in life of women but they are ready to see the consequences of the law.

Question.18. How a woman maintains herself after divorce?

Table.7.33

S. No.	How a woman maintains herself after divorce?	Frequency	Percent
1	By her own earnings.	83	27.7
2	Maintained by husband	197	65.7
3	Get maintenance from other relatives	7	2.3
4	By any other way	13	4.3
	Total	**300**	**100.0**

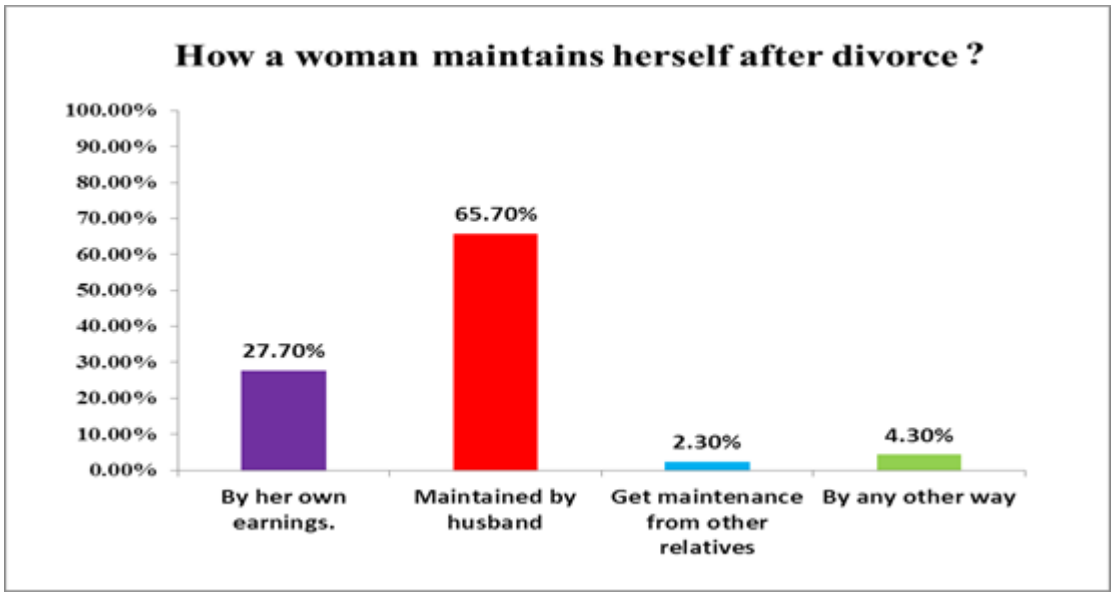


Figure.7.33

The aforesaid table and figure 7.33 notice the answers of the respondents on the question that how a woman maintains herself after divorces? Out of total 300 respondents, 197 (65.70%) respondents' said maintained by husband. However, 83 (27.70%) respondents answered by her own earnings and certain 13 (4.3%) said by any other way. Further, a small number of respondents, 7 (1.3%) said that they get maintenance from other relatives. The consequences of the study show that a majority of respondents replied, that after divorce a women get maintenance from her husband.

Question.19. Who gets custody of children after divorce of parents?

Table.7.34

S. No.	Who gets custody of children after divorce of parents?	Frequency	Percent
1	Father	106	35.3
2	Mother	189	63.0
3	Any other relative	5	1.7
	Total	**300**	**100.0**

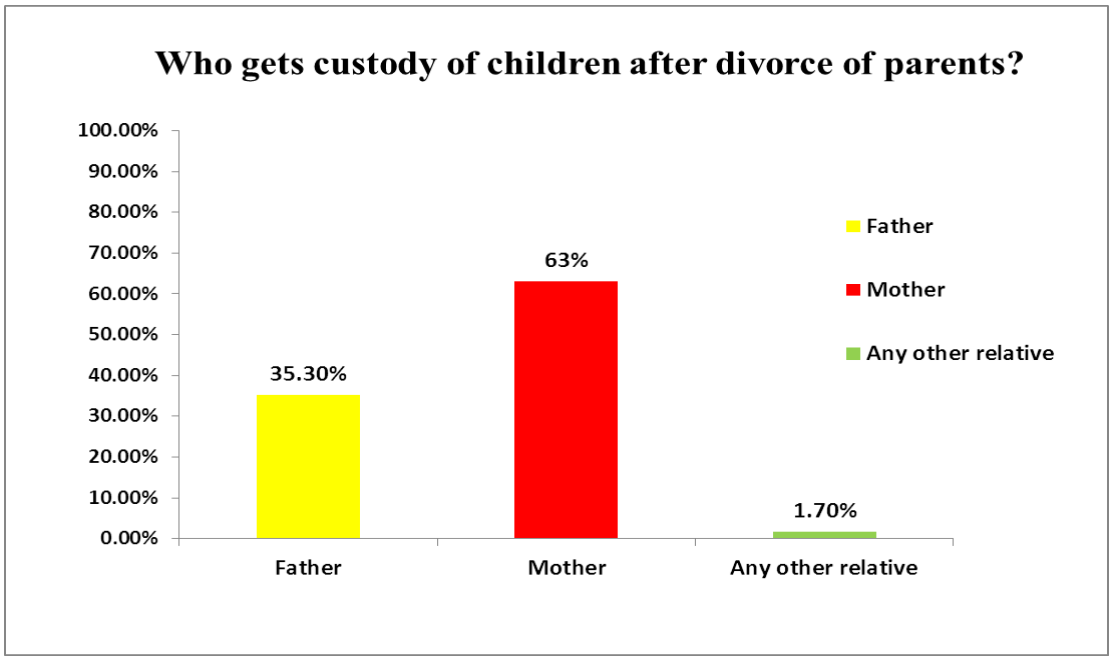


Figure.7.34

The aforesaid table and figure 7.34 notice the answers of the respondents on the question that who gets custody of children after divorce of parents? Out of total 300 respondents, 189 (63.0%) respondents' said mother. However, 106 (35.3%) respondents replied father and Further, a small number of respondents, 5 (1.7%) said any other relative. The consequences of the study show that a majority of respondents replied that mother gets custody of children after divorce of parents. As we have seen by the answers of this question that majority of respondents said that women get the custody of the children after divorce of parents, here point to be noted is that a woman who herself depend on husband for her own maintenance get the custody of children.

What will be the position of the women who got divorced by the husband and she has to maintain herself and her children from the earnings of the husband.

Question.20. Do Muslim Personal Law gives equal property rights to women?

Table.7.35

S. No.	Do Muslim Personal Law gives equal property rights to women?	Frequency	Percent
1	Yes	95	31.7
2	No	162	54.0
3	Can't Say	43	14.3
	Total	**300**	**100.0**

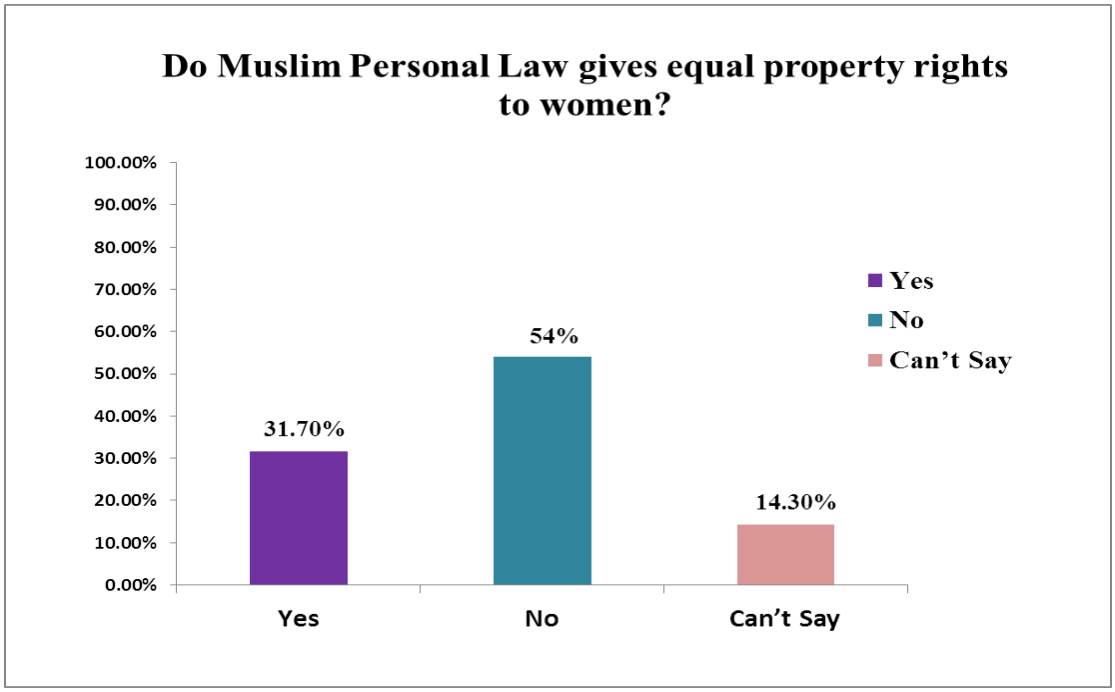


Figure.7.35

The above mention table and figure 7.35 notice the reactions of the respondents on the question that do Muslim Personal Law gives equal property rights to women? Out of total 300 respondents, 162 (54.0%) respondents' gives negative response and said no. However substantial number of respondents 95 (31.7%) answered yes. Further, 43 (14.3%) respondents said that they can't say anything. The results explore that a majority of respondents answered in negative and said that Muslim Personal Law does not gives equal property rights to women.

Question.21. Do you feel male and female have equal rights in society?

Table.7.36

S. No.	Do you feel male and female have equal rights in society?	Frequency	Percent
1	Yes	55	18.3
2	No	124	41.3
3	Can't Say	121	40.3
	Total	**300**	**100.0**

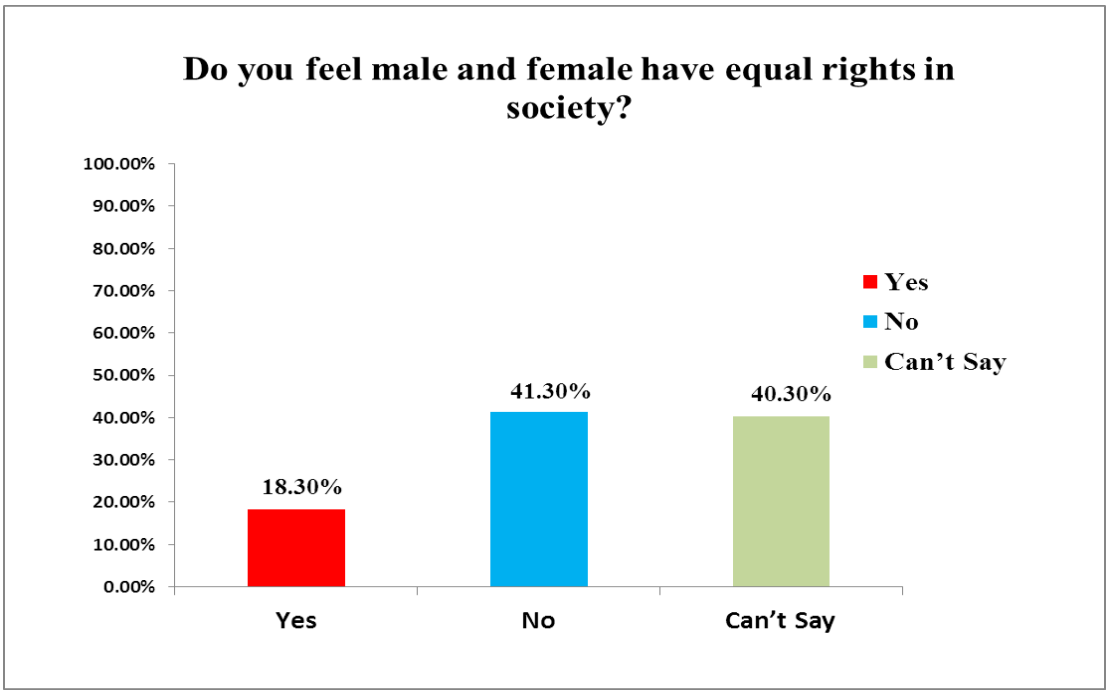


Figure.7.36

The aforesaid table and figure 7.36 notice the breakdown of the respondents on the question that do you feel male and female have equal rights in society? Out of total 300 respondents, 124 (41.3%) respondents' said no. However substantial number of respondents 121 (40.3%) answered that they can't say anything. Further, 55 (18.3%) respondents said, yes. The results show that a majority of respondents i.e. 41.30% said that they don't feel that male and female have equal rights in society and 40.30% are of the opinion that they can't say anything about the equal rights of women in society. So the position of very clear that women don't have equal rights in society.

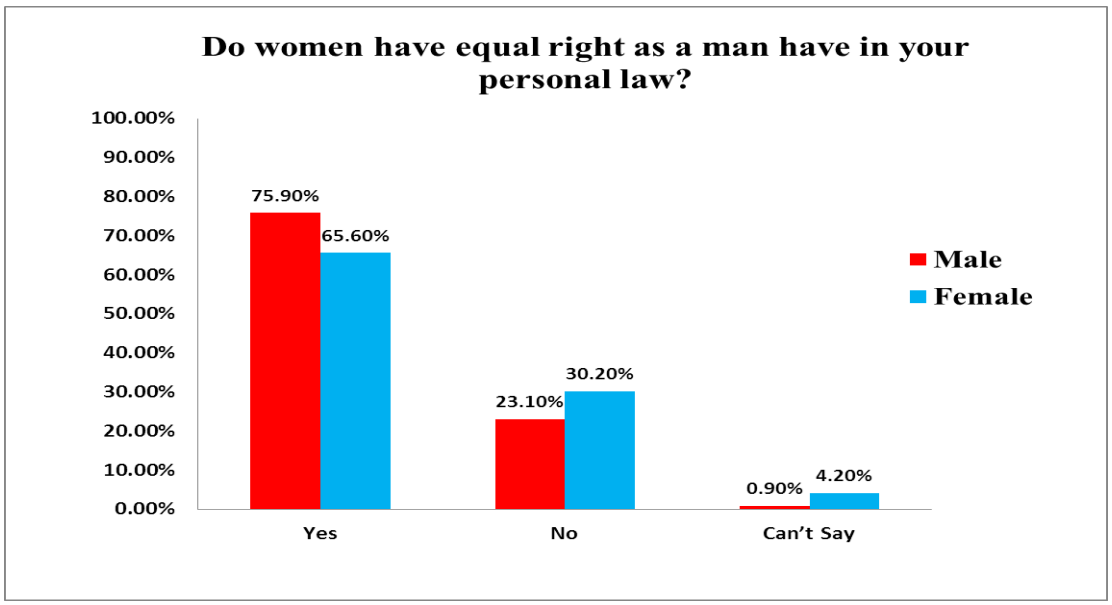
7.3 Section- C

Comparative Study between Male and Female Respondents

Question.5. Do women have equal right as a man have in your personal law?

Table.7.37

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	82	75.9	126	65.6
2	No	25	23.1	58	30.2
3	Can't Say	1	0.9	8	4.2
	Total	**108**	**100.0**	**192**	**100.0**



Figue.7.37

The aforesaid table and figure 7.37 evaluate the responses of male and female respondents, who know that women have equal right as a man have in your personal law. Table shows that 75.9% male and 65.6% female respondents said yes while 23.1% male and 30.2% female respondents said no and remaining 0.9% male and 4.2% female respondents said that they can't say anything. The study shows that the ratio of male respondents were higher than female, when the question is asked to both of them regarding equal rights of male and female in their personal law. It shows that male are satisfied with the equal rights of women in personal law while maximum women do not agree with the male regarding their equal rights in personal law. The position is clear that female don't feel to have equal rights in their Personal Law.

Question.6. Do male and female has equal rights in your family?

Table.7.38

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	71	65.8	138	71.9
2	No	34	31.5	53	27.6
3	Can't Say	3	2.7	1	0.5
	Total	**108**	**100.0**	**192**	**100.0**

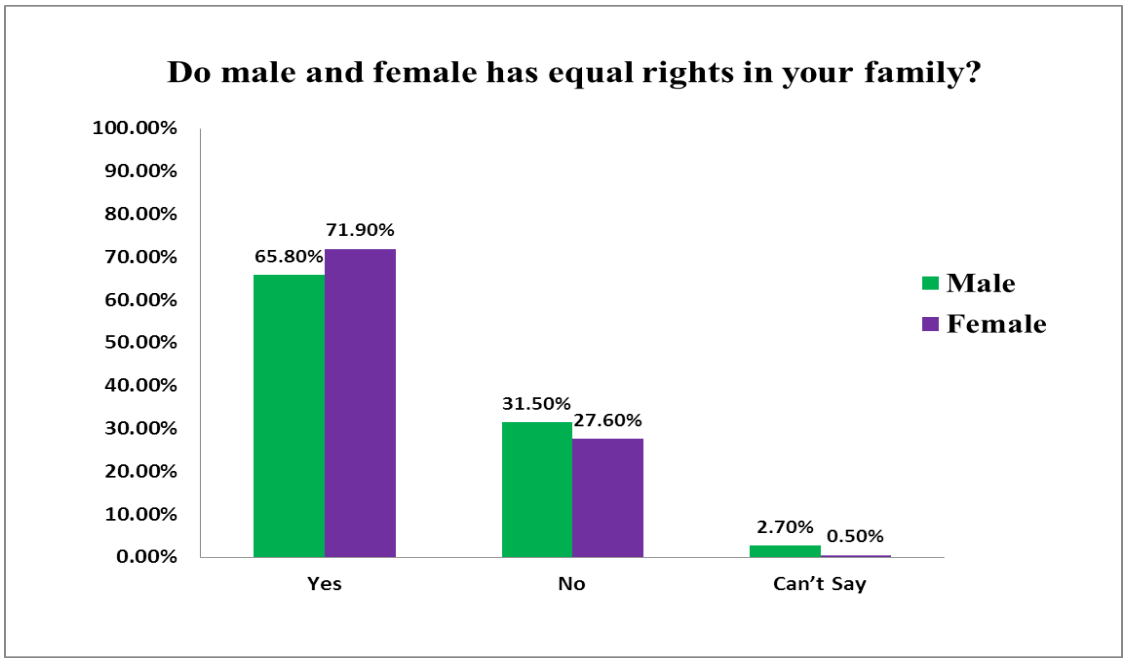


Figure.7.38

Above table and figure 7.38 assess the responses of male and female respondents to know that male and female have equal rights in their family. Table shows that 65.8% male and 71.9% female respondents said yes while 31.5% male and 27.6% female respondents said no and remaining 2.7% male and 0.5% female respondents said that they can't say anything. The study shows that the proportion of female respondents were higher than male respondents, who know that male and female has equal rights in their family. The reason is that the female are always taught in family that they are treated with equality in their family and they accept the fact taught by the elders of the family whether it's true or not.

Question.9. Have your proper consent was taken in your marriage?

Table.7.39

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	55	50.9	123	64.1
2	No	17	15.7	30	15.6
3	Can't Say	36	33.3	39	20.3
	Total	**108**	**100.0**	**192**	**100.0**

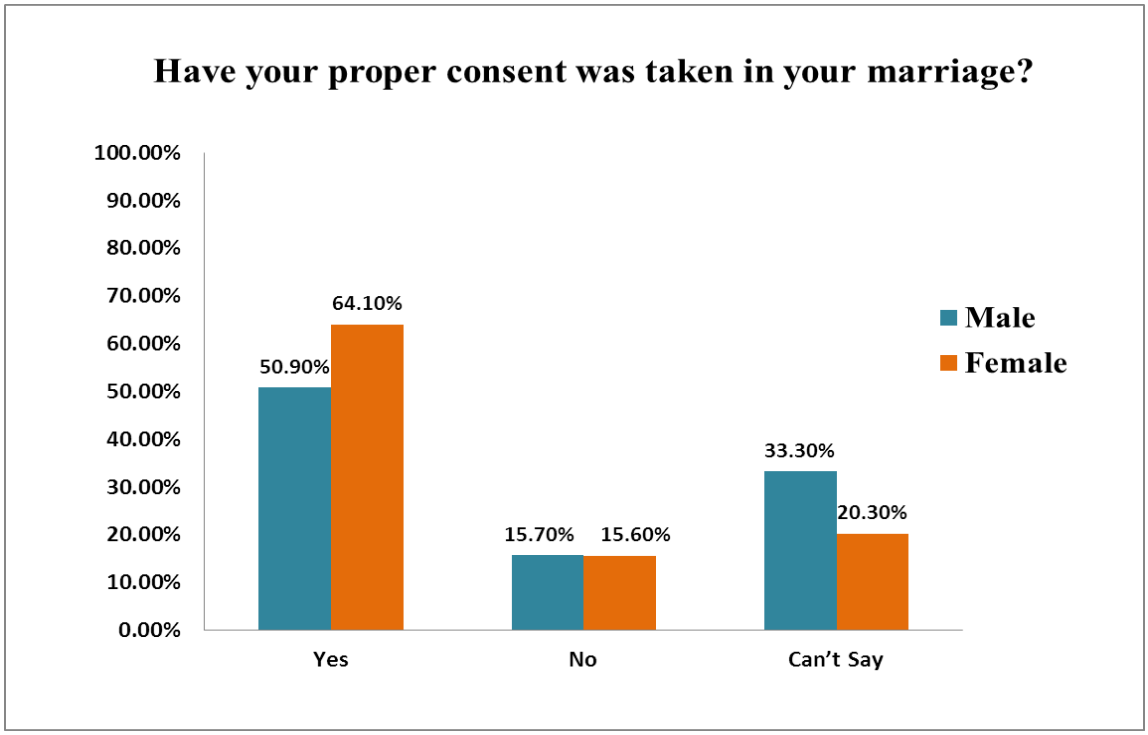


Figure.7.39

The above table above and Figure 7.39 show the division of the male and female respondents, whom proper consent was taken in the marriage. Table shows that 50.9% male and 64.1% female respondents said yes, 33.3% male and 20.3% female respondents said that they can't say anything and remaining 15.7% male and 15.6% female respondents said no. The study shows that the proportion of female respondents was higher than that of male respondents whose marriage was properly consented. It shows that more women are satisfied with importance of their consent in marriage as they were being asked about that in their marriage.

Question.11. Do you know about the right of maintenance of a divorced woman and her children?

Table.7.40

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	40	37.0	116	60.4
2	No	41	38.0	46	24.0
3	Can't Say	27	25.0	30	15.6
	Total	**108**	**100.0**	**192**	**100.0**

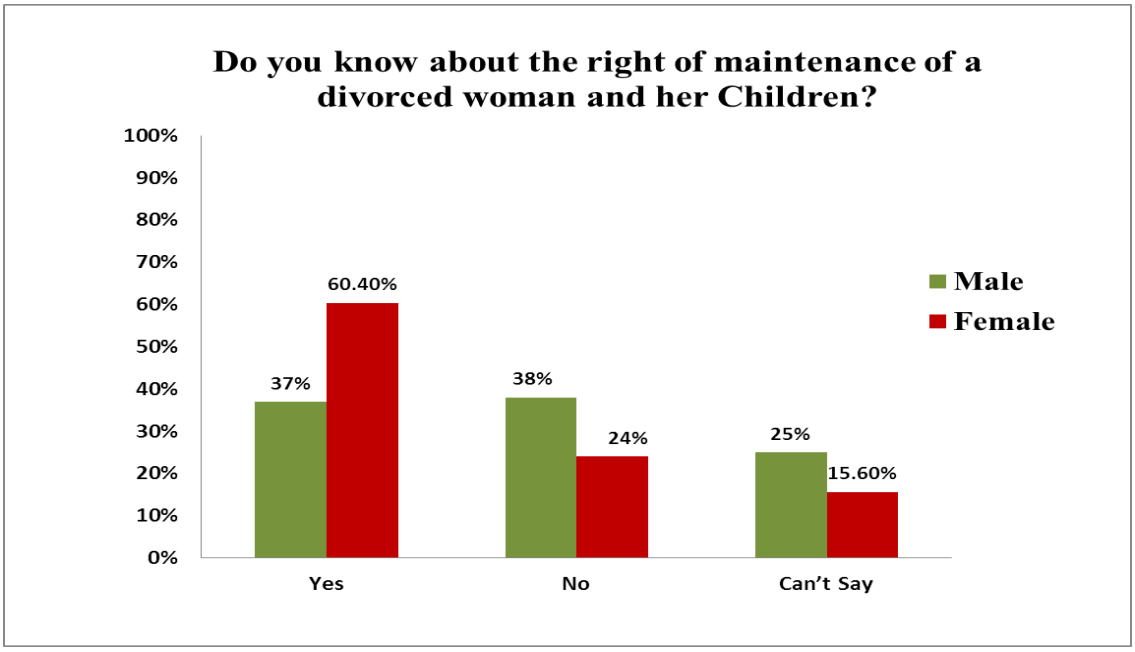


Figure.7.40

The responses of male and female respondents have shown in above table and figure 7.40. Table shows that 37.0% male and 64.4% female respondents said yes while 38.0% male and 24.0% female respondents said no and remaining 25.0% male and 15.6% female respondents said that they can't say anything about the rights of maintenance of a divorced woman and her children. The outcome shows that the ratio of female respondents was higher than that of male respondents who know about the right of maintenance of a divorced woman and her children. It means that women are more aware about the right of maintenance of divorced women and her children while men are not only less aware but more male don't know about this right of female which will be their duty in case divorce took place.

Question.12. Do male and female has equal rights in case of divorce?

Table.7.41

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	35	32.4	82	42.7
2	No	51	47.2	83	43.3
3	Can't Say	22	20.4	27	14.0
	Total	**108**	**100.0**	**192**	**100.0**

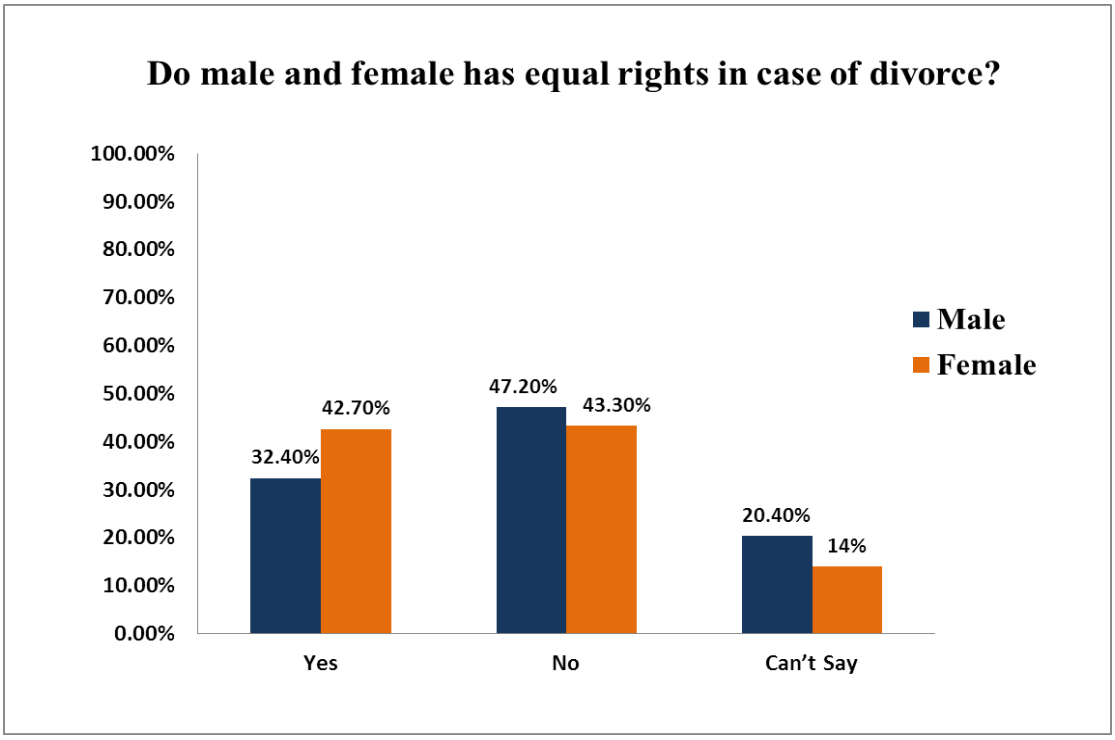


Figure.7.41

The aforesaid table and figure 7.41 notice the answers of the male and female respondents on the question whether men and women have equal rights in the matter of divorce. Table shows that 32.04% male and 42.7% female respondents said yes while 47.2% male and 43.3% female respondents said no and remaining 20.4% male and 14.0% female respondents said that they can't say anything about the male and female have equal rights in case of divorce.

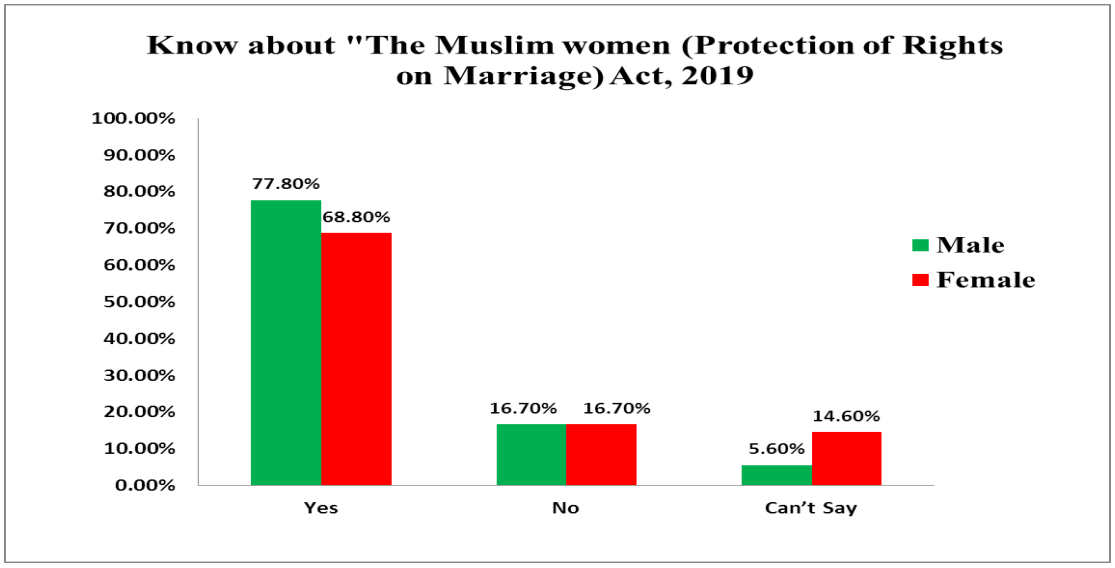
Male who are in dominant position in society don't think that male and female have equal rights in case of divorce but comparatively more women are of the opinion that they have equal rights in case of divorce the reason behind is that women are taught from the beginning of their life that they have equal rights as male members of

the society have in mater of divorce. While we study this table as a whole it is found that 43.30% female are of the opinion that they don't think that male and female have equal rights in case of divorce while 14 % women can't say any thin. So 43.30% +14% i.e. 57.30 % women do not agree that female have equal rights in case of divorce.

Question.14. Do you know about "The Muslim Women (Protection of Rights on Marriage) Act, 2019?

Table.7.42

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	84	77.8	132	68.8
2	No	18	16.7	32	16.7
3	Can't Say	6	5.6	28	14.6
	Total	**108**	**100.0**	**192**	**100.0**



Figue.7.42

Above table and figure 7.42 shows the number of male and female respondents who know about "The Muslim Women (Protection of Rights on Marriage) Act, 2019. Table shows that 77.8% male and 68.8 % female respondents said yes while 16.7% male and 16.7% female respondents said no and remaining 5.6% male and 14.6% female respondents said that they can't say anything. The results shows that a

majority of male respondents was higher than female who know about "The Muslim Women (Protection of Rights on Marriage) Act, 2019. It shows that women are comparatively less aware about the Act of 2019 as compare to their male counterpart. The reason may be lack of education or exposure of outside world.

Question.17. Do this law will bring change in life of women?

Table.7.43

S. No.	Response	Male		Female	
		Frequency	Percent	Frequency	Percent
1	Yes	40	37.0	94	49.0
2	No	19	17.6	17	8.9
3	Can't Say	49	45.4	81	42.2
	Total	**108**	**100.0**	**192**	**100.0**

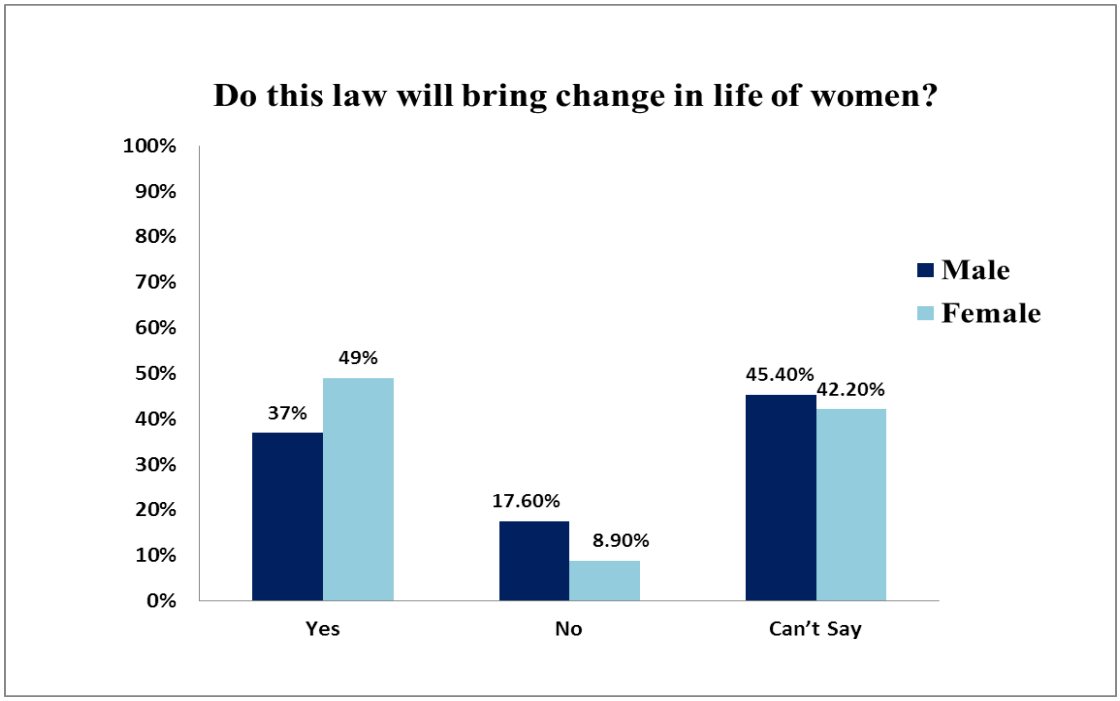


Figure.7.43

The aforesaid table and figure 7.43 notice the reactions of male and female respondents on the question that does this law will bring change in life of women? Table shows that 37.0% male and 49.0% female respondents said yes while 17.6%

male and 8.9% female respondents said no and remaining 45.4% male and 42.2% female respondents not reacted and said that they can't say anything.

The responses of the respondents, shows that about half of the women respondent thinks that this law will bring change in their lives. It shows the optimistic view of the women about this Act and that this law will bring chance in their lives.

CHAPTER VIII

CONCLUSION ANS SUGGESTIONS

CHAPTER-VIII

CONCLUSION ANS SUGGESTIONS

8.1 Conclusion

Complete gender justice is complex to achieve typically in a country like India. The diversity of cultures, subcultures, is vast and there is a lot of rigidity in traditions and beliefs. Lack of education, Lack of development, Poverty, Improper enforcement of the laws, lack of awareness among women, deep rooted patriarchy, economic dependence of women, all leads to the subversive condition of women in our society. Gender hierarchies in Europe and USA are relatively more balanced than in India. Quite simply, most of their gender equality laws are mostly centered on employment and workplace. Not only that, the equality laws also explicitly include trans-genders and the rights have been extended to gay and lesbian communities which was unprecedented in India till Naz Foundation case. Gender development in any sphere and in any country is a key component of the development and overall welfare of any state. Various NGO's and government agencies, activists have been promoting gender rights and vocal in their protest against discrimination. Even though, there has been progress in securing gender justice, there is still a lot to be done. It is quite heartening to notice that women have entered in of profession and occupation, which were almost a preserve of the male. Today women are holding positions in every walk of life in our country and globally. Senior bureaucrats, pilots, service officers in army, navy and air force, doctors, diplomats, parliamentarians, architects, engineers, software entrepreneurs, business entrepreneurs, journalists, writers, fashion designers etc. Full responsibility for the progress in equality of relations, is required to be shared in order to achieve the goals of gender equality, developments and peace for women. In India women, together with men, must be full participants, in the shaping of society and its policies and structures. Women's equality cannot be achieved through equal opportunities due to unequal status of women in society, which exist. It is therefore, necessary that gender issues become an integral part of policy analysis, planning, decision-making, evaluation and impact assessment.

The condition of social and individual life is mutually interdependent. Stability of society therefore depends to the large extent on preservation and

maintenance of just and equitable relationship among individuals not only in the professional and public life but also within the four walls of home. All those branches of countries legal system, which regulate these relationships, thus play a vital role in the social progress of its people. One of these is family law.

In India the intellectual leadership has in the recent past played a very important role in social importance of family rights, obligations and relations. And therefore, the need for the betterment of such intellectual and religious leadership in promoting equal rights, obligations and relations has not been neglected. But as in all other multi-religious societies social legislation affecting the family has in this country been always problematic. Though a lot had been achieved in the recent past even before the advent of freedom, the subject has been of vital interest in the post-independence era. The Constitution of India specifically empowered the state to legislate on Marriage and divorce, infants and minors, adoption, wills intestacy and succession, joint family and partition.[1] Moreover it has issued a mandate to the state directing it to endeavor to secure for citizens an uniform civil code throughout the territory of India. The progress so far made in exercise of the aforementioned legislative power and towards the goal of uniformity includes the enactment of:-

1. Special Marriage Act 1954,
2. Hindu Marriage Act 1955
3. Hindu Succession Act (1956),
4. Hindu Minority and Guardianship Act 1956,
5. Hindu Adoptions and Maintenance Act (1956).
6. Dowry Prohibition Act 1961.
7. The Foreign Marriage Act 1969

Reference may also be made to provisions relating to the maintenance of wives under Criminal Procedure Code 1973, as amended in 2005, 2013 and 2019

Modernization of Muslim Personal Law has during recent years been the subject of lively debate between the pro-reform section and the anti-reform traditional

[1] List iii ,Entry 25

forces. In 1963 the Central Government had planned to set up a committee to study the ways in which the Personal Law of Islam reformed in some of the Muslim countries. But in view of the strong opposition, this very sensible move had to be given up. Apart from this unsuccessful move, no efforts have been made by the government to educate the Muslim masses regarding drawbacks in their Personal Law and the possibilities of their removal or amend it. On the contrary the party in power has given assurance to the Muslims that it has no plans of "tempering" with their religious Personal Law. At times it has chosen to bow down to the obstructionist forces which refused to move even an inch in the direction of family law reform. The intellectuals in the Muslim community have not, however been sitting idle. These intellectuals have been quite active, through vituperated against and even insulted by the orthodox. They have shown a consciousness as to the need for reform and an anxiety to secure it. Among the various institutions of Muslim Personal Law, most frequently talked about are, arbitrary polygamy, unilateral divorce and iniquitous succession right of men and women. Contemporary legislations in West Asia, North Africa and other Muslim regions (Including Pakistan and Bangladesh) are often quoted by them in order to show that there is sufficient authority and also enough materials within the broad framework of Islamic Law itself. With the help of incidence of these countries the Muslim Personal Law can be reformed in India too, so that these differences can reduce the diversity between Islamic Law and the other personal law prevailing in the country.

There is however, another side of picture too. The Muslim public opinion, if that term could apply to the views of a substantial majority, is vehemently against any reform of classical Muslim law. The religious leadership of the community is not, generally, convinced of the exercise of any drawbacks in its social life. The Muslims find in every suggestion for reform, an organized effort, if not a conspiracy, to wipe out their culture from the soil of India and not a desire to bring about social change. The result is that even those who actually are conscious of existence of certain drawbacks in their social life do not want them to be remedied by legislation. They are convinced that if they agree for the reforms of their personal law today tomorrow they will have to digest its replacement by the Common Civil Code.

Unfortunately a Common Civil Code is in the eyes of common Muslim a nightmare. Responsible for this widespread aversion are those pseudo- reformist who

cherish and propagate the belief that the Common Civil Code spoken of in the Constitution will be stuffed wholly with the concept of Hindu jurisprudence and have nothing in it is derived from the legal system of Islam. The influence of this idea is so strong that they ridicule and dismiss the reality that the planned Common Civil Code will derive all the super elements from Islamic jurisprudence too, and will in fact be much nearer in the Islamic legal system than any other classical personal law.

The Ulama of India will never have any consensus on any item of agenda of reform. The unity which they have recently shown in opposing the reforms must not be expected in favor of any form of reform whatsoever. It is too much to expect unanimity to ooze out of this perplexing group in regard to any suggestion for reform.

It must be remembered that in Turkey Mustafa Kamal had to adopt the ready-made Swiss Civil Code after he was utterly disagreed with the committee of Ulemas, he had to set up for drafting an Islamic Code, which failed to agree on the single article after having been in session for several years. The only way to secure law reform in India is to get the necessary legislation promulgated by the state. There is no other alternative.

It is fallacious on the part of the opponents of social reform to take shelter behind article 25 of The Constitution of India. Article 25 guarantees freedom of conscience and the right freely to profess, practice and propagate religion. It does not contemplate freedom to treat fellow citizens here Muslim woman as cattle .On the contrary it clearly lays down that nothing in it shall prevent the state from making any law providing for social welfare and reform. Also article-51A specifies our fundamental duties. Among these duties, one important duty is to renounce practices derogatory to the dignity of women, and to develop scientific temper humanism and the spirit of enquiry and reform.

The constitutional mandate to state is to; directing it to endeavor to secure for the citizens a uniform civil code throughout the territory of India has not been seen in its true perspective. The implementation of this directive is almost invariably demanded in the name of the uniformity and equality and not for the sake of change in the timeworn social traditions and out modern norms of family life.

It is crystal clear that as far as the rights of Muslim women especially mentioned in the Shariat Act are concerned, many abuses have crept in the

usage and interpretations over a period of time. Most Muslim countries have either modified personal law or interpreted it liberally without violating the spirit of Quran. They have legislated comprehensive reforms in the marriage and divorce law, and changes done on maintenance law is part of that package.

There is great relevance of the fact for Indian Muslims, that Islamic countries like Pakistan, Turkey and Indonesia are examining their outmoded and discriminatory social and legal practices like polygamy and unilateral divorce and modifying their personal laws. As India is not an Islamic state renound author of various books on MPL Tahir Mahmood[2] says that Muslims in India should adjust themselves like Muslims in other countries and they should willingly welcome the Common Civil Code. No Muslim country has so far denied the authority of the source of Shariat. All the Muslim countries accepted Quran and traditions of the prophet Muhammad as the main source of Muslim Personal and Family Law. But they claim that just as in the past Muslim jurists had the right to reinterpret personal laws, so also today Muslim society has the right to reinterpret personal laws to meet the requirement of the present age.[3]

There are various enactments which have been passed by various Muslim countries, which shows that Islam is not a barrier to progressive reforms. Lebanon enacted a new Civil Code in 1932, Syria in 1949 and Iran in 1953. Egypt made changes in its Personal Law in keeping with the spirit of modern age in 1920 and again amended it in 1929, 1931 and 1962. Syria regulated polygamy in 1953. Tunisia prohibited polygamy in 1956 and Iran in 1959. Inheritance laws were subjected to change, in keeping with the requirements of the modern age, in Egypt in 1943 and 1964. Tunisia made changes in Inheritance Laws in 1959[4]. Pakistan has also now changed the family laws and declared plurality of wives and the pronouncement of instant triple talaq illegal.[5] The instances of Pakistan are particularly relevant to the point because Muslims who are now in Pakistan and the Muslims in rest of India were governed by the same personal law. Then why the Muslims in secular India are

[2] Eminent scholar and Jurist of Muslim Law
[3] Mushirul Haq, Religion and Law in Pakistan in quarterly bulletin, Shimla Institute of advanced studies, January 1969 pg 23-29
[4] Kewal A. Farooqui, Adviser on Law to the Central Institute of Islamic Research, , edi1972
[5] The Statesman New Delhi, October 23, 1967.

unable to experience even that limited degree of modernization which Muslim in Pakistan have been able to achieve.

Muslims are divided on the question of reform of the personal law. The orthodox Muslims opposes the reform of Muslim personal law while the secular and progressive Muslims are in favor of it. The problem is that the secular Muslims do not enjoy the confidence or respect of religious scholars and of the community in general. They are often criticized for their so called mala fide Intention. As the orthodox Muslims think that this is the attempt to denigrate Islam in order to be recognized by Hindu as liberal and progressive.[6]

Reformists of Muslim Personal Law suggest that what is important in the spirit of Islam. For instance they argue that Islam has nothing to do with the socio political life of people. Law formulated by the jurist could be replaced by better laws provided that they were in keeping with the spirit of Islam. They think that monogamy and other laws which are in favor of women are in keeping with the spirit of Islam.[7]

Some scholars are also of the opinion that no effort needs to be made at all to reform Muslim Personal Law. They believe that the best way to reform Mohammedan Law is not to reform it at all. Justice M.H. Baig believes that if an ideal civil code is formulated and made available to all the citizens then several Muslims would naturally abandon their own personal law in favor of the ideal code because of its inherent superiority and advantages. Formulation of an ideal "Hindu Code" applicable to all persons who want to be governed by it or who may opt for it because they prefer it to their own unreformed personal laws. The advantages of such code will attract so many persons that it will pave the way towards the preparation of The Uniform Civil Code.[8]

It does not seem a practical view, because in the absence of positive steps by government and progressive Muslims, the Muslim mind cannot be prepared to accept reforms. Deliberate efforts must be made to remove widespread misconceptions in the Muslim minds to expose false and misleading arguments put forth by obstructive

[6] Hamid Dalwai, by Sayyid Nasir Ali,Urdu weekly Al-Jamiat,Delhi ,June12 1970.
[7] Chiragh Ali , The Praposed ,Political ,Legal and Social Reforms, Bombay 1983
[8] Justice M.H.Baig, A Uniform Civil Code, Indian Express, May, 24, 1973

elements and other people who have vested interest and to include government to take steps in the direction of reforms. It is a matter of deep regret that Maulvies with their obstructive and primitive beliefs continue to dominate Muslim society. They have succeeded in barring inequality into region. They not only oppose changes in Muslim society, but even they attempt to restrict any movement towards change. They have closed their minds towards the demands of modern human and egalitarian values. It has also been seen nowadays that undue attention has been given to various pity issues in personal law while neglecting the more serious problems of community like continuing deprivation or discrimination.[9] Vote bank politics becomes the reason why governments do not want to interfere in matters of personal laws of the minority communities of the country .They shifted their attention from basic economic and political task. They try to exploit communal and ethnic issues for their political gain. Politicians have tendency of taking benefits from major sources of conflict and confrontation and forcing Indian ethnic and religious minorities to fall back on their primitive resources and think in terms of struggling for survival in line of religious and communal directions.

It is also true that ethnic religious and communal issues have been exploited by the unscrupulous Muslims religious leaders and corrupt Muslim political leaders to strengthen their hold on Muslim community. They have played the usual politics of grievance, bargaining and recrimination without bestirring the community to fight the real enemies like Poverty, illiteracy, social injustice backward customs etc. The deplorable condition of Muslim women in society is mainly due to its self appointed leaders. These leaders don't have genuine desire to uplift the Muslim women and Muslim community socially, economically or educationally.

The greatest tragedy of post partition India is that liberal Muslims have generally chosen not to go in national political parties. Thereby they denied themselves a platform from which they can address their Muslim and other Indian brothers. As there is no national level Muslim political leader this has made it easier for the obstructers to increase their stronghold on the community.

[9] H.A.Gani,Reforms of Muslim Personal Law,Deep and Deep Publication,New Delhi

Muslim conservatives must also be reminded that the Muslim women constitute 47 to 49% of the Muslim community and that no progress either economic or social or political is possible without their wholehearted support, cooperation and participation. Such male chauvinism as has been widely demanded by conservative Muslim leadership without in any way addressing the problems that women face. These people can only create a breach within the community which itself defeats the wider purpose of unifying the community. It is true that vast majority of Muslims are affected with a sense of insecurity and anxieties and this in turn has bred deep religiosity in them. A good course of action would be required from educated liberal Muslims to come together and be more actively involved in the basic problems of Muslim society and basically of Muslim women.

The argument that Muslim personal law is divine and cannot be changed by human beings, is not only unattainable but is also irrelevant as it is based on confusion between changing the Shariat and changing and inadequate interpretation of Shariat. The traditional interpretation of Shariat law is now inadequate. The early divine injunction was meant for human beings and was to be interpreted by human beings. This was done in accordance with existing new or intellectual capacity. Corresponding to the advancement in man's knowledge there is also a change in his mental capacity and this change calls for a change in the interpretation of laws. If with the advancement in knowledge no change is instituted in the interpretation there will be no correspondence between knowledge and action and this will retard the growth of the society.

Moreover if the Muslim Personal Law is divine and cannot be changed by men then personal law would not have been reformed in all countries except a handful of Islamic states. Muslim personal law in India cannot and should not be equated with the Shariat. Sharat is the name given to Islamic corpus of law, religion and ethics and was in the past administered by the Muslim ruler with Muslim judges for Muslim subjects.

8.2 Suggestions

1. It is now empirically established that women's education is a single cure for thousand societal ills. Female education is a must, irrespective of their

religion, cast, creed, or place of residence. Therefore government should take special initiative for female education in general and Muslim female education in particular

2. It is important for the government to take proper measures to enhance and implement women reservation for equal representation at the places where women need support to get equality and equal social position. Therefore reservation in favor of women has shown rapid increase in female representation in corporate decision-making as well as policies.
3. Special rules governing women's reproductive work and aimed, in any event, at achieving equal working conditions for rural men and women should also be formulated.
4. Special legislations should be enacted for domestic women workers to deal with minimum wage, social security and social services.
5. To ensure that the principle of non-discrimination is observed, express provision should be made for fines as a penalty for contravention of the rules, and monitoring and inspection bodies should be established to ensure compliance there to.
6. Legislation expressly stipulating that rural women be included in organizations and provided technical assistance and training should be introduced.
7. The State should guarantee women's access to formal and informal education, technical training and new technologies for women in general and Muslim women in particular.
8. The most important thing for the reform in Muslim Personal Law is to improve the status of Muslim married women. Like restrictions on reasonless talaq or, restrictions on the plurality of marriage, provisions for dissolution of marriage on account of incompatibility of temperament etc. The All India Muslim Personal Law Board and other Muslim organizations must have to take reasonable efforts to set the life of Muslim married women in order. If it happened this will automatically improve the life and living standard of family which will turn in to healthy and happy society.
9. The Kazis Act 1880 should be suitably amended. Obtaining marriage certificate must be made mandatory on stamp paper of sufficient amount of money, where the mehr amount as fixed must be mentioned in certificate.

Stamp duty should be fixed according to the amount of the mehr fixed between the marriage parties. In this way a sufficient amount would be available to grant maintenance to such divorcees who have no other means to support and the marriage certificate issued by Kazi who officiated at the wedding ceremony would be more authentic[10].

10. Though instant triple talaq have been declared unconstitutional by Muslim Women (Protection of Rights on Marriage) Act 2019, but it is still prevalent in the society so its proper implementation should be ensured by the government.

11. A clause for maintenance for life or maintenance untill women do second marriage can also be stipulated with the charge on husband's property. The state should consider providing a model Nikahnama which should be adopted by couple at the time of marriage.[11] [12]

12. Muslim community should be educated in such a way that their perception regarding government's interference in Personal Law through Uniform Civil Code removed. Government should take proper measure to enact Uniform Civil Code in order to comply constitutional mandates and to remove social and legal biases against the women in general and Muslim Women particularly.

13. Government should conduct a referendum among the Indian Muslim community in which all the adult Muslim men and women of 18 years and above can participate freely after a campaign of information, in the press, radio television and political meetings conducted by the Muslim themselves. This referendum could be organized by the Muslim community with administrative help and advice provided by the Indian Election Commission. In the referendum the Muslim community can be invited to pronounce on the following questions

- Monogamy or polygamy?
- Practice of talaq and payment of maintenance to divorced women until marriage.
- The right for Muslim women to work freely in the outside world.
- The wearing of pardah (hizab) by women.

[10] Mohammed Ynus Saleem, This is non issue,Times of India March 30, 1986.
[11] A.G.Noorani , Muslim Law Reform: Codify and enforce Divorce Law, Indian Express 1086.
[12] H.A.Gani, reforms in Muslim Personal Law , Deep and Deep Publications 1988 pg 162

14. The Indian Parliament can pass the necessary modification in the laws based on the result of the referendum and this will save the Indian Government and Hindus from the accusation of interference in the religious freedom of Muslims. This can also help to avoid unnecessary law and order problems and futile bloody violent communal manifestations. This will enhance the image and prestige of India as a secular country which is famous for its unity in diversity.
15. The long term solution of the Muslim Personal Law reform lies in spreading education among Muslim masses. It is the duty of the Muslim leaders and government alike to raise the social, educational and economic standard of Muslims. The only obstacle in the reform of Muslim Personal Law is backwardness of the community and the lack of courage and vision on the part of its leadership. Equal attention should be paid to the education of boys and girls. If this is done, women will be as educated as men and will be as capable of earning their own living as men are. Divorced women will not be dependent for maintenance on men .It will increase their importance in their family as they will be independent members of the family who can help family members financially.
16. Instead of taking Ulemas in confidence government should try to gain confidence of public. So that in case Ulemas don't agree for reforms in Muslim Personal Law, public opinion could be formed against them.
17. Muslim Women should be informed properly about their rights in Constitution and other laws including Muslim Personal Law through electronic media so that they can raise their voice against the discrimination and injustice.
18. Small video clips and advertisement related to the rights of Muslim Women in Personal Law, Constitution and other laws can play a vital role in educating those Muslim Women who are not allowed to go out of four walls of their homes for study or any other purpose. This kind of advertisement and video clips should be played in between news, feature films, serials, as advertisement at, you tube, face book and other social media platforms.

In the opinion of researcher the time has come to consider the matter of reforms in Muslim Personal Law in its totality, and to present to the government of India a concrete proposal for reform, which restore those rights to the women, which

they are entitled, under the Holy Quran, Shariat Act and Constitution of India, which is the supreme law of the nation, but denied to them.

Last but not the least; it is the need of the hour that women must possess self-worth, self-confidence, and freedom to decide for their needs and requirements. Women need to understand and accept that discrimination among people on the basis of gender is unreasonable. Women herself need to realize that, they are paid less, expected to cook, and restricted by their family members. To overcome these situations and to have an independent role in society, women need to realize their own importance themselves first after that the society will cherish their success and celebrate their importance.

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APPENDICES

QUESTIONNAIRE

Dear Respondent,

I am requesting you to fill up this questionnaire. The topic of my research work is Entitled "**Gender Justice in Muslim Personal Law with Special Reference to Divorce"**. The following questions are designed with the intention to know the awareness of females and males towards their rights and position of gender justice in society. The information you provide will be kept completely confidential and will only be used for research work. The researcher will always be grateful for your cooperation.

Research Supervisor
Prof. Sudarshan Verma

Research Co-Supervisor
Dr. Sangeeta Krishna

Research Scholar
Vibha Tripathi

Department of Law
Babsaheb Bhimrao Ambedkar University, Lucknow

Section- A
Socio-Economic Profile of Respondent

1. **Name:** …….
2. **Age:** …….
3. **Gender:** (A) Male (B) Female (C) Other
4. **Marital Status of the respondent:** (A) Married (B) Unmarried (C) Divorced
5. **Age of Marriage :** (A) 0 -15 Years (B) 15 -30 Years (C) 30-45 years (D) 45-60 years (E) Above 60 years

6. **Education:** (A) Literate (B) Illiterate (C) Up to high School
   (D) up to Intermediate (E) Graduate (F) Post Graduate
7. **Occupation:**……
8. **Address :** ……
9. **Mobile No.:**……
10. **Email id:** ……

Section- B

Kindly read the question carefully and select one of the four responses given against each of them by tick marking [√]

1. In family who is deciding authority in matters of

		Father	**Mother**	**Individual Concern**	**Other**
A.	Education				
B.	Marriage				
C.	Life style				
D.	Property				
E.	Other family matters				

2. Do you know about the following concepts?

		Know properly	**Know Slightly**	**Don't know**
A.	Right to give or withdraw consent in Marriage			
B.	Right to get Mehr in marriage			
C.	Right to give divorce			
D.	Method of giving divorce			
E.	option of puberty			
F.	Process of Halala			

Give following answers by tick marking [√] following option:

3. Do you know Constitution of India gives equal Rights to both male and females?

Yes ☐ NO ☐ Don't Know ☐

4. Do you know privileges and protections given to all the females by Constitution are equally available to Muslim women

Yes ☐ NO ☐ Don't Know ☐

5. Do women have equal right as a man have in your personal law?

Yes ☐ NO ☐ Don't Know ☐

6. Do male and female have equal rights in your family?

Yes ☐ NO ☐ Don't Know ☐

7. Do you know a male can marry four wives at the same time?

Yes ☐ NO ☐ Don't Know ☐

8. Do female also have this right,

Yes ☐ NO ☐ Don't Know ☐

9. Have your proper consent was taken in your marriage?

Yes ☐ NO ☐ Don't Know ☐

10. Have you got or given Mehr in your marriage?

Yes ☐ NO ☐ Don't Know ☐

11. Do you know about the right of maintenance of a divorced woman and her Children?

Yes ☐ NO ☐ Don't Know ☐

12. Do male and female have equal rights in case of divorce?

Yes ☐ NO ☐ Don't Know ☐

13. Can a female give triple talaq to male?

Yes ☐ NO ☐ Don't Know ☐

14. Do you know about "The Muslim women (Projection of Rights on Marriage) Act, 2019?

Yes ☐ NO ☐ Don't Know ☐

15. Do you know this act abolish triple talaq and criminalize it?

Yes ☐ NO ☐ Don't Know ☐

16. Do you know any woman who got divorced by method of triple talaq?

Yes ☐ NO ☐ Don't Know ☐

17. Do this law will bring change in life of women?

Yes ☐ NO ☐ Don't Know ☐

If yes, How ……
……
……
If no, why ……
……
……

18. How a woman maintain herself after divorces?

A. By her own earnings. ☐

B. Maintained by husband ☐

C. Get maintenance from other relatives ☐

D. By any other way ☐

19. Who get custody of children after divorce of parents?

A. Father ☐

B. Mother ☐

C. any other relative ☐

20. Do Muslim Personal Law gives equal property rights to women?

Yes ☐ NO ☐ Don't Know ☐

21. Do you feel male and female have equal rights in society?

Yes ☐ NO ☐ Don't Know ☐

If Yes, How……
……
If No, Why……
……

22. Kindly give any suggestion for bringing gender equality in society.

……
……
……

Respondent Signature

रजिस्ट्री सं॰ डी॰ एल॰—(एन)04/0007/2003—19 REGISTERED NO. DL—(N)04/0007/2003—19

भारत का राजपत्र
The Gazette of India

असाधारण
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भाग II — खण्ड 1
PART II — Section 1
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 31*st July,* 2019/*Shravana* 9, 1941 (*Saka*)

The following Act of Parliament received the assent of the President on the 31st July, 2019, and is hereby published for general information:—

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

No. 20 OF 2019

[31*st July,* 2019.]

An Act to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Muslim Women (Protection of Rights on Marriage) Act, 2019.

(*2*) It shall extend to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall be deemed to have come into force on the 19th day of September, 2018.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) "electronic form" shall have the same meaning as assigned to it in clause (*r*) of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(*b*) "Magistrate" means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides; and 2 of 1974.

(*c*) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

CHAPTER II

DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

Talaq to be *void* and illegal.

3. Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

Punishment for pronouncing *talaq*.

4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

CHAPTER III

PROTECTION OF RIGHTS OF MARRIED MUSLIM WOMEN

Subsistence allowance.

5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

Custody of minor children.

6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offence to be cognizable, compoundable, etc.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— 2 of 1974.

(*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(*b*) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

Repeal and savings.

8. (*1*) The Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 is hereby repealed. Ord. 4 of 2019.

(*2*) Notwithstanding such repeal, anything done or any action taken under the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019, shall be deemed to have been done or taken under the provisions of this Act. Ord. 4 of 2019.

———

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

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भारत का राजपत्र
The Gazette of India

असाधारण
EXTRAORDINARY
भाग II — खण्ड 1
PART II — Section 1
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं॰ 4] नई दिल्ली, शनिवार, जनवरी 12, 2019/ पौष 22, 1940 (शक)
No. 4] NEW DELHI, SATURDAY, JANUARY 12, 2019/PAUSHA 22, 1940 (SAKA)

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 12*th January,* 2019/*Pausha* 22, 1940 (*Saka*)

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ORDINANCE, 2019

No. 1 OF 2019

Promulgated by the President in the Sixty-ninth Year of the Republic of India.

An Ordinance to protect the rights of married Muslim women and to prohibit divorce by pronouncing *talaq* by their husbands and for matters connected therewith or incidental thereto;

WHEREAS the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was promulgated by the President on the 19th day of September, 2018;

AND WHEREAS the Muslim Women (Protection of Rights on Marriage) Bill, 2018 replacing the said Ordinance was passed by the House of the People on the 27th day of December, 2018 and is pending in the Council of States;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause *(1)* of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:—

CHAPTER I
PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Ordinance may be called the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019.

(*2*) It shall extend to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall be deemed to have come into force on the 19th day of September, 2018.

Definitions.

2. In this Ordinance, unless the context otherwise requires,—

(a) "electronic form" shall have the same meaning as assigned to it in clause *(r)* of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(b) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband; and

(c) "Magistrate" means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides.

2 of 1974.

CHAPTER II
DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

Talaq to be *void* and illegal.

3. Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

Punishment for pronouncing *talaq*.

4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

CHAPTER III
PROTECTION OF RIGHTS OF MARRIED MUSLIM WOMEN

Subsistence allowance.

5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the Magistrate.

Custody of minor children.

6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offence to be cognizable, compoundable, etc.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— 2 of 1974.

(*a*) an offence punishable under this Ordinance shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(*b*) an offence punishable under this Ordinance shall be compoundable, at the instance of the married Muslim women upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(*c*) no person accused of an offence punishable under this Ordinance shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

Repeal and Savings.

8. *(1)* The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 is hereby repealed. Ord. 7 of 2018.

(2) Notwithstanding such repeal, anything done or any action taken under the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 shall be deemed to have been done or taken under the provisions of this Ordinance.

Ord. 7 of 2018.

RAM NATH KOVIND,
President.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

UPLOADED BY THE MANAGER, GOVERNMENT OF INDIA PRESS, MINTO ROAD, NEW DELHI–110 002
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MGIPMRND—3229GI(S3)—12-01-2019.

Bill No. 82 of 2019

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2019

A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Muslim Women (Protection of Rights on Marriage) Act, 2019.

(*2*) It shall extend to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall be deemed to have come into force on the 19th day of September, 2018.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) "electronic form" shall have the same meaning as assigned to it in clause (*r*) of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(*b*) "Magistrate" means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides; and 2 of 1974.

(*c*) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

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DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

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4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

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6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offence to be cognizable, compoundable, etc.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— 2 of 1974.

(*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(*b*) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

Repeal and savings.

8. (*1*) The Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 is hereby repealed. Ord. 4 of 2019.

(*2*) Notwithstanding such repeal, anything done or any action taken under the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019, shall be deemed to have been done or taken under the provisions of this Act. Ord. 4 of 2019.

STATEMENT OF OBJECTS AND REASONS

The Supreme Court in the matter of Shayara Bano *Vs.* union of India and others and other connected matters, on the 22nd August, 2017, in a majority judgment of 3:2, set aside the practice of *talaq-e-biddat* (three pronouncements of *talaq*, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgment gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.

2. The petitioner in the above said case challenged, *inter alia, talaq-e-biddat* on the ground that the said practice is discriminatory and against dignity of women. The judgment vindicated the position taken by the Government that *talaq-e-biddat* is against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity guaranteed under the Constitution. The All India Muslim Personal Law Board (AIMPLB), which was the 7th respondent in the above case, in their affidavit, *inter alia,* contended that it was not for the judiciary to decide matters of religious practices such as *talaq-e-biddat*, but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice.

3. In spite of the Supreme Court setting aside *talaq-e-biddat*, and the assurance of AIMPLB, there have been reports of divorce by way of *talaq-e-biddat* from different parts of the country. It is seen that setting aside *talaq-e-biddat* by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce. Therefore, to protect the rights of married Muslim women who are being divorced by triple *talaq,* a Bill, namely, the Muslim Women (Protection of Rights on Marriage) Bill, 2017, was introduced in, and passed by, the Lok Sabha on the 28th December, 2017 and was pending in Rajya Sabha.

4. The aforesaid Bill proposed to declare the practice of triple *talaq* as *void* and illegal and made it an offence punishable with imprisonment up to three years and fine, and triable by a Judicial Magistrate of the first class. It was also proposed to provide subsistence allowance to married Muslim women and dependent children and also for the custody of minor children. The Bill further provided to make the offence cognizable and non-bailable. However, apprehensions have been raised in and outside Parliament regarding the provisions of the pending Bill which enables any person to give information to an officer in charge of a police station to take cognizance of the offence and making the offence non-bailable.

5. In order to address the above concerns, it has been decided to make the offence cognizable, if the iniformation relating to the commission of an offence is given to an officer in charge of a police station by the married Muslim women upon whom *talaq* is pronounced or any person related to her by blood or marriage. It was also decided to make the offence non-bailable and compoundable at the instance of the married Muslim woman with the permission of the Magistrate, on such terms and conditions as he may determine.

6. As the Bill was pending for consideration in Rajya Sabha and the practice of divorce by tripletalaq (i.e., *talaq-e-biddat*) was continuing, there was an urgent need to take immediate action to prevent such practice by making stringent provisions in the law. Since both Houses of Parliament were not in session and circumstances existed which render it necessary for the President to take immediate action in the matter, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 (Ord. 7 of 2018), with aforesaid changes was promulgated on the 19th September, 2018.

7. In order to replace the said Ordinance, the Muslim Women (Protection of Rights on Marriage) Bill, 2018 was introduced in Lok Sabha on the 17th December, 2018 and was passed by that House on the 27th December, 2018. However, the Bill could not be taken up for consideration in Rajya Sabha and both Houses were adjourned. As both Houses of Parliament were not in session and the practice of divorce by triple *talaq* (i.e. *talaq-e-biddat*) was continuing, to give continued effect to the provisions of the aforesaid Ordinance, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 (Ord. 1 of 2019) was promulgated on the 12th January, 2019.

8. Subsequently, to replace the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019, necessary official amendments to the Muslim Women (Protection of Rights on Marriage) Bill, 2018 were moved in Rajya Sabha. However, the Bill could not be taken up for consideration in Rajya Sabha and both Houses were adjourned. Since both Houses of Parliament were not in session, to give continued effect to the provisions of the aforesaid Ordinance, the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019 (Ord. 4 of 2019) was promulgated on the 21st February, 2019. Thereafter, the Sixteenth Lok Sabha was dissolved on the 25th May, 2019 and the Muslim Women (Protection of Rights on Marriage) Bill, 2017 and the Muslim Women (Protection of Rights on Marriage) Bill, 2018 pending in Rajya Sabha lapsed.

9. Accordingly, to replace the Muslim Women (Protection of Rights on Marriage) Second Ordinance, 2019, the Muslim Women (Protection of Rights on Marriage) Bill, 2019 is being introduced in Parliament.

10. The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment.

11. The Bill seeks to replace the aforesaid Ordinance.

NEW DELHI;
The 14th June, 2019.

RAVI SHANKAR PRASAD

LOK SABHA

———

A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto.

———

(Shri Ravi Shankar Prasad, Minister of Law and Justice)

MGIPMRND—543LS—17-06-2019.

रजिस्ट्री सं० डी० एल०—(एन)04/0007/2003—18 REGISTERED NO. DL—(N)04/0007/2003—18

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 19*th September,* 2018/*Bhadra* 28, 1940 (*Saka*)

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ORDINANCE, 2018

No. 7 OF 2018

Promulgated by the President in the Sixty-ninth Year of the Republic of India.

An Ordinance to protect the rights of married Muslim women and to prohibit divorce by pronouncing *talaq* by their husbands and for matters connected therewith or incidental thereto;

WHEREAS the Muslim Women (Protection of Rights on Marriage) Bill, 2017 has been passed by the House of the People and is pending in the Council of States;

AND WHEREAS inspite of the fact that the Supreme Court has held in the matter of Shayara Bano *Versus* Union of India and others [Writ Petition (Civil) No. 118 of 2016] and other connected matters that the practice of *triple talaq* (*talaq-e-biddat)* as unconstitutional, the said practice is still continuing unabated;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action to give effect to the provisions of the said Bill with certain modifications;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:—

CHAPTER I
PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Ordinance may be called the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.

(*2*) It shall extend to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force at once.

Definitions.

2. In this Ordinance, unless the context otherwise requires,—

(a) "electronic form" shall have the same meaning as assigned to it in clause *(r)* of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(b) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous

and irrevocable divorce pronounced by a Muslim husband; and

(c) "Magistrate" means a Judicial Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides.

2 of 1974.

CHAPTER II

DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

Talaq to be *void* and illegal.

3. Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

Punishment for pronouncing *talaq*.

4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

CHAPTER III

PROTECTION OF RIGHTS OF MARRIED MUSLIM WOMEN

Subsistence allowance.

5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the Magistrate.

Custody of minor children.

6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the

event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offence to be cognizable, compoundable, etc.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— 2 of 1974

(a) an offence punishable under this Ordinance shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(b) an offence punishable under this Ordinance shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(c) no person accused of an offence punishable under this Ordinance shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

RAM NATH KOVIND,
President.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

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MGIPMRND—1807GI(CRC)—19-09-2018.

Bill No. 181 of 2018

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2018

A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq *by their husbands and to provide for matters connected therewith or incidental thereto.*

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Muslim Women (Protection of Rights on Marriage) Act, 2018.

(*2*) It shall extend to the whole of India, except the State of Jammu and Kashmir.

(*3*) It shall be deemed to have come into force on the 19th September, 2018.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) ''electronic form'' shall have the same meaning as assigned to it in clause (*r*) of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(*b*) ''Magistrate'' means a Judicial Magistrate of the first class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where the married Muslim woman resides; and 2 of 1974.

(*c*) ''*talaq*'' means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband.

CHAPTER II

DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

Talaq to be *void* and illegal.

3. Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

Punishment for pronouncing *talaq*.

4. Any Muslim husband who pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

CHAPTER III

PROTECTION OF RIGHTS OF MARRIED MUSLIM WOMEN

Subsistence allowance.

5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate.

Custody of minor children.

6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offence to be cognizable, compoundable, etc.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,— 2 of 1974.

(*a*) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;

(*b*) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(*c*) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

Repeal and savings.

8. (*1*) The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, is hereby repealed. Ord. 7 of 2018.

(*2*) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the provisions of this Act.

STATEMENT OF OBJECTS AND REASONS

The Supreme Court in the matter of Shayara Bano *Vs*. Union of India and others and other connected matters, on 22nd August, 2017, in a majority judgment of 3:2, set aside the practice of *talaq-e-biddat* (three pronouncements of *talaq*, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgment gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.

2. The petitioner in the above said case challenged, *inter alia*, *talaq-e-biddat* on the ground that the said practice is discriminatory and against dignity of women. The judgment vindicated the position taken by the Government that *talaq-e-biddat* is against constitutional moraility, dignity of women and the principles of gender equality, as also against gender equity guaranteed under the Constitution. The All India Muslim Personal Law Board (AIMPLB), which was the 7th respondent in the above case, in their affidavit, *inter alia*, contended that it was not for the judiciary to decide matters of religious practices such as *talaq-e-biddat*, but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice.

3. In spite of the Supreme Court setting aside *talaq-e-biddat*, and the assurance of AIMPLB, there have been reports of divorce by way of *talaq-e-biddat* from different parts of the country. It is seen that setting aside *talaq-e-biddat* by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce.

4. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to *talaq-e-biddat*, urgent suitable legislation was necessary to give some relief to them. Therefore, to protect the rights of married Muslim women who are being divorced by triple *talaq*, a Bill, namely, the Muslim Women (Protection of Rights on Marriage) Bill, 2017, was introduced in, and passed by, the Lok Sabha on the 28th December, 2017 and is pending in Rajya Sabha.

5. The aforesaid Bill proposed to declare the practice of triple *talaq* as *void* and illegal and made it an offence punishable with imprisonment up to three years and fine, and triable by a Judicial Magistrate of the first class. It was also proposed to provide subsistence allowance to married Muslim women and dependent children and also for the custody of minor children. The Bill further provided to make the offence cognizable and non-bailable.

6. Apprehensions have been raised in and outside Parliament regarding the provisions of the pending Bill which enables any person to give information to an officer in-charge of a police station to take cognizance of the offence and making the offence non-bailable.

7. In order to address the above concerns, it has been decided to make the offence cognizable, if the information relating to the commission of an offence is given to an officer in-charge of a police station by the married Mulsim women upon whom *talaq* is pronounced or any person related to her by blood or marriage. It is also decided to make the offence non-bailable and compoundable at the instance of the married Muslim woman with the permission of the Magistrate, on such terms and conditions as he may determine.

8. As the Bill is pending for consideration in Rajya Sabha and the practice of divorce by triple *talaq* (i.e., *talaq-e-biddat*) was continuing, there was an urgent need to take immediate action to prevent such practice by making stringent provisions in the law. Since both Houses of Parliament were not in session and circumstances exist which render it necessary for the President to take immediate action in the matter, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, with afforesaid changes was promulgated on the 19th September, 2018.

9. Accordingly, to replace the said Ordinance, the Muslim Women (Protection of Rights on Marriage) Bill, 2018 is being introduced in Parliament.

10. The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment.

11. The Bill seeks to achieve the above objectives.

NEW DELHI;
The 10*th December,* 2018.

RAVI SHANKAR PRASAD

LOK SABHA

———

A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing *talaq* by their husbands and to provide for matters connected therewith or incidental thereto.

———

(Shri Ravi Shankar Prasad, Minister of Law and Justice)

MGIPMRND—2326LS(S3)—11-12-2018.

Bill No. 247 of 2017

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) BILL, 2017

A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq *by their husbands and to provide for matters connected therewith or incidental thereto.*

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

Short title, extent and commencement.

1. (*1*) This Act may be called the Muslim Women (Protection of Rights on Marriage) Act, 2017.

(*2*) It shall extend to the whole of India except the State of Jammu and Kashmir.

(*3*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) "electronic form" shall have the same meaning as assigned to it in clause (*r*) of sub-section (*1*) of section 2 of the Information Technology Act, 2000; 21 of 2000.

(*b*) "*talaq*" means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband; and

(*c*) "Magistrate" means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973, in the area where a married Muslim woman resides. 2 of 1974.

CHAPTER II

DECLARATION OF *TALAQ* TO BE *VOID* AND ILLEGAL

Talaq to be *void* and illegal.

3. Any pronouncement of *talaq* by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be *void* and illegal.

Punishment for pronouncing *talaq*.

4. Whoever pronounces *talaq* referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years and fine.

CHAPTER III

PROTECTION OF RIGHTS OF MARRIED MUSLIM WOMEN

Subsistence allowance.

5. Without prejudice to the generality of the provisions contained in any other law for the time being in force, a married Muslim woman upon whom *talaq* is pronounced, shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children as may be determined by the Magistrate.

Custody of minor children.

6. Notwithstanding anything contained in any other law for the time being in force, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of *talaq* by her husband, in such manner as may be determined by the Magistrate.

Offences to be cognizable and non-bailable.

7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under this Act shall be cognizable and non-bailable within the meaning of the said Code. 2 of 1974.

STATEMENT OF OBJECTS AND REASONS

The Supreme Court in the matter of Shayara Bano *Vs.* Union of India and others and other connected matters, on 22nd August, 2017, in a majority judgement of 3:2, set aside the practice of *talaq-e-biddat* (three pronouncements of *talaq*, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgement gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.

2.The petitioner in the above said case challenged, *inter alia*, *talaq-e-biddat* on the ground that the said practice is discriminatory and against dignity of women. The judgement vindicated the position taken by the Government that *talaq-e-biddat* is against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity guaranteed under the Constitution. The All India Muslim Personal Law Board (AIMPLB), which was the 7th respondent in the above case, in their affidavit, *inter alia*, contended that it was not for the judiciary to decide matters of religious practices such as *talaq-e-biddat*, but for the legislature to make any law on the same. They had also submitted in the Supreme Court that they would issue advisories to the members of the community against this practice.

3. In spite of the Supreme Court setting aside *talaq-e-biddat*, and the assurance of AIMPLB, there have been reports of divorce by way of *talaq-e-biddat* from different parts of the country. It is seen that setting aside *talaq-e-biddat* by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims. It is, therefore, felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce.

4. In order to prevent the continued harassment being meted out to the hapless married Muslim women due to *talaq-e-biddat*, urgent suitable legislation is necessary to give some relief to them. The Bill proposes to declare pronouncement of *talaq-e-biddat* by Muslim husbands *void* and illegal in view of the Supreme Court verdict. Further, the illegal act of pronouncing *talaq-e-biddat* shall be a punishable offence. This is essential to prevent this form of divorce, wherein the wife does not have any say in severing the marital relationship. It is also proposed to provide for matters such as subsistence allowance from the husband for the livelihood and daily supporting needs of the wife, in the event of husband pronouncing *talaq-e-biddat*, and, also of the dependent children. The wife would also be entitled to custody of minor children.

5. The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment.

6. The Bill seeks to achieve the above objects.

NEW DELHI; RAVI SHANKAR PRASAD.

The 15*th December,* 2017.

LOK SABHA

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A

BILL

to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto.

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(Shri Ravi Shankar Prasad, Minister of Law and Justice)

GMGIPMRND—2939LS(S3)—18-12-2017.

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URL: https://www.iium.edu.my/deed/hadith/muslim/009_smt.html
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URL: https://en.m.wikipedia.org/wiki/Triple_talaq_in_India
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URL: https://nl.qaz.wiki/wiki/Triple_talaq_in_India
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URL: https://www.business-standard.com/about/what-is-triple-talaq-law

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