# MATRIMONIAL RIGHTS OF MUSLIM WOMEN IN INDIA- WITH SPECIAL REFERENCE TO MAINTENANCE AND INHERITANCE

A Dissertation submitted to the National University Of Advanced Legal Studies, Kochi In partial fulfilment of the requirements for the award of L.L.M Degree in Constitutional and Administrative Law


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## CERTIFICATE

This is to certify that Shivani Rawat, Reg. No: LM 0120013 has submitted his Dissertation titled, "**Matrimonial Rights Of Muslim Women In India- With Special Reference To Maintenance And Inheritance**", in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by his is original, bona-fide and genuine.

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## DECLARATION

I declare that this dissertation titled, "**Matrimonial Rights Of Muslim Women In India- With Special Reference To Maintenance And Inheritance**", researched and submitted by me to the National University of Advanced Legal Studies in partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of Ms. Namitha K.L. is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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Shivani Rawat

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## INTRODUCTION

Matrimonial rights are those rights which arise when two people are arranged in matrimonial relation. These rights include right to conjugation, right of a woman to reside in her matrimonial home, right of a woman to stridhan/dower, right of women to be maintained by her husband if she is not earning, right to seek divorce etc. The Muslims in India are a minority. According to the Census[1] of 2011, Muslims comprised 13.4% of the India's populace. There is a suspicion that there is no advancement in the Muslim in light of specific components one of the factor is that the ladies in the Muslim society are not given their privileges. The Muslim women have been claiming their rights under law.

In Muslim personal law, the issues of women rights are exceptionally dubious. Rights of Muslim women identified with triple talaq, succession, and maintenance have been given a great deal of consideration for a couple of days at this point. All things considered, the Indian Constitution has allowed sexual orientation and religious based correspondence and opportunity from bigamy/polygamy; however there are as yet numerous conventions that are connected on a moderate culture. As we note, a huge part of Muslim Personal Law is still un-systematized and the vast majority of the court's lawful choices are centered around the Quran and hadith standards.

While the 1937 Shariat Implementation Act stipulates that, taking into account any training or use in actuality, any Muslim should consistently be governed by Muslim individual law, in certainty that the said law in India is not classified in a deliberate enactment and is rather dissipated across a wide range of remarks, archives, choices, and so on. A codification by a group of recognized scholars and researchers of all features of Muslim personal law in India is along these lines the shouting need of great importance.

In 2014, the Bharatiya Muslim Mahila Andolan (BMMA, or' Indian Muslim Women's Movement') discharged the essential draft of a bill that has come to characterize its motivation: The Muslim Family Law Act. The Act opens with the revelation that' new lawful codes are received all through the planet , including the Muslim majority,... to implement the standard of law in family matters, and to put a conclusion to assertion and irregularity in court choices'

[1] The Census of India of is conducted by Ministry of Home Affairs after expiration of 10 years.

(Bharatiya Muslim Mahila Andolan 2014).It at that point mourns the ' nonappearance of systematized law ' concerning Muslim family matters in India, which offers legitimate authorities no firm ground for mediating Muslim individual laws, and grants the propagation of “standard practices ... different from the Qur'an esteems and standards”.

Much after over seven many years of self-rule, the world is secured in regionalism, communalism, castesism, and so forth shackles. While under Indian Constitution and other enactment, ladies have been given different rights, they are considered as delicate. Prelude advocates equity, fairness and opportunity, yet close to home laws are lamentably avoided from the extent of "laws conflicting with the soul of the constitution." The focal point of this conversation is close to home laws and their change. The report of the Sachar Committee admirably plot Muslim ladies in many pieces of the nation experiencing analphabetism, neediness and under-normal cooperation in work. We are battling for a reasonable nationality that has been consistently undermined by close to home law. It's the ideal opportunity for them to scrutinize their social underestimation. The triple talaq choice has provoked a significant move throughout the entire existence of how Indian individual laws have so far dominated. By the day's end, the sacred soul must be brought to peak by executing Article-44 , which fills the need best.

In article 44[2], the Constitution of India unmistakably indicates the UCC: "The State will attempt to make sure about the resident a uniform Civil Code all through the domain of India". The constitution is in this way, obvious that except if a uniform common code is followed, mix can't be guzzled. Notwithstanding, the very actuality is that it's just an "orders rule" set down inside the constitution and as Article 37[3] of the Constitution itself clarifies, the mandate standards "will not be enforceable by any court". In any case, they are "central inside the administration of the nation". This shows despite the fact that our constitution itself accepts that a uniform Civil Code ought to be executed in some way, it doesn't make this usage obligatory. Henceforth, the discussion on having a uniform common code for India despite everything proceeds. The interest for a steady thoughtful code basically implies having one lot of laws which will apply to all or

[2] Article 44 of the Constitution of India provides: “Uniform Civil Code for the citizen: The State shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India.”

[3] Article 37 of the Constitution of India provides that “the provisions contained in Part II shall not be enforceable by any court, but the principles therein laid down are fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws.”

any residents of India independent of their religion. In spite of the fact that the exact forms of such a steady code haven't been spelt out, it ought to apparently consolidate the principal present day and dynamic parts of all current individual laws while disposing of those which are retrograde.

The general public has been divided inside the name of religions, orders and sex. Indeed, even at the present, in India, there are various laws administering rights related with private issue or laws like marriage, separate, upkeep, selection and legacy for different networks. The laws overseeing legacy or separation among Hindus are in this way, altogether different from those concerning Muslims or Christians then on. In India, most family law is chosen by the confidence of the gatherings concerned Hindus, Sikhs, Jains and Buddhists go under Hindu law, while Muslims and Christians have their own laws. Muslim law is predicated on the Shariat; through and through different networks, laws are systematized by an Act of the Indian parliament. There are different arrangements of laws to influence criminal and common cases, similar to the Criminal Procedure Code (CrPC) and in this way the Indian Legislation. The diverse ranks and statements of faith and their allowances of faith based expectations or practices are bewilderingly confounding and no place might be a situation like in India, of shifted individual laws bumping together, permitted.

Numerous Islamic nations have systematized and changed Muslim individual Law to see its abuse. Muslim nations like Egypt, Turkey and even Pakistan have transformed their laws. Terence Farias, in his part the occasion of shariah calls attention to that the 1961 Muslim Family Law Ordinance of Pakistan "makes it mandatory for an individual who wants to require a subsequent spouse to get a composed authorization from a legislature selected Arbitration Council." The intriguing point in regards to Pakistan is that until 1947 the two India and Pakistan had represented Muslims under the Shariat Act of 1937. Be that as it may, by 1961 Pakistan, a Muslim nation had really improved its Muslim Law very India had and this remaining parts genuine today. there's no motivation behind why India should proceed with immensely biased individual laws. Truth be told, the changes directed in Tunisia and Turkey annulled Polygamy. Polygamy has additionally been either prohibited or seriously confined in Syria, Egypt, Turkey, Morocco, Iran and even in Pakistan. Other than Muslims who rest in U.S.A., Australia, U.K. what's more, different pieces of Europe promptly acknowledged the common laws appropriate

consistently to all or any residents inside the separate nations yet don't feel shaky on that account. The significant social resistance at whatever point has originated from the Muslim people group that sees any arrangement to welcome a UCC as an assault on its strict rights. The discussion in India appears to have gone the method for the secularists during this regard and hence the ongoing decisions by the Supreme Court requiring a Uniform Code has not seen the fights and cautions that happened following the Shah Bano case in 1985. There is a likelihood that the Muslim people group considers to be code as a cultivated actuality after 75 years of independence. The issue is far more political than legitimate. At whatever point the trouble has come up there are irate words from each side of the discussion . Strict fundamentalism must go, social and financial equity must be caused accessible to the Muslim ladies and other ladies and their poise and quality to be guaranteed, essential human rights ensured and there ought to be a conclusion to misuse of Muslim ladies.

There is a proposal that the general public itself needs to demand the enhancements, and afterward these can be accomplished. It is overlooked, as could be, that Muslim women have lifted their voices altogether and in associations and are battling hard to get rights. Following a far reaching instructive unrest all through the district, and long battles by associations and people, numerous Muslim women and people are vocally turning out for change, which makes strain somewhat, yet in all actuality there is still no bound together aandolan or mass development obviously speaking to voices.

OBJECTIVE OF THE STUDY:

The objective of the research is as follows:

1. To review the Muslim personal laws with respect to the matrimonial rights.
2. To review and examine the recent development in Muslim Personal Laws with respect to matrimonial rights.
3. To analyze directions issued by the judiciary with respect to the matrimonial rights of Muslim women.

HYPOTHESIS:

1. The existing law is inadequate to realize the matrimonial rights of the Muslim women.

2. Judicial interference has been inadequate in addressing the lacunae in the existing personal laws related to matrimonial rights of Muslim women.

CHAPTERISATION:

Chapter 1: Introduction: This chapter will deal with the concept of matrimonial rights, the need for codification of these matrimonial rights of Muslim women and why such rights are important in general.

Chapter 2: Constitutionality of personal laws: This chapter will deal with the constitutional validity of personal laws with special reference to the constitutional validity of the Muslim Personal laws.

Chapter 3: Muslim Personal laws viz a vis Matrimonial rights: This chapter will deal with the journey of legislations starting with the Shariat Act, 1937 till Muslim women (Protection of rights on marriage) Act, 2019, dealing with the with the matrimonial rights, her right to divorce, the schools of Muslim law from where these personal law hold validation etc. This chapter will also analyze the ShayraBano V. Union of India (2017).

Chapter 4: Inheritance and Maintenance- A Matrimonial Right: This chapter will deal with the right of Muslim women to claim their right of inheritance as her matrimonial right and the right to get maintained under the personal laws as well as under the central law like Cr.P.C., why was it a debate under the Shah bano begum case and the validity of the Muslim women protection (rights on divorce) Act, 1986 by the Daniel Latifi case.

Chapter 5: Conclusion

METHODOLOGY OF THE STUDY

The method used in the dissertation will be doctrinal research or non-empirical research methodology.

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## CHAPTER II

## CONSTITUTIONALITY OF PERSONAL LAWS WITH SPECIAL REFERENCE TO MUSLIM PERSONAL LAWS

**Introduction:**

There are various sources of laws of a State, and one of them is customs and usages. Customs and usages not only play an important role in following the personal laws but also drafting of the same. For a custom to be a valid source of law, there are certain essentials that are to be kept in mind. These are as follows[4]:

- Antiquity: A custom is said to be valid if such a custom has been followed from time immemorial. For example, in England, the reign of Richard I King (the year 1189) has been set as a timeline for the determination of the custom's antiqueness. But in the case of India, there is no such timeline that has been decided.
- Continuous: A custom has to be continuous in order to be considered a valid source of law. Any interruption in the following of the custom or long interval in the same will not be considered as a continuous valid custom.
- A matter of right: Custom should be followed with the information on the community. It ought not to have been practiced and professed covertly. A custom should end up being a matter of right. A simple dubious exercise of a right is not adequate to be called a legitimate custom.
- Reasonable: A custom should adjust to the standards of reasonableness and public utility. A custom, to be legitimate, ought to be founded on soundness and reason. In the event that a custom is probably going to cause more burden than comfort, that particular custom will not be substantial.
- Moral: A custom that is immoral or gone against public policy cannot be a legitimate custom. Courts have announced numerous customs as invalid as they were practiced for an immoral reason or were against public policy. The abolition of the practice of Sati is one such example.

[4] Rajendra Kumar, CUSTOM, Lucknow University (2019), https://udrc.lkouniv.ac.in/Content/DepartmentContent/SM_4c1bee9c-cb81-4e0f-b9aa-ef256ae4290b_30.pdf.

Barring the uniform laws like the Special Marriage Act[5], Criminal Procedure Code[6], the personal laws are backed with the religious customs and usages. In India, the personal laws act as an umbrella in the matters of marriage, divorce, succession/inheritance, guardianship/ adoption as these are followed. These personal laws provide for how a family is set up by governing the personal relations as per the customs and usages of a particular religion.

**Sources of Muslim personal law:**

The history of the Muslim Personal Laws in India can be traced during the medieval period. Prior to the British Rule, India was under the Mughal rulers. India has followed a lot of Islamic rules and regulations. The primary source of these Muslim laws was Quran. This source is supplemented by the learning and preaching of Prophet Mohammad, which is also known as Ijma and Qiyas.

The term Islam under the religious texts refres to "*a submission to the will of God"* and in the literal sense it means "peace, greeting, safety and salvation". Islam preaches, like all religions, that "all men are equal before the eyes of God and that the God will not be merciful to him who is not merciful to men."[7] The sources of Muslim laws can be bifurcated as follows:

A. Primary sources: The primary sources of Muslim Law incorporates the Quran (religious text), the Sunnat or Hadis(the tradition of the Prophet), the Ijma(decisions of the allies of Mohammed and his followers) and the Qiyas (analogical derivations got from a correlation of initial three sources). [8]
B. Secondary sources: The secondary sources of Muslim law includes Legislation, Customs and Judicial Decision.

Apart from the sources of Muslim law, while adjudicating matters that are relating to Muslim Personal laws, we also look into the schools of Muslim law. Just like in Christianity where there are two sects, Muslims are also divided into two sects, namely Shias and Sunnis.

[5] Act of 1954.
[6] Section 125 of Act of 1974.
[7] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 437 (Lexis Nexis, 3rd ed., 2015).
[8] DINSHAH FARDUNJI MULLA, PRINCIPLES OF MOHMEDAN LAW 15(Bombay Thacker, 1905).

The term **Quran** has its derivation from an Arabic word 'Quarra', which means 'to read'. It is said that Quran was revealed by God to Prophet Mohammed, through the agency of angel Gabriel and such revelation were done in a span of 23 years. Quran is not the book of law, but is concerned with the conduct of life. It differentiates true and false and also what is right and what actions are wrong. Quran is divided into chapters or "Sura", which comprises of different sub heads and has around 6000 verses. Approximately 200 verses deal with marriage, matrimonial reliefs maintenance, gifts etc.[9].

It also includes the guidelines for peace-building and order and the questions that actually came up for judgment. The Quran has repealed, especially hostile standards and guidelines of existence, for example, female infanticide, betting and so forth. The Quran also includes laws surrounding the protection of children, general status of women, inheritance etc. Women were granted rights of descent and successions, and were known as independent individuals. In Aga Mohammed Jaffer *v.* Koolsoom Beebee[10], it was held that as a guideline, courts implementing Mohmeddan law ought not to endeavor to place their own structure on the Quran as opposed to Mohmeddan's choice of incredible relic and high authority observers.

Sunna mean model conduct of the Prophet. The significance of the term Sunna is the Trodden path. Sunna contains the tales of Muhammad's proclaiming, his deeds, activities and so forth.[11] The portrayal of what Prophet stated, did or permitted implicitly recorded as a hard copy is called Hadis or traditions.[12] The Prophet's demonstrations and lessons are professed to be affected by Allah and are along these lines viewed as heavenly disclosures. In Abdul Fata Mahomed v. Rasamaya[13] , it was held that "Neither the ancient text nor the percepts of the Prophet Mohamed ought to be taken truly in order to reason from them new laws, particularly when such proposed rules don't conduce generous equity."[14]

Since Prophet was a religious leader first and later on a political leader, everything that he suggested and did were considered as Sunnat or Hadis. All his preaching and words were considered as **Sunnat –ul-Qual.** All his conduct and behavior were considered as **Sunnat- ul-**

[9] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 440 (Lexis Nexis, 3rd ed., 2015).
[10] (1897) 25 Cal 918.
[11] ONDER BAKIRCIOGLU, ISLAM AND INTERNATIONAL CRIMINAL LAW AND JUSTICE 25(Tallyn Gray et. al. eds. 2018)
[12] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 441(Lexis Nexis, 3rd ed., 2015).
[13] (1894) 22 Cal 619. 632.s
[14] DINSHAH FARDUNJI MULLA, PRINCIPLES OF MOHMEDAN LAW 16(Bombay Thacker, 1905).

**Fail**. And things which he approved without saying anything i.e., by mere silence are called **Sunnat-ul- Taqrir**.

The justification to use the Sunna as a source of law is itself given in Quran, whereby it is clearly given that "Whatever the Prophet gives acknowledge it, whatever he denies, you avoid it". The Sunna were not compiled till the lifetime of the Prophet, but the difference between Sunna and Quran is that when it comes to content the Sunnat is more authoritative in nature while the Quran is in itself the force.

The structure of Hadiths: Hadiths consists of two parts: *isnad* and *matn*. The former consisted of lists of narrators who gave accounts of the acts, preaching, teaching, judgment explicit and implicit views of the Muhammad and his immediate followers. The latter part comprises of the text which communicates the as to what the Prophet has reportedly has said or done.[15]

Kinds of Tradition:

i) Ahadis-i-Mutwatir are those beliefs that are universally accepted. There is no question about their conviction and many people have narrated this. Certain Islamic groups follow suit.

ii) Ahadis-i-Mashoor are the common practices recounted by the Prophet's companions and finding approval by masses. For a plurality it is the source of law, and not all.

iii) Ahadis-i-Ahad are the unique rituals not practiced frequently or by others. Acceptance and implementation is usually a localized one.[16]

Ijma implies the agreement of the companions of the Prophet, or even of exceptionally qualified legitimate scholars.[17] The Muslim community, after the Prophet, was agreeing to the human formulated doctrines and rituals which were not there in the Quran and Sunna. Despite the instructions of the Divine, the disciples of Muhammad (sahabah) used the general consensus system (ijma) to improve the application of Islamic Law. New rules were produced by this process and they formed a significant part of the Islamic law.

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[15] ONDER BAKIRCIOGLU, ISLAM AND INTERNATIONAL CRIMINAL LAW AND JUSTICE 27 (Tallyn Gray et. al. eds. 2018).

[16] K, *Sources of Muslim Law,* WORDPRESS (March.12,2021, 4:53 P.M.) https://kanwarn.wordpress.com/2010/08/24/sources-of-muslim-law/.

[17] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 441(Lexis Nexis, 3rd ed., 2015).

By deriving its authoritativeness from Quran and the Sunnat, Ijma can never be in inconsistency to any of them. The idea of Ijma must be advantageous in nature and can never attempt to revise or change the sources. Where Quran and Hadiths are quiet on the individual issues, the legitimate researchers of the extraordinary learning, called "Mujtahids", were urged to find a substantial end from Quran and Sunnat.[18]

The Ijma of the companions of the Prophet remain on a higher platform when contrasted with the Ijma of the legitimate legal jurist. The subject of importance and restricting nature of Ijma of different legal jurists has prompted the disparity of relevance and philosophies among different schools. The explanation being that there is a flat out nonappearance of rules as for the base and most extreme quantities of legal scholars required to show up at an agreement and there is no rules to decide if the accord must be in unanimity or by a dominant part.[19]

The meaning of Qiyas is reasoning using analogy or analogical findings from the past examined three sources of law, with exercise of reason.[20] Qiyas are valid in situations where although the terminology used in the primary sources do not address one specific empirical condition; it is nevertheless protected by applying the rule of justification. The Qiyas has to be distinguished with Rai (opinion). Rai means reasoning of an individual i.e., sound and considerable opinion. But when this Rai is aimed at maintaining a formal continuity, and is driven by an actual entity or judgment counterpart, it is called Qiyas.

**Schools of Muslim personal law:**

Muslims are divided into two groups: the Shias and the Sunnis. After the death of the Prophet Mohammed, there was a chaos in the spiritual leadership of this religion. The reason behind this division was to decide as to who is the successor of the Prophet Mohammed and the method of the appointment of the successor. Majority were of the view that the Jammat shall be followed in order to elect the Imam.[21]Both the sects are then further divided into various schools. Under the Sunni School, there are five sub-schools and under the Shia school, there are four sub-schools.

[18] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 442(Lexis Nexis, 3rd ed., 2015).
[19] Supra 18.
[20] Supra 18.
[21] *School of Muslim Law- History, Their Difference, Practice Obtainable*, LAWNN (March. 14th 2021, 4:30 P.M) https://www.lawnn.com/schools-of-muslim-law/.

**Sunni School:**

**a. Hanafi School:**

Hanafi School is the most popular school in Muslim Law. Before this school was called as Hanafi school, it was known as the Koofa School which was dedicated to a city Koofa in Iraq.[22] Later this school was named after Abu Hanafi who is the founding father of this school and one of the greatest Imam. Abu Hanafi did not write books in relation to the rules of this school. Therefore, this school grew and passed on its preaching with the help of two disciples of the Abu Hanafi- Abu Yusuf, who was the Chief Qazi at Baghdad, and Imam Mohammed, who was a great jurist. These two disciples gave a juristic preference and codified the ijma of that time. The popular book of this school is Hedaya. In addition to this, during the 17th century, the Fatwa –I-Alamgiri, compiled the commands of the Mughal Emperor Aurangzeb and were included in the Hanafi School Doctrines.[23] The cohorts of this school are prominent in India, Afghanistan, Pakistan, China, Bangladesh, Syria, Turkey, Lebanon and erstwhile Soviet Union.

**b. Maliki School:**

This school was established by Imam Malik bin Anas in 8th Century A.D. at Medina in Saudi Arabia. This school imparts the views and the practices that are prevalent in that city. He adopted the Prophet's practices and relied on the Ijma of the Mujtahids of Medina in case of any disagreements in these traditions. Kitab-Ul-Muwatta includes the teachings of the Maliki School. Maliki school followers are to be found in France, Morocco, North and East Africa.[24]

**c. Shafei School:**

The founder of the Shafei School was Muhammad ibn Idrish Ash Shafei and this school was founded in the ninth century. Muhammad ibn Idrish ash Shafei was also the founder of Qiyas and he established Ijma as a source of law. In India, Sunni Muslims of the

[22] DIGANT RAJ SEHGAL, *Schools of Muslim Law,* IPLEADERS (March 14, 2021, 3:45 P.M.) https://blog.ipleaders.in/schools-of-muslim-law/.
[23] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 445(Lexis Nexis, 3rd ed., 2015).
[24] Ibid.

Southern region, follow this school. The followers of this school are found in Egypt, Malaysia, Cairo, Indonesia, and in the western and southern India. [25]

**d. Hanabali School:**

This school was likewise established in the ninth century by Imam Ahmad bin Hanabal of Baghdad. This school is considered as one of the most conventional out of the four schools. Because of its inflexibility, this school didn't succeed for an extensive stretch of time. The Hanabilis are increasingly centered around the exacting understanding of the Quran and the Hadis and consummated the precept of usul. The books of this school are Taat-ur-Rasul and the Kitab-ul-Alal. The adherents of this school are pervasive in Syria, Palestine and Saudi Arabia.[26]

**Shia Schools:**

An understanding of Imamate is necessary so that the meaning of the Shia schools can be well understood. The term Imam is comprehended as the "*one leading the prayers or the highest priest at a mosque"*.[27] The Imamate descends in the immediate male lineage of the Prophet, by divine command, as per the Shias. Therefore, the first Imam, according to Shia's, was Ali as well as the Caliph. As per the Shia's, once the Imam has been elected, this cannot be undone.

The Shias are divided into three schools:

**a. Zaidya School:**

The cohorts of this school consider Zaid as their Imam. The practice and followers of this school are in Yemen and are not found in India. This faction is considered the most powerful, and is active in Yemen politically.[28]

**b. Ismailiya school:**

The cohorts of this school take Ismail as their seventh Imam and are commonly referred to as the seveners (sabiyan). According to them, Imamate came down to the Ismail on

[25] Supra 24.
[26] DIGANT RAJ SEHGAL, *Schools of Muslim Law,* IPLEADERS (Feb.14, 2021, 3:45 P.M.) https://blog.ipleaders.in/schools-of-muslim-law/.
[27] Supra 26.
[28] Supra 26.

Jafar's passing, the sixth Imam. Ismail's supporters kept him mystery from the Abbasids, and he was also called Ismail-al-Muktum (covered up). Ismaili Imamate went to the Caliphs of Fatimid, however after the eighth Imam there was a break. The school's cohorts are prominent in India, Pakistan, Syria, and Central Asia.[29]

**c. Ithna Ashari:**

Sometimes named the Ithna Asharis as the Twelvers. The twelveth Imam departed to return as Mehdi (Messiah) on judgment day. The school's adherents are mostly to be found in Iran and Iraq. The school's adherents are known as the ideological quietists.

**Secularism:**

The term secularism finds its roots from the term '*secularsiation'* which was first used in the year 1648 after 30 years of war for the transfer of Church properties to the exclusive control of the princes in Europe. In 1851, the term secularism was coined by George Jack Holyoaked who led a national movement.[30] It thus can be interpreted as a doctrine which has true religious morality, tolerance and freedom of worship and faith to the citizens of the country irrespective of their caste, sex, creed, race, gender etc.

In the words of DE Smith, the expression secular state is defined as: *"A secular state is a state which guarantees individual and corporate freedom of religion, deals, with the individual as a citizen irrespective of religion, is not constitutionally connected to a particular religion nor does it seek to promote or interfere with it."* The Preamble of the Constitution of India, 1949 provides for the term SECULAR. This means that India is a State that observes an attitude of neutrality and impartiality towards all the religions that are existing in this country. A secular state is based on the idea that the State is concerned with relation which exists between two individuals rather than the relation between an individual and its faith.[31] Shri H.V Kamath was of the opinion that *"On the off chance that a State distinguishes itself with a specific religion, there will be a difference inside the State. All things considered, the State addresses every one individuals, who*

[29] DR. POONAM PRADHAAN SAXENA, FAMILY LAW LECTURES- FAMILY LAW II 447(Lexis Nexis, 3rd ed., 2015).
[30] S.M.A.W. Chishti, SECULARISM IN INDIA: AN OVERVIEW, The Indian Journal of Political Science , April-June, 2004, Vol. 65, No. 2 (AprilJune, 2004), pp. 183-198.
[31] DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 132 (Lexis Nexis 2018).

*live inside its regions, and, hence, it can't stand to recognize itself with the religion of a specific part of the populace."*[32]

The State is under an obligation to treat all the religions equally. A State shall not be interfering with the religious beliefs of a particular religion. Part III of the Constitution of India, 1949 which provides for Fundamental Rights, states the "right to practice, profess and propagate religion" A right to religion can be considered as a natural right. A citizen born in a specific religion has a right to profess, propagate and follow its religion and the state shall not intervene in deciding whether such a citizen has a right or not.

Features of a secular state:

According to S.M.A.W Chishti[33], a secular state is a state which does not follow or recognize any state religion. It respects and provides the citizens the freedom to profess, propagate and follow the religion that they want to. There are certain characteristics which have been highlighted by S.M.A.W. Chishti which constitutes a secular state. These characteristics are explained as:

- ***Religious tolerance:*** A secular state is the one which allows all the religions to co-exist in a society. The state does not impose or restrict any practice, propagation and following of any religion by the citizens. Such a state ensures that there is smooth and peaceful functioning of all the religions in the society and the citizens enjoy their right to religion.
- ***Discouragement to bigotry:*** It is the duty of a secular state that it should discourage any unreasonable attachment to any religion or any religious group which would undermine or demean any other religion or religious group. The secular state protects the fundamental right and liberty of the citizens who succumb being the victims of the religious bigotry.
- ***No funding of religious education by government:*** In a secular state, a State cannot fund any religious educational institution. As a secular state, all religions are equal and morality has the higher ground. Such a state provides for education where students are

[32] Constitutional Debates on 6th December, 1948 (Part I).
[33] S.M.A.W. Chishti, SECULARISM IN INDIA: AN OVERVIEW, The Indian Journal of Political Science, April-June, 2004, Vol. 65, No. 2 (April-June, 2004), pp. 183-198.

taught supremacy of morality and the syllabus is such that it comprises of moral education irrespective of the religion.

**Constitutional validity of personal laws:**

Can the court intervene in the matters of personal law: a dilemma?

While understanding the constitutional validity of the personal laws, the Judiciary has quite not taken a proper stand as to whether they are under the position to decide its validity or not. The court in some cases have refrained themselves from getting involved in matters pertaining the personal laws while in some cases have actively taken part in deciding matters that are under personal law and whether such a law is constitutionally valid or not.

In ***Krishna Singh v. Mathura Ahir[34]:*** a two judge Bench of the Supreme Court was thinking about can a shudra turn into a sanyasi. While holding that if the custom and usages allowed he could so turn into, the Court held that without such use or custom he was unable to be so appointed. The High Court had held that any impairment endured by a Shudra as indicated by the personal law would be disregarding Articles 14 and 15 of the Constitution. It would be violative of the equity condition as additionally it would be segregation based on position. Disliking this perception the Supreme Court expressed, that the learned High Court judges neglected to see the value in that part III of the Constitution does not address the personal laws of the parties in issue. In applying the personal laws, he (the High Court judge) couldn't present his own ideas of current occasions however ought to have upheld the law as gotten from perceived and definitive wellsprings of Hindu laws, for example Smritis and discourses alluded to, as deciphered in the decisions of different High Courts, aside from where such law is adjusted by any utilization or custom or annulled by rule. In ***Maharshi Avdhesh v. Union of India[35]:*** A petition was filed under Article 32 of the Constitution of India, where the petition was seeking two reliefs. They were the enactment of the Uniform Civil Code and the declaration of the unconstitutionality of the 1986 Act[36]. The issue was resolved by a two-judge Bench of the Supreme Court with a perception that these are issues for the Legislature. However, successfully the Supreme Court held that even codified personal law cannot be tested on the grounds of the fundamental rights.

[34] AIR 1980 SC 707.
[35] 1994 Supp (1) SCC 713.
[36] Muslim Women (Protection of Rights on Divorce) Act, 1986.

***Masimalani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*** [37]**:** This case plays a major role when we see that how the court took a contrary view while observing whether personal laws will be tested according to the Fundamental rights or not. On one hand the court has held that the personal laws are not susceptible to the fundamental rights. But in this case, the court made some observations which prove that there is a need for the personal laws to be tested on the grounds of the fundamental rights. These observations are as follows:

a. *"The basic structure of the Constitution of India pervades balance of status and opportunity. The personal laws presenting mediocre status on women in the society are an abomination to balance. Personal Laws are sourced not from the Constitution but rather from the strict sacred writings. The laws consequently determined should be steady with the Constitution in case they become void under Article 13 in the event that they disregard principal rights."*

b. *"The General Assembly of the United Nations on 4.12.1986 adopted "The Right to Development" where India played a crusading position for its gathering and endorsed something almost identical. Its prelude sees that each fundamental freedom and key freedoms are imperceptible and dependent. All Nation States are stressed at the presence of real hindrances to headway and complete fulfillment of people, denial of normal, political, monetary social and social rights. To propel improvement comparable thought should be given to the execution, headway and security of normal, political monetary, social and political right."*

c. *"Art. 1 guarantees right to improvement a natural basic liberty, by goodness of which each individual and all individuals are qualified for take part in add to, and appreciate monetary, social, social and political advancement in which every common freedom and crucial opportunities can be completely figured it out. Article 6 (1) commits the State to recognition of every basic liberty and key opportunities for all with no separation as to race, sex, language or religion. Sub-article (2) rejoins that ... equivalent consideration and pressing thought ought to be Sub-Article (2) urges that ... equivalent consideration and earnest thought ought to be given to execute, advancement and assurance of common, political, financial, social and political rights. Sub-article ( 3) thereof charges*

[37] 1996 8 SCC 525.

*that:- " State should find ways to dispense with deterrent to improvement, coming about because of inability to notice common and political rights just as monetary, social and financial rights. Article 8 projects obligation on the State to undertake...necessary measures for the reaslisation of right to improvement and guarantee, bury alia, fairness of chance for all in their admittance to premise assets ... furthermore, circulation of pay. "The common liberties for ladies, including young lady kid are, hence, unavoidable, vital and resolute piece of general basic freedoms. The full improvement of character and essential opportunities and equivalent investment by ladies in political, social, monetary and social life are concomitants for public turn of events, social and family steadiness and development socially, socially and monetarily. All types of segregation on grounds of sexual orientation is violative of principal opportunities and basic liberties."*

d. *"Article 15 (3) of the Constitution of India emphatically guarantees such Acts or exercises. Article 21 of the Constitution of India upholds " right to life". Value honorability of individual and right to progress are natural rights in every individual. Life in is broadened horizon consolidates all that offer importance to a singular's life including society, heritage and custom with satisfaction of person. The satisfaction of that legacy in full measure would incorporate the right to life. For its importance and reason each lady is qualified for end of impediments and separation dependent on sexual orientation for human turn of events. Ladies are qualified for appreciate monetary, social, social and political rights without segregation and on a balance of equity. Similarly to effectuate essential obligation to foster logical attitude, humanism and the soul of enquiry and to endeavor towards greatness in all circles of individual and aggregate exercises as urged in Articles 51-A(h) (j) of the Constitution of India, offices and openings not exclusively are to be accommodated, yet in addition for all types of sex based segregation ought to be disposed of."*

e. *"Be that as it may, the right to equality, eliminating impediment and oppression a Hindu female by reason of activity of existing law ought to be in similarity with the right to balance revered in the Constitution and the individual law likewise should be in congruity with the Constitutional objective."*

Again in ***John Vallamattom v. Union of India*** [38], a three Judge Bench of the Supreme Court when deciding about the Constitutional validity of S. 118 of the Indian Succession Act, 1925, a pre Constitutional personal law pertinent basically to Christians and Parsis. Considering Ahmedabad Women's Action Group case and different Judgments, the Supreme Court might have effortlessly excused the matter by just holding that this law, being a personal law and being a pre Constitutional law was not "law in force" according to Article 13 of the Constitution of India and consequently not defenseless to challenges on grounds of infringement of major rights. The Court checked its Constitutional validity and struck it down as being violative of Article 14 of the Constitution. The court observed:

a. *"It is neither in question nor in debate that proviso (1) of Article 13 of the Constitution of India explicitly expresses that all laws in power in the region of India preceding the beginning of the Constitution, to the extent that they are conflicting with the arrangements of Parts III thereof will to the degree of such irregularity be void. Keeping in see the way that the Act is a pre Constitution establishment, the inquiry as respects its Constitutionality will, along these lines must be decided as being law in power at the initiation of the Constitution of India. By reason of proviso (1) of Article 13 of the Constitution of India perforce doesn't make a pre Constitution legal arrangement protected. It only makes an arrangement for the materialness and enforceability of pre constitution laws subject obviously to the arrangements of the Constitution and until they are adjusted, revoked or changed by a capable council or other equipped specialists."*
b. *"In any perspective on the matter regardless of whether provision was constitutional on the day on which it was authorized or the Constitution came into power, by reason of realities arising out from there on, the equivalent might be delivered unlawful. The world has seen an ocean change. The right of correspondence of ladies opposite their male partners is acknowledged around the world. It will be unethical to segregate a lady on the ground of sex. It is illegal both in our law as likewise in global law."*
c. *" It is regardless of uncertainty that marriage, progression and such matters of a mainstream character can't be brought inside the assurance cherished under Articles 25*

[38] 2003 6 SCC 611.

*and 26 of the Constitution. Any enactment that brings progression and such matters of common person inside the ambit of Articles 25 and 26 is a suspect legislation....."*

The constitutional validity of personal laws has been questioned through the process of judicial review. The expression judicial review refers to the power of the court to declare a law as invalid/void in case such law is not consistent with the Basic Structure of the Constitution. Article 13 mentions that if any law that has been enacted by the Legislature is inconsistent with the Part III of the Constitution of India, then such law stands void. In the matter of A.K. Gopalan *v.* State of Madras[39] the then Chief Justice of India, Kania C.J. observed the following-

*"**The inclusion of Article 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any fundamental right was infringed by any legislative enactment, the court always has the power to declare the enactment, to the extent it transgresses the limits, invalid."**[40]*

In Minerva Mills *v.* Union of India[41], Y.V. Chandrachud C.J, observed the following: ***"It is the duty of the judges, may their obligations, to articulate the legitimacy of laws. In case courts are denied of that power, the principal rights gave on individuals will turn into a simple decoration since rights without cures resemble writ in water. A controlled constitution will then, at that point, become uncontrolled."***

There have been several landmark cases which have questioned and explained the constitutionality of the personal laws through the process of judicial review. The judgement of **State of Bombay *v.* Narasu Appa Mali[42]** plays a major role in the understanding that whether to what extent personal laws can be subject to the Fundamental Rights enshrined under The Constitution of India, 1949. In this case, the constitutional validity of Bombay Prevention of Hindu Bigamous Marriage Act, 1946 was challenged as violative of Article 14, 15 and 25 of The Constitution of India, 1949. The court in this case clarified on two issues:

- **Whether the act is violative of Articles 14, 15 and 25? and**
- **Whether the personal laws are "law" under Article 13 of the Constitution of India?**

[39] (1950) SCR 88 (100).
[40] DURGA DAS BASU, COMPARATIVE CONTITUTIONAL LAW 406 (Lexis Nexis 2020).
[41] (1980) AIR SC 1461.
[42] AIR 1952 Bom 84.

**Issue whether the impugned Act is violative of Article 14, 15 and 25 of the Constitution of India or not:**

a. Article 25[43]:The Bombay High Court first dealt with the fact that the impugned Act is violative of Article 25 or not. The Article 25 of the Constitution of India provides for the ***Freedom of conscience and free profession, practice and propagation of religion*****.** The Article 25(1) states that it is the right of the person to profess, practice and propagates its religion subject to public order, morality and health. The State has a right to make laws with respect to the following aspects:

   (i) Regulating and restricting any economic, financial and political or other secular activity which may be associated with religious practice.

   (ii) 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.[44]

   The court was of the opinion that if the State frames legislation with respect to marriage, this cannot be disputed. Considering that monogamy is the way by which the State is incorporating a social reform, the court held that the State is empowered to make such a law under the Article 25 of the Constitution of India, 1949. On the question whether the State has the power to decide as to what constitutes social reform, the court was of the opinion that the Legislature is chosen by the people. It is the responsibility of the legislature to provide for the welfare of the state and shall lay down the policy in pursuance of such welfare. Therefore, if the Legislature has come to a decision that monogamy can lead to a welfare State, in the opinion of the Court, the impugned legislation is not in contravention of the Article 25 of the Constitution of the Court.

b. Article 14 and 15[45]: On deciding whether the impugned legislation is violative of Article 14 and 15 of the Constitution of India, the Court was of the opinion that Article 14 and 15 emphasize on the equality before law. The only difference between the abovementioned two Articles is that Article 14 which provides that the State cannot deny any person to exercise his right of equality before law or equal protection of law. The right under

[43] Constitution of India, 1949.
[44] Article 25(2) of the Constitution of India, 1949.
[45] Constitution of India, 1949.

Article 14 is conferred upon every person. On the other hand, the right under Article 15 provides that no person shall be discriminated on the ground of religion, race, caste, sex, and place of birth or any of them.[46] The right provided by this Article[47] is limited to the citizens of India. The court was of the opinion that Article 15(1) mentions that there is a possibility of discrimination on reasonable grounds[48] (the legislation shall not be arbitrary in nature). It is on the Legislature to decide whether such reasonable restriction is within the ambit of the principle laid by the Article 14 of the Constitution of India.[49]

**Issue whether the personal laws are "law" under Article 13 of the Constitution of India?**

On deciding whether personal law comes under the ambit of Article 13 of the Constitution of India, 1949, the Bombay High Court explained the meaning of law in force and when a law is considered as inconsistent with the Constitution of India. Article 13(1)[50] stipulates that all laws that were enacted and enforced in India before the independence will be void to the Constitution of India if such laws are violative or inconsistent with the Part III of the Constitution of India. The legislation will be void till the part of the inconsistency with the Part III of the Constitution. In order to understand what the Drafters of the Constitution of India meant by the term "laws in force", Article 13(3) (b) provides such clarity. According to the Article 13(3) (b) of the Constitution of India, law in force means *"Law in force incorporates law passed or made by the lawmaking body (the legislature) or other authorized body in the domain of India before the beginning of this Constitution and not recently canceled, regardless that any such law or any part thereof may not be then in activity either by any stretch of the imagination or specifically regions."*[51] Article 13 (2) of the Constitution of India provides that the State shall not make any law that takes violates the fundamental rights of the citizens. If there is a custom or usage that violates or is inconsistent with the fundamental rights, then such custom or usage is void in

[46] Article 15(1) of the Constitution of India, 1949.
[47] Article 15(1) of the Constitution of India, 1949.
[48] Doctrine of reasonable restrictions: The doctrine of reasonable restriction means that the Fundamental rights can be enjoyed but the legislature has the right to enact such laws which can be violative if it is within the reasonable restrictions mentioned under Article 19 of the Constitution of India. The reasonableness of a restriction shall not be excessive and beyond what is needed in the larger interest of the society.
[49] Doctrine of non-arbitrariness: The doctrine of non-arbitrariness mentions that the Legislature has the power to determine and classify subject of law but such law shall not be arbitrary in nature. The Supreme Court of India laid this doctrine for the first time in E.P. Royappa v. State of Tamil Nadu (1974 AIR 555).
[50] Constitution of India, 1949.
[51] Article 13(3)(b) of the Constitution of India, 1949.

nature. The term used in Article 13(3) under the definition of law is custom and usage and not personal laws. Thus, personal laws do not come under the definition of law under Article 13(3). According to Article 372(1) of the Constitution of India, 1949, states that the laws that have been existing even before the enactment of the Constitution, will continue to be applicable if and only if they are in consonance with the constitutional provisions and these acts will be considered as valid until and unless they are either amended or repealed by a competent Legislature or competent authority. According to the language of Article 372 that the term "law in force" does not include personal laws because Article 372(2) provides that the President can make adaptations and modifications to the law in force and nowhere under this provision, the President cannot make such alterations in the personal law of any community. Personal laws are not law in force as they are based on religious percepts and customary practices. Thus, the Fundamental rights which are enshrined by the Part III of the Constitution of India are not applicable to the personal laws.

In the case of **Harvinder Kaur *v.* Harmander Singh**[52]**,** the issue before the court was that whether the Section 9 of the Hindu Marriage Act, 1954 which provides for the relief of restitution of conjugal rights is violative of Article 14 and 21 of the Constitution of India or not. In this case, the Delhi High Court criticized the induction of constitutional law in the matters of family law. The court observed: *"In the seclusion of the home and the wedded life, neither Article 21 nor Article 14 of the Constitution of India has any spot. In a touchy circle which is on the double generally personal and sensitive, the presentation of the chilly standards of established law will debilitate the marriage bond.....In the home the thought that truly gets is the regular love and warmth which includes for so minimal in cool courts. Sacred law standards discover no spot in the homegrown code."*[53] This matter was resolved by the Supreme Court in **Saroj Rani *v.* Sudershan Kumar**[54] where the issue before the Court was whether a husband who has obtained the decree of restitution of conjugal rights by decree but refuses to comply with it and later use it as a ground for divorce. The court on deciding the constitutional validity of the restitution of conjugal rights the court observed: *"It [a decree of restitution] fills in as a social reason as a guide to the anticipation of separation of marriage. It can't saw in the way the*

[52] AIR 1984 Del 66.
[53] AIR 1984 Del 66.
[54] AIR 1984 SC 1562.

*learned appointed authority of Andhra Pradesh High Court has seen and we are in this way unfit to acknowledge the position that Section 9 is violative of Article 21 and 14 of the Constitution of India if the reason for the pronouncement is the compensation of intimate rights… is perceived in its legitimate viewpoint and if the technique for its execution in instances of noncompliance is kept in see."*

**Constitutional validity of Muslim Personal Laws:**

In the case of **Ahmedabad Women's Action Group *v.* Union of India**[55] three writ petitions were filed challenging various personal laws. Under the first writ petition, it was sought that certain aspects of Sharia law were violative of Article 14 and 15. These aspects are existence of polygamy, summary divorce, Shia law of inheritance is violative of the principle of equality enshrined under Article 14 and 15 of the Constitution of India. Under the second writ petition the provisions of Hindu Marriage Act. 1955; Hindu Succession Act, 1956; and Hindu Guardianship Act was violative of Article 14 and 15. The court quoted the judgment of State of Bombay case[56] while deciding whether the personal laws are under the ambit of Part III of the Constitution of India. Relying on the judgment pronounced by in State of Bombay v. Narasu Appa Mali, Gajendragadkar J., observed the following: *"The Constitution of India perceives the presence of personal laws in the sense when the issue falls under the Concurrent list. This thing manages the subjects of marriage and separation; newborn children and minors; reception and so forth… on the grounds that as I would see it, the composers of the Constitution needed to avoid the personal laws with regards to the ambit of the part III of the Constitution of India. Their intentention was not to test the Personal Laws by reason of the Fundamental rights ensured under Part III of the Constitution."*

But in the case of Triple Talaq, the court went on to decide the constitutionality of the personal laws. The court moved ahead of the precedent that was set in State of Bombay v. Narasu Appa Mali case where it was held that the personal laws are not "law" under the Article 13[57]and thus the personal laws are not under the ambit of the Part III of the Constitution of India.

[55] AIR 1997, 3 SCC 573.
[56] State of Bombay v. Narasu Appa Mali.
[57] Constitution of India, 1949.

In the matter of **Shayara Bano *v.* Union of India**[58], the question before the Court was that whether the precedent set in State of Bombay *v.* Narasu Appa Mali which provides that the personal laws are not within the bounds of Article 13 (1) of the Constitution of India is correct or not. Rohiton Fali Nariman J. while pronouncing judgment on behalf of U.U. Lalit, J., observed that since the 1937 Act was enacted by the Legislature prior to the enforcement of the Constitution of India, 1949, the said Act will come under the purview of the expression "law in force" as mentioned under Article 13(3) (b) and would come under the purview of Article 13(1) as it is inconsistent with the provisions provided under Part III of the Constitution of India, to the extent of such inconsistency. In this case, it was also argued that the practice of Triple Talaq is an essential element of the Islamic practices and thus is protected under Article 25 of the Constitution of India. The Article 25 provides for the freedom of conscience and free profession, practice and propagation of the religion. But this provision also states that such practice, profession and propagation of the religion shall not be violative of the public order, morality and health. The protection that is guaranteed under the Article 25 and 26 of the Constitution of India is not confined to the matters of doctrine or belief but it stretches out to acts done in compatibility of religion and, thusly, contains an assurance for customs, recognition, services and methods of love which are fundamental or essential piece of the religion.[59] On further explanation, the court observed *"What constitutes an integral or essential part of religion has to be determined with reference to its tenets, doctrines, practices, historical background etc., of the said religion. The test to decide if a practice is fundamental for a religion is to see if the idea of the religion will be changed without that part or practice."*[60] When the Court applied the test, it was observed that with the removal of the practice of Triple talaq, the fundamental nature of the Islamic religion will not be affected. Thus, it was held by the Apex court that the practice of Triple talaq is arbitrary in nature as it breaks the marital bond capriciously and whimsically by Muslim male without attempting for reconciliation. It is violative of Article 14 of the Constitution of India. The 1937 Act[61] is inside the extent of Article 13(1) and should be struck down to the degree that it perceives and upholds Triple Talaq in India. It has been observed in this case that the court only went on to decide whether the 1937 was valid or not and not the

[58] (2017) 9 SCC 1.
[59] Commissioner of Police v. Acharya Jagdishwarnanda Avadhuta, 2004 (12) SCC 770.
[60] Commissioner of Police v. Acharya Jagdishwarnanda Avadhuta, 2004 (12) SCC 770.
[61] The Muslim Personal Law (Shariat) Application Act, 1937.

entirety of the personal laws. The majority in this case did not delve upon whether personal laws can be subject to the provisions of the Part III of the Constitution or not. On the other hand, the minority decision which was pronounced by Justice Kehar relied on the decision given in State of Bombay v. Narasu Appa Mali.

**Conclusion:**

Any law which is inconsistent to the fundamental rights will be considered as void as per the Article 13 of the Constitution. On the same lines, Article 372 provides that any law which contravenes the provisions of the constitution or has not been enacted by the appropriate legislature or any competent authority will be considered as void.[62] From the case laws that have been mentioned, we can understand that the court is itself confused whether they should intervene in the matters of personal law or not. In some judgments like the Mudaliyar case, the John Vallamatton case, the courts took a progressive approach and held that the personal laws shall be consistent with the fundamental rights in order to stay valid irrespective of the fact that they were enacted before or after the enactment of the Constitution of India. Since the constitution is the grundnorm for all the laws and fundamental rights is a part of the same, it is essential that the personal laws shall be considered as laws and shall be subject to the fundamental rights. But the courts have also refrained itself from commenting over the constitutional validity of the personal laws. Even in Shayra Bano case, the majority judgment did not comment over the constitutional validity of the personal laws. Thus, it can be said that whether personal laws come under the ambit of Article 13 is still a question.

[62] Article 372 (1) of the Constitution of India, 1949.

## CHAPTER III

## MUSLIM PERSONAL LAWS VIS A VIS MATRIMONIAL RIGHTS

**During the colonial period:**

In the medieval period, the personal laws were used for the settlement of the issues between the parties. All the laws, be it civil, criminal and procedural laws, were based on the religious practices. As India was under the Mughal rule before colonization, majority of the laws were influenced by the Islamic law.

It was during the colonial period, that for the first time, the Muslim personal laws were codified. The officials of the East India Company took the responsibility of translating the Islamic legal texts and publish them. The Charter of 1753 under the British rule gave Hindus and Muslims the right to practice their personal laws. The Crown will not interfere in the matter unless the parties decide to take the matter to the Court.

The Hastings Judicial Plan of 1772 is known for the establishment of the Adaalat system in India. Under the Plan of 1772, it was provided that all civil matters, such as disputes relating to property, inheritance, marriage, caste etc were to be decided by the Mofussil Diwani Adaalat. It was also provided that in case of any religious matters like marriage, inheritance etc, the Muslims will be regulated by the laws of the Quran and the Hindus will be regulated by the Shastras.[63] For the adjudication of matters which involved Muslim personal laws, the English Judges consulted the Maulvis[64]. These religious practices were codified through precedent.[65] Even after the judicial reform[66] introduced by the Lord Cornwallis in India, the personal laws remained untouched. The Judicial Committee of the Privy Council in 1866 (the then highest court of appeal during the colonial period) placed Shariat law[67] on pedestal. Shariat law went

[63] Chapter III, Evolution and Growth of Personal Laws in India, https://ir.nbu.ac.in/bitstream/123456789/2825/12/12_chapter%203.pdf.
[64] A Maulvi is a learned teacher or doctor of Islamic law. He ministers to the religious needs of the others.
[65] Lekshmi Parameswaran, *The History of Personal Laws in India,* INDIA POLICY FOUNDATION (ed.1, 2020 , pg-6).
[66] Lord Cornwallis introduced The Cornwallis Code, 1793. This code brought a major change in the judicial system of India. The Code introduced reforms in the police, commercial reforms by separating administrative and commercial services, permanent settlement in Bengal, suppression of bribery etc.
[67] Also known as the Muslim Personal Laws.

through a transformation when it was being reformed and codified. They were codified so that they can be applicable in different social contexts.

The Muslim Personal (Shariat) Application Act, 1937: The Muslim Personal (Shariat) Application Act, 1937[68] was the first enactment towards the codification of Muslim personal laws in India. The Act of 1937 provided that Shariat is applicable to all the subject matters relating to succession, marriage, divorce, maintenance, property of females, dower etc., where the parties are Muslims.[69] The Shariat Application Act, 1937 provides that in matters of personal legal issues, it is the Islamic law which shall prevail. The State shall not interfere in the matters which are of such a nature. This Act, however, fails to codify the Islamic law. It is provided under this act that the Islamic law that is regulated by the Islamic texts and practices shall be considered as a law. The Act fails to provide for exact provisions with respect to the matters that pertain to personal legal issues. In other words, it acts like a guideline as to how the State shall not interfere in the codification of the laws. One of the leading cases under the 1937 Act is **Mohammad Ahmed Khan *v.* Shah Bano Begum**[70]. The facts of the case were that following 43 years of marriage, Shah Bano's significant other, Mohammed Ahmed Khan, a rich and notable attorney, pushed his wife, Shah Bano, out of their conjugal home. At that point, alongside her five kids, Shah Bano was tossed out in old age. Shah Bano filed complaint under area 125 of the Code of Criminal Procedure (Cr. PC) for maintenance. The Section 125 of the Code mentions the right of the maintenance. Section 125(1) of the Code mentions the people who are entitled to receive maintenance. Such people includes the wife (if she is not having sufficient means to maintain herself), the child which was born before he got married, the child who may be an illegitimate or legitimate but is not in a sound mental or physical condition (except for his daughter who is married) and his parents who are not able to maintain their living. The Magistrate in such cases has the jurisdiction to pass an order whereby such order directs the person to maintain such people. The Section 125 (2) mentions that the maintenance will be provided for such people from the date when the Magistrate passes the order and that the person has to abide by the order. In case where the person fails to provide the maintenance to such a person as mentioned in Section 125(1) of the Code, then the Magistrate has the power to issue a

[68] Hereinafter referred as the Shariat Application Act, 1937.
[69] Section 2 of the Muslim Personal (Shariat) Application Act, 1937.
[70] 1985 AIR 945.

warrant whereby it will be mentioned the amount that is outstanding for the person to pay and such payment either has to be done in a wholesome amount or has to pay as their monthly allowance. Even after that if he fails to do so, he is then punished with imprisonment which can be for a month or for the period till the time such payment is not made. This has been provided under Section 125(3) of the Code. A husband is not entitled to pay the amount for maintenance under the following circumstances[71]:

a. If such wife is living in adultery with another man
b. Without any specific reason does not live him
c. If by mutual consent they refuse to cohabit.

In case it is proved in the Court that such wife has been living in adultery with another man, or refuses to stay with her husband without any specific reason or has my mutual consent refused to cohabit, then the order of maintenance shall be revoked by the Magistrate.[72]

Shah Bano brought to court under the universally applicable Code of Criminal Procedure, instead of putting it under un-codified personal laws which are often perceived in a gender-discriminatory manner. The Muslim religious leaders responded the way they did, because the decision had the potential to change the Muslim woman: the embodiment of Islamic values and culture that was not to be dealt with by those who wanted to maintain it as it was. When the judiciary eroded the framework of Muslim Personal Laws, it was viewed by the Muslim community as a violation of the principle of secularism as secularism as they saw it was recognition by the State of various religious traditions. While the Muslim community saw Shah Bano as an example of a Muslim woman, the Supreme Court saw her as an Indian resident whose case would be judged on the grounds that she was an equal citizen of the country and deserved the same protection regardless of her religious identity.

<u>The Dissolution of Muslim Marriage Act, 1939:</u>

Khula is an offered which is made to the spouse by the wife so as to cut off the conjugal association between them. In the event that the spouse acknowledges such offer, at that point he will deny his significant other and such denial of wife will be considered as permanent. A

[71] Section 125(4) of the Code of Criminal Procedure, 1973.
[72] Section 125(5) of the Code of Criminal Procedure, 1973.

separation by method for Khula is a separation with assent, and at the case of spouse. The Quran expresses the accompanying as for khula: *"It isn't legitimate for you to take from them anything of what you have given them, except if both dread that they cannot keep inside God's limits. So if ye dread that ye can't keep inside God's limits, there is no wrongdoing in you both about what she emancipates herself with. It is not a deal/bargain by husband to the wife."*[73]

Prophet Mohammad said "if, a woman be preferential by a marriage, let it be severed." [74] A woman can take divorce by way of khula or mubaarat or by seeking judicial decree. The essentials of khula are:

a. The common consent of the husband and wife
b. Some iwad (return, consideration). This iwad or return should be accorded between the parties for a consideration paid or payable to the husband by the wife. Such an agreement if the wife wants the marriage to be dissolved by herself is called Khula.

The legal presumption is that while talaak is usually precipitated by the irregular behavior of the wife, khula is caused by that of the husband, in which case it is reprehensible that he should be given any consideration. This has been mentioned in the Marghinani, Hidaya, II, 14. Such type of divorce is irrevocable in nature. Mubaraat is also a mode of divorce whereby the divorce is done by a mutual agreement between the husband and wife. Before independence, The Dissolution of Muslim Marriage Act, 193975 was considered as one of the landmark legislation where it re-introduced right to divorce of the wife.

The salient features of the Act of 1939 are as follows:

(i) The grounds that are available for the dissolution of marriage under Section 2 of the Act are exclusively for women. The Act of 1939 will be applicable irrespective of the fact that the marriage was solemnized before or after enactment.

(ii) The grounds for divorce are as follows[76]:

a. The whereabouts of the husband are unknown for four years;

[73] Quran, II, 229.
[74] DR. M.A. QURESHI, MUSLIM LAW p-132 ( Central Law Publications, 4th ed., 2015).
[75] Hereinafter referred as the Act of 1939.
[76] Section 2 of The Dissolution of the Muslim Marriage Act, 1939.

b. The husband has failed to provide maintenance to the wife for a period of two years;
c. The husband has been sentenced for imprisonment for a minimum period of seven years;
d. The husband has failed to perform his marital obligations (without reasonable cause) for a period of three years;
e. The husband has been suffering from insanity for two years or leprosy or any venereal disease;
f. The husband is impotent at the time of the marriage and continues to be so
g. The wife, having been given in marriage by her father or any other guardian before she attained the age of fifteen years, repudiated the marriage before she attained the age of eighteen years. Provided that the marriage has not been consummated.
h. Cruelty towards wife
i. Any other ground which is recognized as valid by the Muslim Law as a valid ground for the dissolution of the marriage.

(iii) According to the Section 2 of the Act, there are nine grounds under which divorce can be sought. Out of these nine grounds, seven grounds are such which provide a wife to seek divorce on fault of her husband. Section 2 (vii) of the Act of 1939 provides that the wife has a right to seek divorce through a judicial decree before she reaches the age of eighteen. A condition has been attached with the same that the marriage shall not be consummated when she seeks such matrimonial relief.

In Noor Jahan Bibi *v.* Kazim Ali[77], the petitioner filed a case against the respondent alleging that the respondent charged her of bad character. It was held by the court that under the ambit of Section 2 (ix) of the Act of 1939, the wife can seek divorce on the ground that the husband has falsely accused her of adultery and of bad character.

In the case of Dr. Syeda Fatima Manzelat .*v.* Mr. Syed Sirajuddin Ahmed Quadri[78], the question before the High Court of Andhra Pradesh was "whether cruelty with wife and failure to provide

[77] AIR 1977 Cal 90.
[78] 2013 (5) ALD 298.

maintenance to wife is sufficient ground for the wife to obtain divorce from husband under the Islamic law?" The facts of the case were that, after marriage, the husband and the wife resided in India and abroad for two decades. They had a girl child out if this wedlock. The wife filed a petition under Section 2 (i) and (viii) of the Act of 1939. In the petition, she alleged that the husband and his relatives had taken away all the gold ornaments and she was being harassed mentally and physically. The court observed that the matter was filed under Section 2 of the Act of 1939 and thus she is entitled to seek divorce. In this case, the court decided the matter under the spirit of Dissolution of Muslim Marriage Act, 1939 and granted divorce to the wife from her husband.

The Muslim Women's (Protection of Rights on Divorce) Act, 1986:

After the judgment of the Shah Bano case, it sparked the resistance from Muslim authorities, the then government which was led by the Indian National Congress passed the 1986 Muslim Women's Act (Protection of Rights on Divorce) (hereafter referred to as the Muslim Women Act). This Act annulled the act of imposing secular law above personal law by the judiciary through the adoption of a new law. In Daniel Latifi *v.* The Union of India[79], the case discussed the constitutional validity of Section 3 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 and was hence, challenged. The Section 3 of the 1986 Act mentioned about the right of the woman to receive Mahr or other properties during divorce. According to this section, a Muslim woman during the time of the divorce is entitled to the following[80]:

a. Maintenance that shall be reasonable and fair in the eyes of the Court while she is observing the period of iddat by her former husband. It is the duty of the husband to provide such allowance to meet her basic standard of living.
b. In case such divorced woman is having a child which was born out of wedlock whether prior or after the divorce, it is the duty of the husband to provide such maintenance which shall be reasonable and fair in the eyes of the court for both the child and the mother for a period of two years from the time such child was born.
c. Such amount shall be payable by the former husband to the divorced woman which shall be equal to the sum that was agreed as Mahr or dower at the time of the wedding.

[79] (2001) 7 SCC 740,746.
[80] Section 3(1) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

d. All the properties which were given to such divorced woman by the relatives, friends, husband's friends or his relatives or the husband, irrespective whether such property was given to her before or after marriage, shall be her property.

The Section 3(2) of the 1986 Act, provides that in case a divorced woman is not receiving any of the above which has been provided under Section 3(1) of the 1986 Act, then either such divorced woman or any person whom she has authorized has a right to file a complaint before the Magistrate for passing an order with respect to exercising of her right to receive such mahr, dower, or the property. But there are conditions which are applicable when an application to the Magistrate is submitted which are to be met[81]. These conditions are as follows:

a. If the husband who is having sufficient means has failed to provide maintenance to the wife while she is observing the period of Iddat.
b. If an amount that is equivalent to the mahr or dower or the properties that she owned has not been given to her.

   Then in such cases the Magistrate has to pass an order in respect to meet the requirements of the divorced woman and also it is the liability of the husband to maintain the standard of living that she used to have during the time of the marriage.

The failure to do so, the husband has to face the punishment whereby the Magistrate will issue a warrant for the payment of such amount of maintenance or dower or mahr with fines which are provided under Section 126 of the Code of Criminal Procedure, 1973.[82]

This case arose after the Shah Bano Begum's case[83]. The most significant issue in this case was that whether a divorced from Muslim woman was qualified for maintenance post iddat period. In the time of iddat, the spouse should keep up the wife. Be that as it may, after the time of iddat, the spouse is not liable for any support. The court in this case held that a spouse is subject to make arrangements for the future of the divorced wife which incorporates maintenance. The Apex court made its stand clear, that if after the iddat period the divorced wife does not re-marry and is likewise unfit to look after herself, at that point the husband will keep up the wife and give

[81] Section 3(3) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[82] Section 3(4) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[83] 1985 AIR 945.

her an appropriate expectation for everyday comforts with respect to what she had during the time of marriage. The following will condense the whole Court's conclusion:

(a) A Muslim husband is held responsible to give fair and reasonable arrangement to the divorced wife's future, which likewise incorporates her maintenance. The spouse must make such sensible and reasonable arrangement, which reaches out past the iddat period. Obligation of Muslim husband to his divorced wife emerging under Section 3(1)(a) of the 1986 Act, to pay the maintenance is not limited to the iddat period.

(b) A divorced Muslim woman who has not remarried and who can keep up herself after the iddat period continues as provided under Section 4 of the 1986 Act, against her family members who are subject to keep up her with respect to the properties which they acquire on her passing as per Muslim law from such separated from woman including her children and guardians. In the event that any of her family members being not able to pay the maintenance the Magistrate may guide the State Wakf Board to accommodate maintenance.

Section 4 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 provides for the order of the maintenance. Under this section, it is the liability of the relatives of the divorced woman to pay her maintenance in case she has not re-married and is unable to maintain her standard of living. Section 4 (1) provides that the relatives who will inherit her property after her death have to pay the maintenance in such share in which they will inherit the property. In case the divorced woman has off-springs, it is the duty of such off-springs to provide maintenance to their mother. In case they fail to provide such maintenance because they do not have sufficient resources, then it is the duty of the parents of the divorced woman to provide her maintenance as ordered by the Magistrate.

Another instance could be that the parents are not capable enough to provide the maintenance to the divorced woman, then the Magistrate may order the relatives to pay the amount not payable to the divorced woman in the ratio which the Magistrate shall deem fit. In case the divorced woman is unable to maintain herself, or the relatives are unable to maintain her as per the orders given by the Magistrate or the woman is not having any relative, then it is the State Wakf Board

which has to provide maintenance to such divorced woman as directed by the Magistrate through his orders.[84]

The Apex Court was additionally of the opinion that the husband will not be freed from his responsibility once the iddat period has been finished. After the divorce, the risk of the spouse is referenced under the Section 3 of the Act and not under the Section 125 of the Code of Criminal Procedure however a Muslim woman has a privilege to record an application for the maintenance under Section 125 of the Code of Criminal Procedure. [85]

*The Muslim Women (Protection of Rights on Marriage) Act, 2019:*

Talaq-e-biddat is a moment divorce and is effective instantly when "Talaq" is pronounced three times. Three declarations can be made right now talaq during a single tuhr (when the lady isn't bleeding) by saying "I separate thee" thrice simultaneously, for example no holding up period between two progressive declarations is required.[86] This form of talaq, is also referred to as Triple Talaq. This is an irrevocable form of divorce. *The Muslim Women (Protection of Rights on Marriage) Act, 2019- This Act came after the case whereby the demonstration of triple talaq was made as void and unlawful. The Chapter II of the Act, 2019 proclaims that the "Any profession of talaq by a Muslim spouse upon his better half, by words, either spoken or composed or in electronic structure or in some other way at all, will be void and unlawful"*[87]*. The Chapter III of the Act accommodates the protection of rights and privileges of the e married women. Section 5*[88] *provides for the subsistence allowance while section 6 provides for the*

[84] Section 4(2) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[85] DR. M.A. QURESHI, MUSLIM LAW p-132 ( Central Law Publications, 4th ed., 2015).
[86] Pushkraj Deshpande, *Triple Talaq, Judgment of Hon'ble Supreme Court and the Most Anticipated Triple Talaq Bill* (Feb. 26, 2021, 10:40 P.M.) https://www.mondaq.com/india/Family-and-Matrimonial/668468/Triple-Talaq-Judgment-Of-Hon39ble-Supreme-Court-And-The-Most-Anticipated-Triple-Talaq-Bill.
[87] Section 3 of the Act, 2019.
[88] Section 5 of the Act: "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.*[89] *Section 7 of the Act makes the pronouncement of triple talaq as an offence and the punishment is decided by the Magistrate.*

In **Sayara Bano *v.* Union of India**[90], this act of triple talaq has been held as unconstitutional in nature. The petition challenged the legality of the act of triple talaq in consonance with Article 14[91], Article 15[92] and Article 21[93] of the Constitution of India, 1950. The facts of this case are that Shayara Bano was divorced by her significant other Rizwan Ahmad on 10.10.2015, where he, before the observers, said "I give talak, talak, talak" and gave her divorce. She challenged that such divorce is one-sided and unalterable in nature which ends the ties of marriage and such type of separation has been given consent under the Section 2 of the Muslim Personal Law (Shariat) Act, 1937.

The petition mentions "*It is presented that religious officials and ministers like imams, maulvis, and so forth., who proliferate, bolster and approve practices like talaq-e-biddat, nikal halala and polygamy are abusing their position, impact and capacity to expose Muslim women to such gross*

[89] Section 6 of the Act: "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."
[90] (2017) 9 SCC 1.
[91] Article 14 of the Constitution of India, 1950 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 Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."
[92] Article 15 of the Constitution of India, 1950 provides: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
(1) 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
(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".
[93] Article 21 of the Constitution of India provides that a person shall not be deprived of his/her life or personal liberty.

*practices which treats them like property, in this manner disregarding their principal rights revered in Articles 14, 15 and 21 and 25[94] of the Constitution of India."*[95]

The petition demonstrated the predicament of the Muslim women and how they were being abused under the umbrella of triple talaq. The request additionally referenced that Muslim personal laws in India take into account the act of talaq-e-bidat or talaq-I-badai, which incorporates a Muslim divorce from his significant other by enunciating more than one talaq in a single tuhr (the period between two mensuration cycles), or in a tuhr after intercourse, or by pronouncing a permanent divorce at one go. As per different noted scholars, this act of talaq-e-bidat (one-sided triple-talaq) which for all intents and purposes treats women like asset is neither in concordance with the advanced standards of human rights and gender equality, nor a necessary piece of Islamic faith.[96] The counter-affidavit statement introduced by the All India Muslim Personal Law Board (AIMPLB) contended that the Supreme Court has no ward to settle over Muslim Personal Law since it is indistinguishably weaved with the religion of Islam, which relies upon Quaranic mandates and is not a law passed by Parliament.[97] But this argument was not held to be a good argument as there have been various cases in the past like the Shah Bano case, Daniel Latifi case etc, whereby the Supreme Court have given some revolutionary judgments with respect to Muslim Personal laws in India. The court came to a decision in a majority of 3:2. The views of minority: The minority judgment was written by Justice Keher. The views of the minority judgment were:

[94] Article 25 of the Constitution of India, 1950 provides: "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;
(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"
[95] W.P.C. of 2016.
[96] Ibid.
[97] AVANTIKA TIWARI, TRIPLE TALAQ- COUNTER PERSPECTIVE WITH SPECIFIC REFERANCE TO SHAYARA BANO, ILI Law review, Vol.1, Summer Issue-2017.

*"We are contented, this is a case which presents a circumstance where this Court should practice its watchfulness to give fitting headings under Article 142 of the Constitution. We subsequently thus immediate, the Union of India to think about proper enactment, especially regarding 'Talaq-e-Biddat'. We trust and expect that the thought about enactment will likewise contemplate propels in Muslim 'individual law' – 'Shariat', as have been revised by enactment the world over, even by religious Islamic States. At the point when the British rulers in India gave aid to Muslims by enactment, and when medicinal measures have been embraced by the Muslim world, we discover no explanation, for an autonomous India, to fall behind.*

*Till such time as enactment in the issue is considered, we are fulfilled in injuncting Muslim spouses, from articulating 'talaq-e-biddat' as a methods for cutting off their wedding relationship. The moment order, will in the primary example, be employable for a time of a half year. In the event that the administrative procedure begins before the expiry of the time of a half year, and a positive choice develops towards reclassifying 'talaq-e-biddat' (three declarations of 'talaq', at very much the same time) – as one, or on the other hand, on the off chance that it is concluded that the act of 'talaq-e-biddat' be discarded through and through, the order would proceed, till enactment is at long last established. The failure of which, the order will stop to work"*[98]

*The view presenting the majority was written by Justice R.F. Nariman:*

*"Plainly this sort of Talaq is clearly subjective as in a Muslim man will insensitively and capriciously cut off the conjugal security with no exertion at compromise to spare it. Subsequently, this type of Talaq must be held to be infringing upon the major right contained in Article 14 of the Indian Constitution. In this manner, as we would like to think, the Muslim Personal Law Shariat Application Act of 1937, to the extent that it tries to perceive and implement Triple Talaq, is inside the importance of the articulation "laws in power" in Article 13(1)*[99] *and thus, must be excused as invalid and void to the degree that it perceives and upholds*

[98] Supra 97.

[99] Article 13(1) of the Constitution of India, 1950 provides: "Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

*Triple Talaq . Since we have pronounced Section 2 of the 1937[100] Act invalid and void to the degree expressed above on the smaller ground that it is obviously subjective, we don't think that its fundamental, as the scholarly Attorney General and those supporters contended, to go into the ground of divorce in such cases."*[101]

[100] The Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 provides: "Application of Personal law to Muslims.—Notwithstanding any custom 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 religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

[101] Supra .

## CHAPTER IV

## INHERITANCE AND MAINTENANCE – A MATRIMONIAL RIGHT

### IV.1. INHERITANCE:

**Introduction:**

The property right of a woman to inherit is closely attached to the matrimonial right in India and this right to inherit has been regulated by various personal laws. With respect to the right of inheritance of Muslim, the intestate succession is regulated by the Quran and the testamentary succession is regulated by the Indian Succession Act, 1925.[102] In order to understand this in relation to the matrimonial right of the Muslim woman, it is essential to take a look on meaning and difference of intestate succession and the testamentary succession.

What is the meaning of the term Succession?

The term succession refers to inheriting or acquiring of the assets of the deceased either as indicated by the desire of the deceased or as per the laws that are applicable. Succession can be classified into two types: Intestate and testamentary. The term intestate succession is used to denote the laws that are identifying with legacy. The property of an individual, on their passing, without guidelines left by that person regarding its devolution, devolved in accordance with the law of intestate succession to which the deceased was subject at the hour of their demise. On the other hand, the term testamentary succession refers to the devolution of the property through a testament or will. A Will that is capable of taking effect in law governs succession of the property of a person to which he or she was subject to at the time of his or her death.

When a Muslim dies, there are 4 duties that are to be performed by his successors. These duties are:

a. Expenses of burial and funeral are to be paid
b. Payment of the debts of the deceased

[102] Vijender Kumar, "MATRIMONIAL PROPERTY LAW IN INDIA: NEED OF THE HOUR." *Journal of the Indian Law Institute* 57, no. 4 (2015): 500–523. http://www.jstor.org/stable/44782798.

c. Determination of the value or will of the deceased. This can be computed up to only a maximum of 1/3rd of the property. The rest of the property is to be distributed according to the laws of succession.
d. Distribution of the remaining estate in accordance with the Shariah Law

There are two types of inheritors under the Muslim Personal Law. These are:

a. Sharers: These include the first in the line of inheritance like the husband, wife, daughter, son, daughter of son, father, mother, full sister, uterine sister etc.[103]
b. Residuaries: These include paternal grandfathers, grandmother, consanguine sister, uterine brother etc.[104]

**Right of inheritance of a woman:**

Quran has given women the right to inherit the property whether she is a spouse, mother, little girl or a sister. Though the Quran has given rights to women to inherit the property, but this right is not equal in nature. When compared to the right of inheritance of a man, a woman inherits either the half that a man inherits or less than what a man inherits. The right of inheritance is not same for both man and woman. A woman in the 176th verse will inherit the half of a man's property but in case a woman dies, a man can inherit her entire property. Somewhere or other this inequality in the holy script has led to un-equal status of Muslim women in their society.

A Muslim woman is qualified for acquire the property according to the offer which is reliant on the relationship that she had with the deceased. Suran An-Nisa verses number 11, 12 and 176 state as:

> *Verse no. 11: "Allah, (in this way) guides you as respects of your children's (legacy): to the male, a bit equivalent to that of two females: if just little girls, at least two, their offer is two third of the legacy; if just one, her offer is half"*

> *Verse no.12: "In what your wives leave, your offer is half; in the event that they leave no kid; yet on the off chance that they leave a youngster, ye get a fourth; after installment of*

[103] Consanguine siblings: Descendants of the same bloodline.
[104] Uterine siblings: They have same mother but different fathers.

*inheritances and obligations. In what ye leave, their offer is a fourth, if ye leave no youngster; yet on the off chance that ye leave an off-spring, they get an eighth; after installment of inheritances and obligations."*

*Verse no.176: "They approach thee for a legal choice. State: Allah coordinates (in this manner) about the individuals who leave no relatives or ascendants as beneficiaries. On the off chance that it is a man that bites the dust, leaving a sister yet no youngster, she will have a large portion of the legacy; if (such a perished was) a lady, who left no kid, her sibling takes her legacy, if there are two sisters, they will have 66% of the legacy (between them): if there are siblings and sisters, (they share), the male having double the portion of the female. Along these lines doth Allah clarify to you (His law), in case ye fail and Allah hath information on all things."*[105]

Right of inheritance of Daughter:

The share of the daughter in inheriting the property that has been referenced by the Quran as "*Allah guides you concerning (the legacy of your) youngsters. A male gets share equivalent to that of two females. In any case, in the event that they (the kids) are just ladies, and more than (or equivalent to) two, their offer is two thirds of that which he (expired) had left. What's more, if there is just a single woman, her offer is half (of the home)."*[106]

The share that the daughter will get will be totally reliant on the way that whether the (deceased) parent is made due by the quantity of sons and daughters. In the event that the two sons and at least one daughter endure the deceases, the daughters and sons will share the rest of the bequest yet every daughter takes a large portion of the portion of a son. In case of no son and just a single daughter endures the dead, rather she takes half of the property. The rest of the daughters share two thirds of the bequest uniformly among themselves if there are no son yet more than one

[105] Fatma Osman Ibnouf, *The Gender Equality and Women's Human Rights in Islamic Texts (Quran and Hadith),*RESEARCH GATE (Last visited Apr.15,2021, 10:30 P.M.) https://www.researchgate.net/publication/274899721_The_Gender_Equality_and_Women's_Human_Rights_in_Islamic_Texts_Quran_and_Hadith.

[106] Surah –an Nasa, Q4:11.

daughter.[107] In case the shares allotment as mentioned in Quran, exceeds the unity, then the shares of the daughters can fluctuate. In Sunni's the reduction will be according to the share of the daughter but such a case is no in the Shia's.

In **Sheikh Madar *v.* Kursheeda Begum**[108] the Trial court and the Andhra Pradesh High Court, both certified the guideline of Muslim law of inheritance under Hanafi law for example the residuary can get an offer on segment if the property is left in the wake of circulating it to the sharer which establishes the primary class of property inheritors. Assuming subsequent to giving the offer to the little girl any offer is left, the residuary would be entitled for something similar. Since the girl and the residuaries were requesting for the offer on parcel at the same time, it didn't give a ground to the spouse of the expired, i.e., the widow to decline the portion of the residuary. It was additionally expressed that assuming the offer which is to be isolated is equivalent to solidarity, the residuaries would not be qualified for an offer however assuming the offer to be partitioned is not exactly a solidarity, the sharers would acquire the property first and afterward the residuaries would share the remainder of the left over property.[109]

Right of inheritance of Mother:

The Quran has given portion of mother as "*And for his folks, every one's offer is one 6th of that which he left in the event that he had youngsters. In any case, in the event that he had no youngsters and the guardians acquire from him, the mother's offer is one third. Also, of he had kin, the mother's offer is one sixth."*[110] In case of Sunni's, if the deceased is not survived by off-springs or offspring of a parent, and just a single kin survives, assuming any, the mother's share of the deceased is one third (33%) of the properties. At the point when at least two guardians succeed the dead, the portion of the mother is one sixth. Regardless of whether at least one daughter or offspring of a son survives the dead, the mother will just get one sixth of the property. Where a mother is a legitimate beneficiary with the deceased's father and widow or accomplice, she takes the deceased's husband or wife's share as leftover with the father after all

[107] Ahangar, M. (2014). Succession Rights of Muslim Women in the Modern World: An Analytical Appraisal. *Arab Law Quarterly, 28*(2), 111-135. Retrieved February 28, 2020, from www.jstor.org/stable/43294660.
[108] 2005 (5) ALD 8.
[109] Vijender Kumar, "MATRIMONIAL PROPERTY LAW IN INDIA: NEED OF THE HOUR." *Journal of the Indian Law Institute* 57, no. 4 (2015): 500–523. http://www.jstor.org/stable/44782798.
[110] Surah an- Nasa, Q4:11

the deductions made. Under fitting conditions the portion of the mother might be expanded by radd.[111] Be that as it may, in Shia's, the mother takes the Quranic segment of one sixth regardless of whether the relatives of the deceased are alive. Without any lineal relatives however in nearness of father, the mother is entitled for one third (33%) of the bequest.

Right of inheritance of Grandmother:

Under Sunni law, as a substitute for the mother of the dead, a grandma whether paternal or maternal, or both, is ted a one sixth share. Moreover, a grandma might be a daughter, or a much more prominent ancestor. Regardless, grandmother who is nearest to the perished will reject a grandmother from taking a share. They divide the doled out number if there is more than one grandmother of a similar level of association. A paternal grandmother may acquire under Sunni without the perished father and mother while a maternal grandma may acquire without the deceased. The deceased's father's association does not change property.[112]

Right of inheritance of Sister

The deceased's sisters are doled out fragmentary shares under the two Sunni and Shia rule, in view of whether their relationship with the deceased is because of them having the same mother(uterine), a same father(consanguine), or the two guardians in common(germane). An uterine child, either sibling or sister, takes a one sixth offer under Sunni law or, if multiple, they share one third (33%). In addition, the conditions under which they acquire vary. Under Sunni law, if the deceased is not survived by a child, son's child, father, an uterine sibling or sister acquires one sixth of the property. Under Sunni law, a germane sister is qualified for one half of the estate of a child if the deceased is not survived. Two third (66%) portion of the property, on account of at least two pertinent sisters, gave the deceased is not survived by the offspring of the child, or the father of father. 2:1 extent of the residuary property is gotten by the germane brother or germane sister. If there should be an occurrence of consanguine sisters:

a. 1 consanguine sister: one half of the property given in case the deceased is not having any heirs.

[111] Supra 108.
[112] Supra 109.

b. 2 or more consanguine sisters: two third of the bequest, given that the deceased is not having any heir.

In case of a consanguine brother, the share of the consanguine sister tends to reduce. Both brothers and sisters will now inherit in the ration of 2:1 respectively.

Under Shias,

Uterine sisters: Without the heir of the deceased, the portion of the uterine sister is one half of the property and the paternal grandfather does not expel her from the right of inheritance.

Germane sister: Same as that of the uterine sister, if there should be an occurrence of no heirs of the deceased, she is qualified for one half of the bequest. If there are more than one sister, then each sister is having a share of two third of the estate. If there is a germane brother and a germane sister, then their share will be in the proportion of 2:1 respectively.

Consanguine sister: same as that of the uterine and germane sisters, in case there is no survivor of the deceased. In case of two consanguine sisters, then each sister is having a share of two third of the estate. If there is a consanguine brother and a consanguine sister, then their share will be in the proportion of 2:1 respectively.

**Right of inheritance of Widow:**

As for the share of property that widow will get, Quran notice that "And they [widows] get one fourth of that which you leave on the off chance that you have no off-spring. In the case where the deceased is survived by a son, they get one eighth of water you leave-after installment of any bequeathals that you have made or obligations (that you had)"[113] In any case, there is contrast in various schools regarding the equivalent. Under Shia's, in the event that the spouse is made due by his own kid or youngster's kid, at that point the widow will get one eighth offer. Here the husband can be endured either by the son's off-spring or by the daughter's off-spring.

In the case of **Syed Ali *v.* Syed Mohammad**[114], the court held that in case of the childless widow, the woman will inherit only the movable property. She does not inherit the land or

[113] Surah-an Nasa, Q4:7,11-12.
[114] AIR 1928 Pat 441.

immovable property but she is entitled to 1/4th of the share of the value of the trees or buildings standing upon it.

In Shia law as we have observed that where the surviving spouse is a widow, she was qualified for just 1/4th share as a Quranic heir and the rest of the property would pass to the government under the doctrine of escheat[115]. This view has later changed in Abdul Hamid *v.* Peare Mirza[116] where it has been upheld by the court that a widow is allowed to claim her entitlement to 1/4th of the share as also to the rest of the property under the doctrine of return[117].

In the case of Kulusumhi v. Aṇṇt Begum[118] the Apex Court opined that ***"the property inherited by the widow on the death of her husband cannot be divested on her remarriage"***. In the instant case, the death of Osman Pasha (husband of respondent), the respondent got her share of l/8th of the assets of the deceased as his sharer along with the mother, brother and sister of the deceased and her first husband. These beneficiaries had their shares explicitly cut out as per the arrangements of Hanafi law. The family members of the deceased asserted that since the widow has now remarried, she had an insidious expectation in any case and there was a conspiracy among her and the enemy of her significant other. The same contention was whipped by both the Trial Court and the High Court of Karnataka and it was stood firm on that the foothold of the property previously acquired by the spouse would not be influenced according to the Hanafi school of law. Consequently, the court held that "a vested inheritance is the offer which vests in a main beneficiary right now of the predecessor's demise. In the event that the successor bites the dust before conveyance, the portion of the legacy which has vested in him will pass to such people similar to his beneficiaries at the hour of his demise. The offers in this manner are not really settled at every passing.[119]

[115] The concept of doctrine of escheat postulates that where an individual dies intestate and does not leave behind an heir who is qualified to succeed to the property, the property devolves on the Government.
[116] AIR 1935 Oudh 78.
[117] Under the Muslim Law this doctrine comes into action when the residue property returns to the Sharers and not the Distant Kindred in absence of any heir under the residuary category. When in case of more than one Sharer then the property shall be proceeding to be returned in the proportionate shares and if there is only one sharer then the whole of the residue property should be transferred back to the sole sharer. The remaining property or called the residue cannot be transferred to distant kindred as long as there is a sharer or residuary alive.
[118] ILR 1986 Kant 4027.
[119] 4 M. Hidayatullah (rev.), D. F. Mulla, Principles of Mohomedan Law 53 (17th edn. 1972).

## IV.2. MAINTENANCE:

### Introduction:

The Muslim population in India is 14.23%[120], Muslim women constitute for approx 47.4%[121] of the Muslim population in India. With this increase of the Muslim women in India, they have been so often raising their voices requesting fairness in the individual laws for Muslims. They have been scrutinizing the translation of the Quran for the universalistic standards of human rights.[122] Middle East students of history began utilizing the word 'Islamic woman's rights' during the 1990s with fights that at that point picked up unmistakable quality in Egypt, Iran and somewhere else, where ladies tried to 're-read the Qur'an and early Islamic history' to 'recover their confidence'.[123]

Muslims in India are engaging in fresh conceptions of the Islamic heritage, which could allow them as people of a modern nation-state to build bridges to the majority community or society in general, and not further separate them from it. This campaign is not limited to a small group of Muslim scholars, as it is backed by portions of the newly emerging Muslim middle class in India and many grassroots movements throughout the world.

Women do not have need to manage the intensity of an oppressive Islamic State in India. However their rival, a male strict gathering all around settled in and profoundly prevailing, is just imperceptibly less undermining. To the extent that they pick in keep themselves to interpret and analyze the Muslim Personal Laws from inside implying that they rely upon the Quran for direction and side with the 'ulama'[124] in their objection to state intercession, they hazard downsizing their aspirations under the law for sex value. In any case, in Quran, it has been unmistakably referenced that there will be no pastorate. Along these lines the assessment of ulama to guide a woman and what not to do stands invalidated.

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[120] Census 2011, https://www.census2011.co.in/religion.php.
[121] Census 2011: Sikhs, Jain have the worst sex ratio, DNA (Last visited on 21st June., 2021, 11:00 A.M.) https://www.dnaindia.com/india/report-census-2011-sikhs-jains-have-the-worst-sex-ratio-2161061.
[122] Sylvia Vatuk, *Islamic feminism In India: Indian Muslim Activists and the Reform of Muslim Personal Law*, Modern Asian Studies, Vol.42.
[123] Ibid.
[124] Ulama is defined as a group of Muslim Scholars who are acknowledged as having an expert knowledge of the Islamic law and philosophy.

The Muslim women may make some substantial strides in curing the religious authority's steady inability to execute a few parts of Islamic law that were at first intended to ensure ladies yet are still to a great extent overlooked as a general rule. Most explicitly, taking into account that the voices of these backers are turning out to be more grounded and progressively conspicuous, rendering the Muslim people group — administrative and lay the same—progressively mindful of the issues and the cures they are offering, any change is inescapable. Plainly, a methodology which looks for just to acquire certain rights for women conceded in the Qur'an will not prompt full sexual orientation uniformity.[125]

**What is maintenance?**

The term maintenance under Quran is called as Nafaqa. The term Nafaqa includes food, shelter and basic amenities for a person to live. According to Quran, it is the obligation of a husband to maintain his wife and his family. It also provides for the amount that is to be paid as maintenance. A Muslim woman is can claim her maintenance through three ways:

a. Through personal laws
b. Through Criminal Procedure Code
c. Through an agreement

The provision of maintenance under Sharia Law is ambiguous as it provides no proper demarcation between obligations imposed by the law or a moral/ethical duty under the Muslim law. Therefore, it makes it difficult to understand whether it a legal obligation or a moral duty. It is the obligation of the spouse to give maintenance to his wife irrespective of the fact that she can maintain herself or not. But there are certain exceptions to this right of maintenance. They are:

i. If the wife is disobedient, she is not entitled to claim this right;
ii. If she does not allow free access to the husband without any conditions, she is not entitled to this right, and;
iii. If she deserts her husband, she is not entitled to claim this right.

Provision of maintenance under the Muslim Personal law has been characterized till the iddat period. It is the obligation on the husband to maintain his wife, when she is witnessing the period

[125] Sylvia Vatuk, *Islamic feminism In India: Indian Muslim Activists and the Reform of Muslim Personal Law*, Modern Asian Studies, Vol.42.

of Iddat. A spouse whose marriage has been performed by the Muslim Law and has arrived at the age whereby they can practice their matrimonial rights, on separating from his wife, the wife is qualified for the maintenance. On the off chance that the marriage is unpredictable in nature, at that point such spouse is not qualified for any kind of maintenance. A woman is qualified for the maintenance regardless of whether the iddat period is finished.[126] Under Shia law, a wife is qualified for any support if two conditions are fulfilled:

a. There shall be a permanent marriage
b. The wife shall allow her husband to have an access all the time.

The liability to maintain wife is the personal liability of the husband. The relatives of the husband are not entitled to maintain the wife after the death of the husband.

**Maintenance through different modes:**

As mentioned above, a Muslim wife can claim her maintenance through three different ways:

1. Through Muslim personal laws;
2. Through Criminal Procedure Code, and;
3. Through an agreement.

A. **Through Muslim Personal Laws:**

Maintenance duty of maintenance of wife is upon the husband in light of the fact that after the marriage the wife needs to bear new liabilities and subsequently some more rights become vested in her which she can state whenever as and when the events emerges. The spouse is needed to keep up with his better half regardless of his monetary position. The spouse is qualified for support from her significant other however she might possess the ability to keep up with herself. For better understanding maintenance privileges of Muslim women under the personal law might be contemplated under the accompanying headings:

(a) During the Continuance of the Marriage

[126] This was earlier held in MA Khan *v.* Shah Bano Begum and then in Daniel Latifi v. Union of India.

A Muslim husband is legally bound to maintain his wife. In this connection Syed Ameer Ali[127] says: *"It is on the man to keep up with his better half, says, the Fatawa-I-kazi Khan, regardless of whether she is Muslim or non Muslim, poor or rich, if there has been copula; whether grown-up (grown-up) or youthful, so intercourse with her is conceivable. This is the obligation of the spouse to keep up with his significant other"*. The commitment emerges from the marriage legitimately contracted. In the event that the marriage is void or irregular, the husband has no obligation to maintain his wife. However, where the marriage is irregular merely because of the absence of witnesses, she is entitled to maintenance.

It is not necessary that the wife must be Muslim. She may belong to any religion. Fatawa-i-Kazi Khan says "*that there is no difference in the right of a wife to maintenance whether she be a Muslim or non Muslim, free and bound*." The obligation or the duty of the husband to maintain his wife commences only from the date when the wife attains puberty and not before it. Where a spouse is young for consummation and lives with her folks, she has no option to guarantee maintenance. Additionally, on the off chance that she won't submit to the sensible orders of the spouse or lives independently with no sensible support, she relinquishes her right of maintenance against her better half. A Muslim spouse cannot guarantee maintenance from the husband if her own lead is violative of her wedding commitment. According to Tyabji, a wife does not lose her right to maintenance in the following cases.

(i) Where she refuses access to her husband on some lawful ground;

(ii) Where the marriage cannot be consummated owing to:

(1) The husband's minority; or

(2) Due to her absence from him with his permission; or

(3) Because of her illness, or

(4) Due to malformation.

In the following instance wife was held to be justified in refusing access to her husband- A wife, whose marriage has not been consummated, may legitimately take off from the wedding house or may decline dwelling together with him if her brief dower isn't paid by the husband on request. Non-installment of the brief dower is a legitimate ground to live separate from the spouse and in such a case her right of support isn't lost and the husband will undoubtedly keep up

[127] Syed Ameer Ali was a British-Indian jurist. He was a signatory to the 1906 petition to the Viceroy and thus was the founding member of the All India Muslim League.

with her. Additionally, where a wife lives independently due to the cruelty by the husband, she is qualified for be kept up with by him. According to the Muslim personal law, the wife is obligated to cohabit with her husband. On the refusal of wife on exercise of the right of the husband without any reasonable ground, she is no longer entitled to claim her maintenance. It is also provided under this law that the wife can claim her right of maintenance only during the subsistence of her marriage. Muslim law does not perceive any commitment with respect to the spouse to keep a wife when marriage has been broken up either by death or by separate.

(b) After the Dissolution of the Marriage

The spouse is qualified for maintenance just during the continuation of marriage and not past it. A marriage, in Muslim law might be broken up either by death or by separate.

(i)Dissolution of Marriage by Death

Where the marriage is ended by the demise of the spouse, both under the Hanafi Law as articulated in the Hedaya and the Baillie's Digest and the Shia law in the Imamia, the widow has no option to maintenance, regardless of whether pregnant at the hour of the passing of her significant other lo. After the spouse's passing the widow isn't qualified for support in any event, during her time of Iddat. Spouse's obligation to keep up with his better half is his own risk which reaches a conclusion upon his passing. Section 125[128], does exclude widow in term spouse in this way, a widow has no privilege to guarantee support likewise under the Criminal Procedure Code, 1973. The current situation of the individual law doesn't follow Quran which necessitates that a widow is to be kept up with for one yearly.

(ii) Dissolution of Marriage by Divorce

under Muslim Personal law spouse's on the right track to get support from her significant other during means of marriage is outright. As respects support after separate, the Muslim individual law accommodated the spouse's commitment to keep up with her limitedly. It is given that spouse is qualified for support just during the duration of marriage and not after it. A Muslim spouse is obliged to keep up with his separated from wife simply up to the time of Iddat and from that point, his responsibility is finished. The time of Iddat upon separate is three feminine courses or in any case three lunar months. The Iddat of a widow is four months and ten days. In

[128] The Criminal Procedure Code, 1973.

addition, not just the kind of Iddat period decides the spouse's on the right track to support, the sort of disavowal is additionally seen in this regard. As per Hanafi School of Muslim law, a spouse who has been separated, regardless of whether by a revocable talaq or by an unalterable talaq, is qualified for support just during the time of Iddat. As per the Shafei school of Muslim law, a spouse who has been unalterably separated has no right of maintenance. In the event that spouse is pregnant, the period would reach out up to the hour of conveyance or fetus removal regardless of whether it stretches out past the time of Iddat, for example 90 days. Assuming, notwithstanding, the spouse conveys before that period, Iddat will end with that occasion. When Iddat period is finished, the spouse can't guarantee maintenance under any conditions. Both Hanafi and Shafei schools keep up with that a pregnant separated from spouse is qualified for maintenance. Ladies' more right than wrong to maintenance emerges upon marriage and the spouse is first arranged by need to this privilege, even before the youngsters. So long she keeps on excess as spouse, husband is compelled by a solemn obligation to keep up with her. Once separated, she is entitled for her support just for the time of Iddat, being a period as recommended by Sharia Law.

**B. Maintenance under an Agreement**

A wife is also entitled to recover maintenance from her husband under an agreement signed between the spouses or their guardians. Accordingly, a stipulation by the husband to pay separate maintenance to his wife in case of disagreement, dissension, ill-feeling or separation between the spouses is not against public policy and is enforceable in law. The wife may even obtain from her husband an agreement to give her separate maintenance if the husband ill-treats her or disagrees with her or marries with another woman and an agreement to the effect that the wife would be entitled to claim maintenance till her life time and such right cannot be defeated by divorcing her. In Mohammad Moinnuddin v. Jamal Fatima[129], Mehndi Hassan had married thrice before he and his father had entered into an anti- nuptial agreement with Jamal Fatima, the prospective bride providing that in case of disunion or dissension between the couple, Mehndi Hasan would be bound to pay to the women an allowance of Rs. 15/- per month for her life and certain properties hypothecated to ensured payment of such allowance. There were dissensions between the couple and the husband divorced the wife. Wife filed a suit for claiming the allowance. The court held that the contract was valid and the divorced wife was entitled to

[129] 63 Ind Cas 883.

receive the allowances as provided in the contract. The court further said. "The marital rights ended with the divorce, but the contract subsists till the plaintiff dies or breaks it, so long as the right to maintenance lasts, it cannot be treated as devoid of consideration or opposed to public policy." This shows that an agreement for maintenance stands on a more solid footing then the wife's bare claim for maintenance under the personal law. The explanation is self-evident. A marriage under the Muslim law is an agreement simpliciter and any understanding went into between the mates or their watchmen has a limiting power given that it isn't against any law or public arrangement.

Law perceives the obligation of each spouse to keep up with his significant other and kids. The spouse is additionally under the obligation to be respectful towards her significant other and permit him free access at every legitimate time.

Aside from this commitment, the mates can go into an understanding that the spouse will pay extraordinary recompense to his significant other. Such stipend one called Kharach-I-Pandan, guzara and Mewa Khori. Tayabji say that specifications in the marriage agreement might deliver the spouse responsible to offer unique leeway to the wife notwithstanding maintenance.

Kharcha-i- Pandan:

According to Mulla 'Kharach-i- Pandan' literally means betel-box expenses, is a personal allowance to the wife customary among Muslim families of rank. It is kind of maintenance given to the wife by her husband if she stays along with her husband and is obedient to him. It is an expense of the betel-box hence pockets money. It is personal allowance to the wife customary among Muslim families fixed either before or after the marriage, and varying according to the means and position of the parties. Kharach-i-Pandan is the absolute property of the wife and she is at liberty to use it according to her sweet will and the husband has no control over that money. In Nawab Khwaja Muhammad Khan v. Nawab Hussaini Begum[130], the marriage was held during the infancy of the children. It was agreed by the parents of the spouses that the father of the son will pay Rs. 500/- per month in perpetuity to his son's wife. The payment was known as "Kharach-i-Pandan' and no conditions were laid down for its payment. The wife went to her

[130] (1910) 12 BOMLR 638.

husband's house and lived there for some years. Later on there arose differences between husband and wife. Consequently, the wife left matrimonial home. She filed a suit for the realization of her Kharach-iPandan. It was held that she was qualified for recuperate the entire sum in any case the way that she was not involved with the understanding. She was unmistakably qualified for continue in value to authorize her case. The judges of the Privy Council further held that it was excessive for her to live with her significant other. The Privy Council held: *"By the concurrence on which the current suit is passed, the respondent ties himself energetically to pay to the offended party the decent remittance, there is no condition that it ought to be paid just when the spouse is living in the husband's home or that his obligation should stop at whatever the conditions under which she ends up leaving it."*

Mewa Khori:

The term Mewa Khori (literary means eating of fruits) and guzara (literary means allowance for subsistence) are similar in character. In Ali Akbar v. Mst. Fatima[131] an allowance of Rs. 25.00 per month was fixed for Kharach-i-Pandan in addition to maintenance to which she would be entitled. It was held that the spouse was entitled despite the fact that she might be declining to get back to her better half. Kharach-I-Pandan is an individual recompense and it can't be moved despite the fact that installment got on immovable property. Apart from the personal law, there is a statutory provision contained in the Code of Criminal Procedure regarding maintenance of wife where husband have neglected or refused to maintain her.

### C. Under the Criminal Procedure Code of 1973:

Section 125 empoweres the Magistrates to order the husband to provide maintenance to the wives. The provision was extended to 'divorced wives' also. Under section 125, a divorced Muslim wife, who has not remarried can make an application to the Magistrate for seeking a maintenance order against the husband provided she is unable to maintain herself and her former husband despite having sufficient means neglects or refuses to maintain her. On her application, the Magistrate can order the former husband to pay her a monthly allowance. If the order is not complied with, the Magistrate can issue warrants in the manner provided for levying fines. Further, the non compliance results in imprisonment up to one month or till due payment, if

[131] (1917) ILR 39 All 401.

made earlier. But, under section 127 (3) (b)[132], such an order has to be cancelled or modified on the proof that she has received in full from her former husband the sum which under the Personal Law is payable on such divorce. The provisions of the Criminal Procedure Code, 1973 constitute a piece of legislation which aims to help deserted wife and other relations and require the husband to pay a monthly sum to enable them to live in the society.

The provision of section 125 of the Criminal Procedure Code[133] provides a simple speedy but limited relief and seeks to ensure that the neglected wife, children and parents are not left

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[132] Section 127(3)(b) in The Code Of Criminal Procedure, 1973

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-

(i) in the case where, such sum was paid before such order, from the date on Which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband by the woman;

[133] 125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) His wife, unable to maintain herself, or

(b) His legitimate or illegitimate minor child, whether married or not, unable to maintain itself,

or

(c) His legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) His father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause

(b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Provided further that the Magistrate may, during the pendency of the Proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct: Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person]

Explanation, - For the purposes of this Chapter

(a) Minor means a person who, under the provisions of the Indian Majority Act, 1975 (9 of 1875) is deemed not to have attained his majority;

(b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Any Such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any Person so ordered fails without sufficient cause to company with the order, any such Magistrate may, for every breach of the order, issued a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's [allowance for the maintenance or the

beggared and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. The term 'wife' appearing in sec. 125 (1) refers only to a legally wedded wife. Therefore, legally wedded wife, unable to maintain herself is entitled to claim maintenance under this section. Also, it is necessary that the person from whom maintenance is claimed have sufficient means to maintain the wife claiming maintenance.

The term "means" in sec. 125 (1) is not confined to visible such as lands and other property or employment. Where a person is healthy and able-bodied he must be held to have means to support his wife and other relations. On certain occasions, the courts have gone to the extent laying down that the husband may be insolvent or professing beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and eke out his livelihood. The provisions under Ss. 125-128 are applicable to all persons belonging to all religions and have no relationship with the personal laws of the parties. The relief given under these sections is of a civil nature and findings of the Magistrate are not final and parties can legitimately agitate their rights in a court even after the request for the Magistrate. The clarification (b) of sec. 125 (1) gives that to the reason for Sections 125-128[134], 'wife' includes a woman who has been separated by, or has acquired a separation from, her significant other and not remarried. Under the drawn out meaning of 'spouse' the option to guarantee support is likewise made accessible to a separated from wife. Sec. 126[135] gives procedure to execute the remedy provided under Sec. 125.

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interim maintenance and expenses of proceeding, as the case be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the dare on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to, live with her, husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

[134] Section 125-128 of the Criminal Procedure Code, 1973.

[135] 126. Procedure.

(1) Proceedings under section 125 may be taken against any person in any district-

(a) where he is, or

(b) where he or his wife, resides, or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

Sec. (1) provides that proceedings under Sec. 125 may be taken against any person residing in any district

(a) Where he is, or

(b) Where he or his better half dwells, or

(c) Where he last lived with his significant other.

Sec. 127[136] empowers the Magistrate to adjust or alter the request for the support on of (I) an adjustment of the conditions of the party paying or getting the maintenance, or (ii) any choice of able common court. The party qualified for modification of the request, can generally move to the

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(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proceed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons- cases: Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms at to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just

[136] 127. Alteration in allowance.

(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as case may be, the Magistrate may make such alteration in the allowance he thinks fit: Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that-

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-

(i) in the case where, such sum was paid before such order, from the date on Which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband by the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

Officer at whatever point there is a difference in conditions. "Change of conditions" covers change in essential conditions just as changes in different conditions. The change might be in the conditions of the paying party or of repeating party. Under this part, the spouse can apply for increment of her maintenance. The contrary party can likewise apply for decrease or for dropping of request because of a common court order, for example for compensation for intimate rights, weakness of marriage, separate, and so forth Additionally a request for support can be dropped on the utilization of the two players that they have compromised. Area 127 (3) excludes a spouse from paying support in three conditions:

(a) The lady has remarried, after the separation,

(b) The lady had gotten a standard total payable on separate.

(c) The women has (in the wake of acquiring divorce) deliberately gave up her right of maintenance.

When a support request is passed by an able court it very well may be implemented under Sec. 125(3) and stays in power until there has been undoing under Sec. 125 (5) or adjustment under segment 127 or end of intimate relationship. Sec. 128 is simply strengthening to segment 125 (3) which accommodates implementation of request. The condition for the authorization of a request is the character of the gatherings. Application for recuperation of support might be made either to the Magistrate who passed the first request or his replacement or to a Magistrate having purview over where the individual dwells. Struggle of Muslim Personal Law with Sec.125 of Cr.P.C:-

Under Muslim Personal Law, a lady is qualified for support just till the finish of the Iddat time frame. Iddat is the period when co-residence of the gatherings end, on the expiry of iddat the mates will stand separated. The time of iddat comprises of three feminine cycles or three lunar months, if there should arise an occurrence of pregnant ladies, the iddat period would stretch out up to the hour of conveyance. Thus, we can see an immediate clash, since CrPC doesn't perceive iddat period and support goes past something very similar. Also, in Muslim Law, polygamy is allowed, and under area 125, union with another lady turns out to be on solid land for asserting maintenance. In Mohammed Haneefa v. Mariam Bi[137], the Court expressed that in the event of a conflict between close to personal law and CrPC, the previous will win. This position was supported by the Supreme Court in Saira Alias Bano v A.M Abdul Gafoor[138]. This caused a great

[137] AIR 1969 Mad 414.

[138] 1987 AIR 1103.

deal of situation in the Legislature. To determine this situation, Section 127(3) was added under which that if a separated from lady gets a sum because of standard or individual laws of the local area, the judge can drop any request for maintenance in support of herself.

Judicial Decisions interpreting the Scope of Section 127:-

Nonetheless, since the judiciary supported the right of ladies to guarantee maintenance, the contention was as yet tireless.. In the case of Bai Tahira vs Ali Hussain Fissalli Chothia[139], it was held that the installment of "fanciful aggregates" centered around the Muslim individual laws should be considered to decrease the proportion of support payable by the mate, but that doesn't vindicate the mate from the responsibility considering the way that every woman autonomous of her religion is qualified for maintenance. The separated from spouse has this right besides from when the total installment specified by custom is essentially adequate to substitute the support .Thus the soul behind Section 127(3)(b) is that a wife can't benefit from both , except if the entire aggregate paid under the standard law is inadequate. An extra imperative was subsequently added by the Apex court in Fuzlunbi v. K Khader Vali[140]. In this case, the court states that "*the portion of the maintenance as provided by the Muslim law should be basically indistinguishable from the step by step support to the divorced person, needed till her remarriage or death, with a particular ultimate objective to substitute the maintenance reward responsibility."* The Apex Court opined in Zohara Khatoon v. Mohd. Ibrahim[141] that the expression "wife" in S.125 and S.127of Criminal Procedure Code, 1973 is inclusive of Muslim women who get separated by technique for Talaq or under the Dissolution of Muslim Marriage Act,1939. It was in this setting of developing struggle and disappointment that the renowned Shah Bano Case surfaced and went onto become the most milestone judgment in this regard.

**Mohammad Ahmed Khan *v.* Shah Bano Begum[142]:**

The background of the case was that following 43 years of marriage, Shah Bano's significant other, Mohammed Ahmed Khan, a rich and notable attorney, pushed his wife, Shah Bano, out of their conjugal home. At that point, alongside her five kids, Shah Bano was tossed out in her sixties. Shah Bano filed complaint under area 125 of the Code of Criminal Procedure (Cr. PC)

[139] 1979 AIR 362.
[140] AIR 1980 SC 1730.
[141] 1981 AIR 1243.
[142] 1985 AIR 945.

for maintenance. The Section 125 of the Code mentions the right of the maintenance. Section 125(1) of the Code mentions the people who are entitled to receive maintenance. Such people includes the wife (if she is not having sufficient means to maintain herself), the child which was born before he got married, the child who may be an illegitimate or legitimate but is not in a sound mental or physical condition (except for his daughter who is married) and his parents who are not able to maintain their living. The Magistrate in such cases, has the jurisdiction to pass an order whereby such order directs the person to maintain such people. The Section 125 (2) mentions that the maintenance will be provided for such people from the date when the Magistrate passes the order and that the person has to abide by the order. In case where the person fails to provide the maintenance to such a person as mentioned in Section 125(1) of the Code, then the Magistrate has the power to issue a warrant whereby it will be mentioned the amount that is outstanding for the person to pay and such payment either has to be done in a wholesome amount or has to pay as their monthly allowance. Even after that if he fails to do so, he is then punished with imprisonment which can be for a month or for the period till the time such payment is not made. This has been provided under Section 125(3) of the Code. A husband is not entitled to pay the amount for maintenance under the following circumstances[143]:

d. If such wife is living in adultery with another man
e. Without any specific reason does not live him
f. If by mutual consent they refuse to cohabit.

In case it is proved in the Court that such wife has been living in adultery with another man, or refuses to stay with her husband without any specific reason or has my mutual consent refused to cohabit, then the order of maintenance shall be revoked by the Magistrate.[144]

Shah Bano brought to court under the universally applicable Code of Criminal Procedure, instead of putting it under uncodified personal laws which are often perceived in a gender-discriminatory manner. Nevertheless, after the judgment sparked by the resistance from Muslim authorities, the then government which was led by the Indian National Congress passed the 1986 Muslim Women's Act (Protection of Rights on Divorce) (hereafter referred to as the Muslim Women Act). This Act annulled the act of imposing secular law above personal law by the judiciary

[143] Section 125(4) of the Code of Criminal Procedure, 1973.
[144] Section 125(5) of the Code of Criminal Procedure, 1973.

through the adoption of a new law. Not only was Shah Bano a Muslim but she was a Muslim woman.

The Muslim religious leaders responded the way they did, because the decision had the potential to change the Muslim woman: the embodiment of Islamic values and culture that was not to be dealt with by those who wanted to maintain it as it was. When the judiciary eroded the framework of Muslim Personal Laws, it was viewed by the Muslim community as a violation of the principle of secularism as secularism as they saw it was recognition by the State of various religious traditions. While the Muslim community saw Shah Bano as an example of a Muslim woman, the Supreme Court saw her as an Indian resident whose case would be judged on the grounds that she was an equal citizen of the country and deserved the same protection regardless of her religious identity.

**Daniel Latifi *v.* The Union of India[145]:**

This case discussed the constitutional validity of Section 3 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 and was hence, challenged. The Section 3 of the 1986 Act mentioned about the right of the woman to receive Mahr or other properties during divorce. According to this section, a Muslim woman during the time of the divorce is entitled to the following[146]:

e. Maintenance that shall be reasonable and fair in the eyes of the Court while she is observing the period of iddat by her former husband. The husband obligated to such allowance to meet her basic standard of living.
f. In case such divorced woman is having a child which was born out of wedlock whether prior or after the divorce, it is the duty of the husband to provide such maintenance which shall be reasonable and fair in the eyes of the court for both the child and the mother for a period of two years from the time such child was born.
g. Such amount shall be payable by the former husband to the divorced woman which shall be equal to the sum that was agreed as Mahr or dower at the time of the wedding.

[145] (2001) 7 SCC 740,746.
[146] Section 3(1) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

h. All the properties which were given to such divorced woman by the relatives, friends, husband's friends or his relatives or the husband, irrespective whether such property was given to her before or after marriage, shall be her property.

The Section 3(2) of the 1986 Act, provides that in case a divorced woman is not receiving any of the above which has been provided under Section 3(1) of the 1986 Act, then either such divorced woman or any person whom she has authorized has a right to file a complaint before the Magistrate for passing an order with respect to exercising of her right to receive such mahr, dower, or the property. But there are conditions which are applicable when an application to the Magistrate is submitted which are to be met[147]. These conditions are as follows:

c. If the husband who is having sufficient means has failed to provide maintenance to the wife while she is observing the period of Iddat.
d. If an amount that is equivalent to the mahr or dower or the properties that she owned has not been given to her.

   Then in such cases the Magistrate has to pass an order in respect to meet the requirements of the divorced woman and also it is the liability of the husband to maintain the standard of living that she used to have during the time of the marriage.

The failure to do so, the husband has to face the punishment whereby the Magistrate will issue a warrant for the payment of such amount of maintenance or dower or mahr with fines which are provided under Section 126 of the Code of Criminal Procedure, 1973.[148]

This case arose after the Shah Bano Begum's case[149]. The significant issue in this case was that whether a divorced from Muslim woman was qualified for maintenance post iddat period. In the time of iddat, the spouse should keep up the wife. Be that as it may, after the time of iddat, the spouse is not liable for any support. In this case the court pronounced that the spouse is subject to make arrangements for the future of the divorced wife which incorporates maintenance. The Apex court made its stand clear, that if after the iddat period the divorced wife does not re-marry and is likewise unfit to look after herself, at that point the husband will keep up the wife and give

[147] Section 3(3) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[148] Section 3(4) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[149] 1985 AIR 945.

her an appropriate expectation for everyday comforts with respect to what she had during the time of marriage. The following will condense the whole Court's conclusion:

(c) A Muslim husband is held responsible to give fair and reasonable arrangement to the divorced wife's future, which likewise incorporates her maintenance. The spouse must make such sensible and reasonable arrangement, which reaches out past the iddat period. Obligation of Muslim husband to his divorced wife emerging under Section 3(1)(a) of the 1986 Act, to pay the maintenance is not limited to the iddat period.

(d) A divorced Muslim woman, who has not been remarried and who can keep up herself after the iddat period continues as provided under Section 4 of the 1986 Act, against her family members who are subject to keep up her with respect to the properties which they acquire on her passing as per Muslim law from such separated from woman including her children and guardians. In the event that any of her family members being not able to pay the maintenance the Magistrate may guide the State Wakf Board to accommodate maintenance.

Section 4 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 provides for the order of the maintenance. Under this section, it is the liability of the relatives of the divorced woman to pay her maintenance in case she has not re-married and is unable to maintain her standard of living. Section 4 (1) provides that the relatives who will inherit her property after her death have to pay the maintenance in such share in which they will inherit the property. In case the divorced woman has off-springs, it is the duty of such off-springs to provide maintenance to their mother. In case they fail to provide such maintenance because they do not have sufficient resources, then it is the duty of the parents of the divorced woman to provide her maintenance as ordered by the Magistrate.

Another instance could be that the parents are not capable enough to provide the maintenance to the divorced woman, then the Magistrate may order the relatives to pay the amount not payable to the divorced woman in the ratio which the Magistrate shall deem fit. In case the divorced woman is unable to maintain herself, or the relatives are unable to maintain her as per the orders given by the Magistrate or the woman is not having any relative, then it is the State Wakf Board which has to provide maintenance to such divorced woman as directed by the Magistrate through

his orders.[150] The Apex Court was additionally of the opinion that the husband will not be freed from his responsibility once the iddat period has been finished. After the divorce, the risk of the spouse is referenced under the Section 3 of the Act and not under the Section 125 of the Code of Criminal Procedure however a Muslim woman has a privilege to record an application for the maintenance under Section 125 of the Code of Criminal Procedure. [151]

[150] Section 4(2) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.
[151] DR. M.A. QURESHI, MUSLIM LAW p-132 ( Central Law Publications, 4th ed., 2015).

## CONCLUSION

In Muslim personal law, the issues of women's rights and privileges are profoundly questionable. Muslim women's rights and privileges related with triple talaq divorce, inheritance, and maintenance are given a ton of consideration for several days at this point. All things considered, the Indian Constitution has allowed gender equality and religious equality and opportunity from prejudice, yet there are numerous conventions that are connected on a merciless moderate culture. As we note, an out-sized a piece of Muslim Personal Law remains un-codified and the greater part of the court's decision are centered around the Quran and hadith standards. With reference to Muslim Personal Law 'ulama issues, it continues to say exclusive arenas during which it's now that formerly followed their independent voices by clerical authorities and demanded new people,' including Western-religious credentials from the normal conversations. The sole thanks to read and understand the sacred text was to take a seat at the foot of somebody through an extended instructor to whom the content had been passed down orally. Yet now they will be replicated in thousands of copies, in or in writing. For him or herself, every literate read them. There was no source left to clarify their purpose or to expire (ijazat) what one had the knowledge of the religious texts. The sacred text of Muslim, Qur'an is explicitly considerate of women's development as well as their well being, yet the traditions does not fail to disappoint them from the moment of their birth.

The Qur'an set out the idea of marriage as a sacred bond and propounds equality. But as the tradition construes, a husband is his wife's god in 'earthly form', the determiner of her final destiny and her gateway to heaven despite the fact that Qur'an has prohibited against any form of human deification as the one inexpiable evil. The Muslim source of law permits divorce, but Muslim societies have evidently made talaq lawfully and socially strenous and back-breaking for innocent women striving for their rights. The misinterpreted version put forward the idea that divorced women automatically lose custody of their children when the boy turns 7 and the girl 12. Distinctly, the quintessential and objective of Qur'an and the spirit of other Muslim law sources is misinterpreted in the issue of polygamy, inheritance rights and purdah system. The customs once intended to shield and safeguard their rights and guarantee women autonomy have become mere instruments of exploitation.

Christoph Luxenberg, a scholar of ancient Semitic languages in Germany, contended that the Qur'an has been confused and mistranslated for centuries and that women are constantly

grappling with gender inequality. Qur'an Zairiyat(51/49) quotes the idea of equality as: " We made everything with an accomplice so you can have an exercise. People are not organically or truly equal, yet they are complimentary to one another." according to Muslim law sources, employments must accommodate ladies' natural condition, physiology and profound life and limiting ladies has no spot in Islam. Lamentably, Prophet was deceitfully refered to in Hadith and his perspectives being ill bred towards the ladies. His words cites as, " If a spouse welcomes her into bed and his better half rejects him and husband dozes indignantly till the morning, at that point holy messengers would revile her till morning." But opposing to it, as indicated by Barlas, the prophet being the good example for the Muslim people group had regards both the sexual orientations and thus is not competent to expressing whatever would ignore the suppositions of the ladies and along these lines, subservient position depicted to ladies in some Muslim social orders depends on the tricky and narrow minded person understanding of the Qur'an and states a misogynous substance.

The fact that Muslim women are now coming up and raising their voices for their rights and the re-reading of the texts are helping women to enlighten themselves with their rights from which they were being hampered. The women are now realizing that the patriarchic society has made them submissive and that the women are no longer were considered as objects. Just like triple talaq was never mentioned in the texts, we never know how many such religious practices must be going on with respect to women that were never mentioned but just because Imams or any leader must have mentioned they were being followed.

On the constitutionality of personal law:

When we talk about the validity of a law, any law which is inconsistent to the fundamental rights will be considered as void as per the Article 13 of the Constitution. On the same lines, Article 372 provides that any law which contravenes the provisions of the constitution or has not been enacted by the appropriate legislature or any competent authority will be considered as void.[152] From the case laws that have been mentioned, we can understand that the court is itself confused whether they should intervene in the matters of personal law or not. In some judgments like the Mudaliyar case, the John Vallamatton case, the courts took a progressive approach and held that the personal laws shall be consistent with the fundamental rights in order to stay valid

[152] Article 372 (1) of the Constitution of India, 1949.

irrespective of the fact that they were enacted before or after the enactment of the Constitution of India. Since the constitution is the grundnorm for all the laws and fundamental rights is a part of the same, it is essential that the personal laws shall be considered as laws and shall be subject to the fundamental rights. But the courts have also refrained itself from commenting over the constitutional validity of the personal laws. Even in Shayra Bano case, the majority judgment did not comment over the constitutional validity of the personal laws. Thus, it can be said that whether personal laws come under the ambit of Article 13 is still a question.

On right to inheritance as a matrimonial right

The matrimonial rights of Muslim women in India are governed by Quran. With special reference to the right of inheritance and right of maintenance as a matrimonial right, it has been observed that there is still more preference to the customs and traditions rather than a technical law which aims to remove the ill practices of the society. In relation to the inheritance as a matrimonial right, we have seen that there has been a difference in the shares of the widow and the widower. When a husband dies, the widow gets $1/4^{th}$ of the husband's property (in case of no child) and she gets $1/8^{th}$ share of the husband's property in case there is a child. But in case of a widower, he is entitled to get ½ of the share of the deceased wife's property. The rationale behind the same has never been explained to anyone. Even the courts, while deciding matters on the right of inheritance, does not go beyond the scope of the Quran and reiterates what is mentioned in the holy text.

On right to maintenance as matrimonial right

In relation to the matters relating to the right of maintenance, it is quite surprising that the courts have taken a part in helping the women to claim their right of maintenance as a matrimonial right. In case of maintenance, the courts have asked the legislature to form a uniform civil code. The main idea behind the enactment of the uniform civil code is that there will be a secular law which will be applicable to all religions and they shall be abiding the same. Instead of enacting different laws for different purposes, this code will consolidate all the matters relating to personal laws under a uniform code. But the question here arises is that what is the reason that even after 75 years of independence, the legislators have been reluctant to enact the Code? Does politics overshadows the need of the citizens? These questions arises on account of the fact that

in the two landmark judgments, the Apex Court has clearly stated that Uniform civil code is the need of the hour as it will curb the usage of the loopholes that are present in the personal laws and deprive women of their rights.

On the judicial decisions:

The judiciary time and again has hinted on the need for a better statute which covers such loopholes. Due to the principle of separation of power, the court cannot direct what the legislature has to do but it can provide guidelines as to how such issue can be resolved. In my opinion, it is the sole responsibility of the Legislature that people are able to use the loopholes present in the personal law for their benefit and depriving women of their rights. The State shall promote and make aware the rights of the women, especially married women. Till today, many women are tolerating the atrocities that are inflicted upon them by the matrimonial homes. There could be a high possibility that this is so because the women are not aware about the matrimonial reliefs that are available to them. Thus, it is the duty of the state to make them aware and encourage them to exercise their matrimonial rights. We cannot empower women unless we make them aware. We need to make them aware; once we make them aware, they can further take the baton of empowerment and exercise their rights.

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