

## CHAPTER-VI

### CONSTITUTIONAL AND STATUTORY PROTECTION TO THE RIGHTS OF THE MUSLIM WOMEN

#### 6.1 Introduction:

Constitution of India gives many rights to its citizens; the framers of the Indian Constitution seek to fulfil the hopes and aspirations of the people of India. The Indian polity more or less has always tried to keep pace with the contemporary need based development of laws for specified purposes. It may be in the field of human rights, politics, civil rights, Constitutional rights or social transformation in general<sup>1</sup>. The founding father of the Indian Constitution was highly influenced by the Universal Declaration of Human Rights and they tried to incorporate the essential ethos of the universal declaration in the construction of India. The similar responsibility was taken by the judicial system of India. The apex court of India many times viewed that in order to achieve the basic ideals of justice, liberty, equality and fraternity and also social, economic and political justice.

The Indian political setup must be skilled with high quality. This is so because Constitution is a living document upon which legislations are made and it must be interpreted liberally.

The Constitution of India contains the ideals of the makers of the Constitution which is evident in the preamble to the Constitution which declares<sup>2</sup>:

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<sup>1</sup> Dr. Nuzhat Parveen Khan, *Women and the Law* 33, (Universal Law Publishing, 1<sup>st</sup> Edn., 2016).

<sup>2</sup> Dr. J. N. Pandey, *Constitutional Law of India* 30, (Central Law Agency, Allahabad, 47<sup>th</sup> Edn., 2010).

“We, the people of India, having solemnly resolved to constitute India into a severing, socialist, secular, democratic, republic and to secure to all its citizens: Justice - Social, Economic and Political: liberally of thought, expression, belief, faith and worship: Equality of status and of opportunity Fraternity assuring the dignity of the individual and the (unity and integrity of the Nation):

In our constituent assembly this twenty sixth day of November, 1949 do hereby adopt, enact and give to ourselves this Constitution”.

The starting of the preamble makes it clear that the source of the Indian Constitution is the people of India i.e. including all men and women of India regardless of any caste, community, religion or sex. The founding fathers conceived that social, economic and political justices the conclusive aim to be realised. Another holy objective enshrined in the preamble is equality of status and opportunity to all citizen meaning both men and women.

The principle of gender equality<sup>3</sup> is also enshrined in Fundamental Rights, Fundamental Duties and Directive Principles of State Policy. The Constitution not only grants equality to women, but also empowers the state to adopt measure of positive discrimination in favour of women. Within the framework of a democratic polity, our laws, development policies, plans and programmes have aimed at women’s advancement in different spheres.

India has also ratified various international conventions, treaties and human rights instruments committing to secure equal rights to women. Key among them is the ratification of the convention on elimination of all form of discrimination against women (CEDAW) in 1993.

The Constitution of India apart from granting equality to women also authorize the state to take positive steps to eradicate disparity in support of women for neutralizing the cumulative socio-economic, education and political disadvantages faced by them. Fundamental rights, entrust before the law and equal protection of law; prohibits

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<sup>3</sup> Supra Note 1.

discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment. Various provisions have been introduced through Constitution to ensure dignity and self-respect to women at large. Articles 14, 15 (3), 16, 39 (a), 39 (b), 39 (c), 42 and 44 of the Constitution are of specific importance in this regard<sup>4</sup>.

The basic human rights are essential attributes of human worthiness which are safeguarded by various provisions of the Constitution of India. But it is universal problem that Women have to face disparity and discrimination in every phase of life. Women are considered as an entity for the reproduction and procreation of children. Legislation cannot change the situation in a single night however; the judiciary can bring improvement to a certain extent by taking special care in imparting its Constitutional duties and protecting the interest of women as per the contemporary needs of the society.

#### **6.1.1 Constitutional Rights of Women in India:**

Our Constitution makers could anticipate the societal evil related with the empowerment of women. The framers of the Constitution had seen existing gender inequality during their time and had envisaged that gender equality was decisive for the development of the country. In order to curb the inequality disparity and to furnish sensible opportunities and generate consciousness for the exercise of human rights, it was essential to encourage with due caution educational and economical interest for both men and women and to give sufficient safeguards from social injustice and exploitation.

Part III of the Constitution of India guarantees fundamental rights to all citizens. These rights are known as cardinal human freedoms which every citizen has the right to enjoy for the peaceful existence of human being. Infringement of these rights entails

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4 Dr. Nuzhat Parveen Khan, Women and the Law 35, (Universal Law Publishing, 1st Edn., 2016).

punishment as mentioned in the Indian Penal Code<sup>5</sup> or in other special legislations depending upon the decision of the judiciary. The fundamental rights are applicable to all citizens, regardless of any race, place of birth, religion, caste, creed, colour or gender. These rights have their birth through many sources, including England's Bill of rights which is known as Magna Carta, the United State Bill of Rights and France's Declaration of the rights of Man and Citizen.

### **6.1.2 Preamble and Women's Right:**

The preamble accommodates the essence of the Constitution. It contains the aims and ideals of the people of India. The framers of the Constitution were not fully pleased with just territorial unity and integrity. Forever lasting unity, it should be on the basis of social, economic and political equality. The aim of equality of status and opportunity is enshrined in the preamble. This aims focus upon equal rights to women and man in terms of both status and opportunity. There are many legislation which confers equal rights for men and women but due to unawareness about economic rights women suffers a lot. The primary task to provide social justice to women is the codification of personal laws. Although the judiciary has protected the rights of women and pass binding decisional laws to provide social justice. However there is a big gap between Constitutional rights and their applicability in the day to day lives of the many women.

## **6.2 Fundamental Rights and Women's Right:**

### **Article 14 – Equality before Law:**

Article 14 of the Constitution of India<sup>6</sup> ensures equality before the law and equal protection of laws within the territory of India. This is a most significant provision which gives equal protection to women against any infringement of her rights. This article also facilitates process for the foundation of many legislation which seek to secure protection and enforcement of legal rights of women in India.

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<sup>5</sup> The Indian Penal Code, 1860, ACT No. 45 of 1860.

<sup>6</sup> Supra Note 2 at P. 77.

The Supreme Court has assumed active role in defining the status of women in India through judicial interpretation in the following judgement:

In its milestone judgement, *Air India V. Nargesh Meerza*<sup>7</sup>, the Supreme Court held that denial of women employment solely on the ground that she is a woman is violation of Article 14 of the Constitution of India.

In the landmark judgment of *C.B. Muthamma V. Union of India*<sup>8</sup>, the legality of the Indian Foreign Service (Conduct and Discipline) Rules of 1961 was challenged, where a female employee needs to get approval of the government in writing before her marriage or at any time immediately after the marriage is solemnized, contrary to this, a women may be needed to resign from service. The Apex Court held the provision violative of Constitution and bigotry towards women.

In *Bombay Labour Union Representatives V. Messrs International Franchises (P) Ltd.* The Supreme Court of India validate gender equality and observed that there was no logical reason to proclaim that married women would be more likely to be absent in comparison to unmarried women or widows in any department of the pharmaceutical industry. As regard the efficiency there is hardly any difference between married or unmarried ones, even the economic interest has not been affected by this uncooperative reason.

In *Savita Samvedi V. Union of India*<sup>9</sup>, the Supreme Court invalidate a Railway Board Circular which permit son, unmarried daughters, wife, husband, father to be allotted railway accommodation and the same facility was not made for married daughter in spite of being a railway employee. The Apex Court held that differentiation based on marital status is “wholly, unfair, unreasonable and gender biased” and in violative of Article 14.

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<sup>7</sup> AIR 1981 SC 1829: (1981) 4 SCC 335: 1981 Labic 1313.

<sup>8</sup> (1979) 4 SCC 260: AIR 1979 SC 1868 : (1980) 1SCR 668.

<sup>9</sup> (1996) 2 SCC 380.

Thus, the Supreme Court plays a significant role in protecting the rights of women in India. The scope of Article 14 was interpreted by the Supreme Court, citing the following implications:

In dealing the fundamental right of equality of opportunity, a scientific precise or unyielding approach should not be made and the belief should not be involved even if different scales of pay, service conditions, leave, etc. are establish in different or dissimilar post:

- Article 14 allows reasonable classification but disapprove biased discrimination.
- Article 14 assuredly applied where equals are treated uniquely without any favouritism.
- Article 14 has no application where equal and unequal are treated differently.

However, it is to be noted that absolute equality between men and women in all the fields of life is a distant goal. Although steps are taken to ensure full equality between both the sexes, the supreme law of the land could provide its citizens equality to a restricted measure. Political and legal equality is maintained, but the economic and social equality were encompasses under the purview of Directive Principles of State Policy.

### **Article 15:**

Article 15 of the Constitution of India ensures that the state shall not discriminate only on the grounds of religion, race, caste, sex or place of birth or any of them within the territory of India<sup>10</sup>. The Article further declares that nothing under the Article shall prevent the state from making special provision for women and children<sup>11</sup>.

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<sup>10</sup> Article 15 (2) the Constitution of India, 1950.

<sup>11</sup> Article 15 (3) The Constitution of India, 1950.

Knowing the fact that women have been facing inequalities and biasness for decades, the Article provides scope to initiate positive steps to reduce women from debarring in politics, education, employment, etc. So as to bring them balance with men.

The Apex Court in *State of Andhra Pradesh V. P. B. Vijayakumar*, took notice of the Governmental Policy in the year 1984 to determine that women were not getting their due share of public employment<sup>12</sup>.

*The Court explained the scope of Article 15 (3) as, the insertion of clause (3) to Article 15 in relation to women is recognition of the fact that for century's women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15 (3) provides. Its objects are to strengthen and improve the status of women.*

The Supreme Court further held that rule introduced by A. P. Government that reserves posts for women is valid. The Supreme Court in *Yusuf Abdul Aziz V. State of Bombay*<sup>13</sup>, it was held that section 497 of the Indian Penal Code which punishes only a man for adultery even if women is guilty of abetting the crime, is valid because it does not discriminate only on the basis of sex, which is prohibited by Article 15.

The importance of Article 15 is that it is a safeguard against every type of discrimination by the state on the ground of religion, race, caste or sex. Article 15 attacks at the germ of partiality by prohibiting discrimination based upon one's place of birth. This right is available to citizens only i.e. men and women of India. The provision of Article 15 (3) expand to all the state activity inclusive of public employment mentioned in Article 16.

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<sup>12</sup> AIR 1995 SC 1648: 1995 AIR SCW 2586: (1995) 4 SCC 57.

<sup>13</sup> AIR 1954 SC 32 1:1954 SCJ 385: 1954 SCR 930.

### Article 16:

Article 16 of Constitution of India guarantees equal employment opportunity to every citizen of India. Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. There should not be any discrimination in respect of employment opportunity under the state only on grounds of religion, race, caste, sex, descent, and place of birth residence or any of them<sup>14</sup>.

In *Gazula Dasaratha Rama Rao V. State of Andhra Pradesh*<sup>15</sup>, the Apex Court observing women's rights, skill out the combined scope of Article 14, 15 and 16 and explained "Article 14 guarantees the general right of equality, Articles 15 and 16 are instances of the same right in favour of citizens under some special circumstances".

Again in *Uttarakhand Mahila Kalyan Parisad V. State of Uttar Pradesh*<sup>16</sup>. The Supreme Court held that the variance in the pay scales and promotional avenues between male and female employees are prohibited by Article 16 (2).

Once again, in *Associate Bank officers Association V. State Bank of India*<sup>17</sup>, the Apex Court held that female workers are not inferior to their male opposite workers, hence there should not be any discrimination on the ground of sex against women.

The Delhi High Court expressed its concern about women's right in *Dimple Singla V. Union of India*<sup>18</sup>, by saying that until and unless the mindset of people develop eradication of disparity against women cannot be achieved. Such mindset and attitudes hampers the worthiness of working women.

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<sup>14</sup> Dr. Nuzhat Parveen Khan, *Women and the Law* 42, (Universal Law Publishing, 1<sup>st</sup> Edn., 2016).

<sup>15</sup> AIR 1961 SC 564 (1961) 2 SCR 931.

<sup>16</sup> AIR 1992 SC 1695 : Lab IC 1788 : 1992 AIR SCW 1781.

<sup>17</sup> AIR 1998 SC 32: 1997 AIR SCW 3976: (1998) 1 SCC 428.

<sup>18</sup> 94 (2001) DLT 91: (2002) 2 AISLJ 161.



The Supreme Court in *Madhu Kishwar V. State of Biha*<sup>19</sup>, held that Article 13, 14, 15 and 16 of the Indian Constitution prohibit discrimination on the ground of sex. The Apex Court viewed that females are the poorest of the poor who have been suffering discrimination and social inequalities.

In case of *Anuj Garg V. Hotel Association in India*<sup>20</sup>, the Supreme Court held that it is important to record the biological factor between male and female assembling on implication of societal conditions so much that the actual differences are uttered by the harsh cultural norms of the time.

### **Article 19:**

Article 19 of the Constitution of India gives certain freedoms to the citizens of India (which includes both women, men and third gender). The freedoms are:

Freedom of Speech and expression<sup>21</sup>, Freedom to assemble peaceably and without Arms<sup>22</sup>, Freedom to form Associations or Unions<sup>23</sup>, Freedom of Movement<sup>24</sup>, Freedom of Residence<sup>25</sup>, Freedom of Trade and occupation<sup>26</sup>.

The Supreme Court in *Delhi domestic working women's forum V. Union of India*<sup>27</sup>.

Held that right enshrined in Article 19 (1) (g) must be utilize with human respectability: the court ask for safeguarding the rights of victims and provision of legal aid and assistance to the complaints of sexual assault cases.

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<sup>19</sup> (1996) 5 SCC 125: AIR 1996 SC 1864: 1996 AIR SCW 2178.

<sup>20</sup> (2008) 3 SCC1: AIR 2008 SC 663: 2007 AIR SCW 7772.

<sup>21</sup> Article 19 (1) (a) of the Constitution of India.

<sup>22</sup> Article 19 (1) (b) of the Constitution of India.

<sup>23</sup> Article 19 (1) (c) of the Constitution of India.

<sup>24</sup> Article 19 (1) (d) of the Constitution of India.

<sup>25</sup> Article 19 (1) (e) of the Constitution of India.

<sup>26</sup> Article 19 (1) (g) of the Constitution of India.

<sup>27</sup> (1995) 1 SCC 14 : JT 1994 (7) SC 183.

### Article 21:

Article 21<sup>28</sup> of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law.

In the landmark judgement of *Maneka Gandhi V. Union of India*<sup>29</sup> the Supreme Court widened the scope of Article 21 and held that right to live does not merely mean animal existence but also cover new dimension of right to live with human dignity. According to Justice K. Iyer, a fundamental right is not an island in itself. The term “Personal Liberty” mentioned in Article 21 was liberally interpreted to inundate bundle of rights within itself.

The procedure mentioned in Article 21 of the Constitution of India does not merely means combination of procedure provided by law but it demands just, fair and reasonable procedure. One of the important interpretation of this case was the connections between Articles 14, 19 and 21, thus it known as the golden triangle of the Constitution.

In *Vishaka V. State of Rajashtan*<sup>30</sup>, the Court decided that for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15 & 19 (1) (g) and 21 of the Constitution and the safeguard against sexual harassment are implicit therein.

In *Bodhisatwa Gautam V. Subra Chakraborty*<sup>31</sup> a landmark judgment was given by the Supreme Court. The Court grant an Interim compensation to the victim of rape till the final decision of the case.

Mentioning to the miserable condition of women in society Mr. Justice Saghir Ahmad observed that *“Unfortunately, a woman in our country, belongs to a class or group of society who are in a disadvantage position on account of several social barriers and*

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<sup>28</sup> Supra Note 2 at P. 238.

<sup>29</sup> AIR 1978 SC 597 : (1978) 2 SCR 621 : 1978 1 SCC 248.

<sup>30</sup> (1997) 6 SCC 241 : AIR 1997 SC 3011 : 1997 AIR SCW 3043.

<sup>31</sup> (1996) 1 SCC 490:1996 AIR SCW 325: AIR 1996 SC 922.

*impediments and have, therefore, been victims of tyranny at the hands of man with whom they, unfortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also had the right to be respected and reacted as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life. Rape is a crime against basic human rights and is also volatile of the victims most cherished of the fundamental rights, normally; the right to life contained in Article 21 of the Indian Constitution”.*

In *Neera Mathur V. Life Insurance Corporation of India*<sup>32</sup>, the right of privacy of female employees was recognised by the Apex Court. Infringement of privacy of a female is infringement of Article 21 which safeguard right to life and privacy.

### **Article 23:**

Article 23<sup>33</sup> of the Constitution of India provides traffic in human beings and beggar and other similar forms of forced labour are prohibited which also comprises the “Devdasi System”.

As per the Devdasi System females or girls were either disposed or committed to religious institution in the name of God where they might face the instances of sexual exploitation.

The proposition of human dignity spread through the entire Constitution and has been expressed in express term in the form of this Article.

It has been the most evil practice of a male dominated society where women and girls sold and purchased. To curb this evil, the parliament passed the Immoral Traffic (Prevention) Act, 1956.

In *Vishal Jeet V. Union of India*<sup>34</sup>, the Apex Court directed the state government to take steps to end child prostitution.

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<sup>32</sup> AIR 1992 SC 392: (1992) 1 SCC 286: 1991SCR Supl (2) 146.

<sup>33</sup> Supra Note 2 at P. 317.

<sup>34</sup> AIR 1990 SC 1412: 1990 Cr LJ 1469.

In the leading case of *Gaurav Jain and Supreme Court Bar Association V. Union of India*<sup>35</sup>, the Supreme Court gave many instructions as to the establishment of rehabilitation centres and Juvenile homes for children of prostitutes and child prostitute.

Article 23 of the Constitution of India, comprehensively indicate to safeguard the individual both against the state as well as private citizens. The applicability of Article 23 is not limited.

### **6.3 Directive Principles of State Policy and Women:**

Directive Principles of State Policy are the welfare provisions enshrined in part IV of the Constitution of India. These are suggestions given to the Union and regional governments of India to bear in mind at the time of making legislations and schemes. Although the provisions are directives in nature and not enforceable by any Court, nonetheless the principles are deemed as elementary and foundational in the administration of the country, it is obligatory on the part of the state to utilise these guidelines in framing laws to build a fair society in the country.

The founding father of the Constitution borrowed Directive principles of state policy from the Constitution of Ireland and also founded upon the Gandhinian Principles. These principles anticipate equal rights to work, equal pay for equal work, and sufficient measures of decent and worthy livelihood to both men and women. The provisions dealing mainly to women are as follows:

Article 39 (a)<sup>36</sup> of the Constitution of India assures and instruct a state to utilize policies which aimed on men and women equally having the right to an adequate means of livelihood. This right is available to all citizens, irrespective of sex, for having adequate means of livelihood.

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<sup>35</sup> AIR 1997 SC 3021:1997 AIR SCW 3055.

<sup>36</sup> Supra Note 2 at P. 406.

According to 39 (d)<sup>37</sup> there shall be equal pay for equal work for both sexes, additionally it also assures the physical being and strength of workers, including both men and women, also children of young age are not abused. Thus it is the duty of the state to secure equal pay for equal work for both the sexes i.e. men and women.

(a). Policy of equal work is a Constitutional aim.

In *Randhir Singh V. Union of India*<sup>38</sup>, the Apex Court held that the principle of equal work is though not a fundamental right but enforceable through Constitutional remedies under Article 32 of the Constitution.

In *Daily Rates Casual labour V. Union of India*<sup>39</sup> the Apex Court observed that the doctrine of equal pay for equal work is applicable to both men and women, daily wage earners are also paid equally to that permanent employees if the work they perform are identical.

(b). Men and women to be safeguarded equally:

Article 39 (e)<sup>40</sup> of the Constitution of India provides that the health and strength of workers (both men and women) and also children of young age should be safeguarded equally.

In *M.C. Mehta V. State of Tamil Nadu*<sup>41</sup>, the Supreme Court instructed that children cannot be engaged in match factories especially in fireworks.

### **(c). Article 39-A**

#### **Equal Justice and Free Legal Aid:**

Article 39 A of the Constitution of India provides equal justice and free legal aid<sup>42</sup>. The state shall secure that the operation of the legal system promotes justice on the

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<sup>37</sup> Id.

<sup>38</sup> AIR 1982 SC 879.

<sup>39</sup> AIR 1987 SC 2342.

<sup>40</sup> Ibid. 410.

<sup>41</sup> (1991) 1 SCC 283.

<sup>42</sup> Supra Note 2 at P. 410.

basis of equal opportunity and shall in particular provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunity or securing justice are not denied to any citizen by reason of economic or other disabilities<sup>43</sup>. In *Hussainara Khatoon V. Home Secy. State of Bihar*<sup>44</sup>, the Supreme Court held that legal aid and speedy trial is now treated as fundamental rights under Article 21 of the Constitution.

#### **Article 42:**

Just and Human condition of work and maternity relief for women<sup>45</sup>:

Article 42 of the Constitution of India entrust on obligation on every employer to provide just an human condition of work and for maternity relief. In practice the status and behaviour towards women in corporate offices is really disheartening and in fact they are ill treated by their seniors. In such a pathetic situation, the provisions of Article 42 are very significant thus, it has become the duty of employer to ensure just working conditions to all the employees.

In *Dattatraya Moreshwar V. State of Bombay*<sup>46</sup> the Apex Court held that granting maternity relief under Article 42 is not violative of Article 15 (1) of the Constitution.

#### **Article 44:**

##### **Uniform Civil Code and Gender Justice:**

The framers of the Constitution were fully aware of Gender disparity and sexual inequality, so they included Article 44 of the Constitution which provide that the state shall endeavour to secure to all citizen a uniform civil code throughout the territory of India<sup>47</sup>. It is a matter of regret that till today, state did not think it is necessary to evacuate uniform civil code nevertheless the judiciary time to time reminded and

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<sup>43</sup> Legal Services Authorities Act, 1987 was passed in furtherance of this directive.

<sup>44</sup> AIR 1979 SC 1360.

<sup>45</sup> Supra Note 2 at P. 409.

<sup>46</sup> AIR 1952 SC 181.

<sup>47</sup> Supra Note 2 at P. 411.

stressed upon the infirmity of laws dealing with marriage, succession, divorce, adoption and maintenance etc.

In *Shah Bano V. Mohd. Ahmed Khan*<sup>48</sup>, the Apex court dealt with the matter relating to Muslim Husband's liability to maintain his wife beyond the period of Iddat. The Supreme Court ordered the husband to provide maintenance under section 125 of Code of Criminal procedure, 1973.

Which is applicable to all irrespective of religion and overrides the personal law in case of inconsistency between the two.

In this reference, Y. V. Chandrachud J. (the then Chief Justice of India) observed:

*"It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common civil code will help the cause of notional integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on the issue. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and unquestionably it has the legislative competence to do so".*

The explanation in this landmark judgement made the Islamic community and the Rajiv Gandhi Government to pass the Muslim women (Protection of Rights of Divorce) Act, 1986 that permits a magistrates to ask her relatives who will get her property to maintain her after the period of Iddat is over. In case of no relatives, the Wakf Board will take the responsibility of her maintenance.

In an another leading case of *Sarla Mudgal V. Union of India*<sup>49</sup>, the Supreme Court give direction to the government to focus again at Article 44 of the Constitution which as per the judiciary pertinent for unity and integrity of the nation. The question before

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<sup>48</sup> AIR 1985 SC 945: (1985) 2 SCC 556:1985 Cr LJ 875.

<sup>49</sup> (1995) 3 SCC 635: AIR 1995 SC 1531.

the Court was whether the Hindu Husband converting to Islam solemnizes a second marriage without dissolving the first marriage. The Supreme Court held that such a marriage will be void, the husband will be liable for bigamy under Section 494 of the Indian Penal code 1860. Thus, the change in one's religion will not change the applicability of law. Muslim personal law would have been applied only if the first marriage was done Muslim law.

The Apex Court in *Noorsaba Khatoon V. Mohd. Quasim*<sup>50</sup> observed that the children of divorced Muslim women is entitled to get maintenance from their father, section 125 of the Code of Criminal Procedure, 1973 and also under the Muslim Personal law, the father is under absolute duty to maintain the children of divorced wife.

It is sad to say that till date, there is no uniform civil code in India, although there is a uniform Criminal Code applicable to all irrespective of any religion. It is of urgent necessity to frame a civil law dealing with divorce, maintenance, marriage, adoption and succession ruling the Hindus, Muslims, Christians and Parsi etc. for the governance of Muslim there is Muslim Personal Laws for example Shariat Act, the Dissolution of Muslim Marriage Act and the Muslim Women (Protection of Rights on Divorce, Act etc. For Hindus and Christians there are various laws like Hindu Marriage, Act, the Hindu Adoption and Maintenance Act, Indian divorce Act and Chochin Christian Succession Act etc.

Thus, it is submitted that unless the execution of uniform civil code is made, no rights of women can be protected, no gender equality can be achieved in its real way, uniformity of all laws will bring prosperity in the society.

#### **6.4 Fundamental Duties and Women:**

The 42<sup>nd</sup> Amendment Act, 1976 added Part IV-A of the Constitution which inserted long list of fundamental duties under Article 51A. As per Article 51A<sup>51</sup>, It is our duty to renounce practices derogatory to the dignity of women. But it is to be noted that

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<sup>50</sup> AIR 1997 SC 3280.

<sup>51</sup> Supra Note 2 at P. 428.



unlike Fundamental rights, Fundamental duties are not enforceable, i.e. non abidance of these duties will not entail punishment. Article 51A (e) specifically mentions: To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women<sup>52</sup>.

In *C. Rajkumari V. Commissioner of Police, Hyderabad*<sup>53</sup>, the High Court of Andhra Pradesh held that any contest which is likely to injure the dignity of women or to represent her indecently would-be against the provision of indecent representation women (Prohibition) Act, 1986 and also inconsistent with the provision of Article 14, 21, and 51A of the Constitution of India.

The equal remuneration Act, 1976, the Maternity Benefit Act 1961, the dowry prohibition act 1961 and the Immoral Traffic (Prevention) Act 1956 are some of the enactments which got its survival from Article 51 A of the Constitution of India.

### **73<sup>rd</sup> and 74<sup>th</sup> Amendments Act of 1993:**

The 73<sup>rd</sup> and 74<sup>th</sup> Amendments (1993) to the Constitution of India have set up a vital change by raising women's participation in democratic process. The amendments seek to provide for reservation of 33.3percent of elected seats. It is to be noted that one third reservation for women of post of chairpersons of these local bodies.

Article 243D (3) and Article 243T (3)<sup>54</sup> “provide for reservation of not less than one third of total number of seats in panchayats and municipalities for women to be allotted by rotation to different constituencies.

Article 243D (4) T (4)<sup>55</sup> provides that not less than one third of the total number of officers of chairperson in the panchayat and municipalities at each level to be reserved for women's.

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<sup>52</sup> Part IV A Art 51A (e) the Constitution of India 1950.

<sup>53</sup> AIR 1998 AP 302.

<sup>54</sup> Women and the Indian Constitution available at: <https://vikaspedia.in/social-welfare/women-and-child-development/women-development-1/legal-awareness-for-women/women-and-the-indian-constitution> (visited on 22nd Oct. 2020).

<sup>55</sup> Ibid.

## **6.5 Provision of Muslim law and the Constitution of India:**

### **1. Polygamy for Muslim Husband and Monogamy for Muslim Wives.**

Under Muslim law, polygamy is permitted to males while it restricts the wives by prohibiting plurality of husband. Allowing polygamy for males and monogamy for females is violative of Article 15 of Constitution which provides no discrimination on the ground of sex. “Sex is a sound calcification<sup>56</sup>, which is the most common foundation to differentiate between two classes, viz, male and female. The Constitution of India expressly mentioned in Article 15, ruled out all kind of discrimination against women, be it on the ground of sex solely”.

Many arguments were urged earnestly in support of polygamy for male and monogamy for female. For example, number of male population in comparison to the female population, uncertainty of fatherhood in case of plurality of husband, bodily fragileness of the females chances of demolition of our contemporary social structure, if females are permitted to be polygamous, are few of the justifications which have been set down from time to time. In this regard, citation of famous Jurist Sir Abdur Rahim may be made which says “the law decides in favour of the husband, because generally speaking he is mentally and physically superior of the two<sup>57</sup>”.

Nevertheless, the above mentioned justification cannot override the Constitutional provision of Article 15 (1) prohibiting discrimination against women is final and especially Article 15 (3) allowing discrimination in support of women for single occasions. Exhibit the revulsion of the Constitution to any type of disparity against women as women and any justification for any violation cannot be subsided, altered or pacified by the rigour of the instruction.

### **Some landmark judgment in favour of polygamy.**

*State of Bombay V. Narasu Appa Mali*<sup>58</sup>.

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<sup>56</sup> AIR 1954 SC 321 (Yusuf Abdul Aziz V. State of Bombay).

<sup>57</sup> Abdur Rahim, Muhammadan Jurisprudence, 327.

<sup>58</sup> AIR 1952 Bom. 84.

Chief Justice Chagla and Justice Gajendragadkar both held that polygamy for males and monogamy for female did not infringe the provision of Article 15 (i). Chief Justice Chagla observed as follows<sup>59</sup>:

*“It is urged that polygamy discriminates against women only on the ground of sex. This argument, in our opinion, overlooks the history of polygamy as a social institution. Polygamy is justified, if at all, on social, economic and religious grounds and hardly over on grounds of sex.....therefore, it would be difficult to say that the institution of polygamy would constitute a discrimination against members of one sex only on the ground of their sex”.*

And the observation of Justice Gajendragadkar are as follows:

“There can be little doubt that the institutions of marriage like all social institutions in the result of contemporary social conditions. The rules prescribed for marriages are determined by the social and economic condition of the society in dealing with these rules, it is also necessary to remember the obvious natural differences between the sexes themselves and considerations which may legitimately arise from these differences. In my opinion, therefore, the provisions of personal laws permitting polygamy cannot be said to offend against Article 15 (1)”.

In *Dwarka Bai*<sup>60</sup>, Justice Panchapakesa Ayyar opined that discrimination against women may be justified on the ground of abilities of man and woman and such discrimination would not violate Article 15 of the Constitution of India. The observation for Justice Panchapakesa that a woman would conceive as a consequence of adultery but not a man, would not a differentiation on the ground of sex alone was highly criticised.

### **Contradictory opinion of Privy Council and Supreme Court:**

In *Punjab Province V. Daulat Singh*<sup>61</sup>, this case was an appeal from the decision and order of the federal court of India, where Sec. 298 which prohibit discrimination “On

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<sup>59</sup> *State of Bombay V. Narasu Appa Mali*, AIR 1952 Bom. 84 (89).

<sup>60</sup> AIR 1953 Mad 792.

<sup>61</sup> AIR 1946 PC 66 (71).

the grounds only of religion, place of birth, descent colour or any of them” of the government of India Act, 1935 was questioned. The observation made by Sir John Beaumont as follows:

“For the application of Section 298, it is imperative for the court to go through the scope and object of the Act which is challenged, so as to decide the foundation upon which the Act is based. If the whole foundation of the Act is violative of one or many ground mentioned in Sec. 298(i) then the Act will be bad. However, if the real ground of the Act is somewhat different, the Act will be valid. According to Sir Beaumont, the real aim of the Act is to circumvent a way of eluding the main Act, which inherently is unacceptable, and no doubt some of the rights are circumvented by the Act may be conferred in person, whose only loophole is lack of the particular descent, such lack of descent is not so important ground on which the rights are avoided”.

The above view was rejected by the Privy Council and giving the decision of the board, lord thankerton observed thus<sup>62</sup>.

“Beaumont, J. Holds that in applying the terms of sub-Sec (I) of Sec 198 it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground on which the act is based. Their lordships are unable to accept this as correct test. In their opinion, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in Sec. 298 (1), but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal rights conferred by the sub-section and while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal rights the object of the act, however laudable, will not obviate the prohibition of sub-sec (i)”.

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<sup>62</sup> Id.

The same judgement of the Privy Council was relied by the five judge of Supreme Court in state of Bombay V. Bombay education society<sup>63</sup>. The Supreme Court held that no matter how laudable the object or justifying the cause for the impugned provision may be, its validity has to be judged by its actual operation and effect.

The Supreme Court in C. B. Muthamma V. Union of India<sup>64</sup>, where the Indian Foreign Service (Conduct and Discipline) Rules, 1961 was challenged on the ground that Rule 8 (2) of the above mentioned rules provided that “a woman member of the service shall have to get permission in writing before her marriage or at any time after the marriage is solemnized and rule 18 (4) provided that “no married woman shall be entitled as of right to be appointed to the service”. Justice Krishna Iyer strongly held the above mentioned rules inconsistent of Article 14 and 16. Any discrimination on the ground of sex alone would be violative of Article 14 and the observations in Narasu Appa Mali<sup>65</sup> and Dwaraka Bai<sup>66</sup> cannot be said to be good law.

### **The True Concept of Polygamy in Islam:**

The concept of Polygamy is very controversial; the Islamic law allows polygamy for male and monogamy for female. A Muslim husband is empowered to have four wives at a time but a Muslim wife can have only one husband. To understand the true nature of polygamy in Islam, it is imperative to understand the important verses of Holy Quran they are:

#### **Verse 4:3**

“If ye fear that ye shall not

Be able to deal justly

With the orphans

Marry woman of your choice

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<sup>63</sup> AIR 1954 SC 561 (567, 568).

<sup>64</sup> AIR 1979 SC 1868.

<sup>65</sup> AIR 1952 Bom. 84.

<sup>66</sup> AIR 1953 Mad 792.

Two or three or four  
 But if ye fear that ye shall not  
 Be able to deal justly (with them),  
 Then only one or,  
 That which your right hands possess  
 That will be more suitable  
 To prevent you  
 From doing injustice”

**Verse 4:129:**

“Ye are never able  
 To do justice  
 Between wives  
 Even if it is  
 Four ardent desire”

**Verse 24:32:**

“Marry those among you  
 Who are single and  
 The virtuous ones among  
 Your slaves male or female  
 If they are in poverty  
 Allah will give them  
 Means out of his grace.  
 For Allah is ample-giving  
 And he knowth all things”.

In the Pre-Islamic days, men are empowered to have any number of wives, it was only after the advent of Islam, Prophet Muhammad (PBUH) restricts the number of wives to four at a time. The phase under which verse 4:3 was revealed should be taken into consideration. After the battle of Uhud large number of men lost their life, abandoning

many widows and orphans. So, getting married to multiple wives becomes a social necessity, the Holy Prophet restrict the strict condition of equality among all of them and if one have doubt as to maintenance of equality among the wives, than he must marry only one verse 4:129 reveals that it is beyond human ability to maintain equality even if he tries his best, this is the real truth mentioned in the Holy Quran.

A careful and prudent analysis of verse 4:3 and 4:129 would make it clear to everyone that monogamy is the rule and Polygamy is utmost sparse exception.

Verse 24:32 of the Holy Quran direct that a man or woman must marry anyone who is single, that is one who is free of any bond of wedlock whether unmarried or lawfully divorced or widowed. So, this later verse of 24:32 is likely to repudiate the earlier verse 4:3.

Thus, it may be said that analysing the Pre-Constitutional phase, post Constitutional period and the judgements given by supreme court and High Courts, the Muslim law permitting polygamy for men and prohibiting the same for women is a discriminate on against women and violative of Article 15 on the ground of sex alone and it cannot be said to maintain equality before the law and equal protection of law between men and women.

### **Muslim marriage and the Constitution of India:**

As regard the Muslim marriage or Nikah, the Muslim personal law provides three types of marriages they are – valid (Sahih Marriage) void (Balil Marriage) and irregular (Fasid Marriage).

A Muslim man can contract a sahih marriage with a Muslim woman, kitabia i.e. a Christian or Jewess but not with an idolatress or a fire worshiper where as a Muslim woman can marry only with Muslim man. She is not entitled to marry a Kitabi, i.e. a Christian or Jew. Marriage with a kitabi or a fire worshiper is however irregular not declared as void.

So, allowing a Muslim male to perform a valid marriage with a Kitabia female but refusing a marriage between Muslim female with a Kitabi and rendering it as irregular

as violative of Article 15 and discriminatory against women on the ground of sex alone. Abdur Rahim opined that such differences is made due to chances that a Muslim woman may adopt the faith of the husband for instance converting to Christian or a Jew, but the same doubt is less regarding a Muslim husband to convert into the faith of a Kitabia, nevertheless, it cannot be denied that there is no discrimination on the ground of sex alone to engage the provision of Article 15 of the Constitution.

### **Provision of Talaq and the Constitution of India:**

Under Muslim law, a husband has boundless and unilateral power to pronounce Talaq upon his wife without citing her any reasonable grounds, where as a Muslim wife has no such power to break the marital tie. She only has a right to seek extrajudicial divorce by Talaq-e-Tafweez that too on the conferment of such power by her husband. She may have extrajudicial divorce by way of Khula or Mubarat, but only with the consent of her husband. If no conferment for Talaq-e-Tafweez or no consent for Khula is given by the husband, then the only resort with her is to file a suit in the court of law upon any one or two grounds mentioned in the dissolution of Muslim Marriage Act, 1939. Thus biasness against the wives is glaring flagrant and the discrimination is grounded on Sex alone, that being the sole difference between a Muslim wife and Muslim husband.

To understand clearly about the proposition of talaq let us analyse some of the leading cases:

In *Zohara Khatoon*<sup>67</sup>, the Supreme Court pointed that the unilateral power of the husband to pronounce talaq, is distinctive feature of Muslim law because neither the Hindu law nor the Parsi, Christina law have such provision. Only Muslim wife have to bear such arbitrary and boundless power of the husband of only for the reason of application of Muslim law. So, only because Muslim law applied to her, she is undergoing a miserable situation and other women belonging to different religion do

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<sup>67</sup> AIR 1981 SC 1243.



not face such gloomy situation then, it may be said that Muslim wives are in favourably discriminated against on the ground of religion only.

The Allahabd High Court in *Rahmat Ullah V. State of U.P.* and *Khatoon Nisa V. State of U.P.* (write Petition NO. 45 and No. 57 of 1993) ruled that the pronouncement of Talaq-e-Biddat is violative to the provisions of Article 14, 15, 21 and 51A of the Constitution of India.

### **The True Quranic Meaning of Talaq-**

The Holy Quran enumerates that the Talaq should be pronounced in three successive tuhars, and the third pronouncement makes the talaq irrevocable. The Holy Quran provides for the involvement of arbitrator for the final pronouncement of Talaq<sup>68</sup>.

Maulana Mohammed Ali viewed that in the early days of Islam, it is the duty of the Qazi to nominate, Arbiters each from the husband and wife's family, who tried to conciliate the matters between the husband and wife. But if it becomes impossible for the parties to reside under the same roof, then divorce is allowed, however the last decision for divorce is vested upon the Qazis, it is the most finest method which represent the Islam in its accurate distinction.

However in the later days some of the Muslim jurists abrogate this method of talaq, and misconceived the form which under which "Talaq-ul-Biddat" was allowed. It is to be noted that Talaq-ul-Biddat is not recognised in the Holy Quran.

### **Nikah Halala and the Provision of the Constitution:**

In 2018, Sameena Begum and other Muslim women filed petitions in the Supreme Court Challenging various Muslim personal laws pertaining to marriage and divorce. In particular, they challenged the protection of polygamy and nikah halala on the ground that they violate the rights to equality, non discrimination and dignity of Muslim Women<sup>69</sup>.

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<sup>68</sup> The Holy Quran, Verse 4:35.

<sup>69</sup> Nikah Halala and Personal Law Reform II available at: <https://www.scobserver.in/the-desk/nikah-halalala-and-the-ucc-ii> (visited on 29th Oct. 2020).

In 2017, in *Shayara Bano V. Union of India*, the Court act in nation the end of triple talaq, the Union government introduced legislation criminalizing it by 2019 and the Muslim women (Protection of Rights on Marriage) Act, 2019 was passed.

Practice of Nikah-Halala is infringement of fundamental rights guaranteed under Articles 14, 15 & 21 of the Constitution and public order, morality and health<sup>70</sup>.

### **6.6 Statutory Protection of women in India.**

There are several legislations in India which seek to protect the rights of women (including Muslim women). In Indian Muslim society woman occupies a position which is secondary in status. The Holy Quran glorified women as mother who will lead to the final destination, a wife who completes a man's half faith to Islam and a daughter is the blessings of Almighty Allah upon the family. In India, there are largest numbers of legislation for the welfare of the women. The Constitutional law of India and the various Acts passed by the Central Governments and the regional governments entrust special protection to women, and to raise status of women in India.

The father of the nation says;

“To call a woman the weaker sex is a libel, it is man's injustice to woman. If by Strength is meant brute strength, then, indeed, is woman less brute than man. If by strength is meant moral power, then the woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, a man could not be. If non violence is the law of our being, the future is with a woman who can make a more effective appeal to the heart than man?” – Mahatma Gandhi<sup>71</sup>

Legal Provisions from various Statutory Legislation for the Protection of Women:

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<sup>70</sup> Supreme Court declines urgent hearing of plea against polygamy, nikah halala available at: <https://www.thehindu.com/news/national/supreme-court-declines-urgent-hearing-of-plea-against-polygamy-nikah-halala/article30136168.ece> (visited on 1st Oct. 2020).

<sup>71</sup> Constitutional & Legal Rights of Women in India available at: <https://sheroes.com/articles/women-rights%20-india/NzExNg> (visited on 2nd Oct. 2020).

The Union Government has actively taken major move to codified, safeguard and raise the position of women which is visible from the provision of Constitution as well as in the legislative enactments and amendments were also to assist the legal protection to women to safeguard their economic, social and cultural lives. There are some of the legislation which manifest the role assumed by the government of India in the interest of women as follows:

- Dowry Prohibition Act, 1961<sup>72</sup>
- Maternity Benefit Act, 1961<sup>73</sup>
- Births, Death & Marriage Registration Act, 1886<sup>74</sup>
- Medical Termination of Pregnancy Act, 1971<sup>75</sup>
- National Commission for Women's Act, 1990<sup>76</sup>
- Prenatal Diagnostics Techniques (Regulation and Prevention of Misuse), Act 1994<sup>77</sup>
- Protection of Women from Domestic Violence Act, 2005<sup>78</sup>.
- Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal Act, 2013<sup>79</sup>
- Muslim Women (Protection of Rights on Divorce) Act, 1986<sup>80</sup>, etc.

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<sup>72</sup> Dowry Prohibition Act, 1961, (Act No. 28 of 1961).

<sup>73</sup> Maternity Benefit Act, 1961, (Act No. 53 of 1961).

<sup>74</sup> The Births, Death & Marriage Registration Act, 1886, (Act No. VI of 1886).

<sup>75</sup> The Medical Termination of Pregnancy Act, 1971, (Act No. 34 of 1971).

<sup>76</sup> National Commission for Women Act, 1990, (Act No. 20 of 1990 of Gov. of India).

<sup>77</sup> The Prenatal Diagnostics Techniques (Regulation and Prevention of Misuse) Act, 1994, (Act No. 57 of 1994).

<sup>78</sup> Protection of Women from Domestic Violence Act, 2005, (Act No. 43 of 2006).

<sup>79</sup> Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal Act, 2013, (Act No. 14 of 2013).

<sup>80</sup> Muslim Women (Protection of Rights on Divorce) Act, 1986, (Act No. 25 of 1986).

Some of the important legislations are discussed below:

**D. P. Act, 1961:**

The tradition or norms of offering dowry in India has been widespread from the ancient period, in which family of the bride gives gifts including valuable items and profitable assets to the groom as a consideration of marriage. Earlier this custom was performed with the intention of supporting newly married couple but in due course of time it took the form of compulsory demand from the groom side for the happening of marriage, which is demanded even after the Marriage to secure the well being of the bride.

The system of dowry in India reached to the extent that it put a great economic burden on the bride's family<sup>81</sup>. And Muslim society is no exception to this system.

To curb the menace, dowry prohibition Act was passed in 1961. The Act imposed penalty which includes imprisonment for a term of 5 or more years with a fine of Rs. 15,000.- and also the amount of dowry paid by the bride's family. Demanding of dowry itself entails punishment of imprisonment of 6 months to 2 years and fine of Rs. 10,000/-.

Section 304B of Indian Penal Code imposes punishment for cases dealing with dowry death. The provision says, if a married woman is caused body injury or dies within the period of seven years of her marriage or she has faced cruelty by her husband or in laws due to any demand of dowry.

Section 113B of Indian Evidence Act provides – when the question is whether the person has committed the dowry death of a woman and if it appears that just before her death she is subjected by such a person to cruelty or harassment for or in connection with any demand for dowry; the court shall presume that such person has caused dowry death<sup>82</sup>.

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<sup>81</sup> Mr. Abhishek Sharma, Bride Burning and Dowry System in India, Manupatra, <https://www.manupatrafast.com/article/pop/open/Article.aspx?ID=9a6063d0-e-59f-42f7-a&e8-7aa6bacf35bb2txtsearch=subject%20women%20And%20child%20Rights>

<sup>82</sup> Dr. Avtar Singh, *Principles of the Law of Evidence* 443, (Central Law Publication, Allahabad 19<sup>th</sup> Edn., (2011).

### **Protection of Women from Domestic Violence Act (2005):**

All women irrespective of any religion shall have a right against domestic violence. The Act mainly aims to safeguard a wife, a female live in partner or a woman residing in a house like a mother or a sister from domestic violence from a husband, male live-in partner or relatives. The victim herself or anyone on her behalf can file a complaint.

Section 498 of the said Act, provides whoever, being the husband or the relative of the husband of a woman, subject her to cruelty, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. The complaint registered against an offender makes it a non-bailable one, ensuring a woman's safety and provide protection from domestic abuse. The acts of violence are not limited to physical brutality, but also other forms of abuse like verbal, economic, emotional and sexual.

### **Maternity Benefit Act, 1961:**

The Maternity Benefit Act, 1961 was passed with the intention to regulate women employment and providing maternity and other benefits. The Act provides for 12 weeks paid maternity leave but this has now increased to 26 weeks in the amendment act of 2017. From which 8 weeks paid leave may be taken before the expected delivery and 18 weeks of paid leave may be taken after the delivery.

Some of the other privileges available to women under the Act are:

1. If in case the woman faces a miscarriage she shall after presenting reasonable prescribe proof she shall be allowed to take paid leave for six weeks following the date of the miscarriage<sup>83</sup>.
2. In case of a tubectomy operation a woman shall be, on production of a prescribed proof entitled to leave with wages at the rate of maternity benefit for

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<sup>83</sup> Id.

a period of 2 weeks which shall be immediately followed by the day of the operation<sup>84</sup>.

3. Leave for a period of one month shall be granted at the rate of maternity benefit in case of any kind of illness that occurs as a consequence of pregnancy, delivery, premature birth, miscarriage or medical termination of pregnancy<sup>85</sup>.
4. Every woman according to this act who is entitled to maternity benefit shall also be allowed a medical bonus of rupees 250 if no pre-natal confinement and post-natal care is provided for by the employer free or charge<sup>86</sup>.

Punishment for the violation of provision of Act is imprisonment upto 1 year and fine up to Rs.5000/-<sup>87</sup>.

#### **Indian Maternity Benefit Amendment Act, 2017:**

- Key changes of the Amendment Act are providing crèche (day care) of activities is not mandatory for employers with more than 50 employees<sup>88</sup>.
- Paid maternity leave has been doubled for women working at companies with at least 10 employees<sup>89</sup>.
- Providing an-in house crèche facility which is self-administered by the employer<sup>90</sup>.

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<sup>84</sup> Id.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Maternity Benefit (Amendment) Act, 2017 available at:

<https://www.pillsburylaw.com/en/news-and-insights/indian-maternity-benefit-amendment-act-2017.html#:~:text=The%20key%20changes%20include%3A%20> (visited on 1st Nov. 2020).

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

- Work from time option – the Act provide for work from home for women, which may be utilized after the expiry of 26 weeks period<sup>91</sup>.
- Employee awareness: It becomes mandatory under the Act, for the employers to educate and aware women about the maternity benefits that are made for them for a specified term of time<sup>92</sup>.

### **Sexual Harassment of Women at Work place Act, 2013:**

This Act provides for women's right against harassment at work. It is a right to file complaint against sexual harassment. The Act grants a sexually harassed woman employee can file a written complaint to an internal complaints committee (ICC) at a branch office within a period of 3 months as per the sexual Harassment Act. The same can also be filed by any Legal heirs of the woman or by any person who has written permission on given by her to make the complaint<sup>93</sup>.

Pre-Conception and Prenatal Diagnostic Technique (Prohibition of Sex Selection) Act, 1996.

The parliament of India enacted the Pre-Natal Diagnostic Techniques Act, 1996 to curb selective abortion. The Act was passed to ban determination of sex and to arrest the declining sex ratio in India.

The act banned prenatal sex determination. Every genetic counselling centre, genetic laboratory or genetic clinic engaged in counselling or conducting Pre-Natal diagnostics techniques, like invitro fertilisation (IVF) with the potential of sex selection (Preimplantation genetic diagnosis) before and after conception comes under purview of the PCPNDT Act and are banned<sup>94</sup>.

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<sup>91</sup> Id.

<sup>92</sup> Ibid.

<sup>93</sup> Constitutional & Legal Rights of Women in India available at: <https://sheroes.com/articles/women-rights%20-india/NzExNg> (visited on 2nd Oct. 2020).

<sup>94</sup> Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 available at: [https://en.m.wikipedia.org/wiki/Pre-Conception\\_and\\_Pre-Natal\\_Diagnostic\\_Techniques\\_Act,\\_1994](https://en.m.wikipedia.org/wiki/Pre-Conception_and_Pre-Natal_Diagnostic_Techniques_Act,_1994) (visited on 1st Nov. 2020).

The Act was amended by the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003. Some of the implications of the amendment are –

- Amendment of the act mainly covered bringing the technique of pre conception sex selection within the ambit of the act<sup>95</sup>?
- Bringing ultrasound within its ambit<sup>96</sup>.
- Empowering the central supervisory board, Constitution of state level supervisory board<sup>97</sup>.
- Provision for more stringent punishments<sup>98</sup>.
- Regulating the sale of the ultrasound machines only to registered bodies<sup>99</sup>.

#### **National Commission for Women Act, 1990:**

The National Commission for Women Act, 1990 was passed to safeguard the interest of women. To achieve the goal of women empowerment, National commission for Women was set up on 31<sup>st</sup> January 1992 with Mrs. Jayanti Patnaik as the chairperson<sup>100</sup>.

As per the Act, Central government will nominate a women chairperson, 5 members from various fields and a secretary member to form the commission and mandates for (a) safeguards of rights of women granted by the constitution, (b) study the problems faced by the women in current day and the recommendations to eradicate these

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<sup>95</sup> Id.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> National Commission for Women available at:

<http://www.legalserviceindia.com/article/I318-National-Commission-For-Women.html>  
(visited on 1st Nov. 2020).



problems, (c) evaluating the status of women in India from time to time and (d) funding and fighting cases related to women's violations<sup>101</sup>.

The commission discharge functions like legal aid and intervention, suggesting improvements in the existing laws and initiating bill for the raising standard of women and also to aware about their rights.

### **The Muslim Women (Protection of Rights on Divorce) Act, 1986:**

The Muslim Women (Protection of Rights on Divorce) Act was a landmark legislation to protect the rights of Muslim women who have been divorced or have obtained divorce from, their husbands and to provide for matters connected therewith or incident thereto<sup>102</sup>.

**The Muslim Women (Protection of Rights on Marriage) Bill 2019**, after receiving presidents assent become as Act<sup>103</sup>. Some of the Key Provision are:-

- Declaration of Talaq – The Act makes all declaration of Talaq, including in written or electronic form, to be void and illegal<sup>104</sup>.
- The Act makes a declaration of Talaq as cognizable offence, attracting up to three years imprisonment with a fine<sup>105</sup>.
- Custody – A Muslim woman, against whom such talaq has been declared, is entitled to seek the custody of the child<sup>106</sup>.

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<sup>101</sup> Id.

<sup>102</sup> The Muslim Women (Protection of Rights on Divorce) Act 1986 available at: [https://en.m.wikipedia.org/wiki/The\\_Muslim\\_Women\\_\(Protection\\_of\\_Rights\\_on\\_Divorce\)\\_Act\\_1986](https://en.m.wikipedia.org/wiki/The_Muslim_Women_(Protection_of_Rights_on_Divorce)_Act_1986) (visited on 1st Nov. 2020).

<sup>103</sup> The Muslim Women (Protection of Rights on Marriage) Act 2019 available at: <https://www.drishtiiias.com/daily-updates/daily-news-analysis/the-muslim-women-protection-of-rights-on-marriage-act-2019> (visited on 1st Nov. 2020).

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

Thus, India being mainly a male dominated nation has restricted and limited the participation of women of the country in general and Muslim women in particular in all fields of public spheres. Their duties are confined to domestic task mainly; the recognition of women even after 73 of years of independence is recognised as miserable and vulnerable section of the society. Although women constitute half of the population of India yet they are regarded as weaker class due to the treated meted by her in every sphere of life. India cannot affirm full development unless women are brought into limelight i.e. her active role should be appreciate in the family matters as well as in the public spheres gender disparity is one of the strongest barriers for the development of women. Gender equality is pertinent to achieve complete and full development of the country. It is important to note that various legislation which are enacted by the central government for the protection of women and creating awareness about their rights in the society helps in abolishing some of the heartless conservative cultures of discrimination on the basis of gender.

It is perhaps ironical that the Holy Quran places women on very high pedestal and the Ahadis of the Holy Prophet (PBUH) seek to raise the standard of Muslim women to a great extent but the study reveals that no one is anxious about the dignity and worthiness of the woman. It is unfortunate reflection representing the frame of mind of indifference of the society which amounts in a complete denial of human rights of Muslim women in which gender justice sink. All her rights enunciated in the Holy Quran as well as in the Constitution of India are basic and fundamental which are in alienable and indivisible part of Universal Human rights.

### **6.7 Discussion:**

The analysis of constructional and legal provision for the protection of women right reveals that the supreme law of the land has granted many basic and fundamental rights for protection of women. The Constitution of India guarantees equality to men and women, many legislations have been enacted to safeguard and raise the standard of women. No doubt to some extent women is interest were protected from these legal

provisions; but it is sad to note that most of under privileged and unaware women yet have to face miserable condition in a male dominated society.

The study shows that some sections of women are even not aware about basic human rights. Women in general are discriminated at every levels in society due to lack of awareness about their legal rights. Particularly the conditions of Muslim women are more pathetic where the dominance of patriarchy is clearly visible.

Following are some of the important fact perceived by the researcher in this chapter:

- Indian Constitution guarantees every woman (Including Muslim women) the right to honour ability, flawless growth, and a life unbounded of discrimination.
- The Preamble of the Constitution is the soul of Constitution which describes the guiding principles, goals of the people of India. The aim of equality of status and opportunity to all women of India irrespective of any religion.
- The framers of the Indian Constitution had the anticipation of gender disparity against women, so they tried to incorporate the principle of gender equality in part III, Part IV and Part IV (a) of the Constitution.
- The framers of the Constitution of India were aware about the fact that until there will be development of women there cannot be development of the nation.
- Part III of the Constitution of India guarantees fundamental rights to all citizens. These rights are the basic and most important rights of all the citizens, infringement of which entails punishment.
- Article 14 – Rights to Equality<sup>107</sup> – The state shall not deny to any person equality before law or the equal protections of laws within the territory of India. Article 14 mainly concern two aspects – it direct the state not to deny to any person equality before law and also instruct not to deny equal protection of

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<sup>107</sup> Supra Note 2 at P. 77.

law. Thus, it is a crystal clear from Article 14 there will be no unequal treatment between men and women and there will not discrimination on the ground of sex of a citizen. It is perceived as one of the most significant right upon which the foundation of gender equality is based.

- Article 15 (I)<sup>108</sup>: The state shall not discriminate against any citizen on the ground of sex. So, no discrimination will be allowed on the ground on the ground of sex.
- Article 15 (3)<sup>109</sup>: Special provision for women. It means that the state is enabled to make welfare provision for uplifting women for instance, reserving seats in local bodies of self governance.
- Article 16<sup>110</sup> – Equality of opportunity. It suggests that men and women shall have equality of opportunity in employment or appointment to any public office.
- It is to be noted that application of these provisions are de jure not de facto.
- Article 21<sup>111</sup> – Right to life and personal liberty – No person shall be deprived of his personal life and liberty except according to the procedure established by law.

The Supreme Court in *Visakha V. State of Rajasthan*<sup>112</sup> said: Gender equality includes protection from sexual harassment and right to work with dignity which is universally recognised as basic human rights.

Part IV of the Constitution provides for directive principles of state policy. Article 38<sup>113</sup> provides the state to secure social order which will be for justice, social, economic and political for furtherance of welfare of the people. It aims to eliminate in

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<sup>108</sup> Supra Note 2 at P. 31.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid. 142.

<sup>111</sup> Ibid. 238.

<sup>112</sup> AIR 1997 SC 3011.

<sup>113</sup> Supra Note 2 at P. 405.

equalities in status and opportunities. The objective of the framers of the Constitution was to assure that equality should prevail in real sense.

- Article 39<sup>114</sup> commands that the state should make policy for achieving the rights to adequate means of livelihood, equal pay for equal work, that the health of women worker are not abused and the citizen are not compelled by economic necessity to do risky work not suitable to their age.
- Article 42<sup>115</sup> necessitates that the state to make provision for securing just and human condition of work and for maternity relief.
- Article 44<sup>116</sup> provides for uniform civil code. It strives to bring gender justice, the supreme court of India through its landmark, judgement argued for uniformity of laws like marriage, divorce, succession, maintenance etc. But till today it remains only a directive. Thus, it can be said that Shri K. M. Munshi has rightly opined as long as family matters are under the shield of religion, faith or custom it will not be possible to achieve equal dignity of women.
- In part IV:A, fundamental duties incorporated by 42<sup>nd</sup> Amendment Act, 1976, it imposes a natural duty to renounce practices derogatory to the dignity of women (Article 51:A)<sup>117</sup>.
- The equal remuneration Act, 1976, Dowry Prohibition Act, 1961, Maternity benefit Act and the Immoral Traffic (prevention) Act, 1956 are some of the Beneficial legislation which originates from Article 51 A of the Constitution.
- The 73<sup>rd</sup> and 74<sup>th</sup> Amendments (1993) to the Constitution of India provides for women's participation in democratic process by reserving of 33:33 percent of elected seats.

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<sup>114</sup> Id. 406.

<sup>115</sup> Ibid. 409.

<sup>116</sup> Ibid. 411.

<sup>117</sup> Supra Note 2 at P. 428.

- One of the important aspects of this chapter is the analysis of Muslim personal law and the provision of Constitution of India.

Polygamy is one of the frequent occurrences of Muslim society. Under Muslim law, it is only permitted to males and not to females. The rule of polygamy for males and monogamy for females is deemed as violative of Article 15 of the Constitution. The said culture discriminates against women on the ground of sex alone.

The true spirit of Holy Quran reveals that polygamy was only permitted under a particular situation and it was a practice which was allowed only to meet the exigencies of the Pre-Islamic period.

- Verse 4:3 of the Holy Quran was revealed during the battle of Uhud, where multiple marriages were the only option to evade pathetic situation arises due to loss of men's life widows and orphans.
- The Holy Prophet (PBUH) made remarkable reforms to maintain the dignity of women in society by restricting the number of wives to four. However, utmost care to be taken to balance equality among all the four wives.
- Verse 4:129 of the Holy Quran disclose that it is not under human capacity to maintain equality even if all efforts are made, this is the actual truth mentioned in the Holy Quran.
- Again Verse 24:32 of the Holy Quran commands that it is highly desirable that a Muslim man or Muslim female must marry one who is single.
- Instance of discrimination on against women was again visible where a Muslim man can marry validly with a Muslim woman, and with a kitabia but a Muslim female can contract a valid marriage only with a Muslim male. Allowing Muslim man to contract a valid marriage with a kitabia but refusing the same for Muslim female is violative of Article 15 of the Constitution of India.

- Muslim Personal Law grants boundless and uncontrolled powers to the Muslim husband to pronounce talaq upon his wife unilaterally without citing any reason to her such act whereas a Muslim wife can only seek khula only with the consent of the husband to get separated from him. This is a complete discrimination against Muslim women. However, it is very important to note that Holy Quran never permits Talaq ul Biddat.
- According to Holy Quran, Talaq should be pronounced in three successive tuhrs and upon the third pronouncement talaq becomes irrevocable.
- Presently the custom of pronouncing of triple talaq was declared unconstitutional and an act punishable by law.
- Analysing the literary sources dealing with Nikah Halala, it appears that the practice is directly against the dignity of Muslim women and it violates their right to privacy of Muslim women. But it is to understand that Islam never makes Nikah Halala as a marriage for single or few days or to act as intermediary marriage which will make the divorced wife halal to get married to the former husband. Some of the relevant implications of Nikah Halal are –
  - Firstly it has a deterrent effect on the husband, so as not to pronounce talaq at their whims and fancies.
  - Talaq, the most sinful thing before the Almighty Allah, than how the act of Nikah Halala can be allowed before Allah, which has become a frequent occurrence just to fulfil the capricious desires of Muslim men.
  - Again, if Talaq was given to any woman, then she has a right to remarry to any person and that marriage will last till the death of that second husband or on the occasion of second divorce the marriage will get dissolved. So then again if she or the former husband of the woman wants to remarry again with each other then they can do so. So, from no point it is to assume that the second marriage will only act as

intermediary marriage or it does not act like a procedural requirement to get marry to the first husband.

- The practice of Nikah Halala serve as punishment too for the Muslim husband who had to live life with a woman who already had consummated the marriage with someone else, but in reality the practice turn more miserable and punishable for the woman who of no fault of her, has to undergone such a disgraceful practice.
- Moreover, it is due to the unawareness of Muslim women about their rights that had led them to suffer more. And it is they who should directly deny to undergo the practice of Nikah, Halal.

The chapter also discuss about the beneficial legislation for women. The various legislation has benefitted the women section to a considerable extent, but law cannot change or improve the status of Muslim women overnight, the struggle for gender equality has been a long drawn battle. It is always to be remembered that just guarantying rights through law will not provide accessibility the right in real sense.

- A concerted efforts of legal experts social reformers, legal researcher should be taken to mould the attitudes of orthodox, patriarchy based society to assist women in socio, economic and political filed.