

Economical Position of Muslim Women under Personal Law: Socio-Legal Perspectives

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ABSTRACT

Indian Constitution guaranties a Fundamental Rights to every person 'to Live with Dignity'.² To Live with Dignity, it is important for a person to be financially strong, because no person without financially good can meet daily needs. Indian Constitution also protects against the discrimination and provides Right to Equality to every person.³ Hence, women can enjoy rights as enjoyed by her counterpart. Although, it has always been presuming that in India males are dominating over their counterpart. However, Indian Constitution empowers state to make discriminative enactments in favour of women⁴ for the upliftment and the betterment of Indian women. In pursuance to these provisions the concept of Women Empowerment has become a matter of open debate and discussion about the women's rights. Whenever, issues related to women are discussed in India, then there are Muslim women in its centre. There are many misconceptions in Indian society regarding the social and religious status of Muslim women. Islam has introduced a system in which there is no discrimination between the two sexes; both have rights and duties in an equal degree. There is no denying the status of women, it is Islam. The Holy Qur'an explains rights to women side by side with man. A separate chapter in the Holy Qur'an Al-Nisa, contains the rights of women in general. Similarly a number of traditions of the Holy Prophet refer to different aspects of women's life. Wrong interpretation of the Shariyat laws on women has however, resulted into certain misconceptions, misgiving, misunderstandings and confusions regarding the Islamic ideology for women. In the context of said provisions of Indian Constitution and the misconceptions prevailed in Indian society it is expedient to discuss the Economical status, the eminent factor affecting the right to live, of Muslim women. Therefore, in this research paper only Economical status of Muslim women will be discussed not the entire social and religious position. This paper is not meant to comment on any prevailing custom tradition or religious filling of any community.

Keywords:

INTRODUCTION

Right to Religion has been guaranteed by the Indian Constitution by its Article 25⁵ and it has been accepted by the Supreme Court of India that Secularism is the basic structure of Indian Constitution.⁶ Therefore, the people residing in India are governed, in case of Personal matters, by their Family Law. Moreover, in case of Muslims, Indian legislature has enacted an Act namely, Muslim Personal (Shariyat) Application Act, 1937⁷ for the application of Muslim Personal Law. Section 2⁸ of the said Act provides that the personal matters of the Muslims, like marriage, divorce, maintenance, inheritance, gift, will; etc will be governed by the Shariyat Law.

Shariyat or sharia has, commonly, four sources namely Qura'an, Hadis or Sunna, Ijma and Qyas. These four sources form the body of common conduct for Muslims and known as Shariyat.⁹ Qura'an is the primary

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² Article 21, Constitution of India, 1950

³ Article 14, Constitution of India, 1950

⁴ Article 15(iii), Constitution of India, 1950

⁵ all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

⁶ S.R. *Bombai v. Union of India* AIR 1994 SC

⁷ (ACT NO. XXVI OF 1937)

⁸ "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).

⁹ Ahmad Aqil, 'Mohammedan Law', Revised by Dr. I A Khan, Central Law Agency, Allahabad, Edn 2004, p-10

source of Muslim Law and was revealed on Prophet Mohammad through the messenger of God. *Qura'an* explains the rules related to the religion, law and morality. The *Qura'an*, being divine origin, cannot be altered or changed. Even the courts of law have no authority to change the apparent meaning of the verses of *Qura'an*. *Hadis* is known as, the narrations of 'what the Prophet Mohammed said, did or tacitly allowed'.¹⁰ *Qura'an*, itself laid the importance of *Hadis* as,

*"Whatever the Prophet gives accept it, and whatever he forbids you abstain from it."*¹¹

*"Obey God and obey the messenger(Prophet Mohammad)"*¹²

Ijma, the next source of Muslim Law could be defined in the form of the consensus of the jurists of the certain period on a religious matters. Sir *Abdur Rahim* has defined *Ijma* as "agreement of the jurists among the followers of Prophet Mohammad in a particular age on a particular question of law".¹³ *Ijma* has the immense importance, *Qura'an* emphasizes on *Ijma* and ordained to its followers as *"If you have differed among anything, then refer it to Allah (Quraan) and His Messenger (The Sunnah)"*.¹⁴ Last primary source of *Shariyat* is *Qiyas* and it could be defined as *"Qiyas* or analogy is a process of deduction by which the law of a text is applied to cases which though not covered by the language, are governed by the reason of the text."¹⁵ Although there is no clear authority of in the *Qura'an*, however the scholar has quoted many versus of *Qura'an* and traditions of Prophet Mohammad' to support the utilization of *Qiyas*. *Sayyed Khalid Rashid* has quoted a tradition to support the *Qiyas* as *"Give your rulings in accordance with the (provisions of the) Book and Sunnah if such are available. If you do not find such provisions, have recourse to your opinion based on mere whims"*.¹⁶

Marriage is a social institution by which, a definite and dignified status is conferred to the women. Under the Muslim law, marriage is known as *Nikah* and considered as a civil contract¹⁷ between the two persons of opposite sex. Before advent of Islam women had no right to enter in the marriage freely. It was her father, brother or any other male relatives who could give the consent to enter in to the marriage. Islam confers right to women to choose her marriage partner. This has been supported by *Hadis* of Prophet which may be quoted here. When a girl came to the Messenger of God, Prophet Mohammad, and reported that her father had forced her to marry without her consent. The Messenger of God gave her the freedom to accept or refuse the marriage. In another version, the girl said: "Actually I accept this marriage but I wanted to let women know that parents have no right [to force a husband on them]."¹⁸ Moreover, Islam permits spouse to make terms and condition of their marriages. Women, at the time of marriage, can make provisions in *Nikahnama* as they wish. However there is a restriction on this freedom that these terms and conditions must not be in against the general principles of Islam and these would be void till the extent of inconsistency. After getting married Muslim woman can enjoy the rights conferred on her by the *Qura'an* and Prophet Mohammad. Islam gives, apart from other social, religious and political rights, a glorious economical status to the women. It provisioned several economical provisions in favor of Muslim women to make her financially strong so that they could spend their life with dignity.

RIGHT TO PROPERTY AND CARRY BUSINESS

Islam recognizes the separate personality of women. Even after marriage, Islam protects women's separate personality and ensured her full capability to be financially independent from her husband. Women have been conferred a right to earn money. They can sign business contract own her name and manage all of their assets in any way they wish. Husband or any other person has no right to claim on her earnings. They are free to run their own business. In this regard *Qura'an* itself stated as ***"Do not covet what Allah has conferred more abundantly on some of you than others. Men shall have a share according to what they***

¹⁰ Ibid, at p-21

¹¹ Quran, LIX : 7

¹² Quran, IV : 58

¹³ Supra note, 8 at p-23

¹⁴ Quran, IV : 59

¹⁵ Rashid Syed Khalid, *Muslim Law*, Revised by Prof. V.P. Bhartiya, Eastern Book Company, Lucknow, Edn 2009, p-9

¹⁶ Ibid, p-11

¹⁷ *Abdul Qadir v. Salima*(1886)8 All 149 at p-154

¹⁸ Ibn Maja, No. 1873 as quoted on <http://www.wisemuslimwomen.org/currentissues/marriagepartner/> last visit at 02/06/2017

ave earned, and women shall have a share according to what they have earned. Do ask of Allah His bounty. Allah has full knowledge of everything.¹⁹

In other word, women under Muslim Law have right to possess ownership and dispose of property whether property is self acquired or received in *Mehr*, *Nafaq* (Maintenance) or by inheritance. One of the eminent Jurist Sir *Abdur Rahim*²⁰ has rightly stated that under Mohammedan law the husband has no right to have control over his wife's property by the fact of marriage. That is to say, a woman's legal capacity is no way affected by her marriage. Thus the position of wife has been raised by Islam and it is clear from the provisions to right to *Mehr*, Maintenance and Inheritance.

MEHR (DOWER) RIGHT'S TO WIFE

It is the unique feature of Muslim Law. *Mehr* is paid to the wife by the husband on the marriage. It is the integral part of Muslim marriage and can be fixed by an agreement between the parties to the marriage. In case, it is not fixed, it will be determined by the operation of law.²¹ *Qura'an* makes it an obligation to the husband stating-

“And give the women (on marriage) their *Mehr* generously.”²²

“And if you decide to divorce a wife in order to take another, do not take away anything of what you might have given the first one, even if you had given her a cantar (i.e. a great amount) of gold. Would you take it back by slandering her and committing a manifest offense?”²³

Moreover, on one occasion, when Hazrat Ali came to the Prophet to ask for the hand of Bibi Fatima, the first thing the Prophet asked him was, “Do you have anything to give as *Mehr*?” He said he had a horse and a saddle. He sold his saddle for 480 *Dirham* and brought it to the Prophet.²⁴

Mehr is considered as the consideration of Muslim marriage. *J Mahmood* observed that *Mahr* may be concluded as a consideration for connubial intercourse by way of analogy to the contract of sale. But on the other hand a different view has been taken that it provides the women with the right to resist the husband until *Mahr* is paid.²⁵ *Mehr* is not related to divorce and it is an independent institution of law of marriage under Islam. *Mehr* is considered as a gift to be paid by the husband to his wife at the time of marriage.²⁶ Supreme Court of India²⁷ has take the same view and observed that *Mehr* is not the customary due; it is the essential part of *Nikah* which is paid partially at the time of *Nikah* and partially paid on dissolution of marriage.

TYPES OF MEHR

Mehr could be categorized into two heads, one is specified and another is proper. When it is fixed by the parties to the marriage, it is known as specified *Mehr* and when it is not fixed known as proper *Mehr*. Further, specified *Mehr* is divided into prompt and deferred *Mehr*. Prompt dower is paid immediately after the marriage or on demand²⁸ and deferred is paid at the time of dissolution of marriage²⁹ whether by the way of divorce or death of husband. Parties are free to stipulate that what amount of *Mehr* would be prompt and what would be deferred. Generally, it is fixed half as prompt and half as deferred. Stipulation of nonpayment of *Mehr* between parties to the marriage will be void and wife will be entitled to get proper *Mehr*.³⁰

OBJECT OR PURPOSE OF MEHR

The main object behind the concept of *Mehr* is to make wives financially strong so that, even after the death of her husband or divorce she may not become helpless. Apart from this, *Mehr* imposes an obligation to the

¹⁹ Quran, 4 : 32

²⁰ Abdur Rahim, *Mohammadan Law*, p-333

²¹ *Abdul Qadir v. Salima*(1886)8 All 149

²² Quran, IV: 4

²³ Quran, IV : 20

²⁴ <https://www.dawn.com/news/726611> last visit on 02/06/2017

²⁵ Ibid

²⁶ Ahmad Furqan, “*Understanding Islamic Law in India: An Assesment of the Contribution of Justice V.R. Krishan Iyer: A Tribute*”, Indian Law Institute's Journal, July-September 2015 p-312

²⁷ *Shah Bano Begum Case* AIR 1985 SC

²⁸ Mulla, ‘*Principles of Mahomedon Law*’, 22nd Ed., Lexis Nexis, p-385

²⁹ ibid

³⁰ Supra note 20

husband as a mark of respect of the wife. Another object of *Mehr* is to place a check on the capricious use of divorce on the part of husband.³¹

REMEDIES ON NON-PAYMENT OF MEHR

Muslim Law provides effective tools against the non-payment of *Mehr*. Wife can refuse to cohabit with her husband, if prompt dower has not been paid. However right to refusal to cohabit can be exercised by wife, if marriage has not been consummated. In a suit for restitution of conjugal rights by the husband, non-payment of prompt *Mehr* will be the absolute defense for wife and suit will be dismissed.³² But if, the suit for restitution of conjugal right is brought after sexual intercourse has taken place with her free consent, a decree for restitution, conditional on payment of prompt dower may be passed.³³

Mehr is considered as a debt and unpaid widow has a right to retain possession of her husband's estate. Privy Council in *Hamira Bibi v. Zubaida Bibi*, has explained this right of widow to enforce her demand for the payment of unpaid *Mehr*. Lord Parker observed "the dower ranks as a debt and widow is entitled along with other creditors to have it satisfied on the death of the husband, out of his estate."³⁴ Right to retain possession of her deceased husband's property is a way of compulsion to obtain speedy payment of the *Mehr* which is an unsecured debt. In case of not in possession or has lost possession, wife can recover the *Mehr* debt by instituting suit against the legal heir of the husband. However legal heir will not be responsible personally. They will be liable to the extent to which and in the proportion in which they inherit the property of deceased husband.

MAINTENANCE RIGHT TO MUSLIM WIFE

The provision of maintenance is remedy to allow women to lead a dignified life. The word maintenance means amount required for comfortable living. The maintenance is provided for administration of justice after bridging economic gap wherever necessary between the parties.³⁵ The right to maintenance plays significant role to make financially strong to any person, as it includes all things which are essential to life like bread, clothes, shelter and other needs of life. Islam imposes a broad and wide legal obligation on the husband to provide maintenance to his wife. Wife's right to maintenance is an absolute right. She can get maintenance from her husband whether she is capable to maintain herself or not or her husband is capable to provide maintenance or not.³⁶ However, wife is entitled to get maintenance from her husband as so long as she is faithful to him and obeys his reasonable orders. Husband is not bound to maintain a wife who, willingly, resides separate from her matrimonial home without any reasonable cause or she is disobedient otherwise. In case of non-payment of prompt dower or the guilty of cruelty on the part of husband, wife can live separate and get maintenance from her husband.³⁷

MAINTENANCE RIGHT TO DIVORCED MUSLIM WIFE

During the subsistence of marriage there is no controversy and wife has, as stated above, an absolute right to maintenance but a controversy arises in case of divorced wife. Muslim law provides right to maintenance to the divorced wife only during the period of *Iddat*.³⁸ But under Section 125 Cr.P.C., 1973 the term 'wife' includes a divorced wife who has not remarried. Section 125 of Criminal Procedure Code, 1973 being a general law of land and secular in nature applies to all communities. In this way a divorced Muslim wife is entitled to be maintained by her divorced husband even after the period of *Iddat*³⁹ and section 127(3)(b) of the same Act could not impose any bar on this right even wife has received her deferred *Mehr*. Supreme Court of India has rejected the contention that deferred *Mehr* is a payment on the divorce of a wife and hence the payment of deferred *Mehr* under personal law excludes the payment of maintenance. It had been decided by the apex court that under section 127(3)(b), *Mehr* is not the customary due payable in lieu of divorce but it is the integral part of Muslim marriage and may be paid on dissolution of marriage.⁴⁰

³¹ Supra note 8, p-151

³² *Nasra Begum v. Rizwan Ali*, AIR 1980 ALL 118

³³ *Rabia Khatoon v. Mukhtar Ahmad*, AIR 1966 ALL 548

³⁴ *Hamira Bibi v. Zubaida Bibi*, (1916) 43 IA 294

³⁵ *Captain Ramesh Chader Kaushal v. Mrs VeenA Kaushal*, AIR 1978 SC 1807

³⁶ Mulla, *Principles of Mahomedan Law*, 1972, p-271 as quoted by Prof. Kusum, "Family Law-I" LexisNexis, third edition, p-251

³⁷ *ibid*

³⁸ Mulla, 'Principles of Mahomedon Law', 22nd Ed., Lexis Nexis, p-361

³⁹ *Mohd Aslam Khan v. Shah Bano Begum* AIR 1985 SC 945

⁴⁰ *ibid*

MAINTENANCE UNDER MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

After the decision of *Shah Bano's* case, a strong agitation was made by the Muslim Community. Opportunity has been taken by the Parliament to specify the divorced Muslim wife's right on divorce. Parliament has enacted Muslim Women (Protection of Rights on Divorce) Act, 1986. The act provides to the Muslim women a right of 'fair and reasonable provisions and maintenance' within the period of *Iddat* from her divorced husband⁴¹. Apart from this she will be entitled to get the amount of *Mehr* and all the properties given to her by the relatives even by the husband or husband's relatives.⁴² Upholding the constitutional validity of the Act, Supreme Court has declared that a Muslim husband is liable to make reasonable and fare provision and maintenance as well and such fare and reasonable provisions extending beyond the period of *Iddat*, must be made within the period of *Iddat*.⁴³

DIVORCED MUSLIM WIFE'S RIGHT UNDER 125 Cr.P.C.

After introducing the Muslim Women (Protection of Rights on Divorce) Act, 1986, a question relating to, whether a divorced Muslim wife can apply for maintenance under section 125 Cr.P.C. has been raised in courts. This question was raised due the Section 5 of the said Act. Section 5 makes an option to the parties of the suit under section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 to be governed by the provisions of section 125 to 128 of Cr.P.C. Bombay high court, in *Karim Abdul Rehman Shaikh vs Shehnaz Karim Shaikh & Others*, answered the question in negative and held that wife could not be permitted to file a petition for maintenance under section 125 of Cr.P.C. Parties to the suit can be aggrieved mutually to be governed under the code.⁴⁴ But Calcutta High Court has adopted another view on this point and held that the claims available to the divorced women are in addition of the claims available under Section 125 Cr.P.C.

To dilute the controversy whether divorced Muslim wife can apply under Section 125 Cr.P.C. or not, Supreme Court's two decisions give the clear cut picture. In the case of *Iqbal Bano v. State of U.P. and others*⁴⁵, it has been decided that "Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced (Muslim) women in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same court....."⁴⁶ On another occasion Supreme Court has decided that it is crystal clear that even a divorced Muslim women would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.⁴⁷

Now it is a well established principle that divorced Muslim wife is entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of *iddat* also, as long as she does not remarry.

MAINTENANCE UNDER MARRIAGE CONTRACT

Under Muslim law, Parties to the marriage are free to stipulate the certain agreements or conditions before or at the time of marriage or even after the marriage. However such agreements or conditions must not be in contrary to the general principle of Islam and the public policy. If any condition is found illegal, marriage would, before consummation, be voidable but after consummation marriage will be valid and such agreements or conditions will be void.⁴⁸ Therefore, there may be stipulation in the marriage contract that wife will be entitled to recover maintenance from her husband if husband ill-treats her, takes mistress or husband solemnizes second marriage. In *Khwaja Mohammad v. Hussaini Begum*, both husband and wife were minor at the time of their marriage theretofore, on the behalf of minor parties, their parents entered in to marriage contract and made a provision regarding the payment of sum per month to the wife. It had been held that provision for monthly payment was valid and to be enforceable.⁴⁹

⁴¹ Section 3(1)(a), Muslim Women (Protection on Rights on Divorce) Act, 1986.

⁴² Section 3(1)(c) and (d), Muslim Women (Protection on Rights on Divorce) Act, 1986.

⁴³ *Daniel Latifi v. Union of India* AIR 2001 SC 556

⁴⁴ 2000 Cri.L.J. 3560

⁴⁵ (2007) 6 SCC 785

⁴⁶ *ibid*

⁴⁷ *Shabana Bano vs Imran Khan* AIR 2010 SC

⁴⁸ *Hafizan v. Saidino*, AIR 1925 Sind 22, as quoted by Purohit Nishi, *The Principles of Muslim Law*, 2nd Edn, 1998, Orient Publication Company, Allahabad, p-142

⁴⁹ (1910) 37 IA 152, as quoted by Purohit Nishi, *ibid* p-232

Moreover, wife will be entitled to get maintenance or other allowances even after the divorce. In case of *Mydeen v. Mydeen*,⁵⁰ husband entered into an agreement on his second marriage with his first wife and settled certain property on her for life. After that he divorced his wife and claimed the property settled upon her. But it had been held by the court that the agreement was valid and enforceable even after the dissolution of marriage.

REMEDIES ON NON-PAYMENT OF MAINTENANCE

Dissolution of Muslim Marriages Act, 1939 provides a right to wife to seek divorce from her husband, if the husband neglects or fail to provide for her maintenance for a period of two years.⁵¹ To get remedy under the said Act, firstly, women has to file a petition seeking dissolution of her marriage in the competent court and secondly she will has to prove that her husband has been fail to provide maintenance for a period of two years from the immediate before the date on which petition was filled.

RIGHT TO INHERITANCE

Inheritance is the main part of economics rights and closely related to community. Inheritance is an integral part of *Shariah* Law and its application in Islamic Society is a mandatory expect of the divine teaching of Islam.

Ilm-ul-faraiz, the Muslim Law of succession, which has been derived from the rules of succession to be found in the *Quran*, or in the Traditions, as well as from such of the pre-Islamic customs as were approved by the Prophet, is a great achievement of the Muslim Jurists.⁵²

Islam has conferred on the women the right of inheritance and she is entitled to claim her share as provided by the Quran. She is absolute owner of hers property and no one has any right to claim on it. Even, after getting married her right to be inherit does nor effect and she will be inherit, as a daughter from her father's property or as a sister, if any, from her brother's property. She is also entitled to be inheriting from her son's or daughter's property.

WIFE'S INHERITANCE RIGHT IN DECEASED HUSBAND'S PROPERTY

Women as a wife have been kept in the category of sharer or *Quranic* heir. Sharer or *Quranic* heirs are those heirs whose share has been fixed by the *Qura'an* itself. The *Qura'an* says:

".....And for them (Wives) one-fourth of what you leave behind if you did not have a child, but if you have a child then for them one-eighth of what you leave behind; ..." ⁵³

Above verse of Quran gives the clear cut picture about the right of inheritance to the wife. It provides that wife will be entitled to get 1/4, where there is no child, but if husband dies leaving behind children her share will be 1/8 of her deceased husband's property. However, in case of plurality of wives, they will have to share the 1/4 or 1/8 equally between them. The right of inheritance can be enjoyed by regularly married wife, irregularly or *Muta* wife can not avail the benefits of inheritance law. Moreover, a divorced wife will not be entitled to take any share from her divorced husband, but if a husband pronounces a revocable *Talaq* and dies before the completion of the wife's *iddat*, she will be entitled to get share 1/4 or 1/8 accordingly.⁵⁴ If a man dies after pronouncing an irrevocable divorce, wife could not be inherited as marriage tie is snapped immediately after pronouncement of irrevocable divorce.⁵⁵

WOMEN'S INHERITANCE RIGHT AS A DAUGHTER

Since after getting married, women's right to be inherited is not lapsed and they will be entitled to inherit from their deceased father's property. The *Qura'an* gives the daughter a specific share saying that:

".....if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half....." ⁵⁶

⁵⁰ AIR 1951 Mad 992

⁵¹ Section 2(ii), Dissolution of Muslim Marriages Act, 1939, "A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:—..... (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;"

⁵² K.P. Saxena, : *Muslim Law*, p. 878.

⁵³ *Qura'an* IV:12

⁵⁴ Mahmood Tahir, *The Muslim Law of India*, 3rd Edn, 2002, LexisNexis, New Delhi. P-126

⁵⁵ *ibid*

⁵⁶ *Qura'an* IV:11

Daughter has also kept in the category of sharer and therefore, her share has been fixed by the Quran. When a Muslim dies without any son, leaving behind one daughter, she will take 1/2 of the total property of her father but if there are two or more daughter they will collectively be inherited 2/3 of her father's property. However, if a Muslim dies living behind son and daughter then daughter will be converted as residuary and she will take half of her brother.

WOMEN'S INHERITANCE RIGHT AS A MOTHER

Mother is regarded as sharer and inherited from the property of her deceased son or daughter. Quran has fixed the share of mother. She will be inherited by 1/3 of the total property of her deceased son or daughter if they die living behind no son or daughter but if they die living behind son or daughter or sister mother will be inherited by 1/6th.

WOMEN'S RIGHT TO BE A TESTATRIX OR LEGATEE

Muslim law does not impose any restriction on women to be a testator or legatee. *Mulla* says that "Subject to the limitations hereinafter set forth, every Mohomedan of sound mind and not a minor may dispose of his property by will"⁵⁷. There is no bar over the Muslim women to make will for disposition of her property after her death. Husband or any other person has no right to interfere with the right to make will. Therefore, Married Muslim women can dispose of her property by the way of will since only two restriction has been imposed on the power of making will ie one is related to how much property may be bequeathed and to whom property may be bequeathed another restriction is related to the capacity of testator/testatrix. Testator/testatrix must be major and be minor.

Unlike testatrix, in case of legatee also, Muslim law does not make discrimination on the ground of sex. A Muslim may give his property by will to any person whether natural or juristic, Muslim or Hindu, male or female.⁵⁸ The only requirement is that legatee must be capable to holding the property. Even after getting married, women's right to be legatee would not be effected. She will be absolute owner of the property which has been received under will and husband or any person can not interfere in the property right of the women.

WOMEN'S RIGHT TO BE A DONOR AND DONNEE

A *Hiba* or gift is a "transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the later.⁵⁹ Under Muslim law, a Muslim may dispose of his property by the way of gift provided he/she must be major and sound mind.⁶⁰ In making *Hiba*, no bar has been imposed over the women. Wife is absolutely free to make *Hiba* of her property and no need of permission of her husband or any other person. Apart from donor a Muslim women may be a valid donee. Sex, age, creed or religion is no bar to the taking of a gift.⁶¹ Property taken under *Hiba* will be her absolute property.

WIFE AND LAW OF WAQF

Muslim women have been conferred a right to make *waqf* of her property. *Mulla* stated "Every Mahomedan of sound mind and not a minor dedicate his property by way of *waqf*."⁶² *Waqf* means the permanent dedication by a person professing the *Mussalman* faith of the property for any purpose recognized by the *Mussalman* law as religious, pious or charitable".⁶³ Therefore, she can enjoy the all rights of a *waqif*⁶⁴ ie to decide the purpose of *waqf*, to appoint the care taker of *waqf* property.

Moreover, women, whether married or unmarried can be appointed as *Mutawalli*⁶⁵ as her male counterpart is appointed for *waqf* property. It had been held by the Privy Council that there is no legal bar against the women holding *Mutwalliship*.⁶⁶ However women cannot be appointed as *Mutawalli* where *waqf* is created

⁵⁷ Mulla, 'Principles of Mahomedon Law, 22nd Ed., Lexis Nexis, p-136

⁵⁸ Syed Khalid Rashid, *Muslim Law*, Edited by V.P Bhartiya, vth Edn, Estern Book Company, p-336

⁵⁹ Mulla, 'Principles of Mahomedon Law', 22nd Ed., Lexis Nexis, p-138

⁶⁰ ibid

⁶¹ Ahmad Aqil, *Mohammedan Law*, Revised by Dr. I A Khan, Central Law Agency, Allahabad, Edn 2004, p-251

⁶² Mulla, *Principles of Mahomedon Law*, 22nd Ed., Lexis Nexis, p-213

⁶³ ibid, p-200

⁶⁴ A Person who makes a waqf

⁶⁵ Mutawalli means a person who is appointed by the waqif as a manager of the waqf,s property.

⁶⁶ *Shahar Bano v. Aga Mohammad*, (1907) 34 I.A. 46

for that religious purpose which cannot be performed by the women under Muslim community.⁶⁷ Mutawalli will be entitled to take remuneration for the services rendered by him for the *waqf* property. However remuneration for *Mutwalli* is not an essential requirement to make *waqf*. If no provision is made by the founder for the remuneration of the *Mutwalli*, the court may fix a sum not exceeding one-tenth of the income of the *waqf* property.⁶⁸

Conclusion

In Indian society, especially in Muslim community women are considered inferior in comparison to her male counterpart, while Muslim law conferred upon her a glorious economical status. They can run her business; they can enter in to business contract. Women have been considered capable to hold property in their own name. After getting marriage her husband has no right to interfere with her property right. Wife can make will, *Hiba* or *Waqf* of her property without the permission of her husband and property may be will or *hiba* in favor of women. Provisions of *Mehr*, Inheritance and maintenance make their status financially strong. But in spite of these legal provisions, the truth remains that women are considering the subordinate to her counterpart male. Misconception and misinterpretation of Islamic provisions have always been the main factor behind this. Unawareness of the women's right under Islamic Jurisprudence is also the factor behind it. Society plays the main role to develop and uplift the status of its member. Society must take initiative to create an atmosphere in which there is no gender discrimination and women have full freedom to take self decision, to participate in economical, social and political life.

⁶⁷ *ibid*

⁶⁸ Ameer Ali, 4th ed., Vol. 1, 469, as quoted by Mulla, '*Principles of Mahomedon Law*', 22nd Ed., Lexis Nexis, p-260