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**A CRITICAL ANALYSIS OF MUSLIM PERSONAL LAWS FROM THE
PERSPECTIVE OF FEMINIST JURISPRUDENCE**

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Abstract

The historical subjugation and deprivation of women's rights have been experiencing tremendous change in the twenty-first century. The significant role played by religions in sustaining patriarchy in Indian society is now being questioned by feminists. The inherent perception of Islamism is that women are subordinate to men as is evident from the male-centric practices of Islam. This paper aims to critically evaluate the practices in Muslim Personal Law relating to marriage, divorce, and property rights, that are prejudicial to the rights and interests of women. The limited power of the judiciary to intervene in personal laws is a challenge to bring revolutionary changes to these inequitable practices. The determination of the nexus between the fundamental rights of individuals and religious sentiments is a herculean task attached to the legislature and the judiciary. The paper also comments on the progressive changes brought by revolutionary judicial pronouncements like the triple talaq verdict and the laws that particularly recognize the marriage and divorce-related rights of women including the latest the Muslim Women (Protection of Rights on Marriage) Act, 2019. The paper also discusses the need to address the issues of polygamy, Nikah-Halala, and the disproportionate nature of property rights that are highly discriminatory against women. The authentic texts of Islam, Codified Muslim Laws, precedents, commentaries of Islamic jurisprudence, books, and scholarly articles were used to critically evaluate the practices of Islam from a feminist perspective. Moreover, the scope of the analysis is limited to the laws concerning marriage, divorce, and inheritance rights.

Keywords: *Muslim Personal Law, Marriage, Dissolution of the Marriage, Property Rights, Talaq-e-biddat, Polygamy, Nikah-Halala, Women's Rights*

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Introduction

Religions have been a significant part of Indian society from time immemorial. The inalienable relation between religion and the domestic family system persuaded the pioneers of the Constitution to recognize religious freedom as a fundamental right of the citizens. In post-independent India, religious personal laws were laid down for the governance of the private realm by upholding the notion of unity in diversity without compromising the spirit of secularism. Muslims constitute more than 14% of the country's population. They are governed by Muslim Personal Laws apart from the secular laws which apply to all communities in general. Muslim personal laws are largely uncodified in nature and the judiciary relies on the pronouncements of authentic texts such as the Quran, Hadith, Sunnat, Ijma, and Qiyas to decide various questions of the matter in hand. This research paper is restricted to the scope of Muslim Personal laws regarding marriage, dissolution of the marriage, and property rights concerning women.

Hypothesis/ Research Question

What are the practices in Muslim Personal laws in India that are discriminatory towards women concerning marriage, divorce, and inheritance rights, and the suggestive responses to rectify this arena of Muslim Personal Laws?

Statement of Research Problem

This paper intends to critically evaluate the progressive and regressive nature of Muslim Personal Laws in India from the viewpoint of feminist jurisprudence with specific reference to laws governing marriage, dissolution of the marriage, and property or inheritance rights. This research appreciates the positive developments in Muslim personal law concerning the rights of women and critically evaluates the arenas where pro-gender equality changes are a high-time requirement. The study also analyses the validity of titling Muslim personal laws as highly discriminatory and also makes comments on the judicial intervention in supervising the laws towards a progressive direction.

Research Methodology

In accordance with the objectives of the research, a purely doctrinal method has been used to critically analyze the gender equality concerns of the Muslim Personal Laws in India. The doctrinal method has been employed by making use of the authentic texts of Islam, codified Muslim Personal Laws, precedents, judicial interpretations, books, and articles to conclude the answers to the research question.

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Analysis & Discussion

Muslim laws are well-known for recognizing women as a separate legal entity and at the same time ill-known for subjugating the rights of women to the will of men. The Islamic law and practices relating to marriage, dissolution of the marriage, and inheritance seem to be discriminatory toward women and place them in a disadvantageous position compared to men. However, many issues have been already addressed by the judiciary and legislature to better protect the rights and interests of women.

i) Marriage

Marriage according to Muslim law is a civil contract for which proposal and acceptance in the presence of two witnesses are mandatory. The free consent of the bride is essential for marriage and often the women's consent is not free consent due to socio-political circumstances. The practice of polygamy is highly discriminatory towards women although justifications for the same have been provided by Islamic jurisprudence. Muslim men are allowed to practice polygamy whereas women are not. In *SarlaMudgal v. Union of India*², the Hon'ble Supreme Court commended the need to reform the practice of polygamy, since, in this particular case, people converted to Islam merely to involve the practice of polygamy.

The practice of *Nikah-Halal* mandates a wife to get married and divorced from another person before re-marrying her divorcee husband. These practices are extremely discriminatory and infringe on the rights of Muslim women. A group of petitions and Public Interest Litigations on the question of polygamy and *Nikah-Halal* have been placed before the Supreme Court to determine the Constitutionality³. The evident discriminatory nature of these provisions permitted under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was condemned via these petitions. Although these practices are prejudicial to the rights and interests of women, the extent to which the judiciary can step into the shoes of reforming religious practices remains an unanswered question.

ii) Dissolution of marriage

The dissolution of marriage under Muslim Law is addressed as talaq. The authentic texts of Islam and schools of jurisprudence provide *talaq-e-Sunnat* as the authorized form of divorce.

²*SarlaMudgal v. Union of India*, AIR 1995 SC 1531

³*Supreme Court Impleads NHRC, NCW in Muslim Personal Law Case*, The Hindu, Aug. 30, 2022, <https://www.thehindu.com/news/national/supreme-court-issues-notices-on-pleas-challenging-validity-of-polygamy-nikah-halala-in-muslim-personal-law/article65829181.ece>

Muslim Law is gender biased concerning the matter of dissolution of marriage and gives the right to dissolve the marriage to the husband in general. On questions of dissolution of marriage men are governed by Shariat Act and women are governed by the Dissolution of Muslim Marriage Act, of 1939. To dissolve the marriage the husband can invoke his authority directly from the religious texts however, the woman has to take recourse under the limited legal powers provided through the few codified laws. The married woman's right to dissolve the marriage or the *khulais* an under-discussed concept in India. It is high time to address the power of the husband to unilaterally dissolve the marriage which is one of the cruel things under Shariat law. In *Shamim Ara v. State of Uttar Pradesh*⁴, the Supreme Court limited the power of the husband concerning the unilateral declaration of the dissolution of marriage and also held that the talaq declaration has to be properly communicated to the wife.

Triple talaq or the *talaq-e-biddatis* another regressive practice that condemns the essence of Muslim Law. It is the unilateral declaration of divorce by the husband upon his wife through three pronouncements and without her consent. Also, triple talaq is not an essential practice rather it is later incorporated as a mere practice that does not have the basis of Islamic pronouncements⁵. Quran pronounces an authentic form of divorce and also, and instantaneous triple talaq is disapproved by the prophet himself⁶. In India, the Supreme Court in *ShayaraBano v. Union of India*⁷ declared instantaneous triple talaq void and illegal, and subsequently the Muslim Women (Protection of Rights on Marriage) Act, 2019 came into force and created a legal barrier to the practice of triple talaq.

iii) Property rights

One of the major aspects of the debate on gender equality is centric on the empowerment of the weak gender in order to improvise them to compete with the historically and socially conceived dominant gender. In this regard, the financial independence of women is essential to emancipate themselves from the shackles of religious and familial laws. The authentic text of Islam - Quran- identifies the property rights of women however, the now prevalent discriminatory practices were incorporated by mere customs. The Shariat Act was introduced to establish the authority of Muslim Law over customary practices.

⁴*Shamim Ara v. Union of India*, (2002) 7 SCC 578

⁵*ShayaraBano v. Union of India*, (2017) 9 SCC 1

⁶ Anita Yadav, *Rights of Muslim Women: An Analysis of Indian Muslim Personal Laws*, Affirmative Action; Women & Law, ISBN 978-93-82462-35-4, 2015, Lucknow

⁷*ShayaraBano v. Union of India*, (2017) 9 SCC 1

Property rights are one grave area where the rights of women are highly suppressed under Muslim law. Neither the Shia law nor the Sunni law has codified the property rights of Muslim women. Mahr is the obligation in the form of cash or kind for the husband to give women. The ownership of Mahr is exclusive to the wife and such absolute ownership of property is a revolutionary chapter in the system of Muslim personal laws.

According to Muslim law, there are two types of heirs: - sharers and residuary

If the deceased had left behind a son and daughter, then the right of the daughter to be sharer ceases and she becomes residuary, with the residue being so disturbed as to ensure that each son gets double of what each daughter gets⁸.

The Muslim person does not discriminate between males and females in terms of inheritance or the entitlement of the ancestor's property. However, evident discrimination or distinction is made concerning the quantum of property that can be inherited. Generally, the quantum of share of a female heir is half of that of male heirs. The reason stated is that after marriage a woman will get Mahr where the husband only has inherited property to look after their family. Even widows have inheritance rights subjected to certain conditions.

iv) Judicial approach

According to Martha Nussbaum, "Judges should not insult the religions, and they should be especially cautious in dealing with the affairs of a religious minority"⁹. Judicial response to the status of women under Muslim personal laws shows that over time, the Court has tried to maintain a balance between upholding the sanctity of religious practices and also the fundamental rights of the individuals. From the revolutionary *Mohd. Ahmed Khan v. Shah Bano Begum's*¹⁰ decision to the popular triple talaq verdict¹¹, recognition of the rights of women under Muslim Personal Law has been witnessing progression.

Since Muslim marriage is a civil contract, the parties have all discretion to decide the terms of the contract within the limits of the mandatory provisions of Shariat law. Ijtihad or the creative interpretation of the existing Muslim would suffice to recognize the rights of Muslim women under personal laws. Article 25 of the Constitution provides for the freedom of religion subjected to conformity with other fundamental rights. Therefore, religious personal laws

⁸*Inheritance Under Muslim Law*, E-Courts Files,

<https://districts.ecourts.gov.in/sites/default/files/jcj%20palakondawrkshp1.pdf>

⁹ Martha Nussbaum, *Personal Laws, and Equality: The Case of India*, Oct. 17, 2009, University of Chicago

¹⁰ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556

¹¹ *ShayaraBano v. Union of India*, (2017) 9 SCC 1

escape constitutional scrutiny to a certain extent. However, as and when the need arises the judicial response is critical since Muslim law is largely uncodified.

Findings, Results & Observations

Muslim personal laws are uncodified and the judiciary relies on pronouncements of the authentic texts of Islam to decide various questions. Generally, in a positive manner, Muslim laws are hailed for considering or entitling women as a separate legal entity¹² although the scope of the same is restricted to a large extent. Over time, these laws have given certain rights to women to make choices about marriage, inheritance, etc. without prejudice to the generality of the law and the customary practices. However, most of the laws established ultra vires the fundamental rights of an individual guaranteed under the Constitution, such as polygamy (in fact, polygyny), unilateral declaration of divorce, the inequality in the inheritance of property, etc. Therefore, it is high time to decide the balance between the conservation of the practices of Islam religion and that of the rights of an individual. Religion is a very sensitive issue, specifically, in the Indian political system, therefore, a much more cautious approach has to be adopted to find the nexus between the two. Educating people about their rights and the rights of others is the first step to equipping society to accept the changes in age-old customary practices that are gender discriminatory in nature.

Conclusion

The higher degree of discrimination towards women stems from the inherently patriarchal Indian society irrespective of the communities. Muslim women are considered to be a vulnerable section of society subject to the suppression of individual rights concerning marriage, dissolution of the marriage, and maintenance and property rights under the provisions of Muslim Personal law. Gender equality concerns still exist in the realm of Muslim personal laws. Even though many aspects of the law are still discriminatory towards women, much progress has been made over time through the combined effort of the legislature and the judiciary.

¹²*Supra* Note5

Literature Review

The existing literature in the arena of feminist jurisprudence-based analysis of Muslim Personal Law reveals the fact that a gradual progression is under process concerning the recognition of women's rights in the private realm. Most of the literature focus on the inconsistency between the status of women in the authentic texts of Islam and that of the customary practices. Judicial pronouncements, over time, have tried to deal with this inconsistency by recognizing the fundamental rights of women without hurting religious sentiments.

The critical analysis of the disparity between the provisions of Muslim Law and customary practices concludes the same as the reason for the deprivation of women's rights. Polygamy and *talaq-e-biddat* are the two practices that condemn, the otherwise women-progressive Muslim Personal Law¹³.

The constitutional validity of Muslim Personal Laws has been a matter of much deliberation by the judiciary. According to the author, a strict judicial approach toward reforming these laws has the potential to trigger religious sentiments. Considering the history of communal tensions in India and the need to recognize individual rights without prejudice to religious feelings raise the question of the Uniform Civil Code provided under Article 44 of the Constitution¹⁴.

Rudramani Gupta, while analyzing family laws from the lens of feminist jurisprudence hailed triple talaq as a revolutionary step in Muslim Personal Laws. *Talaq-e-bidder* is a highly discriminatory practice against women where in the institution of marriage both men and women play an equally important role¹⁵.

Eliminating the practices of polygamy and the disproportionate shares of property are the two grey areas of Muslim Personal Laws that are yet to be considered to address gender equality concerns. However, the author appraises the Muslim Personal Law (Shariat) Application Act, 1937 and the Dissolution of Muslim Marriage Act, 1939 compared to the then-existing other personal laws to expose the women-progressive approach of Muslim Law¹⁶.

The author comments on the disparity between the fundamental principles and practices of

¹³ Anita Yadav, *Rights of Muslim Women: An Analysis of Indian Muslim Personal Laws*, Affirmative Action; Women & Law, ISBN 978-93-82462-35-4, 2015, Lucknow

¹⁴Shalina A Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code*, Indiana Law Journal: Vol. 83: Iss. 2, Article 10
<https://www.repository.law.indiana.edu/ilj/vol83/iss2/10>

¹⁵Rudrani Gupta, *Feminist Jurisprudence and Gender Bias in Family Laws*, Shethepeople, Nov. 29, 2021,
<https://www.shethepeople.tv/law-and-her/feminist-jurisprudence/>

¹⁶ Tanja Herklotz, *religion Based Personal Laws in India from Women's Right Perspective*, South Asia Chronicle

Islam Law and that of the creation of customs. The paper argues that is the misconception of *Usul-ul-fiqh* that leads to discriminatory practices against women. The author focuses on the rights of women concerning marriage and property rights and comments on the same with an evident bias to the Islam Law¹⁷.

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