

‘AIN’T WOMEN RELIGIOUS?’ - CRITIQUING THE MUSLIM PERSONAL LAW FROM AN INTERSECTIONAL FEMINIST PERSPECTIVE

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Abstract

India has witnessed great changes in its Muslim personal law, which much like other personal laws has not been just towards women. But the feminist legal reforms that have occurred through legislative or judicial means have largely been from outside the paradigm of religion. This leads to Muslim women being governed by personal laws which are largely created by male interpretations and/or state interference, implicitly condoning (and at times supporting) an illegitimate hierarchy of sexes, which under the guise of protection of religion, greatly impacts the identity of the Muslim woman. Feminist jurisprudence operates exclusively by reforming social and legal norms, while excluding religious norms entirely.

This article, therefore, undertakes an examination of the reforms in and feminist jurisprudence on Muslim personal law through the lens of intersectionality. It will provide a

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brief introduction to the sources of Muslim personal law and the judicial and juristic trends that have led to its patriarchal nature. Subsequently, a theoretical examination of feminism will be undertaken to highlight its exclusion of religious Muslim women from its subjects. This creates a conundrum where Muslim women are caught between either being Muslim or being women. Islamic feminism, a transnational discourse and movement which has emphasized on injecting women's voices into hermeneutics and the critical study of Islamic jurisprudence will then be described in brief. The article thus concludes, that Islamic feminism serves as a method that is both intersectional as well as important for creating legal change that preserves the religious autonomy and identity of the Muslim woman.

I. INTRODUCTION

Personal law in India has been the source of much debate and controversy. There have been lengthy Constitutional Assembly debates about the Hindu Code Bills, several demands for a Uniform Civil Code and a history of controversy over Muslim Personal Law (“MPL”) which started in the 1980s and was recently seen in the *Shayara Bano v. Union of India* (“**Shayara Bano**”) where the Supreme Court invalidated the practice of triple talaq.¹ It does not come as a surprise that the personal law system in India, when viewed through a gender lens, points out many inequalities, especially when referring to MPL.

¹ *Shayara Bano v. Union of India* (2017) 9 SCC 1.

While it cannot be said that Indian law has made no attempts to alleviate the unfair laws against Muslim women, it can also be contested that these attempts have been outside of the paradigm of religion and have involved either imposition of secular law or overreach by judges in their roles, such as the *Muslim Women (Protection of Rights on Divorce) Act 1986*. This leaves Muslim women with personal laws which are largely created by male interpretations and/or state interference, implicitly condoning (and at times supporting) an illegitimate hierarchy of sexes, which under the guise of protection of religion, greatly impacts the identity of the Muslim woman. This protection of religion implicitly assumes that religion and its laws are for men to create.

At the same time, state interference is itself undesirable because for feminist jurisprudence to increase and maintain intersectionality, it is necessary to take into consideration the importance of the religious and cultural identity of Muslim women and prevent infringement of these identities by any law made for the welfare of women in general. With *Shayara Bano* still being a recent memory and the practice of polygyny and *nikah halal* soon to be examined by a constitution bench of the Supreme Court,² it is important to examine the feminist jurisprudence of MPL. Muslim women get caught between Western feminists who often think of Islam as antithetical to feminism³ and Muslim reactionaries, who cling to narrow, oppressive interpretations, solidifying western stereotypes.⁴ This article examines the reformation of MPL from an intersectional feminist lens to highlight certain assumptions that the feminist struggle has held in India, relating to securing Muslim women's rights. If feminism operates exclusively by

² *Sameena Begum v Union of India* (2018) SCC OnLine SC 610.

³ Margot Badran, *Feminism in Islam: Secular and Religious Convergences* (Oneworld, 2009) 1.

⁴ Asma Lamrabet, 'An Egalitarian Reading of the Concepts of *Khilafah*, *Wilayah* and *Qiwamah*' in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (Oneworld 2014) 118.

reforming social and legal norms but opposing or at best distancing itself from religion at the same time, it would be eschewing religious norms. It is likely that this would produce an incomplete understanding of Muslim women's experiences and discrimination, often originating from religious sources and would not only force them to be alienated from the mainstream feminist movement⁵ but also impose laws that diminish what Farrah Ahmed has called religious autonomy.⁶ This article highlights that this creates a conundrum, where the law is required to be reformed but also not overlook the importance of women's religious identities, in a system that already emphasizes personal laws created from an understanding of religion that overlooks the voices of the myriad women who also subscribe to it.

The Islamic feminist movement, a transnational discourse that began in the late twentieth century and which has worked as a local movement as well in India with Muslim women's rights activists⁷ has emphasized on injecting women's voices into hermeneutics, subsequently using the different meanings derived by these women to create legal reforms. Agreeing with the importance of such hermeneutics in creating laws, this article critiques the law in view of the Islamic feminist project and analyses the arguments of Islamic feminists for the purpose of producing an intersectional feminist perspective in India that offers a way out of the conundrum at hand.

II. MUSLIM PERSONAL LAW IN INDIA AND REFORMS

⁵ Huma Ahmed-Ghosh, 'Introduction' in Huma Ahmed-Ghosh (ed), *Contesting Feminisms: Gender and Islam in Asia* (State of New York Press, 2015) 6.

⁶ Farrah Ahmed, *Religious Freedom Under the Personal Law System* (OUP New Delhi, 2016) 55.

⁷ Nadja-Christina Schneider, 'Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – or Vice Versa?' (2009) 11(1) *Journal of International Women's Studies* 56-71.

Muslim Personal Law in India or Muhammadan law, as is commonly called has been said to be “*so intimately connected with religion that [it] cannot readily be dissevered from it*”.⁸ The sources of this *shari’a* in general are the Qur’an believed to be the direct word of God by the Muslim faith, the *sunnah*, *ijmā* and *qiyas*,⁹ only the former two considered divine although there is dissent as to the divine nature of *sunnah*.¹⁰ While it is important to understand a meaningful distinction between *shari’a* and *fiqh*, for the purposes of this article it is sufficient to know that *shari’a* is the knowledge that can only be identified from the divine sources of Qur’an and *sunnah*, while *fiqh* is its human understanding and application to create practical legal rules. ‘The path of *shari’ah* is laid down by God and His Messenger; the edifice of *fiqh* is erected by human endeavour’.¹¹ It has been argued that despite classical theorists of Islam having emphasized the infallible and unchangeable nature of the law of the Qur’an — the primary source of Islamic law, it has changed with changing times and society and has not become fossilized.¹² It shall be shown in forthcoming discussion, how important this distinction is to reformers today.

Reforms in these derived laws have not been easy. Among other interpretative concepts in Islamic law, *ijtihad* plays a great role. Literally meaning ‘striving or exertion’, *ijtihad* is defined as “*the total expenditure of effort ... in order to infer, with a degree of probability, the rules of Shari’ah from the detailed evidence in the sources*”.¹³ In other words, it is the right to interpret the divine sources of Islamic law.

⁸ *Gobind Dayal v. Inayatullah* (1885) 9 All 775, 781.

⁹ Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (5th edn, OUP 2008) 12, 13.

¹⁰ Mohammad Hashim Kamali, *Shari’ah Law: An Introduction* (OUP, 2008) 19.

¹¹ *ibid* 16.

¹² Syed Jaffer Hussain, ‘Legal Modernism in Islam: Polygamy and Repudiation’ (1965) 7(4) *Journal of Indian Law Institute* 384-398 <<https://www.jstor.org/stable/43949855>> accessed 27 December 2020; Shaheen Sardar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press, 2016) 21-40.

¹³ *ibid* 163.

However the Indian legal system gave recognition to the concept of the 'closing of the door of *ijtihad*': a widely-believed consensus by tenth-century religious scholars – which Muslims thereafter widely adhered to – to put an end to *ijtihad*.¹⁴ In the case of *Aga Mahomed Jaffer v Koolsom Beebee* the Privy Council accepted this doctrine of closing of doors, allegedly due to political reasons and held, “*It would be wrong for the Court on a point of this kind to put their own construction on the Koran in opposition to the express ruling of commentators of such antiquity and high authority*”.¹⁵ A disinclination to facilitate legal reforms in Islamic law thus, received a binding legal precedent.

With this, it set a legal trend which has been criticized for firstly, being in line with the colonial objective of keeping their Muslim subjects backwards while pleasing the conservatives who disapproved *ijtihad* and secondly, for the continued reliance on commentaries of 'high authority', which are prone to inaccuracies because of translation from Persian or Arabic to English.¹⁶ The latter additionally can be observed to be giving primacy to commentaries exclusively of male voices, considering that few of these commentaries could be found to be written by women. Both these trends are evident in the legal reforms in MPL. The first was present in the Parliament's reversal of the *Shah Bano* judgment—a move criticized by many as Muslim appeasement¹⁷ and both can be seen in the most recent *Shayara Bano* where the minority judges declared it the task of the Imam—the religious head—to interpret and decide the correct teachings of Islam. This raises the concern that since most religious heads are male, the judges assume that he would be objective in a case where the respondent itself is a major religious body, comprising such religious scholars, out of which

¹⁴ *ibid* (n10)94.

¹⁵ (1896-97) 24 IA 196. (emphasis added).

¹⁶ Anees Ahmed, 'Reforming Muslim Personal Law' (2001) 36(8) *Economic and Political Weekly* 618-19 <<https://www.jstor.org/stable/4410313> > accessed 27 December 2020.

¹⁷ Salman Khurshid, *Triple Talaq: Examining Faith* (OUP 2018) 14.

only a handful are women.¹⁸ The entanglement between the state and patriarchal religious organisations forces Muslim women to look for alternative ways to secure their rights. At the same time, the colonial state did interfere by deciding which matters would be governed by MPL, which religious doctrines would be treated as law even if it was regarded as not mandatory by scholars. This displaced a system of “*different interpretation and nuanced instances of discretion that often accompanies shari’a norms... [with] a rulebound legal system*”.¹⁹ MPL thus, became a crystallization of traditions, mostly patriarchal in nature, that might otherwise have evolved. This works to maintain the existing power relations.²⁰

Asghar Ali Engineer, a noteworthy Indian scholar known for his work on women’s rights in Islam was deeply critical of the Muslim jurists, the *ulema*, for their mechanical application of the British-made MPL.²¹ These jurists religiously followed the notion of ‘the closing of the gates of *ijtihad*’ which was popularised by the Western author Joseph Schacht. He argued that following a period of *ijtihad* in its formative years, there was a consensus which prohibited further *ijtihad*, beginning an age where new legal doctrines could not be derived independently from the Qur’an and *sunnah*, but only from the already existing *fiqh* rules of a scholar’s school of legal thought.²² Modern scholars have attacked Schacht’s thesis as being mythical, by

¹⁸ Out of the 50 Executive members in the All India Muslim Personal Law Board (AIMPLB) only 4 are women and out of 149 General members, only 26 are women <<http://www.aimplboard.in/index.php>> accessed 21 October 2019.

¹⁹ Micheal R. Anderson, ‘Islamic Law and the Colonial Encounter in British India’ (1996) 7 WLMUL 24.

²⁰ Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press, 2011) 65.

²¹ Asghar Ali Engineer, ‘Women’s Plight in Muslim Society’ (2006) Nov. 1-15 *Secular Perspectives* <<http://www.csss-islam.com/wp-content/uploads/2015/06/November-1-15-06.pdf>> accessed 22 June 2019 (link not active)

²² Joseph Schacht, *An Introduction to Islamic Law* (OUP 1965) 69-75.

demonstrating that it had never been so that *ijtihad* had completely stopped. Those qualified to perform *ijtihad* and the process itself always existed in varying capacities throughout history.²³ Engineer criticizes the Indian *ulema* for continuing to shy away from *ijtihad* and continuing to apply the medieval formulations of classical Islamic law. They issue *fatwas* without any consideration of its consequences. The most apt illustration of this is the case of Imrana, a young married Muslim woman who was raped at gunpoint by her father-in-law. This was followed by a *fatwa* by a Deobandi scholar, which opined that due to sexual relations with her father-in-law, her marriage was invalidated.²⁴ The Supreme Court noted several such *fatwas*, some even forcing survivors to marry their rapist. However, though it was restricted and discouraged, the court allowed *fatwas* to continue being issued.²⁵

The *qadi*—the Muslim predecessor to the colonial judge— operated very differently from the current judges. No *qadi* was bound by the opinion of another, unlike *stare decisis* in common law. Instead, they would mutually recognize differences in interpretations to achieve justice in varying factual situations. Unlike the *qadi*, who was trained in the spirit of Islam and Islamic law, the British and later Indian judges instead applied principles textually and mechanically based on digests and commentaries.²⁶ While judges themselves are not competent to interpret religious sources, recently they have attempted to mitigate the rigour of MPL against women. In a case dealing with a challenge to

²³ Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East Studies 3-41; Ahmed Fekry Ibrahim and McGill University, 'Rethinking the Taqlid Hegemony: An Institutional, Longue-Durée Approach' (2016) 136(4) Journal of the American Oriental Society 801-16, 804.

²⁴ Barbara D. Metcalf, 'Imrana: Rape, Islam, and Law in India' (2006) 45(3) Islamic Studies 389-412, 389-90.

²⁵ *Vishwa Lochan Madan v Union of India & Ors* (2014) 7 SCC 707.

²⁶ Asghar Ali Engineer, 'The Need for Codification and Reform in Muslim Personal Law in India' (2000) Dossier 22 WLUM 57 <<http://www.wlum.org/node/332>> accessed 27 December 2020.

Section 494 of the Indian Penal Code for allowing polygamy for Muslim men, the Allahabad court relying on several commentaries held:

*“Polygamy under Islam was always an exception, and never a generality. Then polygamy went and goes with the obligation of equality, equity, justice to be discharged or dispensed amongst more than one wife. The Koran speaks of conscience as an obligation on the husband before taking two, or three or four wives. It speaks of equality of love amongst wives, and equality which is within the sole perception of the woman, not the male. It is a hard discipline of the Islamic religion which requires perfection as any wife in a polygamous marriage can as of right speak out in a case of inequal treatment, and make matters difficult for a husband.”*²⁷

The High Courts of Kerala,²⁸ and recently Gujarat²⁹ have also made similar observations. In these examples, the court took note of scholarly opinions that were more just towards women's rights and used them to inform their understanding. A brief hint of acceptance of such a method can be observed in the judgement of Kurian, J. in the *Shayara Bano* case, which recognizes the religious importance of MPL but instead of protecting it as religious freedom, he tested *talaq-e-biddat* as a practice against Qur'an and Islamic teachings itself.³⁰ However despite such attempts, the underlying reality persists: Islam and legal rule-making in Islam is exclusively hegemonized by men and secular law continues to overlook this. Thus, MPL continues to harbour practices like polygyny, *nikah halal* and until very recently, *talaq-e-biddat*, all of

²⁷ *Chandra Pal and others v Keshav Deo & Ors* 1989 (1) AWC 527.

²⁸ *Amina v Hassan Koya* 1985 KLT 596.

²⁹ *Jafar Abbas Rasoolmohammad Merchant v. State of Gujarat* (2015) SCC OnLine Guj 5552.

³⁰ *ibid* (n 1) para 25.

which are unjust towards women. *Shayara Bano* has not dealt with many of these practices that are unjust towards women.³¹

III. INTERSECTIONALITY AND FEMINISM

Exploring reform in MPL requires that it be understood that some of the main agents of change, i.e., feminists and the State have more often than not been in dissonance with the experiences of religious women and religion as another social division that can contribute to change. There have been great debates about the fundamental right to religious practice and propagation, the judge's role as theologian and the fate of religious practice being tested on the touchstone of 'constitutional morality' as emphasized in the *Sabrimala case*.³² While the State's opinion of religion is a topic of much interest in itself, this article focuses only on the former to show how feminism often excludes religion.

In the introduction to Bell Hooks' *Ain't I a Woman*, her criticism of mainstream feminism, that, it assumes that 'All women are White and all Blacks are men',³³ started a movement for the development of a method of recognizing social divisions to understand analytical differences between women.³⁴ First coined by Kimberle Crenshaw, it set in motion a significant transformation of feminism which came to be called intersectionality.³⁵ Hooks' criticism brings to light the tendency for women to be constructed as a single homogenous group

³¹ *Sameena Begum v Union of India & Ors* (2018) SCC OnLine SC 610.

³² *Indian Young Lawyers Association vs The State of Kerala* (2018) SCC OnLine SC 1690.

³³ Bell Hooks, *Ain't I a Woman* (South End Press 1981).

³⁴ Nira Yuval-Davis, 'Intersectionality and Feminist Politics' (2006) 13(3) *European Journal of Women's Studies* 193-209, 193.

³⁵ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139-167.

by only considering their shared oppression and ignoring the specific ones by overlooking the power relations between different groups of women.³⁶ Beginning with a focus on the specific struggles of Black women in “*the various ways in which race and gender interact to shape the multiple dimensions of Black women’s experiences*”, the idea of intersectionality has now expanded much beyond and draws attention to intersections of race, class, sexuality, caste, ability and nation.³⁷

Intersectional feminism raises the question that if feminist theory claims to capture the experiences and aspirations of all women, then who is it that defines what ‘woman’ is? To Hooks, feminism is “*a movement to end sexism, sexist exploitation, and oppression*”, and so it must include the lived experiences and struggles of all those who are struggling against sexism.³⁸ This becomes especially important when certain groups such as Black women in Crenshaw’s case or Muslim women are left out from feminism reflecting their experiences. This implicitly means that the definition of ‘woman’ as defined by mainstream feminists would not include Black or Muslim women. This leads to what has been called gender essentialism, which has been a criticism by many against feminists such as Catherine MacKinnon, for creating a universal idea of ‘woman’ but which actually only includes middle-class, heterosexual, white women thus, making the experiences of other women ancillary to the interests of feminism and silence them.³⁹ This makes it difficult to speak about a universal ‘woman.’

³⁶ Sara Salem, ‘Feminist critique and Islamic feminism: the question of intersectionality’ (2013) 1(1) *The Postcolonialist* 1-8.

³⁷ Jakeet Singh, ‘Religious Agency and the Limits of Intersectionality’ (2015) 30(4) *Hyptia* 657-674.

³⁸ Bell Hooks, *Feminism is for Everybody: Passionate Politics* (South End Press, 2000) 1.

³⁹ Larissa Behrendt, ‘Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse’ (1993) 1(1) *Australian Feminist Law Journal* 35; A Harris, ‘Categorical Discourse and Dominance Theory’ (1989) *Berkeley Women’s Law Journal* 181-182.

In the Indian context, another problem with mainstream feminism that follows from this has been the emphasis put on choice. Chandra Mohanty has argued that while western feminism is itself not a monolith, there have been similarities in much scholarship that has formed the idea of the third world woman from a western feminist lens, which has tended to homogenize religious women as victims who are unable to see the allegedly inherent patriarchy in their religion, thus reproducing colonial notions.⁴⁰ With choice being a necessary element for autonomy and agency that western feminists rely on, being religious becomes a blanket oppressive force which takes away from women and their agency as they relinquish their rights to become part of an oppressive community. This is exacerbated by the False Consciousness thesis, which propounds that Muslim women are brainwashed victims of men and patriarchal institutions, Islam included, who act against their own objective interest by following religion.⁴¹ Such a view overlooks the possibility that women can choose to be religious. It creates a convenient distinction between which choices are emancipatory by assuming that choices can be made outside of power relations and thus, the choice to be religious — religion itself being seen as depriving of agency — is not free, while other choices may be. An example of this is the Western view that a woman wearing a *burqa* would be thought of as being regressive and a victim to Islam. It has been argued, however, that for many Muslim women, wearing a *burqa* (or not wearing it) can be a political act of asserting her identity or agency.⁴² So the same way 'objectivity' is itself an example of the

⁴⁰ *ibid* (n 36).

⁴¹ Sarah Bracke, 'Author(iz)ing Agency: Feminist Scholars Making Sense of Women's Involvement in Religious 'Fundamentalist' Movements' (2003) 10(3) *The European Journal of Women's Studies* 335-346.

⁴² Kelsy C Burke, 'Women's Agency in Gender-Traditional Religions: A Review of Four Approaches' (2012) 6(2) *Sociology Compass* 122-133; Ghazala Jamil, *Muslim Women Speak: Of Dreams and Shackles* (SAGE Publications, 2018) 105-121.

reification of white male thought,⁴³ it may be said that feminism becomes a reification of the white, heterosexual, secular female thought.

IV. ISLAMIC FEMINISM

If intersectionality in feminist jurisprudence is the aim, then how exactly may Muslim women argue against patriarchy from within their religion, especially if MPL is riddled with patriarchal practices and androcentric laws? This article proposes Islamic feminism as a solution to the conundrum at hand. With its many varying definitions and shades, a brief understanding of Islamic feminism is required to understand its application in India. It can be defined as a discourse or “*an analytical category to understand a multi-faced phenomenon where Islam is used to argue for an expansion of women’s rights or a term of identity.*”⁴⁴ It is both a transnational discourse that started in the late 1990s and a local movement in India, with the latter existing independently before the former started.⁴⁵ The key idea of Islamic feminism is the use of feminist hermeneutics to produce readings of religious sources which are used to women and debunk the relationship between patriarchy and Islam. For this it is immensely important to understand the immutability of *shari’a* versus the flexible *fiqh*. That State sanctioned Muslim family laws – either enacted or customary – is fixed and non-negotiable is a belief that is commonly held. Women’s demands for justice are silenced by designating these laws as ‘God’s Law’ and God’s direct commandments.⁴⁶ Muslim jurists also carry the

⁴³ Gloria T. Hull and Barbara Smith, ‘Introduction’ in Gloria T. Hull, Patricia Bell Scott and Barbara Smith (eds), *But Some of Us are Brave* xxv (The Feminist Press, 1982).

⁴⁴ Liv Tønnessen, ‘Islamic Feminism’ (2014) 1 Sudan Working Paper CMI:SWP.

⁴⁵ *ibid* (n 7).

⁴⁶ Tamir Moustafa, ‘Islamic Law, Women’s Rights, and Popular Legal Consciousness in Malaysia’ (2013) 38(1) *Law & Social Inquiry* 168-188, 168.

same assumption that MPL is divine law which cannot be tampered with by humans.⁴⁷ This presents an obstacle to reform and so, Islamic feminists stress on the difference. They apply their own *ijtihad* and highlight the egalitarian nature of Islam to argue that the patriarchal model is against Islamic values.⁴⁸ Two voices emerged out of Islam's evolution: 1) an ethical vision with spiritual equality of men and women and 2) a hierarchical structure based on male-female relationship. The androcentric and misogynist Arabic society in which Islamic doctrine subsequently developed, emphasized and eventually sacralised the latter voice of hierarchy.⁴⁹

Two ways in which Islamic feminism operates have been identified by Mulki Al- Sharmani. The first, a feminist exegesis of the Qur'an, which looks to the Qur'an as a source of liberation for Muslim women and the second, is an engagement with *fiqh* which is deconstructed to highlight the hierarchy of genders that has been part of Islamic law.⁵⁰ The working of both methods shall be illustrated presently to clarify how Islamic feminism helps Muslim women exercise agency and bring positive changes to their legal rights, especially in the context of family law.

A. *Women in Classical Law*

Ontologically, conservatives prove male authority by the theological idea of a woman as unequal and supplementary to man and the traditional Islamic view on female sexuality as well as readings of Qur'anic verses granting men a 'degree' above women. The woman

⁴⁷ *ibid* (n 21).

⁴⁸ *ibid* (n 3) 4.

⁴⁹ Leila Ahmed, *Women and Gender in Islam: Historical Roots to a Modern Debate* (Yale University Press, 1992) 66-83. Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 (1) HAWWA: Journal of Women of the Middle East and the Islamic World 1-28, 4.

⁵⁰ Mulki Al- Sharmani, 'Islamic Feminism and Reforming Muslim Family Laws' EUI Working Paper RSCAS 2011/29.

was created for the man and from the man; ontologically making man God's primary creation and the woman secondary, who is additionally also made responsible for what is known as Man's Fall from the Garden of Eden.⁵¹ Her prime function is hence, childbirth.

The traditional view on sexuality is equally problematic. Female sexuality is viewed as active and dangerous, directly linking security of social order to a woman's sexuality and confuses sexual self-determination of a woman with uncontrolled promiscuity and *fitna* (chaos), with women being primary agents of *fitna* and destructive for social order.⁵² It causes men to lose focus and capitulate to the sexual advances of women.⁵³ It is the epitome of *fitna* and synonymous with Satan.⁵⁴ This necessitates the suppression of female sexuality through means including, *inter alia*, veiling. The control over women's sexuality is also central to much Qur'anic interpretation which forces upon women a religious duty to protect their chastity for the honour of men.⁵⁵ This traditional view is problematic because firstly, it is androcentric in its approach, as it seeks to systematically protect men by suppressing female sexuality and maintaining the man as superior over women. Secondly, this treats women not only as threats to humanity, but also outside of it, leading to a dehumanization that propagates the idea that men are the primary recipients of God's message. Any liberation of women is opposed since Muslim societies socialize men in a manner which does not equip them to deal with self-determined women, and so it is conflated with chaos.

⁵¹ Riffat Hasan, 'Equal Before Allah? Woman-man equality in the Islamic tradition' (1987) 7(2) Harvard Divinity Bulletin.

⁵² Al-Ghazali, *Revival of Religious Learnings*, Vol 1 (Fazl-Ul-Karim tr, DaruHshaat 1993).

⁵³ Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in Muslim Society* (Saqi Books 2011) 26.

⁵⁴ Al-Ghazali, *Revival of Religious Learnings*, vol 3 (Fazl-Ul-Karim tr, DaruHshaat 1993).

⁵⁵ Sa'diyya Shaikh, 'Exegetical Violence: *Nūshuz* in Qur'anic Gender Ideology' (1997) 17 Journal for Islamic Studies 48-73, 49.

B. Deconstructing Classical Law

This forms much of the basis for much of the imbalance in the legal rights of women and men in MPL and *fiqh* in general. Islamic feminist scholars criticize *fiqh* by arguing that rights in marriage and gender roles are therefore constructed in a fashion that is hierarchical and discriminatory against women through the law. They argue that in relation to women's rights, *fiqh* rulings do not embody the ideals of the *shari'a*, but rather the jurists' shared legal and gender assumptions which were a product of the social norms of their times, especially in the formative period of Islam.

Mir Hosseini demonstrates this with the illustration of marriage. She argues that even though jurists took great care to not equate marriage with a sale, the conception of women's rights in a marriage is built on the logic of sale. The analogy itself has featured and affirmed repeatedly in court judgments with differing opinions.⁵⁶ The woman's sexuality becomes a commodity, which is accessed exclusively by her husband, even if she herself is not his commodity. There is an exchange of duties and rights: the man's right to 'unhampered sexual access' and the woman's duty to provide it and the woman's right to maintenance and the man's duty to provide it.⁵⁷ The husband's right over sexual pleasure was to such a degree that he could also restrict the wife's movements to keep her available for himself. Failure to obey the husband would result in forfeiting his support.⁵⁸ But the Qur'an

⁵⁶ *Abdul Kadir vs Salima* (1886) ILR 8 All 149; *Anis Begam v Muhammad Istafa Wali Khan* AIR 1933 All 634; *Hijabani v. Ali Sher Khan* MANU/UP/0287/1921; *Khatoon Begam vs Saghir Husain Khan* AIR 1945 All 321; *Ghiasuddin Babu Khan vs Commissioner Of Income-Tax* (1985) 153 ITR 707 AP.

⁵⁷ Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform' (2003) 1 (1) HAWWA: Journal of Women of the Middle East and the Islamic World 1–28, 7.

⁵⁸ Kecia Ali, 'Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law' in Omid Safi (ed) *Progressive Muslims* (One World, 2006) 170.

condemned the subjugation of women, which is the opposite of what was achieved by relying on the logic of a contract of sale. Engineer states that the Muslim scholarly discourse for “*women is duty-based and for men is right-based*”, which is the opposite of the Qur’anic discourse.⁵⁹ Therefore, the marriage contract and its duties were elevated to a religious, immutable status, remaining a contract but something more as well. The extent of this is so deep that it can be seen in the works of Asaf A.A. Fyzee, regarded as a modern reformist scholar and cited frequently by courts.⁶⁰

Classical jurists, by citing God as the authority, made the foundations of women’s gender rights virtually fixed. This fixture reflected the culture and social fabric of the society of that time. This was underpinned by the exclusion of women from participating in the knowledge production of both, religion and law, which marginalized their voices.⁶¹ Later scholars found support in two ideas: complementarity and science. While men and women are equal, God assigned different roles to them and so, there is no hierarchy. This essentially means that women’s natures complement men’s and vice versa, describing it as not only natural and harmonious, but also divine. Since the values attached to these gender roles may vary in differing contexts, this has been criticized as an inherently unequal relationship, which is rhetorically constructed so that a disruption would fundamentally destroy Islam.⁶²

An illustration of such complementarity espoused by many contemporary feminist scholars, is that classical Islamic law levies no obligation on the wife to perform housework.⁶³ Such an argument is

⁵⁹ *ibid* (n 21).

⁶⁰ Fyzee (n 9) 70.

⁶¹ *ibid* (n 57) 13-14.

⁶² Amina Wadud, *Inside the Gender Jihad: Women’s Reform in Islam* (One World 2006) 27-28.

⁶³ *ibid* (n 50) 12-13.

used to push forward a view of Islamic law as egalitarian and liberal. It implicitly accepts the complementary nature of the obligations of the husband and wife, immediately limiting the framework within which such feminists can argue. Kecia Ali criticizes such arguments for overlooking that the reason housework is not being made an obligation is because her main legal role is to be sexually available to the husband. 'Sex in marriage was almost exclusively a female duty and a male right'.⁶⁴ There were no enforceable rights for women. Socio-economic circumstances also cannot be ignored, since all women would not be in a position to avoid housework if there is no help, which makes the family laws which are based on such ideas largely unsustainable. Later 'scientific' justifications – alien to classical *fiqh* – also began being used, arguing that it was women's nature to live under rule and leadership of husbands by emphasizing female psychology – allegedly emotional and nurturing – and biological functions of childbirth; and extending it to domestic functions.⁶⁵

Women were consistently excluded from active participation in the process of developing *fiqh*. Islamic history itself has the presence of many significant women like Khadijah and Aishah, yet classical *tafsir*⁶⁶ has created and defended male authority, primarily by dictating that women are "weak, inferior, intellectually incapable, and spiritually lacking", and justify traditional gender roles by attributing to it a divine mutuality and complementarity.⁶⁷ Women were confined to being objects, rather than the subjects of Islamic law. The ideals of *shari'a*, which advocate for equality, justice and freedom were ignored and

⁶⁴ *ibid* (n 58) 173-179.

⁶⁵ Omaima Abou-Bakr, 'The Interpretative Legacy of Qiwaamah as an Exegetical Construct' in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World, 2014) 98.

⁶⁶ *Tafsir* (pl. *tafsir*) is the Arabic word which most commonly refers to commentaries on the Qur'an based on exegesis.

⁶⁷ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (OUP 1999) 7; Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (One World, 2006) 28.

even deterred in being implemented by the social norms of the formative period of Islamic jurisprudence. These social norms became legal norms on being used by jurists who assimilated these into jurisprudence and commentaries, establishing ideas of ownership and authority over women.⁶⁸ Yet, these *tafsir*, which were supposed to be ancillary to the Qur'an, "*became part of that past actuality now attached to the contents of the Quran, with the consequence that [it] came to be regarded as beyond question or doubt*",⁶⁹ and it is these interpretations which are applied when constructing the *shari'a*, personal laws, private Islamic affairs and public policies.

C. De-Patriarchalising Islamic Law

Fazlur Rahman's work is one of the first to present and argue for a thematic study of the Qur'an over a passage-by-passage study to achieve a holistic understanding of the Qur'an.⁷⁰ A distinction must be made between Qur'an's moral injunctions and legal enactments specifically aimed at its seventh century audience. Muslim tradition has failed to do so and has instead looked at the Qur'an as a religious source of laws, which creates contradictions within different verses of the Qur'an and fails to understand its underlying unity. "*Some of the greatest restrictions on women, causing them much harm, have resulted from interpreting Qur'anic solutions for particular problems as if they were universal principles*".⁷¹ Instead of being a lawbook, Qur'an, as Rahman argues, "*is the divine response, through the Prophet's mind, to the moral-social situation of the Prophet's Arabia, particularly to the problems of commercial Meccan society of the*

⁶⁸ *ibid* (n 57) 21-22

⁶⁹ John Burton, *The Collection of the Quran* (Cambridge University Press, 1977) 271.

⁷⁰ Fazlur Rahman, *Major Themes of The Qur'an*, (Bibliotheca Islamica, 1994) Introduction v.

⁷¹ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (OUP 1999) 99.

day".⁷² Verses then must be divided into three types: 1) verses with universal aims, such as justice and equality, 2) temporary verses with time specific application, such as distribution of war spoils and 3) verses that need reinterpretations with change in time.⁷³

Islamic feminists use creative theological arguments to prove the anti-patriarchal nature of the Qur'an. Masculinizing God and supporting male hierarchy is anti-Islamic, since it is akin to idolatry and violates the principles of 'God's Unity', which is central to Islam.⁷⁴ The androcentric notion of 'Creation' is also denied. Riffat Hasan notes that the Qur'an nowhere makes a distinction between the creation of man and woman, with the above assumptions seeping in through pre-Islamic foreign influences. She relies on hermeneutics and linguistics, to argue for the lack of gender-specificity in the Qur'anic verses. Verse 4:1 describes women and men as being made of a single *nafs* (soul) which is conceptionally neither male nor female, with no linguistic basis to attribute the original *nafs* to the male Adam.⁷⁵ The Qur'an has used the word *adam* not only as a name but as a collective noun, often interchangeably used with *al-insān*, meaning humanity. Ḥawwā' (Eve) is not directly named and instead mentioned as Adam's *zawj* (mate),⁷⁶ which is a masculine noun, and so it does not exclusively refer to women. Adam then, not necessarily male, makes its *zawj* not necessarily female.⁷⁷ Not only is this important to establish gender-neutrality in this context, but also to provide an equal moral capacity to

⁷² Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (University of Chicago Press, 1984) 5.

⁷³ Asma Lamrabet, 'An Egalitarian Reading of the Concepts of *Khilafah*, *Wilayah* and *Qiwamah*' in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World, 2014) 121-122.

⁷⁴ *ibid* n(2) 106.

⁷⁵ Amina Wadud, *Inside the Gender Jihad: Women's Reform in Islam* (One World, 2006) 31-32; Asma Barlas, "Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an (University of Texas Press, 2002) 19-20.

⁷⁶ See Surah - al Baqarah 2:35; Surah al-A'raf 7: 19; Surah-Ta Ha 20: 117.

⁷⁷ Riffat Hassan, 'Made from Adam's Rib: The Woman's Creation Question', (1985) 27 Al-Mushir Theological Journal of the Christian Study Centre 124-155, 126.

women and men, so that it is not women who have to be specifically regulated. This methodology illustrates the first method of Islamic feminism in Al-Sharmani's distinction.

Hasan finds in *hadith* literature the seeping in of ideas of inequality into Islamic traditions, including the *Sahih al-Bukhari* and *Sahih Muslim*, the two most authoritative Sunni Islamic sources after the Qur'an. The validity of the content of a *hadith* is determined by its list and chain of transmitters. Much of the views on the dangers of female sexuality are also derived from *hadith* which attribute sayings to the Prophet by transmitters that paint misogynist pictures and increase the dehumanization by sayings likening women to animals. Fatema Mernissi has posited that many of these are reflective of the transmitters' personal misogynist views and even mistakes in listening, and on a historical analysis appear to have logical holes, fitting too conveniently in the political circumstances of the transmitter at times. They also contradicted clarifications given by the Prophet's wives, undoubtedly a stronger source for confirming the practices of the Prophet, with many clarifications that they gave—more egalitarian in nature—not being incorporated in the compilation of the *hadith*, including al-Bukari's *hadith*.⁷⁸

Similar methods are used for deriving new meanings out of the Qur'an and deconstructing those meanings from the Qur'an as well as other sources, which contribute to creating a hierarchy among genders. This must not be confused with arguments of many apologetic scholars who, while unearthing the rights of women in Islam fail to notice the hierarchical background within which rights are being searched for. Instead, a new approach to the Qur'an is required which radically changes the concepts of marriage, divorce and other matters pertaining to family laws.⁷⁹ In Engineer's view, the *ulema* is contradictory in its

⁷⁸ Fatima Mernissi, *Women and Islam: An Historical and Theological Enquiry* (Mary Jo Lakeland tr., Basil Blackwell 1991) 49-84.

⁷⁹ *ibid* (n 58) 181.

support of Qur'anic ideals and its immutability on one hand, and on the other, its application to women's rights.⁸⁰ The Qur'anic verses on polygyny (4:3) demand justice between wives as a necessary qualification, which makes polygyny an exception and not the rule. Yet, the *ulema* completely ignore this, instead making polygyny virtually a privilege for Muslim men. Islamic feminists argue that Islam is opposed to polygyny. It restricted already rampant polygyny and intended for it to gradually end with the progress of society from the pre-Islamic ways of Arabia. They intra-textually read Verse 3 and Verse 129 of the fourth *surah* of the Qur'an:

- a) If you can be just and fair among women, then you can marry up to four wives. [Verse 4:4]
- b) If you cannot be just and fair among women, then you may marry only one.
- c) You cannot be just and fair among women. [Verse 4:129]⁸¹

Therefore, you cannot marry multiple women. The Gujarat High Court has taken cognizance of such arguments. It has also relied on scholarly work which historically contextualizes polygyny and commented, "*the code upon which polygamy rests in Islam is strict and difficult to keep...It is for the maulvis and Muslim men to ensure that they do not abuse the Quran to justify the heinously patriarchal act of polygamy in self-interest*".⁸²

While Qur'anic re-interpretation is beneficial, from a legal point of view, a focus on jurisprudence is just as necessary. The second group of scholars in Al-Sharmani's distinction, such as Ali and Mir-Hosseini deconstruct Islamic law to separate its divine elements from its human ones and subject it to historical contextualization to highlight the

⁸⁰ *ibid* (n 21).

⁸¹ Azizah Al-Hibri, 'A Study of Islamic Herstory: Or How Did We Ever Get Into This Mess?' (1982) 5(2) Women's Studies Intl Forum 207-219, 216.

⁸² *Jafar Abbas Rasoolmohammad Merchant v. State of Gujarat* (2015) SCC OnLine Guj 5552, para 42, 61-62.

inequality at its very source i.e., within the knowledge-development process, which is very much what modern family laws rest on.⁸³ Ali argues that Islamic feminism must focus on jurisprudence because even if scriptural re-interpretations are achieved, the field of jurisprudence is entirely left to traditionalist thinking otherwise.⁸⁴ Some scholars focus solely on re-interpretation while others on jurisprudence. In Al-Sharmani's view, both groups are of great importance and work in synthesis, where the first unearthing an anti-patriarchal Islam which provides normative weight to the legal reforms in Muslim family laws. Islamic feminism, much like other academic projects, has its own politics and internal disagreements, which need not be discussed here. What needs to be understood is its multi-level methods of operation and the impact it serves. Its most important function is that it brings women to the forefront of Islam, participating as moral and intellectual equals to men in the construction of religion and religious laws.

V. ISLAMIC FEMINISM AS INTERSECTIONALITY

This article argues that feminist jurisprudence needs to look at multiple axes of 'woman' and religion. This will be supported by two reasons, both of which work interconnectedly: first, that the existing personal laws already do not recognize women as being part of constructing Islam; second, that following a path that seeks to end gender injustice without addressing reforms in MPL implicitly falls prey to the same assumption that Islam is inherently patriarchal, the consequences of which would adversely impact the religious autonomy of Muslim women.

A. *MPL Hinders Religious Autonomy*

⁸³ *ibid* (n 50) 13.

⁸⁴ *ibid* (n 58) 182

In Farrah Ahmed's view, religious autonomy means personal autonomy of human life in the specific sphere of religion. She relies on Rawls to create a link between self-respect and autonomy—which he stated to be essential to one's life⁸⁵—and argued that non-recognition of any important part of a person's identity injures the person's self-respect, in turn reducing autonomy. Charles Taylor has suggested that non-recognition or misrecognition constitutes a form of oppression. He writes:

The thesis is that our identity is partly shaped by recognition or its absence often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.⁸⁶

Building on this thesis, it can be contested that the current system of MPL does not recognize any heterodoxy in its laws, to the extent that it confines itself to crystallized patriarchal traditions and relies on old commentaries which are considered 'authoritative', as mentioned earlier. This brings with it the issue that even a person who interprets a religious doctrine differently will be forced to govern herself by an interpretation of that doctrine that she does not agree with. Thus, MPL, being a collection of state-endorsed religious interpretations, misrecognizes such people who do not share the same interpretation of religious doctrine. Ahmed has argued that this interpretation of religious doctrine might be of great importance to a person's religious

⁸⁵ John Rawls, *A Theory of Justice* (5th edn, Universal Law, 1972) 178, 440.

⁸⁶ Charles Taylor, 'Multiculturalism and the Politics of Recognition' in C Taylor, A Gutman, and J Habermas, *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25.

life.⁸⁷ This becomes even more important when different sects and schools of jurisprudence of Islamic law in India are considered.

However, the focus of this article is women and their interpretations, which only adds to this, since most of the current personal law is based on older and patriarchal rules, if not inaccurate collections of interpretations. If heterodoxy is not recognized, then the current law will be followed, which creates gender hierarchies. These can have drastic deviations from the interpretations of a woman which can be exemplified in the following; Verse 4:34 of the Qur'an, which talks about marital discord includes the Arabic word *Wahjurūhna* the most obvious meaning of which is to 'separate beds from your wife'. This has however been interpreted by revered Muslim scholars as 'confining the wife to home', 'refusing to talk to her during sex' and even 'tying her up and forcing her to have sex.'⁸⁸ Realistically, polygyny, which is interpreted by Islamic feminists to be unacceptable in Islam, has been a part of MPL. This shows that by not recognizing the importance of individual interpretations, a wife could very well be forced to be governed by the misogynistic interpretations that become law, which is not only unjust on the face of it, it is also forcing onto her a religious practice that she does not believe in.

This raises questions of her autonomy being affected. There are many ways for religious women to exercise agency and reinterpret their religion to empower themselves while navigating the complexities of their lives.⁸⁹ The same way that the law here is painting all Muslims with the same brush, feminist jurisprudence, by ignoring the agency of religious women is contributing to harming their religious autonomy.

⁸⁷ *ibid* (n 6) 111.

⁸⁸ Sa'ddiya Shaikh, 'Exegetical Violence: Nūshuz in Qur'anic Gender Ideology' (1997) 17 *Journal for Islamic Studies* 49-73, 65.

⁸⁹ Kelsey C Burke, 'Women's Agency in Gender-Traditional Religions: A Review of Four Approaches: Women's Agency in Gender-Traditional Religions' (2012) 6(2) *Sociology Compass* 122-133, 123-29.

This is evident in the Indian struggle against the gender injustices of MPL. There has been a great demand for a Uniform Civil Code, a proposal that is also enshrined in Article 44 of the Indian Constitution. The secular nature of the demanded code became increasingly Hindu, with secularism itself taking a character of 'secularism in a Hindu way'⁹⁰ and the demands for gender justice became coloured with the community and nationalist politics for a united India. It could thus, interfere with the ability of Muslim individuals to live by their religious norms and religious practices.⁹¹ Proponents of the Uniform Civil Code would overlook these difficulties for Muslim women who seek to be religious, which is implicitly defining feminism in a 'secular' manner, presenting the same problems as mainstream Western feminism. Many major women's organisations seem to have withdrawn support for such a code because of the increasing exploitation of their cause by Hindu nationalists.⁹² Consequently, some scholars —both Muslim and otherwise— have suggested codification of MPL as an alternative.⁹³

At the same time, the limits of intersectionality must also be recognized. It can be argued that the framework of intersectionality limits itself to prevent oppression and not to protect a woman's religious identity. However, Jakeet Singh's identification of the relationship between intersectionality and religious women's agency can be used to argue against this view. Singh argues that "*critiques of,*

⁹⁰ Nadja-Christina Schneider, 'Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – or Vice Versa?' (2009) 11(1) *Journal of International Women's Studies* 56-71, 60.

⁹¹ *ibid* (n 6) 169.

⁹² Zoya Hasan, 'Secularism, Legal Reform and Gender Justice in India' in Katja Füllberg-Stolberg et al. (eds) *Dissociation and Appropriation: Responses to Globalization in Asia and Africa* (Arabische Buch, 1999) 137-150, 138.

⁹³ Asghar Ali Engineer, 'Women's Plight in Muslim Society' (2006) Nov. 1-15 *Secular Perspectives* <http://www.csss-islam.com/wp-content/uploads/2015/06/November-1-15-06.pdf> accessed 22 June 2019 22 June 2019 (link not active); Justin Jones, 'Towards a Muslim Family Law Act? Debating Muslim Women's rights and the codification of personal laws in India' (2020) 28(1) *Contemporary South Asia* 1-14.

and resistance to, power and oppression are always grounded in a particular ethical-political formation”, which makes it so that power and oppression in a society cannot be seen in isolation since the responses to these are created from within that ethical-political formation.⁹⁴ This is evident in the rejection of feminism by many Muslims, with a great number being women who view it as a Western notion that is disregarding and unaccommodating of the cultural values of their religion and community.⁹⁵ Feminism often appears to many Muslim women as another hegemonizing force—the *civilising mission* of sexual politics. Muslim women fear derision for their recognition of hierarchies.⁹⁶ This makes it important to include a feminism that both validates their religion and experiences while at the same time reforms laws for their welfare.

B. Muslim Identity

Amina Wadud stated that defining Islam provides power. Western media defines Islam as whatever Muslims do, such as oppressing women despite principles, ideals and values to the contrary.⁹⁷ It caricatures Muslim men as ‘polygamous and abusive’, and Muslim women as ‘veiled, shackled, and secluded’.⁹⁸ Western feminists, believing Islam to be irretrievably patriarchal, create binaries between believing Muslims and feminists, from which Muslim women must

⁹⁴ *ibid* n(37) 669-670.

⁹⁵ Huma Ahmed-Ghosh, ‘Introduction’ in Huma Ahmed-Ghosh (ed), *Contesting Feminisms: Gender and Islam in Asia* (State of New York Press, 2015) 6.

⁹⁶ Ghazala Jamil, *Muslim Women Speak: Of Dreams and Shackles* (SAGE Publications, 2018) 118.

⁹⁷ *ibid* (n 62) 21.

⁹⁸ MM Hasan, ‘The Orientalization of Gender’ (2005) 22(4) *The American Journal of Islamic Social Sciences* 26-56, quoted in Md. Mahmudul Hasan, ‘Feminism as Islamophobia: A review of misogyny charges against Islam’, (2012) 20 *Intellectual Discourse*, 58.

choose one.⁹⁹ Islamic Feminism is a principled method for women to not have to be governed by male interpretations of Islam and to be able to define Islam for themselves, who choose to define it as unaccepting of patriarchy. This can develop a jurisprudence that breaks this binary of Muslim/feminist by letting a woman be both at the same time, with no fundamental contradictions.

Identity as Muslims is crucial in such a discussion. Laws do not exist in a vacuum but rather in a political society. Even more than the alleged divine nature of MPL, Indian Muslim jurists have resisted reforms since it is viewed as an attack on their Muslim identity. But what is more important is that Muslim women equally identify as Muslims. Relying on an empirical study, Engineer has argued that Muslim women do not favour changes in MPL even though they detest the current laws.¹⁰⁰ A Malaysian author also writes, “*For most Muslim women, rejecting religion is not an option. We are believers, and as believers we want to find liberation, truth, and justice from within our own faith*”.¹⁰¹ However, this is a conscious choice to believe —not a coercive one — which is emancipatory at the same time, keeping the personal and religious autonomy of the Muslim woman intact and not presenting them as ‘passive victims’.¹⁰² The limits of intersectionality will then have to be pushed to reach the understanding that religious identity can be of key importance to the Muslim woman. Inclusion of religion into feminism would firstly, assist in developing legal reforms in MPL that are not solely made out of experiences of men and secondly, protect the religious autonomy of women by not imposing

⁹⁹ Amina Wadud, ‘The Ethics of Tawhid over the Ethics of Qawamah’ in Ziba Mir-Hosseini et al. (eds), *Men in Charge? Rethinking Authority in Muslim Legal Tradition* (One World 2014).423-424.

¹⁰⁰ Asghar Ali Engineer, ‘Status of Muslim Women’ (1994) 29(6) *Economic and Political Weekly* 297-300, 298.

¹⁰¹ Zainah Anwar, ‘What Islam, Whose Islam? Sisters in Islam and the Struggle for Women’s Rights’ in Robert W. Hefner (ed) *The Politics of Multiculturalism* (University of Hawai’i Press, 2001) 227.

¹⁰² *ibid* (n 7) 59.

any secular laws in opposition of religious practices, such as a Uniform Civil Code which may not be neutral in character. This has been the case in Tunisia, where, by the exercise of *ijtihad*, the reformers made use of a reading which is the same as the Islamic feminist endeavour illustrated above, to deny men the right to polygyny.¹⁰³ While its politics of *shari'a* and its reform can be distinguished from India, the point remains that a woman-friendly re-interpretation of Islam can be and has been employed to change the Muslim family laws.

Instead of being opposed to secular feminism, Islamic feminism is an independent site or middle space 'between secular feminism and masculinist Islamism'.¹⁰⁴ An illustration is found in Wadud's interpretation of *talaq*, which states that there need not be complete removal of a woman's power to repudiate marriage.¹⁰⁵ The Qur'an does not prohibit a woman's right to divorce, which can assist in justifying laws such as the *Dissolution of Muslim Marriages Act, 1939*, which gives Muslim women the right to get a judicial divorce. The *Shah Bano* judgment then is not in opposition to the Islamic feminist reformatory strategy either. Looking at MPL through an intersectional lens, Islamic feminism is identified as a beneficial solution to the dilemmas of feminism versus Islam that Muslims get trapped in.

Religion has always played a great role in the construction of legal norms and change. *Brown v. Board of Education* would have likely been circumvented by American citizens if Christian abolitionists would have not relied on Biblical arguments to debunk the religious

¹⁰³ Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964) 211; Mounira M Charrad 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation' (2007) 64(4) Washington and Lee Law Review 1513-1528, 1518.

¹⁰⁴ Riffat Hasan, 'The Development of Feminist Theology as a Means of Combating Injustice Toward Women in Muslim Communities/Culture' (1995) 28(2) European Judaism: A Journal for the New Europe 80-90, 88.

¹⁰⁵ Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* 80 (OUP, New York, 1999).

prescription of slavery. Mackinnon herself has greatly influenced feminist jurisprudence and brought about legal change by changing the narrative through pushing boundaries of awareness of oppression by the law. While it is true that a change in the narrative is required for a legal change to be effective (or at times happen in the first place), it can be argued that for religious reforms, this change in narrative is insufficient if not accompanied by a change in the scriptural interpretation, which provides scriptural support to the change in narrative.¹⁰⁶

VI. CONCLUSION

This article has argued that feminist jurisprudence, by overlooking the importance of a religious identity of a Muslim woman is harming the woman by 1) maintaining the view of her as a 'passive victim' of Islam, thereby contributing to the idea that Islam is inherently patriarchal and hence the woman is only a coerced subject of it and 2) by reducing her religious autonomy by not recognizing her identity as only a woman and not Muslim. The experience of one person as Muslim and woman are inseparable. The experiences of being both create a site for the intersection of religion and gender, which inevitably include the hierarchical rules of MPL that govern these women. An analysis in intersectionality was then performed to argue that Islamic feminism serves as a medium for Muslim women to resist and reform the specific oppression faced by them. Women are just as Muslims as men are. Women-inclusive *tafsir* shows drastic differences in the Qur'an's meanings. The conservative assumption about regressive practices promoting gender hierarchies are not argued to not be rooted in and are even contradicted by the Qur'an. Islamic feminists recognize that

¹⁰⁶ Russell Powell, 'Catharine Mackinnon May Not Be Enough: Legal Change and Religion in Catholic and Sunni Jurisprudence' (2007) 8(1) Georgetown Journal of Gender and the Law 1-5.

while mere reinterpretation is not enough, it is still a valuable tool.¹⁰⁷ Not only does it delegitimize religious sanction to gender hierarchies, but it also provides Muslim women and men methods to search for an equal, unoppressive society within their religion, especially by deconstructing and reconstructing *fiqh*. Thus, looking at the Qur'an as a trans-historic and trans-cultural text and re-interpreting it constantly to find the best meaning is necessary.

¹⁰⁷ Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press, 2002) 2