Muslim Women and Marriage Laws
Debating the Model *Nikahnama*

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This paper discusses the model *nikahnama* or equitable marriage contract and the ensuing debate around it. Created to bring about uniformity in procedures for Muslim marriages, the aim of the model nikahnama is to address the issue of Muslim women's entitlement within marriage, minimise disputes and facilitate their settlement. The paper locates a detailed exploration of the nikahnama initiative within the broader and historically shifting context of the debate on Muslim marriage laws.

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This essay brings into focus recent initiatives that address Muslim women's disadvantaged position in marriage through the formulation of a "model *nikahnama*" or an equitable marriage contract. For the first time since the Shah Bano controversy (1984), efforts to frame a model nikahnama drew a large number of "religious" and "non-religious" Muslim groups into conversation and set off a consensus-building process within the (Muslim) communities on the issue of a Muslim woman's "entitlements".

Critical feminist discourse has remained largely indifferent to this initiative since the democratic representativeness of such community participants is assumed to be low. However, the feminist critique of the law reform initiatives, the impasse in the state-directed reform of personal laws, and the changing relations between the majority and minorities in India demand that this important initiative is understood and confronted. While the debates on the Uniform Civil Code (UCC) in the 1990s centred on the state's recognition of the rights of women as equal citizens in negotiating with family and community, the debate on the nikahnama foregrounds a Muslim woman's entitlements in an "Islamic" marriage that is formalised through negotiations with the family and community, including the "religious" leadership.

Theoretically, such Muslim women inhabit the position of "internal reformer", proposed by Partha Chatterjee (1995), who would interrogate the community while keeping majoritarian influences and state machinery in check. Even as the efficacy of such a model nikahnama continues to be questioned, what needs to be underscored is not merely its role in fostering consensus around Muslim women's entitlements and rights in post-Independent India but more importantly its potential to disrupt normative (feminist) notions of women's agency as "secular".

This essay locates a detailed exploration of the nikahnama initiative within the broader and historically shifting contexts of debates on Muslim marriage laws. It begins by charting such shifting contexts during colonial and postcolonial times, chronicling both the enduring connections as well as the departures until the Shah Bano moment. Unlike Hindu law reform, sharia remained the perspectival horizon for social and legal reformists working on changes in Muslim personal law. The changing interpretations of contested issues in Muslim law in the courts are placed within this background.

The nikahnama initiative, perceived as emerging from within this established Islamic tradition, mobilised and enabled a conversation between "secular" and "religious" Muslims.

While documenting the initiative, we also bring into the discussion the debate among the ulema or Islamic scholars about the desirability and direction of changes in rules and conditions of Muslim marriage. The complex interrelations between the ulema, political leaders, courts, individual litigants and Muslim women's organisations over competing visions of "Muslim" women's entitlements in sharia require us to complicate the relationship between "secularism" and "religious communities" in postcolonial India and also rethink the configuring of women's issues as "secular" or "religious".

Colonial Laws

It is well known that Muslim women began litigating for their entitlements in family property in colonial courts from the beginning of the 19th century. However, the courts increasingly disregarded their conventionally guaranteed "entitlements" as the century progressed (Agnes 1999). This process was commensurate with the growth and establishment of the colonial system of courts that brought in new norms, rules and legal culture, making it increasingly difficult for Muslim women to negotiate their rights (Kozlowski 2007). When the colonial rulers were compiling laws for their Indian subjects (this was also the period when the association between "religion" and "family law" was being established), they relied heavily on *qazis* (Islamic judicial personnel ineligible for appointment in formal courts) and muftis (Islamic scholars) as native authorities (Scott 2001; Anderson 1996). By the latter half of the 19th century, however, colonial courts discontinued the use of these legal authorities (Singha 1998). Not surprisingly, by the end of the century the dismal fate of Muslim law in British India had become an established theme in the discourse of Muslim social reform.[1]

By the turn of the century, the arrival of explicitly political questions regarding universal adult franchise, equal citizenship rights, and representative government in the discourse of anti-colonialism reshaped the women's question in new ways and gave it a new urgency (John 2008). Like Hindu women, Muslim women also demanded legal redress for polygamy, child marriage, purdah and denial of property rights. However, the consolidation of "communal" identities predicated on the radical difference between Hindus and Muslims and their politicisation in the context of Indians' investment in questions of franchise and self-government (Tejani 2008) meant that the Muslim political leadership and ulema assumed an active role in bringing legislative reforms for women. While nationalist feminism was predicated on demands for universal citizenship, Muslim women activists and organisations actively worked for legal change by aligning with (Muslim) community leaders (Forbes 1996). Both the Muslim Personal Law (Shariat) Application Act, 1937 and its successor, the Dissolution of Muslim Marriages Act, 1939 (DMMA) were preceded by a long process of consensus building. Born of complex negotiations between the landowning Muslim elite, religious political organisations and ulema (Hussain 2006a), this tenuous consensus, however, broke down after the passage of the DMMA on the contentious grounds of "Muslim judges" (De 2009).

The Constituent Assembly debate on the proposed Article 35 reflected and anticipated the fissures that developed between the "secularising" nation state and "religious" Muslim communities. In an effort to counteract differentiated personal status laws for India's religious communities, this article proposed, "the State shall endeavour to secure for its citizens a uniform civil code throughout the territory of India". Expressing apprehensions about the proposed UCC, the Muslim members argued that obliterating personal laws would not only harm the community but also be an impossible project given the diverse customary practices related to marriage and inheritance prevalent in the country. However, some members of the assembly countered that all modern nations required uniform laws, and since a civil code had already been put in place, it would be incorrect to claim that extending it to laws governing divorce, marriage and maintenance would lead to large-scale unrest among Hindus and Muslims. They went further to note that codification itself should not be viewed as a problem since the Muslim Personal Law (Shariat) Application Act, 1937 had already brought all Muslims within the ambit of a single law despite opposition from different Muslim communities. The article was finally included as Article 44 of the Indian Constitution in the non-justiciable Directive Principles of state policy on the grounds of non-discrimination against women.[2]

The debate on the UCC (and other issues related to "minorities) in the Constituent Assembly reflects the changed political status of Muslims in post-Independence India – from being a significant political constituency in British India comprising a quarter of the population of undivided British India, Muslims were reconstituted as a "religious minority" in the new Indian nation state. Indeed, under the new dispensation, their "political safeguards" were withdrawn at the last minute on the ground that they would promote "religious" and "separatist" identities inimical to the growth of a secular, democratic nation (Ansari 1999; Bajpai 2000; Jha 2002). Further, as a "minority" they were advised by Nehru to depend on the goodwill of the "majority" community rather than demanding their due (Ansari 1999). Given the importance of the women's question to the anti-colonial discourse, as well as the fraught nature of the issue of political representation and their altered political status, it is not surprising that Muslim members in the constituent assembly articulated Muslim women's rights in marriage as an issue of Muslim identity.

Post-Independence Developments

Ironically, in the post-Independence period it was the Hindu "religion" that was the subject of reform, the most notable being the abolition of untouchability in public life and the passage of the Hindu Code Bill (Chatterjee 1995; Galantar 1998).

This Review of Women's Studies brings together a set of eight papers focusing in different ways on the theme of marriage. It is a small tribute to the memory of Leela Dube, renowned anthropologist and women's studies scholar, who did so much pioneering work in the field.

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Meanwhile, modernist Muslim legal scholars such as Fyzee consistently argued for the reform of Muslim personal law, often citing changes in other Muslim countries but to little avail (Sikand 2005). The debate on the reform of Muslim personal law gained momentum with the Supreme Court judgment in the *Mohammad Khan vs Shah Bano* case in 1985. In this judgment, the Court upheld the right of divorced Muslim women to maintenance under Section 125 in the Criminal Procedure Code (CrPC) and strongly suggested the formulation of a UCC on the grounds that Muslim personal law as it stands does not address the immiseration of women after divorce. It also cited passages from the Quran as supportive of its suggestion for the grant of maintenance to divorced Muslim women. Asserting the primacy of secular laws over religious personal laws, the Supreme Court went further and noted the necessity of the Court assuming the role of a *reformer* in the absence of initiatives to reform Muslim personal law. In so doing, the Court drew on the work of pro-reform Muslim legal scholars like Tahir Mahmood and set aside objections raised by the All India Muslim Personal Law Board (AIMPLB), a self-constituted body of the Indian ulema.[3]

The Shah Bano judgment opened the fault lines in the already troubled relationship between secularism and democracy in India. The events that followed also posed major challenges to the "secularism" of Indian feminism. The Shah Bano judgment led to a massive mobilisation of "conservative" Muslim opinion led by the representatives of the AIMPLB (Pathak and Sunder Rajan 1989), forcing the Congress government to enact the Muslim Women (Protection of Rights on Divorce) Act 1986 (MWPA) in an effort to address the issue of Muslim women's maintenance after divorce. Feminist groups, who had strongly critiqued state and non-state violence against women – and having brought in a series of legal challenges – criticised the continued placement of women's rights under religious personal laws and advocated the formulation of a common civil code.[4] The consensus among women's groups was that such legislation would put an end to the legal inequalities and resulting injustice that women in different religious groups continued to suffer (Sangari 1995).

However, since the feminist demands resembled those of the Hindu majoritarian Bharatiya Janata Party (BJP) – which used the bogey of Muslim women's rights to whip up hatred against the Muslim minority – they compromised the feminist consensus. Since the decade following the Shah Bano judgment not only witnessed the demolition of the Babri Masjid but also the massive loss of Muslim lives and property in the riots preceding the destruction of the mosque, women's groups began to reassess their position because "consent" for the UCC was being sought when Muslim communities were under such duress. The politics of Hindu majoritarianism has meant that issues of sexuality, sexual orientation and violence yet again became feminist issues, with a slow and steady retreat of the issue of the passage of the UCC from the feminist agenda. Meanwhile, embracing reform within religious personal laws has been and continued to be viewed by feminists as politically regressive (Menon 1998; Roy 2001; Sunder Rajan 2008; Rajan 2005).

The key challenge that the Shah Bano controversy posed to feminism concerned the manner in which separate personal laws were embedded in "religion". More precisely, it arose from the understanding that neither "religious" nor other forms of "ascriptive" community were amenable to democratic negotiation with regard to women's rights. The formative tension at the heart of nationalist feminism in the early 20th century over universal citizenship versus particularistic communities could here be seen in its full-blown form, playing out as the struggle between "secular feminism" and "religious patriarchy".

This enduring impasse has two crucial components both of which are contested in the discussion ahead: one, that Muslim personal law is not amenable for change; and two, that the Muslim "religious" community opposes any changes in the existing scenario. In the following section, it is argued, through an analysis of the trends in the adjudication of Muslim personal law, that Indian courts, litigants and Muslim jurists never saw such laws as either inflexible or unchangeable or inimical to the rights of women. Subsequently, through the discussion of the debate on the model nikahnama, the second assumption is also challenged.

Judicial Activism

In the courts of law, the story that unfolded after the enactment of the Muslim Personal Law (Shariat) Application Act, 1937 and DMMA was a complex one. The gaps and ambiguity left in the 1937 Act – a declaratory law that brought Muslims living across the Indian subcontinent into the ambit of "sharia" while leaving it mostly undefined – were sought to be filled by the courts through an interpretation of the received tradition. This included Anglo-Mohammedan law, rulings of the British-Indian courts and a large body of un-codified Muslim law drawing from the holy Quran, Hadith and fiqh. In the early decades, such a judge-made law for adjudicating cases under these two acts helped define its scope, interpret the provisions and boundaries or criss-crossing that can be made between this law and secular laws regarding marriage.

Tahir Mahmood (1997) points out that a similar evolution of these two laws continued after Independence when a host of state and central legislations were enacted from 1948 until 1986.[5] Muslim women litigated not only for their customary rights over waqf properties, often seeking exemptions from the 1939 DMMA but also to secure their right to divorce, of maintenance in marriage and, after talaq, for child custody, etc. Until 1960, it appears that litigation was mostly around divorce. Muslim women sought divorce under the DMMA, citing lack of maintenance or delay in payment of *mehr* (marriage gift), forcing the courts to adjudicate the claims of those Muslim women who had divorced themselves through customary forms that did not feature in DMMA. In the 1960s, the litigation shifts to maintenance after the talaq where the courts debated whether Section 488 in CrPC applied to Muslim women (Mahmood 1997: 35-92). The 1970s saw a surge in judicial "activism" around triple talaq, maintenance and mehr through innovative interpretation (Subramanian 2008). Continuing the received tradition, many judges continued to grant Muslim

women maintenance under the ambit of the newly introduced Section 125 in the CrPC, 1973.[6]

Agnes (2001), Mahmood (1997) and Subramanian (2008) point out that a similar tradition of creative interpretation by different courts continued in the Muslim Women's Maintenance Act, 1986 due to which the position of Muslim women on "alimony" became better compared to women from other communities.[7] On the issue of triple talaq, too, Latifi notes that the courts began to change their interpretation during the 1970s, moving towards considering triple talaq as single talaq and thereby making it revocable.[8]

Notwithstanding the Shah Bano controversy, it is clear that the courts, litigants and jurists see sharia/religion-inspired Muslim personal law as flexible and favourable to Muslim women. Rather than the origin of Muslim personal law, jurists see other factors as contributing to the conflicting trends in the interpretative traditions of Indian courts: the Hinduisation of the court's understanding of Muslim customs and norms of marriage (Agnes 1996), and declining expertise in Muslim law (Mahmood 1997: 463-64). Given this scenario, it is reasonable to ask why the political initiative of redefining the scope of Muslim law "in the spirit of shari'a" has figured insufficiently on the feminist agenda as well as of bodies such as the AIMPLB. The model nikahnama initiative, taken up within this perspective, assumes importance in this scenario.

'Gender-just' Nikahnama

Following the passage of MWPA 1986, the Muslim Personal Law Board came under increasing pressure to initiate reforms in the community to stem the trend towards unilateral talaq (repudiation), permanent deferment of mehr and the resulting immiseration of Muslim women. As there was a stand-off regarding the state-directed reform for Muslim women, a few women activists from Mumbai, including Uzma Naheed and Flavia Agnes, sought to initiate such a reform through a "new model nikahnama". This model nikahnama contained a nikahnama, *hidayatnama* (guidelines for marriage under sharia) and *qarar* (declaration to abide by sharia), which provided specific guidelines for a couple on how they should behave in the event of a dispute between them, and how the issue should be resolved within sharia.

Hidayatnama and qarar are used creatively to produce a more equitable contract (Agnes 1996). And since almost all marriages are solemnised through the nikahnama prepared and administered by the local qazis and ulema, it was hoped that the model nikahnama would ensure women's rights of mehr and talaq by outlining a set of un-Islamic (and thus also anti-women) practices as a way of ushering change within the community. As Uzma Naheed (2005) noted, "We wanted to involve the ulema in the work and wanted a solution within the framework of Sharia". This initiative led to a vibrant discussion of desirable "conditions of marriage contract" in the latter part of the last decade and brought some of the most contentious issues of Muslim marriage under debate: underage marriages, non-payment of mehr, arbitrary talaq, cruelty in marriage, maintenance after talaq, multiple marriages of men, women's employment, and others. (Some featured in discussions around the UCC.)

The debate on nikahnama began in earnest after the AIMPLB released the approved copy of the nikahnama in 2005, which was submitted by the above-mentioned team of women activists in 1995, together with minor changes (*The Milli Gazette* 2005: 21). The women's groups' nikahnama stipulated the following: the husband should not inflict physical harm or wrongfully confine the wife; he should not indulge in any other inhuman behaviour; leave the wife in her natal home for an extended period; use abusive language; accept dowry; and not utter triple talaq or talaq in isolation. The women's groups' nikahnama suggests that differences between the couple should be resolved through arbitration and stipulates that a husband contracting a second nikah should obtain permission from his first wife. The sharia guidelines in the nikahnama were simple. However, the "additional conditions" (to abide by sharia) became controversial. These included the immediate payment of mehr on marriage or doubling the amount of mehr in case of divorce or second marriage as a measure of penalty. In addition, the wife enjoyed a share in the husband's property to the extent of her dues besides having exclusive rights over gifts received in cash or kind from her parents and relatives. The nikahnama also gave the wife the right to reside in the matrimonial home with full sharia rights in case the husband took another wife and the husband was obliged to bear the expenses of the children, especially girl children, after divorce even if they stayed with the wife. Moreover, disputes were to be settled with the help of the arbitrators while debates about the interpretation of clauses were to be referred to a reputed *darul qaza* (sharia court).[9]

Before the board released a copy of the nikahnama, the Islamic Fiqha Academy circulated the draft for discussion among the ulema. It was suggested that the *tafweez-e-talaq* (delegated right of divorce) should be linked to the conditions of marriage such as cases where the husband refused to treat the wife well and maintain her, or if he beat her, and that the darul qaza (Qasmi 1997) should mediate disputes. Similarly, it is also suggested that mehr should never be "forgiven" and in case it was, the qazi was to ensure that it was done by the woman willingly and in full knowledge of her rights (ibid).

However, when the AIMPLB came out with its approved nikahnama in 2005, it deleted the mandatory clauses regarding triple talaq and replaced them with a simple caution against it. Clauses regarding mehr in kind and the prohibition on dowry and against violence were retained but new stipulations were now introduced, especially a conservative code of conduct for women mandating that they should neither step out nor take up employment without the permission of the husband.

Competing Versions

Disagreeing with the AIMPLB on the tone, tenor and content of the nikahnama, two new boards – the Muslim Women's Personal Law Board and the Shia Personal Law Board – framed two new nikahnama, which were released in 2006 and 2008 respectively. The Shia board's nikahnama, introduced after approval from the Ayatollah Sistani of Iran, stressed the

well-being of women by incorporating the provision of *khula* (women-initiated divorce) strictures against preventing the wife's progress in education and employment, and the provision of alimony to the divorced wife on humanitarian grounds (Pradhan 2006; *Times of India* 2006).

The nikahnama of the women's board takes the pedagogic intent of the nikahnama quite seriously and includes an elaborate code of conduct (sharia guidelines) for the couple. It also stresses that the qazi should be well versed in sharia and be able to explain the nikahnama to the couple. The marriage should not be forced and underage men and women should not be married as they lack the knowledge about rights and obligations in marriage. Moreover, mehr can be pardoned willingly by women but not done through deception or the wrong interpretation of the Quran. It also details proper conduct for a modern husband, including ways in which he could help with housework. It stipulates proper procedures of giving talaq (that it should not be given in anger or through triple talaq or phone/sms/internet) and avoiding talaq and khula (that it can be taken in cases of desertion, violence, extra-marital relationships of husband, etc).[10]

While releasing the nikahnama, almost all the boards asserted that the contract would safeguard the interests of Muslim women and that it was not obligatory but voluntary on the community. The differences in the positions come through in the hidayatnama and qarar sections. Except the Muslim Personal Law Board's nikahnama, the rest clearly stipulate against triple talaq and spell out the desirable manner of giving talaq. Nearly all of them encourage Muslim men and women to resolve their disputes through arbitrators and darul qaza. How was such consensus reached? It is argued later that the consensus over these provisions was reached through discussion and debate among the ulema that deliberated upon the usefulness of the model nikahnama in addressing contemporary problems within the Islamic fiqh debating tradition. An examination of this process suggests more suppleness than rigidity of a "religious" community to questions of entitlements of Muslim women in marriage.

The Ulema Debate

Ishtirat fin-nikah, a compilation of the ulema's opinion by the Islamic Fiqha Academy was the result of the effort of Maulana Qazi Mujahidul Islam Qasmi, then president of the AIMPLB, who sent the copy of the (conditional) nikahnama prepared by the Uzma Naheed et al to the ulema of different persuasions (*firqa*) in 1996 (Qasmi 1997). The ulema were asked specific questions: Can women put in extra conditions, alongside the usual list of sharia obligations, in the nikahnama? What is the sharia status of such conditions? Is it obligatory for the husband to fulfil these conditions? Can such conditions be linked to women's exercise of a delegated right of divorce (tafweez-e-talaq)? When can the agreement about tafweez-e-talaq be reached – before, at the time of, or after the nikah? And can the conditions about tafweez-e-talaq be put in the nikahnama itself? Can a woman put in a condition that, in the case of husband remarrying or giving a talaq, the mehr should be doubled?

Muftis from many darul ifta, students of Imarate-e-Sharia (Bihar), Islamic Fiqha Academy (Delhi), Imarat Shaia Phulwari, Darul Uloom (Hyderabad), and Darul Uloom Sabeel-us-Salaam (Hyderabad) participated in this discussion. Their answers,[11] along with authoritative commentaries by Maulana Abdul Jahed Qami, Maulana Saifulla Rahmani, Maulana Mahfooq ul Rahman and Shaheen Jamali were also included in the volume.

The ulema participating in the discussion drew on traditions of Islamic history and fiqh (including that of the Indian subcontinent) in the logic of statements, ways of argumentation and modes of interpretation to arrive at the best way of addressing the contemporary conditions of Muslim women. In this tradition, opinions of the Imams of the four major schools of fiqh – Hanafi, Shafai, Maliki and Hanbali – are drawn to support or oppose a stand on an issue. Formalists argue for "rule-following" laid down in a particular school of jurisprudence while others for reading it in the light of the Hadith and the Quran. Still others contend that even as the "majority" opinion holds against a particular possibility, one should follow the minority opinion, keeping in mind the requirement of the times. Some also advocate drawing from the experiences of changes in the law in Syria or Egypt, with reference to a particular change.

Should Women Be Given Increased Mehr in Case of Talaq/ Remarriage? Twenty-eight of the 54 ulema who responded to this query opined that women should be consulted in the case of talaq and a second marriage by the husband. Mehr should be understood to be "in consideration of what the wife gives the man in marriage" but not as "compensation". While the possibilities open to women in such a situation and the opinions of earlier imams for and against such increased mehr were discussed, many did not offer a firm opinion. They felt this condition of increased mehr may not be made compulsory for all. Rather than second marriage, many argued for linking increased mehr with talaq (especially unreasonable talaq) as this practice needs to be urgently curbed. Increasing mehr manifold (five or six times) would prevent unreasonable talaq and some argued it should be made a criminal offence. But others feared that increased mehr on talaq may increase violence on women, as men would feel trapped in an unhappy marriage. Many, including Qasmi, opined that women should be reasonably provided for whether in the form of *muta*, increased mehr or maintenance during the *iddat* period so that she does not suffer after the talaq. Qasmi also argued for a higher mehr in the cases of talaq and second marriage by the husband.

Tafweez-e-talaq: The issue of tafweez-e-talaq generated strong objections. Opining that such a possibility does not exist either before or at the time of marriage, many worried about the confusion in terminology and pointed to the lack of fiqh for this provision. Alluding to the fact that the Prophet of Islam mentioned it to his wives only after nikah, they argued that delegating the right of divorce to the wife either before the marriage or during the marriage becomes untenable according

to the sharia.[12] Maulana Mahfooz ul Rahman and Shaheen Jamali summarise the debate as follows:

> There is a consensus (and consent) about the existence of tafweez-e-talaq in general but to put it as a written condition in the nikahnama would be problematic. There is a distance between the nikah and the tafweez.…Instructions or applications for both the conditions cannot be the same. Once the man becomes a husband (maalik) he can be relied upon, but before it happens, one cannot trust him (Qasmi 1997: 212-49).

However, both scholars, along with Maulana Saifulla Rahmani, disagree with the rest about the non-fiqh nature of tafweez. Arguing that all the three forms of tafweez (before, at the time of, and after nikah) are valid, Rahmani suggests that each of these requires its own terms so as to benefit the woman. If it is an agreement reached before nikah it should be suggested by the man but at the time of nikah the initiative should be taken by the woman. However, given the conditions and the mood of Indian society, he advocates it is better to enter into this agreement after nikah through a standardised form. Opposing the mention of triple talaq in the nikahnama (as it make an anti-Quranic practice legitimate), he supports the position that "delegated right of divorce" should be mediated by the Darul Qaza.

Does Sharia Approve of 'Conditional Nikahnama'? The most important issue in the debate was the sharia status of "conditional nikahnama", i e, additional obligations such conditions imposed on husbands and if they should fulfil such obligations. A majority of ulema, while agreeing that Quranic obligations be fulfilled, objected to extra conditions whose sharia status they said was not certain. Many argued that since they are unacceptable in the Hanafi, Shafai and Maliki schools of fiqh, they should not be a part of the nikahnama. Others argued that as the Hadith does not mention such conditions, one should not accept them. Some others cited the prohibition in the Quran against non-Quranic conditions in any agreements and raised objections.

However, a strong minority of ulema, including Maulana Rahmani, go against this majority interpretation. Summarising their opinion, Mujahid ul Islam Qasmi states:

> Collectors of Hadith seem to agree with such conditions. Ahmed Hanbali also seems to agree with such conditions. God said, 'Hey you faithful, you should fulfil the promise'. The conditions in nikah also fall under such to-be-fulfilled promises. All such promises are to be fulfilled, except when they contradict the principles laid down in the Quran… Even though they are not the basic foundation of the nikah, as they are only designed to benefit the woman more, they should be implemented (Qasmi 1997: 27).

The interpretive direction and tendencies of the majority ulema, Saifulla Rahmani contends, amount to a misreading of the Quranic injunction regarding the non-Quranic promises and a literal interpretation of the Hadith. Rather, as long as one is not reneging on the *waajib* (core) conditions, extra conditions (*mubahat*) that benefit the weaker party should be supported. As the conditions in nikah are obligatory on any Muslim, fulfilling such *mubahat* conditions also becomes necessary. More importantly, he points out, "the ground reality is (that) Indian Muslims lack literacy, are ignorant about Sharia, lack knowledge about Islam and are influenced by the other communities (adaptation of the customs of the other religions) with which one lives". As sharia conditions of nikah tend to be used opportunistically by Muslim men, it is necessary that "one should put in certain possibilities for victimized women within the scope of the Shari'a". Following the long-cherished but rarely used south Asian practice of drawing on non-Hanafi fiqh schools, he argues,

> In this context, the opinions of the Hanbali school can help us. Within the Hanbali school, there is a scope for a woman to dissolve her marriage, in case the husband goes against the nikah condition that he should not remarry in her presence. To contain the self-centred behaviour such conditions can be put in. In these conditions, one should go beyond the existing opinions of the four schools and think in the spirit of the Shari'a so that Shari'a can be protected (ibid).

Evidently, it is the minority leadership among the ulema led by Rahmani who argue for a contextual reading of sharia and fiqh while the majority are not willing to "stray" from the established path. However, as Rahmani himself clarifies, given the established fiqh tradition of argumentation, such a minority opinion also would constitute a standard (though not a rule) requiring it to be advocated among and considered by the majority as a proper interpretation. But, how is this differentiated opinion-spectrum of the ulema interpreted outside this group?

Model Nikahnama in Practice

The progress of the model nikahnama was closely followed and commented upon in both the mainstream and Muslim media. The English media's attention was focused on the AIMPLB, its various foibles, its reluctance to reform, and its unrepresentative character (Katakam and Bindre 2005). It was also criticised for not going far enough, especially on issues of triple talaq, khula and incorporating provisions against polygamy and child marriage (*Outlook India* 2005). There were also sporadic reports of the AIMPLB's nikahnama being adopted for "mass" marriages in certain areas (*Indian Express* 2005).

The discussion among the Muslim intellectuals and Muslim media was more nuanced. Even as Asghar Ali Engineer criticised the board's nikahnama, he welcomed it as a first step towards internal reform (Engineer 2005). Others drew attention to the sectarian differences within the board as the reason behind the slow progress of reform (Lakhdawala 2004). The efficacy of the nikahnama became connected to the larger debate on Islam and reform in India – its agents, effectiveness, reach and use. The well-known fortnightly *Milli Gazette* commented that pegging hopes on a purely voluntary adaptation of nikahnama to bring radical changes in the community was not desirable (ibid). Its editor, Zafarul Islam Khan, annoyed by the insistence of the Muslim women activists that the Muslim Personal Law Board release the nikahnama, said:

> These registers (nikahnama) are printed by booksellers without any authority from the State, a mufti or even any darul uloom or the like. I am at a loss as to why the kind of forms that some activists demand are not printed and sold like the old registers? I am unable to understand why people ask the All India Muslim Personal Law Board to okay a certain format? It is not a fiqh body as such (*The Milli Gazette* 2004).

However, in the pages of the same magazine, Uzma Naheed explained how they managed the support of the sympathetic

ulema, including Maulana Qasmi, and defended the need for the board to release it. Syed Shahabuddin welcomed the idea of a new model nikahnama and called upon the ulema in small towns to popularise it. Syeda Hameed of the Bharatiya Muslim Mahila Andolan (BMMA) raised doubts about the entire nikahnama debate because women's rights in Islam had been guaranteed and there was nothing innovative that the new nikahnama would give. Still others wondered how these various types of nikahnama would find their way to the masses and how would the masses find ways of having it implemented.

Such reasonable scepticism about the utility and efficacy of a redesigned or gender-just nikahnama seems valid. Studies on marriage practices among north Indian Muslims (Jaffrey 2001) have pointed out to the nikahnama either being absent in many marriages or rarely taken seriously, making the issue irrelevant. Sabiha Hussain's study (2006b) of darul qaza also painted a dismal picture of their willingness or ability to help Muslim women obtain their rights in sharia. However, Muslim activists in Hyderabad Deccan suggest that the nikahnama has a presence and has been used in the resolution of disputes by Muslim women, especially to reclaim dowry and gifts after separation or talaq.[13] As such, both the use of nikahnama during the marriage and the implementation of its provisions in marriage, and in cases concerning the breakdown of marriage, appear to be context-specific. They depend on historical, political and social factors determining marriage practices of Muslim communities as well as the cultural and moral economy in which the nikahnama operates in specific instances.

Progressive or Retrogressive

Given this complex scenario, it is difficult to interpret the inclusion or non-inclusion of the provisions in the different nikahnama as affirmation or resistance, or as an indication of the progressive or retrogressive attitude of the ulema and Muslim communities in general to the question of Muslim women's "rights" in marriage. The actual use and efficacy of such a nikahnama would invariably depend on the prevailing practices, the presence and work of the women's organisations, or the prior histories of such reformist discourse in each location. For instance, reports suggest that the darul qaza in urban areas of Gujarat such as Ahmedabad, started by the Personal Law Board, are active in popularising nikahnama among the trading Bohra community who have responded well.

A bridegroom interviewed by a newspaper said that by signing this nikahnama he would be ensuring his wife's safety in the marital home (Siddiqui 2005). More important is the experience of BMMA, a Muslim women's organisation that has consistently advocated reform of personal laws. Within the framework of the sharia it has also prepared and used "gender-just" nikahnama in marriages that it officiated. It performed 40 marriages in Mumbai and nearly 200 group marriages in various locations in Gujarat, including Juhapura district. The mehr amount in these marriages ranged from the usual Rs 5,000 to a high of Rs 1,00,000. Instead of the usual "forgiving of mehr", or small amounts of cash, many women got property and jewellery in the form of mehr. They claim, "while a codified Muslim law is the long-term goal, this nikahnama has already helped Muslim women in ensuring her legal rights".[14]

While BMMA's experience suggests how useful nikahnama can be, the real significance of the nikahnama debate lies elsewhere: in the space that Muslim women have carved for themselves through this initiative and its role in resuming the traffic between "religious" and "secular" spaces on issues of gender after Shah Bano. By initiating the nikahnama debate on the grounds of sharia, Muslim women have been able to enter the male-dominant terrain of the "religious community" and disrupt the stereotype of Muslim women as victims of community patriarchy. In pushing the "Islamic" tradition for reform and succeeding to an extent, they have disrupted the prevailing secular Hindu narrative of the unchanging and regressive Islamic tradition. Nikahnama has the possibility for extensive reach not only to popularise correct practices and strictures against bad practices but also to draw the community (elders in the form of arbitrators, the darul qaza) into such an exercise.

The significance of the processes of consensus building in the community in general and the ulema in particular on the issues of nikahnama also cannot be underestimated. This is reflected in the common features seen in all the nikahnama – prohibition on dowry, marital violence, unconditional payment of mehr and the conditions in which women can exercise the delegated right of talaq, and the very possibility of Muslim women entering a "conditional" nikah. Minimally, this consensus can have the effect of potentially reframing the question of Muslim women's marital suffering in the mainstream discourse. However, at the other end, given the growing activism of Muslim women, "conditional" nikahnama also create the opportunities for individual Muslim women to claim entitlements in marriage.

After the passage of the Muslim Personal Law (Shariat) Application Act, 1937 and its successor, the Dissolution of Muslim Marriages Act, 1939 (DMMA), where a wide array of Muslim formations (political, religious and women's groups) worked together, this is another rare instance where a democratic discussion about desirable marriage practices and women's entitlements took place among Indian Muslim communities. Even though such discussions took place during the debate on the UCC in the 1990s, its interlocutors were largely feminists and the state, rather than the "communities". Nikahnama as an instrument also occupies a socio-legal terrain distinguishing it from these earlier state-directed initiatives. The DMMA became a law and the UCC was to become so. The nikahnama, posited instead as "community reform", has prevented the consolidation of conservative Muslim opinion against the state and resumed the (contested) conversation among "religious" and "secular" domains on marriage practices even as it intervened in "secular" feminists' concerns with dowry and the immiseration of married women due to desertion. As Islamic and secular idioms became inextricably mixed up, dowry was redefined as un-Islamic rather than an illegal practice, while mehr is increasingly viewed as the "right" of Muslim women!

Postscript

It is a moot question if the debates sketched above on the ability and scope of Muslim personal law to questions of gender justice in the adjudicative spaces of the court, Muslim communities and Muslim women's groups, especially around nikahnama, have implications for the feminist debate on marriage law reform. Let us begin with the familiar binary between the UCC and religious personal laws. While the feminist debate on gender-just marriage laws ignited a demand for change in personal laws, rarely have the positive changes in the domain of personal laws been seen in the feminist discourse on law reform as important markers of gender justice. Agnes had consistently argued that a case exists for taking in gender-just implications and interpretations of Muslim and Christian personal laws into the larger feminist debate on matrimonial law reform. Writing after the Latifi judgment on the constitutional validity of the Muslim Women's Act in 2001 and the positive interpretation of the Act by the courts, she argues:

> Viewing these developments as a matrimonial lawyer, the statute introduces *a new principle in the realm of Indian matrimonial law*, that of lump sum settlements at the time of divorce. This is the aspiration of a divorced woman from every community, in place of extremely restrictive, recurring monthly entitlements, which are difficult to enforce (Agnes 2001: 3975).

In everyday legal practice Agnes suggests that "lump sum settlements" have become a regular part of the matrimonial remedies negotiated out of court by the lawyers for a divorcing woman (Agnes 2009: 60). For her, granting an acceptance of such settlements denotes an acknowledgement of marriage as an economic arrangement and allows us to move away from the notion of marriage as a sexual union alone. The model nikahnama discussion that foregrounds the economic arrangements of marriage clearly has implications for discussing the existing economic arrangements including current dowry practices and post-divorce settlements in Hindu or Christian marriages, some of which have come up in the irretrievable breakdown of the Marriage Laws (Amendment) Bill 2010. However, as long as the binary of the universalist UCC versus particularistic religious personal laws is allowed to stand in for secular feminism's fight against religious patriarchy, such a conversation would be difficult to initiate.

NOTES

1 Two perspectives emerged about the corrective course of action. By working within the Anglo-Indian legal system (and thus taking the coexistence of different personal laws for granted), modernist Islamic jurists such as Ameer Ali directed their efforts at rectifying the "imperfect knowledge of Mussalman Jurisprudence, of Mussalman customs and usages" which resulted "in cases decided by the highest Law Court against every principle of Mohammedan Law" (Ali 2003: 23). Ali thought it was both possible and desirable to reconcile the inconsistencies and discrepancies in the existing system of Islamic law through the compilation of learned commentaries so that Islamic law could be aligned with modern principles of jurisprudence such as equity and the progress of society. On the other hand, the ulema, largely dominated by the Deoband school, sharing in a broader critique – by Muslim jurists and lawyers – of the inability of British courts to adjudicate cases involving Muslims through recourse to the tenets of Islamic Law also opened the Darul Ifta (fatwa giving offices) and invited and answered queries from ordinary people on a wide range of issues (Metcalf 2006).

2 *Constituent Assembly Debates of India*, Deliberations of 23 November 1948, Vol VII (http://parliamentofindia.nic.in/ls/debates/vol7p11.htm), accessed on 25 June 2011.

3 *Mohammad Khan vs Shah Bano*, AIR 1985, SC 945.

4 Five to six such draft legislations were prepared during the early 1990s and widely discussed and deliberated upon. Excerpts from the drafts by the Forum against Oppression of Women, Mumbai, All India Democratic Women's Association, Working Group on Women's Issues, Delhi, and Bailancho Saad from Goa can be found in *Alternatives Vikalp* (1996).

5 "During the life of 46 years the Supreme Court of India has decided about 50 cases involving questions of Islamic law. The number of various High Court rulings reported since 1947 is about six hundred…The High Court rulings of 1947-1996 have covered the entire gamut of Islamic religious and personal laws. There have been important decisions regarding religious beliefs of particular groups (Ahmadiyas, Bohra, Khojas, Mewatis), religious practices (namaz, parda, growing a beard, dargah rituals), religious institutions (mosques, shrines, graveyards), religious functionaries (imams, sajjadnashins, qazis), scope of Muslim law (statutory, traditions), matrimonial and family relations, property and succession, pre-emption and wakf law and administration" (Mahmood 1997: 456-57).

6 The Shah Bano judgment was not unique. In Bai Tahira's (1973) case, as Daniel Latifi notes, "the Supreme court unanimously held that irrespective of the amount named in the marriage contract as *mehr*, a reasonable amount was due to the woman. Until this amount was discharged, the divorced woman would continue to be entitled to maintenance under Section 125 of the CrPC (Mahmood 1997: 253). In the case of *Hamid Khan vs Jummi Bi* (1978) again, it reiterated the stand that "a wife's purported surrender of her right to mehr does not in any way defeat her right to maintenance under Section 125 of CrPC if she is otherwise entitled to it and has not remarried. Such a statutory right… cannot be surrendered by contract" (p 254). In the case of *Fazlunbi vs Kadher Vali* (1978), the Supreme Court commented "the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and it will release the quondam husband from the continuing liability only if the sum paid was realistically sufficient to maintain the ex-wife and salvage from destitution which is the anathema of the law" (p 292).

7 Similar judicial outcomes were also noted by Mukhopadhyay (1999) who examined the outcomes of such litigation by deserted women from Hindu and Muslim communities in West Bengal district courts. However, she argues that the anti-Muslim biases of Hindu judges, that is, Muslim women being more oppressed due to their religion, also played a role in bringing about favourable judgments under this act. Subramanian (2008) points out that such a trend in district courts cannot be generalised as many lower courts remained ignorant of the precedent of the definitive Daniel Latifi judgment when activist lawyers did not push their client's case.

8 Commenting on *Marium vs Shamsul Alam's* ruling of the Allahabad High Court in 1978, Latifi says, "It is hoped that the judicial inclination noticed in the present case against construing a talaq as talaq-ul-bid" at and in favour of construing it as talaq-ulsunnat will become a general practice in our courts. This would conform to the climate of contemporary Muslim opinion, including that of the Indian "ulema". Subramanian (2008) notes that the high courts continued a conservative approach towards triple talaq, i e, accepted its validity until the 1990s. It was only in the last decade that they accepted its revocability. He comments that ironically such decisions were taken in cases where they benefited the husbands.

9 Nikahnama or a conditional marriage contract, reviewed and approved by Sayed Salman Nadvi, Durban, South Africa, prepared by Maulana Abdul Waheed Fayazi, Mohammad Shaoib Koti and Uzma Naheed, with Adv S M A Kazmi, 1995.

10 *Sharai nikahnama va nikah va anubandh kii nirdesaavali – islami Shari'a kii roshani me* (Sharia nikahnama or sharia guidelines regarding marriage and marital conduct), All Indian Muslim Women's Personal Law Board, Lucknow, 2008.

11 A hundred ulema sent in their opinions, responses and answers to the queries.

12 In the case of agreeing to tafweez before the nikah, two objections are raised: that the purpose of such an agreement is to lead to the marriage and when it does not, it becomes unnecessary; two, if it is sensible on the part of the woman to trust a man who is yet to become her husband. In the case of agreeing for talaq during the nikah, objections are raised on the following grounds: one, that the Quran, while giving the right of divorce to the husband alone discourages men from talaq and, therefore, delegating it to the wife is against the spirit of the sharia; two, that when the woman enters into the nikah, she should not enter with a suspicion about the husband.

13 Interviews with Noorjehan (Confederation of Voluntary Agencies), Khaleda Parveen (Jamait-e-ulema-Hind), Azmat Qayyoom (Movement for Peace and Justice) and Rehana Sultana (social activist).

14 Bharatiya Muslim Mahila Andolan (http://bhartiyamuslimmahilaandolan.blogspot.com/).

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