

Justice for Muslim Women in India: the sinuous path of the All India Muslim Women Personal Law Board¹

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Abstract

Muslim Women movements in India have been very active in the past decade, attracting attention both in the Sub-Continent and beyond. This article vows to present a particular trend of this activism centred on the legal sphere, moreover within the frame of the Muslim personal law system and its non-State adjudicative bodies. Through the All India Muslim Women Personal Law Board (AIMWPLB), it will present the example of an attempt to challenge the 'patriarchal' legal discourse on Islamic Law by procuring an alternative dispute resolution forum specifically aimed at Muslim women's issues, as well as advocating for a more gender equal interpretation of the Quran through the prism of 'Islamic Feminism'. However, it will show that despite its President's tremendous efforts, the AIMWPLB's scope remains limited. Although establishing a somewhat successful mediation centre in the Lucknow area, it has for the moment failed to extend its reach in the rest of the Indian Territory. Likewise, its particular discourse on Islamic Law has had but little influence on its overall application in India, and paradoxically could even be counter-productive towards its progression towards a gender equalitarian interpretation.

Introduction

If you ever travel to Lucknow and adventure in its outskirts, you might find a little white mosque lost in the middle of an empty field. As insignificant as it might seem, this is no ordinary mosque. On one of its walls hangs a huge banner: 'All India Muslim Women Personal Law Board' (AIMWPLB). In a patriarchal society and moreover within what is often portrayed as a male dominated religion such as Islam, one could be surprised as to find an organisation that would promote the place of women within its legal frame. Yet, such organizations seem to be now thriving in India, attracting a lot of attention from academics and the media, both locally and around the globe³.

Women activist groups are not a recent phenomenon in India; they have been fighting for their rights and enhancing legal consciousness for decades. However, their work was for a long time entrenched within the secular paradigm of the State, perceived as the only one able to redress, through both economic empowerment and

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³ Indeed, the AIMWPLB office walls are covered in framed newspapers clips mentioning its actions. Internationally, the BBC has underlined its existence (for example: *Protest against India rape fatwa* 2005; Mukerjee 2005), and it was recently mentioned in an article of the New York Times (Roy 2012).

legal reform, the social inequities that were still at play on the ground, and officially translated in the form of a personal law system⁴. The rapid reform of Hindu personal law⁵, as well as the possible recourse to criminal law (especially sect. 125 of the *Code of Criminal Procedure* in regards to a wife's right to maintenance), were interpreted as many steps in the right direction that would sooner or later influence Muslim personal law towards more gender equality, and perhaps lead to the constitutional objective of a Uniform Civil Code (art. 44) for all Indians.

Yet, Muslim law apparently did not budge. Even worse, the State seems to have abandoned any sort of reform after the *Shah Bano* case, legislatively precluding the Judiciary to depart from Islamic classical interpretation regarding post-divorce maintenance⁶. Moreover, it acknowledged and defended the existence of non-State courts, under the authority of *Qazis*, as legitimate *fora* where disputes pertaining to family matters among Muslims could be settled⁷. It all seems as though the idea of Uniform Civil Code is now out of reach (Dhanda and Parashar 2008), and despite some strong advocates (Pal 2001), the movement appears now to reform Muslim personal law from within, making it more 'just': either through enactments that would submit its application to Human Rights principles, or through an internal process of 'Substantialisation' that would privilege acculturation of Islamic principles through custom, hence transforming it alongside India's overall progression in matters of gender equality⁸.

⁴ A personal law system is a legal system where citizens are regulated by the law of their perceived community (religious or otherwise) in matters pertaining to their civil status (marriage, filiation, succession). After its independence, India has maintained this system inherited from the Raj (*The Muslim Personal Law (Shariat) Application Act 1937*). Article 26 of the Indian Constitution disposes that "every religious denomination (...) shall have the right: (b) to manage its own affairs in matters of religion", although subjected to "public order, morality and health" (*The Constitution of India 1950*).

⁵ Hindu law has indeed been profoundly reformed towards more gender equality in numerous fields relating to family law, such as inheritance (*Hindu Succession Act 1956* and *Hindu Succession (Amendment) Act 2005*) allowing daughters to be coparceners of a familial joint property. Marriage, adoption/guardianship traditional laws have also been amended, not to mention the constitutional ban of 'untouchability' (art. 17).

⁶ The case revolved around a rich husband refusing to grant his divorced wife maintenance beyond the 'idda (3 lunar months) period. The Supreme Court construed the Quran in order to extend the maintenance he owed her on top of 'idda money (*Mohd. Ahmed Khan v. Shah Bano Begum and Ors. 1985*). This ruling spurred protests around India and the Legislator enacted a new law (*The Muslim Women (Protection of Rights on Divorce) Act 1986*) apparently to overturn the decision towards a more traditional approach. This was perceived as a backlash from progressive/gender equality policy regarding the Muslim community in India. However, it has proven to be just the opposite (Menski 2008; Vatuk 2009) and in fact crystallised the *Shah Bano* solution (*Danial Latifi v. Union of India 2001*). However few commentators have perceived this change and the State is still considered incapable and/or unwilling to reform Muslim personal law in India beyond property issues (as it has partially done concerning *Wakf* properties – *Wakf Act 1995*).

⁷ The State made its position known in an affidavit responding to a Public Interest Litigation (PIL) claim that vows to declare *Darul-Qazas* (*Qazi* Courts) unconstitutional (*Vishwa Lochan Madan v. Union of India* writ Petition (Civil) 386/2005) still pending in front of the Supreme Court (Redding 2010). Moreover, it has somewhat institutionalised them through the *Wakf Act 1995*, where each State's *Wakf* Board names *Qazis* and allots them a geographical 'jurisdiction' – if they are theoretically chosen over their merits alone, their lineage remains however a preponderant factor. Notwithstanding, the Indian State makes clear that it is not bound by these institutions' decisions, but whilst admitting and even accepting their use alongside of the official justice system, mainly due to practical reasons (relating to the cost of the latter and the overbearing number of cases it already has to handle), the State acknowledges that most *Qazi* decisions will remain unchallenged.

⁸ The process of 'Substantialisation' consists in acknowledging that custom - as a source of Islamic law - has always played a predominant role in both its interpretation and application to a certain cultural/political

The idea of 'justice' is therefore increasingly put forward, parallel to or directly against the rule of law attached to the State. This idea is not specific to India, as it can easily relate to the Western movement of Alternative Dispute Resolution (ADR), which then was exported to certain parts of the globe. ADR's underlying ideology is the promotion of a harmonious society where conflict can and should be avoided through consensual means, rather than the inherent clash an adversarial judicial system is likely to create. The point is to favour negotiation over adjudication, where 'justice' is no longer linked to the application of a somewhat 'dogmatic'⁹ rule of law but found through a negotiated settlement (Nader and Grande 2002).

This article vows to assess what part the AIMWPLB plays in this legal paradigm. Created in 2005 and based in Lucknow, the AIMWPLB is interesting for it both inserts itself within the wide galaxy of Muslim feminist movements in India, but also within the frame of non-State Muslim adjudication entities, such as the All India Muslim Personal Law Board (AIMPLB)¹⁰. It therefore vows to have a 'social' role in helping Muslim women in need, but also a 'legal' one in challenging the mainstream discourse on Muslim law through 'Islamic Feminism' and a re-interpretation of the Quran towards gender equality, all within the frame of the existing personal legal system¹¹. Hence, the AIMWPLB vows to be a relevant actor within the apparently opposing scenes of ADR and the Rule of law, following in that sense the model put forward by the AIMPLB, and departing from mainstream feminist movements which for the most part help navigate around the legal system, and influence it from outside, rather than changing it from inside. To take a closer look at the AIMWPLB is also getting an insight into the broader question of how and under what conditions can non-State legal bodies can acquire the power to enforce their rulings in modern Nation-States, such as India.

In its short life-span of 7 years, the AIMWPLB has managed the feat to create a successful alternative dispute resolution *forum* in the Lucknow area, and is reckoned as such alongside other *Darul-Qazas* (despite the tensions between them). However, it has yet to gain the capacity to elaborate an Islamic legal discourse that is 'dogmatic' (Legendre 1996-1997). Indeed, the AIMWPLB is perfectly aware that it has not gained enough legitimacy to transform its legal opinion on Islamic law into rulings that would be directly applicable - whether socially or through the official judiciary's recognition. Therefore, it seeks the help of the State (through its constitutional frame) to legitimize its positions... to little avail as of yet. On this issue, I will however argue that one can

context (Dupret 1999). In the modern era, this has been translated into its inclusion into the positivist frame of a Nation State, allowing the latter to define and reform it (Dupret and Buskens 2012).

⁹ I will explicitly define my use of the word 'dogmatic' *infra*.

¹⁰ Non-State Muslim adjudicative bodies - commonly referred as '*Darul-Qazas*' - are mainly organized through the *Wakf Act* 1995, as well as the affiliation of 'non-official' *Qazis* to a Muslim legal association, the most powerful being the AIMPLB, which was instrumental in the *Shah Bano* protests.

¹¹ I am here making the distinction between 'Feminist movement' and 'Islamic Feminism' that Nadja-Christina Schneider (2009) operates in her seminal article on the matter, concluding in the AIMWPLB's potential in allying both aspects of this particular Indian Feminism. For a more detailed account on 'Feminist movements' in India, Sylvia Vatuk's (2008) work remains a corner-stone (as for a more global approach to 'Islamic Feminism', see Mir-Hosseini 2006).

be weary of the AIMWPLB stance, which could be counter-productive for women rights in the long run, despite its initial intentions.

This analysis is the result of fieldwork achieved in Lucknow in October 2011, where I have been to the AIMWPLB and interviewed its president Shaista Ambar, as well as in the *Darul-Qaza* of 'Farangi Mahal' (linked to the AIMPLB), where I interviewed one of its *Qazis*¹². Notwithstanding, I would emphasize that this article does pretend to grasp the multiple realities at play in India, whether they relate to ADR, Islamic feminism and more generally to Islamic law. It does however wish to shed some light towards one particular example that vows to participate and act upon these numerous fields, and to assess how it has managed to do so up until today.

1. "Signs of churning"? The AIMWPLB as challenging the AIMPLB's non-State adjudicative supremacy.

For a very long time, the AIMPLB seemed to hold a firm grasp on the definition, but also the non-State adjudication of Islamic law in India¹³. However, since the 1990s this monopoly seemed to be challenged on multiple fronts, certain portions of the Muslim community feeling they had not been sufficiently represented. 'Signs of churning' (Jones 2010) could be observed as other contesting 'law boards' were created¹⁴. The AIMWPLB follows this ongoing movement, with apparently the same goals as to become an alternative to the AIMPLB.

1.1. A one woman board?

Created in 2005, the AIMWPLB's objective was to potentially be accessible for all Indian Muslim Women throughout the territory, allying informative action towards their legal consciousness¹⁵, but also being able to assure legal adjudication pertaining to family matters (in others words, to have its own *Darul-Qaza* in the form of a *mahila adalat*), thus attaching itself to a Mosque in order to gain theological legitimacy as to its interpretation of Islamic law.

1.1.1. Lucknow... where else?

The AIMWPLB was created in Lucknow, and doesn't seem to have extended its reach outside Uttar Pradesh (UP), let alone the city. Notwithstanding, its president is a well known figure in the area. I was indeed surprised, while desperately looking for the organization's location, to notice how so many people in the streets knew Shaista

¹² Both interviews were conducted in Hindi and Urdu. I would like to thank Akhil Katyal, who acted as an interpreter and scooted me around Lucknow from one place to the other. I would also like to express my gratitude to Shaista Ambar and the *Darul-Qaza* of 'Farangi Mahal' for their welcome and the time they shared with me.

¹³ I do not wish to imply that it held the monopoly on Islamic legal discourse; one could cite the *Jamaat-e-Islami Hind* (JIH) or the *Imarat Shariah* as a counter-examples. But unlike other organizations, the AIMPLB vowed to be a representative body and not only a school of thought (even though the latter may have other social activities). It also managed to create throughout the territory a multiplicity of *Darul-Qazas*, being able to ascertain predominance in the application of Islamic law, thus influencing its definition and content.

¹⁴ Such as the All India Shia Muslim Personal Law Board (AISMPPLB), also based in Lucknow.

¹⁵ Following in that sense other Feminist movements, such as the Women's Research and Action Group (WRAG) educating women on their legal rights in State Courts, and the Bhartiya Muslim Mahila Andolan (BMMA) which is more focused on women's rights within the Islamic legal frame.

Ambar, a member of the local communist party who previously held responsibilities in the UP government.

The organization however does not have any other office outside Lucknow and relies heavily on internet to extend its presence over the country. Indeed, its website is very nicely arranged and also offers a blog¹⁶, but the number of ‘hits’ remains relatively low compared to India’s overall Muslim population¹⁷ and the blog has not been updated since April 2011. Moreover, this ‘advertising’ policy can only reach the small segment of the population which can both read and have internet access. Another issue is one of language, since both websites are in English. Surprisingly, Shaista Ambar does not speak English and depends on her daughter for translations. Regardless, the AIMWPLB does receive some legal queries, as I have been able to read, notably a mail from a woman in Tamil Nadu asking if ‘triple *talak*’ was authorized under Islamic law¹⁸. The number of such queries appears nevertheless to be quite limited.

1.1.2. *Material difficulties*

The AIMWPLB also runs on a very small budget, which limits its scope. Located in the suburbs of Lucknow, it consists of a small mosque to which is adjoined an office where Shaista Ambar receives ‘litigants’, with a room at the back reserved for women who wish some privacy. Within the Mosque’s grounds, there is also a shelter/dispensary for families who have no-where else to go. Despite the latter, which has been built following a particular donation, the rest of the buildings were financed by Shaista Ambar herself, who sold her family jewellery to that purpose.

Being present on a Friday, I was able to observe that the Mosque did attract a large number of followers. It however remains minuscule compared to other Islamic Institutions in Lucknow such as ‘Farangi Mahal’¹⁹. Even though these two institutions are barely comparable, given their respective history, suffice is to say that the AIMWPLB is still of a very small stature within the ‘network’ of *Darul-Qazas*. Despite claims that it consists of a 30 member board, it only appears to rest on Shaista Ambar’s

¹⁶ Website of the AIMWPLB: <http://muslimwomenpersonallaw.com/>
Shaista Ambar’s blog: <http://shaistaambar.blogspot.com/>

¹⁷ 127 667 ‘hits’ were recorded as of May 11th 2012. In comparison, India’s Muslim population is over 138 million people (source: IndiaStat, based on the 2001 census).

¹⁸ ‘triple *talak*’ is a form of divorce, initiated by the husband and irrevocable once he pronounces ‘*talak*’ three times. Similar to a repudiation, it is of course a contentious issue for feminist movements as it gives to the husband a formidable power within the marriage bond (moreover since traditional Islamic law does not allow maintenance beyond ‘*idda*’ – and the wife can only claim her *mahr* (dower), unless it has already been paid beforehand).

¹⁹ ‘Farangi Mahal’ is one of India’s most prominent Islamic centres dating from the 17th century. It has its own *madrassa*, *Darul-Qaza* as well as *Darul-Ifta* (where *fatwas* – legal opinion – can be enacted). Its compound in Lucknow is huge and clearly attracts a lot of money. (For more on the history of this institution see Robinson 2001).

shoulders alone and one can legitimately ask if it would last long without her continued devotion to this endeavour.

Hence, given the sharp contrast between the AIMWPLB's depiction in the media and its material reality, one has to ponder its real influence within the realm of Islamic law in India. Its media coverage has nevertheless been able to advertise its existence outside Lucknow, but it lacks the relays to extend its presence in other parts of the country. This being said, it is common for a young organization to primarily focus on its geographical origins, as well as to rely on a strong leader in order to secure its position before expanding. The AIMWPLB's record on that front is quite impressive, as it managed in a limited time-frame to both secure social recognition as well as spiritual legitimacy through the establishment of a Mosque. Yet, it is also not uncommon for movements to fade away once their leadership becomes vacant and no strong organizational structure is there to take over.

It is indeed striking to notice how the AIMWPLB is closely identified to its President²⁰, such as it becomes difficult to assess whether 'litigants' come to the AIMWPLB for what it represents (as an organization, an ideology) or actually due to its President's own reputation. As aforementioned, the AIMWPLB seems to rest on Shaista Ambar alone, and would need as that stage of its existence to structure itself around other personalities in order for it to both to expand outside Lucknow, as well as to simply survive beyond its current President.

1.2. An alternative dispute resolution *forum* that falls short of adjudication

All non-State Muslim legal *fora* have a tendency to first use mediation and conciliation before stepping up to adjudication. The AIMWPLB follows the same procedure, but for the most part is only able to achieve the first stage of this process. If indeed Shaista Ambar elaborates a distinctive Islamic legal discourse, which can be linked to the broader movement of Islamic feminism, she is only partially able to translate it into a socially enforceable ruling. Conscious of this shortcoming, the AIMWPLB skilfully concentrates its efforts on the contractual field (marriage) and the State's constitutional frame in order to implement its legal discourse ; a strategy both drawn for the organization's minority position within the realm of non-State Muslim adjudicative bodies, as well as from a critique of the judiciary's and *Qazi's* patriarchal bias. This can be exemplified through the 'case' of L. and H. which was resumed to me by Shaista Ambar, while the litigants were actually present.

1.2.1. The facts of the 'case'

L and W were young and flirted with each other for some time until they "foolishly" decided to have pre-marital sex. Out of this intercourse, a son was unexpectedly born (H). During her pregnancy, L's family had desperately tried to get her married to W, fearing the shame a 'bastard' would bring to their good name. But L was from a poor background, and W's family (which had higher standards for their

²⁰ Indeed, while searching for the organization's 'headquarters' by asking as to the whereabouts of the AIMWPLB, people were a bit confused and finally understood that I was searching in fact for Shaista Ambar.

son) refused the marriage. W further claimed that H was not his, and that he was leaving anyway for the Persian Gulf, where he would be working as a tailor.

L went to Shaista Ambar who started mediation. Since no arguments relating to Muslim law could convince W to marry L, she threatened to file rape charges against him. W got scared and reluctantly agreed to the marriage, but only upon his return from the Middle East (in order for him to provide for his new family), which was suppose to last only a few months.

As it turned out, he came back several years later. L's family started to organize the marriage but were inadvertently informed that W's family had made plans of their own and chosen another bride for him. S. Ambar was called upon again. W offered L 2 lakhs Rs.²¹ in compensation, if she abandoned the marriage and accepted H was not his. Despite the large amount this sum represented for her, L nevertheless refused on the grounds that H would never have his father's name and would therefore always be considered as a 'bastard'.

S. Ambar managed (though this remains unclear) to make a paternity test while W was at the police station, arrested for a misdemeanour (apparently at her instigation). The test proved W was H's father. Faced with the facts and their possible repercussions (such as child support), W finally agreed to marry L in the AIMWPLB's Mosque.

1.2.2. Recognition through mediation

The legal problem revolved around the child's recognition by his father, which in Islamic law is translated by *ikrar bi-l nasab*. Shaista Ambar's resolution of the case was however not one of adjudication where she would have declared the child to be W's following a legal procedure involving witnesses and other material evidence, but one of mediation where she convinced (notwithstanding a certain amount of threats – rape charges and social stigma by publicly presenting the results of paternity tests) W to legitimize H through marriage. The mediation allowed the basic legal matter of recognition to be linked to the wider social issue revolving around the status of an unmarried mother. The AIMWPLB's aim in this instance was to procure a legally binding solution that, it felt, could not be found either through the State's judicial system, or the *Darul-Qazas*.

The first assumption is to consider that Indian society as a whole is patriarchal, and even though State law favours women in some instances, judges will still have some difficulty applying it²². As it comes to this particular case, Indian statutes offer some latitude, their goal being to limit as much as possible the 'bastardisation' of a child. As such, Section 112 of the *Indian Evidence Act 1872* prolongs up to 280 days after the dissolution of marriage the presumption of paternity, Section 45 allows expert evidence (construed as allowing DNA testing), and Section 125 1. b) of the *Code of Criminal Procedure* orders the maintenance of a minor child whether he be legitimate or not. Hence, Courts have indeed ordered DNA tests to prove the paternity of a

²¹ About 400 \$.

²² In regards to maintenance of divorced Muslim women, Sylvia Vatuk (2001) has shown that this statement is quite true during an investigation of Family Court practices in Chennai.

child²³. However, the solution in this case would only have been one of maintenance and not legitimacy. It is also possible to consider that the judge would not have deemed L. to “have a strong and *prima facie* case” required to seek the order of such a test by certain High Courts²⁴.

The second premise is based on the same perception: a biased patriarchal application of Islamic law by *Qazis*. Indeed, even though Shaista Ambar believes Islam to be profoundly gender equal, she on the other hand considers *Qazis* to have made throughout the ages a misapplication of its precepts, relying on intricacies conveyed by books rather than the clear precepts of ‘The Book’ to ascertain their male dominance. According to her, women are not welcomed and hardly believed at first glance when they dare to initiate proceedings. Moreover, society has made them weary of confiding in a man, and ‘truth’ is better assessed when they can talk amongst women.

In this specific case and according to Shaista Ambar, the *Qazis* would have rapidly judged the child to be the result of *zina* (unlawful sexual intercourse), thus confirming his status as a ‘bastard’. The question however could have been one of *Ikrar* (recognition) of the child. Indeed, Islamic law does not allow easily the ‘bastardisation’ of an offspring, applying a prolonged presumption of paternity (*‘idda* period) and elaborating an easy process of recognition. The latter only requires three conditions: that the child may not be of someone else, that there a sufficient age difference between him and his alleged father and that finally the child (unless he is too young) accepts the recognition²⁵. *Ikrar* may be judicial or extra-judicial (as a unilateral act). During judicial proceedings, the *Qazi* can acknowledge that the claim is sufficiently sound and not require other forms of evidence. If the defendant disagrees however, he may be forced to swear an oath denying the claim (*inkar*).

It is interesting to notice how in this case, Shaista Ambar did not follow this procedure (not even mentioning the possibility of *Ikrar*), even though this would have allowed the child to be considered from the marriage bed (*al walad li-'l-firash*). She preferred pushing towards the contractual solution of marriage, which in her mind had the advantage of satisfying both the woman and the child, and on a practical note was also a way of advertising her own version of *nikah nama* (marriage contract)²⁶.

In this instance, the AIMWPLB embodies both the precepts as well as the critiques of ADR as a viable alternative to the rule of law represented by adjudication. As advertised by its proponents, mediation in this instance did allow a harmonious social solution that surpassed what adjudication would have been able to offer, which at best would have been the recognition of the child and financial support, but leaving the mother stranded. However, by criticizing the *Qazis*’ own use of ADR, Shaista Ambar also confirms that it can easily be perverted as a false conciliation where the weak party

²³ *Anil Kumar vs. Turaka Kondala and another* 1998.

²⁴ *S. Thangavelly vs. S. Kannammal* 2004.

²⁵ The *Maliki* School adds a fourth condition as to assess whether the relationship is materially plausible.

²⁶ This solution however has the problem of not automatically legitimizing the child, and as time will tell, W could very well claim in front of a State Court that although married to his mother, he never officially recognized him as his son.

does not have the upper hand in truly negotiating a consensual solution, just as Laura Nader and Elisabetta Grande (2002) have shown in other instances.

The AIMWPLB is aware of such shortcomings, and is therefore advocating for another type of Islamic legal discourse that both State and non-State Courts would recognize as legitimate and enforceable. This goal has yet to be achieved.

2. The AIMWPLB's legal opinion: advocating for an Islamic feminist legal discourse

I define the expression 'legal discourse' as a discourse that has a direct implication on someone's behaviour. This discourse is fundamentally 'dogmatic'. The concept of 'dogmatic discourse' was put forward by Pierre Legendre (1996-1997, 1999) drawing from the classical linguistic distinction between signifier and signified²⁷. The modern era has progressively drawn the individual to abandon his sovereignty to interpret the signifier, and rely on other entities (clergy, State etc...) to impose a signified meaning to it – for example not questioning the rules on how society should behave. Different tactics and doctrines were elaborated to snatch from the individual his power to interpret, whether it is on the greater reliance on textual sources (and hence an elite trained in interpreting them), the positivist theory of the State...etc. all build from a certain *mise en scène* of their authority and legitimacy²⁸.

Hence, a legal discourse (whether it be a statute or a decision from the judiciary) is binding to the individual for it emanates from an entity that is deemed legitimate enough as not to argue its interpretation on how social ties should be organized. Law in this sense is no more than an illusion (Ross 1957) based on an *a priori* individual's surrender to a certain 'space of reference' from which this interpretation emanates. It systemises the link between two actions, translating them into 'cause' and 'consequence'.

A legal opinion, or discourse about law is on the other hand the effort of the individual to regain his own interpretation, trying to convince others through rational arguments to follow his position.

2.1. The AIMWPLB's critique of the patriarchal Islamic legal discourse

India as Nation-State is built on a positivist dogmatic legal discourse that has established its Constitution as the basis of any law. But by maintaining a system of personal laws, it also acknowledges that the State is not the unique 'space of reference' where this legal discourse can emanate.

The AIMWPLB critiques the legitimacy of these other 'spaces of references', such as the *Darul-Qazas*, as having through an elitist reliance on books and man focused legal education taken away from the individual (and more specifically women) its godly right to interpretation of Islam. It follows in that sense the path of 'Islamic

²⁷ I would point out that Pierre Legendre uses this expression in a totally different context (centred on Western civilization), and that I am adapting and extending his concept to the issue at hand, for it allows to theoretically frame the latter in a comprehensive manner.

²⁸ A legal hearing is indeed a show, where actors have a role to play and judges are staged in a way to ascertain their power, Antoine Garapon (1997) defining the process as a 'ritual'.

feminism’, and aware of its minority position is actively seeking the help of the State to implement it.

2.1.1. Islamic feminism and individual Quranic hermeneutics

Islamic feminism originates ironically from a global movement which was not prone to gender equality to begin with. Indeed, Islamist rhetoric which has sprung in the 20th century advocates a literalist approach to Islam’s founding scriptures against the ‘Substantialisation’ of Islamic law that was at play either through customary practices (as the devotion to *Sufi* Saints in South Asia) or its positivation by States. Yet by relying almost exclusively on the Quran, it also paved the way for Feminist movements to interpret the Holy text on their own and to consider it quite gender neutral, if not very protective of women²⁹. Sunnis not recognizing any clergy, it is very difficult for other Islamist movements - who have thrown away most of Islamic law’s other sources - to counter such interpretations and would most likely have to take them into account (Mir-Hosseini 2006).

The AIMWPLB follows this trend by advocating its sole reliance on the Quran as the only valid source of Islamic law. For Shaista Ambar, the Holy text suffices to solve most of the legal problems that Muslim women face. In the case of L and W, she indeed based her argument on the Quranic prescription that no soul can suffer for others’ mistakes (Q 6: 164); hence H could not have his status diminished despite his parents’ pre-marital encounter.

As such, the AIMWPLB seems to rely on an individualist approach of Islam, against any traditional and systemised authority. It follows in that sense the Human Rights path of entrenching the freedom of religion, but through individual claims and thus the latter’s own interpretation of his religion. Islam is therefore de-Substantialised to become an “individual state of life” (Christians 2012, 228).

The inherent problem of this venture is that it can rapidly reveal itself to be a double-edged sword. The Quran, despite Shaista Ambar’s claims, contains but very few legal verses as such³⁰, more often than most in contradiction with one another. The AIMWPLB’s refusal to use classical Islamic legal tools such as the theory of ‘abrogation’³¹, certainly allows Islamic feminism to pick and choose Quranic verses that suit their goals, but at the same time cannot dispute to others the right to have an anti-feminist approach using the same reasoning. Furthermore, it is still to be proven how the AIMWPLB would get around verses which clearly favour the male, such as the ones relating to inheritance (Q 4: 11-12 and 176).

²⁹ One of their leading arguments being that ‘triple *talak*’ is no-where to be found in the Quran.

³⁰ Authors do not agree on their exact number, ranging from 350 to 2000 that could be interpreted as such (out of 6236 verses). Moreover, out of these legal verses, only a fraction concern interpersonal relations (*mu’amalat*), the others regulating the relations between God and mankind (*ibadat*).

³¹ Based on Q 2: 106, it consists in identifying the verse which has been revealed last, which as a consequence abrogates the previous ones. The classical example is the ban on alcohol - which appears to be allowed (Q 16: 67), then banned while praying (Q 4: 43) to finally be totally forbidden (Q 5: 90).

The AIMWPLB had already been able to somewhat enforce such discourse through its marriage contract (*nikah nama*)³², which includes several Quranic verses emphasizing the husband's duties towards his wife³³. Notwithstanding, marriage in Islam being primarily a private affair, which does not require the presence of any religious or legal official, the drafting of a marriage contract can be done bi-literally and include all sorts of clauses, as long as it states the amount of the 'dower' and the spouses' consent. As such, it is the translation of a private legal opinion, rather than one of legal discourse that would define marriage as an institution³⁴ imposing general and binding obligations.

2.1.2. *The AIMWPLB's claim to legal discourse through the positivation of Islamic law*

The AIMWPLB is quite aware of its difficulties to transform its discourse from a dissenting opinion to a binding legal one. Still advocating maintaining a personal legal system, it therefore seeks the help of the State to implement its women-focused application. Hence, Shaista Ambar has written to the Indian President in order to both codify Islamic Quranic precepts and directly include them in India's constitutional frame³⁵.

Indeed, she continually proclaims her attachment to the Indian nation³⁶, and seeks as such the positivation of Islamic law as the translation of its pluralist nature. In other words, she accepts the idea of the Constitution being the 'rule of recognition' (Hart 1993) under which Islamic precepts can become law, which would in turn bind the *Qazis'* interpretation of the latter.

It is however somewhat of a paradox on the one hand to claim that the Quran - as an ultimate and trans-national godly 'constitution' - does not impede on any 'secular' constitutional provisions, and on the other to still advocate for a personal legal system. For if the Indian Constitution is already Islamically compatible, so are the 'secular' laws that derive from it. Why not then only rely on them as adjudication is concerned?

The second problem lies on its trans-national nature. By constitutionally fixing broad Islamic precepts (by definition applicable to all Muslims indifferent of time and space) the process of their Substantialisation is halted (or more precisely dependent on the Legislator, representing the Hindu majority). However, it is under this very process that several progressive social achievements relating to the Muslim community are nowadays advocated, such as the inclusion of Muslim 'Dalits' into India's reservation policy (Misra 2007), or more recently the surprise *fatwa* issued by the *Deoband*

³² Accessible online: <http://muslimwomenpersonallaw.com/pdf/nikahanama.pdf>

³³ It also requires photographs for identification and is made up of three copies: one for the spouses, one remaining with the AIMWPLB for archiving, and the last for means of registration (which is not yet required under Indian Law). It therefore included multiple safeguards that most *nikah nama* currently lack.

³⁴ Notwithstanding, a recent legal decision defined Muslim marriage as an institution (*Mst. Gulshan v. Sh. Raisuddin* 2011), paving the way for such opinion to become a legal discourse (although it remains a single judgment emanating from a District Court, far from the value of a precedent).

³⁵ A copy of the letter she sent can be found on her blog (Ambar 2011).

³⁶ The same is also true of the *Qazi* I met in 'Farangi Mahal', who perceives also Muslim personal law as a constitutional right, and acknowledges the limits of its application within *Darul-Qazas* (especially when property issues are concerned).

seminary to ban polygamy on the grounds it was contrary to Indian custom (Srivastava 2012)³⁷.

Concluding remarks

Following Nadja-Christina Schneider's (2009) distinction between feminist movement and Islamic feminism, one could conclude that if indeed the AIMWPLB has achieved its goals as creating an alternative dispute resolution *forum* - allying both secular and Islamic legal principles to achieve a mediated solution - its scope remains quite small and barely extends beyond its Lucknow headquarters, despite the global attention it received. However, its endeavour to elaborate an Islamic feminist legal discourse that in time could challenge the one put forward by other legal 'spaces of reference' such as the AIMPLB has for the time being been unsuccessful, and remains but a dissenting legal opinion with but little effect on the application of Muslim personal law in India.

Notwithstanding the AIMWPLB diagnoses on both the 'Islamic legal discourse' and the *Qazis'* led mediation do bare some ground. Despite its paradoxical appeal to the State and the rule of law in order to apply Islamic legal principles, the AIMWPLB does intend to show that the State's approval of *Qazi* led mediation can be less harmonious than it seems. As Laura Nader and Elisabetta Grande (2002) have demonstrated concerning Africa, mediation can be less than equal and one party (according to Shaista Ambar's claims, it would be the 'Muslim Man') can easily have the upper hand to enforce a solution only glazed by negotiation³⁸.

One can however be weary of the possible counterproductive effects the AIMWPLB's alternative legal discourse and the attempt to strengthen it based on individual interpretation and its positivation through the Indian constitutional frame. Albeit the inherent theoretical contradiction in regards to the very existence of a personal legal system, such an approach might lead to unforeseen consequences and diminish the otherwise real progress Muslim law has made in the recent years, whether originating from the State or the Muslim community itself as to both its adaptation to the Indian context and its social and economic evolution.

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³⁷ One could also add that the AIMPLB in its *Compendium of Islamic Laws* (2001) had already mitigated the practise of 'triple *talak*' as to invalidate it if pronounced out of anger or not in sound state of mind. State Courts have used this source in their decisions to strongly regulate the practice of *talak* in general. (*Dagdu S/O Chotu Pathan, Latur vs Rahimbi Dagdu Pathan, Ashabi...* 2002).

³⁸ Particularly so when the 'mediator' is not a neutral and 'foreign' actor to the problem at hand, but a participant in the community within which it erupted.

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