

Agnes on Muslim Personal Law

[Flavia Agnes is a leading feminist scholar, women's rights lawyer and social activist based in Mumbai. She has written and worked extensively on Muslim women's issues, communalism and religion-based personal laws in India. In this interview with Yoginder Sikand, she talks about her work.]

Q: Could you tell us something about your own background?

A: I'll skip all the details about my childhood and I'll start by saying that I lived as a housewife for 13 long years in a very violent marriage. I could stand it no longer and then went through a very painful separation, it was because of the trauma that I went through that I came in touch with women's groups in and around Mumbai, through which I discovered that my trauma was actually shared by numerous other women as well. So, it was my struggles with my marriage that led me to get involved with women's organizations struggling for the rights of women.

Claiming to 'defend' women is still routinely justified to defend imperialistic projects, as, for instance, in the case of the American invasion and bombing of Afghanistan, where they claimed that they were doing so to liberate Afghan women from Taliban rule.

Q: You have been a prominent critique of what you see as the insensitivity of many 'secular' feminists to the particular issues of religious minorities. What exactly is your stand on this?

A: Yes, there is this sort of bias among many women who call themselves 'secular feminists'. Often such biases are unacknowledged and sometimes are not even consciously held. Let me explain this by giving you my own personal example. I was a church going Catholic but I gave up all that and I joined the Feminist movement that defined itself as 'secular'. These women wanted to be known simply as 'women' and claimed that they had transcended community boundaries and so on. But soon it dawned on me that many 'secular' feminists were really not as secular as they claimed. Most of them were Hindus, or of Hindu background. And so some of them would talk about how Christian and Muslim personal laws were flawed and discriminatory towards women, but they would never talk about aspects of Hindu personal law that discriminate against Hindu women.

That's when I began to feel the need to engage in this whole discourse on personal laws, to see what exactly the different personal laws actually mean for women both in theory and in practice in the ways that they are interpreted by the courts.

So, this is how I came to feel the need to challenge the communalism that exists in significant sections of the women's movement that defines itself as 'secular'. A turning point was the 1991 women's studies conference held at the Jadavpur University, Calcutta. I was invited to speak on Christian law, and what it means to be a Christian feminist. I was shocked! I mean, I had been working all along as a 'secular' feminist, and just because I have a 'Christian' name and because I happen to have been born in a Christian family I was branded as a Christian and invited to speak in that capacity. Why were the other women at the conference not similarly labeled as 'Hindu' feminists, I asked the audience, unable to control my anger. This showed, I said, the deep-rooted communalism within some sections of the feminist movement, where activists from Hindu families are simply 'feminists' with no qualifying label,

while those from Muslim or Christian or other non-Hindu backgrounds come to be identified with the extra tag of 'Muslim' or 'Christian' or whatever. And this is sought to be defended with the same logic that the Hindutva-wadis use—that Hinduism is not really 'religion' but 'culture'. So, then it becomes 'culture', and therefore, excusable, if a feminist from a Hindu family keeps an idol of Krishna in her house or celebrates Diwali. She is still considered to be secular. But if a feminist from a Christian family keeps a picture of Christ or celebrates Christmas, she is said to be a Christian 'feminist', and so she is not really secular enough! So, the assumption is that a 'Hindu' feminist is by definition secular, since Hinduism and 'culture' are synonymous, while a Muslim or Christian feminist has to constantly struggle to 'prove' that they are 'secular' and not 'communal' by denying their religion. In other words, it often boils down to the claim that, for some it's okay for a 'Hindu' feminist to practice her religion in some way but the same is not true for a 'Muslim' or a 'Christian' feminist.

Q: What was the reaction of the audience to your speech?

A: Pandemonium! A lot of heated discussion and debates. I was accused by some feminists of dividing the feminist movement on communal lines. My critics claimed that all women are actually one and to raise such sensitive issues would break the movement. My answer was that I wasn't dividing the movement. Rather, the organizers of the panel themselves had done so by, in a sense labeling me as a 'Christian' activist. I asked them why some 'secular' feminists keep harping about the legal injustices that Muslim and Christian women are subjected to because of their personal laws but remain silent on similar aspects of Hindu law. As you can imagine, many women criticized me, but several others appreciated the point I was making.

Q: What is your position on a Uniform Civil Code?

A: I am opposed to a uniform civil code. Who are we to decide what is best for other women? At best I think we can have an optional civil code, but it should not be made compulsory for all. That's precisely what the Hindutva lobby wants. In the name of a Uniform Civil Code it wants to impose Hindu law on everybody, and this is just another way of bringing other communities into the Hindu fold or to deny their separate cultural identities. Another problem with this argument is that it totally ignores the patriarchal provisions in Hindu personal law.

I think we need to think of devising ways of reconciling gender justice with legal recognition of the identities of multiple cultural groups. So, instead of a Uniform Civil Code, I think we need to work towards separate gender just personal laws for the different communities. I think that, especially after the Shah Bano controversy and then the destruction of the Babri Masjid and the violence that followed, many women's groups in India are veering round to this position, aware that supporting a Uniform Civil Code at this juncture would only play into the hands of the Hindutva-wadis. These gender-just personal laws have to emerge from the grassroots in a gradual manner in order to gain the acceptance of the different communities. They cannot be forcibly imposed or legislated from above. And as these different gender-just personal laws for the different communities evolve slowly it will lead to uniform principles, although not uniform laws.

Q: How did you get involved in activist work among Muslim women?

A: I studied Muslim personal law in the course of my thesis work, and then came the massive pogroms directed against Muslims in Mumbai in the wake of the destruction of the Babri Masjid. By this time we—some friends and I—had set up our own NGO, called *Majlis*, which was working among women in Mumbai, including Muslim women. I deposed before the Srikrishna Commission investigating the pogrom. After that, I began writing on Muslim personal law issues, and some of these were later published as articles in journals and as booklets. Through my writings I tried to critique the notion of Muslim laws as being necessarily and wholly anti-women looking at the various ways in which these laws could be interpreted and also the fact that in some respects these laws are more favorable to women than Hindu laws are. I also tried to critique various judgments that began appearing at this time that were clearly anti-Muslim. Particularly after the Shah Bano controversy there was an outburst of anti-Muslim sentiment, including in the women's movement, with numerous 'secular' feminists claiming that Islam and gender justice were totally irreconcilable. In my own small way I tried to counter these stereotypes. For instance, I tried to show that the Muslim Women's Maintenance Act, which Parliament passed in the wake of the Shah Bano controversy, is actually an improvement on the earlier position.

Numerous judgments have interpreted the act to provide lifelong maintenance for divorced women lifetime, in accordance with the Qur'anic injunction to treat divorced women justly and fairly and to give them a reasonable maintenance. So, this supposedly retrograde law is actually helping Muslim women, but why, I keep asking, do many 'secular' feminists ignore this? Is it because of some deep-rooted anti-Muslim prejudice?

In the course of my work I came into contact with Muslim groups in Mumbai, including with people associated with the All-India Muslim Personal Law Board, giving them inputs on issues related to legal matters, including, but not only, on gender-related questions, I also worked with some Board members and Muslim social activists to draft a model marital contract or *nikah namah*.

Q: Who all were involved in drafting this *nikah namah*? What provision does it contain that can protect the wife from arbitrary divorce or from her husband taking a second wife?

A: Our *nikah namah* was a joint effort by a group of women, including Uzma Naheed, one of the few women members of the Board, Nasreen Fazalbhoy of the Mumbai University, Nilofer Akhtar, an advocate, and myself, in consultation with two 'ulama. It clearly lays down the *dower* or *mehr* promised to or received by the bride, the rules for arbitration in case of divorce, the possibility of delegated divorce, and the conditions under which a man may take a second wife. Personally, I wasn't happy at all with the last thing, but some others in the drafting team said we should put it in. But we've tried to restrict polygamy by insisting that a second marriage should be allowed 'only for valid reasons' 'as per the stipulations of shari'ah' and only after making 'adequate arrangements' for the wife's maintenance and residence. Our *nikah namah* specifies that the husband shall not force the wife to share her matrimonial residence with the second or subsequent wife, and will not 'in any way alter the prevailing status of the wife to her disadvantage'. He must also 'treat her with the same degree of respect and economic security' as the wife from the second or subsequent marriage. Further, in case he contracts a second

marriage without informing his first wife, the latter will have the right to demand a separate residence and maintenance and also the right to delegated divorce. The husband, in this case, might also be liable to pay a fine.

On the issue of divorce it lays down that if the husband resorts to triple talaq in one sitting without first resorting to arbitration, he will have to pay his wife all that he owes her, in addition to a fine. The normal course should be to first go through arbitration proceedings, with two arbitrators, one from each side. In case the differences between the spouses are irreconcilable, the arbitrators will help the spouses arrive at a settlement before the dissolution of the marriage on maintenance during the *iddat* period, payment of outstanding mehr dues, return of gifts given at the time of the marriage or subsequently, fair and reasonable provision, children's custody, access and maintenance and division and transfer of joint and separate moveable and immovable property.

Q: What do you feel about the splits in the Board? What implications do you think this might have for Muslim women?

A: I think this is a very welcome development. It clearly challenges the notion of the Board being the final arbiter of Islamic law, a claim that the Board has repeatedly been making ever since it was established in 1972. The fact of the matter is that, legally speaking, it is not the Board but the courts that are the final authority in this matter. The courts, and not any extra-legal entity, have the final authority to interpret Islamic law, no matter what the 'ulama and the Board may claim. Not many people know this. They think that the Board is the final authority in these matters, and they pin all their hopes for legal reform and progressive interpretation of Muslim personal law on the Board. But, as I have tried to show in my writings, this stems from a fundamental misunderstanding. It is the courts that have the final authority in this regard. So, a Muslim woman is not bound to first go to the Board for any issue. She can go straight to the courts. Even if she does go to the Board, she need not accept the decision of the Board on any matter and she has the right to go to the courts, for the courts alone, and not the Board or the 'ulama, have the final say in interpreting Muslim personal law. And, further, as I have been stressing in my writings, of late the courts have passed several pro-women judgments based on that authority. Thus, for instance, in various recent judgments the courts have ruled that a Muslim man does not have the power to arbitrarily divorce his wife. The man must supply the courts with reasonable and adequate reasons for divorce. The couple must first go through proper arbitration proceedings and fulfil the conditions specified in the Qur'an, otherwise the courts will not accept the legality of the divorce.

Q: So, you feel that the splits have actually strengthened the courts in their capacity of being the ultimate interpreters of Muslim personal law?

A: Exactly, and this a very welcome development. Earlier, there was a sort of sanctity attached to the Board, and the courts felt that they needed to take the Board's opinion into account in making decisions. Judges may have been apprehensive that if they interpreted Muslim personal law in a certain way the Board would protest. They may have felt that they needed to respect the views of the Board, which claimed to represent all the different Muslim sects. But now that there are several Muslim personal law boards, each claiming to authoritatively interpret the shari'ah, obviously the courts can now say that the Board does not have a monopoly, and hence can argue that what the original

Board or any of the splinter groups say cannot be said to be the final word on the shari'ah since they cannot agree among themselves as to what the shari'ah says on a particular matter! The ability of the courts to interpret Muslim personal law will also be strengthened now because earlier the Board, claiming to represent all the Muslim sects, had a certain political clout, which, following the splits, has been considerably curtailed.

The splits in the Board have also brought to light the sectarian differences within the larger Muslim community, clearly indicating the differences in the ways in which the different Islamic sects interpret the shari'ah. So, it shows how the shari'ah is not a monolith, and that Muslims are almost as internally diverse as are other communities, such as the Hindus and Christians.

Q: The 'ulama claim that, as scholars of Islamic law, they have the ultimate authority to interpret Muslim personal law. In their writings, some 'ulama even claim that non-Muslim judges in secular courts, such as in India, do not, or at least should not, have the right to interpret the shari'ah. So, what exactly is the legal position on this?

A: The 'ulama may say what they like, but the fact of the matter is that, according to Indian law, it is the courts that have the ultimate authority to interpret Muslim personal law. The judges of the courts may, of course, be of any religious background, not necessarily Muslim. So, a maulana may say that if a Muslim man pronounces talaq three times in one he has divorced his wife, and might claim that this is in accordance with the shari'ah. But the courts need not accept that. They might say that this is insufficient for a divorce, and that the couple must first go through arbitration proceedings and so on. The judgments of the courts, and not the views of any maulana or of the Board, will be accepted as final and binding.

Q: In order to circumvent the authority of the courts to interpret Muslim personal law, and also to ensure cheaper and faster justice, some 'ulama and Islamist organizations are now talking about setting up a chain of shari'ah courts or *dar ul-qazas* to deal with family-related issues. What are your opinions on this?

A: Some *dar ul-qazas* have been set up in recent years in different parts of the country, but no comprehensive study has been made to examine how they actually function and whether they actually do provide justice to women. It certainly is a way to have disputes judged in far less time and at considerably less cost than through the courts. I fear, however, that the qazis in these courts have been reared in a very sternly patriarchal tradition and that, therefore, they may not be sensitive to women's concerns and may not be willing to interpret Muslim law in a gender-sensitive way. I think one way to help remedy the situation is to have more Muslim women scholars who are well-versed in the nitty-gritty of Muslim jurisprudence and can interpret it in a women-friendly way. In any case, it is important to reiterate here that the decisions of these *dar ul qazas* have no legal standing as far as the courts are concerned, and that litigants can always approach the courts if they do not agree with the judgements of the qazis. □□□