

# Gender Asymmetry and Mutual Sexual Relations in Online Legal Interpretation- Beyond the Dissonance Through the Fatwas of askimam.org.

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## Abstract

As part of a larger research project which examines Muslim women's sexual and reproductive health rights within the interlocutory space of online fatwas, this paper provides a glimpse into the co-construction, by muftis and petitioners, of an Islamic discourse of jurisprudence on sexuality in marriage. This paper argues that the discourse moves away from the dominant legal one of male sexual right and female responsibility to fulfil, towards an underlying and more subtle ethical discourse centred on mutuality. Combining a methodology of feminist post-structural discourse analysis with a legal interpretive framework drawn from classical legal methodologies, the paper analyses a fatwa by South African-based Deoband mufti Ebrahim Desai on his online fatwa platform askimam.org. Assessed alongside ancillary fatwas on his website, the analysis reveals how petitioners and muftis remain committed to the gender asymmetric legal (*fiqh*) rules governing Muslim marriage, yet also articulate views based on expectations of reciprocity and mutuality in sexual relations prevalent in contemporary marriage. Where some petitioners grapple with the dissonance created by their pietistic loyalty to the gender asymmetric legal tradition and ethical expectations of reciprocity and mutuality, muftis such as Desai respond by employing discernible strategies that produce a discourse of mutuality in sexual relations within modern marriage. This paper asserts that both petitioners and muftis in online fatwas like those of askimam.org, have the potential to reformulate and reconfigure present and future *fiqh* discourses on sexuality within Muslim marriage. This is evident in their alignment with an ethics of marriage and well being, located in ideals of reciprocity and mutuality.

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## Introduction

Kecia Ali states:

There is a mismatch between views of marriage and sexual intimacy as based in mutual consent and reciprocal desire and the entire structure of classical jurisprudential doctrines surrounding lawful sexuality.<sup>3</sup>

Ali's suggestion is that while Muslims subscribe to the Quranic ideal of Muslim marriage characterised by 'mutual consent and reciprocal desire', they are simultaneously faced with jurisprudentially-based gender norms which prioritise male sexual rights and stress female obedience, sexual availability and passivity.<sup>4</sup> In the jurisprudential framework of Islam, marriage is based on dominion, an arrangement that includes financial dependency and which denies women control over their bodies and deciding capacity on the terms of sexual intimacy. It can also constrain their negotiations for a safe and healthy sexuality.<sup>5</sup> Ali analyses classical legal texts and posits that because many prevailing jurisprudential doctrines surrounding lawful sexuality were enacted by jurists for audiences in vastly different historical socio-cultural contexts to those today, there is a "real dissonance between the cultural assumptions undergirding the classical edifices of jurisprudence and exegesis, and modern notions..."<sup>6</sup>

Traditional readings of foundational texts, the Quran and the hadith, and classical legal treatises by religious actors such as muftis are employed in formulating normative gender asymmetrical discourses around sexual health, agency, expression and intimacy, in ways that give men control over women, producing contemporary iterations of Islamic marriage and

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<sup>3</sup>Kecia Ali, *Sexual ethics and Islam: Feminist reflections on Qur'an, Hadith, and Jurisprudence*. London: Oneworld, (2006), xxv.

<sup>4</sup>Ali, "Sexual Ethics and Islam," 13.

<sup>5</sup>Amina Wadud, *Inside the gender Jihad: women's reform in Islam*. UK: Oneworld Publications, (2006), 236-241. Wadud argues that this type of marriage construct prevalent in Muslim communities engenders a "sexual politics of domination" and creates a situation where women have limited capacity in sexual decision making, resulting in constrained negotiations for safer sex practices, thus exposing them to sexually transmitted diseases, HIV and AIDS, and unwanted pregnancy.

<sup>6</sup>Ali, "Sexual ethics and Islam," xxvii. Ali argues that many of these jurisprudential doctrines were enacted by jurists who lived in contexts and geographical regions where slavery and particularly slave concubinage was normative. Slavery, she argues remains conceptually linked to legal regulations surrounding marriage in Islam. Hence understandings of marriage as domination is predicated on an "analogy to slavery at a fundamental level, and the discussion of wives and concubines together strengthens the conceptual relationship." She argues that a historicizing of the rules around marriage is relevant to contemporary discussions on Muslim marriage and divorce law.

divorce law<sup>7</sup> that appear to seldom deviate in significant ways from classical versions.<sup>8</sup>

Alternative reformist attempts in the interpretation of foundational texts which offer emancipatory options,<sup>9</sup> have had a limited influence on the popular application of the fiqh of marriage. As Ali contends, "It is precisely in the arena of sexual ethics where normative Islamic texts and thought have been, and continue to be, most influential"<sup>10</sup>. These fiqh-based gender norms rooted in a classical era persist, and are mediated into society by means of popular religious literature, lectures and even fatwas. They are subsequently internalised by ordinary Muslim men and women in both Muslim minority and majority contexts. South African research has shown how an internalisation of these norms establishes a

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<sup>7</sup> By Islamic law, we refer to the combination of *usul al-fiqh* and *furu al-fiqh*, the positive laws and jurisprudence that collectively constitute the substantive aspects of Islamic legal reasoning and maxims. Importantly, Islamic law in this context is the human, fallible attempt to comprehend and concretise God's will within varying temporal socio-cultural contexts. As El Fadl asserts, *Fiqh* is the human attempt to reach the ideals of the immutable and unchangeable *Shari'a* which is "God's Will in an ideal and abstract fashion".

Refer to, El Fadl, Khaled Abou, *Speaking in God's name: Islamic law, authority and women*. UK: Oneworld Publications, (2014), 32 and; Ziba Mir-Hosseini, "Islamic Family Law and Social Practice: Anthropological Reflections on the Terms of the Debate," *Family, Law and Religion: Debates in the Muslim World and Europe and Their Implications for Co-operation and Dialogue*, (2009), 21-32.

<sup>8</sup> As examples of this see: Bennett, Linda Rae. "Zina and the enigma of sex education for Indonesian Muslim youth," *Sex Education* 7, no. 4 (2007): 371-386; Izugbara, C. Otutubikey, "Patriarchal ideology and discourses of sexuality in Nigeria." In *Understanding human sexuality seminar series*, vol. 2, (2004): 1-34; El Fadl, Khaled Abou, *Speaking in God's name: Islamic law, authority and women.* 209-247 and 272-297; Mir-Hosseini, Ziba, Mulki Al-Sharmani, and Jana Rumminger, *Men in Charge? : rethinking authority in Muslim legal tradition*. London: Oneworld Publications, 2015; Shaikh, Sa 'diyya, "Knowledge, women and gender in the hadith: a feminist interpretation," *Islam and Christian-Muslim Relations* 15, no. 1 (2004): 99-108; Shaikh, Sa'diyya, Nina Hoel, and Ashraf Kagee, "Research report South African Muslim women: sexuality, marriage and reproductive choices," *Journal for Islamic studies* 31 (2011): 96-124.

<sup>9</sup> Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an*. University of Texas Press, (2002); Ayesha S. Chaudhry, *Domestic Violence and the Islamic Tradition*. UK Oxford: Oxford University Press, (2013); El Fadl, Khaled Abou, *Speaking in God's name,* 94; Aysha A. Hidayatullah, *Feminist Edges of the Qur'an*. Oxford University Press (UK), 2014; Faqihuddin Abdul Kodir, *Hadith and Gender Justice: Understanding the Prophetic Traditions*. Cirebon: Fahmina Institute, 2007; Fatima Mernissi, *Women and Islam: An historical and theological inquiry*. Oxford: Basil Blackwell; Mir-Hoseini, Ziba. "Islamic Family Law and Social Practice", 21-32. Mir-Hosseini, Ziba, Mulki Al-Sharmani, and Jana Rumminger, *Men in Charge?*; Sa'diyya Shaikh, "Knowledge, women and gender in the hadith: a feminist interpretation"; Laury Silvers, "In the Book We have Left out Nothing": The Ethical Problem of the Existence of Verse 4: 34 in the Qur'an." *Comparative Islamic Studies* 2, no. 2 (2006); Wadud, *Inside the gender Jihad*, 236-239.

<sup>10</sup> Ali, *Sexual Ethics and Islam*, xxv-xix.

pietistic loyalty to them apparent in constrained religious personhood with regard to women's sexual and reproductive agency.<sup>11</sup>

Using a feminist post structural lens, the task in this paper is to explore how Muslim women, men and religious actors (in this case legal scholars called muftis) in Muslim minority contexts engage with the dissonance between contemporary expectations of marriage and sexual intimacy characterised by mutuality and reciprocity and fiqh-based gender asymmetrical norms. We do this through a case study analysis of online fatwas generated by a South African religious legal scholar who identifies with the Deoband Hanafi legal school of thought which originates in India, where forty per cent of South African Muslims have their roots.<sup>12</sup>

## What is a Fatwa?

It has already been established that women's agency in terms of their knowledge of sexual rights and obligations within a Muslim marriage can be revealed through an analysis of fatwas – verdicts or judicial pronouncement given by a mufti in response to a question posed by a petitioner (mustafti).<sup>13</sup> Due to its moral nature it is neither binding nor enforceable and is generally not a verdict in a court of law. Its coercive influence depends on the authoritative status accorded to the mufti by the petitioner.<sup>14</sup> It is assumed that the fatwa-issuing mufti is pious and possesses superior religious knowledge such that his advice is aligned

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<sup>11</sup> Hoel Kagee Shaikh, "Research report South African Muslim women: sexuality, marriage and reproductive choices," 96-124; Hoel, Nina, and Sa'diyya Shaikh, "Sex as Ibadah: Religion, Gender, and Subjectivity among South African Muslim Women," *Journal of Feminist Studies in Religion* 29, no. 1 (2013): 69-91.

<sup>12</sup> Omar, A. Rashied. "Democracy and Multiple Muslim Identities in Post-Apartheid South Africa." *Annual Review of Islam in South Africa* 7 (2004): 2; Kutscher, Jens, "The politics of virtual fatwa counseling in the 21st century," *Masaryk UJL & Tech.* 3 (2009): 39.

<sup>13</sup> See Shahid Mathee's work on historical fatwas from Timbuktu (Mathee, Mohamed Shahid. "Women's agency in Muslim marriage: 'fatwas' from Timbuktu." *Journal for Islamic studies* 31, (2011): 75-95.

<sup>14</sup> Mohamed Chawki, "Islam in the Digital Age: Counselling and Fatwas at the Click of a Mouse," *J. Int'l Com. L. & Tech.* 5, (2010): 166; Mozaffar Hossain, "The story of fatwa," *Interventions* 4, no. 2 (2002): 237-242; Lena Larsen, "Men are the Protectors and Maintainers of Women: Three fatwas on spousal roles and rights," in *Men in charge? : rethinking authority in Muslim legal tradition*, eds. Mir-Hosseini, Ziba, Mulki Al-Sharmani, and Jana Rumminger (London: Oneworld Publications, 2015), 197-218; Masud, Muhammad Khalid, Brinkley Messick, and David S. Powers, "Muftis, fatwas, and Islamic legal interpretation," in *Islamic legal interpretation: muftis and their fatwas*, eds. Masud, Muhammad Khalid, Brinkley Messick, and David S. Powers (Cambridge, Mass: Harvard University Press, 1996), 3-32.

with “Gods judgement”. “A fatwa therefore plays an important role in the formation of the pious Muslim self,”<sup>15</sup> whether as mufti or as petitioner.

The structure of a fatwa comprises of both an enquiry/petition and an answer. Scholarship on fatwas indicates that the enquiries are valuable and often used as sources of data because they provide insights into the actual problems and concerns of particular societies. In his response, the mufti must fulfil two procedural criteria pursuant to Islamic law. First, he must understand the question and, second, he must consult with scholarly authorities within the legal schools in framing his response. If a resolution is not possible, he then uses historically established methods of judgment known as *qiyās* (analogical deductions), *ijmā* (consensus), and *ijtihād*. Answers are usually not arbitrary but set on some precedent found within the collections of fatwas found in the *fiqh* literature. Different legal schools have their own compilations of *fiqh* literature.<sup>16</sup>

In terms of change and the evolution of legal thought, Muftis responses provide deep insights into the ongoing development of Islamic jurisprudence. Wael Hallaq argues that muftis are central to the ongoing development of legal doctrines in the different schools of law because of their contributions to the growth, continuity and change in these doctrines.<sup>17</sup>

As an aspect of a discursive Islamic legal tradition, fatwas therefore play an important role in providing insights into social problems and concerns. Petitioners lived realities and expectations provide “social data” and muftis respond using legal interpretive techniques and texts to relate to that data. In this way an analysis of “fatwas as expressions of the encounter between text and lived reality” sheds light on how dissonant and ambivalent perspectives and experiences of sex and intimacy are mediated by petitioners and religious actors.<sup>18</sup>

Cognisant of the contentions with the field of feminism, the uncertain position of religion in feminist theorizing, and the complex relationship between Islam and feminism,<sup>19</sup> we utilise feminist post structural theory

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<sup>15</sup> Larsen, “Men are the Protectors and Maintainers of Women,” 201.

<sup>16</sup> Masud, Messick and Powers, “Muftis, fatwas, and Islamic legal interpretation,” 20-26.

<sup>17</sup> Wael B Hallaq, “From Fatwās To Furū: Growth and Change in Islamic Substantive Law.” *Islamic law and society* 1, no. 1 (1994): 65.

<sup>18</sup> Larsen, “Men are the Protectors and Maintainers of Women,” 198.

<sup>19</sup> See: Abu-Lughod, Lila, “Do Muslim women really need saving? Anthropological reflections on cultural relativism and its others,” *American anthropologist* 104, no. 3 (2002): 783-790; Nina Hoel, “Feminism and Religion and the Politics of Location: Situating Islamic Feminism in South Africa,” *Journal of Gender and Religion in Africa*, no.19 (2013): 73-89;

(FPST) because of its potential to centralise women's faith-based lived experiences, understandings and practices, its ability to make spaces for non-liberal traditions like Islam<sup>20</sup>, and in that it allows that knowledge production and women's access to knowledge can be transformed through an understanding of lived experience as it relates to power within society.<sup>21</sup> Further, because fatwas exhibit a hierarchical social relation of power wherein the mufti is regarded as the interpreter of the *shariah*, and the petitioner as the follower relies on the mufti's piety, religious knowledge and sense of justice, FPST proves valuable for its potential to expose shifts and displacements in the relation of power between male and female members of society, and religious actors.<sup>22</sup>

Section one of the paper briefly sketches the relevance of the Internet to issues of sexual intimacy and health for Muslim couples, extrapolates on online fatwas in general and on the website askimam.org and its main religious actor Mufti Ebrahim Desai. In sections two and three of this paper, using a combination of two approaches, an analytical approach located within the traditional legal interpretive methodological lineage<sup>23</sup>,

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Fatima Seedat, "Islam, feminism, and Islamic feminism: Between inadequacy and inevitability," *Journal of Feminist Studies in Religion* 29, no. 2 (2013): 25-45; Sa'diyya Shaikh, "Transforming feminisms: Islam, women, and gender justice," in *Progressive Muslims: On justice, gender and pluralism*, ed. Safi, Omid (UK, Oxford: One World Publications, 2003), 147-162; Sunera Thobani, "Feminism without Borders: Decolonizing Theory, Practicing Solidarity (review)," *Hypatia* 20, no. 3 (2005): 221-224; Jasmin Zine, "Muslim women and the politics of representation," *American Journal of Islamic Social Sciences* 19, no.4 (2002): 1-22.

<sup>20</sup> This is relevant in light of recent critiques which warn against imposing a secular liberal framework of agency and freedom – which liberal feminism subscribes to- onto non-liberal faith traditions like Islam (see Mahmood, Saba, *Politics of piety: The Islamic revival and the feminist subject*. Princeton University Press, 2011).

<sup>21</sup> Amina Mama, *Beyond the masks: Race, gender and subjectivity*. Routledge, (2002); Weedon Chris, *Feminist practice and poststructuralist theory*. Oxford, UK: B. Blackwell, (1989).

<sup>22</sup> Masud Messick and Powers, "Muftis, fatwas, and Islamic legal interpretation," 20-21. The authors assert that this is not only true for historical settings and fatwas. Contemporary online fatwas exhibit a similar relation of power. As a case in point, in this research a question from a petitioner in South Africa posed to the Mufti on askimam.org states: "I would be very much grateful if you could kindly tell me the definition of fatwa and its important . insyaAllah with ur sharing i will share the knowledge to my friends." (Askimam.org. 2011. Fatwa # 18511, 2010. Available from:

<[http://www.askimam.org/public/question\\_detail/18511](http://www.askimam.org/public/question_detail/18511)>. [Accessed 15 October 2015].)

The hierarchical difference between the petitioner and the mufti produces a discourse of power in relation to *sharī'a* knowledge as seen in the petitioner's trust and dependence on the Mufti's knowledge. The petitioner has also donned a follower status, promising to disseminate the knowledge.

<sup>23</sup> By paying attention to elements within classical *adab al mufti* treatises, like the basic characteristics of a mufti, the conditions and requirements for the position, the kind of interpretive relation between muftis and questioners and the basic structural elements of

and feminist post structural discourse analysis<sup>24</sup> we analyse two fatwas - one where the petition originates from Pakistan and is answered by South African student mufti Docrat, and the other where the petition originates from a Muslim minority context and is answered by South African master teacher<sup>25</sup> Mufti Ebrahim Desai himself. The former fatwa illustrates the normative legal position on male sexual right within Muslim marriage and further illustrates Mufti Ebrahim Desai's loyalty to these *fiqh* rules, while the latter illustrates how Desai conditions this normative jurisprudential position. Using ancillary fatwas on askimam.org, we examine a number of strategies used by both petitioners and the mufti to manage the dissonance between the lived realities of sexual intimacy in modern marriage, which is characterised by expectations of mutuality and reciprocity, and classical jurisprudential gender norms.

### ***The Internet, askimam.org and Mufti Ebrahim Desai***

A study of the nexus between religion and the Internet in Western contexts suggests that the Internet provides a peek into the personal realities of religious lives and practices that until now has not been possible. It is also an indicator of the current contemporary state of religion in society, illuminating "the social reality of life in a networked society", where online trends are just a reflection of the changes happening offline and not necessarily the cause. Online practices are clearly embedded in the values and systems of offline culture, providing "an interesting and important microcosm for studying trends within religious practice and meaning-making in society."<sup>26</sup>

Research on online chats and forums has shown that for many Muslims talking about sex and sex related pietistic concerns has become much easier with cyber Islamic environments.<sup>27</sup> The Internet provides

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the fatwas, Masud, Messick and Powers, offer a substantial framework for the exploration of this specialized field of Islamic legal interpretation.

<sup>24</sup> An FPDA approach to data analysis requires that sources of data be taken from a range of different voices in order to showcase a plurality of perspectives. Polyphony and heteroglossia, in particular, makes spaces for multiple, silent and marginalised voices. Refer to: Judith Baxter, *Positioning gender in discourse: a feminist research methodology*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, (2003), 67-73.

<sup>25</sup> Ebrahim Moosa, *What is a Madrasa?* Chapel Hill: UNC Press Books, (2015), 125-126.

<sup>26</sup> Heidi A Campbell, "Understanding the relationship between religion online and offline in a networked society," *Journal of the American Academy of Religion* 80, no. 1 (2012): 3-5. Studies on online interactions of Muslims attest to Campbell's thesis. Refer to footnote 27.

<sup>27</sup> Alia Imtoul and Shakira Hussein. "Challenging the myth of the happy celibate: Muslim women negotiating contemporary relationships," *Contemporary Islam* 3, no. 1 (2009): 25-39; Roxanne D. Marcotte, "Gender and sexuality online on Australian Muslim forums." *Contemporary Islam* 4, no. 1 (2010): 117-138; Anna Piela, "Muslim women's

anonymity, allows for the freedom for Muslim men and women to articulate intimate sexual issues and seek counselling and religious legal advice through easy access to online muftis, also known as jurisconsults who constitute part of a wide group of ulama / religious scholars.<sup>28</sup> The Internet has also generated increased individualization and privatization of religion and new usages in activism and decision-making, but it has also entrenched conformity and compliance with religious authorities and dominant doctrines.<sup>29</sup>

Recent research confirms that online fatwas in particular have the potential to destabilise normative forms of religious authority, establish a "new manifestation of a Muslim ummah" (religious community) and inform and influence the legislative processes of incorporating aspects of Islamic law into the secular legal system for Muslims in minority contexts<sup>30</sup>, as well as contribute towards reforming trends in women's sexual health<sup>31</sup>. Online fatwas can therefore provide insights into ulama's "new *ijtihad*" (independent reasoning)<sup>32</sup> perspectives on contemporary lived realities of ordinary Muslims.

The very act of asking someone for a fatwa is the most explicit recognition of that person's religious authority. Ebrahim Desai exemplifies a scholar who, although being trained in non-Azhari institution outside of the Arab world, gained global recognition mainly through mass support accumulated via information and communication technology.<sup>33</sup>

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online discussions of gender relations in Islam." *Journal of Muslim Minority Affairs* 30, no. 3 (2010): 425-435.

<sup>28</sup> Gary R Bunt, *Islam in the digital age: E-jihad, online fatwas and cyber Islamic environments*. Pluto Press, (2003); Mohamed Chawki, "Islam in the Digital Age: Counselling and Fatwas at the Click of a Mouse," *J. Int'l Com. L. & Tech.* 5 (2010): 165; Larsen, "Men are the Protectors and Maintainers of Women," 200-205.

<sup>29</sup> Bunt, "Islam in the digital age", 2-6; Heidi A. Campbell, "Understanding the relationship between religion online and offline in a networked society," 64-93; Jens Kutscher, "The politics of virtual fatwa counseling in the 21st century," *Masaryk UJL & Tech.* 3 (2009): 33; Vit Sisler, "Cyber counsellors: online Fatwas, arbitration tribunals and the construction of muslim identity in the UK," *Information, Communication & Society* 14, no. 8 (2011): 1136-1159.

<sup>30</sup> Vit Sisler, "European Courts' Authority Contested: The Case of Marriage and Divorce Fatwas On-Line," *Masaryk UJL & Tech.* 3 (2009): 51; Sisler, "Cyber counsellors," 1152-3.

<sup>31</sup> Alexis Kort, "Dar al-Cyber Islam: Women, domestic violence, and the Islamic reformation on the World Wide Web," *Journal of Muslim Minority Affairs* 25, no. 3 (2005): 363-383.

<sup>32</sup> Kort, "Dar al-Cyber Islam," 363.

<sup>33</sup> Sisler, "European Courts' Authority Contested," 67.



Desai is identified as the author and acknowledged religious authority figure of askimam.org, where every fatwa on the site is approved and sanctioned by him.<sup>34</sup> He trained at two Deoband seminaries in India and is currently based in Sherwood, Durban, at *Darul-ifta al Mahmudiyah*, a training institute for muftis, where he teaches and from where all his fatwas are generated. The Deoband hanafi legal school in which Desai is located, is also shared by many established religious authority figures and structures in South Africa so that his fatwas provide insights into the religious thought and trends within the South African Deoband structures. Desai is arguably “master teacher”, and a survey of the structure of the fatwas on askimam.org reveal that while Desai’s students hail from different geographical locations, they generate the bulk of fatwas. As master teacher he is the final authority as indicated by the closing line at the end of each fatwa: “checked and approved by Mufti Ebrahim Desai”.<sup>35</sup>

Moosa<sup>36</sup> argues that in the madressa tradition, “master teachers” and their texts are valued and integral to the scholarly formation of apprentice students.<sup>37</sup> In this regard, Desai is affiliated with a host of linked teaching institutions, websites and publications which provide an online religious space and publications for ordinary Muslims and other scholars.<sup>38</sup> Desai also occupies prominent positions within various high profile *iftā* (fatwa-

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<sup>34</sup> About Us, askimam.org, [Online] Available at: <http://askimam.org/about>. [Accessed on 23 November 2015].

<sup>35</sup> In the foreword of his online publication Contemporary Fatawa volume 2, which is a compilation of selected online fatwas and accessible as a free download on the daruliftaa site, Desai says, “...most of the fatwas [herein] were answered by the students of the Darul Iftaa as part of their training in becoming Muftis” (see Desai, Ebrahim. *Contemporary Fatawa Volume 2*. Daruliftaa Mahmudiyah [online] n.d. Available from: <<http://www.daruliftaa.net/index.php/resources/publications/viewcategory/27-publications> >. [Accessed 30 October 2015].

<sup>36</sup> Ebrahim Moosa, *What is a Madrasa?* Chapel Hill: UNC Press Books, (2015), 125-126.

In this book Ebrahim Moosa traces the pedagogical roots and practices of the Deoband seminaries in India.

<sup>37</sup> Moosa describes three characteristics of the ideal “master teacher” as, first, being an example of acting on his knowledge, second, training students in the way Prophet guided his companions and, third, assisting a student to “imitate and internalize the exemplary conduct of the master- teacher”.

<sup>38</sup> The websites are listed as idealwoman.org, daruliftaa.net, and darulmahmood.org. Another affiliated website in which his fatwas, advice and talks are found is the UK-based Darulfiqh.com. Herein Desai’s additional credentials and involvement in various iftaa bodies are listed. Desai is also the author of “Contemporary Fatawa” vol 1 and 2 and numerous other publications on these sites.

making) bodies, indicating his potential influence on ulama structures in South Africa<sup>39</sup>

His website, askimam.org, is a well-organised, easily researchable site, which, like those in Muslim majority contexts, contains a range of fatwa, reflecting varying themes dealing with religiosity, piety and health. Answers on the website reflect the religious outlook of the Deoband Hanafi school of thought, are concise, and do not always provide substantial textual analysis and justifications.<sup>40</sup> The distinct feature is that answers generated on the website diverge from the ones in Muslim majority contexts, instead reflecting the contemporary challenges of Muslim minority contexts.<sup>41</sup> This is salient since scholars have noted that some fatwa sites in Muslim minority contexts are more open and pragmatic in dealing with contemporary challenges and others are more conservative and limited.<sup>42</sup> Studies on Desai's online fatwas make arguments for both conservative<sup>43</sup> as well as reforming<sup>44</sup> trends, the latter particularly on the issue of domestic violence.

In summation, we identify Desai and his website askimam.org as important features of the discursive Islamic landscape providing insights

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<sup>39</sup> DarulFiqh. 2012. Profile of Mufti Ebrahim Desai. Available from: < <http://darulfiqh.com/profile-of-mufti-ebrahim-desai-daamat-barakatuhum/>> [ Accessed 29 November 2015].

The darulfiqh website describes these positions as: "Executive member of KZN Jamiatul Ulamā (The Council Of Muslim Theologians), Secretary of Jamiatul Muftien (The Council of Muftis) – This is an organisation comprising of the senior Muftis of South Africa from 12 Darul Iftaa's, Head of the Fatwa Department of KZN Jamiatul Ulamā (The Council Of Muslim Theologians), Head of the Judicial Committee of KZN Jamiatul Ulamā (The Council Of Muslim Theologians), Official Arbitrator of commercial and marital mediations/arbitrations".

<sup>40</sup> Sisler, "European Courts' Authority Contested," 65-66.

<sup>41</sup> Bunt, "Islam in the digital age," 167-168; Kort, "Dar al-Cyber Islam: Women, domestic violence," 363-383.

<sup>42</sup> Chawki, "Islam in the digital age: counselling," 165-180; Kutscher, "The politics of virtual fatwa counseling," 33.

<sup>43</sup> Kutscher, "The politics of virtual fatwa counseling," 39. In an analytical comparison of fatwas dealing with Muslim perspectives of non-Muslims in a minority context, Kutscher describes askimam.org as "conservative" and "supporting counter-societal developments" probably due to the "mufti's ideological geographical and educational environment". He contends the apartheid system of "non-integration" may have somewhat contributed to the Desai's conservative and mono-doctrinal orientation.

<sup>44</sup> Kort, "Dar al-Cyber Islam: Women, domestic violence," 378-380. Kort's study on domestic abuse was the only one I located which focused on sexual health within the fatwas of mufti Ebrahim Desai on askimam.org, exposing a substantial gap in the research on how South African-based online fatwas are "telling stories" (Mathee M, "Womens agency in Muslim marriage," 26) on women's sexual health and to what extent contemporary experiences and social realities influence these fatwas.

into the changing relationship between legal argument and interpretation and people's social realities as portrayed in the fatwas. The anonymity provided by the online space allows for the generation of fatwas on a range of issues including sexual reproductive concerns. Recent research on askimam.org argues for both conservative and reforming trends on the website. Our analysis below shows further how these trends form part of the ongoing work of law in society, namely the alignment of classical fiqh or historical legal norms with contemporary social norms and expectations to produce modern ways of living.<sup>45</sup>

### **“If a Husband Ask to his Wife for Sex, and if she Refused Oftenly”**

Fatwa C<sup>46</sup> published on October 2009 is answered by one of Desai's students, Rayhaan Docrat, and reads as follows:

*Question: “ if a husband ask to his wife for sex, and if she refused oftenly, with reasons that she is not in mood, and after this, if husband indulge in some other immoral and sinful activities, then what would be position of both in front of ALLAH?*

*Answer: When a husband and wife make nikaah Allah Ta'ala grants certain rights and privileges to one over the other. It is the duty of the man to provide shelter for the woman and to take care of her needs. Similarly, it is necessary for the woman to obey her husband at all times and to respect his authority over her.*

*Rasulullah has mentioned*

*“If I had to command anyone to make Sajdah (prostrate) to another person, I would of instructed the woman to make Sajdah to her husband”*

*Rasulullah also mentioned*

*When a man calls his wife to bed and she refuses, he then spends the night upset and angry with her, the angels curse her till the morning.”*

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<sup>45</sup> Legal change is not novel to the online space. The commentary tradition in Islamic law is a historical form of legal writing which also illustrates a traditional form of legal change. For more detail see Mulla Jiwan's *Nūr al-Anwār* where his commentary on child custody actually changes the legal outcome for children of divorce. Jiwan, Mulla Ahmad ibn Abi Sa'id ibn 'Ubayd Allah al-Hanafi al-Sadiqi *Nur Al-Anwar Ma'a Hashiyat Qamar Al Aqmar*. Delhi: Kutub'khanah Rashidiyah, (1960), 286.

<sup>46</sup> Askimam.org. 2011. Fatwa # 18350, 2009. Available from:

< [http://www.askimam.org/public/question\\_detail/18350](http://www.askimam.org/public/question_detail/18350)>. [Accessed 15 October 2015].

*If a woman has a valid reason for not responding positively to her husband, she should discuss this with him.*

*If there is no valid reason for not responding to him, she should rather obey him and save herself from the curses of the angels. However, if she does not offer herself to her husband, it does not give him the right to abuse his chastity and to involve himself in any illicit relations. If he commits any evil or immoral act, he will be responsible for his own actions and answerable for it on the day of Qiyaamah....*

*And Allah knows best*

*Wassalaamu `alaykum*

*Ml. Rayhaan Docrat,*

*Student Darul Iftaa*

*Checked and Approved by:*

*Mufti Ebrahim Desai*

*Darul Iftaa, Madrassah In'aamiyyah*

A brief analysis of the dynamic of male sexual need and female responsibility tells us how the jurist views a wife's refusal. But first, the petition tells us how the male petitioner problematizes his wife's refusal. He makes a link between her refusal and his "immoral and sinful activities", and extends the consequences of her refusal to their "position in front of Allah". His question draws a direct link from her sexual refusal to their relationship with God. The Muftis response affirms this; the cursing angels are invoked "when he then spends the night upset and angry with her" to show a direct threat to the wife's God-believer relationship arising out of her sexual refusal. That threat becomes a coercive tool to prompt her into having sex.

This is further seen in an analysis of the petition in the other main fatwa under discussion in this paper, fatwa A<sup>47</sup> which originates from the UK, is answered by Desai himself and found in the website's category of marriage, dated Feb 2007. The male petitioner asks:

*" My wife got very law sexual desire. I want to have intimacy every other day or after week, she doesn't let me even touch her. I fill very bad and then I don't know what to do. Is there any sin when wife reject her husband. Can you please explain to me about this situation."*

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<sup>47</sup> Askimam.org. 2011. Fatwa # 17537, 2009. Available from: <[http://www.askimam.org/public/question\\_detail/17537](http://www.askimam.org/public/question_detail/17537)>. [Accessed 15 October 2015].

Here too the petition reveals a slippage in the dominant discourse of male sexual needs as a right towards one of female sexual assertiveness in the form of the wife's decision to refuse. She is constructed by the petitioner as both a powerful subject with agency in the sexual arena and as a powerless subject of the legal discourse, which portrays her as sinful if she does not fulfil her husband's rights by being sexually available. He seeks the mufti assistance to coerce his wife through juristic means to have sex with him, appealing to her pietistic commitment.

Confirming established research in this field,<sup>48</sup> further analysis of other petitions on askimam.org reveals that female petitioners evoke an internalised ethical Islamic voice over a legal one and simultaneously also display a pietistic commitment to the normative Islamic legal tradition as illustrated in the following excerpt from fatwa F in the sample.<sup>49</sup> Here the female petitioner who was sexually molested as a child feels forced into consummating her arranged marriage and resorts to the Mufti to argue for an annulment. She says:

*...My 'husband' knew about my traumatic childhood experience but forced kissed me and touched when I was sleeping..... I felt violated and hurt. I really do not like him, and I feel like I can't full fill my duty as a wife towards him. How can I love someone when I was forced into this .....“I know I won't be able to full fill my duty as his wife, it's not fair to me nor to him”....*

The analysis reveals a slippage as the wife simultaneously accepts and resists the dominant discourse of male need and female responsibility in favour of a subordinate discourse of an ethics of fairness in this context. This synchronic movement puts her in a subjective position of power in relation to the discourse of male sexual need.

The analysis also supported evidence in the literature that the internalized perspectives of male sexual need presented here in familiar hadith, is not acceptable by some women. This is evidenced too by the

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<sup>48</sup> Ahmed, Leila, *Women and Gender in Islam: Historical roots of a modern debate*. Yale University Press, (1992), 66. Ahmed theorised that Muslim women have internalized two Islamic voices and “two competing understandings of gender”: the pragmatic legal voice, in which marriage is deemed an institution of sexual hierarchy, and the ethical voice which is “virtually unheard by rulers and lawmakers” and which “stressed the importance of the spiritual and ethical dimensions of being and the equality of all individuals”.

<sup>49</sup> Askimam.org.2011.Fatwa#32362,2015.Availablefrom:

<[http://www.askimam.org/public/question\\_detail/32362](http://www.askimam.org/public/question_detail/32362)>. [Accessed 15 October 2015].

agentival roles played by both wives in fatwas A and C who refused to engage in intercourse because (as in the case of fatwa C) “she was not in the mood”, and in fatwa A, “she doesn’t even let me touch her”. Fatwa F further illustrates that this internalised perspective is sometimes also offset by a discourse of fairness. Determined by life experiences and their internalization of a pragmatic legal Islamic voice and an ethical voice,<sup>50</sup> some women evoke the ethical voice by negotiating, resisting or rejecting the discourse of female responsibility to fulfil male sexual need and instead enact their capacity to refuse.

In addition to revealing how wives in fatwas A and C, resist the *fiqh*-based gender norms, an analysis of other ancillary petitions on Desai’s website provide further glimpses into how Muslim wives are making choices in the sexual realm of marriage. Some women balance pietistic concerns with sexual desire, while others also resist the Deoband gender ideology,<sup>51</sup> thereby informing Desai and the other jurists of women’s contemporary experiences, expectations and understandings of marriage as relations of mutuality and reciprocity.

As an example of the former, the petition in fatwa S<sup>52</sup>, reads:

*During haiz if wife insist to have sex using condom when there is very little or almost no bleeding during the three days wait period of haiz.*

*Is it permissible in islam or not? There is no forcing or desire shown from husband for sex. It is only wife expectation.*

As examples of the latter, the petition in fatwa P reads<sup>53</sup>:

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<sup>50</sup> Drawing on Ahmed’s thesis, I argue that the petitioner’s argument in fatwa F can be understood in two ways. Firstly, she could be arguing that what is not fair to her is to be in a situation where she cannot fulfil her duty, and given her admitted failure to meet this duty on the basis of her diminished emotional and psychological capacity, she should also be released from the marriage. Secondly, she could be arguing that what’s fair to her is her right to refuse consummation and force, and to not want the marriage. Viewed both ways, she appeals to the ethical voice as described.

<sup>51</sup> This ideology is characterised by male domination and priority and female subordination and submissiveness to men, collectively considered as a divinely sanctioned social order. See: Ambreen Agha, “Religious Discourse in Tablighi Jama’at: A Challenge to Female Sexuality?” *International Journal of Multicultural and Multireligious Understanding* 2, no. 3 (2015), 1-16; Metcalf, Barbara Daly, *Perfecting Women: Maulana Ashraf Ali Thanvi’s Bihishti Zewar* (trans). Berkeley: University of California Press, (1990), 37.

<sup>52</sup> Askimam.org. 2011. Fatwa # 31509, 2014. Available from: <[http://www.askimam.org/public/question\\_detail/31509](http://www.askimam.org/public/question_detail/31509)>. [Accessed 15 October 2015]. See also fatwa # 28092, (hereon referred to as fatwa R) in this regard.

<sup>53</sup> Askimam.org. 2011. Fatwa # 28553, 2014. Available from: <[http://www.askimam.org/public/question\\_detail/28553](http://www.askimam.org/public/question_detail/28553)>. [Accessed 15 October 2015].

*“Have women only been created to satisfy their husbands? Is that the only reason to be a wife? So women don’t have any value?”*

Similarly the petition in fatwa Q reads<sup>54</sup>:

*How can something that has been created for something else be equal to it? I've always heard that men and women are equal in Islam depending on their actions, but I find it hard to swallow that the very nature of women is to be subservient to men?*

Returning to fatwa C, it is evident that when dealing with male petitioners' sexual needs, some jurists like Docrat respond using hadith sources to establish male sexual dominance and female obedience, and explain the dire consequences women invite if they refuse sex. In his narrative male sexual need and access to wives is prioritized to such an extent that female sexual availability is a central legal aspect to a Muslim marriage such that a wife's non-availability renders her in violation of the legal parameters of the marriage contract.

Fatwa C demonstrates that male sexual need and its link to divine approval, is a prominent societal and institutional discourse, and in accordance with the literature, is internalized by ordinary Muslim men and women, and muftis too. It is entrenched within the legal logic governing a Muslim marriage, to the extent that even in the face of women's pietistic concerns and instances of weakened physical health, it is prioritised.<sup>55</sup>

### **“Intimate Relation is a Mutual Issue between the Spouses”**

The legal logic governing marriage in the above fatwas is largely in line with traditional Deoband gender ideology which is characteristically

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<sup>54</sup> Askimam.org. 2011. Fatwa # 14847, 2007. Available from:

<[http://www.askimam.org/public/question\\_detail/14847](http://www.askimam.org/public/question_detail/14847)>. [Accessed 15 October 2015].

<sup>55</sup> In addition to fatwa F, we also refer to another fatwa G where a newly-wed female petitioner asks whether she can avoid washing her hair during the ritual purification required after sex, because the frequent sexual intercourse and subsequent ritual washing has created sinus problems and headaches for her. Citing a Hanafi textual source, the student mufti grants her a concession but still prioritises male sexual need in the face of her pietistic and biomedical concerns. (Askimam.org. 2011. Fatwa # 15104, 2007. Available from: <[http://www.askimam.org/public/question\\_detail/15104](http://www.askimam.org/public/question_detail/15104)>. [Accessed 15 October 2015].)

These fatwas are fringe examples which provide further insights into the entrenched idea that male sexual need is a priority and female availability is a responsibility, even in the face of women's pietistic concerns and instances of weakened physical health, thus further according with the literature and confirming that this a dominant discourse within the Muslim mind.

hierarchical. Below, a close reading of the response to the question in fatwa A reveals more than simple support for this legal logic. As noted above in fatwa C, Mufti Desai approves and sanctions Docrat's response suggesting he also subscribes to the legal logic in the fatwa. However in Desai's response to fatwa A which has a similar petition on a woman's sexual agency, and which he answers himself, it appears that Desai also conditions this gender ideology.<sup>56</sup>

In Fatwa A (the petition of which has already been presented above) Desai's response reads:

Intimate relation is a mutual issue between the spouses. Apart from the wife fulfilling her marital obligations, it is important that the husband takes the feelings, tempo etc. of the wife into consideration before becoming upset. By the husband forcing the issue upon the wife, sometimes it could create estrangement in the marriage. Instead of the husband worrying about the sin of refusing him his marital right, rather talk to her and enquire if she experiences any difficulty in doing so. By the husband forcing the issue upon the wife, she will eventually feel used for this purpose and become demoralized which could possibly ruin the marriage and complicate matters further.

His response to a petition from a Muslim minority context, the United Kingdom, might not seem remarkable until it is compared to student mufti Docrats response in fatwa C.<sup>57</sup>

Mufti Desai's answer does not wholly emphasise the fiqh-based gender norms. His answer is instead characterised by a shift away from the discourse of female sexual availability and male sexual right and wifely sin, toward mutuality even as he still remains loyal to the legal tradition. To theorise this shift with his concurrent loyalty, we offer an analysis that points to Desai's use of at least five strategies to guide the petitioner toward a discourse of mutuality. In so doing we argue that mufti's such as Desai, remain loyal to *fiqh*-based notions of male-female sexuality while simultaneously also conditioning the legal logic of dominion with an ethics of reciprocity and mutuality.

First, Desai's answer displays his awareness of the minority Muslim context (in this case both his context of South Africa as well as the petitioners context, the UK) where modern marriage is under social and political pressure to function on ideas of mutuality, and where petitions represent female agency and choice within the sexual realm of marriage.

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<sup>56</sup> For a description of the Deoband gender ideology, see footnote 51.

<sup>57</sup> Askimam.org. 2011. Fatwa # 18350, 2009. Available from:

< [http://www.askimam.org/public/question\\_detail/18350](http://www.askimam.org/public/question_detail/18350)>. [Accessed 15 October 2015]



Second, Desai's response is necessarily conditioned by his awareness that the classical law from which he sources his opinion subscribes to an imperative to preserve rather than dissolve an existing marriage. Third, Desai finds value in spouses communicating sexual concerns with each other and, fourth, he advocates what may be described as a benevolent masculinity. In the midst of these, Desai also brings attention to the issue of forced intercourse, an option which he does not outright negate, but discourages reflecting the Hanafi view that while it may be licit, it is nevertheless unethical.<sup>58</sup>

Of these five strategies, we provide a glimpse into three, i.e. the second, third and fourth, of the five strategies used by Desai, namely the Marriage imperative, effective sexual communication and a benevolent masculinity. We show first that by relying on two discourses, that of mutuality and emotional and psychological well-being, muftis like Desai are able to negotiate between the jurisprudential logic of marriage and the ethical considerations; and they remain committed to the former while also strongly inclining toward the latter.

## **Desai's Strategies**

### ***1-The Marriage Imperative***

In addition to the first strategy where Desai might be considerate of minority Muslim contexts where modern marriage is under social and political pressure to function on ideas of mutuality and reciprocity, where petitions illustrate female agency and choice within the sexual realm of marriage, his second strategy is to maintain the imperative to preserve rather than dissolve an existing marriage. For example, Desai stresses the marriage imperative through his attempts to relieve the petitioner's wife from coercion. He asks the husband not to "force the issue upon the wife," in case it creates "estrangement in the marriage". A few sentences later, he once again expresses concerns over the wife's emotions of being forced into sex and the resulting negative morale, which he says, could "ruin the marriage and complicate matters further."

Traditional Muslim thought, also central to the Hanafi Deoband ideology, considers marriage as a safeguard for chastity, and vital to the

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<sup>58</sup> Ali, "Sexual Ethics and Islam," 12.

development and stability of the family, and by extension, the well-being of society. In this respect, marriage is regarded as imperative and incumbent upon every physically and financially able adult Muslim man and woman. Numerous hadith in the corpus of Islamic popular literature on marriage are cited to encourage its uptake and preservation, while Quranic verses like Q 30:21 and Q 2:187, that attest to mutuality and reciprocity are also invoked.<sup>59</sup>

Desai maintains this marriage imperative by giving precedence to the wife's feelings and morale, possibly enacting a shift away from other juristic practice common in South Africa. Research in South Africa for example, reveals the more common experience to be that women are faced with a "marriage at all costs" approach by the ulama and expected to accept unjust and potentially dangerous marital relationships in the "spirit of reconciliation" even in instances of abuse and infidelity. Women report that they are unable to get assistance in exiting the marriage and that abusive husbands are ignored by some ulama, illustrating that the marriage imperative in these instances functions in opposition to mutuality and reciprocity to the degree that it also threatens a woman's well being.<sup>60</sup>

Desai's form of articulation of the marriage imperative in fatwa A potentially moderates the prominent male sexual rights discourse. He uses both a discourse of mutuality, and a discourse related to feelings and morale - the latter two being indicators of health and well-being. His position in this fatwa is in harmony with student Zakariyya Desai's approach in another fatwa D<sup>61</sup> of the sample. The mufti is faced with a question which reads:

*I got married 2 years ago but my wife seems to be unhappy. she says I do not satisfy her sexually*

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<sup>59</sup> Abdur Rahman I. Doi and Abdalhaqq Bewley, *Woman in Shari'ah: (Islamic law)*. Ta-Ha Publishers Limited, (1989), 31; Esposito, John L. *Women in Muslim Family Law*. NY: Syracuse University Press, (1982), 14-15.

<sup>60</sup> Nina Hoel, "Engaging religious leaders: South African Muslim women's experiences in matters pertaining to divorce initiatives," *Social Dynamics* 38, no. 2 (2012), 187-188. Hoel argues that due to the lack of agency experienced by women in terms of divorce, a "marriage at all costs" approach of the marriage imperative can severely hamper the sexual reproductive health choices of women in perilous marriage situations.

<sup>61</sup> Askimam.org. 2011. Fatwa # 16306, 2008. Available from:

<[http://www.askimam.org/public/question\\_detail/16306](http://www.askimam.org/public/question_detail/16306)>. [Accessed 15 October 2015].

In his response Zakariyya Desai says:

*At the outset, it is important that you consider the feelings of your wife in this regard. If she claims that you are not satisfying her, you should obtain professional medical advice on this issue. You are newly married and should avoid any type of resentment from your wife....*

The distinction is that Zakariyya Desai's response is in the context of prioritising female sexual satisfaction. He foregrounds the wife's feelings before dealing with the husband's biomedical health concerns later on in the fatwa particularly for the wife's sexual fulfilment. The newly married status of the couple has a bearing on Zakariyya Desai's answer, also influencing his interests in saving the marriage.

By relying on these two discourses, that of mutuality and emotional and psychological well-being, these muftis locate their answers away from the jurisprudential logic of marriage towards ethical exhortations that reflect Ali's observations earlier.<sup>62</sup>

## ***2- Effective Sexual Communication***

As additional features of mutuality in marriage, Desai in fatwa A also advocates for other strategies, such as an effective communication of sexual concerns between spouses. Docrat in fatwa C also advocates for this. Kodir argues that jurists may exhibit nuanced interpretive approaches in the fiqh to the 'cursing angels' hadith (also found in Docrats answer). This demonstrates that even as jurists use primary sources to buttress dominant discourses, they endeavour to allow women space to refuse sex and to allow for their sexual fulfilment, albeit minimally. Some interpretations of the "cursing angels" hadith for example, state that she will only be sinful and therefore cursed by angels dependent on her husband's emotions, like when he is angry at her refusal, while others suggest that she is "entitled to reject her husband's call for sexual activity if it is certain to hurt her, or if she is engaged in fulfilling a religious obligation". These alternative interpretations, argues Kodir, provide a glimpse into legal scholarly attempts to create "opportunities for the woman to enjoy sexual relations or refuse them".<sup>63</sup>

The mufti's proposals in this regard are in synchrony with a study done in India on young wives, that pointed to sexual communication as an effective strategy to prevent coercive sex and to afford young wives an

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<sup>62</sup> Ali, "Sexual Ethics and Islam," xxv.

<sup>63</sup> Kodir, Faqihuddin Abdul. *Hadith and Gender Justice: Understanding the Prophetic Traditions*. Cirebon: Fahmina Institute, (2007), 73-75.

opportunity to negotiate safe and voluntary sex. One of the key proposals of the study pointed to the provisions by policy makers of providing sex education to young women before they marry, in order to enhance their sexual communication.<sup>64</sup>

### ***3- A Benevolent Masculinity***

In yet another strategy towards mutuality Desai promotes a benevolent masculinity. Bjorn Krondorfer and Stephen Hunt maintain that attempts to reconfigure and alter masculinities so that women are not prejudiced requires unsettling the triad of patriarchy, namely power, hierarchy and privilege. They state, "power proclaims and enforces gender disparity, hierarchy maintains it, and privilege denies that such disparity exists."<sup>65</sup>

Using their approach, we suggest that Desai, even as he subscribes to and is located in a hierarchical model of gender relations, also attempts to unsettle the prevailing gender disparity and prompts the petitioner towards a form of mutuality. He is cognizant of male privilege within the discursive legal space of marriage, and attempts to displace it with a benevolent masculinity that empowers and enables the wife. He says, "...it is important that the husband takes the feelings, tempo etc. of the wife into consideration before becoming upset ...". Desai is aware of the gendered jurisprudential limitations placed on women in the context of sexual intimacy, and highlights the possible health and well-being repercussions of such limitations on the wife and ultimately the marriage and the family.

He nevertheless remains caught within the male privilege of the jurisprudential framework. For example, he continues to promote a benevolent masculinity that is embedded in classical jurisprudential doctrine associated with ideas of the wife's "marital obligations" and "sin" in rejecting her husband in both the petition and the answer. The idea that the wife has a mediated God-believer relationship, through her obligations to be submissive and obedient to her husband, and the threat of divine disapproval at her refusal, which becomes a coercive mechanism diminishing her human and spiritual wholeness within the bedroom, prevails.

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<sup>64</sup> Pande, Rohini Prabha, Tina Y. Falle, Sujit Rathod, Jeffrey Edmeades, and Suneeta Krishnan. "If your husband calls, you have to go': understanding sexual agency among young married women in urban South India." *Sexual health* 8, no. 1 (2011), 102-109.

<sup>65</sup> Björn Krondorfer, and Stephen Hunt. "Introduction: Religion and Masculinities—Continuities and Change." *Religion and Gender* 2, no. 2 (2012), 198-200.

Halkano Abdi Wario, in a study on the constructions of masculinity amongst the peripatetic men of the *tablighi* movement<sup>66</sup> suggests that by virtue of the apolitical stance of Deoband affiliated groups like the *tablighi jamat*, the hegemonic masculinity avoids “some of the most visible forms of masculine power in favour of non-political engagement, avoidance of heated debates of all nature, pacifism, and temporal delegation of household headship” with the result that an ambivalent mix of different facets of masculine power exists in parallel with a normative subservient and subordinate femininity. These are entrenched in the gender ideology of the *tabligh* movement. In his study, Wario theorises the existence amongst the peripatetic Deoband *tabligh* men, of a fluid, alterable and reconstructable masculinity through a “transnational flow of practices of how to be proper Muslim men”.<sup>67</sup> We argue that Desai in this fatwa A and Zakariyya Desai in fatwa D provide similar options for masculinities in the transnational online space. Thus a similar mobility and fluidity of ideas of a benevolent masculinity is enacted in the transnational online space of askimam.org, potentially conditioning the hegemonic masculinity and in so doing, facilitating women’s agency.

## Discussion

The petitions in the above fatwas demonstrate that by negotiating, resisting or rejecting the discourse of female responsibility to fulfil male sexual need, women are making sexual choices informed by an ethics of mutuality and reciprocity. Some enact their capacity to refuse (fatwas A and C), and when these choices prove problematic for their partners, husbands may evoke the legal discourse of female responsibility to fulfil male sexual need, and frame these choices in the context of a spiritual threat - namely the suggestion that the choice not to have sex has consequences for the piety of a wife and her husband. Ancillary fatwas reveal that many women also balance pietistic concerns with sexual desire (fatwa S), and some are challenging the gender hierarchy in Muslim marriage (fatwas P and Q). The petitions also reveal that like the wives in the fatwas, some husbands too are concerned with mutuality in sexual relations (See fatwa D). Spouses continue to remain committed to

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<sup>66</sup> For an explanation of this movement, see, Goolam Vahed. "Changing Islamic traditions and emerging identities in South Africa." *Journal of Muslim Minority Affairs* 20, no. 1 (2000), 43-73. Vahed describes the *tabligh jamaat* as a proselytizing, pietistic, grassroots movement which is an offshoot of the Deoband movement, allied to it, and concerned with providing religious guidance on all matters. It is always led by Deoband-trained or Deoband-affiliated ulama.

<sup>67</sup> Halkano Abdi Wario, "Reforming Men, Refining Umma: Tablīghī Jamā'at and Novel Visions of Islamic Masculinity." *Religion and Gender* 2, no. 2 (2012), 253.

the classical legal tradition of Muslim marriage, even as they grapple with the dissonance it introduces with their expectations of mutuality within marriage (see analysis above of fatwas D, F, G).

Called upon to provide solutions to problems arising out of this dissonance the responses in the fatwas reveal how some muftis negotiate the complex networks of power in the discourses of male and female sexuality, modulating these with discourses of mutuality and reciprocity, ideas of fairness, and concerns for women's health and well-being. The analysis reveals that muftis' responses mirrored two interconnected observations made by Ali. The first is that even conservative muftis include concepts of reciprocity and mutuality in their responses. Second, "a strongly gendered understanding of male-female sexuality... [continues to permeate]...much contemporary Muslim discourse, including that produced in Western contexts".<sup>68</sup>

It could be argued that like some petitioners, some muftis on askimam.org, too, remain true to the classical Islamic legal tradition, but also understand that the sexual desires, expectations and experiences of ordinary Muslims within modern contexts function within the discourses of mutuality and reciprocity, ideas of fairness, and concerns for women's health and well-being.

Gregory Kozlowski argues that "fatwas are often significant for what they cannot or will not say, as well as for what they actually communicate".<sup>69</sup> Thus, we maintain that the absence of legal rationales and foundational sources in fatwa A as well as Desai's silence when dealing with a wife who refuses sex for no "valid" reason could be construed as the muftis tacit consideration for her resistance to one of the most essential dictums of a Muslim marriage - that of male sexual access and female sexual availability. Hence some muftis on askimam.org may realise that an undue reliance in their answers on distinctive gendered perspectives of male-female sexuality found in foundational sources will prove counterproductive to keeping the marriage intact and subsequently maintaining the stability of the family. This explains the trend to downplay male sexual rights and female sexual availability and the trend to rely instead on discourses of mutuality, reciprocity, fairness and well-being. In doing so they meet the lived realities of petitioners and their spouses and provide a means to navigate between the two paradigms of a Muslim marriage, moving from the legal, where ideas of dominion

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<sup>68</sup> Ali, "Sexual Ethics and Islam," 9.

<sup>69</sup> Gregory C Kozlowski, "A Modern Indian Mufti," in *Islamic legal interpretation: muftis and their fatwas*, eds. Muhammad Khalid Masud, Brinkley Messick and David Powers (Cambridge Mass: Harvard University Press, (1996), 247.

produce undue systems of control in Muslim marriage, towards the ethical, where ideas of mutuality and reciprocity preside.

## Conclusion

Considered as discourses between petitioners and mufti's, these fatwas and those in the larger study form an important component of the discursive Islamic tradition<sup>70</sup> providing glimpses into the "dynamics of continuity and change" within it.<sup>71</sup> This paper demonstrates that when called upon to provide solutions to problems arising out of the dissonance experienced by wives and husbands in minority contexts between *fiqh*-based marriage norms and modern lived realities, muftis maintain a continuity with past legal pedagogies and practices which determine Muslim marriage as dominion. However, they also offer remedies in the idiom of present day concerns, where ordinary Muslim men and women's lived experiences of marriage are infused with ideas of mutuality, reciprocity, fairness and well-being. In the long term, this practice may predict the possible future reformulations of an ethics of marriage as mutuality and wellbeing.

Contrasting with scholarship which regards some of Desai's formulations on gender relations in marriage as revolutionary<sup>72</sup>, this paper concludes instead that the framework of the fatwas featured herein remain within the traditional legal logic of male-female sexuality in marriage, and while they may promote change, muftis do not intend them to be revolutionary. Based on these findings here, the paper concludes however that through a reliance on the ethics of marriage and health and well-being located in notions of reciprocity and mutuality, some husbands, wives and muftis in online fatwas like those of askimam.org co-enact a discourse of jurisprudence on sexuality within contemporary Muslim marriage which is potentially partial to women's concerns.

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<sup>70</sup> I draw on anthropologist Talal Asad's reflections on Islam as a 'discursive tradition'. Asad asserts that this tradition consists of discourses which seek to instruct on the proper form and purpose of a practice which is established and therefore has a history. These discourses relate in a conceptual way to a *past* wherein the practice is instituted and established, and is important for understanding and reformulating the *future*, in which the said practice and its goal can best be secured or modified or abandoned. This occurs through a *present*, how the practice "is linked to other practices, institutions and social conditions". See Talal Asad, "The Idea of an Anthropology of Islam," Washington, DC: Georgetown University Center for Contemporary Arab Studies, *Occasional Papers Series* (1986), 20.

<sup>71</sup> Larsen, "Men are the Protectors and Maintainers of Women," 202.

<sup>72</sup> In demonstrating Desai's position on domestic abuse in a particular fatwa, Kort refers to Desai's formulation as the "most revolutionary step towards Islamic reformation on the issue of violence against women" (Kort, "Dar al-Cyber Islam," 378).

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