

Judicial Reform vs Adjudication of Personal Law

View from a Muslim Ghetto in Kanpur

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A keen understanding of the intricacies of the procedural aspect of personal law and internal hierarchies/fissures within the community in question need to guide our vision of judicial reforms. Considering the bias that exists in terms of class, caste, gender and religion in the implementation of law, one wonders what would be the real gains of bringing personal law more and more within the purview of the policing system. This article looks at cases brought by Muslim women to the Kanpur *darul qaza* seeking maintenance and/or divorce and finds that these women do not lack agency. They also approach different legal forums to resolve their personal and domestic issues.

The majority judgment of the Supreme Court that struck down triple talaq as unconstitutional has been welcomed as an important step towards ameliorating the plight of Muslim women and is indeed a landmark legal victory. Yet, many have expressed their unhappiness about the fact that the verdict was ambiguous, made ample room for personal law, and did not do enough in terms of upholding the constitutional rights of Muslim women (Mehta 2017). We would like to draw attention to a few observations that have emerged from two years of fieldwork at a sharia court or *darul qaza* (literally, place where the qazi sits) situated in a large Muslim ghetto of Kanpur.¹ We argue that what is lost in the current discourse is the truism that personal law is a matter of resolving “personal” problems as much as it is a matter of “law.” They are enmeshed in kinship rules, household economics, and family intrigues. Here, litigants work towards resolution where privacy, expediency, and negotiation are the key terms. The question of personal law, therefore, needs familiarity with the processes through which Muslim women (and men)—especially those belonging to the lower rungs of socio-economic hierarchy—resolve their family and property disputes, obtain divorce and custody.

While the media and public discourse have remained focused on the constitutional validity of certain practices in Muslim personal law, there is very little clarity around the question: how are Muslim family and civil cases adjudicated in India? The procedural aspect of Muslim personal law is a black box even for those well-conversant with the contemporary discourse on law and Islam. Feminist legal scholar and women’s rights lawyer Flavia

Agnes noted that during the six-day hearing on triple talaq in May 2017, it became apparent that even the legal luminaries had not “done any research about the situation prevailing on the ground” (Agnes 2017). Yet, in recent years there has been research that shows how adjudication in family matters takes place in collocation between civil, social, and religious forums (Lemons 2010; Solanki 2011; Vatuk 2014, 2017). For example, Gopika Solanki’s fine-grained analysis documents how legal practice is localised and decentralised by multiple legal actors such as lawyers, clergy, family members, religious organisations, sect councils, women’s organisations as well as the doorstep courts, such as residential committees and women’s ad hoc groups (Solanki 2011).

In July 2014, the Supreme Court had displayed both knowledge of local practice as well as practical wisdom when it rejected a public interest litigation (PIL) brought by a Hindu lawyer for banning all sharia courts operating in India. The apex court rejected the plea and argued that the sharia court was an effective “arbitrator, mediator, negotiator and conciliator in matters of family and civil disputes” and were not in conflict with the secular judiciary (*Vishwa Lochan Madan v Union of India 2005 Writ Petition Civil No 386*). In fact, the judgment gave recognition to these religious adjudication units as part of what is known as “alternative dispute resolution” (ADR) forums in the legal landscape of family law in India. These ADR units used by women follow a certain trajectory. A Suneetha and Vasudha Nagaraj’s (2010: 457) research in Hyderabad has documented how Muslim women take their complaint to “natal families, community leaders, local caste *sanghams* (councils), *basti*-level women’s groups and influential local personalities (often in this order) before even approaching a family counselling centre, let alone a local police station (see also Vatuk 2013).

Practical Counsel and Adjudication

In Kanpur, a *mahila thana*, Lok Adalat, and a mediation unit associated with the family court function to redress family disputes. In our field, we found that

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Muslim women routinely resolved their family conflicts by approaching (sometimes simultaneously) civil courts, darul qazas as well as local, neighbourhood forums for redressal and help. A case that was resolved at a mahila thana was brought to the darul qaza due to non-payment of maintenance promised by the husband. The wife accused the husband's sister of "controlling" her husband and finally the case ended in divorce. This was not atypical. Very often, women came to the darul qaza for *khula* (a provision in Islamic law by which a wife appeals for divorce) when the husband faltered on paying the maintenance decreed by the family court. In several cases, they lodged dowry harassment/domestic violence complaints under Section 498A of the Code of Criminal Procedure (CrPC) and at the same time approached the darul qaza for *khula*. In this context, Section 498A exerted pressure on the uncooperative husband to show up at the darul qaza. So far as adjudication of personal law was concerned, these multiple forums gave women the agency to decide which forum to approach in order to redress their familial conflicts/troubles. Moreover, they used the rulings of a forum to argue their case in another judicial forum.

At times, women also decided not to approach any of these legal or religious forums and take their case to the neighbourhood (mohalla) committees for resolution. A woman interviewed at the Kanpur family court pointed out that she was withdrawing her divorce case and taking it to the committee (*jamaat*) in her neighbourhood. Her wedding (*nikah*) had taken place there and all the people knew her well. She was confident that she would receive a better (and faster) settlement in her neighbourhood *jamaat* than in the family court. Cases also travelled from the darul qaza to the mohalla in order to reach a settlement. A complicated case was brought to the darul qaza where the husband had eloped with his wife's younger sister but refused to divorce the elder sister. There were conflicting accounts of the husband's and the younger sister's "shameful" conduct and the qazi could not reach any resolution. At this point, the wife's family convened a mohalla panchayat.

A settlement (*samjhauta*) was drawn up where the plaintiff (the elder sister) was released from the marriage and her younger sister was declared to be the wife. Our interviews with the community leaders in the ghetto suggest that a very large number of disputes were regularly resolved with the intervention of the family members of the conflicting parties. The leaders and notables of the community also played the role of mediators and effective negotiators.²

At the Kanpur darul qaza where we collected more than a hundred cases, close to 95% of the cases were brought by women. Why did they come to the darul qaza? Women came to seek maintenance (*kharcha*) from their husbands and if the husband was unwilling or unable to provide maintenance, she could file for divorce (*khula*). At the darul qaza the most common grounds for divorce were domestic violence and non-payment of maintenance: both religiously valid grounds for women to obtain divorce. In several cases the qazi annulled the marriage invoking *faskh* (a mode of divorce where the husband's consent was not necessary) if the husband was missing, or found not fulfilling duties to his wife. Divorce, we found, was also granted on charges of the husband's impotency. At times, the darul qaza adjudicated on property redistribution as women preferred it over civil court for its inexpensive and expedient nature. The quiet, non-descript building situated within the mohalla was perceived as a space women could access with ease. For them it was like an extension of the private domain where they could speak their mind and state their "real" problems without worrying about the legal merit of their arguments.

The qazi's role was not only to adjudicate but to play the peacekeeper and counsellor for warring family members. Strains in conjugal relations are very often rooted elsewhere—in the matrix of kinship. A large number of vicious fights were between sisters-in-law: emotionally charged battles for family resources and affect. In one case a stepmother came with the complaint that she was thrown out of the house by her stepdaughter. In a long-drawn case, the mother and her children teamed up and fought with

the husband who they accused of having an extramarital affair. Once on a hot summer afternoon, two sisters—tearful and scared—rushed inside the darul qaza. As they sobbed, they told the qazi that their brother was abducted by his brothers-in-law. The qazi consoled them and asked them to immediately report it at the local police station. In this case his role was simply to offer good counsel and practical guidance. Real life personal troubles needed this goodwill as much as it needed reformed personal law.

Kinship Issues Across Communities

The triple talaq judgment might see a sharp increase in court cases brought by wives contesting divorce by triple talaq and seeking maintenance from their husband. But we need to wait and see how it would work in the lives of the women who have been at the receiving end of this unjust practice.³ Researchers and activists working closely with local communities have often shown the counter-intuitive consequences of legal rights and judicial reform. Jeffery (2001) had found that despite having very different legal standing, there was hardly any difference in the hardship that Muslim and Hindu women of rural Uttar Pradesh faced when their marriage failed. It was family, kinship, and custom that take care of the lives of the poor, rural women and there was no difference in their social standing whether they were Muslim or Hindu (Jeffery 2001). As we bring in legal reform we also need to understand the context of personal law: the intricacies of kinship, property, and poverty. The varying legal outcome of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (MWA), which was brought in the aftermath of the Shah Bano judgment, is a good example to clarify this point. Surprisingly, the act which was perceived as being anti-women, was found to be used by judges to give divorced Muslim women a "reasonable and fair" compensation. At times, their rights under the MWA were more than what they could have received under any other personal law as well as Section 125 CrPC (Agnes 2001; Solanki 2011). Yet, Vatuk's research shows that while the

MWA works for families with economic means, for the poor, it becomes an impossible task to get the order executed as the husband—without work or regular income—does not have the capacity to pay the agreed upon amount (2017: 265). These findings caution us that we should keep a watch on varying judicial outcomes of legal reforms, especially in the lives of the precariat.

The argument is not to deny the necessity of reform in ascertaining the rights of women, but to ponder what should be the site of that reform. Those engaged in the struggle of Muslim women such as the Bharatiya Muslim Mahila Andolan, the All India Muslim Women Personal Law Board as well as those standing for Muslim personal law represented by the All India Muslim Personal Law Board, have come up with their versions of gender-just model *nikahnama* or marriage contracts. We asked a community leader in the locality where the Kanpur darul qaza is located why these model *nikahnamas* are not being used. He pointed out that the people approach the local imams for conducting marriages. They struggle to make ends meet and the religious specialists themselves hardly know anything, let alone about the model *nikahnama*. The urban blight that we walked through to reach his house substantiated his claim. Codified texts, however carefully drafted, wilt in these labyrinths of collective unemployment, underemployment, and poverty.⁴

A keen understanding of the intricacies of the procedural aspect of personal law and internal hierarchies/fissures within the community in question need to guide our vision of judicial reforms. Moreover, in India, where disputes are first brought to the police, the distinction between civil and criminal cases remains blurred and intertwined. The criminal law provides unbridled discretionary power to the police. Considering the bias that exists in terms of class, caste, gender and religion in the implementation of law, one wonders what would be the real gains as we bring personal law more and more within the purview of the policing system (Verma 2001). Research from family courts show that the legal professionals themselves do not always

have clarity about the various provisions in law and how they may be used to the litigants' benefit (Vatuk 2017: 252). How would the recent judicial reform in personal law be enforced and implemented is something only time can tell. In the current discourse, we are constantly pitting constitutional law versus personal law, freedom versus religion, Article 14 versus Article 25; emergent from a compartmentalised understanding of Muslim women's lives, as the actual struggles of these women remain as "objects of reform," bereft of agency.⁵ Yet, ethnography shows how women resolve their myriad personal troubles at different legal forums, including those considered as bastion of Islamic patriarchy. In the celebration of our judicial victory, we should not forget that citizenship rights and internal reforms, including socio-economic ones have to go hand in hand. Unpacking the monolith that goes by the name of "Muslim community" as well as dusting the pages of the Sachar Committee report might be a good way to start.

NOTES

- 1 These darul qaza function as extrajudicial dispute resolution centres. Fieldwork at the darul qaza affiliated to the Jamiat Ulema-e-Hind was conducted between December 2014 and January 2017. Both the qazi and the assistant qazi were trained at Dar al-Ulum Deoband, an Islamic seminary of higher learning. The darul qaza is functional for two to three hours on Sundays. The qazi is a schoolteacher whereas the assistant qazi teaches at a madrasah. They considered their service at the darul qaza as voluntary engagement that accrued religious merit. They do not draw any remuneration for the work. There are a few other darul qaza in the city affiliated to different sectarian divisions but we found that they do not function regularly. A few cases were also followed at Parangi Mahal in Lucknow as well as the family court in Kanpur. Currently we are conducting in-depth interviews with the residents and leaders of the ghetto.
- 2 Srimati Basu's research on family courts and mediation units attached to police station also demonstrates how civil society actors—local influential citizens, social workers, non-governmental organisation (NGO) personnel and respectable professionals—who do not possess any civil or criminal enforcement powers effectively defused hostility between contending couples and ensured clients' compliance with the negotiated settlements (2016: 318).
- 3 Faizan Mustafa, commenting on the nuances of this issue, has pointed out the impossibility of judging marriage (and its failure) with the yardstick of constitutionality (11 May 2017). Maintenance is a different issue but who would like to continue with a failed marriage? The women we interviewed in the neighbourhood after the triple talaq judgment were categorical about the fact that if a husband pronounces triple talaq, the wife's family members would never let their daughter/sister continue to stay at her matrimonial home.

- 4 Faisal Devji has recently argued that "just as Hajj is non-controversial for the most part, because it is state regulated, non-sectarian and efficient, so too might personal law become if properly administered by the Government and effectively de-politicised" (8 September 2017). Though appealing, the problem with the proposal lies in fathoming: how does one "administer" personal law and to whom? While in the ritual sphere sectarian competition between Bareilvis and Deobandis is well known, in kinship, caste-like *biradari* dominates. The question therefore remains, how do we "administer" personal law to a "Muslim community"?
- 5 A Suneetha has shown how this binary between citizenship and community breaks down in the lives and work of Muslim women activists who use the Islamic concepts of *haq* and *taleem* to inculcate a sense of self-reliance and moral responsibility in bringing changes in the fields of "education, family dispute resolution and economic survival of Muslim women" (2012: 60).

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