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Suchandra Ghosh/Anindita Chakrabarti

Religion-based 'Personal' Law, Legal Pluralism and Secularity

A Field View of Adjudication of Muslim Personal Law in India

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Leipzig University
HCAS "Multiple Secularities – Beyond the West, Beyond Modernities"
Nikolaistraße 8–10
04109 Leipzig
Germany

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"Talaaq to day rahay ho Nazar-e-qehar ke saath
Jawani bhi meri lauta do Mehr ke saath."

(As you divorce me with rage in your eyes
I want back my youth along with my alimony.)

Meena Kumari (Indian actress)

Introduction

In a matrimonial dispute that we came across in 2015, a woman approached the Darul-Qaza (also known as the Sharia court) in Kanpur. Her complaint was against her husband who had remarried, leaving her and two children to fend for themselves. She had a ruling from the Kanpur Family Court that allocated maintenance for her children but this had very soon proved ineffective as her husband had stopped paying the stipulated amount. When he was summoned to the Darul-Qaza, the husband argued that he had bought an apartment and registered it in the plaintiff's name. The wife alleged that her husband had been refusing to divorce her because of their children and yet was negligent to them. The qazi arbitrated and negotiated between the parties, and a settlement was drawn up that ordered the husband to bear the responsibility of his wife and children. When the husband failed to fulfil his promises, he was summoned again. The qazi reminded him of the agreement and warned him that if he again faltered in fulfilling his financial commitment, the qazi would invoke *faskh*[1] and dissolve the marriage. In India, where religion-based personal (family) law is followed, the sites of adjudication are civil courts. There are also scattered Darul-Qaza and other religious adjudication sites which function as alternative dispute resolution sites. In the case described above, the plaintiff had a ruling from the Family Court but when her husband did not honour the ruling, she

1 A divorce invoked by a qazi where the husband's consent is not required.

approached the Darul-Qaza. The petitioner exercised her agency to pursue her case at a religious forum to achieve the desired outcome.

In this paper, we show how this plural legal landscape is negotiated by litigants, especially women, and thereby illustrate the procedural interplay between civil and religious courts through this adjudication process. The ethnography of adjudication at the Darul-Qaza situated in a large Muslim neighbourhood in Kanpur and the institution's intersections with the societal (We mean the tribunals that function at the neighbourhood or community level) secular courts show how Muslim personal law functions. In this paper, we identify both the links between the Darul-Qaza and civil courts, and the processes of evidence making and legal reasoning that are integral to this interlegality. We argue that the issue of personal law should be understood within the post-colonial legal structure of India and with a good understanding of the processes through which disputes in the delicate area of family, affect and kinship are addressed and resolved. The above case shows how resolution occurs in a family dispute when plural institutional mechanisms are at work. This paper explores the adjudication process at a Darul-Qaza to understand how religion-based family laws get constituted as litigants seek both religious counsel and civil authority.

In post-colonial multicultural nation-states, the judiciary must strike a balance between 'legal universalism', which is invested in the idea of universal citizenship, and 'legal pluralism' through affirmation of the rights of religious minority groups and socially backward communities.[2] In such societies, the dialectic between the law and custom, and thus between the political secularism of the state and the religious practices of multicultural social groups, raises questions about the concept of secularity itself. This paper looks at adjudication processes in Muslim personal law to understand how religion-based family law functions through social, religious and state courts to mitigate disputes and deliver 'justice' to the parties involved. Scholars of legal pluralism have often argued in favour of a shift from the study of doctrine to that of legal practice, to the institutional aspects of law, judicial processes and the litigants' viewpoints. However, empirical research on this subject is scant. Ethnographic research in India has rarely

2 Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context," in *Religion and Personal Law in Secular India: A Call to Judgment*, ed. Gerald James Larson (Bloomington: Indiana University Press, 2001), 36–38.

engaged with the following questions: how do the practitioners reconcile their personal laws with the directives of a modern constitution or the stipulations of its legal imperatives? How do adjudication and the modality of decision-making help us comprehend the balancing between the law, religious codes, and local customs by the qazis and judges? And finally, what does this plural legal landscape suggest about the concept of secularity in a multicultural, constitutionally secular post-colonial nation-state?

Though feminist scholarship of the 1970s and 1980s drew attention to the dichotomous situation between state and non-state law in India, there has been little scholarship on the complex interactions in the realm of ideas and discourses between state law and the wider realm of cultural practices that are constitutive of the Muslim personal law.[3] The literature on legal pluralism has introduced new frames for understanding the relationship between state law and personal legal systems.[4] In this paper, we argue along this line of ethnographic work, rather than revisiting the Uniform Civil Code (UCC) versus personal law debate in India. This discourse revolves around concerns for the unity and integrity of the post-colonial nation-state as well as minority rights and gender justice. What has not been addressed is how religion-based family laws and disputes in the domain of marriage, divorce, custody and inheritance are resolved in practice.

The history of Muslim personal law in India has long included parliamentary debates, activism by right groups and law-making. However, the narrative has paid scant attention to social configurations of law and processes of conflict resolution. This paper is an attempt to focus on interpretations of Muslim personal law and their everyday implications in dispute resolution. How does Muslim personal law actually work in matters of marriage, divorce and inheritance? How often do litigants use a combination of civil law and social and religious forums to address and resolve their familial conflicts? As this paper shows, we need to understand the broad socio-legal landscape that covers disputes under Muslim personal law. Drawing on cases brought to the Darul-Qaza in the city of Kanpur,

3 See Sagnik Dutta, "From Accommodation to Substantive Equality: Muslim Personal Law, Secular Law, and the Indian Constitution 1985–2015," *Asian Journal of Law and Society* 4, no. 1 (2016): 221.

4 See Katherine Lemons, "At the Margins of Law: Adjudicating Muslim Families in Contemporary Delhi," (PhD Thesis, University of Berkeley, 2010); Gopika Solanki, *Adjudication in Religious Family Laws Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (New Delhi: Cambridge University Press, 2011).

the paper provides a field view of dispute resolution and the plural legal landscape under the rubric of Muslim personal law.

The first section of the paper details the historical background to the development of Muslim personal law. The second section situates our field study in a Muslim neighbourhood of Kanpur, and details the plural legal structures – the religious and the secular tribunals settling matrimonial and property disputes. The third section elaborates on the judicial reasoning that informs and guides legal praxis at the Darul-Qaza; the intricacies of adjudication that address matters of kinship and inheritance. The fourth section discusses the different trajectories of dispute resolution in familial and matrimonial disputes, and the innovative procedures that involve both religious and secular judicial forums in conflict resolution. The paper shows through the area of religion-based family law in India how the concept of secularity is constituted as religious and civil rights are negotiated by practitioners at different forums of dispute resolution.

1 Muslim Personal Law, its Development and Reform: A Historical Account

The East India Company established its rule in the Indian subcontinent following the Battle of Plassey in 1757. Before that, the legal order in India had been pluralist with the local authorities responsible for dispute resolution. The East India Company interfered in judicial proceedings only where its business interests were affected. Thus, 'rule of law' meant commercial order and not the law in a systematic, and codified sense. In 1673, the governor of Bombay, Aungier, established panchayats or village councils and gave them judicial powers to decide "cases amongst persons of their own castes who agreed to submit the controversies to their arbitration." In 1694, the governor of Bombay commissioned a qazi "to be Chief Judge and decider of all differences that may happen in your caste-the Moors" (Muslims). Such multiple and parallel systems of local adjudication were of no concern to the British in South Asia until well into the 18th century. The British judicial process was limited to forts and factories at Calcutta, Bombay, and Madras and was intended only for royal subjects.

The East India Company gained military control and was granted the status of Diwan of the Mughal Emperor. Under the new regime, British officers supervised adjudication by indigenous jurists, pandits and qazis. The British officers did not know the local language and customs but were aware that their acceptance was not equivalent to the local authorities. The British officials undertook the task of translating and publishing Islamic and Hindu legal texts. They translated both the texts and concepts into English, remodelling them around British judicial assumptions. Subsequently, the decisions of the qazis came to be increasingly bound by precedents. The process of translation of what the British considered authoritative legal texts led to codification and systematisation, which separated substantive law from procedural law. In this process, Orientalist presumptions and utilitarian ideals entered the dialogue.

Historians have argued that the East India Company's delineation of jurisdictions narrowed the scope and flexibility of legal practice during this period. By incorporating the qazis into a bureaucratic structure, the company delegitimised other local options for adjudication. In this period, South Asian Muslims found themselves at a greater distance from the law they had formerly lived by. The Indian Code of Criminal Procedure (1862) relegated indigenous jurists to the role of court officers who assisted the jurists. Subsequently, Muslim assistants were debarred from colonial courts and Persian legal titles were dispensed with. The 1872 Evidence Act removed the Islamic legal elements of testimony and evidence from 'public law'. Nevertheless, elements of Islamic law were retained in a rigid form as 'personal' code governing Muslims.[5] In the post-colonial context, Muslim personal law exists within the institutional framework of civil law, which works in combination with socio-religious forums. The secular state governs Muslim personal law as seen by the fact that the state has been introducing legislative and judicial reforms to the domain of Muslim personal law since the 1980s.

In the colonial context, Sharia based law underwent transformation through reform and codification. Stripped of its social and institutional underpinnings, traditional substantive law was modulated as it was applied

5 See Alan Scott Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 259–61.

in different social contexts.[6] In other words, the transformation of Sharia based law in the colonial context followed entextualisation. Although the change facilitated administration for the East India Company, the outcome was a curious transformation of *fiqh* that evolved into state law. Whereas Sharia had depended on cooperation between customary and royal law with a plurality of opinion as its defining feature, with the formation of the modern state, Sharia came to occupy a peripheral and marginal space as opposed to the substantive juristic interventions in the colonial context.[7]

In the 1920s and 1930s, women (We deliberately choose women over female as the suggested word sometimes carries a derogatory connotation in academia) activists, women's organisations and Muslim religious leaders called for social transformation through legal reform. In 1929, the All India Women's Conference (AIWC) passed a resolution calling on the Indian government to address questions such as inheritance, polygamy, and the divorce rights of Muslim women. The 1937 Shariat Application Act declared that Muslim personal law would apply to Muslims in all questions regarding intestate succession (barring those relating to agricultural land), including property inherited or obtained under contract or gift or any other provision of the personal law. This was followed by 1939 Dissolution of Muslim Marriage Act, which aimed to consolidate and clarify the provisions of Muslim law regarding suits for marriage dissolution. The act stipulated the conditions under which a Muslim woman could divorce and stated that the renunciation of Islam or conversion to any other religious faith could not be a ground for divorce. Under the Hanafi school of Muslim law, a woman could not pursue marriage dissolution in the case of neglect by her husband or absence of maintenance from her husband. However, the act drew from the Maliki school of law that warranted a Muslim woman's right to approach a judiciary with a divorce appeal if the whereabouts of her husband were not known for four years or on failure to provide maintenance.[8]

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6 See Wael B. Hallaq, "Islamic Law: History and Transformation," in *The New Cambridge History of Islam*, ed. Robert Irwin (New Delhi: Cambridge University Press, 2000).

7 See Hallaq. "Islamic Law," 169–76.

8 For a detailed history of the legal enactments, see: Rohit De, "Mumtaz Biwi's broken heart: The Many Lives of the Dissolution of Muslim Marriages Act," *Indian Economic and Social History Review* 46, no. 1 (2009); Eleanor Newbegin, "The Codification of Personal Law and Secular Citizenship: Revisiting the History of Law Reform in Late Colonial India," *Indian Economic and Social History Review* 46, no. 1 (2009); A. Suneetha,

Other colonial-period legal reforms had a deep impact on personal law in post-colonial India. In 1898, Chapter XXVI of Section 488 of the revised Indian Penal Code used 'vagrancy' to address the plight of impoverished women and children, making those without income and assets the responsibility of their husbands and fathers. The financial burden of maintaining women and children was unequivocally placed on the family and not on the state. Twenty-six years after Indian independence, the term 'wife' was expanded to include all women who had been divorced and not remarried. Responsibility for their maintenance was placed on the husband. Muslim religious leaders objected to this and demanded that the husband face no such obligation after divorce.[9]

Following the Shah Bano case, the Indian National Congress[10] government, under Rajiv Gandhi passed the Muslim Women's Protection of Rights on Divorce Act (MWA) entitling divorced Muslim women to 'reasonable and fair maintenance'. Though the act denied a Muslim woman her right to maintenance after divorce, it entitled her to a one-off lump sum maintenance payment (*mahr*) from her husband.[11] A Muslim wife has an absolute right over her *mahr* and the amount is settled after taking into account the future husband's ability (*hasiyat)* to fulfill it (*ada karna*). The MWA also stipulates that if a woman faces difficulty with subsistence, she can appeal to a magistrate for maintenance. A ruling could also be issued directing her

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"Indian Secularism and Muslim Personal Law: The Story of Model Nikahnama," *Social Difference Online* 1 (2011); Sabiha Hussain, "A Socio-historical and Political Discourse on the Rights of Muslim Women: Concerns for Women's Rights or Community Identity (Special reference to 1937 and 1939 Acts)," *Journal of International Women's Studies* 16, no. 2 (2015).

9 A Muslim woman, Shah Bano, filed a maintenance suit in 1978. After forty-six years of marriage, her husband had divorced her. She then moved a maintenance suit at the Indore High Court for a monthly allowance of five hundred rupees. However, the court ruled in favour of maintenance of twenty-five rupees a month. On appeal, the allocated amount was raised to one hundred and seventy-nine rupees. Her husband Mohd Ahmed Khan appealed to the Supreme Court for relief against the High Court ruling. In 1985, the apex court ruled in favour of the High Court judgment. The verdict also provided that 10,000 rupees would be added to her alimony to cover the legal costs. Muslim leadership resented the relief while many Muslim women's organisations opposed the attempts to exclude Muslim women from the purview of 125 CrPC.

10 The National Congress is a political party founded in 1885. It led the freedom movement in India and after Independence in 1947 it formed successive governments at the centre.

11 See Sylvia Vatuk, "A Rallying Cry for Muslim Personal Law: The Shah Bano Case and its Aftermath," in *Islam in South Asia in Practice*, ed. Barbara D. Metcalf (New Delhi: Princeton University Press, 2009).

adult children or any of her natal relatives to provide for maintenance. In the absence of a family member to provide for her, the court could order the state Wakf Board to pay for her.[12]

Quite counter-intuitively, the MWA had important and beneficial implications for Muslim women. Many suits were filed at different High Courts with lawyers arguing that the husband's obligation to pay maintenance to their wives should not be confined to the *iddat* (waiting period) after divorce. Invoking Section 3(1)(a) of the act, lawyers alleged incompatibility between the inadequate provision of maintenance for indigent women and their constitutional rights to life and dignity.[13] Many High Courts responded to the petitions, allowing financial support under 'fair and reasonable provision' of the act until the divorcee's remarriage or death. Nevertheless, the criticism was made that the act addressed only a particular stratum of the population excluding all those claiming remedy under Section 125 of the Indian Code of Criminal Procedure.[14]

Outlining the history of Muslim personal law, this paper captures the proceedings at a Darul-Qaza to understand the nature of disputes and how they are resolved. Legal-anthropological studies in India very often rely on judgments and court documents. A close scrutiny of legal praxis illustrates that the personal law that governs family and marriage is not merely an administrative tool but a socio-cultural form of communication that is negotiated and facilitated through both formal and alternative dispute resolution (ADR) mechanisms. We also know that in many cases, the secular judiciary transgresses the boundary of strict legality to argue that it is the spirit of law that has currency over legal text.[15] The following sections

12 See Sylvia Vatuk, *Marriage and its Discontents: Women, Islam and the Law in India* (New Delhi: Women Unlimited, 2017), 248–50.

13 See Article 21.

14 Vatuk, *Marriage and its Discontents*, 264–65. Vatuk observed that, in a majority of cases, husbands were not financially stable because of the lack of substantive jobs and a fixed income. Thus, they were unable to comply with the court orders even if they were willing to do so.

15 In the Shamim Ara v State of UP case (2002), the Supreme Court invalidated triple *talaq* arguing that a mere plea of *talaq* in response to the judicial proceedings filed by a wife for maintenance are not tantamount to marriage dissolution. The liability of a husband to pay alimony does not come to an end through such communication. In another case, Dagdu Pathan v. Rahimbi Pathan (2002), the Bombay High Court held that a Muslim husband cannot repudiate a marriage at will but for the divorce to be effective, it should be proven before a competent court as the wife disputes *talaq*. Riaz Fatima v Mohd Sharif (2007) was another case wherein the husband pleaded that he had divorced his wife and

situate the institutional framework of dispute resolution forums that were available to the Muslim women in the city and show how their religio-legal rights were addressed in those forums.

2 Conflict Resolution across *Mohalla* (Neighbourhood) Panchayat[16] and the Darul-Qaza

In this section, we will elaborate on a case of adultery and marital conflict to show how the deliberations at the Darul-Qaza took place where the categories of familial duty and neighbourhood (*mohalla*) were invoked as the case unfolded. Following a communal tension, curfew was imposed in the Babupurva area of Kanpur (where the Darul-Qaza is located). Even so, an elderly petitioner reached the Darul-Qaza. She was accompanied by her sister and brother-in-law. She accused her husband of having an illicit relationship, the reason why she had left home. She told the qazi that if she got divorced, she would not take responsibility for her children. Her daughters were studying and had to be married soon and she demanded that her husband should bear these expenses. Her husband was summoned to the Darul-Qaza and responded to her demands by using a different logic. He invoked her 'motherly' responsibilities to argue that she was in error to leave the children. Though he admitted being at fault, he pointed out that had the plaintiff been a virtuous woman, under no circumstance would she have parted with her children. The qazi deliberated on the complaints and suggested that the couple should mitigate their differences. He advised the couple to read *namaz* as that would help them to calm down and work towards reconciliation. A settled frame of mind would help them to decide on the future course of their marriage.

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therefore she was no longer entitled to maintenance. Rejecting the husband's contention, the magistrate's court awarded maintenance to the wife and child. Subsequently, an appeal was filed at the Delhi High Court that upheld the Sessions Court's verdict on maintenance. The judiciary took a similar stance in many such cases arguing that it is not the letter of law but the principles of justice embedded in the Quran or the Constitution that should be prioritised.

16 *Panchayat* in this context refers to a local tribunal constituted of a few eminent people from the neighbourhood and locality. A member may be a local councillor, a religious cleric, a businessman, or a social worker, usually a person of high social standing and respect in the locality.

The case was heard over a few months. The husband submitted a few conditions to the qazi. First, his wife should return the property purchased in her name. Second, she should never raise doubts over his conduct and remain obedient to him. In response, the plaintiff questioned how her husband could impose restrictions on her if he was the one at fault. The matrimonial dispute did not remain confined to the couple and their children (who regularly visited the Darul-Qaza, sometimes without their parents). Soon, the neighbours from the *mohalla* became involved in the dispute. The husband argued that neither his relatives nor the neighbours wanted his wife to return. He feared that he would be ostracised if he accepted his wife without reprimanding her for her conduct. He insisted on a written apology (*mafinama*) from his wife, that he would show to his neighbours and acquaintances in case they objected to her return. The qazi drew up a temporary settlement that stated that the father would bear the expenses of his children and their mother would look after them. At this, the plaintiff dismissed the settlement and stated that if her husband refused to recognise the rights due to her, she would not accept the responsibility of the children. She argued that her husband should either leave the other woman or marry her so that she could know how much he spends on her. The husband denied the alleged affair while the wife remained firm in her claims. Witnesses from the neighbourhood were brought to the Darul-Qaza by the husband and the children evoked the *mohalla* on several occasions when they argued on behalf of their mother.

This case showcases the concept of *mohalla* as a 'corporate person' so to speak, wherein interventions by the leaders of the *mohalla* were an important avenue of conflict resolution. We also came across a complicated case of divorce (*khula*) where the husband had eloped with his wife's younger sister but had not divorced his wife, the elder sister. About three years after the elopement, his wife appealed for *khula* at the Darul-Qaza. The husband opposed this and expressed his wish to restore the marriage. When the plaintiff visited the Darul-Qaza with her parents, the counselling sessions were frequently interrupted by emotional outbursts about the husband's 'shameful' conduct. As a result, the case became protracted with no resolution in sight. As the Darul-Qaza could not reach any conclusion, a neighbourhood panchayat was convened at the sisters' family's request. A settlement (*samjhauta*) was drawn up whereby the wife got a *khula* while her sister was married to the divorced husband. The case which could not

be resolved at the Darul-Qaza was settled at the *mohalla* forum. These two cases illustrate how the process of conflict resolution cuts across religious and social forums and how the redressal mechanisms work at the local level. The debates around codification of Muslim personal law do not capture the complexities of personal disputes that can be captured only at the forums of dispute resolution.[17]

During our interviews with community leaders, we were told that the Deoband-affiliated Darul-Qaza in Kanpur was set up to serve the city.[18] The tribunal also caters to plaintiffs from other towns and cities. It is mandatory that the adjudicator should be competent to adjudicate and settle family disputes. Decision-making (*sahi nirnay*) or the qazi's discretion depends on how conversant he is with Sharia. However, before approaching a dispute resolution unit, one or both the partners in marriage must try and resolve their dispute within the family or the lineage or in the caste-like *biradaris*.[19] The decision is either for marriage restoration (*sulha*) or to part ways (*alaigi*). When couples approach a neighbourhood *jamaat* with a matrimonial dispute, the concerned mediator will caution the partner who is proven to be at fault to mend his/her ways.[20] The mediators from the neighbourhood who act as a counsellor/negotiator could be the local imam, a notable person or a local power-broker/politician. Members of the local municipality and *mohalla* panchayat will sometimes be invited to mediate and arbitrate in disputes. The local forums work with a close knowledge of the case. Unlike the formal law, these forums do not get into the tediousness of establishing the facts in a case. Instead, a mediator, adjudicator or an arbitrator, approaches the conflicting parties with prior 'knowledge' of the case.

17 When we interviewed the Superintendent of Police in charge of the area, he observed that many cases of conflict are resolved by the residents themselves.

18 The Deoband movement emanated from Daru'l-'ulum Deoband (founded in 1866) propagated Islamic revivalist and anti-imperialist ideas. The initiative was meant to rectify the seeming lack of religious education among Muslims of British India, as religious clerics feared a loss of identity with the mushrooming of English-language education and Western values in the society (Dietrich Reetz, *Islam in the Public Sphere* (New Delhi: Oxford University Press, 2006), 63). Muhammad Qasim Nanaotavi and Rashid Ahmad Gangohi were the principal founders of the seminary and the movement. The Deoband school has exerted its influence throughout India and abroad as a learned reference institution marked by orthodoxy, puritanism and asceticism (Dietrich Reetz, "Dār al-'Ulūm Deoband and its Mediatic Self-Representation," *Islamic studies* 44, no. 2 (2005): 211).

19 *Biradaris* are caste groups, in this case, among Muslims whose members follow a particular occupation.

20 *Jamaats* are local councils.

Familiarity develops from being a member of the community and having access to all the parties concerned in a dispute. This changes the tenor of the litigation process and how the adversaries exercise agency in claiming their rights. The following section documents the polyphony of legal praxis by tracing the cases that are brought to the Darul-Qaza for dispute settlement.

3 Adjudication, Arbitration and Counselling: Qazi Justice in Context

Of the hundred cases that were followed by us at the Darul-Qaza, the key grievances brought by women were domestic violence, desertion, non-payment of maintenance and family quarrels (mostly over resources). Women filed suits against their husbands and in-laws. Complaints were also registered for emotional trauma caused by extramarital liaison, including incestuous relations. Some wives complained that they faced constant pressure to submit to demands to give sexual favours to their husbands' friends and acquaintances. About thirty women complained that they were forced to bring money from their parents. Where they refused, they were subjected to cruel treatment. Women also approached the Darul-Qaza with appeals for divorce and maintenance suits. A few of the cases brought to the Darul-Qaza were disputes over inheritance and property.

Petitioners very often approached the Darul-Qaza for mediation in family quarrels. Women reported cases of domestic violence and harassment by their husbands and in-laws. It was reported that a husband teased and abused his wife for not having brought enough dowry. Women frequently complained of cruelty at the hands of female relatives – a sister-in-law and/or mother-in-law. In one case, the perpetrator was the woman's step-daughter who fought with her father's new wife as she resented him marrying without first arranging her own marriage. In these cases, the qazi pointed out that according to Islam, it is not the duty of the daughter-in-law to take care of her in-laws. The son is responsible for his parents, and if his sister where her father is absent. It is also the husband's obligation to provide for his wife and ensure her well-being. In the family battles that involved a wife and her sister-in-law or mother-in-law, the qazi advised the husband to set up a separate household with his wife. This offered a chance to avoid conflicts between the wife and the other family members over control and management of the family resources.

It was observed that in his deliberations, the qazi made efforts to resolve disputes by diffusing inter-personal conflicts. The task at hand was not to uphold Sharia but to mediate with the conflicting parties and offer good counsel. There were times when the women petitioners visited the qazi to clarify doubts on the status of their marriage.[21] When a husband repeatedly threatened his wife with *talaq*, the apprehensive wife inquired whether such threats had revoked their marriage.[22] In other cases, couples came to clarify whether a husband's pronouncement of *talaq* in a fit of rage and under the influence of alcohol annulled their marriage. In such cases, the key word was 'intention'. When it was found that *talaq* was pronounced under the influence of alcohol or used as a threat, it was not considered a legitimate divorce. Studies have shown that when validating marriage dissolution, adjudicators concentrate on intention. Qazis investigate the background of the litigants and the particular context and circumstances of the cases in order to reach a judgment.[23] Queries are also brought to the qazi regarding the validity of marriage where there was insinuation of incest between a husband and his sister or a mother. Parents appealed to find out about difficult situations such as a divorced daughter who conceived while observing *iddat* and later remarried. The father requested that the marriage be deemed null and void and the child considered illegitimate. A qazi's opinion was also sought in a case where a divorced couple remarried each other while they were observing *iddat*. Was the remarriage legal?

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21 A woman petitioner told Suchandra Ghosh how worship (*ibadat*) does not merely imply fasting, offering *namaz* and paying *zakat*. It encompasses the everyday life of an individual. In an event of *talaq* pronouncement (by the husband), it is the responsibility of the couple to accept the pronouncement and separate.

22 There are three desirable modes of *talaq* pronouncement:

1. A husband may pronounce three separate repudiations during the three successive states of purity from menstruation (*paki*) of his wife.
2. A husband may issue *talaq* (*talaq-e-ehsan*) in a month making no effort towards conciliation in the following two months, and as a result, the marriage is dissolved. Two months imply two distinct menstrual cycles she has undergone after the *talaq* pronouncement. But it is two pronouncements made; then it is *talaq-e-sunnat.*
3. A marriage may be annulled by *talaq-ul-bain* where there is a single *talaq* pronouncement, but the marriage becomes void with immediate effect. Here the intention of the partners is crucial who want to dissolve their marriage. However, the relationship may be restored without observing *halala,* and for that, the couple will have to remarry each other by *nikah.*

23 See Erin Stiles, *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2009).

Often the petitioners looked for financial redress when they approached the Darul-Qaza. *Nikah* is a contract and by entering into it, one fulfils a social obligation. As a prospective bride and groom publicly acknowledge and recognise each other as spouses, the responsibility to maintain (*kharcha*) the wife falls on the husband and the wife is expected to remain obedient to him. Nevertheless, the notions of adequate finance and obedience are matters of interpretation in real life. As the Darul-Qaza deliberated and adjudicated on maintenance in a marriage, the complexities of maintenance, kinship, domestic violence and sexuality emerged as key themes.[24] We found that petitioners approached the Darul-Qaza for maintenance settlements even after decrees had been issued by civil tribunals.

At the Darul-Qaza, the largest number of cases were divorce appeals by women. By *khula*, a wife appeals (*mutalva*) for divorce from her husband and in lieu has to let go her *mahr* and *nafaka*, i. e. maintenance due to her during *iddat*.[25] While they need not come to a Darul-Qaza to plead for *khula*, women are very often compelled to seek mediation by a qazi due to their husband's reluctance to respond to their divorce appeal. In cases when the qazi was convinced that a husband was withholding *khula* to harass his wife and was not committed to the relationship or did not have the capacity or intention to fulfil his duties to his wife, the qazi dissolved the marriage by *faskh*. It was often pointed out at the Darul-Qaza that it is a husband's responsibility to provide his wife with food (*khan-pan*), shelter (*ghar-makan*) and sex (*gosalbzi ki farz/haq pe zauziyat*). Some women complained of desertion by their husbands. Most of them had children and no income to support them. They were depending on either their parents

24 Judith Tucker explored marriage practices and the associated entitlements for women in Syria and Palestine in the 17th and 18th centuries. She found that a marriage, once consummated, would make a husband liable for certain responsibilities. Husbands thus provided for their wives and children and the obligations were binding on them irrespective of the wives' ownership and control over resources. The social norms required a husband to provide adequately, i.e. in line with her background. See Judith E. Tucker, "Muftīs and Matrimony: Islamic Law and Gender in Ottoman Syria and Palestine," *Islamic Law and Society* 1, no. 3 (1994): 269.

25 According to Islam, a husband has to give *mahr*, an agreed upon amount, before he consummates his marriage. While the bride has an absolute right over the *mahr* decided, the amount is determined based on the socio-economic status of the families concerned. However, in North India today, it is almost normative for women to either defer the *mahr* or agree to their husbands postponing the payment. Sometimes the wife also lets go of her *mahr* (*maf*). This is the reason why when the husband approaches a Darul-Qaza for a divorce certificate the qazi orders the payment of *mahr* to the wife.

or brothers. In such cases, the qazi intervened by appealing to the husband to restore their marriage and take charge of their families. When such pleas went unheeded, the qazi annulled the marriage to let the wife remarry if she wanted to. He would state conscientiously that a man should marry only when he thinks that he can fulfil the responsibilities to his wife. Otherwise, he should practice restraint and have control over his urges (*nafs*). The qazi often referred to the Quran to clarify that it is a duty to control one's urges rather than marry and spoil another life.

Sometimes the petitioners approached the Darul-Qaza to clarify their doubts regarding their shares in inheritance. The female petitioners came to appeal over what they perceived as a breach of their rights (*haq*). They appealed to the moral authority of the qazi, drawing his attention to the (mis) conduct of certain family members. Many visited the Darul-Qaza for consultation and counselling over personal matters. Apart from the solutions that the Darul-Qaza dispensed in cases of conflicts, its availability as an accessible counselling space in the neighbourhood motivated many petitioners to bring cases that did not always fall within its jurisdiction. In one instance, two sisters came to the Darul-Qaza in tears, and told the qazi that they feared that their brother had been abducted by his in-laws. In this case, the qazi's role was to console the petitioners and guide them to lodge their complaints at the local police station. The cases bring to fore the divergent concerns under personal law, religious, matrimonial and property rights as much the dilemmas over morality and piety of conduct. Yet, in discourse pertaining to reform, the focus remains on the legal aspects and gender justice while the questions of what exactly is at stake in the realm of personal law has remained, unaddressed.[26]

More than 90% of the petitioners in the cases observed were women. Most of them came from a low-income group. Often, they did not have the necessary financial support to even travel to court or the free legal centres in order to obtain judicial relief.[27] Many felt embarrassed to reach out and discuss marital problems beyond the familiar domains of the neighbour-

26 Farrah Ahmed argues that, in India, discussions on the personal law, have undermined the value of religious freedom in overemphasising the question of gender justice. See Farrah Ahmed, *Religious Freedom under the Personal Law System* (New Delhi: Oxford University Press, 2016), 2.

27 The Family Court Act of 1984 allows a party to appoint a lawyer only with prior permission from the court. This is a procedural code that does not confer substantive rights, neither does it alter the rights provided under a personal law. Arguably, in this instance, litigants have more control when there is no lawyer.

hood and locality. Some had migrated to other cities and found themselves in marital distress in an unfamiliar environment. In those cases, the qazi assured the plaintiffs that the Darul-Qaza would take prompt action regarding their disputes and issue a ruling in their 'best interest'. Given the high level of illiteracy among women (53% in rural areas and 47% in urban areas) in the community, factors such as ignorance of the law, 'fear of the court' caused by judicial complexity and uncertainty of the outcome, were sometimes the reasons litigants chose the Darul-Qaza over a court for dispute resolution.[28] Many women were apprehensive that they would face stigma and social censure if they pursued their cases in the formal courts. Most importantly, at the Darul-Qaza, the petitioners argued their case without worrying about the legal merit of their arguments.

Petitioners often approached the Darul-Qaza with problems that involved disclosing intimate details of their lives. The Darul-Qaza, to their mind, offered a space for such discussions on intimacy. The appellants often said that they trusted the Darul-Qaza and had faith in it and its incumbents. When its employees showed care, concern and empathy in handling the disputes, women felt empowered to speak about their real problems.[29] The qazi's familiarity with the neighbourhood and the discretion that both the qazi and assistant qazi maintained were reasons why the women felt they could approach this forum. We argue that the discourse on religious family law needs to move beyond issues of legality and gender justice towards a different understanding of the 'personal' in personal law. The polyphony of legal praxis shows how questions of kinship expectations, affect and resolutions offered in Sharia are interpreted based on the case at hand. The secular judiciary is approached and civil remedies are sought whenever necessary in order to resolve the conflict and make the parties agree to a settlement (*samjhauta*).

28 The Sachar Committee Report (2006).

29 In one instance, a female litigant suddenly became conscious of Suchandra Ghosh's presence in the unit and asked the qazi for privacy. The qazi sensed her concern and took her to a quieter corner of the room.

4 Towards an Inter-Legal Structure and the Making of Evidence

This section examines how Muslim family cases work through both the religious and the civil tribunals leading to the creation of a plural legal landscape where the cases are authenticated/supported by one another. The dual life of a case in religious and civil forums can be initiated by a litigant, or it may emerge as a requirement for a judicial procedure. At times, the procedural requirements make it necessary for a Darul-Qaza to seek help from the magistrate's court. On other occasions, a civil court is approached for its enforceable authority. In this section, we will discuss how an intricate pattern of interlegality sets in motion as the litigants seek resolution and redressal on matters ranging from family quarrels to bitter disputes over maintenance. We have found cases where the civil court sought intervention from the Darul-Qaza to assist in delivering justice to the conflicting parties. This practice is based on the recognition of the expertise of the qazis in interpreting the intricacies of Islamic law as well as their local knowledge. We have seen how verdicts pronounced in the religious forum are used as evidence in a civil/family court's decision-making just as civil court's rulings served as basis for proceeding with dispute resolution at a Darul-Qaza.

Can a Darul-Qaza enforce a post-divorce maintenance settlement given that its orders do not have any legal standing and are therefore not binding on the litigants? We found that the implementation of agreements on maintenance command compliance as the parties come to the agreement through long deliberations.[30] In our discussions with the lawyers and judges at the trial court, it was pointed out that while a Darul-Qaza could handle issues regarding marriage and divorce, for maintenance and property settlements, petitioners had no choice but to approach a civil court. We found that the issue of enforceability was an important one and it is often a procedural requirement in settling property disputes. If a Darul-Qaza's employees were concerned that a settlement made at the Darul-Qaza might be

30 Sylvia Vatuk, "Divorce at the Wife's Initiative in Muslim Personal Law: What are the Options and what are their Implications for Women's Welfare?," in *Redefining Family Law in India*, ed. Archana Parashar and Amita Dhanda (London: Routledge, 2008), 216–17: Vatuk found that Darul-Qazas in Hyderabad and Chennai implemented informal sanctions in post-divorce maintenance cases in order to ensure the enforceability of their judgments. Qazis withheld divorce certificates until husbands had compensated the post-divorce claims of their wives.

breached, they advised the petitioners to invoke the authority of the civil court. Sometimes a parallel ruling by a family court on the same dispute or even a mere certification by a notary strengthened and validated a religious tribunal's decision on a dispute. However, documentation and ratification of verdicts by a civil authority does not inevitably lead to its acceptance by the clients. Legal anthropologists have cited cases wherein contentions to legal settlements were duly cognised and acted upon to usher in a fresh perspective on the case.[31]

The civil court, on the other hand, directed cases to the Darul-Qaza for the latter's competence and expertise on family matters. Nevertheless, pluralism in procedure between religious and civil courts was sometimes invoked to elicit a ruling on a dispute that could be used as evidence in another tribunal. Often, the admissions from the defendant in a suit were adduced at another tribunal. In one instance, we found a property dispute that was sent to the Darul-Qaza for a verdict so that this could be used in the civil court as evidence.[32]

A petitioner pursuing a civil suit on a property at the Fatehpur District Court (Uttar Pradesh) visited the Darul-Qaza in Kanpur. He approached the forum anticipating that at this forum, his adversaries would admit 'true' facts about the dispute, which he would then produce as evidence at the Kanpur civil court. But his efforts were in vain as his opponents refused to appear before the qazi. The defendants submitted that they would respond to the Darul-Qaza's summons if the plaintiff withdrew the civil suit. The plaintiff was opposed to the idea of dropping the lawsuit as he was not sure if the qazi would issue a favourable verdict. But he wanted to know his rightful dues in the disputed property from the qazi. This case underlines that while people turn to the Darul-Qaza when seeking the admission of facts, expediency, and efficiency, its rulings are not enforceable. Sometimes, the Darul-Qaza recognises a civil/criminal ruling as evidence. In one case, a petitioner's husband was convicted of rape. She appealed for

31 See John Bowen, "Fairness and Law in an Indonesian Court," in *Dispensing Justice in Muslim Courts: Qadis, Procedures and Judgments*, ed. M. Khalid Masud, David S. Powers, and Ruud Peters (Leiden: Brill, 2012), 187–88.

32 For details of this case, see Suchandra Ghosh and Anindita Chakrabarti, "Adjudication of Personal Law and the Question of Secularity: An Analysis of Judicial Practice in Darul-Qazas of Uttar Pradesh," in *Religion and Secularities: Reconfigurations of Islam in Contemporary India*, ed. Anindita Chakrabarti and Sudha Sitharaman (New Delhi: Orient Blackswan, forthcoming).

divorce with a copy of the judgment. She pleaded with the qazi to recognise the criminal court's verdict as evidence and dissolve the marriage by *faskh*. In cases where wives refused to return to their matrimonial homes, husbands registered cases for marriage restoration (*rukhsati*) at a family court. In many such cases, with wives not appearing for the hearings, ex parte judgments were passed by civil courts in the husbands' favour. Submitting the rulings to the Darul-Qaza, husbands sought solutions to their marital disputes. The qazi's role in the cases was to arrange meetings between the parties in the presence of their families and work towards a dispute settlement. In rare cases, the partners reconciled their differences and agreed to a marriage restoration. Most of the cases ended in divorce.

As we understand law not in terms of the state, but in terms of 'authority' and 'institutions', legal pluralism, John Griffiths has argued, needs to be understood with respect to the group concerned and their positioning in relation to the state and its laws. By focusing on institutions and their interactive context in this paper, we shift the focus of analysis from the normative expectations of law to actual behaviour in a pluralistic social setting. As the qazi discerns the facts in a case, ideas of evidence at the Darul-Qaza differ from those that would be admissible in a court of law. In one instance, where impotence was cited as a ground for divorce, the qazis requested medical records. However, the husband's silence (*khamoshi*) was ultimately deemed to be sufficient evidence to support the wife's allegation and *khula* was granted to her. Drawing on legal reasoning which is both 'institutionally distinctive' and 'culturally recognisable', the qazi reasoned his way to the final decision.[33] In the cases studied, the qazi's embeddedness in the local social fabric redefined his role as an efficient and effective arbitrator. He exercised discretion based on his perception of how argumentation and silences work as evidence in a case. Decision-making depended not merely on the 'facts' of a case documented but the potential consequences that a judgment may have upon the individual litigants.

In this section we have shown how judicial procedure in adjudication of personal law very often crosses the boundary between the religious and the non-religious (what we have called the civil legal forums) and how they function in collocation. In a pluralist secular democracy such as India, where both religious and civil tribunals adjudicate on personal matters,

33 Lawrence Rosen, *The Anthropology of Justice* (New York: Cambridge University Press, 1989).

procedural innovation and cross-forum evidence-making raise interesting questions for our theories of secularity. Legal pluralism, in this context, conditions, coordinates and collaborates with the judicial process and the adjudication procedure of the respective courts/forums that engage in the resolution of disputes pertaining to Muslim personal law.

5 Conclusion

This paper provides an ethnography of the secular and shows that what permeates the practice of secularity in a post-colonial multicultural nation-state is an acute entanglement of the domain of the religious and the state. This argument is not far from Talal Asad's observation on family law reform in Egypt.[34] Asad traced the transformations in the idea of the law and legal system in colonial Egypt that helped to make secularism a thinkable, practical proposal. To identify the emergence of social spaces within which secularism could develop, Asad focused on the ways in which legal institutions, religious authority and ethics transformed over a period of time. He stated that one of the most important ways this was achieved was through family law reform. As the legal formation of the family gave the notion of individual morality its own private locus, Sharia could then be spoken of as the law of personal status. Sharia thus became a secular formula, defining a locus in which religion is permitted to make its public appearance through state law.[35] We relate to this insight and extend it to argue that the adjudication of family law in a plural legal context illustrates how continuous negotiations mutually constitute our 'religious' as well as 'citizen' rights in a secular nation-state.

Contemporary adjudication under Muslim personal law in India problematises the boundary between religion and law. We argue that the letter of religion-based personal law needs to be understood with the complexities and nuances of the application of said law in mind. Lawyers, litigants and kin approach the Darul-Qaza and other religious institutions and the state-affiliated family courts work in collaboration towards mitigating family disputes.[36] This ethnography illustrates how Muslim personal law

34 Talal Asad, *Formations of the Secular* (Stanford: Stanford University Press, 2003).
35 Rosen, *Anthropology of Justice*, 229–31.
36 For studies in other contexts, see Sylvia Vatuk, "Muslim Women in the Indian Family

functions through different forums where the boundaries between the religious and the civil are necessarily porous as resolution is very often achieved with the help of a religious authority as well as civil sanctions.[37] As the nature of the disputes in question guided the litigants' choice to approach a certain forum of conflict resolution, adjudication and settlement of disputes often brought the religious and civil in necessary conversation with one another. This dialogue was hinged on evidence-making, procedure and the question of expediency as much as it was based on interpreting the law.

Anthropologists have often argued that a strict implementation of the legal code at times jeopardises its benevolent intent and risks hurting the interests of those seeking relief in law. At the Darul-Qaza, we witnessed how the judicial discretion exercised by the qazi instilled confidence in the female litigants who perceived the Darul-Qaza as a site for speaking about unique problems or oppression in marriage. The qazi was perceived as someone who could help when there were very few options available for dispute resolution.[38] However, the religious forums never had any locus standi in law. This situation was rectified in 2014 with the Vishwa Lochan Madan judgement where the Supreme Court legitimised Darul-Qazas as an effective alternative dispute resolution site. Interestingly, the Supreme Court judges used the argument of expediency and efficiency to legitimise the existence of Darul-Qazas and not that of religious freedom or secularism. The Vishwa Lochan Madan judgment showed an understanding of the real processes of dispute resolution under Muslim personal law that took place at multiple forums depending on the nature of the case.

In the post-colonial secular state, the debate on personal law has been between the enactment of a Uniform Civil Code (UCC) – symbolising unity

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Courts: A Report from Chennai," in *Divorce and Remarriage among Muslims in India*, ed. Imtiaz Ahmed (New Delhi: Manohar Publishers, 2003), 144; Lemons, "At the Margins of Law"; Solanki, *Adjudication in Religious Family Laws*.

37 For ethnographic details engaging with these questions, see Ghosh and Chakrabarti, "Adjudication of Personal Law."

38 Similar findings have been articulated in studies conducted in other regions. See Nahda Shehada, "Negotiating Custody Rights in Islamic Family Law," in *Permutations of Order: Religion and Law as Contested Sovereignties*, ed. Thomas G. Kirsch and Bertram Turner (Farnham: Ashgate, 2009), 258; Susan Hirsch, "Kadhi's Courts as Complex Sites of Resistance: The State, Islam and Gender in Postcolonial Kenya," in *Contested States: Law, Hegemony and Resistance*, ed. Mindie Lazarus-Black and Susan F. Hirsch (New York: Routledge, 1994).

and integrity of the nation – and preserving personal laws in order to protect the pluralist ethos of a multicultural state. Going beyond this binary, in this paper we have explored a field view of dispute resolution within what falls under Muslim personal law. Here, justice lies not in the invocation of 'laws' but in contextual assessments and a keen understanding of familial rights and duties. When we asked how similar cases resulting in different judgments could be justified, the qazis offered the following answer: first, no two individuals are identical, and hence no two cases are the same. They insisted that the same reasoning process entailing drawing of analogies, weighing carefully the moral implications, adducing evidence, and gauging social interest, may reasonably lead to different conclusions. The discussion of Muslim personal law has focused too much on state institutions and political rhetoric regarding the desired legal reform, failing to reflect on the broader range of contexts in which it operates.

In the Indian context, legal pluralism operates through procedural and institutional cooperation and collocation between religious and civil institutions. In this context, the qazi, police, magistrate's courts (and, at times, women's organisations) are aware of one another's presence and resolutions are sought bearing in mind this plural legal landscape. Interlegality is invoked as both a norm and legal praxis. These matters are as much subjects of religio-ethical practice as they are matters of citizens' rights. This paper helps us rethink the question of religion-based personal law and secularity as we follow the process of adjudication and dispute resolution in situ. It contributes to the recent conceptualisations of secularity as a historically changing concept in its cultural meaning.[39] We find echoes of this historically emergent concept of secularity in the idea of 'contextual secularism' as proposed by Rajeev Bhargava. Bhargava views secularism as a multi-value doctrine with internal discord among its constitutive values. According to Bhargava, contextual secularism recognises that a conflict between individual and group rights cannot always be adjudicated by taking recourse to abstract principles. Rather, cases are settled by balancing between competing claims.[40] The adjudication at the Darul-Qaza shows how Muslim women negotiate between two sets of rights: rights given to them by the

39 See Monika Wohlrab-Sahr and Marian Burchardt, "Multiple Secularities: Towards a Cultural Sociology of Secular Modernities," *Comparative Sociology* 11, no. 6 (2012).

40 See Rajeev Bhargava, "States, Religious Diversity, and the Crisis of Secularism," *The Hedgehog Review* 12, no. 3 (2010).

religious community, embedded in kinship relations, and those granted by the secular democratic state. While in theory, they are firm opposites, the ethnography of adjudication under personal law shows how in practice the hiatus is bridged as the litigants seek to resolve their family disputes in a plural legal landscape.

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