A SECULAR NEED

Islamic Law and State Governance in Contemporary India

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For Patricia Redding, Ali Faisal Zaidi, and Micah Stanek,
and their persevering care

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Urdu-to-English translations of documents described and analyzed here are my own unless otherwise indicated. When deploying roman characters to quote source material originally written in the Urdu script, I have mostly adhered to Library of Congress standards on Urdu-to-English romanization and transliteration, including the use of diacritical marks. Otherwise, I have generally omitted diacritical marks in the text when using relatively common Urdu and Arabic words (e.g., *fatwa*, *qazi*, *faskh*) or when less common words (e.g., *faislah*) are repeated at several points. When referring to the names of historical figures and places, I have mostly deployed contemporary transliterations of their names, unless context or the requirements of historical accuracy dictated another choice. For authors, I have used the spelling of their names that they used when their work was originally published.

A SECULAR NEED

INTRODUCTION

Secular Hate, Love, and Need of Islamic Law

Islamic law's relationship to secular governance is a fraught one in the contemporary period. Whether from the perspective of Islamic law's advocates, secularism's partisans, or publics caught in their crossfire, many people see the relationship between Islam and secularism as competitive at best, and otherwise antagonistic. Moreover, the relationship between Islamic law and secularism seems increasingly discordant, with recent developments in the United States (e.g., social conservatives advocating "shariʿa bans" in US courts),[1] Western Europe (e.g., states putting legal limitations on headscarves and mosques alike),[2] and the Arab Middle East (e.g., conflicts between secularist old-guards and Islamist revolutionaries) indicating that unsteady and cold coexistences are increasingly transforming into heated hostilities.

While North America, Europe, and the Middle East are sites of ongoing struggle between secularists and those sympathetic to Islamic legalism, in many ways the outcomes of these struggles are relatively overdetermined. For example, in North America and Western Europe, Islamic law is a relative newcomer. As a result, it has been and will likely continue to be deeply marginalized by entrenched and powerful secularists. Conversely, in the Arab Middle East, the birthplace of Islam (and other Abrahamic faiths), the West's secular ideals have often seemed utopian and historically tendentious—an ineffective, unstable, and eroding relic of an out-of-touch colonialism. As a result, another location in which to explore secularism, Islam, and the possibility of their complex interactions would seem to be both more intriguing and necessary.

India is a compelling location for such an exploration because what is entrenched in India is not merely secularism or religion, but also an especially lively debate between secularists and religious people of all persuasions, including Muslims. As a result, India challenges conventional and powerful narratives about the inevitable opposition between Islamic law and secular forms of governance, and the impossibility of their coexistence. Indeed, secular law and governance in India *do not and cannot work* without

the significant assistance of non-state Islamic legal actors. Put another way, Indian state secularism *needs* the Islamic non-state—so much so, in fact, that this intense need often erupts into a complicated set of love-hate politics toward India's Muslims.

Like all contemporary states, India is a palimpsest[3] of various historical, geographical, and ideological influences. Built on the ruins of British colonialism in South Asia, which was itself built on the ruins of the Muslim Mughal empire, contemporary India sits at the cross-roads of Europe, the Middle East, and Asia, as well as a number of migratory and indigenous ideas, ideologies, and agendas. In this pluralistic polity, both secular and Islamic legal actors (among others) possess remarkable potency and vibrancy. As a result, neither set of actors is likely to be vanquished in the foreseeable future. Such a rich history and verdant present make India an especially compelling location, then, for unsettling deep-seated assumptions and false binaries.

Other theorists have argued the false opposition between secularism and Islam by demonstrating the ways in which Islamically ambitious (or "Islamist") political movements depend on the overreaching, and missteps, of secular states for at least part of those movements' appeal.[4] But secular state governance can itself depend on non-state Islamic legal actors. Indeed, in contemporary India, secular state governance has depended on non-state Islamic legal actors in both ideological and material ways.

Ideologically speaking, secular governance in contemporary India has depended on non-state Islamic legal actors performing certain functions of a liberal/secular state that India's state itself is unable or unwilling to perform. In this way, the Indian state's relationship with the non-state echoes that identified by legal scholar Peter Fitzpatrick, although in a way conversely to his identification of liberal legality's dependence on covert forms of coercion (e.g., in prisons, in the family).[5] Here, the coercive secular state in India needs non-state Muslim actors to recuperate the state's ostensible liberality. Materially speaking, secular governance in contemporary India has depended on non-state Islamic legal actors, with such actors providing necessary dispute-resolution infrastructure for a secular state whose courts were neither designed for, nor capable of, the monopolization of dispute resolution and legal pronouncement—and perhaps especially with respect to family law.

The dependence of secular law and governance on non-state Islamic legal actors involves more than the "interactive" or "dialectic" nature of secular (state) and religious (non-state) modalities of governance. Language like

this, and also the theoretical framings it has given rise to, have been an important legacy of much previous sociolegal scholarship, whether concerning a specific jurisdiction like India,[6] or focused more broadly.[7] Such language and framings have also been an important legacy of critical anthropological approaches to secularism—in particular, the scholarship of anthropologist Talal Asad[8] and those writing in his wake. Yet, as helpful as this scholarship has been, it has also often obscured important questions and issues of power, especially in specific moments and contexts. Indeed, one common implicit suggestion of the "interactive" and "dialectic" language which this scholarship commonly uses is that the secular and religious "dialogue" as equals, when they often do not.

Something like this suggestion of equivalence, in fact, opens up anthropologist Hussein Ali Agrama's recent book on Egypt and secularism.[9] Utilizing the artist M. C. Escher's well-known "Drawing Hands" lithograph, Agrama describes how this work "shows a paradox, of two hands mutually drawing each other into existence," going on to note that "I have always thought this to be an apt metaphor for our most recent understandings of secularism. We no longer see the domains of the religious and the secular as given, but rather, as mutually constitutive of each other in often tense and contradictory ways."[10] Agrama's use of Escher's complex and confounding image is compelling and helpful, but also incomplete. For example, Escher's drawing is two-handed, but there is nothing in it to tell us whether it is, say, right-handed or left-handed—or whether secularism or religion has the upper hand.

In contrast, here I use the idea of the mutual constituted-ness of the secular state and the religious non-state, but also seek to enliven this two-dimensional portrait of the secular/religious with other dimensions altogether. These other dimensions—including the psycho-affective one of dependency—are important if we are to more fully understand instantiations of secularism and religion, as well as the potential dynamics in their interaction. Furthermore, it is also important to recognize these other dimensions if we are to challenge the common, and often subconscious, assumption of a "right/secular-handed" world.[11]

Contemporary Indian secularism demonstrates, in fact, that there are "left-handed" jurisdictions where the religious non-state enjoys a position of relative advantage vis-à-vis the secular state. Or, in political theorist Joel Migdal's terms, jurisdictions where society is strong and the state is weak.[12] Moreover, we can neither make, nor necessarily should make, the world right-handed. Recognizing the power of alternative dispute resolution,

out-of-court settlement, or other forms of non-state religious law and agency does not simultaneously have to involve a lament.[13]

The non-state Islamic legal actors who help make possible the Indian state's system of secular law and governance include individuals involved with an Indian network of private Muslim dispute-resolution providers that call themselves *dar ul qazas*. *Dar ul qaza* means "place of adjudication" (in both Urdu and Arabic), and the Indian *dar ul qazas* examined here provide but one example of what many people commonly refer to as "Muslim courts" or "shariat courts."

These *non-state* Muslim courts are different from the *state* courts that enforce Islamic law in India. Like many postcolonial states that inherited their formal systems of law from the British, the contemporary Indian state operates a religiously pluralistic formal family law system. In India's formal family law system—commonly referred to as a "personal law system"—there are different Indian legislative acts governing the family for each of India's different major religious faiths. Some not explicitly religious statutes—for example, the Special Marriage Act of 1954—have also been legislated to regulate family formation and dissolution among persons who either belong to different faiths or who otherwise do not wish to be governed by religious family law norms. Yet, it appears that these "secular" options are largely underutilized and, indeed, often discouraged by the state.[14]

Realistically speaking then, India's personal law system largely consists of different family law statutes governing Hindus, Muslims, Christians, and Zoroastrians differently. Interpreting these statutes are also large bodies of case law authored by the state's multi-faith judiciary. Hence, a Muslim woman wanting to divorce her Muslim husband religiously will be governed by a different divorce statute (the Dissolution of Muslim Marriages Act, 1939) and case law, than the statute (the Hindu Marriage Act, 1955)[15] and case law governing a Hindu woman wanting to divorce her Hindu husband religiously—although both cases might be heard by the same Christian state court judge.[16]

There is a large body of scholarship, much of it feminist in orientation,[17] on the problems and possibilities presented by India's personal law system. I cannot and do not ignore this state system of law and, indeed, will discuss some important Supreme Court of India cases concerning personal law (Muslim and non-Muslim alike). Yet this book is not primarily about the state's personal law system, whether in its Muslim or non-Muslim dimensions, or what the existence of this state system of religious law tells us about

Indian secularism. Nor is it about state-appointed *qazis* (Muslim judges/legal officials), whether in India[18] or elsewhere.[19] Rather, it is about *the Muslim non-state*—and particularly the *dar ul qaza* network and its important role in making India's state system of secular law and governance possible in the contemporary period.[20]

While there is a strong link between Indian feminism and critiques of the Indian state's personal law system, my shifting of focus away from the state's Islamic law, to non-state Islamic law, does not mean that feminist concerns suddenly lack relevance. Far from it. Indeed, a large percentage of the cases heard by the *dar ul qaza* network examined here are *faskh* divorce petitions brought by Muslim women seeking to unilaterally disassociate from their Muslim husbands. The fact that a significant number of Muslim women "choose" to go to a *dar ul qaza* for a divorce declaration rather than to a state court—where they have the historically path-breaking terms of the Dissolution of Muslim Marriages Act of 1939 available to them—is provocative from a (contemporary) feminist perspective. Indeed, such choices seem to echo some of the findings concerning women's agency that the late anthropologist Saba Mahmood reported in her work on women's piety movements in Egypt.[21]

Moreover, detailed case studies of individual Muslim women seeking *faskh* divorces from *dar ul qazas* rather than state courts reveal the secular (if ambivalent) feminism that drives the Indian state's need for *dar ul qazas*—rather than state courts—to be the sites of Muslim women's divorces. In short, *dar ul qazas* do the work of Muslim (women's) divorce, which the Indian state needs done but is unwilling or unable to do in its conciliation-oriented (or, as anthropologist Laura Nader might describe it, *harmony*-oriented)[22] family court system. In this way, yet another aspect of the Indian secular state's dependency on the Muslim non-state reveals itself, as well as the feminist aspects of this dependency.

Yet, the Indian state's dependence on *dar ul qazas* should not solely be viewed in feminist terms. As mentioned above, there are also other ways in which *dar ul qazas* support Indian secular governance on the ideological front. Indeed, the very existence of a *dar ul qaza* network provides important instantiation of secularism's alleged ability to contemplate religious plurality—much more so than does the orchestrated terrain of state-coordinated Muslim personal law.

The ideological link between *dar ul qazas* and the ability of Indian secularism to contemplate religious plurality is a long-standing one. Indeed, the network of *dar ul qazas* existing in contemporary India can be traced

back to the early twentieth century, when anticolonial, nationalist Muslims in India contemplated ways in which they could remain in a united and multi-faith-oriented independent India—rather than move to a partitioned-off and Muslim-oriented Pakistan—but still maintain a substantial degree of religio-cultural autonomy. During this uncertain time, a nongovernmental organization by the name of Imarat-e-Shariah was formed and, as part of its religio-political program, this organization began to organize a network of *dar ul qazas*. In the contemporary period, the Imarat-e-Shariah has partnered with another non-state organization, the All India Muslim Personal Law Board (AIMPLB), to run even more *dar ul qazas* across an expanse of India significantly larger than the original network reached.

Highlighting the crucial roles that non-state Islamic law and non-state Islamic legal actors play for India's secular state may seem odd given a stark reality in contemporary India—namely, pervasive and intense anti-Muslim sentiment. Indeed, *dar ul qazas* have recently come under legal and political attack by a number of private individuals capitalizing on profound social unease with Muslims in India. This attack, and its recent curious "resolution" by the Supreme Court of India in 2014, will be discussed at length in chapter 2. For now, however, it is worth mentioning that *dar ul qazas* became the subject, in 2005, of a "public interest" petition filed in the Supreme Court of India by a private attorney seeking to shutter both *dar ul qazas* and other non-state providers of Islamic legal opinion. Picking up on stereotypes concerning both the militancy of Islamic legality and the ignorance of Indian Muslims as a whole, one of the questions posed to the Supreme Court by the attorney's petition read: "Whether any institution by the term *'Shariat Court,'* and whether officers by the terms *Qazi* (Legally appointed 'Judge' entrusted with matrimonial jurisdiction), *Nayab-Qazi* (Sub-Judge) and *Mufti* (officially appointed law-officer of Muslim Personal Law) can be allowed to function in the Secular India, especially when these terms not only create a lot of confusion, but also terror of God's wrath, in the mind of uneducated multitude of Indian Muslim Citizenry as regards the extent and nature of obedience to them, and when none of them are appointed or constituted under any authority of law?"[23]

Privately instigated (yet ostensibly "public interest") petitions to the Supreme Court are one site of anti-Muslim sentiment in India. Yet such legal efforts gain traction—both in the eyes of their particular instigators and also the wider society—because of a sense that the Indian state is receptive to their anti-Muslim claims. And indeed, the Indian state has,

with the suspicion and violence that it has directed at Muslims for many years now, certainly been an active participant in generating, nurturing, and perpetuating anti-Muslim sentiment in India.

Hence, a deep paradox sits at the heart of the central importance of non-state Islamic legal actors for the contemporary secular state in India. How can Islam and Muslims be both so crucial to *and* so reviled by India's system of secular law and governance?

Any resolution of this paradox must recognize that anti-Muslim sentiment is a complicated phenomenon and that, attempting to unravel the sources and strands of the Indian state's anti-Muslim sentiment—which is perhaps best understood as a phobia, nay "Islamophobia"—is a worthwhile and necessary effort. In this respect, "secular Islamophobia" in India is particularly intriguing because of the ways in which it proceeds along two seemingly contradictory trajectories—one involving an exclusionary and "otherizing" stance toward Islam, and another involving a radically absorptive stance toward it. Moreover, the persistence of these two seemingly contradictory trajectories is arguably an artifact of the secular Indian state's dependence on non-state Islamic legal actors. In short, Indian secularism's relationship with Islam is, simultaneously, one of hate, love, and—even more fundamentally—need.

In what follows, the complicated secular terrain that Islamic law, Islamic legal institutions, and ordinary Muslims traverse in contemporary India, broadly speaking, is canvassed. Three separate lenses—namely hate, love, and need—help illuminate this treacherous terrain and enable us to disentangle the complicated knot of Indian secularism and Indian Islam that has developed over time. Of these three perspectives, the dependency of Indian secular governance on non-state practitioners of Islamic law is the least appreciated and understood, and hence merits particular attention.

RIOTS, NEGLECT, AND LAW: SECULAR GOVERNANCE IN CONTEMPORARY INDIA

The non-state legal activities of Indian *dar ul qazas* increasingly unfold in a context of state and social hostility toward Muslims. The election of Narendra Modi as prime minister of India in 2014 (and reelection in 2019) is one obvious sign of this hostility. Modi's previous rule as chief minister of the western Indian state of Gujarat was deeply tarnished by his government's complicity in the massacre of thousands of Gujarati Muslims in 2002. As

Gujarat demonstrated, in India, state hostility toward Muslims is often crudely expressed, and also overwhelming. In fact, it is fair to say that contemporary India is saturated with anti-Muslim violence.

Yet not all of this anti-Muslim violence is "violent violence." There are also more quotidian anti-Muslim violences—or what Thomas Blom Hansen might refer to as "everyday suspicions and misrecognitions"[24]—that Indian courtrooms and other state domains operationalize. In short, a range of phenomena in contemporary India—including riots, state neglect, and also the law—embody anti-Muslim violence that can be either extraordinary or ordinary violence.

RIOTS

Perhaps more so than any other incidence of anti-Muslim violence in postcolonial India, the 2002 massacre of Muslims in the Indian state of Gujarat drew attention to anti-Muslim bias and violence in contemporary India. During the worst of the violence, Hindu rioters used a sword to slice open the belly of at least one pregnant Muslim women in a (successful) effort to kill both her and her (presumably) Muslim fetus[25] and also poured flammable liquid down the throat of a young boy before igniting the liquid and exploding him.[26] Muslim businesses, homes, men, and women around the state were also targeted in a coordinated campaign of murder, rape, and pillage. For example, in the aftermath of the Gujarat riots, it was revealed that Gujarati authorities had distributed detailed records of property and business owners in the state; these records were used to facilitate the targeting of Muslims during the 2002 violence.[27] Ultimately, over two thousand Muslims suffered a violent death during this campaign, and tens of thousands more were displaced as Muslims relocated within Gujarati cities to areas considered "safe." More than fifteen years after the 2002 events, major actors complicit in them—including then-chief minister of Gujarat, and now prime minister of India, Narendra Modi—remain unpunished.

The sadness of what transpired in Gujarat, in 2002, is only compounded by the link between those riots and calamitous and momentous events that had transpired ten years earlier in Ayodhya. There, in December 1992, Hindu mobs—coordinated and encouraged by leading Hindu nationalist politicians, including several who later took up positions in the central government—tore down a historic mosque, the Babri Masjid. Furthermore, a few tense months after the destruction of this Muslim religious site, several bombs were set off in Mumbai, India's largest metropolis, over the course of days—allegedly at the direction of Dawood Ibrahim, a Muslim

member of Mumbai's notorious underworld—killing hundreds.[28] The Mumbai bombings sparked yet more anti-Muslim violence, including, arguably, the Gujarat massacre many years later. Indeed, the 2002 Gujarat massacre was committed on the ground by Hindus who were instigated into formation and action by reports of the killing of Hindu religious pilgrims returning from Ayodhya, and who were breaking their long train journey in the small Gujarati town of Godhra. As the train carrying these pilgrims (and others) was departing from the station in Godhra, a train-carriage fire mysteriously broke out after altercations between some of the pilgrims and Muslims who were either on the train itself or lived along the train's route. Over fifty of the Hindu pilgrims were killed in this fiery incident.

The awful outbreaks of violence that have been directed at Muslims in India over the past twenty-five years, from Uttar Pradesh to Maharashtra to Gujarat, are only the latest chapters in a long-standing story of state-complicit Hindu-Muslim tensions and conflicts in postcolonial India. Of course, Hindu-Muslim conflict is not the only kind of religious conflict occurring during this period. Yet, arguably, it has been the most salient kind, providing either an important plotline or a larger frame for other contemporary clashes—in addition to ominously echoing the historical Hindu-Muslim conflict that occurred around Partition and the creation of the independent (and conflicting) states of India and Pakistan.

In short, postcolonial India has more than its fair share of Muslim graveyards. Yet, as gruesome and tragic as the state-coordinated "violent violence" behind these deaths has been, just as serious—if both more quotidian and more insidious—violences have been perpetrated against Muslims for the past several decades via the intertwined violences of state neglect and state law. Put another way, not all anti-Muslim violence in India has resulted from the state helping to separate out, then kill and maim, Muslims; other violence has occurred as a result of the state's blinding itself to the devastating material and social conditions of an often mistrusted and despised minority.

NEGLECT

The 2002 Gujarat violence was perhaps most obviously about the slaughter of Muslims. Yet even amid this murderous maelstrom, other attempts were made to eliminate Muslims in less graphic ways. For example, pamphlets were distributed in Gujarati encouraging a total economic boycott of Muslims, so that "it will be difficult for [Muslims] to live in any [corner] of this country."[29] This kind of economic and social violence, moreover, has a

history that stretches back much further than the 2002 Gujarat violence—a history that was laid bare in a 2006 report to Prime Minister Manmohan Singh titled "Social, Economic and Educational Status of the Muslim Community of India."[30]

In this 404-page report compiled by a Prime Minister's High Level Committee, popularly known as the "Sachar Committee report," a number of startling findings were presented. These included statistics demonstrating that, in 2004–5, Muslims in the urban areas of India faced rates of poverty (38 percent) even higher than those (36.4 percent)[31] experienced by individuals belonging to India's historically very marginalized low-caste and tribal communities (commonly referred to as "scheduled caste/scheduled tribe," or "SC/ST," communities). Additional statistics presented in this report, from 2006, revealed serious underrepresentation of Muslims in the Government of India's public-sector, civil service cadres (e.g., the Indian Administrative Service, Indian Foreign Service, and Indian Police Service).[32] Moreover, the future does not look bright either, if the 2004–5 national literacy figures presented in this report are any indication.[33] Muslim children between the ages of six and seventeen experienced lower literacy rates than SC/ST children within the same age demographic.[34]

The Sachar Committee report generated considerable popular and political commentary, as it represented a significant "effort" by the post-Independence Indian political setup to provide some sense of inclusion for India's 180-million strong[35] Muslim minority. However, while the report spoke with a level of intelligence and seriousness that deserved attention, its pages and words must be viewed in a context of prior efforts, such as the seventy-year-old Constitution of India, and its words and promises—apparently still unfulfilled—concerning minority rights and welfare.[36]

Indeed, a serious "affirmative neglect"—as opposed to, say, any serious affirmative action—must also be identified here; namely, in the set of deliberate post-Partition choices to *not* include many needy Indian Muslims within India's noteworthy "reservations" system. This system is a constitutionally sanctioned social redistribution system that sets aside (or "reserves") seats in legislative assemblies, governmental employment, and higher education for many members of India's marginalized caste and tribal communities.[37] Rationalizing this Muslim exclusion by reference to the constitution's text, structure, intent, and values, numerous people have asserted that to set aside legislative seats, or employment and educational opportunities, for a *religious* minority—as opposed to a disadvantaged *caste*—is somehow unconstitutional.[38] As a result, India's high-minded constitution has

been unable to prevent many Muslims in India from experiencing profound neglect, despite provisions that are intended to protect minorities in this "sovereign socialist secular democratic"[39] republic. Instead, the constitution—and, in particular, its commitment to secularism[40]—has paradoxically been used to *justify* Muslim exclusion from otherwise massive (and admirable) efforts by the Indian state to direct opportunities and resources to India's most marginalized citizens. Such policies further the devastating neglect of Indian Muslims. They also suggest that the Indian state has only been willing to see Indian Muslims in order to injure them rather than to help them.

LAW

Although law has been a useful tool for the violence of Muslim neglect, it is not only law's omissions and ostensible inabilities that end up doing this anti-Muslim work but also its commissions and vicious capabilities. Indeed, India's higher judiciary has regularly engaged in prejudicial discussions about India's Muslim population over the past few decades.

For example, in the well-known 1995 Supreme Court case of *Smt. Sarla Mudgal v. Union of India*,[41] concerning whether or not married Hindu men who converted to Islam, and who then took a second wife (as permitted to Muslims by Indian Muslim personal law) were subject to the Indian Penal Code's criminalization of bigamy, the Supreme Court affirmed the legal propriety of applying the code's anti-bigamy provisions to "Hindu-cum-Muslim"[42] men. Yet, a simple application of judicial precedent to the facts of a contemporary complication arising from religious conversion in India was not accomplishment enough for the Supreme Court in this case.

Instead, the Supreme Court here also decided to lament the very existence of India's personal law system and the lack of a uniform, nonreligiously differentiated family law embodied by this system. Notably, the Court provocatively placed the blame on Indian Muslims for this legal situation. Indeed, echoing common Hindu nationalist accounts of Muslims' supposedly unique intransigence about maintaining their own personal law, the Court wrote: "The personal law of the Hindus, such as relating to marriage, succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins the establishment of a 'common civil Code' for the whole of India."[43]

Moreover, the Supreme Court's provocations did not end there. The Court also went on to observe that "[t]ill the time we achieve the goal—uniform civil code for all the citizens of India—there is an *open inducement* to a Hindu husband, who wants to enter into second marriage while the first marriage is subsisting, to become a Muslim."[44] Such statements again resonate with Hindu nationalist propaganda concerning Indian Muslims. Indeed, for Hindu nationalists, Indian Muslim polygamy is not only emblematic of the unique patriarchy of the Indian Muslim family but also a reproduction device allowing Muslim men to both win converts and produce more spawn than their ostensibly monogamous Hindu male counterparts. Ultimately, in the eyes of Hindu nationalists, all of this aids expansionist Muslim demographic and political intentions in India (if not also elsewhere).

Unfortunately, the anti-Muslim sentiment present in the Supreme Court's decision in *Sarla Mudgal* has lived on. Recent litigation at the Supreme Court concerning Indian *dar ul qazas* exemplifies how Hindu nationalists continue to use arguments about Muslim patriarchy, and the Muslim political power to which such patriarchy allegedly gives rise, in an attempt to curb the operation of Indian Islamic family law and non-state Islamic legal institutions like *dar ul qazas*. These kinds of recent claims resonate and build upon arguments, such as those made by the Supreme Court in *Sarla Mudgal*, which the upper judiciary has indulged in for many years now.

The Supreme Court's decision in *Sarla Mudgal* not only contributed to future legal discourses aimed at eradicating Islamic (legal) institutions in India but also reached back to give new sustenance to older and even more notorious instances of judicial prejudice in India. Indeed, to add insult to injury in *Sarla Mudgal*, the Supreme Court positively referenced[45] in this case one of the most controversial decisions that the Indian judiciary has issued post-Independence—namely, *Mohd. Ahmed Khan v. Shah Bano Begum*.[46] In this infamous 1985 case, the Supreme Court took on the interpretation of Islamic family law, opining that nothing in it forbade the state from making a Muslim man pay indefinite maintenance to his divorced wife who "is unable to maintain herself."[47] Yet the Supreme Court's interpretation of Islamic law occurred as the same court made patronizing observations about the content of such law. For example, the opening paragraph in this case included the following objectionable remarks: "[I]t is alleged that the 'fatal point in Islam is the 'degradation of woman'. To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from

a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly."[48]

In sum, secular India is saturated in anti-Muslim violence. This violence takes plural forms, from violent and fatal anti-Muslim riots aided and abetted by a bureaucratic secular state; to secular state "passivity" and "inaction," and the slow denigration of Muslim lives and capabilities in which this neglect results; to opinion writing by a secular judiciary both remiss towards, and complicit in, Muslim communities' vulnerability to conspiracy theories, stereotyping, and worse.

DECONSTRUCTING SECULARISM

Anti-Muslim sentiment in India is pervasive, but it is neither univocal nor incoherent. Rather, this polymorphic sentiment exhibits predictability, manifesting as an effort aiming to "otherize" Muslims but also a simultaneous desire to "absorb" them.

The first kind of anti-Muslim action revolves around a need to make Muslims discrete and separable from a "normal" body politic—a tactic that is common around the world, especially in secular regimes,[49] and which is also a prominent subtext of Indian anti-Muslim violence.

The second kind of anti-Muslim maneuver is characterized by an impulse to completely deny religio-communal difference and to assimilate Indian Muslims into a secular (yet Hindu) body politic. This kind of anti-Muslim sentiment can be found elsewhere, but perhaps is most ardently articulated by Indian Hindu nationalists who, in addition to being anti-Muslim, are also passionate secularists who presently control the central corridors of state power in India.

Moreover, the paradoxical coexistence of these two manifestations of anti-Muslim sentiment in contemporary India—one oriented toward radical *exclusion*, the other oriented toward radical *inclusion*—can be accounted for by Indian secularism's fundamental *dependence* on non-state Islamic law and legal institutions; or, put another way, the fact that Indian secularism is in a complicated relationship of hate, love, and *need* with Indian Islam.

To be sure, secular need does not have to be triangulated with secular hate and secular love. But it is important to recognize that secular need, in itself, exists and how this overlooked need can prove helpful for understanding Indian secularism's agonistic relationship with Indian Muslims and Islamic law and legal institutions alike. Importantly, this perspective moves

the discussion of secular–Islamic relations very much away from the usual one of seeing the relevant protagonists as hostile—and only hostile—to one another. That being said, the otherizing engaged in by secular discourse and practice, in India and elsewhere, is not insignificant.

OTHERIZING HATE

Anti-Muslim sentiment that is deployed against an "other" Islam is both a deeply Indian and a deeply global phenomenon. As the preceding discussion suggests, there are several ways in which Muslims have been separated out, marked for, and subjected to violence (of a variety of forms) in contemporary India. This discussion is altogether consistent with a large amount of other literature documenting and discussing the violent otherizing of Muslims in contemporary India.

In this literature, the technologies of Muslim otherizing are various, but gender often figures prominently, as recent Indian debates over *dar ul qazas* readily display. Gender-wise, Indian Muslims (or at least Muslim men) are sometimes otherized by being depicted as hypermasculine. Anthropologist Thomas Blom Hansen, for example, has described one strategy of Hindu nationalists that involves "semitiz[ing]" themselves by "overcom[ing] the 'effeminate' Hindu man and emulat[ing] the demonized enemy, the allegedly strong, aggressive, militarized, potent and masculine Muslim."[50] At other times, the otherizing of Indian Muslims results from their being feminized, with detrimental consequences for their ability to participate effectively in a decidedly masculine Indian public space. Anthropologist Lawrence Cohen provides an especially vivid example of this kind of otherizing in his description of "political pornography" that emerged during the 1992 celebrations of Holi in Varanasi, shortly before the destruction of the Babri Masjid. Gracing the cover of a pamphlet distributed at this time was a woman's naked reclining body—with legs spread and knees bent, vagina displayed to the viewer, upright breasts visible in the "distance" beyond the vaginal opening, and raised knees. As Cohen describes this image: "The vaginal opening became a doorway and the surrounding pelvis the body of a mosque, with breasts visible as domes and spread legs flanking the structure. . . . *Kar sevaks* [Hindu religious workers] march to and fro beyond the entry, waiting. The libertine female mosque cries out for penetration. . . . The absent male allows the representation of the mosque's destruction as legitimate desire, as *inalienable Otherness*."[51]

Gender is not the only technology of Indian Muslim otherizing, however; nationalism also often figures prominently. On this point, it is worth

noting how right-wing forces in India have often labeled their opponents "Pakistani" before they brutally attack them. This has been as true in situations where Muslims have been attacked by right-wing, nationalist Hindus, as it is when non-Muslim Maoists have been attacked by ostensibly secular capitalists. Martha Nussbaum has discussed how attributions of Pakistani-ness to Indian Muslims played a role in the anti-Muslim Gujarat riots of 2002,[52] and Arundhati Roy has discussed how the Indian state's anti-Maoist campaigns have similarly worked to otherize the capitalist state's Maoist opponents by attempting to link them to a foreign and Muslim Pakistan.[53]

These otherizing anti-Muslim moves might suggest that all this is somehow unique to India or, even more uniquely, to India's nativists and misogynists. Yet this kind of anti-Muslim sentiment, contingent on identifying a separate and discrete Islam, is commonplace. Indeed, to identify this kind of sentiment as an Indian peculiarity would only replicate the kind of "otherizing"—in this case of India and/or reactionaries—that is so problematically engaged in with respect to Islam in India. And, in fact, otherizing anti-Muslim maneuvering is a global phenomenon in both a geographical and a political sense.

For example, recently in the United States a highly contentious debate about an alleged "shariʿa threat" has broken out, stoked mostly by social and political conservatives concerned about an "Islamic other."[54] Moreover, it is not only in conservative or reactionary circles in the West that examples of an "otherizing" relationship between liberalism and Islam abound, but also in the Western liberal philosophical tradition itself. For example, the late liberal philosopher Brian Barry argued, in 2001, that "[a]lthough the Koran does not (as is sometimes supposed) underwrite a theocracy, it does contain a set of prescriptions for the way in which the community of the faithful is to be organized. . . . This body of doctrine, subsequently elaborated by generations of interpreters, sets up a strain between Islam and liberal norms a sign of which is that no polity with a Muslim majority has ever given rise to a stable liberal democratic state."[55] Here, then, we find a celebrated liberal philosopher casually instantiating a separation of Islamic and liberal norms, with Islam being external to and separate(d) from liberalism, and the two suffering a "strain."

While Barry's later work is representative of a particular strand of contemporary liberalism—namely, one that is hostile to multiculturalist policies[56]—other kinds of liberal theorists have also otherized Islam. In one of his most celebrated essays, Charles Taylor, for example, effectively agreed

with Barry that there is some sort of fundamental conflict between liberalism and Islam when he observed that "[f]or mainstream Islam, there is no question of separating politics and religion the way *we* have come to expect in Western liberal society." In this essay, Taylor then tightened his circle of Western wagons even further when he went on to note how "[l]iberalism is . . . a fighting creed" and that "[t]he challenge is to deal with [Muslims'] sense of marginalization without compromising *our* basic political principles."[57] With such observations and declarations, then, Taylor ends up echoing Barry in the identification of a Taylorian "liberal society"[58] that Taylorian Muslims apparently do not belong to or help define.

Some may be surprised at this otherizing tendency in Western liberalism. Others will be dismayed by it. Yet overemphasizing this otherizing tendency carries its own risks, if only because otherizing does not fully capture all of the ways in which "the other" can be obliterated. Indeed, another kind of politics can erase the "Muslim enemy"—not by killing it, but rather by making it your (best) friend (forever).

ABSORPTIVE LOVE

The period stretching from the late twentieth to the early twenty-first century in India was not only a period when "violent violent" Hindu nationalists managed to tear down mosques and murder Muslims with near impunity, but also a time when Hindu nationalist forces were able to consolidate a long-standing effort to propagate a Hinduized version of secularism that could be conceived of (by its proponents) as not only tolerant, but "super-tolerant." According to this Hindu nationalist view of things, Indian secularism has been especially tolerant because of its links to a Hindu religion that not only predated and anticipated other religions but, as a result, already accepts and adopts the adherents of these other religions as Hinduism's own.[59] Put another way, the contemporary period in India has been a time when not only Muslim otherizing has grown in destructive potency but so has an equally obliterative but absorptive kind of anti-Muslimness—one that both claims Muslims as Hindus and celebrates Hinduism's "secular tolerant" ability to do so.[60]

Such a "lovingly" absorptive approach to Muslims has only relatively recently consolidated itself, but its history is a long one. Indeed, M. S. Golwalkar—one of the most influential spokespersons of this vision of Hinduism/secularism—described Hinduism's links to the Indian state's secularism more than fifty years ago as follows: "But if by secularism is

meant that the State should not be tagged to any particular creed and that all faiths should be equally respected, then this again would only be another name of Hindu tradition. In fact, Hindu tradition goes far beyond the western concept of 'tolerance' which implies that the faith which 'tolerates' is superior to the other. With us, all faiths are equally sacred. . . . Hindu tradition is secularism in its noblest sense."[61]

These words of Golwalkar were written in 1965, in-between the traumatic 1947 Partition of South Asia into India and Pakistan and the 1980s with their especially intense conflicts between Hindus and Muslims in India. Yet, the anti-Muslim implications of this articulation of Hinduism/secularism were clear. For example, Golwalkar's declaration that, according to Hinduism/secularism, "all faiths should be equally respected," is seemingly a benign gesture, but also one that comports with negative depictions of Islam. Such depictions allege and emphasize Islam's proselytizing character, and go on to characterize this proselytizing as demonstrative of Islam's inherent lack of tolerance for other religions and their belief systems—in contrast to a Hinduism that is so broad as to be able even to include Muslims as Hindus. This kind of sentiment is apparent in the following statement made in 1984 by an ideologue of the well-known Hindu nationalist organization, the Rashtriya Swayamsevak Sangh (RSS): "If secularism means treating all religions on an equal footing, proselytisation and secularism can't go together. Those who believe in conversion do so because they feel that their religion is superior to all others. Their organizations therefore cannot claim to be secular. Hinduism, on the other hand, does not believe in conversions and Hindus have never been proselytisers. As such, organizations of Hindus alone can be truly secular."[62]

The thought that Muslims cannot embrace either tolerance or a pluralistic society in a way akin to Hindus is clearly articulated by Hindu nationalism's most vociferous ideologues. Yet, this thought has been present even in less strident actors' words and actions, including leading figures in India's Independence movement. For example, in the events leading up to Partition, the Independence leader and first prime minister of postcolonial India, Jawaharlal Nehru, often expressed exasperation with the desire of Muhammad Ali Jinnah, future leader of the post-Partition Pakistan, for some sort of significant Muslim political autonomy in a postcolonial South Asia—equating this desire with backwardness.[63] And Gandhi himself unfavorably contrasted Islam (and Christianity) with Hinduism, noting that "[i]n my opinion there is no such thing as proselytism in Hinduism as it is understood in Christianity or to a lesser extent in Islam."[64]

One can also see the valorization of an ostensibly loving and super-capacious Hindu tolerance in several Supreme Court of India opinions. For example, in the well-known and controversial 1996 opinion of *Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*,[65] the Supreme Court endorsed the view that Hinduism is secularism *simpliciter*. Commenting on use of the word "Hindutva" by Hindu nationalist politicians in electoral campaign rallies, and possible violations of India's electoral laws concerning the use of religion in political campaigns, the Supreme Court had this to say about the term:

> [T]he term 'Hindutva' is related more to the way of life of *the people of the subcontinent*. It is difficult to appreciate how . . . the term 'Hindutva' or 'Hinduism' *per se*, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry. . . .
>
> . . . It is, therefore, a fallacy and an error of law to proceed on the assumption that any reference to Hindutva or Hinduism in a speech makes it automatically a speech based on the Hindu religion as opposed to the other religions.[66]

With these statements, then, the Supreme Court of India sharply distinguished Hindutva from any possibility of religious sectarianism, but also seemed to suggest that (Muslim) Pakistanis—as residents of the subcontinent—were also all Hindu!

Dr. Ramesh Yeshwant Prabhoo was decided in the aftermath of the post-Ayodhya communal violence in Mumbai.[67] However, it was not the first Supreme Court opinion to endorse the Hindu absorption of secularism and other religions alike. For example, in quite interesting ways, this kind of maneuvering is also on display in *Ganpat v. Presiding Officer*,[68] an older case from 1975, concerning the religious bona fides of a candidate who was running for a seat in the Maharashtra Legislative Assembly reserved for members of India's disadvantaged scheduled castes. Ganpat, who lost the election, brought suit claiming that the successful candidate (a "respondent 2") had converted to Buddhism and thus could not be considered a member of any scheduled caste—caste presumably being a Hindu institution only. In upholding the victory of the prevailing candidate (respondent 2), however, the Court highlighted that "Hinduism is a very broad based religion. . . . Hinduism is so tolerant and Hindu religious practices so varied and eclectic that one would find it difficult to say whether one is practicing or professing Hindu religion or not."[69] In other words, the Court

seemed to be saying: "There is a presumption of Hindu-ness in India, and how could there not be when Hinduism is so capacious?"

From Partition to the contemporary period, then, recognizing Muslims as a distinct grouping has proved difficult for an India that wishes to absorb all difference under the moniker of a Hinduized secularism allegedly—if also fatally—"tolerant" to its core.

NEEDFUL DEPENDENCY

Anti-Muslim sentiment in contemporary India often proceeds along two seemingly contradictory paths. It can be a challenge to account for how these two kinds of anti-Muslim feelings—one oriented toward radical exclusion, the other toward radical inclusion—can coexist. The analysis offered here is that Indian secularism's hate-love relationship with Islam provides just a surface glimpse of what is in fact a complicated and affect-laden dynamic of dependency existing between secular law and governance and non-state Islamic legal institutions—in short, that secular hate and secular love are merely symptoms of an agonistic secular need. In offering this view on secular governance and its underlying predicaments, I am elaborating upon the insights of a number of other scholars, while also taking them in new directions.

For example, the idea of secular dependency takes a large cue from political theorist Partha Chatterjee's well-known arguments highlighting the colonial antecedents to a distinct form of Indian nationalism. Chatterjee observes that "[Indian] anticolonial nationalism creat[ed] its own domain of sovereignty within colonial society well before it [began] its political battle with the imperial power. It [did] this by dividing the world of social institutions and practices into two domains—the material and the spiritual. The material is the domain of the 'outside,' of the economy and of statecraft, of science and technology. . . . The spiritual, on the other hand, is an 'inner' domain bearing the 'essential' marks of cultural identity." As Chatterjee goes on to note, this colonial-era "spiritual nationalism" was later to shape the postcolonial "material nation," whereby spiritualities and materialities (as well as privates and publics, communities and the state, and subalterns and elites) have "not only acted in opposition to and as a limit upon the other but, through this process of struggle, [have] also shaped the emergent form of the other."[70]

Chatterjee's work here aims to suggest deep relationships between social and political phenomena thought to be separate, disassociated, and merely antagonistic. Moreover, the relationship that Chatterjee sketches between

the "spiritual" and the "material" is important, because it connects not only two different domains but also two different affective registers. In other words, Chatterjee's work counterintuitively goes beyond a typical description and analysis of pluralism where one *legal* jurisdiction (perhaps that of the state) simply interacts with another *legal* jurisdiction (perhaps, but not necessarily, non-state). For Chatterjee, India's pluralistic system of law and governance is not simply technocratic but, rather, full of affect: there is both spirituality and struggle here.[71]

Akin to Chatterjee's efforts, I also work to connect the ostensibly technocratic—in this case, secularism—with the seemingly non-technocratic—here, Islam. However, while Chatterjee poses a certain kind of oppositional struggle between these varying kinds of techniques and registers, the suggestion here is of a different kind of relationship—namely, one of agonistic and affective dependence. In this way, then, my approach also draws inspiration from the psychological orientation of the work of both Peter van der Veer and Thomas Blom Hansen and their discussions of religious nationalisms.

For example, when discussing the issue of religious nationalism in India, anthropologist Peter van der Veer has noted: "Hindu and Muslim nationalisms develop along similar lines and . . . the one *needs* the other."[72] More generally, van der Veer has stressed the affect-laden tropes of family and community that infuse modern nationalisms in India, whether religious or secular.[73] The "family feud" is thus what helps sustain the integrity of each of the fighting families in van der Veer's world of intercommunal conflict, love, and dependency. Of course, the argument here is somewhat different, focused as it is on the nonofficially Hindu state and its contemporary relations with non-state Islamic legal institutions in India, but the underlying diagnosis of some sort of needful dependency in these relations parallels van der Veer's own psychologized assessment of how and why social "antagonisms" perpetuate themselves indefinitely.

Even more concretely, the idea of affect-laden secular dependency builds on anthropologist Thomas Blom Hansen's arguments about communal (Hindu) self-esteem and (Hindu) nationalism.[74] Hansen's work suggests a view about the difficult relationship between the Indian state and Indian Muslim communities that sees this difficult relationship less as the result of there being an independent, powerful, and Hindu-dominated "colonizing" Indian state[75] (and an understandable Muslim "anticolonial" counterreaction to this neocolonialism), and more the consequence of an Indian state that perceives its own "lack." It is true that the Indian state is not

actually Hansen's primary focus in the following excerpt from his work. Rather, Hansen's focus is Hindu nationalism. But to the extent that the Indian state has become covalent with Hindu nationalism—as the current Modi government at the center strongly suggests—the following observations made by Hansen are apt. Hansen writes that:

> Communities always fantasize about the special and inaccessible ways in which the other enjoys life—how others 'have more fun'—ultimately revealing to themselves ways in which they also could enjoy themselves and their ambivalence toward these—forbidden—enjoyments. . . .
>
> The inability to control oneself, to discipline one's enjoyment and fantasies and to fully unfold one's enjoyment . . . by being part of a nation or community, institutes self-hatred and castration. The community is weak, sinful and unfulfilled. The only way to remedy this is by destroying the Other. . . .
>
> [In India, t]he identification of the Other as Muslim is instituted and repeated endlessly by Hindu nationalism. . . . The myths of Hindu weakness, un-manliness and lack of discipline correspond neatly to myths of the manliness, secret organization and corporate strength of the Muslims.[76]

Hansen's observations here about the ways in which desire, jealousy, hate, and dependency commonly comingle in intercommunal relations illuminate how it also might be the case that Indian state secularism's perception of its weakness, dependency, and "lack"[77] vis-à-vis non-state Islamic law, and non-state Islamic legal institutions, is tightly bound up in this secularism's anti-Muslim and dualistic hate-love tendencies.

To be sure, attempts to psychologically diagnose the state are likely to be controversial, as is trying to explain the secular state's anti-Muslim sentiments—indeed, the secular state's phobia, or even "Islamophobia"—by reference to the state's felt inadequacies. This approach will be further elaborated upon and argued in my conclusion, with its discussions of how (secular) states *feel*. However, the majority of this book's pursuits are simpler, aiming to demonstrate four major ways in which Indian secularism depends on its ostensibly illiberal Islamic "antagonists." The first two ways can be considered "ideological" dependencies, while the latter two can be considered "material." First, Indian secularism needs non-state Islamic law and legal institutions because of a fear that this secularism may not be genuine in its tolerance. Stated another way, Indian secularism needs its

"opposite" (i.e., the robust articulation of non-secularized Islamic legal enforcements) in order to prove its tolerance credentials, both internally and externally. Second, Indian secularism needs non-state Islamic legal providers because of its ambivalent attachment to feminism. Put succinctly, for reasons of both internal and external legitimacy, Indian secularism needs women (and perhaps especially Muslim women) to have robust divorce options, yet Indian state courts are themselves unwilling to provide these divorce options. The *dar ul qaza* network (among other bodies) can and does perform divorces for Muslim women. Third, Indian secularism needs non-state Islamic legal actors and institutions to intervene with disputing parties where the Indian state cannot because of the state's alien secular qualities and, simultaneously, its fundamental anxieties about the state's popular (il)legitimacy. Finally, the Indian secular state needs Islamic legal actors and institutions to provide legal services because of how the Indian state is already consumed by overwhelming caseloads; these non-state legal actors help disperse dispute resolution across a broader range of capable legal actors and allow governance—as historian Julia Stephens might describe it—"on the cheap."[78]

The multifacetedness of these secular dependencies indicates that the ways in which non-state Islamic legal institutions, such as *dar ul qazas*, make secular law and governance possible in contemporary India are not necessarily simple—regardless of whether one views these secular needs as also imbricated in secular hates and loves. Given this complexity, a versatile methodology open to histories and developments both inside and outside traditional archives concerning the state and law alike is required.

AN INTERDISCIPLINARY METHODOLOGY

> A historical ethnography . . . must begin by constructing its own archive. It cannot content itself with established canons of documentary evidence, because these are themselves part of the culture of global modernism—as much the subject as the means of inquiry. . . . [W]e must work both in and outside the official record, both with and beyond the guardians of memory in the societies we study.
>
> —JOHN COMAROFF AND JEAN COMAROFF, *Ethnography and the Historical Imagination*, 84

A significant number of disputes handled by Indian *dar ul qazas* pertain to Muslim women's marital status or, more broadly, Islamic family law in

India. As fields of inquiry, “Islam,” “the family,” and “India” are difficult to comprehensively document or conclusively explicate. Moreover, the complications only increase when one takes into account how each of these fields is brought into shape and relief by contiguous and sometimes agonistic discourses. As a result, both an interdisciplinary methodology and a multifaceted “library” are required for any nuanced exploration of *dar ul qazas* and their secular Indian context.

In all this, one methodological genre is especially important—namely, that of ethnography. To be sure, an ethnography per se of the Indian *dar ul qaza* network (and the sociocultural context in which it is situated) is not on offer here. However, an ethnographic methodology is deployed in order to get at the messiness of—or, put another way, the dynamic, dialectical, and affective qualities of—humans, social institutions, and laws. Indeed, such a methodology is one interested in the lived reality of certain conceptual categories, including the instability of these humanly authored categories, and also the “unlikely” places where we often find social, political, and legal meanings being made.

As to the exploration of such unlikely places, Laura Nader has identified

> [a need to] push . . . beyond the invisible boundaries of . . . the anthropology of law, and anthropology more generally, and even beyond ethnography. . . .
>
> . . . It [is] elemental that barriers to thinking new about an anthropology of “law” ha[ve] to be removed. And if they [are] not, we [are] not doing our job. . . . If an understanding of complaints leads us to moral minimalisms and the construction of suburbia, so be it . . . . If an understanding of why a young child’s shirt burned so quickly takes us into the Nixon White House to examine election bribery, that is where we pursue the question.[79]

In short, Nader pushes the scholar to pursue legal inquiries wherever they may lead, even if they move along paths into territories not traditionally considered “legal.” Following Nader’s lead, then, my legal inquiries will follow meandering—yet also purposive—paths. These paths will take us to both familiar and unfamiliar places in the process of attempting to understand, not only the *dar ul qaza* network itself, but also its fateful interactions with the Indian state’s secular system of law and governance. These places of exploration will include both non-state *dar ul qazas* and lower state courts, and then also the “Supreme” Court of India.

One intention in putting "Supreme" in scare quotes in the last paragraph is to underline how the methodological approach deployed here differs greatly from that utilized by most lawyers, judges, and law professors when they attempt to understand legal systems. For many such people, the point of law is to tell people (whether working for the government or acting as private citizens) what they can and cannot do. As a result, "law"—according to this particular view of it—should embody both clear commands and clear rules, thus enabling the best-intentioned (and/or the best-educated) to behave and plan their lives. Moreover, under this approach to law, one discerns "the law" and understands a legal system by going to a law library and reading legal textbooks and a given jurisdiction's Supreme Court cases. And indeed, according to this view of the law, the more Supreme Court cases there are on a matter, the higher the chance that a "clear" picture of the law can be made available—or, at least the appearance of one via a very lengthy string citation.

However, law is more uncertain than fixed, clear, and predictable. Again, this is because it is a social and political phenomenon (at least in part)[80] and, like other such phenomena, is formed and reformed in dialectical processes. And as a result of such dialecticism, law is rarely a discrete, separate, stable, or univocal entity—nor is it one that commonly sits (comfortably) atop any sort of singular hierarchy from which it may command a subaltern populace that has itself been made discrete and "other." Law does behave like this, certainly, but only very occasionally. More commonly law—including "high" forms of state constitutionalism—is commanded, shaped, occupied, poked at, distorted, and retorted by all sorts of populations and entities that sit above, below, with, outside, and within these legal spaces.

Such a decentered view and understanding of law requires, in turn, a different and relatively atypical kind of legal archive or "library." A dynamic, diffuse, and multivalent law cannot be found simply by going to a law library and reading legal textbooks, and a given jurisdiction's Supreme Court cases, no matter how "comprehensive" or "up-to-date" or "historical" the library's collection may be. Law's archive is far more complicated and voluminous than any law library can ever be. Indeed, law's archive includes both published Supreme Court opinions and unpublished trial court opinions—and, indeed, non-state (e.g., *dar ul qaza*) opinions as well. This archive also includes the antecedents to formal legal opinions; for example, legal petitions and counterpetitions. And it also includes journalistic stories, recorded interviews of the personal opinions and experiences of litigants and other interested observers, governmental opinions and reports, and assorted

statistics and numbers sourced from state and non-state spaces. And indeed, all of these kinds of materials will be used in the course of my explorations.

To be sure, such an archive of law is essentially contestable—and is contested—by actors both within[81] and without the law. However, this contestation is just like society and social relations themselves, or any pronouncement about the state of society. As such, and as the Comaroffs remind us in the epigraph that opened this section, archives—including legal ones—have to be constructed. Of course, such an archive is always unstable and subject to erosions, additions, and contestations. But that is like law itself—or, at least, the vision of law sketched out here.

The methodology I have chosen takes inspiration from not only Laura Nader and the Comaroffs but also legal sociologist Kim Lane Scheppele's work on "constitutional ethnography." As Scheppele describes it, constitutional ethnography provides a particular lens on constitutionalism—or, we might say, law itself—because it "does not ask about the big correlations between the specifics of [the design of a legal system] and the effectiveness of specific institutions but instead looks to the logics of particular contexts as a way of illuminating complex interrelationships among political, legal, historical, social, economic, and cultural elements."[82] The methodology—and archive—put into motion here looks, then, to all of the elements that Scheppele identifies (e.g., political, legal, cultural) as important, with the goal of illuminating the multiple logics witnessed by the operation of the *dar ul qaza* network, the secular Indian state, and the interactions between the two.

As necessary as they are to pursuing answers about "what the law is" outside of the traditional law library—and, indeed, in society—one soon confronts challenges as to the integrity, comprehensiveness, and representativeness of legal-cum-social sources. In short, one quickly comes to realize how ragged and fragmented both law and law-cum-social archives can be. Writing in another context, historian Gyanendra Pandey has observed how even "the state's 'archives['—]those official sources that generations of historians and social scientists have treated as core accounts, more 'reliable' or at least more 'comprehensive' than any other source" can go missing.[83] And what is true about "official" archives is just as much the case (if not more so) for social archives.

As a consequence, any methodology adequate to these challenges must acknowledge the reality of an always imperfect legal archive. Here, two moves have been made in order to be responsive to this imperfect reality. The first, in light of the sometimes limited sources analyzed, has been to

formulate relatively modest claims. In doing so, cues have again been taken from Pandey's work, and especially his cautioning against "the temptations of totalizing discourses" and his embrace of the converse, namely "provisionality."[84] Toward such provisionality, the primary goal here is to open up a neglected subject—namely secular state dependency on the Islamic non-state—from the examination of which a more complex relationship between state and non-state forms of governance can emerge. Moreover, the development of this "dependency lens" does not involve any attempt to deny the possibility of state control and orchestration of the non-state, nor does it involve any attempt to argue that the secular state's *need* of the Islamic non-state is more important (from whatever perspective) than the secular state's *hate* of Islam. One more perspective—albeit a neglected and crucial one—is simply offered on all of this.

The second move has been a decision to *burrow into* the cases and materials examined here rather than simply collect more and more situations, stories, and sources in the (vain) hope that this latter method would reveal the "complete picture." This burrowing move finds inspiration in the "thickly descriptive"[85] method that political scientist Gopika Solanki deployed in her recent work on Muslim (and non-Muslim) family law in India, but I do this thick descriptive work in an even more intensive manner. I have also followed the lead of religion scholar Benjamin Schonthal's turn to excavating "microhistories" as a way of enhancing our understanding of larger legal processes.[86] Schonthal's recent work on Sri Lanka is, in fact, an interesting deployment of a long-standing and general historical methodological interest in "microhistory"[87] in the specific arenas of law and constitutionalism. Tracking this kind of methodology, the focus here is on the details of a relatively small number of case studies, with the understanding being that a close reading of these cases and their surrounding circumstances can reveal social, political, and legal relations that would otherwise get submerged or lost in large-scale analyses eschewing deep qualitative analysis. This approach also has the benefit of being more rigorous than other approaches in that it provides readers with a level of detail about many of the case studies examined, allowing them to develop their own interpretive take on what is transpiring.[88]

In closing this methodological discussion, it is also important that I mention how the explorations to come will lead us not only to places surprising to most lawyers and legal scholars but also to places that many works on contemporary India do not traverse—namely, to locales outside of India. In this regard, the existence of plural legal jurisdictions—and especially

Islamic ones—is deeply unsettling for many contemporary liberal states, not just India. For example, the United States has recently experienced a highly contentious debate about the "shariʿa threat" allegedly confronting it. In response to this fiery debate, voters in the state of Oklahoma passed an amendment to that state's constitution in 2010 insisting that

> [State of Oklahoma courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. *The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international or Sharia Law.*[89]

While this Oklahoma constitutional provision ultimately did not come into effect due to US Constitutional concerns,[90] in this provision one can identify an antipathy to both supra- and sub-state law—or, in other words, anything that was "non-state" from the perspective of the State of Oklahoma.

Similarly, in 2003, Canadian politics became preoccupied with efforts by the Ontario-based Islamic Institute of Civil Justice (IICJ) to offer religiously premised family law arbitration services to Muslims in Canada's Ontario Province. In response to social uproar concerning this offer, the Government of Ontario went so far as to make illegal any arbitration conducted according to any body of law other than the law of Ontario or of another official Canadian jurisdiction.[91] This significant change in the law of arbitration was clearly the consequence of post-9/11 heightened anxiety concerning the loyalties and intentions of Canadian Muslims.[92]

And in the United Kingdom, the archbishop of Canterbury, Rowan Williams, ignited a firestorm after his delivery in 2008 of a lecture titled "Civil and Religious Law in England: A Religious Perspective." Conceived as a general talk about how to respond to "the presence of communities [in the United Kingdom] which, while no less 'law-abiding' than the rest of the population, relate to something other than the British legal system alone,"[93] the archbishop's words reverberated widely and controversially in a country still recovering from the 2005 attacks on its capital's public transportation system and the fear of a Muslim "fifth column" that these attacks engendered. Moreover, while much about the British legal system's future

attitude toward non-state Muslim legal actors remains unpredictable, it seems likely that non-state Muslim legal institutions and actors will continue to confront scrutiny and popular opprobrium.[94]

In short, it is not just India that is struggling with how to respond to non-state Islamic legality in the contemporary period, and it will not be just India that affects and is affected by the discussions informing this book. Put quite simply then, the discussions here are both about "India" and "not India" at many points in time.

As well, these discussions are not solely about or solely implicated in developments vis-à-vis *Islamic* legal institutions. Rather, they also travel along routes familiar to other Indian faith communities—Hinduism and Christianity included[95]—and also the secular Indian state itself. And indeed, this situation should not be surprising, as it is similar to what obtains in other highly pluralistic contexts. Toward this point, anthropologist John Bowen has described how, in Indonesia, "what formally appear as distinct sets of norms—sharîʿa, the many forms of adat, human rights, among others—in practice *shape and reshape each other*. . . . [J]udges, jurists, and ordinary people employ and deploy elements from one normative set to challenge or refashion another."[96]

Of particular interest here has been the Indian state's encouragement of nontraditional forms of dispute resolution that do not depend on the "usual" state court system—a system that has been left to fray and crumble in the postcolonial era. For example, the late 1980s witnessed the state's creation of *lok adalats* (people's courts). *Lok adalats* were largely the result of a search for less formal, less expensive, and quicker resolutions of millions of bread-and-butter civil disputes (e.g., motor-vehicle accident claims, quarrels with public utility companies, civil family law matters).[97] Another related development has been Parliament's approval, in 2009, of the Gram Nyayalayas Act. This act established a new local-level tier of the Indian judiciary. Moreover, its terms were witness to the state's continuing concern with the state legal system's inefficiencies, in that the act dictates that the Indian Code of Civil Procedure can largely be disregarded in some disputes handled by *gram nyayalayas*.[98]

Ultimately, in all this searching for alternative ways to do dispute resolution—whether via the *lok adalat* or the *dar ul qaza*—similar issues often arise. And, indeed, the practices of non-state Islamic legal institutions, non-state non-Islamic legal institutions, and the secular state's "unusual" and "usual" legal institutions alike exist in distinct yet overlapping planes

of discourse within India. The discussions here, then, are also about "Islam" and "not Islam" both at many points in time.

However, this is not to deny some singular aspects to the Muslim experience in contemporary India. At the very least, secular *lok adalats*, in contrast to Muslim *dar ul qazas*, have not confronted the kind of anti-Muslim sentiment which has been a pervasive feature of Indian politics, law, and society since independent India's liberal inception. While the tools of this anti-Muslimness have changed over time, and have varied in the degrees of crudeness or sophistication they exhibited, the fatal nonchalance or even enmity to which Indian Muslims have been subjected by their fellow citizens has persisted in one way or another for more than seventy years now. Perhaps especially worryingly, both secular theory and state practice have been major sites of such anti-Muslimness too.

Yet, frequent and horrific as all of this violence is, it is also futile in an important sense. For, in trying to undermine Muslims and their legal institutions, Indian secularism has only demonstrated its peculiar dependence on them. The converse is also certainly true. As a result, if secularism cannot eradicate Islamic law but must instead exist in a relationship of dependence on it, neither can there or should there be any eradication of secularism. In India, secularism and Islamic law are too deeply interdependent for anyone to be able to propose the elimination of just one of them. And, indeed, as much as the discussion here aims to provide a more critical understanding of secular theory and practice, it does not propose the elimination of secularism. Elimination campaigns are, in fact, the folly of anti-Muslim programs themselves and the final solutions toward which many of them seem increasingly oriented.

Instead of offering simple solutions, then, the goal of what follows is to offer a nuanced explication of how Islamic law and legal institutions can operate in the context of a contemporary secular and anti-Muslim regime. There may be no way out of the fraught situation of secular hate, love, and need of Islam described here, but perhaps there are paths, albeit difficult ones, through it. And so, without hoping to signpost a path to any pot of justice, I will now delve into this complicated situation with the hope of making the intractable somewhat more tractable, if not necessarily altogether pleasant.

1 MUSLIM AND MUNDANE

Historical and Contemporary Aspects of Dar ul Qazas

THE ROLE OF MUSLIM *DAR UL QAZAS* IN MAKING CONTEMPORARY India's secular system of law and governance possible is fundamental yet also multifaceted. In past and present alike, the functioning of *dar ul qazas* and other similar non-state actors have allowed secular governance in India to remain viable, in both ideological and material senses.

Historical aspects of this enabling role include the early twentieth-century role of a significant *dar ul qaza* network—later to become jointly coordinated by two non-state Muslim organizations, the Imarat-e-Shariah and the All India Muslim Personal Law Board (AIMPLB)—in helping make possible an independent, multi-faith-oriented, and secular India. This outcome was hardly a foregone result of what was a deeply and religiously fractured movement for India's political independence in the early part of the twentieth century. During this turbulent time, the *dar ul qaza* network was part of just one of many competing visions of how Indian Muslims could liberate themselves—perhaps along with their non-Muslim brethren—from British colonial rule. An altogether different Indian Muslim political vision developed at this time was the revolutionary idea of an independent South Asian Muslim homeland called Pakistan. However, the *dar ul qaza* network under analysis here was not allied with Pakistan. Instead, this network was part and parcel of a quite different constellation of Indian Muslim political thought articulated in this period that was concerned with preserving a space for Muslims *within* an independent and united India.

In this way, contemporary *dar ul qazas* have ideological, political, and religious origins that are far less revolutionary than they are conservative—more mundane than they are medieval. Moreover, the origins of this *dar ul qaza* network reveal what the network represented then and represents even now; namely, the possibility of an India that large numbers of Muslims *desire* rather than simply a place where poverty and fear *detains* them. It is here that secular India's ideological dependence on *dar ul qazas* begins to reveal itself.

As for contemporary times, the day-to-day functioning of the Imarat-e-Shariah/AIMPLB *dar ul qaza* network, as well as other similar non-state actors, shows that this non-state activity reduces caseloads for the Indian state's overwhelmed judiciary. Non-state Muslim dispute resolution, in all of its manifestations, is thus of fundamental material importance to the viability of a beleaguered secular state system of dispute resolution.

AZAD AND *AZAADI*: THE HISTORICAL ORIGINS OF A PROMINENT *DAR UL QAZA* NETWORK

Dar ul qazas are commonly referred to these days as "Muslim courts" or "shariat courts." Expressions like these, however, obscure the complexities of (at least some) *dar ul qazas*' historical origins. In particular, such expressions tend to ascribe a simultaneously sensational and sclerotic "Islamness" to *dar ul qazas*, in the process denying them "ordinary Muslim agency."[1] Although *dar ul qazas* are Islamic legal institutions both founded by and currently run by Muslims, the Islamic credentials of the *dar ul qaza* network focused on here are just as much imbricated in the anticolonial, pro-nationalist, and interreligious orientations of the early twentieth-century Indian Muslim founders of this non-state legal network, as they are in some sort of sensationalized *shariʿa*.

Despite this historical reality, *dar ul qazas* have come under intense scrutiny and attack in the contemporary moment, including the recent filing of a petition against them in the Supreme Court of India. This petition accused non-state, Muslim *dar ul qazas* of having contributed to lawlessness in India, and of having worked to undermine the state institutions that can supposedly stem this lawlessness. Simultaneously, the petition configured Indian lawlessness and the erosion of state institutions in India as having contributed to the spread of a regressive, fundamentalist Islam uncontrollable by the Indian state.

The founders of the *dar ul qaza* network focused on here would probably find these recent sensational claims made in the Supreme Court of India deeply troubling, if not altogether strange—and especially the claim that *dar ul qazas* are somehow "anti-national" or "anti-Indian state." Indeed, such allegations are quite remarkable considering the stature of some of the key historical architects of this network.

The well-known Maulana Abul Kalam Azad was perhaps the most important of these architects. The multiple personal transformations that

Azad underwent over the course of his lifetime remain an extraordinary testament to the often contingent quality of political and theoretical affiliations. The fact that Azad was born in Mecca in 1888 but died in New Delhi in 1958[2] is just one sign of how vast and varied his life and careers were. These careers included founding and running a provocative, anticolonial Islamic religious journal, *al-Hilal*, from 1912 to 1914;[3] being one of the founders[4] of the influential, nationalist Jamiat Ulama-i-Hind (JUH) organization in 1919;[5] becoming a major protagonist in the Indian Muslim pro-Turkey/anti-British "Khilafat" movement in the early 1920s;[6] and ultimately advocating "unalloyed secularism"[7] and serving as India's minister of education for the first eleven years of its postcolonial independence.[8]

Azad's later-life iteration as a government minister in independent India is not entirely surprising once one considers how, in the words of scholar Aijaz Ahmad, Azad became "undoubtedly one of the seminal figures in the Indian national movement [who] came to occupy . . . an unassailable position among the nationalist Muslims as they were represented in the Indian National Congress." In this respect, Ahmad also reminds us that Azad was once a plausible candidate to become the first prime minister of independent, post-Partition India.[9] While that high position did not materialize, and Azad had to settle for leading the Ministry of Education, the first prime minister of independent India, Jawaharlal Nehru, memorialized him in a speech to Parliament shortly after Azad passed away in 1958. Praising Azad, Nehru declaimed: "[Azad] was a peculiar and a very special representative in a high degree of that great composite culture which has gradually grown in India. . . . [Azad] represented this synthesis of various cultures which have come one after another to India, rivers that had flowed in and lost themselves in the ocean of India's life, India's humanity, affecting them, changing them and being changed themselves by them."[10]

As to Azad's earlier formative role in the JUH, it is important to note that during the debates leading up to the Partition of colonial South Asia, the JUH—a nationalist, Congress-allied political organization dedicated simultaneously (if also principally) to Indian Muslim religious leaders' concerns—famously came to oppose the demand for carving out a separate, Muslim-oriented Pakistan in what would become an independent South Asia.[11] As will be described in more detail shortly, the JUH also assisted with the initial creation of a nationalistic *dar ul qaza* network. As a result, many of the same early twentieth-century *ulema* who were supporters of this *dar ul qaza* network were also, as the historian Gail Minault describes them, "genuine support[ers of] freedom from Britain" who "wished to promote

pan-Indian Muslim solidarity" but wanted to do so "within the context of a nationalist alliance" working for a united India.[12] The terms of this historical, interreligious, nationalist alliance were of course open to discussion and debate. Nevertheless, the alliance's basic existence, as well as its connections to a now nearly hundred-year-old network of *dar ul qazas*, brings into high relief the recent accusations that *dar ul qazas* are necessarily antinational or even seditious.

To be sure, Azad was not the only influential actor in the JUH; it was not only committed to a pluralistic-yet-united independent India, but also comprised a variety of perspectives and personalities at its founding.[13] For example, the JUH's founders included a prominent member of the Barelvi sect[14] (Maulana Abdul Majid Badayuni),[15] as well as Maulana Husain Ahmad Madani—one of the most prominent early twentieth-century members of the Deobandi sect. Madani served for a time as the JUH's president; a position that his son, Asad Madani, also later occupied, followed by other relatives.[16]

Madani was a key player, not only in the JUH, but also in the extremely influential Deoband Dar ul-Uloom seminary.[17] The leadership of Deoband, like that of the JUH, also came to oppose the demand for Pakistan. While the reasons for its opposition to the idea of Pakistan were multiple, Deoband's conservative leadership was quite worried about the backgrounds and motivations of Pakistan's Muslim partisans, including Muhammad Ali Jinnah. On this point, historian Ziya-ul-Hasan Faruqi has observed that "Deoband was convinced that the western-educated [pro-Pakistan] League leadership was exploiting the fair name of Islam for the worldly gain of the Muslim vested interests."[18]

As a young student at Deoband, Madani was formally trained in Islamic thought and practice and, later in his career, he was asked to become the seminary's principal at a difficult time in the institution's life.[19] While active in prominent, Muslim-identified organizations, Madani saw no contradiction between Islam and an independent India where Muslims and Hindus could live, work, and engage in politics side by side. In this respect, Madani was the author of a well-known tract on what he termed *muttahida qaumiyat* (composite nationalism). Describing *muttahida qaumiyat*, Madani famously wrote:

> Islam comprises the principles that underlie the rectitude of doctrinal, practical, and moral matters. . . . We must now consider whether Islam . . . allows, on the basis of shared residence, race, color, and language, a shared nationalism with non-Muslims. . . .

> . . . To the extent that I can understand its laws, [Islam] can live together with non-Muslims in the same country; it can be at peace with them; it can enter into treaties with them. . . . [Muslims] can interact with [non-Muslims], participate in matters of joy and grief, and dine with them. . . . But this flexibility does not imply weakness.[20]

Madani's vision of and support for a united, independent India was not, however, an endorsement of a centralized (and Hindu-dominated) state. Nor was it, as historian Barbara Metcalf stresses, the result of some deeper belief that Indian Islam was ultimately indistinguishable from some sort of syncretic, quasi-Hindu, "Indian culture." Rather, Madani "was firmly identified, as a Deobandi, with one of the sectarian orientations of Sunni Islam increasingly salient at the turn of the twentieth century for the Urdu-speaking [Indian] Muslim elite."[21] Indeed, at least some kinds of local autonomies[22] for India's Muslims were envisioned in Madani's explicitly Islamic[23] proposals for an independent India, the idea being that these autonomies—legal, geographical, religious, and political in nature—would provide a degree of protection for a united India's minority Muslim population(s).[24]

Azad also envisioned a degree of Muslim autonomy within a united India, at least before his later turn away from a self-consciously Muslim politics.[25] And, indeed, while Madani is commonly known as the *ʿalim* who provided the defining Islamic theological justification for this kind of political setup, it is Azad who provided a detailed institutional scheme for how this would all work in practice.

Azad's institutional work here is particularly noteworthy because, unlike the work of so many in this respect, it actually achieved some degree of success—at least to the extent that part of it survives today in an operating network of *dar ul qazas*.[26] With regard to all this, Azad developed a relatively detailed plan for the local, and then supra-local, selection of *amirs* by different Indian Muslim religious leaders. These *amirs* were intended to lead and give voice to India's Muslim populations, both regionally and nationally (within the context of an independent, Hindu-majority state).[27] The late historian Papiya Ghosh described this pan-India *amir* plan of Azad's in the following way: "The *Amir e Hind* idea was perhaps a sequel to Azad's 1920 proposal for the selection of an Indian imam. According to his plan the ulama of each province were to select their own *Amir e Shariat* and a council of ulama to assist him. These ulama were to establish shariat courts in

every district and appoint district amirs. Finally all the amirs were to meet and select an *Amir e Hind*."[28]

Key to Azad's plan was the Imarat-e-Shariah, a Muslim nongovernmental organization founded in the eastern India state (or province) of Bihar and Orissa, in the early 1920s, with the assistance of the JUH and the sustained efforts of Maulana Abul Mohsin Muhammad Sajjad, a close associate of Azad's.[29] While the intention was for Azad's entire governance scheme to operate across India, ultimately it only came to real fruition in Bihar and Orissa, where a provincial *amir* was selected in June 1921.[30] The Bihar and Orissa of the early 1920s was later divided into what are now the separate contemporary states of Bihar, Odisha (still commonly referred to as Orissa), and Jharkhand.[31] And it is in these states that the Imarat-e-Shariah, and its *dar ul qaza* network, continues to be the most firmly established, known, and respected.

To be sure, this *dar ul qaza* network (as well as the larger system of Indian Muslim governance in which it was embedded) never obtained the pan-national and pan-sectarian stature envisioned for it by Azad.[32] Indeed, while the JUH and Azad were key players in India's independence movement, not all of their ideas and activities were universally popular (of course). For example, at the time of the *dar ul qaza* network's initiation—and not just in the past decade at the Supreme Court—some expressed concerns about the implications of this network for national unity. Describing these earlier concerns, Gail Minault summarizes them as coalescing around the idea that the creation of such a *dar ul qaza* network would represent something like a "juridical partition of India along religious lines."[33] Such worries have continued into recent times in some nonreactionary quarters. For example, writing in the 1990s, the late historian Mushirul Hasan articulated concerns about *dar ul qazas* "isolat[ing] Muslims" and contributing to Hindu nationalists' opportunistic fears about "minorityism."[34]

Yet despite this disagreement over it, the network of Imarat-e-Shariah *dar ul qazas* persisted, and even expanded, with the more recent efforts of the AIMPLB. Indeed, not only has this non-state network exhibited a certain kind of quiet resilience, it has also provided a continuing flicker of inspiration for episodic proposals (via parliamentary legislation) to reinstate[35] some kind of national system of providing *shariʿa* legal advisers to Indian state courts, or perhaps even establish independent *qazi*-run state courts for the adjudication of some kinds of disputes among Muslims.[36] Whether those legislative proposals ever succeed or not, the non-state *dar*

ul qaza network explained here will likely continue to expand its operations across India, as it has for close to a century now.

FACTS, FIGURES, AND *FAISLAHS*: THE CONTEMPORARY REACH OF THE *DAR UL QAZA* NETWORK

As mentioned previously, India's most significant *dar ul qaza* network is historically most firmly established, known, and respected in the eastern half of India, notably the states of Bihar, Odisha, and Jharkhand. Women's studies scholar Sabiha Hussain, writing in 2007, reported that the Imarat-e-Shariah ran twenty-six *dar ul qazas* in this area of India.[37] Yet the past two decades have seen the expansion of this *dar ul qaza* network into locales far from the Imarat-e-Shariah's headquarters in Phulwari Sharif, Bihar (just outside of Patna, the state capital of Bihar). Indeed, beyond those historically established in eastern Indian states, *dar ul qazas* coordinated by both the Imarat-e-Shariah and the AIMPLB have more recently been established in locations as diverse as Mumbai,[38] Lucknow, Indore, and Delhi.[39] These newer *dar ul qazas* number approximately two dozen.[40] In Delhi, there are now two *dar ul qazas* associated with this network. One is located in the headquarters of the AIMPLB in south Delhi, taking up nearly an entire floor of the AIMPLB's modest two-floor office near Jamia Millia Islamia university, in a Delhi locale known as Jamia Nagar. The other Delhi *dar ul qaza* is located in a poor, congested east Delhi locale known as Jaffrabad, and is situated above a *madrasa* filled with boys and young men reciting their lessons.

The *dar ul qaza* network focused on here is a well-known non-state dispute resolution network, but only one of many coordinated by and directed at Muslims in India. For example, the Jamaat-e-Islami coordinates non-state dispute resolution bodies called *shariat panchayats* around India.[41] And when I visited the JUH in Delhi to conduct research over the summer of 2009 members of this organization helped me to visit what they termed a *maḥkamah al-shariʿa* (*shariʿa* department or *shariʿa* court).[42] The JUH helped coordinate this non-state body, which was located far from the JUH's spacious headquarters in central Delhi in a small room attached to a *madrasa* in Jaffrabad, very close to where the above-mentioned Jaffrabad *dar ul qaza* was located.

In summer 2009, when preparing to visit Bihar in relation to my research, I was told that the Barelvi sect coordinated their own non-state dispute resolution system via a non-governmental organization called the Edara-e-Sharia.[43] However, I was unable to personally confirm the functioning of

this Barelvi analog of the largely Deobandi-sympathetic *dar ul qaza* network focused on here. The Edara-e-Sharia does, however, operate a website describing its founding in 1968 as well as its current activities, which include dispute-resolution services.[44] The existence of such a Barelvi organization would be a significant development, because a common (if inaccurate) stereotype is that Barelvis tend to operate in a far less institutionalized manner than the Deobandis.[45] Further, it is important to mention here that some Shia sects also coordinate non-state dispute-resolution systems in India.[46] Finally, it should also be noted that anthropologists Katherine Lemons and Mengia Hong Tschalaer have recently written about the work that women's organizations around India have done to offer non-state dispute-resolution services, with some of this activity being specifically directed at Muslim women.[47]

Comprehensive data on the operations of the *dar ul qaza* network is not easy to obtain. Writing in 2007, Sabiha Hussain noted that this network has "been functional in Bihar since 1917 . . . where *Shariat* Courts have decided 18,000 cases. . . . [Moreover, in] the twenty two *Shari'ah* courts established by the AIMPLB in the country from 1973 onwards, only 6,433 cases have been disposed of and a negligible number, i.e. 461 cases are still under trial. Further, only 31,775 cases have been decided so far in the twenty six *Shari'ah* Courts functioning under the Deobandi *Imarat-e[-]Shari'ah* in Bihar, which has been in existence, as stated earlier, since 1917."[48]

However, Hussain does not report the source of her data here, and the statistics that she does report are confusing. For example, in the above excerpt, she reports simultaneously that twenty-six *dar ul qazas* (or, in her own words, "*Shari'ah* Courts")[49] have decided nearly 32,000 cases since 1917 *and* that only 18,000 cases have been decided.

Additional piecemeal data on these operations is provided by the journalist Mumtaz Alam Falahi. He cites an AIMPLB officer as saying that each AIMPLB-coordinated *dar ul qaza* "disposes" of anywhere between twenty-five and fifty cases a year.[50] This data, however, seems somewhat inconsistent with data provided to me by the *dar ul qaza* located in Jamia Nagar in Delhi, which indicates that this prominent *dar ul qaza* (located in the AIMPLB's headquarters) was less active than reported by Falahi. Indeed, according to a report (prepared in Urdu) given to me by the *qazi* at this *dar ul qaza*, which contained various kinds of data about the numbers of cases filed in and decided by this particular *dar ul qaza*, 235 cases were filed at the *dar ul qaza* between January 29, 1994, and December 1, 2005—or approximately twenty cases a year.[51] Of these cases, 185 or 79 percent were

filed by women.[52] During the same period, this *dar ul qaza* was able to decide or otherwise conclude 135 cases—for example, through a formal decision by the parties to reconcile and continue residing with each other[53]—which amounts to approximately eleven "decided" cases a year. Of the 135 resolved cases, fifty-three—approximately four per year—ended up with a *faskh* divorce being granted to the petitioning wife.[54]

When I enquired about data concerning the number of cases handled by the Imarat-e-Shariah system during my summer 2009 visit to the organization's headquarters in Bihar, I was referred to a very large, framed poster-chart conspicuously located in the hall outside the office at the Imarat-e-Shariah where one initiates a legal matter. The poster-chart was prominently entitled, in Urdu, "*chārṭ mutadā'irah muqadamāt balaḥāẕ nauʿiyat*," or "Chart of Filed Cases with Respect to their Different Types." It contained information on 9,385 legal matters handled by—or, more specifically, *filed* in[55]—the Imarat-e-Shariah from 1392 to 1417 AH (approximately 1972–97 CE). Extrapolating from this data, and the roughly 375 legal matters handled each year during the period indicated, one can estimate that the Imarat-e-Shariah's *dar ul qaza* network has handled—or, at the very least, has initially been asked to handle[56]—more than 37,000 legal matters over the network's approximately hundred-year history.

This aggregate number can and should be broken down. And, indeed, according to the above-mentioned chart, a *wide variety* of legal matters have been handled by the Imarat-e-Shariah during the twenty-five years covered by the chart. One sign of this diversity is that not all of the reported legal matters have been the kinds typically thought of as "cases"—or, in other words, matters involving adversaries and arguments. For example, 2,087 of the 9,385 reported matters (22%) involved a request to the Imarat-e-Shariah to provide a simple attestation of a (Muslim) marriage (or, as the poster-chart described it in Urdu, a *sanad nikāḥ*).

Having said that, the largest number and percentage of legal matters handled from 1972 to 1997 by the *dar ul qaza* network focused on here were "cases" and, moreover, *faskh* divorce cases initiated by women against their husbands. In fact, 5,317 of the 9,385 reported legal matters (or 57%) were *faskh* cases predicated on the different permissible reasons for *faskh* that one readily finds in the various classical Islamic legal traditions—for example, physical violence perpetrated by the husband against his wife (or, as the poster-chart describes it in Urdu, *zad-o-kūb*), or a husband's impotence (or, as the poster-chart's Urdu bluntly records, *nā-mardī*). All of these different kinds of "traditional" *faskh* cases were grouped together and

amounted to approximately 210 being filed per year during the reported period.

Interestingly, another separate *faskh* statistic was also presented—namely, *faskh* for reason of *ʿudūl ḥakmī faiṣlah dār ul qaẓā* or, in English, "disobeying a decision of a *dar ul qaza*." There were 120 instances of this kind of *faskh* request reported from 1972 to 1997. If one aggregates this statistic with the other *faskh* statistic, then 5,437 (5,317 plus 120) *faskh* requests were filed from 1972 to 1997, with the *faskh* requests representing 58 percent of all legal matters handled by Imarat-e-Shariah *dar ul qazas* during this period.

Another significant kind of legal matter handled by Imarat-e-Shariah *dar ul qazas* concerned *rukhṣatī* (commonly denoted simply as *rukhsati*) demands for the return of absconding wives—initiated by aggrieved husbands. In the reported period, 629 of these cases were initiated, representing nearly 7 percent of all initiated cases. This kind of case does not represent nearly as significant a proportion of the total number of initiated cases as, say, women's *faskh* cases do. However, it is worth noting that, in the reported period, the demands for *rukhsati* increased over time—from zero in the first several years, to more than fifty on average in each of the last five years of the reported period.

In summary, women's *faskh* requests represented 58 percent of all initiated cases in the reported period, while requests for marriage certificates represented another 22 percent, and husbands' *rukhsati* demands comprised a further 7 percent. The remaining 13 percent of initiated cases reported on the Imarat-e-Shariah's chart were spread over twenty-nine different categories. Numerically, the next most significant category of reported cases involved demands by forsaken wives against their husbands for provision of marital support. In the reported period, there were 224 of these cases, or 2 percent of the total initiated cases. The next most common cases concerned property ownership or, as the chart described this kind of case in Urdu, *muqadamah ḥaqqiyat*. From this category, 175 cases were reported, representing 2 percent of the total initiated cases during the reported twenty-five-year period. (One such case will be the focus of chapter 5.)

Finally, while not significant in any statistical sense, the chart intriguingly reported both the existence of an appellate structure within the *dar ul qaza* network under discussion,[57] and a small number of actual appeals over the years. Three different kinds of appeals are listed—(in translation) "appeals against the decision of a local *panchayat*,"[58] "appeals against a lower *dar ul qaza* and heard by the central *qazi shariʿa*," and "appeals against a

decision of the central *dar ul qaza* and heard by the high court of the *amir shariʿa*"—with the numbers of such appeals in the reported period being, respectively, fifteen, twenty-one, and six.

All of this data needs context. While I was not able to gather data on the number of comparable Dissolution of Muslim Marriage Act (DMMA) cases brought in the state's courts during the period and geographic regions for which I have Imarat-e-Shariah *faskh* data, statistics gathered by anthropologists Sylvia Vatuk and Mengia Hong Tschalaer (in other areas and time periods) provide some context. For example, Vatuk reports that "[t]he DMMA is . . . little used as a legal resort. In the city of Chennai, over the ten-year period between January 1988 and December 1997, only 66 petitions were filed under the act, an average of 6.6 cases per year. In Hyderabad the DMMA is resorted to somewhat more frequently, an average of 26 cases having been filed each year in that city between 1995 and 2001. However, in comparing these statistics it is necessary to take into account the fact that the Muslim population of Hyderabad is several times larger than that of Chennai."[59]

By way of contrast, Tschalaer reports that, according to data she was given, "between 2006 and 2010, 564 cases were filed under the Dissolution of Muslim Marriage Act"—that is, approximately 113 cases per year—in the Lucknow Family Court.[60] Finally, it is also worth mentioning that, during the summer of 2009, I arranged for a Right to Information Act application to be filed with the state on my behalf asking for the number of DMMA cases filed in district-level courts across the Delhi capital region from 2003 to 2008. The data received in response to my query was complicated by the fact that Delhi's district-level family courts were geographically reorganized in late 2008, and the data before that reorganization does not appear to be generally available. As well, the various courts queried appeared to include in their counts, not only DMMA cases filed by Muslim wives, but also Muslim husbands' restitution of conjugal rights claims, and maybe, too, claims filed by Muslim women under the Muslim Wives (Protection of Rights on Divorce) Act of 1986.[61] Nonetheless, if the courts' reported numbers for all types of cases are accepted as DMMA cases, and one also adds in more numbers that I got separately from an official at the central Tis Hazari state court complex, one arrives—very generously—at the figure of 140 DMMA cases being filed in Delhi family courts for the one-year period extending from mid-2008 to mid-2009.

Whether the figure is 6.6 or 113 or 140 per year, however, none of these DMMA state-court filing statistics compare in the aggregate to the more

than 200 *faskh* cases being filed per year in the Imarat-e-Shariah *dar ul qaza* network during the 1972–97 period. The Delhi statistic of 140 cases per year being filed across Delhi's several state-organized family courts—which, again, is a statistic that appears to include not only DMMA cases but all sorts of other kinds of Muslim marital disputes—is also not so impressive when one takes into account the approximately 20 cases per year being filed in the one (quite modest) non-state Delhi *dar ul qaza* about which I was given data and have already reported on.[62] To be sure, each of these numbers would look different if calculated on a per-capita basis. But simply at an aggregate level—which is also an important metric—*dar ul qazas* appear to be doing significant work.

Additional context is also provided by thinking about the number of *fatwas* issued by the *dar ul ifta* (department of jurisconsultation) operated by the famous Dar ul-Uloom in Deoband during its first century. As recounted by Barbara Metcalf, this *dar ul ifta* reports having issued almost 270,000 *fatwas* over its first one hundred years, in contrast to the (discussed above) estimated 37,000 cases initiated at the Imarat-e-Shariah over a period of almost a hundred years.[63] On average, then, this breaks down to 2,700 *fatwa* issued per year by the *dar ul ifta* at the Deoband Dar ul-Uloom, and almost 400 cases initiated per year at the Imarat-e-Shariah *dar ul qaza*. In his own work, the late historian Peter Hardy cites sources reporting that, between 1911 and 1951, approximately 148,000 *fatwas*—or 3,700 per year—were issued by the Deoband Dar ul-Uloom.[64] On a cautionary note, however, many of these *fatwas* probably encompass issues of a different subject matter or nature than cases typically handled by a *dar ul qaza*.

Fatwas not only provide context for the output of *dar ul qazas* but are a useful instance of comparison too. As already discussed briefly, many different actors help Muslims resolve their disputes outside of India's state courts. Moreover, accompanying this diversity of non-state Islamic legal organizations and actors is a comparable diversity of non-state dispute-resolution mechanisms. Thus, going to a *mufti* for a *fatwa* is arguably just another mechanism—in addition to, and apparently more common than, going to a *dar ul qaza*—for Indian Muslims to resolve legal disputes using non-state legal actors.[65] Further, *fatwas* occasionally play a role in *dar ul qaza* proceedings themselves, being recorded as part of a *dar ul qaza* decision's presentation of evidence.[66] Similarities and overlaps between *fatwas* and the output of *dar ul qazas* therefore emerge in all of these ways.

That being the case, *fatwas* also need to be contrasted with the output of *dar ul qazas*. Indeed, the *dar ul qaza* network focused on here is not a

fatwa-producing one. One remarkable feature of this network, in fact, is its distinct written product—namely, the *faislah* (decision). At a *dar ul qaza*, the (male)[67] person who hears a dispute is referred to as a *qazi* (one who does *qaza*, or adjudication) and not a *mufti* (one who does *ifta* and, as a result, produces *fatwas*). And for those disputes which do not get dropped in their prosecution, or otherwise settle, a *dar ul qaza qazi* writes a *faislah*.

The distinction between *ifta* and *qaza* (and *muftis* and *qazis*) is a long-standing one in Islamic jurisprudence.[68] In South Asia, the distinction between *fatwas* and *faislahs* also has a significant, more recent history. For example, in her historical account of the Deoband Dar ul-Uloom, Barbara Metcalf recounts how colonial authorities were alarmed by efforts to set up a non-state court in Deoband by the town's residents during the late nineteenth century. In response to pressure by the colonial authorities, the Deoband ʿ*ulama* ultimately shut down their court, which was operating in a *masjid* located on the premises of the Deoband Dar ul-Uloom. Yet, "the ʿulama continued . . . through [their] advisory *fatawa* [to] guide many individual Muslims, even officials in their governmental duties."[69] Here, then, one can see some perception of difference between a *faislah* and a *fatwa*, if also their simultaneity. In other words, while the *fatwa* is a substitute for a court decision, it is a rough one and not entirely equivalent.

Further, another point of distinction between a *dar ul qaza*'s *faislah* and a *mufti*'s *fatwa* is that a *faislah* is a decision made in a concrete dispute between two people.[70] This is dissimilar to the situation that accompanies a "typical" *fatwa*, where an abstract question[71] is presented to the *mufti* by (generally) one person facing an (inter)personal dilemma, who is seeking guidance from the *mufti*. With a *faislah*, in contrast, the (typically female) person who initiates the dispute is referred to in the *faislah* as the *mudʿayah*—or "plaintiff"—and the (typically male) person who is asked to respond to the *mudʿayah*'s complaint is referred to as the *mudʿaā ʿalaih*—that is, the "defendant." Thus, at the beginning of a *faislah*, each party's name is listed, separated by the Urdu word *banām*, or "versus." Underlying the existence of a concrete dispute behind every *faislah*, a typical *faislah* would then also include a presentation of the numerous competing facts and arguments put forth by both sides to the dispute.[72] As a result, then, a *faislah* might extend to several pages, many dedicated to a presentation of each party's version of the facts. Furthermore, each party involved in a dispute at a *dar ul qaza* might provide witnesses whose statements (or abridgments of them) are often also recorded in the *faislah*. The differences between *fatwas* and *faislahs*, moreover, seem to be potentially important to the Indian state court

system which has been known to endorse and enforce a *dar ul qaza* decision because it is a *faislah*, and not a *fatwa*.

FAISLAHS AND THE LEGAL ENFORCEABILITY OF NON-STATE MUSLIM DISPUTE RESOLUTION

The enforcement of *dar ul qaza faislahs* by Indian state courts has not been very well documented. This lack results, perhaps, from the seeming implausibility of secular state enforcement of the religious non-state. For many people, the possibility of such enforcement—at the very least—raises very practical legal questions as to the state statutory and judicial context in which *dar ul qazas* are situated, and the manner in which these contexts do or do not facilitate secular state enforcement of the religious non-state. I will briefly explore the statutory context here before moving on to a discussion of actual judicial practice, chiefly through a presentation and explication of two Indian state court decisions in which state judges enforced *dar ul qaza faislahs*. In the first of these cases, the difference between a *faislah* and a *fatwa* was a determinative factor in the state court's decision to enforce a *dar ul qaza faislah*.

With respect to the statutory context in which *dar ul qazas* operate, the meta-legislative statute governing the operation of Islamic law in India, in the contemporary period, is the colonial-era Muslim Personal Law (*Shariat*) Application Act, 1937.[73] The substantive portion of the act reads as follows:

> Application of Personal Law to Muslims—Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).[74]

One notable aspect of this act is its relative open-endedness. It is not written in a particularly restrictive way with respect to its substantive application, or as to *who* shall enforce the *shariʿa*.[75] In fact, the act's reference to

talaq (or male-initiated divorce)[76] seems to sanction a wide variety of Islamic legal practices by a wide variety of Islamic legal actors—including lay individuals. This seems to be the case, both because of the multiple ways in which (some) Islamic legal traditions permit *talaq* to be given and because of the wide variety of reasons that ordinary Indian Muslim men (at least historically)[77] have been able to give for their utterance of *talaq*.

To be sure, the 1937 act contains no explicit statutory reference to or reliance upon *muftis*, *qazis*, or other long-standing non-state Islamic legal service providers. However, there is no explicit prohibition on their traditional (non-state) legal responsibilities either. In contrast, another statute—the Dissolution of Muslim Marriages Act, 1939, which provides grounds of divorce for women "married under Muslim law"—appears to explicitly envision a role for state courts in granting divorces to Muslim women, at least to the extent that the act declares that such women "shall be entitled to a decree for the dissolution of . . . marriage" if they are able to satisfactorily prove any of a number of statutorily delimited grounds of divorce to a state court.[78] Although (reported) case law on the state recognition of Muslim women's non-state divorces is sparse and relatively dated (and even colonial-era), there are indications that India's judiciary views these divorces unfavorably.[79] In addition, language similar to that found in the Dissolution of Muslim Marriage Act, 1939, can be found in the original Indian Divorce Act, 1869,[80] and that latter language has been interpreted by the Supreme Court of India to create *exclusive* state jurisdiction for Christian divorces.[81] Yet, having said that, the language used in the 1869 and 1939 acts to reference (state) courts is not identical. It is thus uncertain as to whether both acts have identical implications for state exclusivity in the divorce jurisdiction.

The Kazis Act of 1880 is also relevant here, and not just because of its title. Indeed, like the 1937 act, this act contains its own significant silences and ambiguities. The 1880 act was legislated after the 1864 statutory abrogation of the power of Muslim *qazis* to participate in the adjudication, by the state, of cases implicating Muslim personal law. This abrogation was contained in Act No. 11 of 1864; an act whose stated purpose was "to repeal the Laws relating to the offices of Hindoo and Mahomedan Law Officers, and to the Offices of Cazee-ool-Cozaat and of Cazee; and to abolish the former offices."[82]

The opening words of the 1880 act reflect the fact that the 1864 curtailment of *qazi* power led to complications, such that—at least in some instances and situations—appointment of *qazis* by the state again seem

desirable.[83] The 1880 act did not comprehensively repeal the 1864 act, however, with section 4 of the 1880 act arguably placing some limitations on the power of state-appointed *qazis*. Section 4 reads as follows:

> 4. Nothing herein contained [in this act], and no appointment made [according to this act], shall be deemed—
> (a) to confer any judicial or administrative powers on any Kází or Naib [Deputy] Kází appointed hereunder; or
> (b) to render the presence of a Kází or Naib Kází necessary at the celebration of any marriage or the performance of any rite or ceremony; or
> (c) to prevent any person discharging any of the functions of a Kází.[84]

In bare terms, then, the 1880 act did not confer any judicial powers on state-appointed *qazis*[85]—but neither did it prohibit non-state actors from acting as a *qazi*.[86] The act is also silent on the potential powers of non-state *qazis*. Of course, it could be argued that what the state disallows to state actors it necessarily disallows to non-state actors. But this kind of interpretation derives from a particular state-centered conception of law and legal authority that finds resistance in the wider realities of legal pluralism in India. Indeed, as legal scholar Werner Menski reminds us: "[I]n a huge country like India with its multiple hybridities, the axioms of legal centralism and of uniformity simply do not work in daily practice, where the diversities and pluralities of 'little people' and of basic human existence re-assert themselves most powerfully all the time."[87]

Indeed, disagreement (and litigation) regarding the precise parameters of state recognition of non-state legal activities are facts of Indian life. The point of this brief discussion has not been to definitively conclude what those parameters are in the Islamic legal context, nor has it been to exhaustively excavate, archive, and explicate all relevant statutory law in this area. Rather, the goal has been to identify some of the relevant statutes, their lacunae and ambiguities, and the way in which these create space for the state to endorse non-state Islamic legal activity in India. These gaps and ambiguities came into play in recent Supreme Court litigation over the bare existence of *dar ul qazas*. During this litigation, a number of arguments centered around the proposition that the 1864 and 1880 acts did not aim to—nor did they in fact—disturb the long-standing activities, operations, and authorities of Indian *muftis*, *qazis*, and other non-state Islamic legal actors.

If the statutory context for contemporary *dar ul qazas* has uncertain implications, then something similar could be said for the judicial context—and, specifically, actual judicial practice. Here, caution is particularly necessary as to the conclusions one can draw about how the Indian state views the operations and decisions of non-state *dar ul qazas*, since the "universe" of judicial lawmaking in India (as in many other countries) is an indeterminate and also undeterminable one.[88] While some lower (district and sessions)[89] courts are beginning to make their decisions easily locatable and searchable via online databases, there are still many gaps in judicial case records—both geographically and historically. In many instances, in order to find a certain kind of case (e.g., one where a *dar ul qaza* decision came into play) at the lower trial-court level, a researcher must either know an experienced local lawyer who has kept good case files of his litigated cases or gain access to the records room of a lower-level court. Even in the records room, however, the researcher is often confronted with case files that are in poor shape after many years of storage in harsh climactic circumstances.

As a result, the lower court cases discussed in this section are not meant to be (nor could they be) "representative." Both cases were mentioned in the defensive filings of the AIMPLB at the Supreme Court, in response to the 2005 attempt there to shutter *dar ul qazas*. When reading these filings, I was intrigued by the snapshot of the two cases provided by the AIMPLB. However, locating the full decisions was impossible, until I undertook a research trip to the headquarters of the Imarat-e-Shariah in summer 2009 where, along with many other records, copies of the two cases (admittedly beneficial to the Imarat-e-Shariah) were kept. On request, I was provided with photocopies of these cases, which I shall now describe.

SURETHA BIBI V. ISPAK ANSARI (1990)

This case was decided on November 30, 1990, by the Chief Judicial Magistrate in Purulia District, West Bengal.[90] It was initiated by Suretha Bibi against her (alleged) ex-husband, Ispak Ansari. She sought post-divorce maintenance and other compensation from him under the terms of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The act declares, in part, that

> a divorced [Muslim] woman shall be entitled to—
> (a) a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
(c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.[91]

As summarized in the chief judicial magistrate's decision, the pertinent facts of the case were that Suretha Bibi and Ispak Ansari married on May 1, 1986, "per Hanifi [*sic*] School of Islam religion."[92] Soon after the marriage, domestic relations deteriorated, with Suretha Bibi making allegations of serious abuse against Ispak Ansari, including that he had burnt her with lit cigarettes and had tried to kill her by igniting her with kerosene—all, apparently, as a result of his having demanded a motorcycle from Suretha Bibi's family, which was not forthcoming.

Despite this abuse, Suretha Bibi was able to escape her marital home and return to the home of her father. She subsequently filed a criminal complaint against her husband under Section 498A of the Indian Penal Code—an oft-used provision of the code that criminalizes (among other things) postmarital demands for dowry.[93] After Suretha Bibi filed her 498A complaint, Ispak Ansari allegedly stopped providing her with any financial support. He also allegedly married a second wife.

In response, Suretha Bibi apparently went to a "Shariat court"[94] (the term used by the chief judicial magistrate in his decision)—which, in fact, seems to have been the *dar ul qaza* at the headquarters of the Imarat-e-Shariah in Bihar—in order to get a divorce from her husband. The *dar ul qaza* appears to have granted Suretha Bibi her request for a divorce in August 1988. Ispak Ansari, however, as part of his defense against Suretha Bibi's claims for compensation under the 1986 act, claimed that the divorce obtained from the *dar ul qaza* was not valid because "shariat court has no jurisdiction to dissolve the marriage between them." Ispak Ansari also introduced documents indicating that he had consulted someone, whom he described as "Vishistha Samajpati Dharmia Jajak" (paraphrased by the chief judicial magistrate as "some Muslim religious person"),[95] for "some reply in the form of answer to question,"[96] doubtless in favor of his position in the dispute. Suretha Bibi,

for her part, obviously disagreed about the (in)validity of the *dar ul qaza*'s granting of a divorce to her, as well as the relevance of the Vishistha Samajpati Dharmia Jajak's actions.

With respect to all this, the chief judicial magistrate recounted in his decision the following dueling contentions vis-à-vis the evidence presented to him about Suretha Bibi's *dar ul qaza* divorce:

> Heard both sides. In this case no oral evidence has been given but both sides argued at length and both sides have filed some documents for consideration.
>
> From [Suretha Bibi's] side a judgment of shariat court in Urdu has been filed with its English [translation] along with the deposition of [Ispak Ansari] for the purpose of this case. This document is collectively marked exhibit 1. From the side of [Ispak Ansari], [Ispak Ansari] filed a xerox copy of another prayer and answer of one "Vishistha Samajpati Dharmia Jajak." The Urdu script with its Bengal translation is collectively marked exhibit A for consideration.[97]

After considering the dueling contentions, the chief judicial magistrate sided with Suretha Bibi, ultimately drawing a sharp distinction between Ispak Ansari's Exhibit A and Suretha Bibi's Exhibit 1. Indeed, he dismissed the relevance of Ispak Ansari's visit to his Vishistha Samajpati Dharmia Jajak, remarking that "[t]his is not a full court judgment or a . . . contested decision of any court, but it is in the . . . shape of reply of some questions by some religious head."[98]

In this sense, then, the chief judicial magistrate in this case appeared to view Ispak Ansari's Exhibit A as something "merely" like a *fatwa*. In contrast, the decision obtained from the *dar ul qaza* by Suretha Bibi was, according to the chief judicial magistrate, "*a full fledged judgment of shariat court* after hearing both sides and after taking evidence of [both] sides where [Ispak Ansari] appeared, contested and gave deposition and a contested judgment has been passed by shariat court declaring dissolution of marriage between parties. It is the *decision* of shariat kaji."[99]

Moreover, wrote the chief judicial magistrate: "Here . . . I hold that the contested decision of a shariat court by kaji is acceptable. . . . So, a prayer made by [Suretha Bibi] in this case is also found to be acceptable, as per Section 3 of the Muslim Woman (Protection of Rights [on] Divorce) Act, 1986."[100] As a result, he ordered Ispak Ansari to pay 11,565 rupees to Suretha Bibi—1,005 rupees for her "denmohar,"[101] 2,060 rupees for postmarital

iddat-period maintenance, and 8,500 rupees in compensation for various goods given to Ispak Ansari by Suretha Bibi and her family, either at the time of her marriage or afterwards.[102]

BIBI JAIRUN NISA V. MD. AZAMATULLAH ANSARI (1996)[103]

This case concerned a claim brought by an aggrieved husband for the restitution of conjugal rights and, as a result, represented a kind of legal case different from *Suretha Bibi v. Ispak Ansari*. However, this second case also dealt with the validity of a *dar ul qaza* divorce (granted here, as in *Suretha Bibi v. Ispak Ansari*, to the wife). The court decision, provided to me by the Imarat-e-Shariah and determined by the 1st Additional District Court Judge of Godda (in the present-day State of Jharkhand), is an appellate decision. It was appealed from a 1995 decision by a Subordinate Judge in Godda District, in which the judge found in favor of Mr. Azamatullah Ansari and his claim for the restitution of conjugal rights.

According to the facts and contentions laid out by the additional district court judge in the appellate decision, Mr. Ansari and Ms. Nisa disagreed vociferously about the nature of their marriage, including intense disagreement about when the marriage had actually taken place. In this respect, Mr. Ansari claimed that it had occurred in 1988 (with "both of them [being] governed by Hanifi [sect] of Mohammadan Law"), while Ms. Nisa asserted that the marriage had actually taken place in 1985, when she was only eight years old. According to Ms. Nisa, she did not go to live with Mr. Ansari until she turned twelve. Yet, according to her, even then the marriage remained unconsummated,[104] which led to her severe abuse by Mr. Ansari[105]—such that, finally, "[w]hen [she] attained puberty she repudiated the marriage in 1991 in presence of witnesses and other villagers."[106]

Apparently, there had been some attempts to resolve the tensions between the marital parties by a Muslim non-state body, which was not a *dar ul qaza*, but even here the parties disagreed about how to characterize that body's involvement. According to Mr. Ansari, after Ms. Nisa left the marital home, and following a failure to convince her family to return her, Mr. Ansari approached the "Muslim Committee of Lalmatia known as Tanjiman Musalamin Idgah, Lalmatia." Moreover, according to Mr. Ansari, "[t]he committee . . . advised [Ms. Nisa] to lead conjugal life with the petitioner. The committee also advised the parents of [Ms. Nisa] for Roksadi which they refused."[107]

However, Ms. Nisa provided a different account of what had transpired at the Lalmatia meeting, namely that "[b]oth the parties agreed to refer this

matter to the Adalat of Kazi Imarat Sharia, Bihar and Orissa, Pulbarisharif." Moreover, from the Imarat Sharia, "Kazi . . . Rahman was deputed to arbitrate. . . . Both the parties [appeared] before him. Kazi examined witnesses produced by the parties, made independent inquiries. He wanted to settle the matter but because of [insistence] of the plaintiff [Mr. Ansari] and his father matter could not be settled." Ultimately, however, "Kazi prepared his case record for arbitration and by order dated 26th Jamadul Sami 1413 Hijri gave finding that [Ms. Nisa] was subjected to cruelty, [Mr. Ansari] failed to discharge his obligation so [Ms. Nisa] was right in exercising the option of repudiation at puberty so the marriage was dissolved and [Ms. Nisa] is no more wife of the plaintiff."[108]

In relation to Mr. Ansari's actual restitution of conjugal rights claim, the additional district court judge identified five different subsidiary legal questions. However, the key issue seemed to concern the fourth question: "Whether the appellant-defendant [Ms. Nisa] repudiated the marriage?"[109] It would appear evident from the above discussion that Ms. Nisa's position on this question was clear, and her position was also described by the additional district court judge as follows: "As both the parties referred the matter for arbitration they are bound by the verdict of the Kazi. It is prayed that the present suit be treated as the suit for making the award of the Kazi as the rule of the Court and the same be treated as a decree of the Court."[110] Mr. Ansari, however, disagreed with Ms. Nisa's contention that the *dar ul qaza*'s decision to confirm a divorce for Ms. Nisa had any relevance in the eyes of the state.[111]

To be sure, Ms. Nisa had good reason to want the additional district court judge to favor her on appeal and to recognize the *dar ul qaza* decision granting her a divorce, and not just because Mr. Ansari had mistreated her. Indeed, it might be said, so had the Subordinate Judge in his earlier decision. In this respect, not only did the Subordinate Judge's decision bind Ms. Nisa to Mr. Ansari against her will, but it did so with peculiar reasoning. In describing this reasoning, the additional district court judge observed that "[t]he learned lower court even justifies the assault [of Mr. Ansari on Ms. Nisa]. . . . The learned lower court has held that Islam religion provide[s] [for the] correction of misguided wife. The learned lower court has stated that a sincere husband did what was justified. Thus the learned lower court justified the assault. The learned lower court took very extreme view that the assault was not by a dagger or gun but [only] by slippers. The assault by slipper is a cruelty. *Even Mohammadan Law* does not grant cruelty to be shown to the wife by the husband."[112] Remarkably

then, not only do we see a lower court apparently advocating cruelty, but also deploying the kind of casual, quotidian anti-Muslim sentiment discussed in the introduction in the process of justifying such cruelty![113]

The Subordinate Judge's opinion was problematic for the additional district court judge not only in terms of outcome and reasoning but also in terms of procedure. Indeed, contrasting the lower court's treatment of witnesses, as compared to the *dar ul qaza*'s reception of the same witnesses, the additional district court judge commented that:

> [In the *dar ul qaza* judgment,] it is stated that two witnesses on behalf of the wife sidestated about the assault and torture to the wife done on behalf of the husband. The learned lower court did not rely [on] these witnesses only because they told what they had gathered from the wife. [But] [t]he ill treatment by husband to the wife can be narrated only by the wife. There cannot be any eye witness for the same. Thus witnesses cannot be made available to the wife as the wife is assaulted and ill treated at her husband's house away from her father[']s house.[114]

In other words, while the *dar ul qaza* took into account testimony concerning Mr. Ansari's abuse (of Ms. Nisa) by witnesses who had good reason to know about the violence although they did not directly observe it (in addition to taking into account Ms. Nisa's personal recounting of her abuse), the Subordinate Judge problematically took a narrow view of what constituted admissible evidence.[115] At least, this was how it appeared to the additional district court judge. He also took the Subordinate Judge to task for not fully appreciating the implications of testimony given by witnesses appearing for Mr. Ansari himself, who gave evidence concerning an assault made by Mr. Ansari on Ms. Nisa at her father's house. In contrast, the *qazi* at the *dar ul qaza* appreciated—and the additional district court judge commended him for doing so—that a "husband . . . so rough as to assault his wife at her father's house . . . can very well assault his wife at his own house. The Kazi of Imarat Sharia was right in coming to this [evidentiary] conclusion."[116]

Ultimately, the additional district court judge sided with Ms. Nisa, noting that evidence presented by Mr. Ansari himself actually demonstrated that there was an agreement between the parties to mediate their dispute before a Muslim committee in Lalmatia. And, when the committee was unable to persuade the parties to reach an amicable solution, the matter was then referred to the Imarat-e-Shariah.[117] According to the additional district

court judge, it then transpired that a *qazi* at the Imarat-e-Shariah "took the evidence of both the parties. . . . Other witnesses were also examined. After making detail[ed] enquiry the Kazi of Imarat Sharia declared the marriage dissolved. The actual word used is 'Fisque'. This shows that the marriage was dissolved."[118]

For the additional district court judge, then, the result of this final *dar ul qaza* intervention was binding on both Ms. Nisa and Mr. Ansari. As a result, with the non-state *dar ul qaza* having dissolved the marriage, there were no conjugal rights that could be restored to Mr. Ansari. Or, as the judge succinctly summarized, "[t]he above discussions proves [*sic*] that the respondent plaintiff husband is not entitled to restitution of conjugal life."[119]

In sum, in both *Suretha Bibi v. Ispak Ansari* and *Bibi Jairun Nisa v. Md. Azamatullah Ansari*, one finds different Indian state courts endorsing the conclusions arrived at by a *dar ul qaza*—or, alternatively, enforcing the *faislahs* of *dar ul qazas*. Admittedly, this is not the only way to read what occurred in these courts. For example, one could read the state court endorsements of non-state *dar ul qaza* conclusions as merely endorsements of how the state itself would have handled these situations, if the courts had been able to intervene in them in the first instance. And, indeed, in its concluding paragraphs, the judgment in *Bibi Jairun Nisa v. Md. Azamatullah Ansari* asserted that the *dar ul qaza faislah* at issue in the case had been "filed in the Court" and, hence, was "the Court's paper."[120] Put another way, one could argue that what the state did in these cases was not so much the "enforcement" of *dar ul qaza* decisions but rather the enforcement of the state's *own* writ and responsibilities.

Such a reading of these cases, however, would overlook the fact that, in *Bibi Jairun Nisa v. Md. Azamatullah Ansari*, the first lower state court judge to hear this case (i.e., the Subordinate Judge) decided to disregard both the substantive result reached by the *dar ul qaza* and the procedures (i.e., evidentiary procedures) adhered to by the *dar ul qaza*. In other words, in this situation at least, there is good reason to think that the secular state saw things differently than did the Islamic non-state—and at multiple levels.

Moreover, the above interpretation of these cases also mistakenly posits that state courts actually want (Muslim) women to be able to exercise their divorce rights freely. Significant work conducted by women's rights activists in India,[121] as well as insightful work by scholars of Indian family law,[122] have both amply demonstrated how Indian state actors are, in fact, often reluctant to dissolve a marriage. Instead, in situations of marital conflict, the preferred outcome is the "reconciliation" of marital parties, no matter

how illusory that reconciliation is or how dangerous it might be to a woman's welfare. Therefore, in both cases discussed here, the state's endorsement of *dar ul qazas*' actions and decisions are best read as instances of state courts enforcing decisions made by non-state *dar ul qazas*, rather than the state merely doing what it would have done of its own volition.

CONCLUSION

Dar ul qazas have existed in India in their contemporary form for nearly a century now. From their earliest days to the present moment, they have played a number of roles, both for Indian Muslims and for the postcolonial Indian state. For the postcolonial state, and in the debates leading up to its inception, the creation of a *dar ul qaza* network represented the possibility that an independent, secular India could serve as a home for South Asia's Muslims, rather than merely being a waystation to a more welcoming Pakistan. Secular India's ideological dependence on *dar ul qazas* thus reveals itself here.

While *dar ul qazas* have mitigated against the idea of "India as waystation" regionally, these non-state legal actors have played a crucial waystation role inside India too. Indeed, *dar ul qazas*—as well as the larger framework of non-state Muslim dispute resolution in which they sit—help divert a substantial number of cases from a beleaguered contemporary Indian (state) court system. Whether this occurs because *dar ul qazas* function as an informal reconciliatory body for warring spouses, or as a tribunal that a state court can defer to because the tribunal is more formal than informal—or more *faislah* than *fatwa*—*dar ul qazas* provide essential material life support to contemporary India's severely overburdened secular system of state law and governance.

2 SECULARISM AND "SHARIʿA COURTS"

A Constitutional Controversy

IN 2005, A PRIVATE ATTORNEY, VISHWA LOCHAN MADAN, PETItioned the Supreme Court of India to shut down not only all *dar ul qazas* but also all *fatwa* giving in India. This petition was dramatic, but so were the events instigating it, namely the "adjudication" by non-state Muslim legal actors (in particular, *muftis*) of a number of alleged rapes of married Muslim women by their fathers-in-law. The welfare of Muslim women was not the only concern of Madan's petition however. This petition also spoke broadly of the ways in which the existence of non-state Muslim dispute-resolution service providers allegedly undermined liberal constitutional values such as "secularism" and "the rule of law."

Unsurprisingly, Madan's petition to the Supreme Court sparked vigorous responses[1] from various defendants who were named in his original petition—including the All India Muslim Personal Law Board (AIMPLB) and the Deoband Dar ul-Uloom—as well as an equally vigorous counter-response in which Madan reacted to named defendants' responses. And, then too, the Supreme Court issued its own opinion on this matter in 2014.

Legal petitions and counterpetitions are distinctly not final decisions; they resolve very little and they are each, on their own, necessarily only "part of the story." Like all legal argumentation, each offers both disagreement with opposing narratives, positions, and parties and internal inconsistencies or ambivalences. And without a doubt, high court opinions too often "suffer" from the same complexity, as the Supreme Court of India's 2014 decision in this matter certainly did. As a result, no definitive statement can be or is given here about what the legal position of non-state Muslim dispute resolution in India is; this position remains contested and contestable.

Moreover, the murkiness of this situation should not be surprising, especially given that the controversy raised by Madan concerned the parameters of legitimate legalism itself. Indeed, any attempt to strictly define legalism and constitutionalism—and, by extension, the appropriate scope

of constitutional examination—would beg an important legal question that Madan asked the Supreme Court to address in his petition; namely, whether "adjudication of disputes is essentially the function of Sovereign State, which can never be abdicated or shared with anybody [outside of the state]."[2] Consequently, of relevance here are a wide variety of materials and influences that circulate in relation to constitutional controversies—including those both inside and outside the hazy juncture where state and non-state institutions, organizations, and individuals intersect—instead of just the Supreme Court of India's "final decision" in this matter.[3]

Crucially as well, without examining a wider-than-normal range of "legal" materials, the constitutional controversy sparked by Madan's petition might be understood solely—and simplistically—along liberal lines. This is especially the case considering how "similar" legal and political controversies concerning non-state Muslim legal actors have also arisen recently in Canada and the United Kingdom. However, unlike the India controversy, those in these other jurisdictions were almost exclusively about the meaning and reach of certain liberal values, including toleration and minority rights.[4]

To be sure, the Supreme Court of India's 2014 opinion in *Vishwa Lochan Madan v. Union of India*[5] can be cited—although only partially—for restating the importance of liberal values like toleration and even John Stuart Mill's "harm principle." For example, in its 2014 opinion, the Court wrote:

> A Fatwa is an opinion, only an expert is expected to give. It is not a decree, not binding on the court or the State or the individual. It is not sanctioned under our constitutional scheme. *But this does not mean that existence of Dar-ul-Qaza or for that matter practice of issuing Fatwas are themselves illegal. . . .*
>
> In our opinion, one may not object to issuance of Fatwa on a religious issue or any other issue *so long it does not infringe upon the rights of individuals* guaranteed under law. Fatwa may be issued in respect of issues concerning the community at large at the instance of a stranger but if a Fatwa is sought by a complete stranger on an issue not concerning the community at large but individual, than [*sic*] the Darul-Qaza or for that matter anybody may consider the desirability of giving any response and while considering it should not be completely unmindful of the motivation behind the Fatwa.[6]

These liberal moments aside, the Supreme Court's 2014 opinion is also significant because of what this recent constitutional opinion concerning

dar ul qazas (and also *muftis*) reveals about India's secular system of law and governance's antagonistic feelings about—yet simultaneous dependence upon—non-state practitioners of Islamic law.

And, in fact, illiberalism and antagonism are around every corner in the controversy that Madan's 2005 Supreme Court petition fueled. Toward this observation, it is important to highlight how earth-shattering his petition to the Supreme Court was. The momentous nature of this petition is evident in its basic goal of getting the Court to "[d]eclare that the . . . activities being pursued by the All India Muslim Personal Law Board . . . and other similar [nongovernmental] organizations for establishment of [a non-state] Muslim Judicial System (Nizam-e-Qaza) and setting up of [non-state] Dar-ul-Qazas (Muslim Courts) and [non-state] Shariat Court[s] in India is absolutely illegal, illegitimate and unconstitutional."[7]

In the same vein, this constitutional petition also forthrightly asked the Court to "[d]irect the Union of India and the States . . . to forthwith take effective steps to disband and diffuse all [non-state] *Dar-ul-Qazas* and the [non-state] Shariat Courts set up in the country and to ensure that the same do not function to adjudicate any matrimonial-disputes under the Muslim Personal Law." In addition to attacking *dar ul qazas* specifically, the constitutional petition also went after *muftis* and their *fatwas* as well when it asked the Court to "[d]irect . . . Dar-ul-Uloom Deoband [and] other Dar-ul-Ulooms in the country . . . to refrain from passing any judgements, remarks or *fatwas*."[8] In many respects then, Madan's abolitionist goals here were truly radical, aimed as they were at the very heart of non-state Islamic dispute resolution in India.

However, Madan's petition located radicalism elsewhere, namely in the leadership that coordinates and directs non-state Muslim dispute resolution. Madan reserved for himself vocabularies—most notably "women's welfare," "secularism," and "the rule of law"—emanating from the calm and mesmerizing register of liberalism.

FATWAS, CLAIMS, AND COUNTERCLAIMS

While Madan's aims were truly far-reaching—namely, to completely shut down non-state Muslim dispute-resolution service providers in India—he viewed these goals as necessary to protect the future of secularism and the rule of law in India. Further, his petition described how the future viability of the Supreme Court of India itself had been placed in doubt by

these non-state providers: "[T]he pseudo-judicial functioning of religious-institution[s] [like *dar ul qazas* threaten] to shake the sovereignty of the Judicial System . . . set up under the Constitution of India and thereby disturb the nice balance set-up [*sic*] with care and caution by the founding-fathers of the Indian Constitution."[9]

The possibility of chaotic imbalance arose in part, according to Madan, because non-state Muslim dispute-resolution service providers allegedly "create a lot of confusion [and] terror of God's wrath . . . in the mind[s] of [the] uneducated multitude of Indian Muslim Citizenry as regards the extent and nature of obedience to them."[10] In other words, to the extent that "counterfeit" (i.e., "pseudo")[11] non-state providers of dispute resolution corrode the reality of what counts as a "court" or "law" in the first instance, they also corrode the certainty of state court supremacy in India. Hence, the Supreme Court must intervene if it wishes to save India—and itself—from this chaotic set of affairs.

Madan's petition described an impending crisis of law and legality in India back in 2005. On its face, this depiction of reality may seem fanciful, and also overly ambitious in its proposal to resolve the situation by shuttering all non-state Muslim dispute-resolution service providers in India.[12] This petition appears even more peculiar given that it was filed by only a single petitioner—"a practicing advocate, enrolled with the Bar Council of Delhi . . . [who] is not a member of any religious or communal institution . . . [and who simply] belong[s] to [the] legal profession."[13] This kind of highly individualistic "Public Interest Litigation"[14] can easily be contrasted with other examples of public interest litigation where, for example, a coalition of nongovernmental organizations that share a great deal of experience with, and concerns about, the functioning of law in India raise a challenge to some legal practice in front of an Indian high court.[15] Why this particular set of grandiose worries, in 2005, about the Indian legal system?

As it happens, there was a set of events in 2005 that sparked worry among many people in India about the effective operations of the Indian legal system. Though Madan's litigious reaction was unique, the anxiety expressed in his petition was widespread.

CONTROVERSIAL *FATWAS*

During the summer of 2005, shortly before the petition instigating the case of *Vishwa Lochan Madan* was filed in the Supreme Court of India, a long-standing fascination and disgust with Islamic law and legal authorities in

India reached a particularly fevered pitch in India's national media. This furor was the consequence of a young Muslim woman's alleged rape by her father-in-law, and an Indian Islamic legal body's pronouncement (or *fatwa*) that, as a result of her rape, this woman should no longer be considered the wife of her husband.[16] The way in which "Imrana's case" (as this set of events was often referred to) was, in fact, not made a "case"—at least in front of the Indian state's family law system—seemed to demonstrate the ease with which religious and other non-state entities could "subvert" the Indian state's interests in regulating family status. This alleged subversion of justice sparked outrage across a wide spectrum of Indian government officials, social activists, and ordinary citizens. That a woman could be divorced via rape, without the state being able to effectively intervene, was eminently frustrating for institutions and people who wanted to believe in the power of their "modern" state against "premodern" attitudes and practices.

For example, in the widely distributed English-language national magazine, *India Today*, well-known reporter, Farzand Ahmed, breathlessly greeted his readers with a "[w]elcome to millennial India, where religion can still be merciless to the victim, and where faith can still be a dehumanising force." Ahmed went on to comment that "[i]n the little mullahdoms of India, justice is there only in crime, not in punishment. The clergy has complete copyright over the subjects' conscience, emotions, intelligence, and reason, no matter its moral system is a violation of basic human rights."[17]

"Imrana's case," then, was the most obvious spark for Madan's petition to the Supreme Court of India. Moreover, the petition did not hesitate to describe the seemingly awful facts of "Imrana's case" to the Court in the following manner:

> Twenty eight years [*sic*] old Muslim Lady, Ms. Imrana by name, mother of five children, residing in Charthawal Tehsil, Muzaffarnagar District, Uttar Pradesh was allegedly sexually violated by her father-in-law Sh. Ali Mohammad on June 4th, 2005. Police have filed a charge-sheet against the main accused on July 4th, 2005 containing details of victims' [*sic*] recorded statement and statements of more than 12 witnesses and also a medical report. The accused is in judicial custody, awaiting trial.
>
> While the factum and offence of alleged rape is yet to be established in a court of law [*sic*]. However, on the mere filing of the FIR by Ms. Imrana, village panchayat passed a verdict asking the victim to treat her husband as her son and banning her from living with him following the alleged

> rape. Without there being any petition from any side, the rape-victim Imrana, her husband Noor Mohammad or even the accused, Sh. Ali Mohammad, Islamic seminary Darul-Uloom of Deoband passed a fatwa (religious dictat) whereunder it was declared that Ms. Imrana became ineligible to live [*sic*] her husband. All India Muslim Personal Law Board on Monday, the June 27th, 2005 supported the fatwa issued by the Islamic seminary Darul Uloom Deoband. . . .
>
> . . . After the issuance of the fatwa by the Islamic seminary Darul-Uloom of Deoband and it being supported by All India Muslim Personal Law Board, Ms. Imrana had to actually leave the company of her husband and she has started staying with her parents in village Kukra.[18]

Soon after the Imrana episode hit the Indian press, a similar case also received wide public exposure. The widely distributed English-language newspaper *Hindustan Times* succinctly described this case as "Another Imrana, this time in Assam." The same article went on to describe how "[t]ales of Imrana-like atrocities are tumbling out of the closet [throughout India]."[19] Not surprisingly, this "second" Imrana episode also got catalogued and described in Madan's petition in the following manner:

> Yet another Muslim 19 year old Muslim lady, Jyotsna Ara by name, married some eight months ago to one, Imran Hussain Bhuyan also was allegedly sexually violated by her fifty-years old father-in-law, Moinuddin in Assam's Nagaon district. . . .
>
> . . . The matter relating to Jyotsna Ara's ordeals came to light, when her father Mujibur Rehman appealed to Nagaon Superintendent of Police, K. K. Sharma on 28th June, 2005, seeking justice for her [*sic*] daughter. . . .
>
> . . . Before approaching the police, Rehman had petitioned the Muftis of Darul-Hadis Parmaibheti Islamia Madarsa. In this case also the *fatwa* has come that the sanctity of her marriage stands destroyed.[20]

Finally, another similar situation also "tumbled out of the closet" around the same time in the Indian state of Haryana. *The Indian Express*, a widely distributed English-language daily, described the facts of this situation as follows:

> Rukhsana [name changed], eight months pregnant, had alleged that her father-in-law, Ismail, raped her 20 days ago when the family was returning from Tonka village. The family had made the trip to buy fodder and

> on their way back, Rukhsana claimed that her father-in-law asked her to ride pillion on his motorcycle while the family followed in a tractor.
>
> "She accused her father-in-law of stopping the bike in a secluded place and raping her," said Salman Khan, a social worker at Nuh village in Mewat, who has been involved with the case. The allegations were made at the Maulana Siddique Madarsa at Nuh.[21]

Madan's petition took note of this particular situation as well, describing vividly how

> [a]nother hapless Muslim sister, Asoobi [aka Rukhsana from the above newspaper article] experienced a similar trauma of being sexually violated by her father-in-law on June 12th, 2005, at Nuh, south of District Gurgaon, Haryana. . . .
>
> . . . As per newspaper reports, even though statements of about 50 persons were taken down by the panchayat, none was sent to the Islamic seminary, Darul Uloom, Deoband. . . .
>
> . . . Mufti . . . Maulana Allauddin at Siddique Madarsa, declaring the verdict (fatwa) has ruled in Asoobi's case, that no police complaint can be filed for her alleged rape. Asoobi's father, Jan Mohammad and her father-in-law (the alleged rapist) have given an affidavit each that they will abide by the fatwa and not report the matter to police.[22]

Ultimately, after laying out all three of these individual situations—involving Imrana, Jyotsna Ara, and Asoobi, respectively—Madan's petition tied all of them together, describing their relevance to its constitutional and legal objectives in the following manner: "Establishment and functioning of Shariat Courts and 'Dar-ul Qaza' (Muslim Courts) . . . is echoing loud and clear in all the three episodes mentioned above. The defiant attitude of the functionaries of these bodies is flagrant, open and blatant . . . [and an] affront on the Sovereign Concept of the Indian Constitution."[23]

Furthermore, according to the petition, these three incidents demonstrated how "Muslim bodies are actually functioning to the detriment of welfare of Muslim women."[24] Madan's conclusion in this respect came despite the fact that, in his own petition, he described a contrary assessment by one of his named defendants, the AIMPLB. According to Madan's description of the AIMPLB's position here, *dar ul qaza* dispute-resolution bodies were established (at least in part) because "it is extremely difficult for Muslim women to get justice in the Judicial System of [the Indian state]."[25]

PARTICULAR CLAIMS IN MADAN'S CONSTITUTIONAL PETITION

While Madan's petition to the Supreme Court of India was apparently sparked by the three incidents involving Muslim women described above, the situation of women (Muslim or otherwise) was not at the core of his precise legal and constitutional arguments to the Supreme Court concerning why non-state Muslim dispute resolution service providers should be shuttered.[26] Thus, neither Article 15 of the Constitution (declaring that "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, *sex*, place of birth or any of them,"[27] but also insisting that "[n]othing in this article shall prevent the State from making any special provision for *women* and children"),[28] nor Article 44 (urging "[t]he State [to] endeavour to secure for the citizens a uniform civil code throughout the territory of India"),[29] were invoked by Madan in his effort to shut down non-state providers of Islamic legal services in India.

Indeed, instead of relying upon provisions of the Constitution of India that go directly to the social and legal position of women in India, Madan's petition began its constitutional and legal argumentation by arguing that, "[b]ecause a State with a Constitution, like India, must necessarily regard its Constitution, as a[n] ultimate Source of all laws governing life, property and all that, which constitute the State and society of India[,] Constitution of India must be honoured as the only fountain-head, from where all legal authority can emanate." Moreover, "[n]o individual person or citizen, or an association thereof by whatever name called, has any right or privilege to indulge in activity which undermines the sanctity of the Constitution. Comfort of certainty lies in the Sovereignty of State, which is a definite, constant and tangible basis for the operation of law."[30] As a result—and because "the respondent AIMPLB strives for the establishment of parallel Muslim Judicial System in India"—the AIMPLB (among others) may be seen to be engaging in an "open rebellion, which deserves to be curbed in the budding stage by the Sovereign State."[31]

Following these arguments about the nature of law and constitutionalism, Madan then turned to the issue of Indian secularism and the implications of the Constitution of India's commitment to secularism for non-state systems of (Islamic) law. Interestingly, in this respect, he described the Constitution of India as a social-reform document, applicable to all of India's religious communities, Muslims included. Wrote Madan: "[T]he Constitution of India seeks to synthesize religion, religious practice or matters of religion and secularism. In secularizing the matters of religion which are

not essentially and integrally parts of religion, secularism . . . therefore . . . consciously denounces all forms of super-naturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices."[32]

Because the constitution is a religious-reform document, intended to "denounce"[33] and deter certain religious practices, Articles 25 and 26—provisions of the constitution dedicated to religious liberty—must be read through this reform lens. Indeed, according to Madan's petition, "Articles 25 and 26 . . . [are] intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands *to establish an egalitarian social order*."[34] By implication, then, inegalitarian social practices—including, presumably, non-state Muslim dispute-resolution services—must be eradicated.

Interestingly, in arguing for this understanding of secularism (and its conceptual cognate, religious liberty), Madan conceded that "essential"[35] religious practices were protected by Articles 25 and 26. Moreover, in determining essentiality, the relevant community itself must be consulted: "It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed."[36] Even more interestingly, Madan's petition conceded that Muslim personal law—for example, the colonial-era Dissolution of Muslim Marriages Act of 1939—was an essential part of Indian Islamic religiosity: "[I]t is conceded that the Muslim Personal Law is to apply to Muslim [*sic*], irrespective of the fact that the Muslim Personal Law may be inconsistent with the Spirit and Social-Philosophy of Constitution of India."[37]

However, while Muslim personal law ends up being protected under Madan's understanding of Indian constitutional secularism, non-state enforcers of this law do not. And this is where Madan's understanding of secularism gets folded into his concern with the rule of law: "However the fact that Muslims are to be governed by Muslim Personal Law does not, at all, mean that the Muslims are not to subject themselves to the jurisdiction of Secular Courts set up under the Constitution of India; or that the Muslims can be given a free hand to set up their own *Nizam-e-Qaza* (Judicial System)."[38]

Indeed, to allow such a "parallel"[39] non-state system of law to operate would be to create a "chaotic situation,"[40] one that would "end up, sooner than later, in the very withering of the Judicial System set-up [*sic*] under the Constitution, and ultimately the withering of the Constitutional System itself. . . . 'Adjudication of Disputes' between citizens subscribing to same

religious faith, can never be contained within the 'domain of religious function' under the control of the 'religious denomination or any section thereof' under Article 26 of the Constitution of India. It is essentially a *secular function* beyond their jurisdiction, power and control, and must be exercised by the Courts set-up [*sic*] under the Constitution of India."[41]

Thus, Madan's petition, while addressing a few other constitutional and legal issues,[42] essentially ended where it began—with a serious concern about how non-state (Islamic) systems of law affect the integrity and future viability of state systems of law. To be sure, however, this concern with the rule of (state) law overlaps with a concern for secularism. And together, these concerns informed the final section of Madan's petition, where he made demands of the Supreme Court. In addition to those mentioned at the beginning of this chapter, these demands included the following:

> -b- Declare that the judgments and *fatwas* pronounced by authorities not established under the Constitution of India or the Procedure established by Law, have no place in the Indian Constitutional system, and the same are unenforceable being wholly *non-est* and void *ab-initio*. . . .
> -d- Direct the All India Muslim Personal Law Board (Respondent No. 9), Dar-ul-Uloom Deoband, other Dar-ul-Ulooms in the country, and all other similar Muslim organizations:
> -i- to refrain from establishing a parallel Muslim Judicial System (Nizam-e-Qaza). . . .
> -e- Direct the All India Muslim Personal Law Board (Respondent No. 9), Dar-ul-Uloom Deoband, and other Dar-ul-Ulooms in the country, not to train or appoint Qazis, Naib-Qazis or Mufti for rendering any judicial services of any kind.[43]

DEFENDANTS' RESPONSES

While the Union of India was the lead named defendant in Madan's petition, the AIMPLB, as Respondent No. 9, appeared to be the real focus of Madan's concerns and ire. As a result, the AIMPLB's responsive pleading (or, "counter-affidavit," in Indian legal terminology) is the focus of this section's analysis rather than the Union of India's counter-affidavit. Three additional reasons account for this focus.

First, the AIMPLB is India's best-known Muslim organization and has, for many Indian liberals, posed one challenge after another to their deeply held values. To read, interpret, and understand the AIMPLB's perspective in the ongoing Indian discussion of non-state law is arguably more important

and more informative than interacting with the state's perspective on this issue—especially since the state does not exercise direct agency vis-à-vis non-state law. Second, as described in chapter 1, the AIMPLB and the Imarat-e-Shariah (another non-state Muslim organization)[44] coordinate a significant number of *dar ul qazas* around India. The AIMPLB's constitutional and legal defense of its own *activities* is thus arguably more relevant—for both Madan and the Supreme Court of India—than the Union of India's constitutional and legal perspective on its (alleged) *inaction* vis-à-vis these organizations' non-state legal activities. Something like this position, in fact, informed the Union of India's own argument to the Supreme Court that Madan's action should be dismissed, at least to the extent that it concerned the Union of India: "The Petition is liable to be dismissed on preliminary legal grounds that Petitioner has not alleged any violation of his fundamental right against the answering Respondent. *The alleged violation[s], if at all, having been claimed are claimed against the Ninth Respondent [the AIMPLB] which is a private body.*"[45] Third, and finally, the Union of India's arguments in its counter-affidavit largely overlap with those of the AIMPLB. Similarities between these two defendants' counter-affidavits suggest that the state's counter-affidavit was heavily influenced, if not actually drafted, in fact, by a lawyer for the AIMPLB itself. Indeed, in Madan's own counter-counter-affidavit (in Indian legal parlance, a "rejoinder affidavit"), he took note of evident similarities between the Union of India's and the AIMPLB's counter-affidavits and accused the "Union of India, represented by the political parties in power [of having] borrowed every thing [*sic*] from the counter-affidavit of Respondent No. 9 . . . . [It has] not cared to apply [its] own mind at all. Not only the ideas have been borrowed/stolen from the counter-affidavit of Respondent No. 9, but also the exact vocabulary employed and mistakes appearing in the counter-affidavit of Respondent No. 9."[46]

Focusing on the AIMPLB's counter-affidavit, then, this organization's contempt for Madan and his petition's efforts was made clear in its counter-affidavit's opening sections. For example, early on in its counter-affidavit, the AIMPLB contested Madan's standing to bring his petition, characterizing him as a mere "busybody" who "has filed the present Petition for no ostensible public purpose." Moreover, according to the AIMPLB, "[t]he Petitioner has no interest in and/or knowledge of the subject matter of the Petition and has not approached this Hon'ble Court with clean hands."[47] Madan's unclean hands, as the AIMPLB characterized the situation, resulted from his petition's attempt to "achieve cheap publicity/popularity and/or to

achieve oblique political objective." While the AIMPLB did not directly label the political objective allegedly motivating Madan—again, characterizing it as "oblique"—it did note that, while "[t]he Petition throws a challenge to Dar-ul-Qaza . . . [i]t conveniently ignores parallel systems existing in other communities having custom/religious practice to dissolve or annul marriage,"[48] including certain Hindu and Christian communities.

After this contentious opening reply, the AIMPLB's counter-affidavit continued on to argue that Articles 25 and 26 (and 29, pertaining to communities' cultural rights)[49] of the Constitution of India protected the operations of the AIMPLB's *dar ul qazas*. As a result, "any interference with the functioning of Dar-ul-Qaza will amount to the breach of Fundamental Rights of the Muslims."[50] The AIMPLB's interpretation of Articles 25 and 26, here, was in direct conflict with Madan's belief that these constitutional provisions could be read to support Indian secularism and its allowance of different personal laws for different Indian religious communities, but also the eradication of different religious communities' non-state dispute resolution providers. By way of contrast, the AIMPLB believed that not only did Articles 25 and 26 (and 29) protect non-state Muslim dispute resolution providers, including its *dar ul qaza* network, but also that to interfere with these non-state Islamic legal providers would "malign[] the entire system of personal laws of the Muslims."[51] Indeed, "Respondent No. 9 submits that settlement of disputes more particularly in family and civil matters by Qadi/Qazi is the integral part of Islam and has always been and still continues to be practiced by Muslim [*sic*] as an essential religious practice."[52] In sum, then, for the AIMPLB, without non-state Islamic legal service providers there could be no Muslim personal law; and, if there was no Muslim personal law, there could be no secularism in India.

From this argument about the relationship between Indian secularism and the Constitution of India's religious liberty protections, the AIMPLB's counter-affidavit then turned to a discussion of legal history. In this respect, the AIMPLB argued that historical systems of Islamic dispute resolution, present in India since precolonial times, were never superseded or extinguished by the British colonial regime. Thus, they remained legally legitimate institutions in a postcolonial India characterized by its inheritance of a great deal of British colonial legislation. Indeed, the AIMPLB's counter-affidavit described the relevance of colonial legal history in the following manner:

> It is necessary to delve into the legislative history of several regulations passed by Governor Generals in Council commencing from the

> regulation number IV of 1793 to 1828 A.D. During this period 24 regulations had been passed by Governors General of Madras, Bombay and Bengal in respect of the different topics relating to personal affairs of Muslim [*sic*]. In depth analysis of Regulations passed during this period will show that none of these regulations interfered with system of Dar-ul-Qaza or Nizam-e-Qaza so far as it dealt with the Suits or Complaints based on matters of marriage and divorce or other family matters or prevented Qazi from the performance of any duties or ceremonies which they were required to do under the Muslim Law.[53]

According to additional discussion in the AIMPLB's counter-affidavit, not only did no British colonial regulation in the period from 1793 to 1828 affect traditional *qazi* responsibilities and duties, but neither did the well-known (and widely discussed) Act No. XI of 1864. The 1864 Act was enacted in the aftermath of the 1857 anticolonial revolt throughout much of British colonial India, and the subsequent formal takeover of East India Company possessions by British imperial rule in 1858. Moreover, the 1864 Act is often understood to represent a particularly momentous British colonial assertion of a sovereign imperial right to determine and pronounce law without local/native input and influence.[54] However, the 1864 Act is itself relatively short, simply declaring (in part) that "it is unnecessary to continue the offices of Hindoo and Mahomedan law officers, and it is inexpedient that the appointment of Cazee-ool-Cozaat, or of City, Town or Pergunnah Cazees should be made by Government," and, hence, any previous colonial regulations pertaining to such official offices and appointments were repealed.[55]

This being the case, the 1864 Act also declared that "[n]othing contained in this Act shall be construed so as to prevent a Cazee-ool-Cozaat or other Cazee from performing when required to do so, any duties or ceremonies prescribed by Mahomedan Law."[56] The AIMPLB's counter-affidavit thus termed this second part of Act No. XI of 1864 as a "saving clause,"[57] going on to describe its effect as follows:

> The saving provisions of Sec. II of Act No XI of 1864 firstly acknowledges the fact that Qazi had always performed functions and duties when required to do so under the Muslim Law and secondly, the repeal of the diverse Regulations or Acts or part thereof did not affect performance of such functions/duties by Qazis under the Muslim Law. The Act No. XI of 1864 merely repealed the provisions of diverse Regulations and Acts which enabled the concerned authority to appoint Qazis and their role to

> assist the Court in expounding questions of Muslim Law arising in Suits/Complaints. In other words Qazi's role to assist Courts on questions of Muslim Law coming before it was repealed but its traditional religious role to function as Cazee under the Muslim Law was expressly saved. . . .
>
> . . . It is therefore clear that the policy of the then British Government towards administration of justice in the matters relating to Muslims [*sic*] Personal Law was that the British Government would not appoint any law officer to perform such duties, but did not prevent or prohibit any system for administration of justice relating to Muslims [*sic*] Personal Law.[58]

After describing the impact of the 1864 Act in this way, the AIMPLB counter-affidavit then moved onward in its historical legal analysis to Act No. XII of 1880, commonly referred to as the Kazis Act of 1880. Here too, the counter-affidavit identified a "saving clause" such that, no matter what the rest of the act aimed to be doing, there was a "recogni[tion of] the prevailing system of administration of justice under the Muslim administration of justice under the Muslim law."[59]

After this exposition of legal history, the AIMPLB's counter-affidavit proceeded to argue that its *dar ul qaza* network, contra Madan's depiction of it as authoritarian and preying on the relative ignorance of the Indian Muslim community,[60] "rests on sustained public confidence in its moral sanction."[61] In this regard, the counter-affidavit explained different Muslim political and social efforts, dating from 1917, allegedly demonstrating "the constant endeavor of Indian Muslims to have an alternative system for delivery of justice as per the Shariat law in India."[62] The efforts described here include the precursor to the contemporary *dar ul qaza* network and its joint sponsorship by both the AIMPLB and the Imarat-e-Shariah. According to the counter-affidavit,

> the Indian Muslims always had the system of Darul-Qaza in operation. Efforts and endeavours were made to organize it through out [*sic*] India. The first organized effort in this direction was made in the erstwhile British Indian Province of Bengal-Bihar-Orissa. . . . [A] leading scholar of the time established an Anjuman (Organization) known as Anjuman-e-Ulema in Bihar in or about 1917. In 1919 six Darul-Qaza were set up in Bihar province . . . under the auspices of Anjuman-e-Ulema. Shortly thereafter the said Anjumane-Ulema established Nadir-i-Ahkam al-Qaza (Appellate Tribunal) with six top most Ulema of the region as its members. Either party to a case decided by any of the six Darul Qazas

> could file an Appeal there and the Nadir-i-Ahkam al-Qaza (Appellate Tribunal) after hearing the Appeal may remand the case with its own observation for revision to the concerned Dar-ul Qaza.[63]

In this excerpt, there are two simultaneous gestures. The first is toward the deep history underlying the contemporary *dar ul qaza* network, thereby attempting to justify its future continuance by pointing to its historical pedigree. The second is to the procedural features that this network shares with contemporary standards of procedural adequacy and fairness; for example, like the Indian state system, the non-state *dar ul qaza* network also ensures appeals, according to the AIMPLB. (Data from the Imarat-e-Shariah presented in chapter 1 is consistent with this claim pertaining to the existence of a non-state appellate structure.)

This second theme was then picked up and continued in remaining portions of the AIMPLB's counter-affidavit. For example, "Respondent No 9 contends that the process of training of Qazis is higly [*sic*] rigorous and is in consonance with the onerous functions that they have to perform."[64] This seems to suggest that *qazis* working in the *dar ul qaza* network have as much, or possibly more, training than judges in the state court system. That being said, the AIMPLB's counter-affidavit did not suggest that there is *competition* per se between the state court system and the *dar ul qaza* network. Indeed, at this point in its counter-affidavit, the AIMPLB turned to an explanation of how the *dar ul qaza* network operates in a manner either supplementary or complementary to—but not in competition with—the state court system:

> Respondent No. 9 contends that Darul Qaza is not set up in derogation of the civil courts. At the very initial stage when a matter is referred to Darul Qaza it is inquired from the parties whether they would like the matter to be decided according to the Shari'at Law and if the parties agree to settle the disputes in accordance with Shari'at Law then they are requested to withdraw their case from the civil court and on the parties agreeing to withdraw the dispute from the Civil Court, Darul-Qaza proceeds with the matter. . . . However if any of the parties refuse to withdraw their case from the civil courts Darul Qaza refuses to entertain the matter at all and refer [*sic*] the parties to adjudicate their disputes in the civil courts. In the matter of dissolution of marriage the Darul Qaza proceeds to dissolve marriage (Faskh-un Nikah) on the proof of one of the grounds mentioned in Section 2 of the Dissolutions of the Muslim Marriages Act, 1939.[65]

On the issue of *faskh* divorce, and in response to Madan's contentions regarding the exclusive jurisdiction of state courts over matrimonial matters, the AIMPLB's counter-affidavit specifically disagreed with Madan on this matter, contending that marriage matters are civil matters, and that both Sections 9 and 89 of the Civil Procedure Code, as well as the Arbitration and Conciliation Act of 1996, allowed for arbitration in civil matters like matrimonial disputes. Indeed, according to the AIMPLB's counter-affidavit, "[t]here are two ways of looking at Darul-Qaza—they may be seen as an alternative dispute resolution (A.D.R.) mechanism which is now greatly favoured in India and has led to the system of Lokadalats and Vishash adalats[.] Alternatively, when the parties agree to abide by the decision of Darul-Qaza on matrimonial disputes, it may be looked at as arbitration proceedings culminating into the arbitration award."[66]

Moreover, picking up on its observations here as to the Indian state's earlier creation of an alternative system of cheaper and quicker state courts—that is, the *lok adalats* mentioned here and also discussed in this book's introduction—the AIMPLB's counter-affidavit then observed how the "settlement of disputes under Muslim law in Darul-Qaza [rather] than in Civil Court has its own advantages. While the procedures and processes followed in both the systems are more or less the same, speedier and much less expensive justice is available in the Darul-Qaza, as against the Civil Courts which take years—sometimes a litigant's lifetime—to decide cases and can be approached only at a cost which by the common man's standard is exorbitant."[67] And, indeed, like *lok adalats* and other similar state-sponsored alternatives to the traditional state court system, the *dar ul qaza* network "relieves the Court of its burden and serves great public interest."[68]

VISHWA LOCHAN MADAN V. UNION OF INDIA, SECULAR HATE, AND SECULAR NEED

In 2014, the Supreme Court of India finally issued its decision in the constitutional controversy fueled by Madan's 2005 petition. The Supreme Court's opinion in *Vishwa Lochan Madan*[69] was written by (now retired) Supreme Court Justice Chandramaula Kumar Prasad, hailing from the State of Bihar.[70] As chapter 1 discussed, Bihar is the state where modern Indian *dar ul qazas* originated at the beginning of the twentieth century. Joining Justice Prasad in hearing and deciding this case was Justice Pinaki Chandra Ghose.

The Court's opinion started somewhat abruptly, albeit in a way succinctly stating the competing interpretations of non-state Muslim dispute

resolution in India animating the case in front of the Court. In this respect, the Court began its opinion by observing that

> All India Muslim Personal Law Board comprises of Ulemas. Ulema is a body of Muslim scholars recognised as expert in Islamic sacred law and theology. It is the assertion of the petitioner [Madan] that All India Muslim Personal Law Board (hereinafter referred to as 'the Board') strives for the establishment of parallel judicial system in India as in [the AIMPLB's] opinion it is extremely difficult for Muslim women to get justice in the prevalent judicial system. Further, under the pressure of expensive and protracted litigation it has become very difficult for the downtrodden and weaker section of the society to get justice. Therefore, to avail the laws of Shariat, according to the Board, establishment of Islamic judicial system has become necessary.[71]

According to the Court's opening statement, then, this was a dispute between parties disagreeing as to whether the dysfunctions of the Indian state's judicial system warranted the establishment of a "parallel judicial system" by non-state Muslim actors.

Moreover, the Court seemed to suggest here that this was a case that raised questions as to whether the difficulties that Muslim women (allegedly) faced in the Indian state's judicial system warranted the operation of a "parallel" judicial system that might itself harm Muslim women (albeit differently). In this respect, the Court bluntly noted on the first page of its opinion that "[w]hat perhaps prompted the petitioner [Madan] to file this writ petition is the galore of obnoxious Fatwas including a Fatwa given by Dar-ul-Uloom of Deoband in relation to Imrana's incident."[72] The Court then briefly recounted aspects of "Imrana's case," as well as events involving Jyotsna Ara[73] and Asoobi—all described above.

From these opening observations, the Court proceeded for several paragraphs to state, in relative detail, the respective positions of the petitioner and the respondents in this case. This discussion largely drew upon the parties' written submissions to the Court—also described and summarized above. Interestingly, when delving into the respondents' respective positions, the Court decided to state the Union of India's position first, noting how

> [t]he stand of the Union of India is that Fatwas are advisory in nature and no Muslim is bound to follow those. Further, Dar-ul-Qaza does not administer criminal justice and it really functions as an arbitrator,

> mediator, negotiator or conciliator in matters pertaining to family dispute or any other dispute of civil nature between the Muslims. According to the Union of India, Dar-ul-Qaza can be perceived as an alternative dispute resolution mechanism, which strives to settle disputes outside the courts expeditiously in an amicable and inexpensive manner. . . . The Union of India has not denied that Fatwas as alleged by the petitioner were . . . issued but its plea is that they were not issued by any of the Dar-ul-Qaza. In any event, according to the Union of India, few bad examples may not justify abolition of system, which otherwise is found useful and effective.[74]

Ultimately, the Supreme Court's holding in this case was equivocal and confusing, if one can even call it a "holding" in the first instance. The ambivalent nature of the Court's holding is perhaps not surprising in light of the Court's vacillation between describing the reality of non-state Muslim dispute resolution in India as essentially futile, *but also* dangerous. For example, speaking of *faislahs* and *fatwas* alike, the Court wrote: "The person or the body concerned may ignore [them] and it will not be necessary for anybody to challenge [them] before any court of law. [They] can simply be ignored."[75] Conversely, however, the Court also noted how "Imrana's case is an eye-opener. . . . Though she became the victim of lust of her father-in-law, her marriage was declared unlawful and the innocent husband was restrained from keeping physical relationship with her. In this way a declaratory decree for dissolution of marriage and decree for perpetual injunction were passed. . . . In this way, victim has been punished. A country governed by rule of law cannot fathom it."[76]

The Court's ambivalence on "the facts" of this case carried over to ambivalence in "the law" that the Court decided to announce. In this respect, the final words of its opinion vacillated between suggestion and command. With regard to its suggestion, the Court first declared that "one may not object to issuance of Fatwa on a religious issue or any other issue so long it does not infringe upon the rights of individuals guaranteed under law,"[77] while also admonishing "that a Fatwa has the potential of causing immense devastation, [so] we feel impelled to add a word of caution. We would like to *advise* the Dar-ul-Qaza or for that matter anybody not to give any response or issue Fatwa concerning an individual, unless asked for by the person involved or the person having direct interest in the matter."[78] Yet giving "advice" was, also, apparently not enough for the Court here. And, indeed, it went on to exhort that "no Dar-ul-Qazas or for that matter, any

body or institution by any name, shall give verdict or issue Fatwa touching upon the rights, status and obligation, of an individual unless such an individual has asked for it."[79]

To be sure, the ambivalence reflected in the Supreme Court's 2014 opinion tracks the multivalent complexity of the entire constitutional controversy fueled by Madan's 2005 petition to the Court—and, in particular, the simultaneous presence of secular hate and secular need. In what follows below, crucial features of this constitutional controversy are summarized. As noted earlier, liberal theories or actualizations of multiculturalism, minority rights, or toleration are just part of the overall picture here. These, and other liberal concerns—most prominently the welfare of (Muslim) women—are present in this Indian constitutional controversy; yet, following political philosopher James Tully, one has to understand "the language of contemporary constitutionalism . . . [a]s more akin to an assemblage of languages . . . composed of complex sites of interaction and struggle."[80] Evidencing this complexity, the focus here is on how secular hate and secular need alike accompanied secular-liberal discourse in the recent Indian constitutional controversy.

SECULAR HATE

The Supreme Court's invocation of "Imrana's case"[81] in *Vishwa Lochan Madan* is a testament to how important this, and similar events, have been to the contemporary debate over non-state Muslim dispute-resolution service providers in India. As highlighted earlier in this chapter, Madan's petition appears to have been motivated by publicity sparked by three different *fatwas* issued in 2005, from around India—each allegedly affecting (actually or potentially) the marital status of a woman claiming to have been raped by her father-in-law. Madan's petition suggested that each of these three women was abject and in need of a certain kind of intervention by the state. For example, Asoobi was described by Madan as "[a]nother hapless Muslim sister,"[82] following in the apparently hapless footsteps of Jyotsna Ara and Imrana herself. Similarly, in an interview that I conducted with him in 2011, Madan described the general position of Muslim women in India as "even worse" than that of Muslim men, going on to say that they "are more, more illiterate, [more] uneducated than the men. . . . See, they are also not having economic independence, so they are on the mercy of the men."[83]

In this way then, Madan's petition and the debate it engendered loudly echoed the "Shah Bano affair," a controversy that presented post-independence India with perhaps its most serious challenge yet to the

content and nature of the state's secular commitments. "Imrana's case" has become a key phrase in the events surrounding Madan's petition, in a way strongly evocative of the way in which the Shah Bano affair earlier became a cultural shorthand for all the alleged problems with Islamic law, Muslim patriarchy, and the situation of Muslim women in India—or, viewed another way, the Muslim "otherizing" in which Indian secularism often engages.[84] One genealogy that this constitutional controversy might easily be slotted into, then, is as a continuation of the Indian judiciary's obsessive and anti-Muslim "concern" with the situation of Muslim women's well-being and rights. Such a concern—if one can truly call it that—was discussed in my introduction, while also being the subject of scholarly work by anthropologists Srimati Basu[85] and Sylvia Vatuk.[86]

The constitutional controversy fueled by Madan's petition built upon a legacy of Indian secular hostility toward Muslim—and *especially* Muslim—patriarchy in other ways as well. This occurred via the making of constitutional arguments pertaining to two liberal values different from women's rights specifically—namely, secularism and the rule of law.

For example, in posing one of its legal questions concerning secularism to the Supreme Court, Madan's petition relied upon a depiction of a certain kind of authoritarian Islam (which Madan aimed to counter); a depiction that was replete with the image of Muslim leaders taking advantage of the uneducated masses who make up the majority of adherents to Islam in India. In this regard, Madan's petition asked

> Whether any institution by the term *"Shariat Court",* and whether officers by the terms *Qazi* (Legally appointed "Judge" entrusted with matrimonial jurisdiction), *Nayab-Qazi* (Sub-Judge) and *Mufti* (officially appointed law-officer of Muslim Personal Law) can be allowed to function in *the Secular India*, especially when these terms not only create a lot of confusion, but also *terror of God's wrath*, in the mind of uneducated multitude of Indian Muslim Citizenry as regards the extent and nature of obedience to them, and when none of them are appointed or constituted under any authority of law?[87]

Here, then, we see an implicit argument for secularism (if not also the rule of law) being made through the deployment of negative stereotypes about a deeply and fundamentally illiberal Muslim community.

Madan's petition also made other derogatory statements about India's Muslim community.[88] Furthermore, in my 2011 interview with him, Madan

emphasized to me how "since we are a democracy . . . there is every likelihood of India being ruled by Muslims in another twenty-five years" due to "adverse population growth" with respect to non-Muslim versus Muslim rates of reproduction in India. However, for Madan, this was not necessarily a problem, because "[i]f the Muslim community keeps governed by the university educated people, we are in safe hands." Yet "[i]f the fundamentalists take over, then it can be a real problem."[89] Similarly, in his original petition, Madan also fretted about the possibility of Muslims engaging in "open rebellion"[90] against the Indian state.

Certainly then, concerns about the meaning and reach of secular-liberal values were present in the constitutional controversy sparked by Madan's 2005 petition. However, this controversy was not simply about (typical) liberal values like secularism. While secular liberalism was certainly present here, so were deep and historically recurrent themes of anti-Muslim sentiment in India. Moreover, the multivalence of this constitutional controversy does not include simply secular liberalism and secular hate. Indeed, secular need is present in all of this too.

SECULAR NEED

The AIMPLB objected vigorously to many aspects of Madan's arguments, including his position that non-state Islamic legal institutions threaten the rule of (state) law. In making its objections in this respect, the AIMPL noted that his arguments conveniently ignored parallel non-state Hindu and Christian practices[91] and also conveniently neglected numerous profound (and arguably enviable) changes in Indian state legal institutions over the past thirty years oriented around improving accessibility to the state's legal system.[92]

As I briefly discussed in my introduction, over the past few decades, there has been a considerable expansion of a state system of "people's courts" (*lok adalats*) that provide less formal, less expensive, and quicker resolutions of millions of bread-and-butter civil disputes.[93] In these "courts," the normal rules of civil procedure and evidence are suspended, and the adjudicators include not only sitting or retired judges but also advocates, social workers, and other persons of local repute. Another related and more recent development has been the legislation of the Gram Nyayalayas Act of 2009, establishing a new local-level tier of the Indian judiciary, with one *gram nyayalaya* (i.e., local-level court) established for every *panchayat* (i.e., the most local tier of government in India) or group of contiguous *panchayats* in India. This 2009 Act can be seen as one result of a discussion that began in earnest

in 1986, after the government-run Indian Law Commission issued a report with recommendations for providing increased access to justice at the village level in India.[94] In any event, under the 2009 Act, each *gram nyayalaya* has jurisdiction over civil disputes, as well as minor criminal offences. Importantly—and here one can see concern with the existing inefficiencies of the Indian legal system again seeping in—the Indian Code of Civil Procedure can largely be disregarded in civil disputes handled by *gram nyayalayas*.[95] Ultimately, then, due to perceived failures in the state's longstanding legal institutions, the past few decades have seen much experimentation in the design of newer state institutions.

Moreover, these experiments—as well as the need for timely, inexpensive dispute resolution these experiments respond to—seem at least partly to have motivated the Supreme Court's ambivalent reaction to Madan's petition, and also the non-state *qazis* and *muftis* targeted by that petition. Indeed, as already discussed, the Supreme Court vacillated not only in its factual view of non-state Muslim legal actors—characterizing their activities as both futile and dangerous—but also in whether to legally excoriate these Muslim actors or simply to give them "advice." In doing so, the Court displayed some hesitation about potentially unintended consequences of getting rid of a form of "alternative dispute resolution." This was evident not only in the seriousness with which the Court apparently took the Union of India's argument that non-state Muslim dispute resolution providers are "useful and effective," because they "settle disputes outside the courts expeditiously in an amicable and inexpensive manner,"[96] but also in the Court's own finding that non-state Muslim dispute-resolution providers make available an "informal justice delivery system with an objective of bringing about amicable settlement between the parties."[97]

In short, the state's previous acknowledgment that new and fresh alternatives to the state's beleaguered court system need to be created is also arguably driving a recognition here that the state (materially) needs non-state dispute resolution providers—including Muslim ones. Ultimately, then, it is possible to understand the bimodal and ambivalent quality of the Supreme Court's 2014 opinion in *Vishwa Lochan Madan* as resulting from the secular state's simultaneous hate—and need—of the Islamic non-state.

CONCLUSION

The controversy fueled by Madan's petition did engage with the language of liberal constitutionalism. Significantly, however, this controversy also

regurgitated long-standing stereotypes about Indian Muslims while also reflecting the state's dependence on non-state Islamic legal actors. This syncretic secularism—liberal, hateful, and needy—suggests, in turn, a complex future implementation of the 2014 Supreme Court decision, in *Vishwa Lochan Madan*, "resolving" this controversy.

And, indeed, there are already signs of this complex future in a case decided in 2017 by the Madras High Court concerning a "shariat council" operating in Chennai.[98] In its opinion in *Abdur Rahman v. Secretary to Government*, the Madras High Court evidenced sharp concern with this council's physical and procedural operations, and the way in which these operations might convince (unsophisticated) persons that it was operating as a state court. In the High Court's own words: "[T]he impression which is conveyed to the public at large is of a Court functioning. We have also to take note of the fact [here] that persons visiting the mosque [where the shariat council was based] may be from different social status and [be] less educated persons . . . or women who are vulnerable."[99]

While the Madras High Court decision cited the earlier case of *Vishwa Lochan Madan*,[100] it seems it was only that case's stereotyping of Muslims that firmly made an impact on the Court. And, indeed, the Supreme Court's earlier proto-liberal concern for Muslim women is hard to find in the Madras High Court's decision to act on the behalf of an educated, nonresident Indian man seeking to prevent his wife's use of the shariat council to divorce him.[101] Furthermore, the Chennai police's "needful" plea to the Madras High Court that the shariat council in question provided a "free service which had facilitated settlement of 1200 disputes"[102] seems to have made only a cursory impact on the High Court. In short, in this recent case, secular suspicion and hate were more prominent than secular liberalism and secular need.

The future cannot be predicted with much certainty. However, it seems likely that the aftermath of the major constitutional controversy discussed in this chapter—like the historical events and contemporary debates leading to it—will be mired in pluralism and polyvalence, liberalism and cruelty, and both hate and need.

3 SECULAR EMOTION AND THE RULE OF LAW

The Case of Ayesha

SECULAR LEGALISM IN INDIA IS BOTH COMPLEX AND PARADOXICAL, encompassing hateful otherizing, absorptive love, and needful dependency. Sometimes these secular emotions are on ready display, and at other times they are more covert. For example, secular-liberal theorizing pertaining to "the rule of law" implicitly but undeniably otherizes non-state legal actors in India and elsewhere when this theorizing is inattentive to ethnographic detail concerning how non-state and state legal actors actually operate.

Rule of law theorizing's tendency to ignore the actual mechanics and procedures of law—not only in state courts but also in legal venues outside the state's direct control—has made this theorizing much more ideological than it is simply naive. Indeed, with respect to *state* legal venues, such ideology conjures up an image of state court practice and procedure that is simultaneously ideal and idealized. With respect to *non-state* legal venues—and especially non-state Islamic legal venues—it understands the practices and procedures of these non-state venues as crude and underdeveloped at best, and illiberal and in violation of the rule of law at worst.[1] Indeed, using a helpful turn of phrase provided by historian Dipesh Chakrabarty, one can say that rule of law ideology's crescendo-ing attachment to the "law-state combine"[2] has increasingly resulted in a depiction of non-state legal practices as always inadequate, and perhaps even deeply undermining of the state.

These are prominent themes in the rule of law theoretical tradition; in particular, its large yet lamentable focus on the importance of state courts. Secular-liberal inattention is not simply about otherizing, however. Indeed, while the theory of liberal legalism works in a way to emphasize differences between state and non-state legality, similarities (though not sameness) between non-state and state legal actors emerge when ethnographic detail is added to the analytic mix.[3] Moreover, the similarities between state and

non-state have been what has enabled the secular Indian state to feel comfortable delegating dispute resolution from its overburdened courts to non-state legal actors, including Muslim ones. Put simply, secularism's hateful and otherizing theoretical project vis-à-vis non-state Islamic legal actors often obscures not only the deep similarities between the secular state and the Islamic non-state but also how the secular state has relied on these similarities for its own survival. While there is strong reason to suspect that hateful secular-liberal otherizing is a *consequence* of the secular-liberal state's inadequacies and dependencies, this chapter simply notes the simultaneity of hate and need, leaving "cause-and-affect" to the conclusion.

Given the importance of ethnographic inquiry to legal thought, the experiences of "Ayesha" (not her real name) in obtaining a divorce decree from a Delhi *dar ul qaza* in 2008 are explored here to illuminate the rule of law, both within and without the secular state and its institutions, and in relation to secularism's hateful and needful dimensions alike.

RULE OF LAW IDEOLOGY AND THE IMPORTANCE OF STATE COURTS AND STATE-COURT PROCEDURE

Vishwa Lochan Madan's 2005 public-interest petition to the Supreme Court of India positioned its demands, in part, as the obvious consequence of two basic aspects of the Constitution of India. The first concerned how the constitution, as a foundational source of law for India, must have supremacy in the legal and political life of India; the second concerned how the constitution's creation of a state system of courts is fundamentally compromised by the existence of a "competitor" in the form of a non-secular, non-state system of legal governance. In short, according to Madan's petition to the Supreme Court, "adjudication of disputes is essentially the function of [a] Sovereign State, which can never be abdicated or shared with anybody."[4]

The kinds of questions, statements, and arguments that circulated in Madan's petition pertained not only to the nature of the constitutional system in India but also to broader issues concerning the nature of law and legal administration. For example, Madan argued that the administration of law must be "definite" and "constant,"[5] and that the existence of "parallel"[6] systems of legal administration reduces legal clarity and certainty. Indeed, he even argued that parallel systems created the possibility of a "chaotic situation,"[7] which could be considered the antithesis of an orderly "legal system."

Madan's concerns with the existence of "parallel" systems of law, including the ways in which such systems threaten the "definiteness" and "constancy" of (Indian) law, are not exclusive to him. Themes extant in the rule of law ideological tradition over the past two centuries—and especially the emphasis in this tradition on public, state courts as crucial sources of law—have been historically used to reproach both personal law systems and non-state systems of alternative dispute resolution. Viewed this way, Madan's 2005 petition to the Supreme Court of India is just another instance of the global use of rule of law ideology against non-state legal actors and institutions, particularly those that are Muslim.[8]

To be sure, Madan's explicit and loud concern with non-state legal actors is somewhat distinct given the "silent treatment" with which prominent rule of law ideologues and efforts have often treated non-state courts or other methods of non-state dispute resolution. For example, working on the global front and in the arena of "law and development," the United Nations has recently issued high-level reports on the need to expand and enhance its rule of law work.[9] Yet, as legal scholar Brian Tamanaha has noted:

> Two recent reports of the United Nations secretary-general [issued in 2004 and 2006] emphasizing the importance of "United Nations support for the rule of law" focus almost exclusively on efforts to build state legal institutions, listing "court administration, legal drafting, judicial accountability, . . . prison management, reparations, prosecutions, international and mixed tribunals, legal training, land and property rights, international humanitarian, human rights and refugee law, constitutional law, institution-building, public administration reform and so on." . . . Only passing mention was given to "the presence of traditional and customary systems."[10]

Thus, while the United Nations and other development organizations believe that strengthening courts is an increasingly important part of rule of law development efforts, non-state courts appear mostly marginal to these efforts.

Echoing such a problematic approach, but in the academic context, legal scholar Judith Resnik has advocated the importance of state courts, while also warning about the dangers of privatized adjudication.[11] As part of her scholarly project, Resnik has written how "the practices of *open* [my italics] courts have become a signature feature that helps to define an institution *as a court*," thereby signaling her opposition to private forms of

dispute resolution, including arbitration. Indeed, for Resnik, a "diminution of public adjudication [leads to] a loss for democracy [as] adjudication can itself be a kind of democratic practice."[12] In short, Resnik's position is that the rule of (democratic) law requires open/public/state courts.

Somewhat similarly, legal philosopher Jeremy Waldron has also focused on the role that open/public/state courts play in the creation and sustenance of the rule of law, stating that:

> I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions that apply norms and directives *established in the name of the whole society* to individual cases and that settle disputes about the application of those norms. And I mean institutions that do this through the medium of hearings, formal events that are tightly structured procedurally in order to enable an impartial body to determine the rights and responsibilities of particular persons fairly and effectively after hearing evidence and argument from both sides.[13]

In his insistence on courts as institutions "established in the name of the whole society,"[14] Waldron indicates not only that he means for a "court" to be a non-private, nonreligiously identified entity, but also the continuity of his theorizing with other rule of law advocates—including both the United Nations and Judith Resnik, with their emphasis on the role of open/public/state courts in relation to the rule of law.[15] Simultaneously, Waldron distinguishes himself from other prominent rule of law theorists—for example, philosopher Friedrich Hayek—by de-prioritizing *legal certainty* as the basis of the rule of law.[16] Indeed, Waldron's recent rule of law work is quite clearly interested in developing an account of "law" which is premised on an understanding of law as a process of disputation—or, to use a Resnikian term, "adjudication"[17]—rather than law as fixed, clear, and always certain.

In the contemporary moment then, it seems clear that Waldron, Resnik, and others recognize the uncertain, process-oriented, and dynamic qualities of "law" and, in the process, disavow the obsession with legal certainty that Madan and other rule of law ideologues have historically demonstrated. Problematically, however, Waldron, Resnik, and others—including, for example, Madan—continue to insist on law as a public/state monopoly.

To be fair, this is not a problem only with contemporary theorizing. In fact, the problems with rule of law ideology are historical, deep-seated, and

hard to avoid. Toward this point, perhaps the best historical work to highlight is the late constitutional scholar A. V. Dicey's highly influential, classic treatise on the rule of law, *Introduction to the Study of the Law of the Constitution*.[18] In this work, Dicey makes repeated reference to "ordinary courts" or "ordinary tribunals," while simultaneously telling us very little about what makes a court "ordinary."[19]

As inchoate as his description of "ordinary courts" is, Dicey makes them central to his conceptualization of the rule of law in a number of ways. Of particular note, "ordinary courts" are important, for him, because these institutions are the actual spaces where legal opinions securing important liberties for posterity are authored. In this respect, Dicey is impressed with the liberties that have accompanied England's "unwritten," judicially crafted constitution and contrasts these liberties with those that have purportedly been secured with written constitutions, stating: "We may say that the [English] constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us [as] the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of [a written] constitution."[20]

For Dicey then, the English system of liberty is more secure than other systems because it is the product of litigation in "ordinary courts." According to Dicey, it is very difficult to suspend a liberty in the English system. Such a suspension would involve far more than an impetuous declaration about the enforcement—or not—of a "mere" constitutional document. Indeed, the declaration would have to extend to suspending the operations of actual institutions (i.e., courts) that the civilian population regularly accesses, uses, and needs: "Where . . . the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution *in the institutions* and manners of the nation."[21]

In this way, Dicey links "ordinary" courts to the rule of law—if not law itself—by envisioning and defining them as institutions and spaces where "ordinary" disputation occurs. And, indeed, in adopting a view of the courts as sites of disputation, Dicey was even able to diagnose the development of the rule of law in France—his nineteenth-century Continental antipode for all things English—with respect to its system of *droit administratif*. *Droit administratif*, loosely speaking, was the French system by which matters

(often broadly conceived) pertaining to administrative law and civil servants were heard in a separate system of administrative courts. Such a system of "special" courts enforcing "special" laws for "special" people was, on its surface and in its very being, antithetical to Dicey's conception of the rule of law. That being said, for Dicey, there was evidence that this system had moved away from its previous despotism. And this was because "*droit administratif* has developed *under the influence rather of lawyers than of politicians*."[22] Indeed, over time, *droit administratif* came to be "decided by a body which acted after the manner of a court which was *addressed by advocates, heard arguments, and after public debate* delivered judicial decisions."[23] For Dicey, the pivotal role of *lawyers*—advocating for their clients' interests in a competitive and adversarial contest—suggests, once again, the crucial role that the presence of quotidian institution-centered disputation plays in his conception of the rule of law.

Yet, beyond the fact that "ordinary" courts with (presumably ordinary) lawyers are important to the rule of law, Dicey is remarkably vague in his seminal work about what makes a court ordinary. Contemporary rule of law advocates, then, have had a formidable history of theoretical evasion about what counts as a "court" to overcome.

And in fact, this evasion is something that Waldron quite explicitly addresses in his recent work, in which one of his goals is to think more concretely about some of the necessary procedural features that ensure and facilitate dispute in legal institutions like "courts."[24] For example, criticizing the vagueness of the extant rule of law literature, as well as how little it has had to say about both the definition of "courts" and their inner procedural workings, Waldron writes:

> In many . . . discussions of the Rule of Law . . . the procedural dimension is simply ignored. . . . I do not mean that judges and courts are ignored. . . . But, if one didn't know better, one would infer from these discussions [about judicial practice] that problems were just brought to wise individuals called judges for their decision (with or without the help of sources of law) and that the judges . . . proceeded to deploy their interpretive strategies and practical wisdom to address those problems; there is no discussion [in this literature] of the *highly proceduralized* hearings in which problems are presented to a court, let alone the importance of the various procedural rights and powers possessed by individual litigants in relation to these hearings.[25]

Seeking, then, to avoid the inattention paid to actual court procedures by his predecessors—including not only Dicey but also political philosopher Joseph Raz, who has written on the importance of something he calls "norm-applying organs" adhering to something denoted as "[t]he principles of natural justice"[26]—Waldron lists the following features that he feels a legal proceeding must embody before the rule of law can be said to exist:

> A. A hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth;
> B. A legally trained judicial officer, whose independence of other agencies of government is ensured;
> C. A right to representation by counsel and to the time and opportunity required to prepare a case;
> D. A right to be present at all critical stages of the proceeding;
> E. A right to confront witnesses . . . ;
> F. A right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
> G. A right to present evidence in one's own behalf;
> H. A right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
> I. A right to hear reasons from the tribunal when it reaches its decision that are responsive to the evidence and arguments presented before it; and
> J. Some right of appeal to a higher tribunal of a similar character.[27]

Waldron characterizes this list as a "preliminary sketch"[28] of a procedural account of the rule of law—and there are many reasons to readily endorse that characterization of his account. However, there are also many reasons to resist this characterization.

Regarding its too sketch-like quality, Waldron's account has nothing to say about many crucial procedural aspects of law and court procedure.[29] For example, where he mentions a "right to confront witnesses,"[30] he presumably means the witnesses of one's legal adversary, thereby further presuming the participation of an adversary. However, that being the case, one might then wonder how a Waldronian "court" would procedurally handle a situation where the other party is unable or refuses to appear (i.e., an

ex parte proceeding). In addition, Waldron refers to a requirement for a "legally trained judicial officer."[31] Yet one might wonder what kind of education and background this officer—as well as the "counsel" also referred to—must have (i.e., what kind of system of legal training, and legal ethics, governs legal representation in Waldron's world). Finally, one might also very much wonder what rules and norms apply to the initiation of a case in a Waldronian "court" (i.e., what procedural "rules of pleading" operate in this kind of court).

These are not just peripheral issues. They are crucial to the procedural operations of actual legal systems around the world. They were also central to the operations of the Delhi *dar ul qaza* that handled the divorce suit Ayesha initiated in 2006. As will be shown, this non-state legal institution displayed a substantial degree of procedural awareness—to a greater degree than Waldron perhaps—on these and other issues.

In exhibiting such procedural prowess, the operations of this *dar ul qaza* also highlight a fundamental problem with Waldron's list of requisite procedural features for a "legal proceeding" and, moreover, his characterization of the list as "sketch-like." If one takes that description of Waldron's list to mean that it is rather open-ended, and an easy starting point for further elaboration by a wide variety of interested persons, then it is hard to endorse his characterization of the list as sketch-like. By way of contrast, it seems clear that Waldron's "sketch" relies heavily and overwhelmingly on the existence of state courts in this sketch's procedural-cum-disputation recommendations. For example, in his invocation of "formal[ity]," "legally trained judicial officer[s]," and "agencies of government,"[32] Waldron is clearly concerned with how the rule of law can be advanced by state courts. Elsewhere as well, Waldron affirms his interest in "open court[s]," "proper legal tribunal[s]," and "public institutions."[33] Given these statements, as well as his earlier comments about courts being institutions "established in the name of the whole society,"[34] it seems clear that Waldron believes state courts—and only state courts—to be the proper sites and sources of the rule of law.

To be sure, all this is left implicit, not explicit. However, there is still work being done here, and in the silences and gaps of other rule of law advocates and ideologues too. Indeed, such thinking about the rule of law is not merely "incomplete" but, rather, actively otherizes non-state legal spaces and actors. At the very least, the faith of contemporary rule of law ideologues in—and their overwhelming reliance upon—the state is likely to be objectionable to many people around the world who will be hard-pressed to perceive laundry lists of state-oriented procedural requirements as sketch-like, or

potentially inclusive of their experiences. In addition, state-oriented accounts of the rule of law expose these people to wild accusations about the nature of their non-state legal experiences, for which the extant rule of law tradition provides no robust (i.e., non-state-oriented) defense or response. Such an accusation was, in fact, included in Madan's petition in *Vishwa Lochan Madan v. Union of India*: "The pseudo-judicial approach of the so-called Dar-ul-Qaza and Shariat Court has been exposed . . . in so much as they do not even care to seek proper petitions, replies and evidence on record, before proceeding to give their fatwas and judgements."[35]

In response to this kind of accusation, and also to the existing inadequacies in—and fatal consequences of—extant rule of law ideology, I will now examine Ayesha's experiences in front of a *dar ul qaza*. Such an examination illuminates what can be gleaned from a suturing of ethnographic methodologies to philosophical theorizations about the rule of law—or, alternatively, reveals what is dramatically marginalized when there is no such suturing. Indeed, as Dipesh Chakrabarty warns us, without such suturing, theorizations risk "produc[ing] theories that embrace the entirety of humanity . . . [while being] produced in relative, and sometimes absolute, ignorance of the majority of humankind—that is, those living in non-Western cultures."[36]

AYESHA AND AN EXTRA/ORDINARY "COURT"

The discussion here shifts gears, moving to approaches more legally ethnographic than legally idealistic, and introducing Ayesha, an Indian Muslim woman whom I came to know during the course of fieldwork conducted in India, over the summers of 2008 and 2009. When I first met her, Ayesha had recently obtained a divorce from a Delhi *dar ul qaza*. Her account of her experiences is important in a number of ways. Most notably, Ayesha is someone who has had sustained personal interaction with a *dar ul qaza*, and thus is intimately familiar with many of the procedural aspects of its operation. Moreover, as someone who is not directly personally invested in the *dar ul qaza*—such as the presiding *qazi*—Ayesha is able to provide an account of *dar ul qaza* procedure that is arguably less inflected by a desire to describe it to an outsider (such as myself) in a way which will enhance its prestige and/or protect it from legal assaults like the one, in 2005, that was launched by Madan in the Supreme Court of India.

As it happens, Ayesha's account of her experiences before a Delhi *dar ul qaza* is, in and of itself, capable of dismantling many stereotypes about

non-state legal spaces, state courts and their procedures, and also Muslim women. Because Ayesha's story is so compelling, a great deal of background on her personal situation is first provided before the details of her Delhi *dar ul qaza* divorce case are discussed.

AYESHA, CONTEXTUALIZED

When I first met her in a crowded ice cream parlor in Delhi, India, during the summer of 2008, Ayesha had just completed her divorce from Zeeshan (not his real name), her husband of eighteen years. Married at the age of twenty-one after graduating with a BA in sociology from Jesus and Mary College in Delhi, Ayesha had spent the two years prior to our meeting in pursuit of a divorce at the *dar ul qaza* run out of the Delhi offices of the All India Muslim Personal Law Board.

I was put in touch with Ayesha through a female relative of hers who worked for the women's wing of a well-known, secular Indian political party. I came into contact with Ayesha's relative just as I was beginning fieldwork; she was one of many people whom acquaintances had suggested that I speak with upon arriving in Delhi. She suggested that I call Ayesha and provided me with her telephone number. As a result, our first meeting was organized over the phone, and I had little sense (other than a voice) of the person whom I was to meet.

At the upmarket, popular spot where we had decided to meet, Ayesha blended seamlessly into the crowd. Like the people around us, she was dressed stylishly and had a youthful air. We spoke to each other in English, this being the language that Ayesha seemed to feel most comfortable speaking. While I felt shy and tentative at this first meeting, being uncomfortable asking a stranger intimate questions about her personal life and marital troubles, I was surprised at how relaxed Ayesha appeared to be talking about her life and, in particular, the divorce that had just been concluded. I remember reflecting after this first meeting that she seemed remarkably composed for someone who had just recently "completed" what is often a wrenching emotional legal experience.

I put "completed" in scare quotes not only because of the lingering legal, social, and psychological side effects that often accompany the end of a marriage, but also because the legal status of the divorce obtained by Ayesha from the *qazi* in the Delhi *dar ul qaza* is potentially unclear. As previously discussed, the enforcement of Islamic law in India depends upon the complex interaction of non-state and state legal practices.[37] There is as much history and ordinariness behind this interaction as there is continuing

uncertainty over some aspects of it, including important questions about the recognition that state courts will afford divorces obtained by Muslim women in non-state venues. In short, the legitimacy and effect that the Indian state will accord the Delhi *dar ul qaza qazi*'s out-of-state-court decision to grant Ayesha a *faskh* divorce are unclear. This is perhaps best illustrated by the fact that Ayesha described to me how her *dar ul qaza*-issued divorce documents were accepted by Indian bureaucratic officials when she went to renew her passport soon after her *dar ul qaza* divorce.[38] And yet, in a recent 2016 decision by the Kerala High Court, *Nazeer v. Shemeema*,[39] one of the issues for determination by the court concerned the position taken by passport authorities in Kerala that the state "cannot merely rely upon unauthenticated [non-state] documents and production of [a state] divorce decree is necessary to correct the spouse name in the passport."[40] This issue arose in relation to attempts by Muslim women to use non-state *talaq* documents to prove a change in their marital status and, as a result, their legal names. Notwithstanding the state's confusion, after speaking with Ayesha, it appeared that for her, and for her family and friends, as well as for the community of Muslims with whom she is in regular contact, Ayesha is considered divorced, with all the attendant disabilities and opportunities which that status affords.

After this first meeting, Ayesha and I remained in contact, and I met her again when I returned to Delhi in the summer of 2009. We met twice over that summer. The first time, she asked me to meet her in a stylish café located just off the lobby of a major five-star hotel in Delhi. This meeting place was especially convenient for Ayesha, as she worked in a high-end boutique located in the same five-star hotel. I was surprised to learn of her place of employment but, at the same time, was able to better understand both her ability and need to—as part of her job—dress to the nines.

I found speaking with Ayesha revelatory, not least because she upset nearly all of the preconceptions that many people have about the "typical" user of a "Muslim court," especially in India. Such preconceptions heavily inform the petition in the constitutional case *Vishwa Lochan Madan v. Union of India*.[41] In attempting to convince the Supreme Court to shut down all *dar ul qazas* operating in India, the petitioner, Madan, argued that a "Culture of Critical Reasoning, which is essential and integral to the Democratic way of life, and to which the Indian constitutional system is avowedly committed, is disdained by the Muslim Clerics [running non-state Islamic legal institutions in India]. They meticulously guard the Muslim Citizenry from this culture of self-introspection and critical reasoning in religio-legal

affairs, by the help of twin institutions of *Darul-Qaza* and *Darul-Ifta*. The twin-institutions help the Muslim clerics hold a tight grip over the trusting, innocent, God-fearing teaming [*sic*] Muslim citizenry, most of which continues to remain even today under abject poverty and utter illiteracy."[42]

In Ayesha's own words, however, far from being abjectly poor and illiterate, she and her family belonged to India's "Muslim social elite," a social categorization which she described to me in the following way: "I come from a family background, that is . . . politically . . . connected and, you know . . . we would, yes, be in the social elite. But . . . we are middle class people, but we're not lower and we're not really upper because I'm not rich. . . . [Y]ou know, you're in the middle, but you're well off. . . . [Y]ou're managing your life very well—and you live well—and . . . you're part of this . . . 'the Muslim social elite,' as such, you know?"

In fact, Ayesha's extended family did appear to be quite socially connected. As indicated earlier, I learned of Ayesha and her situation through a female relative of hers who was active in national politics. Ayesha indicated to me that an uncle of hers was also in politics.

That being said, she and her family did not appear to be "rich." After our first two meetings in public, including the meeting near her workplace, Ayesha invited me to her family's home, located in a solidly upper-middle-class Delhi colony, although one that is almost exclusively Muslim. Ayesha kept a separate apartment on the second floor, where she lived with her teenage son. Both the family home and her individual apartment were certainly comfortable, but not lavish.

In this respect, while Ayesha was—to use her own words again—"managing [her] life very well," her resources were not unlimited. She was a working woman, not living the life of privileged, upper-class, nonemployment. Indeed, money was one of the issues that came up when I asked her what she had found attractive about her *dar ul qaza* experience. She described the benefits of the *dar ul qaza*, in contrast to the state's courts, as follows:

> [The *dar ul qaza*] was faster than the legal courts, um, you know, um, and I think it was, I would say more, um, not say friendly but it was, uh, the legal courts, you know, I mean, from what I hear from this friend of mine, you know you go there and nobody is bothered . . . it's like a process that . . . even though here too it's like a process too but at least you're interacting on a one-to-one with somebody. . . . So, it, it was a bit more personal, I think, so . . . and, and also it was cheaper, much cheaper to do

> it. I mean, you know, we didn't spend that much money on, on it, this which I might have had to in the legal courts.[43]

Ultimately, though Ayesha approached a Delhi *dar ul qaza* seeking to avoid the costs and prolonged delays of the state court system—what one might characterize as the "legal surplus" associated with state courts—her experience in front of the *dar ul qaza* was not itself "law-less." However, before proceeding to that analysis, I will describe Ayesha's experience of getting a divorce through a Delhi *dar ul qaza*. To reiterate, the details provided here come from Ayesha's own account, as outlined to me, of her experience of obtaining a divorce judgment from the *dar ul qaza*, as well as documents pertaining to it that she shared with me.

AYESHA'S DIVORCE, CONTEXTUALIZED

By Ayesha's own account, she became divorced in 2008. As proof of her divorce, Ayesha provided me with a statement of the decision by the resident *qazi* of a Delhi *dar ul qaza* to dissolve her marital bond, under the letterhead of the "Darul Qaza, South Delhi (All India Muslim Personal Law Board)" (inscribed in both English and Urdu). She also provided me with a notarized "English Rendering of Original in Urdu," which she had stapled on top of the original statement of her divorce. Besides the letterhead (and address information), the original statement was rendered entirely in Urdu. The English rendering contained the following order (*ḥukm* in the original Urdu) issued by the Delhi *qazi*: "In the light of chasm in relationship, extremely bitter hatred, total detachment and loss of confidence in each other and with a view to avoid and suppress further ill feelings, I hereby annul the bond of Nikah between Plaintiff [Ayesha] and Defendant [Zeeshan]. Now therefore the plaintiff ceases to remain the wife of the defendant and after the period of 'Idat' she would be free to exercise her own will and choice."[44]

Ayesha had the original *hukm* translated into English because Urdu—or at least the formal, legalistic Urdu that was used by the *qazi*—was neither her nor her family's strong suit. Indeed, Ayesha explained to me that a female acquaintance, Khalida Auntie,[45] who was familiar with Islamic law had helped her write out her original divorce application to the *dar ul qaza*. When I asked her why she had not composed this application herself, Ayesha responded: "Because it has to be done in Urdu. And, I'm sorry, even my mother can't write it in Urdu. And, you know, [Khalida Auntie is] also familiar with language, I suppose. How to write it, and what to write, and,

you know, since [Khalida Auntie is] involved in all of this, so, uh, uh, you know, and my mother thought that it was the best that, you know, [Khalida Auntie] writes it."[46]

In addition to the English translation of the *hukm*, Ayesha also shared with me a notarized English translation of the lengthy *faislah* prepared by the *qazi* in her case, originally in Urdu. The *faislah* ended in the aforementioned *hukm*, but unlike the separate *hukm*-qua-*hukm* document described above, the *faislah* contained a lengthy statement of Ayesha's testimony to the *qazi*, as well as the statements of witnesses who gave testimony to the *qazi* on Ayesha's behalf.

According to the testimony of Ayesha quoted (and otherwise paraphrased) in the *faislah*, her problems with her husband began to develop very soon after their marriage in 1988. The *qazi* quoted Ayesha's statement (what the English translation refers to as her "Plaint") of her marital problems as follows:

> The Defendant has been suffering from doubt and suspicion even before our marriage and since our marriage the defendant has been doubting my character as well. In the event of our participating in any party, if I had talked to any of Defendant's friend [*sic*] then the Defendant would interpret that I had more liking for that man. Or if the Defendant had brought home any of his friends, whom we had entertained, then on his departure the Defendant would say that while I was sitting in front of the visitor my hand had touched his hand in such a fashion as if I had more liking for him whereas there never had been anything of this nature in my mind. On my attempts to disprove the allegations he would express his disapproval and anger so much that he would start abusing me and throwing away household goods/articles and breaking them.[47]

The *faislah*, quoting Ayesha, cited a number of instances where Zeeshan's "doubt and suspicion"[48] exploded into violence or other troubling reactions. Indeed, "mutual quarrels had . . . started immediately after our marriage and there were fewer days when there was no quarrel[;] rather every day was a day of fighting."[49]

As a result of this interpersonal tumultuousness, the *faislah*, quoting Ayesha, described two instances when Ayesha decided to separate from Zeeshan. The first occurred about a year and a half after the birth of their son. This separation lasted for approximately a month, after which Ayesha "spoke to the Defendant and on certain terms and conditions, set out by either side,

we mutually agreed to resume living together." A second separation took place when Ayesha and Zeeshan's son was four years old. On this occasion, the *faislah* described how Ayesha "got [her] 'Khula' [divorce] papers prepared" and sent them to her husband, but Zeeshan "did not give his consent." Consequently, "in the interest of keeping the family life intact and with the view that our child may grow under the protection of both the parents I relented, and in consultation with the Defendant, we resumed living together."[50]

Home life was far from peaceful after this second reconciliation, however, and Ayesha's happiness and psychological stability deteriorated over the next several years, so much so that she "had developed a feeling that either I would be a victim of some accident or I might commit suicide."[51] Finally, in July 2006, Ayesha again decided to separate from her husband and moved in with her parents. She again tried to get Zeeshan to sign "'Khula' papers,"[52] and again failed to convince him to do so.

At that point, according to her testimony presented in the *faislah*, Ayesha decided to approach the *dar ul qaza* to ask for a *khula* divorce. Ayesha's testimony in the *faislah* described this turn of events, following her unsuccessful attempt to convince Zeeshan to sign "'Khula' papers,"[53] simply as: "I applied to 'Darul Qaza' as well for 'Khula' but that too did not materialize."[54]

In my discussions with her, Ayesha provided me with additional background information concerning why her first attempt at getting a *khula* divorce from the Delhi *dar ul qaza* was unsuccessful,[55] and why she ultimately returned to the *dar ul qaza* to—as the English translation of the Urdu *faislah* described it—"annul"[56] her marriage. From my conversations with her, it was clear that, in her second application to the Delhi *dar ul qaza*, her request for an "annulment" was (in technical terms) a request for a *faskh* divorce. A *faskh* divorce is a type of Islamic divorce which is distinguished from *khula* divorce (in many but not all jurisdictions) because it does not require the husband's consent. However, unlike *khula* divorces, a *faskh* divorce requires a third-party (e.g., a judge or a *qazi*) to effectuate it.

As noted earlier, Khalida Auntie had assisted Ayesha in composing her initial application to the Delhi *dar ul qaza* for a *khula* divorce. After Ayesha's first application was filed, and over a period of a year, the Delhi *qazi* interviewed her approximately a half-dozen times about her marriage and the circumstances of its breakdown. In addition, two men—whom Ayesha alternatively referred to as a "jury" and an "investigating party who want to . . . validate all the stuff by themselves to make sure"—visited Ayesha on behalf of the Delhi *dar ul qaza* to speak with her about the circumstances

of her marital breakdown. Finally, the Delhi *qazi* also received testimony from three male witnesses provided by Ayesha on the marriage, its breakdown, and, generally speaking, "the story and the situation." As for Ayesha's husband, Zeeshan, he was mostly uncooperative with the *dar ul qaza* process and ultimately withdrew from any participation in the proceedings, notwithstanding his decision to hire a lawyer to send threatening messages to the *qazi* who was hearing Ayesha's divorce application.[57]

Indeed, it was Zeeshan's lack of participation and cooperation that finally doomed Ayesha's initial application for a *khula* divorce, since *khula* requires the husband's consent for it to be effectuated. Ayesha described the day on which she received the *qazi*'s verdict as follows: "That was the day the *khula* was not possible because [Zeeshan] is refusing to sign it. And I remember that when we went to collect that verdict . . . I asked [the *qazi*], I said, 'So, so why did you not tell [me that my husband's consent is required] from the beginning?'"

Eventually, Ayesha did learn that there was an alternative type of Islamic divorce available—the judicial *faskh*—which would not require Zeeshan's consent. Significantly, Ayesha did not learn of this type of divorce from the *qazi* himself or from other people directly associated with the *dar ul qaza*. In fact, as Ayesha remarked to me:

> The *dar ul qaza*, the priest there, the *qazi*, he doesn't give you advice. He just . . . you know if you ask him also, he'll just tell you point-blank, "No, that's not my job." He, in fact, said, you know, "You have to go and ask around yourself. You know, ask other people who know the law." But, he will never give you the advice as to what you should do, what you shouldn't be doing, in order to speed up the process. Even if he believed it was right, you know, he wouldn't. . . . That's the impression I had of him.

Without the assistance of the *qazi* or other *dar ul qaza* officials, Ayesha's discovery of the possibility of a *faskh* divorce was the product of frustration and fortuity. Still very reluctant to go to the state court system to seek a divorce, Ayesha and Khalida Auntie began to ask other people for help. In Ayesha's words:

> AYESHA: Yeah, it took a year to do this whole thing. And, uh, so it was very frustrating and then, then [Khalida Auntie] got into the act of talking to . . . I keep forgetting the . . . there is some, uh, Islamic, uh, school or something?

JEFFREY: The Islamic Fiqh Academy?

AYESHA: Yes! Somebody from there that [Khalida Auntie] knows, she set up a meeting for me with these two gentlemen from there. One was a very young boy; one was a Middle Eastern guy. And, uh, we spent the day at [Khalida Auntie's] house talking about it. I showed him my application. And that gentleman immediately said that, "But you know, you're saying, asking for *khula*. But it's not possible to get without the consent of the man." And then he took out this book, which detailed and said how this is how it is. So, [Khalida Auntie] said, that, that you know "We didn't know and what does it mean? And, you know, it was like the Qur'an . . . says, you can ask for the *khula*, so who's right?" You know, she was battling . . . she was battling with them on a different level. But at the same time she was concerned that, you know, my, my case should not get jeopardized. She didn't want to antagonize them because we needed their help. . . . So, then this gentleman, I think he's the one who wrote my application out, and said in the end that since *khula* is not possible, that ask for the *nikah-e-faskh*, you know, that [Zeeshan] should have everything. And he said that is what . . . he said, in fact, if you had written that in the first application, you would have got the thing in this. But since you didn't . . . so we said "But, you know, we didn't know."

Based on this advice, Ayesha refiled her claim in the Delhi *dar ul qaza*, this time making sure to ask for a *faskh* divorce. When I asked Ayesha what the *qazi*'s reaction was to her return, and to the re-presentation of her factual situation—this time paired with a new kind of remedial request—she characterized it as follows: "Nothing. In fact, he opened a new file. It's like a, like a, you know . . . like, like a machine . . . he just works, you know. And he's . . . he asked me the same questions. And he did the same process of writing it again."

This similarity in process being the case, Ayesha did notice that, with her *faskh* divorce request, the *qazi* required her to present half a dozen witnesses compared to just the three that she presented with her *khula* divorce request.[58] Two of the new witnesses Ayesha presented were women. Another difference between the *khula* and the *faskh* divorce proceedings that Ayesha noted was the nature of the factual questions the *qazi* asked her second set of witnesses, which were more extensive and specific than those he had asked of her witnesses previously. The enhanced scrutiny to which the *qazi* subjected Ayesha the second time around might have been a result of the

"fault-based" quality of a *faskh* divorce claim—some of the more common grounds for this kind of divorce require a wife to prove to a third party, such as a *qazi*, the husband's misdeeds (e.g., cruelty) or incapacities (e.g., impotence)—compared to the more negotiated quality of a *khula* divorce. This enhanced scrutiny might also have been a consequence of the *qazi*'s reluctance to "annul" a marriage without a husband's participation and consent.[59] Ayesha indicated to me that she felt that "they're not in favor of the women asking for [divorce]." It might also have been due to the fact that the *qazi* did not involve a jury/investigative committee in the proceedings associated with the second claim.

In total, the adjudication of Ayesha's second (*faskh*) divorce claim took another year to complete. Ultimately, however, she did prevail, and the Delhi *qazi* granted a *faskh* divorce to Ayesha, noting that "inspite [*sic*] of Plaintiff's demand for 'Khula' the Defendant has not 'released the wife with grace' and . . . the Plaintiff continues to be in a suspended state which is cause of her suffering." Furthermore, as the "[r]emoval of suffering is part of the duties of 'Qaza,'"[60] by the order of the *qazi*, "the Plaintiff ceases to remain the wife of the Defendant."[61]

SILENCES AND SIMILARITIES BETWEEN NON-STATE AND STATE LEGAL VENUES

Rule of law theorizing has expressed a number of doubtful conceits about state courts and their role vis-à-vis the rule of law. However, as universal and relevant as this ideological tradition purports to be, it is unable to account for the non-state legal landscape that Ayesha confronted in Delhi, with important ramifications. This landscape possesses a number of features that unsettle the rule of law tradition's equation of the rule of law with the rule of state institutions and their (ostensibly) tightly structured proceduralism.[62]

Three particular features of this non-state reality stand out: first, the ultimate ex parte decision by the Delhi *dar ul qaza* to grant Ayesha a divorce; second, the representation and assistance provided to her by various non-"lawyers" during the course of her two-year effort to secure a divorce from the Delhi *dar ul qaza*; and third, the manner in which she had to twice petition the Delhi *dar ul qaza* for her divorce. These features are particularly noteworthy because all three involve fairly basic procedural issues that state courts often confront. Yet rule of law ideologues and advocates—from Dicey

to Resnik to Waldron—have neglected to discuss them at length, or even at all, even when emphasizing the importance of "court-ness."

Furthermore, with a closer ethnographic examination of these gaps and silences—concerning fairly common issues arising in legal/court procedure—one begins to see not *difference* between state and non-state legal venues, but *similarity* (although not sameness). Indeed, as argued below, the Delhi *dar ul qaza* utilized by Ayesha exhibited a great deal of legal procedural canniness, demonstrating at least as much solicitude for a dispute-oriented "rule of law" as idealized theory would suggest that state courts do (for better or worse). This should not be entirely surprising, considering how state and non-state legal venues are products of a "mutually conditioned historicit[y]."[63] Moreover, with such similarities, one can better realize how it is that Indian state courts have come to understand the ways in which they can rely on non-state venues and actors to do legal work, even if there is also resentment in the need for that reliance.

EX PARTE PROCEEDINGS

One important procedural issue that state courts often confront is how to handle a situation where the other party is unable or refuses to appear; namely, an ex parte proceeding. Indeed, as political scientist Martin Shapiro has noted, this kind of procedural dilemma is a far from trivial one and, in fact, presents many state courts with a crisis-like situation, as the legitimacy of courts to enter judgment in such a matter—as well as all other matters—is brought into sharp focus.[64] That being said, many jurisdictions nonetheless allow a court to issue a "default judgment" in favor of the plaintiff when the defendant, given proper notice, fails to appear and defend themselves.[65] However, this is often seen as an uncomfortable or undesirable outcome.[66]

The non-state *dar ul qaza* utilized by Ayesha also had to decide what to do in such an ex parte situation as, according to Ayesha, her husband Zeeshan failed to cooperate with the *dar ul qaza* proceedings, eventually refusing to appear at all. Generally speaking, it appeared that the *dar ul qaza* preferred to proceed with both parties present and cooperating, as it had sent numerous notices to the defendant attempting to convince him to appear.[67] However, it is also clear from the facts described by Ayesha, that the *qazi* in her case eventually decided to let her proceed with her divorce claim in the absence of her husband-defendant. The resolution of an ex parte situation in this manner would seem to be in tension with attempts to adhere

to dispute-oriented rule of law norms. In other words, one interpretation of how the Delhi *qazi* resolved the ex parte situation in Ayesha's case might consider the Delhi *qazi*'s actions as inconsistent with the rule of law (and the same would be true for state courts that operate in the same manner).

This view of the situation is most likely a mistaken one, however, for two different reasons. First, it is possible to look at "legal" proceedings in divorce cases—whether in front of a state court or elsewhere—as being structured differently than other kinds of disputes. Indeed, where divorce is available after a single marital partner's initiation of legal proceedings, and where the other party/partner is intended to play little or no role in the judicial determination of the divorce action, the nature of the proceedings can be seen as somewhat different than a dispute over the (non)performance of a contract, for example. Whereas the determination of rights in a bilateral contractual matter usually invites both parties' active participation, one partner's divorce status could be considered, by way of contrast, as a matter of personal prerogative where divorce is available "unilaterally"—as, for example, in the Delhi *dar ul qaza*, where Ayesha went for her *faskh* divorce. For such divorce cases, the court (state or otherwise) is seen to function in a way that is more akin to a bureaucratic office that processes forms after they have been filled in, and the requisite fees have been paid.[68] "Parties," as such, do not show up in the bureaucratic office (i.e., there is not one party strongly in favor of the application, and another party strongly opposed, with adjudication of the dispute by the bureaucratic official). Instead, the dispute could be viewed as dyadic—between the applicant and the bureaucratic official—and not triadic.

While such a view of the dispute in Ayesha's case is certainly possible, there is also a second way of seeing a dispute as being operative here and, moreover, one that avoids the temptation to separate family law disputes from rule of law discussions more generally.[69] Indeed, rather than viewing a dispute-oriented rule of law ideology as wholly inapplicable to "unilateral" divorce actions, a better view would not interpret the dispute triad literally, with its physical presence marking a "dispute" (and hence the possibility of the rule of law), and its physical absence marking a "lack of dispute" (and a lack of law). In Ayesha's *faskh* divorce proceedings, for example, even without her husband Zeeshan's physical presence at the *dar ul qaza* proceedings, it is still possible to envision a more metaphysical triad in these proceedings, and hence also an *inter-party* "dispute."

Such a triad was created in Ayesha's case by the *qazi*'s apparent reluctance to order a *faskh* divorce (as opposed to a *khula* divorce), and his

insistence that Ayesha provide more evidence for this kind of ex parte proceeding than he would/did in a proceeding involving her husband and his physical presence. In such a situation, it is almost as if the *qazi* were conjuring up Zeeshan and the legitimate objections he might have raised to the testimony of Ayesha's witnesses and, as a result, required Ayesha to produce a surplus of witnesses and testimony from which the *qazi* could subtract Zeeshan's imagined objections. More broadly still, one can see a "dispute" here between Ayesha and her assertion of a Muslim woman's divorce rights, and an overarching patriarchy (perhaps occasionally embodied in the *qazi* himself). As Ayesha herself understood, and explained, the patriarchy that she was confronting, "[I]t's a man's world. . . . So man has all the rights to do everything."

Of course, it is difficult to say with precision which sort of procedural norm concerning ex parte proceedings was being followed by the Delhi *dar ul qaza* in Ayesha's case. For example, was it one that actively—and perhaps too easily—permitted ex parte divorce proceedings? Or was it one that, following many state jurisdictions,[70] only reluctantly permitted them, in the process creating obstacles to their quick and easy effectuation? Or was it one that allowed these kinds of proceedings only because it allowed patriarchal priorities as "parties of interest" into the "courtroom" as well, thereby minimizing these proceedings' ex parte-like qualities? While there is much that is unclear here, all three interpretations are plausible, with the last positing a norm of procedure that (arguably) most closely adheres to dispute-oriented rule of law norms when it comes to ex parte proceedings. According to this interpretation, the *dar ul qaza* permitted patriarchal priorities to enter the *dar ul qaza*, thereby enabling a dispute and also—per a certain view of it—the "rule of law." Moreover, according to this view, state courts have no monopoly over procedural techniques deployed to encourage the disputation that rule of law ideologues both valorize and under-investigate; non-state venues can be equally concerned with ensuring this disputation.

LAWYERING WITHOUT "LAWYERS"

Lawyers play a key role for prominent rule of law theorists, with their existence apparently signifying the existence of court hearings conducted with adequate disputation—and, hence, according to the rule of law. However, like other elements of rule of law ideology, what it means for there to be "lawyers"—or, to use close but not necessarily synonymous terminology, "representation" or "counsel"[71]—is left woefully under-defined by such theorists, leading to as many questions as there are answers.

Without venturing to attempt a comprehensive definition of who (or what) qualifies as a "lawyer," it is safe to say that nobody with that title assisted Ayesha in front of the Delhi *dar ul qaza*. In fact, Ayesha's distaste for and desire to avoid lawyers were conveyed to me when she described efforts made by an uncle to help her:

> [M]y uncle is a lawyer and he put me in a touch with a lawyer too in the beginning. But, you know . . . his first [instinct was] . . . to make us . . . that we'll build a case. "Build a case" means that . . . they'll do all kinds of, you know, you make up your stories and you just exaggerate a lot . . . And . . . it could take time. [My lawyer's] thing was, "Yeah, it's gonna take time." And I didn't want. I wanted [my divorce]. You know, I said, "I've spent eighteen years [and] another five years, you know, coming and going . . . no. I don't have the time. I don't have the money. I don't have the resources, nothing."[72]

Ayesha's strong aversion to lawyers was also expressed in the following additional remarks made to me when I asked her whether she would recommend the *dar ul qaza* to other people in her situation:

> JEFFREY: [W]ould you recommend going to the *dar ul qaza* to other people?
> AYESHA: I think so, I mean, it's, yeah. I mean, but, with, with my, now not knowing all this would make sure that people should get, you know, little bit more advice before they go in and file the application so you know. Because I think it's an easier process, why not? Because the legal courts . . . they just . . . the lawyers first of all, you know. And then this whole thing about making cases, you know, against the person . . . I mean, it just gets dirty, messy, so unless, of course, you're wanting some money out of the person and, you know, you know serious kind of issues like that, then I suppose.

As her remarks suggest, lawyers qua lawyers were understood by Ayesha to embody "sleaze." This is consistent not only with a joke that was often made to me during my fieldwork, playing on a subtlety in pronunciation which differentiates the word "lawyer" from that of "liar" (in English), but also anthropological evidence gathered as far afield as Yemen and, in the Indian context, Rajasthan.[73] According to this view of things, lawyers embody the furthest thing from the rule of law in the way that they turn disputation into a game of dramatic lies, tactical court absences, and

unrelenting fees. In fact, while Ayesha avoided bringing a "lawyer" to the Delhi *dar ul qaza*—by her own choice and not per any rule explicitly expressed by the *qazi*—she suspected that the first adverse decision she received from the *qazi* was partially attributable to threats that a lawyer hired by her ex-husband Zeeshan had directed to the *qazi*.[74]

But this is not to say that Ayesha did not have—to use two Waldronian terms[75]—"counsel" or "representation" of a different sort. As described above, her initial plea to the Delhi *dar ul qaza* was composed for her by Khalida Auntie. When that plea was dismissed by the *qazi* for failing to state a claim upon which he could grant Ayesha relief, Ayesha and Khalida Auntie sought advice and assistance from two men associated with another non-state Muslim organization in Delhi, the Islamic Fiqh Academy. One of the men wrote out her second (and successful) divorce request to the Delhi *dar ul qaza*. Furthermore, Ayesha's father accompanied her to meetings with the *qazi*, although when not giving testimony himself he was not permitted to sit in the same room as Ayesha.[76]

The behavior of all three counselors—Khalida Auntie, the Islamic Fiqh Academy, and Ayesha's father—seems consistent with law as a contest of wits and argument, if not also of counsel and compassion, rather than threats and deceit. In fact, one could view the active participation of these counselors as having contributed more to the rule of law in this case than would have occurred with the participation of lawyers. Indeed, it is far from clear that one should necessarily attribute representation that is consistent with the rule of law to the state-accredited "lawyers" seemingly valued by rule of law theorists from Dicey to Waldron.[77] While there is much more to explore on this subject, for now it is enough simply to emphasize another phenomenon—namely, legal representation—which rule of law ideology exclusively associates with state institutions, yet which can be present in a non-state legal venue.

PLEADING INSIDE AND OUTSIDE STATE COURTS

Ayesha clearly faced difficulties in pleading her divorce case in a way that allowed the Delhi *dar ul qaza* to feel it could grant her relief. As already discussed, Ayesha first requested a *khula* divorce from the *dar ul qaza*, and when it was not possible for it to grant her that kind of relief, Ayesha returned to the *dar ul qaza* with the same set of facts but pleading for a different kind of relief (i.e., a *faskh* divorce, which she subsequently received).

While it is easy to read Ayesha's frustrating experience of having to present the same set of facts twice as evidence of an overly bureaucratic and

obstructionist mind-set within the Delhi *dar ul qaza* Ayesha utilized, another more proceduralistic interpretation of this situation is available. Indeed, one could view this "bureaucratic" mind-set as the manifestation of a common procedural requirement that a party's complaint must be "well-pled."

Two procedural/legal ideas are in play here. The first is that of "party autonomy," or the general idea that parties are in charge of their own cases. This view of litigation sees the judge's role as being that of an umpire: the parties each develop their respective arguments, and then the judge "judges" those arguments in relation to which he is a passive recipient. The second idea is that a party's initial (written) complaint should contain enough information to inform both the court and the opposing party as to the nature of the dispute and the prima facie plausibility of the plaintiff's claim. Accordingly, if a party's claim requires x, y, and z to be established as "elements" of the claim, the party's (written) complaint must include statements as to x, y, and z, giving the court and the opposing party notice as to "the gist" of the legal complaint and demonstrating that it has sufficient viability to warrant further litigation of it beyond the initial filing-of-the-complaint stage.

In Ayesha's case, one can see both procedural ideas operating in the *qazi*'s behavior.[78] From this perspective, the *qazi* was merely insisting that Ayesha plead her case well. In other words, it was her duty to investigate the different legal claims (for divorce) that she could bring in the *dar ul qaza*, and it was her responsibility to plead (and subsequently prove) sufficient facts to make out her claim.

As understood in many jurisdictions (including this Delhi one), *khula* and *faskh* are different types of divorce that embody different preconditions for their legal effectuation. As the *qazi* might have viewed it, Ayesha was the master of her situation and her claim, and she initially chose to ask for a *khula* divorce. Put another way, it was not the *qazi*'s job to write Ayesha's complaint; his only task was to determine whether the requisite elements had been satisfied such that *khula* would obtain. As the husband's consent is a requisite element for a *khula* divorce, and as Ayesha had not been able to elicit this consent, the *khula* claim failed.[79] The situation was different with the alternative legal claim, however. For a *faskh* divorce, the husband's consent is not a requisite "element" (or, in other words, a relevant factor). Hence, Ayesha's (continuing) inability to convince her husband to consent to this kind of divorce would be irrelevant, legally speaking. And, indeed, despite this lack of consent, the *qazi* in Ayesha's case was able—and did—grant a "no consent by the husband required" divorce (i.e., a *faskh* divorce)

to Ayesha, once she specifically requested this kind of divorce in her pleadings.

None of this is to say that the *qazi*'s actions in Ayesha's case were exemplary, or what one would necessarily desire from the operations of a court—whether state or non-state—but it is to say that one can find the rule of (procedural) law operating in this non-state context. As a result, we can again see that state courts have no necessary monopoly over hearings conducted according to "high" procedure.

How one characterizes the procedure operative in state courts—for example, high or low, sophisticated or sophistic—is, in great part, a matter of situational perspective. At the very least, it depends upon what kind of court is being scrutinized. Further, the spectrum-like quality to the "amount" of procedure operative in formally recognized Indian legal spaces has played a significant role in Indian state courts finding non-state legal venues "up to the mark" and, hence, suitable dispute-resolution providers. In turn, such assessments have facilitated the secular state's reliance on the Islamic non-state.

By way of example, in the 2014 bimodal case of *Vishwa Lochan Madan v. Union of India* (discussed in chapter 2), the Indian Supreme Court (in one of its more magnanimous moments) characterized the contested *dar ul qaza* system as something mundane, harmless, and akin to other officially sanctioned rule of law experiments in India:

> The object of establishment of such a [Muslim] court may be laudable but we have no doubt in our mind that it has no legal status. . . . A Fatwa is an opinion, only an expert is expected to give. It is not a decree, not binding on the court or the State or the individual. It is not sanctioned under our constitutional scheme. But this does not mean that existence of Dar-ul-Qaza or for that matter practice of issuing Fatwas are themselves illegal. *It is informal justice delivery system with an objective of bringing about amicable settlement between the parties.*[80]

Here, then, we see the highest state court in India commending the informality of the non-state *dar ul qaza* system. Indeed, failure to do so would bring *lok adalats* and other institutional, and procedural, innovations in the Indian state's legal system into question.

Similarly, albeit conversely, chapter 1 gave us an example of a lower state court in India commending the *dar ul qaza* system for its proceduralism. To recall, *Suretha Bibi v. Ispak Ansari* was decided in 1990 by the Chief Judicial Magistrate in Purulia District, in West Bengal. This case concerned,

in part, the validity of a *faskh* divorce issued to Suretha Bibi by the (non-state) *dar ul qaza* located at the Imarat-e-Shariah's headquarters in Bihar. It also concerned the relevance of a legal opinion produced by a religious figure sympathetic to Ispak Ansari, her husband. With respect to all this, the chief judicial magistrate's decision referred to the competing evidence produced by both sides to support their respective contrary contentions and stated the following:

> Heard both sides. In this case no oral evidence has been given but both sides argued at length and both sides have filed some documents for consideration.
>
> From [Suretha Bibi's] side a judgment of shariat court in Urdu has been filed with its English [translation] along with the deposition of [Ispak Ansari] for the purpose of this case. This document is collectively marked exhibit 1. From the side of [Ispak Ansari], [Ispak Ansari] filed a xerox copy of another prayer and answer of one "Vishistha Samajpati Dharmia Jajak." The Urdu script with its Bengal translation is collectively marked exhibit A for consideration.[81]

After considering the dueling contentions and submissions, the chief judicial magistrate sided with Suretha Bibi, drawing a sharp distinction between Ispak Ansari's Exhibit A and Suretha Bibi's Exhibit 1. He dismissed the relevance of Ispak Ansari's consultation with his Vishistha Samajpati Dharmia Jajak, remarking that "[t]his is not a full court judgment or a . . . contested decision of any court, but it is in the . . . shape of reply of some questions by some religious head."[82] In contrast, Suretha Bibi's decision from the *dar ul qaza* was, according to the chief judicial magistrate, "*a full fledged judgment of shariat court after hearing both sides* and after taking evidence of [both] sides where [Ispak Ansari] appeared, *contested* and gave deposition and a *contested* judgment has been passed by shariat court declaring dissolution of marriage between parties. It is the *decision* of shariat kaji."[83] And ultimately, the chief judicial magistrate held as follows: "Here I hold that the *contested* decision of a shariat court by kaji is acceptable. . . . So, a prayer made by [Suretha Bibi] in this case is also found to be acceptable."[84]

Across quite different contexts, then, state courts in India have "on the ground" found similarity in state and non-state legal procedures. This has thereby enabled state courts to justify non-state legal actors exercising dispute-resolution and decision-making authority—an exercise in which, as discussed earlier, state courts need non-state actors to engage.

Accordingly, the state/non-state differences commonly emphasized by secular-liberal rule of law "otherizing" not only distract from or obscure the deep similarities between state and non-state legal venues, but also how the state depends on non-state legal actors, including the mechanisms and logics of such dependence. Indeed, given all the state/non-state similarities, one has to marvel at how secular-liberal legal otherizing exists in the world that it purports to theorize about—that its hateful project shares oxygen with so much apparent dependency and need.

CONCLUSION

Whichever way contemporary theorists and activists conceptualize the "rule of law," many would understand this expression (and themselves) as tied up not only in a commitment to social welfare but also individual human dignity. For example, in his work on the rule of law, Jeremy Waldron has written: "Law's dignitarian faith in the practical reason of ordinary people may be an act of faith in their *thinking*—for example, about what is reasonable and what is not—not just in their recognition of a rule and its mechanical application."[85]

However, as admirable as this commitment to and faith in "ordinary people" is, rule of law theorists and activists often end up marginalizing non-state legal venues and the ordinary, subaltern people who commonly use these spaces. In this way, then, rule of law theorizing and advocacy can be seen to be less than invested in *all* people's dignity, while also actively contributing to a secular-liberal discourse that places "ordinary others" outside of the realm of both reasonableness and modernity.

Even if it is more covert than overt, this is hateful otherizing. Moreover, such secular-liberal "rule of hate" exists alongside a secular need for the Islamic non-state that such hate hides and elides. The instructive case of Ayesha's *dar ul qaza* divorce demonstrates how non-state "Muslim courts" cannot be divorced from the contemporary context and, also, how their operations cannot be excised—or otherized—from the context in which the Indian state's system of law and governance (dys)functions. The operations of these non-state venues reflect some of the successes of the secular state and its judiciary (and also vice-versa). Similarly, these non-state, Muslim venues are also very much witness to some of the shortcomings of the secular state—indeed, some of its weaknesses, deficiencies, and needs.

4 SECULAR NEED AND DIVORCE

India and the Geopolity

THE INDIAN STATE DOES NOT LIKE DIVORCE. AT THE SAME TIME it cannot do without it. The dimensions to this "divorce dependency" are multifaceted and complex, not least because they are simultaneously global, regional, and domestic. Crucially, these ambivalent dimensions also implicate *dar ul qazas* and similar non-state bodies, and the ways in which their activities facilitate certain ideological and operational aspirations of the secular Indian state.

The Indian state's complicated relationship with divorce finds expression across many (if not all) of India's different religiously premised, formal personal law systems. For example, under the present Indian Divorce Act—which governs divorces where "the petitioner or respondent professes the Christian religion"[1]—obtaining a divorce has never been particularly easy, not least because of the procedural obstacles created by the act. In this regard, the original 1869 act mandated that every Christian divorce action would be subject to a two-layer judicial process while also permitting appellate courts to conduct a detailed review of evidentiary issues "normally" adjudicated and decided in lower-level trial courts.[2] Significant amendments to the original Indian Divorce Act, in 2001, removed a *requisite* layer of judicial process in the High Courts before a divorce decree could take final effect. However, the amendments still provided that: "During the progress of the [divorce] suit in the Court of the District Judge, *any person* suspecting that any parties to the suit are or have been acting *in collusion* for the purpose of obtaining a divorce, shall be at liberty . . . to apply to the High Court to remove the suit . . . and the Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a court of original jurisdiction."[3]

In addition, although the 2001 amendments introduced the possibility of "Christian divorce" via mutual party consent[4] for the first time in India—in lieu of marital parties having to make and prove accusations against each other—they did not offer the option of "true" no-fault divorce (i.e., divorce at the option of one marital party).

More generally, the very infrastructure established by the state for the adjudication of routine family disputes (involving individuals and families governed by any number of different personal law regimes)[5] is skeptical of divorce. On this point, anthropologist Srimati Basu has described the complicated relationship with divorce that the Indian state's family courts possess in the following manner: "Family courts function with a profoundly ambivalent view of divorce. . . . Nowhere is this ambivalence better reflected than in the language of the legislation [establishing these courts]. According to [a] 1984 act, family courts are set up 'with a view to promote *conciliation* in . . . disputes related to marriage and family affairs.'"[6]

Divorce ambivalence, then, is not an issue unique to Muslims or Islamic family law in India. Without a doubt, there are overlapping dynamics in the secular state's interactions with the family law practices of Muslims and non-Muslims alike. That said, there are nuances in how the Indian state relies upon *dar ul qazas* to navigate India's complicated Islamic divorce terrain specifically and what this particular navigation reveals about the secular state's need for the Islamic non-state.

At the macro level, the secular-liberal Indian state needs *dar ul qazas* for reasons of global and regional legitimacy, especially with respect to the Indian state's ideological credentials as a modern, liberal state with modern, liberal family law norms. At the micro level, intricacies in the Indian state's material dependence on non-state Islamic divorce providers are revealed via a close reading of a written *faislah* (originally written in Urdu) issued by a Delhi *dar ul qaza*. This *faislah* resolved a *faskh* divorce petition filed by a Muslim woman against her husband. However, before approaching the *dar ul qaza*, she invoked the state's criminal law procedures vis-à-vis her husband. This kind of multi-sited conflict presents a burdensome situation for the state and, moreover, one from which the Islamic non-state helps rescue the secular state.

DIVORCE AND DEPENDENCY IN THE GEOPOLITY

> Nationalism is . . . constituted from the very beginning as a gendered discourse.
>
> —ANNE MCCLINTOCK, *Family Feuds*, 63

The global dimensions to divorce and divorce reform in India are longstanding. This is perhaps most evident in the historical role that British colonial authorities had in legislating divorce rules for members of India's

different religious faiths. For example, in the mid-nineteenth century, the British legislated marriage and divorce rules for India's Christian populations—namely, the Indian Christian Marriage Act, 1872, and the Indian Divorce Act, 1869. And, in the early twentieth century, the British colonial authorities approved the enactment of the Dissolution of Muslim Marriages Act, 1939 (DMMA)—an act that drew heavily from Islamic legal norms and practices more popular in North Africa than in South Asia.[7]

Moreover, even after the end of colonial rule in South Asia, divorce laws in India continued to be deeply influenced by global trends and pressures. For example, in 1960, not long after India's independence and the Constitution of India had come into force in 1950, the state-coordinated Law Commission of India noted how "[t]he law relating to divorce amongst Christians is contained in the Indian Divorce Act, 1869, and that relating to marriage in the Indian Christian Marriage Act, 1872. Both these enactments are based on the law as it then stood in England. Since then considerable changes have taken place in the social conditions both in England and in India. . . . The need has thus arisen for enacting a law on the topic of marriage and divorce such as *will be suitable to the present conditions*."[8]

The Indian state's need to maintain its status as "modern,"[9] as well as its tendency to view the updating and reforming of its divorce laws as integral to that modern status, has been on display elsewhere too. For example, in a 1978 report by the Law Commission, the Commission discussed potential reforms to the Hindu Marriage Act, 1955, including its regulation of Hindu divorce. The report discussed the need to situate Hindu family law in relation to (ostensible) European modernity, highlighting—and ultimately largely agreeing with—the opinion of "a distinguished jurist" that "the Hindu law of divorce should be liberalised and brought in conformity with the modern trends in Europe and elsewhere."[10]

It has not been only "modern Europe" peering over the postcolonial shoulder of Indian legal reformers, however; so has India's regional neighbor and rival Pakistan. Indeed, while India is usually described as the powerhouse of South Asia (culturally, economically, and politically), the Indian state has demonstrated remarkable anxiety about that regional status in some noteworthy situations. Such anxiety can, in fact, be detected in the Indian Supreme Court's infamous *Shah Bano* decision in 1985.[11] At the end of its decision on the financial support owed by a Muslim husband to the Muslim wife whom he had divorced, the court invoked the situation of divorced and abandoned Muslim women in Pakistan. It stated:

> Before we conclude, we would like to draw attention to the Report of the Commission on [M]arriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that
>
> "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children."
>
> The Report concludes thus:
>
> "In the words of Allama Iqbal, [']the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative.[']"[12]

In writing this, the court appears to be not only opportunistically gesturing at how bad the situation of women in Pakistan ostensibly is, but also making an *anxious* plea for India to understand how the Court was trying to do better vis-à-vis India's (Muslim) women than Pakistan supposedly does towards its women.

Similarly, Pakistan has played a prominent role in the recent public controversy surrounding the Indian Supreme Court's 2017 decision in *Shayara Bano v. Union of India*.[13] In this case, the court reviewed the legality of Indian Muslim men's pronouncement of "triple *talaq*" (with the effect that wives are unilaterally and instantaneously divorced). Notably, over fifty years earlier, with the promulgation of the Muslim Family Laws Ordinance, 1961,[14] the Pakistani state had already made regulations and restrictions regarding the practice of all forms of *talaq*. Moreover, this Pakistani reality was the subject of considerable comment in recent Indian discussions concerning triple *talaq*, whether occurring in the Supreme Court or in the public square. Some of these discussions were quite simplistic, with media articles being written under headlines such as: "If Pakistan and 21 Other Countries Have Abolished Triple Talaq, Why Can't India?"[15] And in his (minority) opinion in this case, the chief justice also commented on a contrast with Pakistan, and on the need to reform *talaq* in India, observing: "When the British rulers in India provided succor to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind."[16]

Pakistan has loomed large here, in part because of the incomplete business of 1947's Partition.[17] Though the end of British colonial rule in South Asia resulted in the division of India (rather than the creation of one free and undivided India), the colonial legacy has been a difficult one to escape in both post-Partition Pakistan and post-Partition India. Legally, this lingering linking legacy has manifested in the continuation, in both Pakistan and India, of significant colonial-era family law statutes. For example, both the Muslim Personal Law (*Shariat*) Application Act, 1937,[18] and the DMMA continue to be operative in contemporary India and Pakistan alike, and now also in Bangladesh.[19] Both acts relate (at least in part) to Muslim divorce; the former acknowledging the historical divorce device of *talaq* for Muslim men, and the latter giving Muslim women a variant of the historic *faskh* divorce right.

Having been extended to postcolonial Pakistan, and then also to Bangladesh, the 1937 and 1939 acts have had a postcolonial life beyond *Indian* Muslims. These colonially drafted and transregional statutes have also been postcolonial *domestic* drivers of divorce reform, acting as seeds for a more "modern" Indian family law that also includes *non-Muslims*. For example, in 1978, the Law Commission of India recommended the liberalization of divorce options for Hindus, not just because of "modern trends in Europe"[20] or regional considerations, but also on the basis that Muslims (among others) *in India* already enjoyed relatively liberal divorce prerogatives. Again reporting the views of "a distinguished jurist,"[21] the Law Commission prominently noted that "the Muslim, Christian and Parsee marriage laws allow divorce more easily than the Hindu law and it is only the Hindus who are put under severe restrictions and have to resort to conversion in several cases."[22]

The reference to Islamic family law here is noteworthy, in part, because of the oft-discussed divorce dimensions of Islamic (family) law. Islam's relative liberality with divorce—for both men and women—has been seen as evidence of its just egalitarian and progressive feminist credentials.[23] However, the same "permissive" divorce regime has also been cited as proof of Islam's regressive attitudes towards women. In both discussions, the welfare of women has figured prominently, if quite differently. In the former view, for example, Islam is understood to allow sympathetic women to free themselves from unworthy men. In the latter, Islam seems not to care at all about disgraceful men forsaking worthy women. Indeed, this characterization of Muslim men's behavior commonly appeared in Indian media reporting leading up to the recent decision by the Supreme Court on the

legality of triple *talaq* in India. In media reports, the sorry treatment of one woman in particular—namely, Shayara Bano, one of the plaintiffs in this case—often figured prominently.[24]

In many ways, Shayara Bano has been a latter-day Shah Bano. To be sure, her nominal similarity to Shah Bano provoked a great deal of eyebrow raising in the commentary surrounding the recent controversy in India concerning triple *talaq*. Meanwhile, there are also more substantive connections between the two controversies, in that the "sorry permissibility" of Muslim men's divorce rights provided the factual background of the *Shah Bano* case itself. And indeed, in the facts leading up to this case, it appears that Shah Bano's husband had divorced her via an "irrevocable talaq." Taking note of this *talaq*, the Supreme Court provocatively described one of the questions presented by the case as follows: "Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? *Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all.* But, is the only price of that privilege the dole of a pittance during the period of iddat?"[25]

The Law Commission's reference to both European and Islamic divorce law in the context of a discussion about the updating of Hindu divorce law is, then, not a naive maneuver. In its discussion, the commission appears to be arguing that, for Hindu divorce law to modernize, it must not only take on the flavor of liberal European modernity but also simultaneously maintain an enhanced regard for women's welfare. However, having said that, an enhanced regard does not imply unfettered divorce rights, and especially if those rights allow "Muslim-ish" patriarchal practices to assert themselves. The reference to Islamic divorce options, especially in the context of reforming Hindu divorce law, must therefore be seen as deliberately double-edged: divorce must be available—as it is in Europe (and Islam)—but not *irresponsibly* available—as it is, in Islam especially.[26]

The imputation of profligate irresponsibility to Islam is but one way in which the Indian secular state's anti-Muslim sentiment has flared up as the state competes for advantage in India's complicated social and legal terrain. On this point, Srimati Basu has observed that "something like 'the secular State saving Muslim women from Muslim men', has been a hallmark of post-1990s case law [in India]."[27] Further, Basu also notes that the secular state's judicial project has not only been an *intra*-Muslim project focused on improving the rights that Muslim women enjoy in relation to Muslim men. Rather, "outside interests"—namely, Hindu men's interests—have also

played a role in this secular case law, whereby Hindu men's feelings that Muslim men are privileged with respect to both Muslim women *and* Hindu men animate the secular-judicial agenda. Indeed, according to Basu: "[I]n the last two decades . . . [Hindu fundamentalist and Hindu majoritarian] groups have sought reform in Muslim personal law as a *punitive* measure supposedly to *curtail* Muslim men's rights. In this respect, there is a significant distinction, if an elision, between the *fundamentalist politics of hatred/envy* and the hegemonic patronage of majoritarianism."[28]

With Basu's helpful account in mind, one then notices how contemporary secular-oriented Indian jurisprudence has produced not only decisions like *Shah Bano*—*enhancing* Muslim women's post-divorce maintenance rights—but also cases like *Sarla Mudgal v. Union of India*[29]—*restricting* the legal availability of polygamy to men converting to Islam from Hinduism. This jurisprudence has also resulted in *Shamim Ara v. State of U.P.*[30]—*restricting* the ability of Muslim men to quickly divorce their wives via the efficient (if potentially arbitrary) triple *talaq*. In all of these cases, both intra-communal fairness *and* inter-communal jealousy have been on full display.[31]

Shamim Ara is a particularly interesting decision, and not only because of what it reveals about the interplay of fairness and jealousy concerns in contemporary debates over India's personal laws. Indeed, the complicated dynamics of this case also provide a particularly compelling illustration of how and why the secular state has become dependent—for ideological reasons—on *dar ul qazas*.

The decision in *Shamim Ara* has been widely cited for its efforts to "reform" Muslim personal law in India, most notably through its seeming imposition of limitations upon Muslim men's powers to divorce their wives quickly via the efficient (if potentially arbitrary) triple *talaq*. For example, political scientist Gopika Solanki has referred to the way in which this case "laid down criteria to regulate triple *talaq* and restrain its misuse."[32] Similarly, political scientist Narendra Subramanian has described how Indian "high courts responded differently to cases regarding the validity of [Muslim men's marital] repudiation pronounced in an irrevocable form . . . until the Supreme Court delivered its definitive verdict in *Shamim Ara*."[33] And to be sure, in its decision, the Supreme Court quite clearly endorsed previous High Court judgments that had earlier disapproved of "instant" or "capricious" *talaq*.[34]

However, as well known as *Shamim Ara* is for its insistence that Muslim men's exercise of *talaq*[35] can no longer be quick and unilateral, much less "reason-less,"[36] this common reading of *Shamim Ara* actually involves a

misreading of sorts. Indeed, rather than a holding, the court's favorable discussion of previous High Court cases, and the checks and conditions that they imposed upon men's exercise of *talaq*, appears to be mostly dicta. As to the actual holding of this case, the precise question posed to[37]—and answered by—the Supreme Court was not whether a capricious husband, with no intervention by mediators or arbiters, could effectively *talaq* his wife. Rather, the question posed in this case was whether or not a Muslim husband's written submissions to a state court indicating his clear desire to be divorced can—from the date of the filing of the submissions *in a state court*—effectuate a *talaq*. Put simply, the question posed to the Supreme Court in *Shamim Ara* was whether or not a Muslim husband could use *state court* procedures to effectuate what is otherwise normally a *non-state* pronouncement of *talaq*.

The Supreme Court ultimately answered this question in the negative ("no"), reversing the lower courts that had heard Shamim Ara's case prior to it reaching the Supreme Court. That monosyllabic answer aside, the earlier details of Shamim Ara's case are nonetheless important to obtaining a fuller comprehension of the eventual result.

In 1979, Shamim Ara filed a complaint for maintenance support under Section 125 of the Criminal Procedure Code. The complaint was filed against her husband, Abrar Ahmed, in the Family Court located in Allahabad, Uttar Pradesh. Ms. Ara and Mr. Ahmed had married in 1968 and had four children together. Responding to Ms. Ara's complaint on December 5, 1990, Mr. Ahmed denied her allegations and "by way of additional pleas [stated] that he had divorced the appellant [Ms. Ara] on [July 11, 1987] and since then the parties had ceased to be spouses."[38] As a result, according to Mr. Ahmed, the divorce limited (or eliminated) any subsequent Section 125 maintenance obligation that he had towards Ms. Ara.[39]

According to the Supreme Court's description of the lower court proceedings, the family court's presiding judge—acting in 1993, fourteen years after the commencement of Ms. Ara's complaint!—"upheld a strange story of divorce totally beyond the case set up by [Mr. Ahmed]." As part of this strange story, Mr. Ahmed was apparently able to produce a written affidavit that he, personally, had sworn in 1988, and which attested to his divorce from Ms. Ara in 1987. Apparently, the affidavit had been filed in a miscellaneous civil suit involving Mr. Ahmed but not involving Ms. Ara. Moreover, as a result of this "affidavit-divorce," "[t]he learned Judge concluded that [Ms. Ara] was not entitled to any [Section 125] maintenance in view of her having been [earlier] divorced."[40]

Ms. Ara did not agree with the Allahabad Family Court's decision and appealed it to the Allahabad High Court, which also did not agree with the family court's 1987 dating of the effectiveness of Mr. Ahmed's *talaq*. However, the high court did decide[41] that the *talaq* "would stand completed on [December 5, 1990] with the filing of the written statement by [Mr. Ahmed] in [Ms. Ara's Section 125] case. Therefore, the High Court concluded that [Ms. Ara] was entitled to claim maintenance from [January 1, 1988] to [December 5, 1990] (the later date being the one on which reply to application under Section 125, Cr. P.C. was filed by [Mr. Ahmed] in the Court) whereafter her entitlement to have maintenance from [Mr. Ahmed] shall cease."[42]

Still not fully prevailing on her claim for Section 125 maintenance, including her contention that she was never (properly) divorced by Mr. Ahmed, Ms. Ara then appealed to the Supreme Court. In response, the court observed that "[t]he singular issue arising for decision is whether [Ms. Ara] can be said to have been divorced and the said divorce communicated to [her] so as to become effective from [December 5, 1990], the date of filing of the written statement by [Mr. Ahmed] in these proceedings."[43] And resolving the dispute, the court declined to find that Mr. Ahmed had ever properly divorced Ms. Ara. As a result, "[n]either the marriage between the parties stands dissolved on [December 5, 1990] nor does the liability of [Mr. Ahmed] to pay maintenance come . . . to an end on that day. [Mr. Ahmed] shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law."[44]

Shamim Ara is clearly a complicated decision. However, a focus on the case's precise facts and the question thrown up by the dispute in this case reveals that, in an important if neglected sense, *Shamim Ara* is about navigating the state vs. non-state character of *talaq*. With respect to that character, it is certainly true that in its decision—specifically, in its dicta—the Supreme Court attempted to bring *talaq* within the broad realm of state scrutiny. Indeed, pointing to these court dicta, objections will likely be raised in the future by aggrieved wives as to the reasons motivating their husbands' specific pronouncements of *talaq*, and also whether "requisite" inter-spousal/interfamilial mediations were attempted, in order to attempt to defeat state recognition of the *talaq*.[45] Yet, that being the case, the *Shamim Ara* decision also distanced the state—quite literally and viscerally[46]—from *talaq*. In the process, the court left *talaq* where and with whom it has historically tended to be—namely, in the largely private, non-state sphere of individual Muslim men's decision-making processes. In many ways then,

the Supreme Court could be described as "threading a divorce needle" in this decision—that is, acknowledging the reality of Muslim divorce but also trying to create roadblocks for it.

This threading of the divorce needle has also been a feature of other personal laws pertaining to divorce. As already noted, over the past seventy years since India's independence there has been a formal expansion of divorce rights for both Hindus and Christians in India. This is most evident in the several amendments that have been made to the acts governing Hindu and Christian family law. With these amendments, as well as other legal authorities, Indian state courts have been given explicit—and largely exclusive—authority to grant Hindu and Christian divorces in a wide variety of situations of marital discord.[47] Moreover, as discussed earlier, these reforms to Hindu and Christian personal law seem to have been motivated, at least in part, by the Indian state's felt need to move its family law practices into conformity with the family law practices—including the availability of relatively robust divorce options—found in other modern, broadly secular "peer states."[48]

However, notwithstanding the legislative push toward divorce liberalization, it is also undeniably the case that, as observed by Srimati Basu, modern-day Indian family courts "function with a profoundly ambivalent view of divorce. . . . Nowhere is this ambivalence better reflected than in the language of the legislation [establishing these courts]. According to [a] 1984 act, family courts are set up 'with a view to promote *conciliation* in . . . disputes related to marriage and family affairs.'"[49] As a result, for Hindus and Christians in India, fairly expansive formal statutory rights to divorce have been diminished by the unwillingness of state courts to actually decree divorce, preferring instead to delegate family disputation to the parties themselves—and with the goal of marital reconciliation, not marital dissolution. In short, formal Hindu and Christian divorce rights exist—as secular modernity requires—but such rights are simultaneously vitiated on a day-to-day basis.

With Hindu and Christian divorce, then, the Indian state is also threading a divorce needle, yet in a way different than for Muslim divorce—as *Shamim Ara* makes clear. Indeed, whereas the *liberalization* of divorce rights for Hindus and Christians has occurred via amendments to their personal law codes giving state court judges more authority to pronounce divorce—with the simultaneous *restriction* of Hindu and Christian divorce rights occurring through efforts to push marital discord out of the sphere of formal adjudication and into the sphere of informal "reconciliation"—a similar

set of moves in the Muslim context would likely produce far different consequences.

This is for two reasons. First of all, historically speaking, interventions by the Indian state into Muslim personal law have often meant *restrictions* to Muslim divorce rights—not *liberalization*, as in the (relatively) recent Hindu and Christian contexts. For example, before the legislation of the colonial-era DMMA, Muslim women in India had a highly imperfect equivalence with Muslim men's *talaq* prerogatives, in that Muslim women's conversion away from Islam effectuated an automatic divorce from their husbands.[50] In short, with her conversion, a Muslim wife could effectuate a divorce from her Muslim husband for whatever reason, whenever she wanted—albeit by becoming an apostate. And indeed, despite the prospect of being labeled an apostate, many Muslim women were exercising the option of divorce-upon-conversion (or, at least, there was a *perception* that significant numbers of Muslim women were doing so), to the extent that influential Indian Muslim religious leaders put pressure on the British colonial government to judicialize Muslim women's divorce rights—via the enactment of the DMMA—as a means to control their apostasy and divorce.[51] To establish such control, the DMMA set out a *restricted* set of grounds upon which Muslim women could get a divorce from their husbands *at the hands of India's state courts*.[52] Further, Section 4 of the act bluntly declares: "The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage."[53] Moreover, it would appear that this sort of restrictive legislative response is not entirely historical—at least, if recent efforts to criminalize triple *talaq* in India are any indication.[54]

Second of all, like formal interventions, pushing divorce into the private or non-state sphere of "conciliation" has also historically worked differently for Muslims in comparison to others in India. Indeed, if anything, the Indian state's overall reluctance to codify or institutionalize personal law for Muslims in India (to the same degree as with India's other religious communities)[55] has seemingly facilitated Muslim divorce. As a result of this reluctance, "traditional" individually (male) pronounced *talaqs* (of one sort or another) have been the predominant form of Muslim divorce in India. Moreover, the readiness of Muslim men to pronounce *talaq* has seemed overwhelming—so much so, that the chief justice of India's Supreme Court referred to this "crisis situation" in his (minority) opinion in *Shayara Bano* in the following alarmed manner: "The whole nation seems to be up in arms [about triple *talaq*]."[56]

Ultimately then, efforts by the judges in *Shamim Ara* to explicitly distance the Indian state from direct involvement, and complicity, in the most common form of Muslim divorce could not mitigate its radical availability or, for that matter, its desirability. In fact, this distancing could only encourage divorce. In addition, statutory amendments to restrict Muslim divorce were either not possible here[57] or posed a danger of going overboard and exposing the state's regressive and/or anti-Muslim instincts.[58] As a result, *Shamim Ara* attempted to facilitate the secular state's restrictive divorce logics by suggesting, in dicta, limitations on Muslim men's ability to effectuate *talaq*. With this case, then, *talaqs* were brought into the realm of state cognizance, although incompletely and ambivalently—certainly allowed, but also impeded.

A similar threading of the divorce needle is also present in the contemporary reality of women's *faskh* divorce rights in India. In all of this it is important to see that, as with Muslim men, the state does not want Muslim women to have untrammeled divorce prerogatives. While the DMMA worked to restrict Muslim women's divorce prerogatives,[59] arguably the restrictive aspects of this strategy have now gone too far. This is particularly the case given the increasing inaccessibility of the state's courts for litigants—a reality that previous chapters have discussed.[60] Therefore, a different way of making divorce truly available for Muslim women—but also restricted—is required. A *mediated* non-state Muslim women's divorce space—for example, a Muslim "court" or *dar ul qaza*—fits this need perfectly.

And, indeed, encouraging mediation for Muslim men was also the strategy of *Shamim Ara*. Seen this way, *Shamim Ara* can be viewed as instituting a rough equivalence between Muslim men's and Muslim women's divorce rights. Since *Shamim Ara*, Muslim husbands are strongly encouraged to resort to a "virtual *dar ul qaza*" (if not a real one) as part of the process of divorcing their wives. Moreover, this rough equivalence in contemporary (expected) divorce practices between Muslim men and women echoes another long-standing rough equivalence. That is, Muslim women in India have always had more divorce options than simply pursuing a divorce case in state courts under the terms of the DMMA, or even pursuing a *faskh* case in a non-state *dar ul qaza*. Specifically, Muslim women wishing to quickly exit their marriages have often enough resorted to applying various forms of pressure on their reluctant husbands in order to encourage them to utter *talaq* (and not just in the context of *khula*),[61] thereby freeing these women. In short, *talaq* can also be a woman's divorce

device—a point that the following case of *Aliya v. Mumtaz* delves into in more detail.

ALIYA V. MUMTAZ

The dependence of India's secular system of law and governance on non-state Muslim dispute-resolution providers, particularly in relation to divorce, exists not only for ideological reasons. Other, quite practical or material considerations also play an important role here, which a detailed exploration of a written *faislah* issued by a *dar ul qaza* located in the headquarters of the All India Muslim Personal Law Board (AIMPLB) in south Delhi reveals. This *faislah* concerned a petition for *faskh* (divorce) presented by a Muslim wife, Aliya, against her Muslim husband, Mumtaz (both pseudonyms). I obtained the *faislah* when, upon my enquiry, the *qazi* who heard and decided the case allowed me to make a photocopy of it. The original *faislah* was handwritten in Urdu by the *qazi*; the excerpts from the *faislah* below are from my English translation of the word-processed Urdu version, which was produced from my photocopy of the handwritten original by someone who reads Urdu as a first language. The excerpts are primarily included within single quotation marks (as opposed to double quotation marks) to emphasize that the narrations excerpted from the *faislah* are filtered through the *qazi* who wrote it, and that the excerpts cannot be assumed to be direct quotations of the parties or individuals involved.

The *dar ul qaza faislah* discussed here ultimately ended up granting Aliya her requested *faskh* divorce. However, in addition to granting the *faskh*, this *faislah* also recounts a long and complicated story of marital and interfamily conflict, whereby multiple legal arenas—non-state and state, civil and criminal—were utilized by the different sides to the conflict. The analysis of this complicated story of family discord, including the particular state and non-state legal actors who became involved in it, reveals material dimensions to the secular state's dependence on *dar ul qazas*.

The following discussion first recounts some of the more significant aspects of the conflict between Aliya and Mumtaz as outlined in the *dar ul qaza faislah*. These "*faislah* forensics" highlight information concerning the various state and non-state legal actors who became involved as Aliya and Mumtaz's marriage imploded. The discussion then looks "between the lines" and engages in a contextual analysis of what the various events alleged and described in the *dar ul qaza faislah* tell us about how the secular state and the Islamic non-state materially relate in contemporary India,

especially in the realm of divorce. This analysis focuses primarily on the ways in which non-state *dar ul qazas* can mitigate "over-utilization" of the state's criminal—as opposed to civil—family law system.

FAISLAH FORENSICS

The *faskh* case at issue here was initiated by an aggrieved Muslim wife, Aliya, in the *dar ul qaza* located in the headquarters of the AIMPLB in south Delhi on July 29, 2003. The case was recorded by the *dar ul qaza qazi* as "Case No. 187/14," from the year 1424 in the Islamic calendar (or 2003/04 CE); this information is contained on the first page of the *faislah*. At the top of this first page, the standard Islamic invocation "*bismillah al-reḥmān, al-raḥīm*" is invoked before anything else. A header immediately follows the invocation, with the physical address of the relevant *dar ul qaza*. The full names of both the plaintiff (Aliya) and the defendant (Mumtaz) are also listed on the first page, together with their familial particulars (i.e., who they are the daughter/son of, respectively), and each party's address.[62]

After this basic information, the *qazi* then proceeds to recount—seemingly with exasperation[63]—the multiple notices sent via the Indian postal service to Mumtaz requesting his appearance and cooperation; Mumtaz's initial lack of response; the *qazi*'s follow-up efforts; the excuses received from Mumtaz (and his father) for why Mumtaz was unable to appear; and Mumtaz's eventual fitful cooperation with the *dar ul qaza* proceedings. In his *faislah*, the *qazi* spent much of the first several pages explaining the efforts undertaken to cajole Mumtaz to appear and cooperate with the proceedings. Ultimately, however, the *qazi* was unable to secure his full cooperation or participation. The last set of exchanges between the *qazi* and Mumtaz respecting this are tellingly described by the *qazi* in his *faislah* as follows:

> But then, on this next hearing-date, a statement was received from the defendant, in which he had written, 'In addition, since this case has been going on in your court, I have had the feeling that your conduct is biased. In this situation, I have absolutely no hope that, in your court, there will be a legitimate decision. Therefore, I will no longer be able to appear in your court in the future.' In order to dispel the defendant's faulty understanding of matters, a detailed explanatory statement was sent to him from the *dar ul qaza*. And according to the abovementioned order, the defendant was asked to appear in the *dar ul qaza* for submitting a pleading in this case. After this, a written document—styling itself as a

'legal notice'—was received, on which the defendant and Ayub Ahmad Qureshi, Advocate had signed. In its first paragraph, the following was written: 'My client [the defendant] received a first notice from Honorable Sir Naveen Arora, Civil Judge, Room 142, Tis Hazari Court, Delhi 54, telling us[64] that you [the defendant][65] should be regularly[66] present in the Personal Law Board on the [relevant] dates.' And then the defendant refused to appear in the *dar ul qaza* again.[67]

In the *faislah*, the *qazi* next proceeded for several pages to record Aliya's account of her marriage to Mumtaz in April 2001, and then the marriage's steady deterioration over the course of a year, as it transformed into a situation of material deprivation and physical violence for Aliya at her in-laws' home. The difficult and dangerous marital situation in which Aliya found herself is perhaps best summarized in this excerpt from her statements to the *dar ul qaza* (as recounted by the *qazi* in his *faislah*):

It also used to be incumbent upon me to prepare all of the food for everyone in the house. All of the dishes and the clothes used to get cleaned by me as well, and also the cleaning of the house. . . . The water tap in the house provides brackish water. Because of this, water from outside the house is brought for drinking-water, and everyone in the house used to drink this outside water. However, they used to force me to drink the tap water. They did not use to allow me to drink the water brought from outside. Additionally, my mother-in-law did not use to give me anything to eat for three or four days in a row. I would tell the defendant that nothing has been given to me to eat. He would then reply to the effect that: 'You are staying in our house, and this is how it is.' Another time, the defendant's father poured kerosene oil on me, and his mother then came with kitchen matches. But then the defendant's father paused and remarked: 'We won't set her on fire but, rather, we will make her go to her father's home.' The defendant then remarked to me: 'I will not stop you from leaving. Indeed, I will leave you instead. I will divorce you.'[68]

According to the *faislah*, despite the marital situation of intense abuse and discord, Aliya and Mumtaz had a son together, born less than a year after their marriage in March 2002. Shortly thereafter, in July 2002, Aliya left her marital home with their child to spend time at her natal (paternal) home. However, it would appear that Mumtaz soon began to suspect that

Aliya had no intention of returning to Mumtaz's family's home. This suspicion ultimately developed into outright conflict between Mumtaz and Aliya, including efforts by Mumtaz's family to use a non-state *panchayat* to compel Aliya's return and, in turn, Aliya's subsequent use of the Women's Cell of the state's police force[69] to compel the return of her material possessions from her in-laws' home. In his *faislah*, the *qazi* described Aliya's testimony with respect to this conflict as follows:

> On the third day after I arrived at my paternal home, the defendant came there and fought and quarreled with my family but, after badly insulting them, ultimately went away. And after that incident, neither the defendant or anyone from his family ever came to my paternal home again. The defendant and his family[70] had a *panchayat* called at one time, in which there were many people from the defendant's side present. The *panchayat* did not pay any attention to what we said, but then told my *mamoon*[71] and father that they must send me back to the defendant's home. And that if the defendant's family gave me any trouble, then the *panchayat*[72] would speak with them. But my *mamoon* and father insisted that the defendant and his family should give back all of our things and, also, that I should be given a *talaq*. However, the defendant and his father were not prepared to do this. The *panchayat* met for a second time perhaps, but I don't remember.
>
> I then filed a case in the Women Cell. But I didn't get all my things that were given for *jahez* by means of the people in this Cell. The people in the Cell did send my case to Tis Hazari,[73] however. And then the Tis Hazari Court Magistrate sent the police, along with my father, to the defendant's house. The police officers took from there [several of my possessions].[74]

Given the degree to which her marital situation had deteriorated, the *qazi*'s *faislah* ultimately records Aliya expressing her need for the *dar ul qaza* to provide the following legal solution: 'Now, I cannot under any circumstances stay with the defendant. May I be set free from him either by him giving me a *talaq*, or a *faskh* being done on my *nikah*.'[75]

Excerpts from the formal statements made by the defendant-husband, Mumtaz, to the *qazi* were also included in the *faislah*. In Mumtaz's statements there was evident disagreement with Aliya's characterization of certain marital events. For example, at the outset of one statement, Mumtaz painted a very rosy picture of the marital couple, describing his and Aliya's marital

union as follows: 'After our wedding, my wife and I remained completely happy and satisfied with each other. Our respected God then blessed us with a boy, and we began to spend a happy and cheerful life together.'[76]

This contrary effusiveness aside, Mumtaz's chronological ordering of the key events of his and Aliya's marriage (and its breakdown) were often similar enough to Aliya's account. And even when disagreeing with Aliya's depiction of events, Mumtaz's narration can occasionally be read to (perhaps) inadvertently coincide with Aliya's. For example, right after Mumtaz's opening statement of how happy his marriage with Aliya had been, he goes on to unhappily note how '[o]ne day during this [initial period of marriage], the [plaintiff's][77] family came to take her away, and my family and I happily sent her with them. Suddenly however, after going to her paternal home, they[78] started to speak of separation from me. And from that time up until now, my wife's family has continuously put pressure on me to pronounce a *talaq*.'[79] In this, Mumtaz's mention of Aliya's desire for a *talaq* does in fact overlap with the specific request that Aliya earlier made of the *qazi* that he 'set [Aliya] free from [Mumtaz] either by [convincing Mumtaz to give Aliya] a *talaq*, or a *faskh* being done on [Aliya's] *nikah*.'[80]

In his version of events, Mumtaz provided additional details about what transpired over the course of his marital relationship that were not part of Aliya's story. For example, while he confirmed her account that Mumtaz and his family gathered a *panchayat* together in response to her failure to return to his family's home—he referred to this *panchayat* as 'our *biradari*'s *panchayat*'[81]—Mumtaz also provided additional details about another remedy that he and his family had also pursued. On this point, the *faislah* described Mumtaz's characterization of events as follows: 'When my in-laws refused to follow the *panchayat*'s *shariʿa*-informed decision[82] and instead insisted on civil court proceedings, then we sought out a *fatwa* vis-à-vis their actions.'[83] Thus, the picture that emerges is of Mumtaz and his family, at different times, attempting to counter Aliya and her family by utilizing different kinds of non-state Islamic legal actors—first, a *panchayat* which issued some sort of *shariʿa*-based opinion, and second, a *mufti* who issued a *fatwa*.

Mumtaz also provided a more complex picture of the extant litigation that had transpired between him and Aliya in state venues. In this respect, he confirmed her utilization of the state police and criminal legal system against him, while also suggesting that Aliya had instigated two different kinds of case against him. The first of these cases was characterized as a '*jahez* case,' and seemingly pertained to Aliya's use of the Women's Cell to

retrieve her material possessions from her in-laws' home.[84] In Mumtaz's version of events, he described not only how 'a complaint was filed against us in the Women Cell,'[85] but then how this led to 'the A.C.P.[86] fil[ing] a 406, 498.A[87] case concerning *jahez*' which, in turn, led to him spending two months in jail.[88]

The second case was characterized as a '*talaq* case.' As previously discussed, *talaq* is not normally a remedy that Muslim women may explicitly seek. As a result, it is not clear whether this was in fact a civil DMMA case. In any event, Mumtaz also described his own use of the state court system—namely, the filing of a restitution of conjugal rights claim against Aliya—seemingly in retaliation for her litigiousness. Mumtaz's own words (as recounted in the *faislah*) describe these events as follows:

> After the plaintiff had been gone from our place for twelve days, she and her family filed a case in the Women Cell against me and my parents. Because of this case, I had to remain in jail for almost two months, and my parents were only able to stay out [of jail] by paying bail. After one month, the Women Cell sent the case to the court and the court, with the assistance of the police, got all of the plaintiff's things—along with some of our things as well—taken back to the plaintiff's place. This case has already involved many court dates. Indeed, on every court date, yet another court date is given. And up until now, there has been no court decision. The plaintiff filed a *jahez* case against me in court. In addition to this, she filed another case in court to get *talaqed* from me. After the plaintiff filed a *jahez* case against me, I filed a case in Tis Hazari Court for the restoration of conjugal rights.[89]

Finally, multiple altercations between members of Mumtaz's and Aliya's respective extended families are also recounted by Mumtaz. Two stand out in particular from his account. The first such altercation occurred in Muzaffarnagar District (Uttar Pradesh), and allegedly involved two of Aliya's uncles and her two brothers accosting Mumtaz in an (unsuccessful) attempt to get him to pronounce a *talaq* on Aliya. This aggressive interaction apparently resulted in no physical violence but still caused Mumtaz to file a formal complaint against his assailants in Muzaffarnagar District.[90]

The second altercation of note reported by Mumtaz resulted (according to him) in a stabbing injury to his back. With respect to this violent confrontation, Mumtaz recounted how he was near Durgarpur Chowk in Ghaziabad when Aliya's parents, her two brothers, and three of Aliya's uncles

attacked him with knives.[91] This attack resulted in a criminal complaint. According to Mumtaz, as stated by the *qazi* in his *faislah*, '[i]n this matter, all the above-mentioned persons got out on bail one week ago. However, the case against them continues in Ghaziabad.'[92]

After outlining the version of events provided to the *dar ul qaza* by Aliya and Mumtaz respectively, the *qazi* finally gave his own interpretation of what had transpired in Aliya and Mumtaz's marriage. Furthermore, the *qazi* also framed two legal questions raised by Aliya's petition, namely: "(1) Was the plaintiff entitled to support while staying in her paternal home or not? (2) What is the position of the *shariʿa* vis-à-vis the plaintiff's demand for a *faskh*?"[93]

To answer the first question, the *qazi* had to consider a series of interactions (and conflicts) between Aliya and her family, and Mumtaz and his family, concerning Aliya's decision to leave her marital home to reside with her natal family. Mumtaz's version of events (as described by the *qazi* in the *faislah*) described multiple attempts by him (and, on one occasion, by him and his father) to go to Aliya's family's home in order to bring her back to her marital home, during which Mumtaz was either turned away or, in one instance, allegedly physically assaulted by Aliya's family, and also by Aliya's neighbor.

These "attempts" had bearing on the first legal question, because if Mumtaz had consented to Aliya's living away from the marital home, then he had an obligation to maintain her financially even while they were not together. Ultimately, the *qazi* concluded that Mumtaz, in fact, had not exerted serious efforts to bring Aliya back to the marital home.[94]

As to the second question, the *qazi* noted the extreme discord between the two parties, highlighting the futility of many attempts by both state and non-state actors to get Aliya and Mumtaz to reconcile their differences. In this respect, the *qazi* described the discord at great length in the following excerpt from his *faislah*:

> This is a matter in which all of the following is going on:
>
> The plaintiff is getting a complaint filed in the Women Cell;
>
> But the Women Cell is not able to resolve the differences [between the parties];
>
> After [the plaintiff is] getting a case registered, and going to court, the court is sending the police to get the plaintiff's *jahez* things returned from the defendant's place to the plaintiff's paternal home;

> Between the parties,[95] such an intense degree of fighting and arguing are going on that even the stage has been reached where the *thana* police are arriving;
>
> Even several criminal cases are being filed;
>
> These [legal] proceedings are continuing presently;
>
> A stage has been reached where you are hurling allegations against each other so intensely that [even] the parties' relatives have tried to take each other's lives;
>
> A *panchayat*'s attempts [at mediation] are finding no success; and
>
> There has been no clear effect on the parties despite the *dar ul qaza* talking[96] to the parties time and time again.
>
> In such a matter, it is clear in every way that, instead of there being mutual affection and love between the parties, hatred, tension, and mutual discord have reached a peak.[97]

Ultimately, the *qazi* placed most of the blame for the couple's inability to resolve their differences on Mumtaz, in the process declaring that the "hurt" (*ẓarar*) and "harm" (*ḥarj*)[98] that Aliya was experiencing at Mumtaz's hands were within the power of the *dar ul qaza* to remove via a declaration of *faskh* divorce.

ANALYSIS

An analysis of the *dar ul qaza faskh* divorce action initiated by Aliya against her husband, Mumtaz—including the facts either alleged by the marital parties and/or confirmed by the *qazi* who heard the divorce action—reveals dependency components of the relationship between the secular state and the Islamic non-state in India. Particularly relevant here is the use by both Aliya and Mumtaz of the state's criminal law system to put pressure on each other in their contentious divorce dispute.

With regard to all this, one of the first things to notice is that Aliya's approach to the Delhi *dar ul qaza* cannot easily be attributed either to her or her family's general unfamiliarity with the state's legal system or to any physical lack of access to it. Indeed, Aliya used one of the Women's Cells of the Delhi police to initiate adverse legal action—including, according to Mumtaz, a combined Section 498A/406 case[99]—against Mumtaz (and his parents). Furthermore, the marital discord between the parties, as well as the state's involvement in the discord, seems to have largely transpired in or around Delhi. While Delhi is a sprawling city, and the distances within

its boundaries can be substantial, it has a relatively efficient physical infrastructure that makes such distances far more manageable—whether from the perspective of time, cost, or comfort—than in many non-urban, rural areas. In fact, regarding the (relative) manageability of these distances, it is worth remembering that in the course of her multipronged disputation with Mumtaz, Aliya was able to make it not only to the Tis Hazari state court complex in north Delhi, but also to the *dar ul qaza* located in the AIMPLB's headquarters in south Delhi.

It thus remains noteworthy that Aliya apparently did not prioritize the state court system as the means to terminating her marriage,[100] instead choosing a non-state *dar ul qaza* to pursue her *faskh* divorce. One way of interpreting Aliya's choice might be to see her as ideologically opposed to interacting with or utilizing the secular state's legal processes. However, this interpretation is not supported by the overall picture of conflict between Aliya and Mumtaz as described by the *qazi* in his *faislah*. Indeed, as noted above, Aliya did utilize a state legal process—namely, when she approached the Women's Cell of the Delhi police force for help—in her conflict with Mumtaz and his family. This action indicates her willingness to use state processes, at least at some level. This, then, raises the question: Why the willingness to use the state in some instances but not others?

When configured this way, one can notice that Aliya used the *criminal* side of the state's legal system with some degree of eagerness—as did Mumtaz and his relatives in their altercations with Aliya's relatives—while seemingly showing far more reluctance to use the *civil* side of the state's legal system to divorce her husband. We are reminded that in her request for relief to the *qazi*, Aliya stated: "Now, I cannot under any circumstances stay with the defendant. May I be set free from him either by him giving me a *talaq*, or a *faskh* being done on my *nikah*."[101] Similarly, in Mumtaz's narration of the reasons underlying the physical attacks upon him, it appears that Aliya had wanted Mumtaz to pronounce *talaq* upon her. And if that wish were not fulfilled (as it apparently was not), then she wanted the *qazi* to declare a *faskh* divorce.

The basic distinction between criminal and civil law processes that Aliya can be seen to be invoking here is a prevalent one. Indeed, it is so widespread that it has become an almost intuitive way of thinking about state law and legal processes around the world. There are many reasons underlying this common distinction between the criminal and the civil, the main ones being the nature of the parties (e.g., the state is generally the chief protagonist in criminal proceedings) and the nature of the consequences

(e.g., imprisonment is rarely a consequence of civil proceedings) found in each system.

In India, another kind of distinction between criminal and civil law processes is also apparent. It revolves around the respective costs and delays associated with each side of the state's legal system—the criminal side of India's legal system being seen as far more efficient than the civil side. Of course, this distinction also features elsewhere. For example, in many state criminal law systems, a party who has been injured by another person (or entity) initiates a legal case by going to the police and making a complaint. This usually does not require a lawyer. However, filing and advancing a civil petition in court—whether on a family or nonfamily law matter—does require a lawyer in many (though certainly not all)[102] state civil law systems. Put more succinctly, using a state's criminal law system can be relatively quick and costless for aggrieved parties, while the state's civil law system can be relatively slow and expensive. In India, however, the difference between criminal and civil law processes is arguably more pronounced and, in part, due to diffuse large- and small-scale institutional, staffing,[103] and advocacy[104] differences between the two state systems of law. Regardless of its reason, however, what is certain is that many people believe that, for all the problems of the state's court system *generally*, the criminal side of the system often functions "better" than the civil side.

Such a perception undoubtedly factored into the decision made by India's national legislature in 2005 to create a dramatically new protective process for female victims of domestic violence. Under the terms of the Protection of Women from Domestic Violence Act, aggrieved women were empowered to pursue *civil* remedies—for example, monetary damages[105] and protection orders[106]—against their abusers, yet to do so in front of a *criminal* magistrate. This "mixing" of the systems was unorthodox (and controversial), but resulted from the perceived need to provide women with civil (i.e., nonpenal) remedies against their abusers, albeit in an *expeditious* manner—hence, the resort to the criminal side of the state's legal system.[107] While there is emerging evidence that the Protection of Women from Domestic Violence Act is not working in the manner intended,[108] the original motivation for its innovative provisions still stands.

Concern with the efficiency of the civil law system in India compared to the criminal law system has, moreover, been a long-standing one. For example, in 1989 the Law Commission of India made the following observations about the efficacy of India's civil versus criminal legal systems in the context of discussing potential reforms to Section 125 of India's Code of

Criminal Procedure (the parameters of which were famously at issue in the *Shah Bano* case):

> Recourse to a civil court has become virtually out of reach of a wife, child or parent seeking maintenance. Because, the workload in the civil courts has increased to such a great extent that a claim for maintenance would remained unresolved for years in the trial court itself. It would take more than a decade to get the matter finally resolved through the hierarchy of the appellate courts in view of the position of arrears in the civil courts. Under the circumstances, now a person claiming maintenance under section 125, Cr.P.C. scarcely approaches the civil court in order to establish such right in that forum. Besides, the litigation in the civil courts has become so costly that a person in need of maintenance can scarcely afford it. The court fees, the advocate's fees, the incidental expenses and the expenses required to be incurred in connection with appeals make it economically impermissible to approach the civil court. Most of the claimants for maintenance rest content with the order of the criminal court exercising jurisdiction under section 125 Cr.P.C. and do not make recourse to civil proceedings.[109]

While the perception that criminal law processes in India are more efficient is a long-standing one, there is also a perception that the advantages of the criminal law system are, increasingly, fragile ones. In all this, the number of Section 498A criminal cases being brought by women against their husbands—such as the one that Aliya apparently brought against Mumtaz—are increasingly being seen, by the state, as overwhelming and unsustainable. On this point, a recent report by the Law Commission of India readily attests to the state's despair at its 498A predicament.[110] For example, in its report, the commission notes how "[over the] course of time, a spate of reports of misuse of [Section 498A] by means of false/exaggerated allegations and implication of several relatives of the husband have been pouring in."[111] Furthermore, "[a]ccording to informations received from the Hon'ble High Courts (during the year 2011), 3,40,555 cases under Section 498-A . . . were pending trial in various courts towards the end of 2010. There were as many as 9,38,809 accused implicated in these cases." Notably, the report also presents statistics "published by National Crime Records Bureau for the year 2011 . . . [showing that t]he conviction rate in S,498A cases is [a low] 21.2%."[112]

Moreover, in all this consternation, an important way in which the secular state manifests its material dependence on the Islamic non-state begins to crystallize. This "dependency dynamic" comes to the forefront in situations like the one between Aliya and Mumtaz, where a Muslim woman wants to end her marriage but her Muslim husband refuses to pronounce *talaq*. Given the relative costs and delays on the civil side of the state court system, pursuing a DMMA divorce action in a state civil court is not an attractive option for many women in this situation. Rather, there are incentives to utilize the criminal law arm of the state against the recalcitrant husband—for example, with the filing of Section 498A charges—in an attempt to coerce the stubborn husband into giving her a *talaq*. And this is, in fact, what Aliya appears to have done during the course of her efforts to divorce Mumtaz.

In this sense, Aliya's actions appear to be not at all atypical. Indeed, in Aliya and Mumtaz's divorce conflict, one might see—as described by Srimati Basu—"the cultural life of S[ection] 498A, [including] the ways in which it is used to express issues of marriage and property, with criminality functioning as a lever of civil negotiations."[113] Or, extending Basu's analysis further, one might also surmise that what we are seeing here in *Aliya v. Mumtaz* is the use of the *state's* criminal law processes to gain leverage in *non-state* civil "negotiations" involving divorce.

Ultimately, while Aliya exhausted the state's criminal law system, she was nonetheless unable to compel Mumtaz to give her a *talaq*. Accordingly, she decided to file a petition in a *dar ul qaza* to get a *faskh* divorce. While the process that she endured at the *dar ul qaza* was not without friction, Aliya eventually succeeded in getting a divorce in this non-state space, which raises the possibility that she might have been better served by pursuing her divorce there in the first instance. Moreover, it might also be suggested that, perhaps, this is a course of action that the state would have preferred—and, in fact, really needs. At the very least, having a more clearly robust *dar ul qaza* divorce option for Aliya would have mitigated the "overuse" by both Aliya and Mumtaz of the state's criminal law system.

The state's dependence here is arguably of its own making. One solution to the state's Section 498A predicament, for example, could be to massively expand funding for state criminal courts in order to unclog their dockets. However, it appears that the state—especially since the Supreme Court's 2014 decision in *Vishwa Lochan Madan v. Union of India*—has instead decided to pursue another strategy. This strategy acknowledges the crucial

role that *dar ul qazas* (and other Muslim non-state dispute-resolution providers) have long provided in diverting divorce cases from the state's beleaguered legal system, whether on the system's civil or criminal side, and whether for ideological or material reasons.

CONCLUSION

Divorce rights in India flow in circuits connecting the global and the local, various religious communities, and the state and non-state spheres. In all this circulation there is both a genuine longing for divorce and a genuine distaste for it. Expansive Islamic divorce rights, for Muslim men and women alike, are particularly intense sites of envy and disgust. Moreover, the non-state utterances and institutions that instantiate divorce for Muslims are things the secular state loves, loathes, and needs.

5 ILLEGITIMACY AND INDIGENEITY

Secular Courts and Muslim Dar ul Qazas

INDIA'S SECULAR COURT SYSTEM SUFFERS A CRISIS NOT ONLY OF inefficiency but also of legitimacy. Its state courts suffer from popular illegitimacy because they are sites of institutional *coercion*. In contrast, *dar ul qazas*—not part of the state and also not operating as courts *qua* courts—are often locations of arbitral *consent*. As such, *dar ul qazas* operate with a legitimacy and efficacy that state courts largely cannot accomplish. That being said, non-state *dar ul qazas* can help defer some of the state court system's legitimacy problems by operating as sites of "appeal" from state courts. In all this, another facet of the secular state's dependence on the Islamic non-state emerges.

As previously discussed, *dar ul qazas* allow the patriarchal Indian state to remain a viable player in the global competition for secular-liberal prestige. On the domestic front, the existence of "indigenous" *dar ul qazas*—and their openness to all sorts of parties and disputes, including those brought by Hindu plaintiffs—provides a lifeline to a modern, secular state court system suffering from a lack of legitimacy and authority as a result of the system's very own modern secularity. Scholarly discussions that have considered the development of the modern state and, even more specifically, the role state court systems play in efforts to consolidate that kind of state—while also delegitimizing it—are informative here. These discussions include work by Michel Foucault and political scientist Martin Shapiro, as well as historian Mithi Mukherjee's more recent work on the colonial antecedents of the postcolonial and self-consciously secular Indian state.[1]

The colonial antecedents to the postcolonial Indian state are important in multiple ways. Indeed, the Indian state court system's lack of popular legitimacy stems, in part, from a remarkable colonial overhang in India's postcolonial system of legal and political governance. Suffusing the colonial judiciary was a professed allegiance to proceduralism,[2] the English language, and bureaucratic hierarchy, and these colonial attributes are still

prominent features of the current system. Each of them also exists in tension with a number of colloquial legal preferences and practices.

To be sure, these colonial attributes might also be considered dated stereotypes, as the postcolonial adoption of the colonial state's techniques and technologies of statecraft has witnessed much indigenous adaptation.[3] And, in fact, these many postcolonial adaptations are what has helped make legal scholar Marc Galanter's 1968 observation that "the present legal system [in India] is firmly established"[4] still ring true today. In all this, then, it is certainly the case that colonial-era courts have put down some indigenous roots in postcolonial India and, as a result, have reduced some of the distance that the colonial period opened up between the state and the subaltern.

Yet institutional distance and a lack of popular confidence in India's state courts remains. And without a doubt, this lack of confidence exists among many Indian Muslims. Reasons for Muslim distrust and trepidation vis-à-vis India's state courts are several and particular, but also include those that overlap with the concerns of other communities. Indeed, one might say that such reasons and concerns are fundamental or, put another way, relate to a distrust of the state's legal institutions that is not only pan-communal but also largely unavoidable under contemporary understandings and practices of legal and political administration.

STATE COURTS THROUGH THE LENSES OF FOUCAULT, SHAPIRO, AND MUKHERJEE

In a 1972 intervention titled "On Popular Justice: A Discussion with Maoists," Michel Foucault starkly articulated his belief of how something we might call "courtness" poses a direct threat to popular movements and interests.[5] Indeed, so strong were Foucault's beliefs in this regard,[6] that he decided to publicly problematize efforts of fellow French leftists to construct parallel judicial structures and processes aimed at litigating—outside of state structures—fierce disputes then raging between popular actors and the French police.[7] Expressing his basic skepticism of these non-state court efforts, Foucault opened his piece by noting how his "hypothesis is not so much that the court is the natural expression of popular justice, but rather that its historical function is to ensnare [popular justice], to control it and to strangle it, by re-inscribing it within institutions which are typical of a state apparatus."[8]

How does a court—state or non-state—manage such a nefarious project, according to Foucault? In answering this, Foucault argues an essential kind of triangulation (or strangulation) of popular interests and desires that courts accomplish wherever and whenever they have been established. For example, at one point, he remarks that one should

> look a bit more closely at the . . . spatial arrangement of the court, the arrangement of the people who are part of or before a court. . . .
>
> What is this arrangement? A table, and behind this table, which distances them from the two litigants, the 'third party', that is, the judges. Their position indicates firstly that they are neutral with respect to each litigant, and secondly this implies that their decision is not already arrived at in advance, that it will be made after an aural investigation of the two parties, on the basis of a certain conception of truth and a certain number of ideas concerning what is just and unjust. . . . Now this idea that there can be people who are neutral in relation to the two parties, that they can make judgments about them on the basis of ideas of justice which have absolute validity, and that their decisions must be acted upon, I believe that all this is far removed from and quite foreign to the very idea of popular justice. In the case of popular justice you do not have three elements, you have the masses and their enemies.[9]

Foucault's skeptical analysis of courts is both a comparative and a historical one. While his comparative analysis is relatively ambitious—extending to the entire West, although perhaps not as far as China[10]—his historical analysis is more limited. And, indeed, this is because of his diagnosis that "courts" are actually a relatively recent invention, and one allied to the development of modern states. On this point, he observes: "In the Middle Ages there was a change from the court of arbitration (to which cases of dispute were taken by mutual consent, to conclude some dispute or some private battle, and which was in no way a permanent repository of power) to a set of stable, well defined institutions, which had the authority to intervene and which were based on political power (or at any rate were under its control)."[11]

Foucault's historical description of the superseding of informal and consensual arbitration by formal and coercive courts is a relatively cursory one (in what was a relatively short conversation piece). However, Martin Shapiro, in his classic 1981 text on courts in comparative and political

analysis, examined this historical development in much more detail (albeit largely consistently with Foucault's sweeping account).[12]

Shapiro's work is especially helpful in understanding some of the deep legitimacy issues confronting modern state courts. Importantly, in this work Shapiro develops a generic description of dispute resolution that places state courts on a continuum with other older (yet also extant) forms of dispute resolution.[13] His continuum is constructed around the variables of formality and "distance from the litigants" and begins with the idea of a very informal "go-between"—or, in other words, someone who acts as a communicative intermediary and simply passes messages between disputing parties. Shapiro's continuum then considers the role of the mediator—in short, a third party who is selected by the disputing parties to sit with them and work out a mutually agreed-upon solution to their dispute; then the more formal arbitrator—a "mediator plus," who is selected by agreement of the disputing parties but is also empowered by them to formulate her very own resolution of their dispute; ending, finally, with the figure of the modern state court judge.

While the judge features on Shapiro's dispute-resolution continuum, she is also an "extreme" phenomenon; that is, she is someone who is *neither explicitly chosen nor agreed to by both of the disputants*, and is also empowered to implement an *external solution* (i.e., "the law") to their dispute. The *very formal*, modern state court judge, then, sits in extreme opposition to the *very informal* go-between, whose dispute-resolution role is almost epiphenomenal to the disputing parties' direct working out of a solution to their problem.

Crucially, for Shapiro, the state court judge, with her social and institutional distance from disputants, confronts a constant crisis of popular legitimacy. In this respect, he observes: "Contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic."[14] Indeed, because a modern state court judge—in contrast with a typical go-between, mediator, or arbitrator—is not chosen by both the parties themselves and does not seek the explicit consent of both the parties in relation to final resolution of the dispute, the only thing recommending the judge and her decision to skeptical litigants is either brute force or a somewhat mirage-like set of ideas and practices implicating the alleged benevolence and fairness of the state and its officials.[15] However, both are unstable sources of authority and legitimacy.[16]

The themes that animated both Foucault's and Shapiro's earlier works on popular justice and its tense relationship with state courts also animate Mithi Mukherjee's recent sweeping historiographical work on the colonial development, and postcolonial adoption, of a certain species of justice for "official India."[17] Mukherjee explains this kind of justice as one that is deeply anchored in a triangulated idea of equity,[18] where officialdom—first embodied by the British Empire, then by the anticolonial Indian National Congress party, and then by the independent, postcolonial Indian state—positions itself as an arbiter (or even a judge) of competing claims to justice among India's diverse and fractious polity. Importantly, in positioning itself this way, Mukherjee explains how and why the postcolonial Indian state suffers a certain distance from ordinary Indians in a way akin to the colonial state's (Shapiro-like) distance—with all the problems of legitimacy that this entails. Mukherjee also contrasts the dominant and "imperial" conception of state-centered justice operative in colonial and postcolonial contexts alike as one that was opposed to—and opposed by—Gandhi's more personalized and "renunciative" understanding of freedom.[19] And, in fact, Gandhi's noncooperation movement in the 1920s included, as part of its anticolonial efforts, a plea that Indians boycott the colonial state's courts, and also that the Indian National Congress refrain from giving leadership positions to lawyers.[20]

Much of Foucault's, Shapiro's, and Mukherjee's critical insight into the conundrums of triangulated modern-day legal and political governance, whether in India or elsewhere, is arguably on display in the facts surrounding a case heard in 2000 by a *dar ul qaza* operated by the Imarat-e-Shariah organization in Bihar.

DISPUTING PROPERTY AND DEFERRING ILLEGITIMACY: A HINDU PLAINTIFF'S APPEAL TO A MUSLIM *DAR UL QAZA*

Statistics provided by the Imarat-e-Shariah on the numbers and kinds of cases handled by the organization's *dar ul qaza* operations from (approximately) 1972 to 1997 were provided in chapter 1. These statistics, along with others discussed there, suggest that *dar ul qazas* have been very much preoccupied with Muslim women's *faskh* divorce cases against their Muslim husbands. However, included in the Imarat-e-Shariah's statistics were numbers also suggesting that its *dar ul qaza* network occasionally hears disputes concerning property. While doing fieldwork at the Imarat-e-Shariah's

headquarters in 2009, I was given copies of *dar ul qaza* documents pertaining to a particularly interesting property dispute heard in 2000.

This dispute is intriguing, not only because it is a relatively rare instance of a non-state *dar ul qaza* getting involved in an area of law usually considered peripheral to, or outside of, Muslim personal law[21]—where questions of marital/divorce status and its consequences largely dominate the discussion[22]—but also because it involved a Hindu plaintiff and a Muslim defendant, and their respective families.

The *faislah* that the *dar ul qaza qazi* wrote in this case, together with statements by each of the parties to the dispute (i.e., the Hindu plaintiff and Muslim defendant)—all of which were included in the case file to which I had access—make it clear that this was a dispute that had developed and continued over three generations. For this reason, in what follows I often speak of each side's respective family members as the important protagonists in this case rather than the particular (grandson) plaintiff or (grandson) defendant.

Moreover, in my analysis I characterize the plaintiff and his family as "Hindu" and the defendant and his family as "Muslim"—rather than using a particularized pseudonym for everyone involved—even though I have not had the opportunity to ask any of these individuals (many now deceased) how they personally identify in a religious context. The reference to their religions, then, is based not only on what interlocutors at the Imarat-e-Shariah briefly told me about the case before giving me the file in 2009 but is also based on the names of the individuals involved in the case. These names are "recognizably" Hindu and Muslim. While names do not perfectly track religious identification in South Asia, the following discussion will nonetheless view, and describe, each side of the dispute through the lens of a particular religious affiliation in the hope that this (reasonable) analytical move can help shed light on the crucial role that the Islamic non-state plays for the secular Indian state with respect to this state's legitimacy.

According to the undisputed facts presented by the *qazi* in his *faislah*,[23] both the Hindu plaintiff and the Muslim defendant in this case were grandsons, respectively, of two men who entered into a lease agreement back in 1942 (roughly five years before 1947 and the partitioning of colonial South Asia into independent India and independent Pakistan). The facts presented further indicate that the Muslim defendant's grandfather had, via the lease agreement, rented a shop from the Hindu plaintiff's grandfather, who owned the plot of land upon which the shop was located.

The lease arrangement appears to have continued amicably for a few decades. However, it apparently started to fall apart in the early 1970s, when the Hindu plaintiff's father and uncle instigated litigation against the Muslim defendant's family in a state civil court located in Bihar. Details of this and subsequent litigation were presented in the defendant's statement to the *dar ul qaza* and were included in the case file given to me.

According to the Muslim defendant's statement, the Hindu plaintiff's family lost their initial state court case, but then appealed to the local district court, where they lost again. The Hindu plaintiff's family then appealed to the Patna High Court (in Bihar), where they won. In response, the Muslim defendant's family appealed to the Supreme Court of India, where they finally won this particular suit in the 1980s.[24]

However, according to the Muslim defendant's statement, any real resolution of the dispute was illusory, as in 1988 two new civil cases concerning the disputed plot/shop were filed against the defendant's family, by the Hindu plaintiff's family, in a local Bihar civil court.

From the case-file materials, it is not clear what precisely motivated the state court litigation, which stretched from the early 1970s to the late 1980s. However, from the facts presented in the *qazi*'s *faislah*, one might hypothesize that the original rent settled upon in 1942 was for an amount far less than what the property could fetch decades later, but that the Muslim defendant's family neither wanted to renegotiate the low rent with the Hindu plaintiff's family, nor end the (perhaps indefinite) lease that it had on favorable terms. Hence, the efforts by the plaintiff's family to try to force the departure of the defendant's family.

Regarding these efforts by the plaintiff's family, the *qazi* noted in his *faislah* that a settlement of the 1988 state court civil litigation was agreed to by the plaintiff's and defendant's families toward the end of 1990. The terms of this settlement allotted a much smaller portion of the original rental plot/shop to the defendant's family than what they had previously held, and also significantly increased their monthly rent payments. Further, according to the terms of the settlement (as presented by the *qazi*), even this scaled-back rental agreement would terminate after eleven and a half years, or in early 2002. In short, with this settlement, the defendant's family were able to rent, remain in, and operate a portion of the original shop, but for a limited time only, and with an increase in the rent. The plaintiff's family, in turn, immediately received a substantial portion of their plot of land/shop back (presumably to either rent or sell to others on substantially improved financial terms), and also received an increased rent payment for the

portion of the plot still held by the defendant's family, but could not evict or take complete control of the full plot of land/shop for over a decade.

While this settlement was seemingly a fair one—or, at the very least, one in which both sides of the dispute got something of what they wanted—it apparently did not lead to long-lasting amicable relations between the plaintiff's and defendant's families. And, indeed, not long after the 1990 settlement, it appears that the Hindu plaintiff's family brought another civil suit in a state lower court (again located in Bihar) claiming nonpayment of rent and seeking eviction. As the *qazi* noted in his *faislah*, however, the Muslim defendant's family was able to provide evidence to the state court that it had paid its rent regularly and properly, so the state court entered judgment for the Muslim defendant's family.

The story did not end even there, however. At some point, the Hindu plaintiff again approached the Muslim defendant and asked him to vacate the remaining portion of the shop land. As the *qazi* noted, this request was made while the defendant was away on *haj* and unable to properly respond. Soon, however, yet another request was made. Ultimately, the plaintiff's persistence seemed to accomplish part of its intended goals, as the defendant told the plaintiff that he would vacate the shop and terminate the lease early—before the terms of the 1990 state court settlement agreement—but that he would require financial compensation (Rs 30,500) in exchange for early termination. This conversation appears to have occurred in early 1999 because, as the *qazi* noted, the plaintiff agreed to the offer and paid a first installment of the "early vacation fee" to the defendant in May 1999, following up with the remainder of the agreed sum in November 1999. The Muslim defendant then vacated the shop, and it returned to the custody and control of the Hindu plaintiff.

One might think that this would have finally ended the dispute. However, in fact this is where the case began for the *dar ul qaza* network. And indeed, in the *dar ul qaza* case, filed in 2000, the Hindu plaintiff approached a *dar ul qaza* (located in Nalanda District, Bihar, and operated by the Imarat-e-Shariah) with a claim that the Muslim defendant had improperly—and, more specifically, in a manner contravening Islamic religious norms—coerced the Rs 30,500 payment out of the plaintiff, and that the defendant should be ordered to return this "extortion" (or, "early vacation fee") to the plaintiff.

Because there was little material disagreement between the parties as to what had in fact transpired between them over so many years, the *qazi* first summarized this lengthy series of events before moving on to a discussion

of Islamic property law and what it had to say about this situation. A substantial portion of the *faislah* is, in fact, in Arabic and concerns the nature of different kinds of Islamic property rights; how best to characterize the property right inhering in the defendant's rental agreement/settlement with the plaintiff; and whether that property right could be exchanged for money—or, put another way, whether the property right could be commodified. Ultimately, the Muslim defendant prevailed in this case, with the *qazi* ruling that the defendant was entitled to ask for and receive recompense (Rs 30,500) from the plaintiff for abrogating his (the defendant's) property right.

Here, however, I am less interested in this particular victory, including the substantive rules of Islamic property law underlying it, than in what the entire course of the multi-sited disputation between the plaintiff and defendant suggests about the role of the Islamic non-state in India's secular system of law and governance.

As to this course, the first point one might note here is that the litigation between the parties and their families actually began in the state's secular court system, with the Hindu plaintiff's family initially suing the Muslim defendant's family in a lower-level state civil court in the early 1970s. After losing there and appealing multiple times up the state court system's hierarchy—finally winning at the Patna High Court, but ultimately losing at the Supreme Court—the Hindu plaintiff's family initiated yet more litigation in lower state civil courts, first in 1988, and then again in the early 1990s (for an alleged failure by the Muslim defendant's family to pay rent on the rented shop).

With this lengthy chain of litigation in mind, it would be difficult to diagnose any fundamental lack of faith in the secular state's court system by the Hindu plaintiff and his family. The family chose to begin their litigation against the Muslim defendant and his family in the state courts and, after losing multiple times, pursued multiple appeals and new rounds of litigation in the same courts.

The Muslim defendant and his family's view of all this, however, was likely different. While it is possible to see their participation in the state civil court litigation against them as signifying respect for the state court system, it is equally possible to see the defendants as worried about an ex parte decision being rendered against them by a court system not altogether well-disposed toward Muslims. In that sense, the Muslim defendant's family might be viewed as *besieged* parties at every stage of the state court litigation. And, in fact, the Indian Supreme Court, when pronouncing upon an

aspect of this Hindu-Muslim property dispute in the mid-1980s, described the Hindu party as the "oppressor" party and the Muslim party as the "oppressed" party in the litigation.[25] Or, to use terms borrowed from Shapiro, the Muslim defendant's family could be described here as a *coerced* parties to (contemporary) state court litigation.

Yet something different is arguably going on when the Muslim defendant got hailed in front of a *dar ul qaza*. While it is impossible from the mere case record to know the underlying social dynamics at play in the locale where the Hindu plaintiff's and Muslim defendant's respective families were in dispute, it appears possible that the defendant could have simply disregarded the case instigated against him by the plaintiff at the *dar ul qaza*. After all, the defendant and his family had won all of the relevant previous rounds of state court litigation (including the Supreme Court proceeding) and had already been paid a significant sum of money by the plaintiff (to vacate the shop on rent). Further, the plaintiff's complaint to the *dar ul qaza* about "having to" pay the defendant was seemingly spurious and meant to harass. For several reasons then, it appears that the Muslim defendant had already essentially "won," and hence his appearance in and cooperation with the *dar ul qaza* process was a consensual one.

In all this, then, one might say that the events underlying and surrounding this litigation in the *dar ul qaza* confirm the essential observations of Foucault, Shapiro, and Mukherjee concerning party consent and (the perception of) legal legitimacy. In this situation, although there does appear to be clear consent by the Hindu plaintiff's family to the courts of a state inclined toward Hindu majoritarianism—or, in other words, a state likely to be viewed as more legitimate than not by such a plaintiff—such consent is harder to locate in the Muslim defendant and his family. In contrast, for the Muslim defendant, there appears to have been some sort of relatively enhanced regard for the "courts" of a non-state organization explicitly committed to Muslim interests. While both sets of preferences might, at some level, appear to be obvious ones, they also suggest that the secular state court system does not always enjoy widespread popular legitimacy. Rather, it seems to be a partisan and communal system in some important instances.

This is not great news for the state. Moreover, there are arguably even more problems here for the state in the reality of a Hindu plaintiff's approaching a Muslim *dar ul qaza* to sue a Muslim defendant. Indeed, recalling Shapiro, one can view this situation as highlighting a key feature of arbitration-oriented process—namely, that it embodies consent to the

arbiter and to his ultimate decision by both parties. By implication, this consent also supposes a kind of respect. Thus, one might read the bare existence of this case as signifying that a *dar ul qaza* can function as a "secular" institution,[26] at least to the extent that such a non-state body is seemingly finding respect from some Hindu parties who trust it to operate in a noncommunal fashion at least sometimes. Importantly, it might also suggest that Muslim *dar ul qazas* can, occasionally, be even *more* "secular" than the state courts themselves.

Further, *dar ul qazas* are doing this "secular work" not just by being open to non-Muslim parties (and especially plaintiffs), but also by helping secular state courts overcome actual or potential popular legitimacy deficits. As discussed, this sort of legitimacy deficit is a theme in the works of Foucault, Shapiro, and Mukherjee. Shapiro's work, however, is especially relevant here because of the analytical precision he brings to analyzing how state courts try to resolve their popular legitimacy problems on a day-to-day basis.

To quickly recapitulate, Shapiro is clearly worried about the stability of modern state court systems, characterizing them as essentially in a "permanent crisis"[27] of legitimacy due to their often nonconsensual nature. Yet at the same time, Shapiro is also deeply interested in a kind of intractability of these same systems and, significantly, the ways that they buttress their legitimacy by propagating certain practices, myths, and ideologies implicating the alleged benevolence and fairness of the state and its officials.[28]

One such practice/myth/ideology centers around the "right" of appeal—something embodied by many modern court systems with their judicial and bureaucratic hierarchies. In the phenomenon of appeal, however, Shapiro sees more "technique and power" rather than "rights and justice." For example, writing about how appeals function to give a patina of legitimacy to fundamentally illegitimate modern state court systems, Shapiro notes how

> one of the principal virtues of a trial is that it provides an official termination to conflict, relieving the disputants of the necessity of further reciprocal assertions or retributions. But too much finality may be disturbing to the losing member of the triad. One of the functions of a "right of appeal" may be to provide a psychological outlet and a social cover for the loser at trial. For appeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court. Indeed the loser's displeasure is

> funneled into a further assertion of the legitimacy of the legal system. Appealing to a higher court entails the acknowledgment of its legitimacy.[29]

In the context of the *dar ul qaza* case discussed here, then, one way to see this non-state case is actually to view it as a continuation of several other previous stages of state court litigation—or, in other words, as part of a continuing set of appeals by the Hindu plaintiff's family against the Muslim defendant's family. To be sure, this is more of a "horizontal appeal," rather than a (stereotypical) "vertical appeal" up a ladder of hierarchically organized state courts. However, as the well-known horizontal appeal phenomenon of forum shopping makes clear,[30] this does not make it any less of an appeal qua appeal.

Crucially, to see the non-state *dar ul qaza* network in conversation with the state's secular system of courts—and as a site of appeal from these same courts—is to see the *dar ul qaza* network providing a space for continuing legal contestation and the possibility of secular institutional legitimacy. Put another way, with *dar ul qazas* helping keep disputes unresolved rather than resolved, the Islamic non-state helps defer the illegitimacy of the modern, secular state. While this legitimacy deficit is pronounced vis-à-vis Indian Muslims generally, it may cut particularly sharply and dangerously for the state when a Hindu party loses in the state's courts.

Without a doubt, to see the provision of appeal (and continuing contestation) as one key function of *dar ul qazas* is not necessarily to celebrate it. The value of appeal is always ambiguous for the individual parties involved. In fact, the situation here appears to be one of a relatively privileged Hindu family attempting to first use the state's court system to encroach upon a Muslim family's property rights, only to continue that repeatedly unsuccessful harassment in a *dar ul qaza*. Or, to put it in legal scholar Mitra Sharafi's terms, the situation appears to have been one of a relatively privileged Hindu family with not much to lose and a lot to gain by wagering an extended "legal lottery."[31]

More broadly, the secular need for the Islamic non-state is itself deeply ambiguous, especially given that this secular need comes accompanied by secular hate and secular love. Indeed, like a court, secular need can be seen as triangulated—albeit not with parties, but with feelings. It is to this large and fraught landscape of secular feelings that this book's final and concluding chapter will turn.

CONCLUSION

State courts are in a constant crisis of illegitimacy. Superimposed on previous regimes of arbitral consent, modern-day state judges and state law are external impositions on parties and not the product of mutual party consent in any obvious sense. These legitimacy issues are particularly keen in secular regimes, especially those where the polity is deeply fractured and communalized along religious lines. In these kinds of states and societies, secular courts need mechanisms to defer finality in legal disputes, of which appeal is one. Appeal can work in both vertical and horizontal ways and, in India, the recent openness of a Muslim *dar ul qaza* to a property dispute between a Hindu plaintiff and Muslim defendant previously heard in several state courts suggests how non-state *dar ul qazas* can be crucial sites of secular appeal and salvation.

CONCLUSION

Cause, Affect, and Analysis of the Feeling State

CAN A SECULAR STATE HATE? CAN IT LOVE? CAN IT BE NEEDY, and then, in turn, resentful and romantic?

These questions are prescient ones, even if the discussion up to this point has focused on how secular need for the Islamic non-state exists in India along both ideological and material dimensions. The ideological dimensions to secular need are evident in the role *dar ul qazas* played in the nationalist struggle for independence from British colonial rule; in the way that the divorce work they perform allows the Indian state to maintain certain global claims concerning the state's secular-liberal nature; and in how they help resolve some of the legitimacy conundrums facing modern state judiciaries. The material dimensions to secular need are apparent in the *Vishwa Lochan Madan v. Union of India* litigation in the Indian Supreme Court; in Ayesha's *dar ul qaza* divorce case and its vivid illustration of the long-standing and seemingly unfixable operational problems of Indian state courts; and then too in the "overuse" of the state by Aliya and Mumtaz in their divorce dispute. Secular love and (even more evidently) secular hate provide backdrops to these stories and situations.

Yet in all this secular hate, secular love, and secular need, what has been discovered is more about the simultaneity of these three conditions rather than any causal relationship between them—or, viewed another way, surface rather than subconscious and psychology. To be sure, surface analysis can be useful, either in spite of or because of its relative simplicity. At the very least, the surface simultaneity mapped out so far has helpfully restated, and "scientifically" confirmed, some of the findings on secular-religious relations reported by other scholars.

These scholars have included anthropologist Hussein Agrama and his heuristic use of Escher's well-known "Drawing Hands" lithograph of "two hands mutually drawing each other into existence" to represent the relationship between the secular and the religious.[1] Also included is political scientist Gopika Solanki and her description of the secular and religious as being "interpenetrative,"[2] and then too anthropologist Katherine Lemons

and her recent insightful observations about the "dynamic relationship between state and nonstate" as illustrated by the secular work that the Islamic non-state performs.[3]

The work of these scholars (and others) is, without doubt, both important and helpful. However, the portrait of state-society (or secular-religious) relations produced by this body of work might be made more multidimensional. At the very least, one should be aware that two-dimensional portraits can lend themselves to a view (also a liberal wish) that the state has proved itself victorious over society—or, making heuristic use of Escher's lithograph again, that this two-handed drawing is right-cum-state-handed. And, indeed, for scholars who do hold such a state-centered view of the world—or who, like Yüksel Sezgin, largely conceive of non-state actors as "resistors" rather than simply ordinary yet powerful "agents"[4]—the simultaneity of secular hate, secular love, and secular need might only confirm that the secular state has essentially tamed the religious non-state. That is, that the state's multivalence only proves its omnipresence.

However, what if we view the state as less sanctimonious vis-à-vis society than insecure? In addition, what if the secular state's moments of feverish emotionality are a result of its cognizance, perhaps covert, that in state-society relations it is society that holds the upper hand? Or, in scientific terms, what if the story here is less about simultaneity and correlation and more about causation? Or, alternatively, in artistic terms,[5] what if state-society relations were best captured, not in the canvas arts and portraiture, but in the dramatic arts and tragedy?

In short, what if secular need undergirds the secular state's hatred and love of the Islamic non-state? Or put another way altogether, what if the state is not an aloof or impervious state but, rather, a feeling and vulnerable state? Indeed, a feeling state is one that does not simply "dialect" with the non-state in a back-and-forth "contest" that has all the dynamism of a game of tic-tac-toe but, rather, a state that finds a certain kind of ineluctability in its non-state interlocutor, but antagonism and *amour* too.

A discussion about the feeling state opens up many lines of inquiry. Importantly, it enables a fresh exploration of some big-picture and seemingly intractable issues confronting Islamic legal practice in secular India (and the world). Toward this point, emotions seem to underlie the near-constant drumbeat of controversies that Indian secularists and Muslims have found themselves caught up in over time—a drumbeat that is usually accompanied by the plaintive cries of a secular state feeling "so very much" about its Muslim citizens and their legal practices. For example, it is worth

recalling the "crisis situation" over triple *talaq* that confronted the chief justice of the Indian Supreme Court when he adjudicated the *Shayara Bano v. Union of India* case in 2017. With discernible apprehension and simultaneous wonder, the chief justice observed that "[t]he whole nation seems to be up in arms [about triple *talaq*]."[6] For this reason, and because of the many related episodes of secular-Muslim tension in India, a discussion about feelings and emotions seems not only warranted but also necessary in order to fully understand what is going on. At the very least, a discussion along these lines can open up the possibility of viewing these episodes as inevitable and manageable as opposed to situations of unexpected and unbearable crisis.

Any claim that India's contemporary system of secular law and governance *needs* the Islamic non-state, especially where this secular need of the Islamic exists in a context of widespread anti-Muslim sentiment in India, is a paradoxical one. This is not only because the pervasiveness and intensity of anti-Muslim sentiment in India seems to be in fundamental tension with any view that Indian secularism could ever need Islam, but also because anti-Muslim sentiment in India itself pulls in two contradictory directions—one oriented toward the radical exclusion of Muslims from Indian society, and the other toward their radical absorption. However, these paradoxes can be made less paradoxical (if no less resolvable) by the deployment of a psychologized or psychoanalytic perspective—for example, one that views secular need (or inadequacy) as underlying and driving both secular hate (or exclusion) and secular love (or absorption).

Such an analysis places certain feelings in constellation with each other or, in other words, posits certain connections, links, and orderings of various emotional states. However, hate, love, and need do not exhaust the emotional universe, nor do all constellations need to be tripartite. Stated another way, the positing of a triangulated relationship between secular hate, secular love, and secular need—with the latter motivating each of the former—is but one way of configuring the secular state's feelings.

Alternative emotional relationships and landscapes, thus, are on hand here. However, such emotional terrains are not accessible in the first place without some fundamental—and here I want to concentrate on the fundamental—commitment to the basic idea that a state can be vulnerable, and that the state relates to the world from this position of vulnerability. In short, such an analysis embodies a commitment to the view that a state can feel. In what follows, insights from Martha Nussbaum, James Scott, and Sara Ahmed are built upon to suggest why one should embrace this fundamental, if also controversial, idea.

That a state, like an individual, might have feelings is a contentious proposition or, at least—as historian Ann Stoler recognizes when she queries: "Why does the pairing of 'state' and 'sentiment' read as an oxymoron?"[7]—a very weird one. Indeed, skeptics of "the feeling state" might readily note how states are complex entities embodying plural (and sometimes conflicting) institutional and individual agencies. As a result, it might be felt that states should not be anthropomorphized. This is perhaps especially true for states formally and explicitly embodying a separation of state powers. Such skeptics might further caution that, however hateful (or loving) the individuals holding important seats of power in a given state are, one should still be quite careful about painting that state's motivations with any broad emotional brush. Thus, while Narendra Modi is the prime minister of India, and Donald Trump is the president of the United States, neither the Indian or the US government should simply be reduced to either leader's respective emotional inclinations or pathologies.

There is much that is reasonable about such skeptical views. And, in fact, something like the thought that states have complex and pluralistic structures and agencies seemed to inform Aliya (the Muslim woman whose divorce case was analyzed in chapter 4) and her understanding that the secular state's *criminal* law system in India functions differently than the same state's *civil* law system.

That said, ordinary language used everyday to describe states and their political programs is seemingly unable to avoid ascribing feelings to states. For example, it is commonplace to discuss how some states are "secular" while other ones are "Islamic" (to mention just one kind of "theocratic" statecraft). Such a characterization is often made as a result of looking, for example, at a state's declaration in its constitution regarding its own nature—rather than the multiple and sometimes conflicting ideologies by which different parts of the state operate on a day-to-day basis. In this way, for example, the Indian state is usually characterized as "secular," based on its constitution's preamble,[8] whereas the Pakistani state is almost always characterized as "Islamic," for similar constitutional reasons.[9]

Both ascriptions are often used to shorthand not only ideological predispositions of the state but also affect- and emotionally laden ones. For example, the secular state is often characterized as tolerant of—or even caring toward—each of its different and diverse citizens. Conversely, the Islamic state is often caricatured as preachy, spiteful, and exclusionary, especially in relation to non-Muslims. Or, as the late anthropologist Saba Mahmood characterized the difference in perceptions around "religious extremism"

and “secular freedom,” so-called religious extremism “is judged to be uncritical, violent, and tyrannical [but secular freedom is deemed] tolerant, satirical, and democratic.”[10]

Yet Muslims can also be the victims of exclusionary state policies—and often enough (although not exclusively) are such victims in secular states.[11] Moreover, when secular states enact anti-Muslim policies, “Islamophobia” is often readily enough the framing that Muslims and those sympathetic to their precariousness use to understand these fraught situations of bias and discrimination.

Crucially, the term “Islamophobia,” when applied to a state and reduced to its predicates, seems to recognize that a state can have a phobia—or that a state can *fear*.[12] Again, then, we see that common discussions and language seem to recognize that states, despite their organizational complexities, can exhibit something like the same emotional life that any individual is capable of possessing.

To be sure, though, to say that states can fear—whether that fear is of an “irrational other” or a “rational enemy”—is not to conclusively establish that states should be understood to have the kind of rich emotional life that individuals sometimes strive for. Toward this point, Martha Nussbaum’s important work on political emotions has argued how base (human) fear can be. In some ways, according to her, fear is not like other emotions—and, for good reason, may not be understood as an emotion by some in the first instance[13]—because fear is often precognitive and instinctual. Writes Nussbaum: “Fear is an unusually primitive emotion. It is found in all mammals, many of whom lack the cognitive prerequisites of sympathy (which requires positional thinking), guilt and anger (which require ideas of cause and blame), and grief (which requires an appraisal of the value of the lost individual). We now know that animals as ‘simple’ as rats and mice are capable of appraising objects as good or bad for the self. All fear requires is some rudimentary orientation toward survival and well-being.”[14] Thus, humans become afraid when they cross paths with an angry dog, or hear the buzz of a wasp, or smell a decaying body. However, in these fearful situations, it is unlikely that people have complex thoughts—such as they might have about the people they love—before they withdraw (often violently and very quickly).

Nussbaum’s work reminds us, then, that one must be careful here. Just because states can fear does not mean they have a rich and complex emotional life. Rather, following Carl Schmitt’s theory of the political,[15] we might

say that states are often just as crudely invested in self-preservation and tribalism as rudimentary individuals all too readily are.

Nussbaum does suggest the possibility of more cognitive aspects to fear in some instances.[16] Without delving into that possibility, one might simply note that even with the precognitive/instinctual fear diagnosed by Nussbaum as being common in humans and human societies, there is *perception* at work: one *sees* the dog; one *hears* the wasp; one *smells* the decaying body. Furthermore, this perception is hardly innocent or unconditioned by historical, social, and political forces—a point that is the thrust of political scientist James Scott's influential work *Seeing Like a State*.

In *Seeing Like a State*, Scott pushes us to see how "[e]very act of measurement [can be] an act marked by the play of power relations."[17] More broadly, his aim is to trace the "high-modernist"[18] project of governance, finding power plays embedded in everything from the modern state's description and management of forests and other landscapes, to similar moves made by the state with regard to human populations and communities.

In one particularly compelling discussion of all this, Scott explains the cultivation of contemporary forests by modern governments. Describing the development of "fiscal forestry" by modern Europeans, with this kind of forestry's intense focus on the production of commercial timber, Scott describes how "the actual tree with its vast number of possible uses was replaced by an abstract tree representing a volume of lumber or firewood." Importantly, in this view of the forest "nearly everything was missing from the state's narrow frame of reference. Gone was the vast majority of flora: grasses, flowers, lichens, ferns, mosses, shrubs, and vines. Gone, too, were reptiles, birds, amphibians, and innumerable species of insects. Gone were most species of fauna, except those that interested the crown's gamekeepers."[19]

Moreover, such a limited and unreal focus eventually led to efforts to *create* bureaucratically imagined forests *in reality*. And then, perhaps most powerfully, Scott goes on to describe how this kind of depleted forest became an aesthetic in and of itself: "The visual sign of the well-managed forest . . . came to be the regularity and neatness of its appearance. Forests might be inspected in much the same way as a commanding officer might review his troops on parade, and woe to the forest guard whose 'beat' was not sufficiently trim or 'dressed.'"[20]

Through such a discussion, Scott powerfully demonstrates how even the seemingly mundane techniques and categories of modern governance—he is speaking here about the production of a commodity, namely lumber, after

all—are inflected with deep power operations, affecting not only *what* we see, but also what we *want to see*. What is also apparent and important, even though Scott does not explicitly say so, is that the seeing state here is a desiring state: the state as commanding officer *wants* to see troops dressed a certain way. Or put another way, what Scott suggests implicitly here is that the seeing state is a feeling state—indeed, perhaps even a lustful state.

As in Nussbaum's discussion, this involves a somewhat circumscribed set of feelings. At the very least, one might notice here that Scott's stately lust (such as it is) is for a material commodity. Further, when he turns his attention to how human beings are also a terribly seductive target of modern state bureaucratic governance techniques, Scott notes that such techniques (when taken to their extreme) can produce a terribly abject sort of human life, stating:

> I would argue that just as the monocropped, same-age forest represents an impoverished and unsustainable ecosystem, so the high-modernist urban complex represents an impoverished and unsustainable social system. . . .
>
> The point is simply that high-modernist designs for life and production tend to diminish the skills, agility, initiative, and morale of their intended beneficiaries. They bring about a mild form of . . . neurosis.[21]

For Scott, then, one might say that modern state governance tends to create a kind of diminished human being that is animal-like and akin to another kind of commodity—namely, livestock. In all this, Scott also appears to be signaling that the state just wants to *use* all human beings—with their all-too-common (created) stupidities and neuroses—like it uses other commodities. And while the state surely has aesthetic proclivities (nay, desires) in relation to human commodities, akin to its approach to material commodities, its feelings here may not be particularly cognitive, developed, or mature.

Having said that, one of Scott's essential insights—that political forms of social ordering can end up thoroughly transforming human populations, both in their own and others' eyes—is elaborated upon even more powerfully by feminist theorist Sara Ahmed in her work on "queer phenomenology."[22] More broadly, her work explores how human beings come to be "oriented" (or directed) in the ways they are—whether that involves sexual, gender, or race orientations.[23] For Ahmed, sexuality, gender, and race share

similarities in that all involve a certain way of being situated—or oriented—in the world.

In all this, one of Ahmed's central concerns is exploring the political economies that draw us close to some things and (kinds of) people, and away from others. In one of her more haunting passages, she observes how a certain "model of touch shows how bodies reach other bodies. . . . And yet . . . not all bodies are within reach. Touch . . . involves a . . . [political] economy. Touch then opens bodies to some bodies and not others."[24] By linking touch, orientations and desires, and political economy in this way, Ahmed does something quite important. Indeed, in making these linkages, she is able to attribute an emotional life to states.

This is perhaps most clearly expressed in Ahmed's chapter "The Orient and Other Others," which explores, phenomenologically, how "the Orient" gets constructed through a collective orientation—contra the East—that comes into formation among those considered Western.[25] Following in the footsteps of Edward Said, Ahmed sees this collective orientation as one involving longing and desire, observing that: "The Orient is not only full of signs of desire in how it is represented and 'known' within the West (for example, through the image of the harem), it is also desired by the West, as having things 'the West' itself is assumed to be lacking."[26]

For Ahmed, however, the formation and existence of these collective emotions must be accounted for, not only historically, but also theoretically—if only because they are seemingly both unreal and all too real at the same time. With respect to this ambiguity, when writing about the orientation—or facing—of the West toward the (orient) East, Ahmed notes: "So we might say . . . that the nation 'faces this' or 'faces that'; or we might even say 'the whole world was watching.' In a way this is a nontruth, as the nation (let alone the world) is not available as somebody that can have a face. And yet, at another level, it speaks a certain truth."[27]

Thus, it is fair to say that Ahmed sees truth in the emotional life of collective groupings, whether they are groups, nations, or states. However, it is also a complicated truth, and—unsurprisingly for Ahmed—one especially well suited to being unraveled by political economy. Using insights from this methodology, she goes on to describe nations, atypically, not as fully formed aggregates of disconnected and conflicting persons, but rather as cohering collections of people who find themselves directed—or oriented—in a certain way, at a certain point in time, by political, economic, and historical forces.

In doing so, Ahmed makes out an agent-ful collective, but one that has little agency in its own aggregation and formation. From her perspective:

> [I]t is not that nations have simply directed their wishes and longings toward the Orient but rather that the nation "coheres" an effect of the repetition of this direction. . . .
>
> Groups are formed through their shared orientation toward an object. . . . In a way, "what" is faced by a collective is also what brings it into existence. As such, the object "in front" of the "we" might be better described as "behind" it, as what allows the "we" to emerge.[28]

Crucially, then, Ahmed here points the way toward dissolving the difficulty of seeing individual and state emotions as similar—because of the alleged problem of agency—which was raised above. For Ahmed, neither individuals nor states (as collectives) have any kind of "agent-ful agency" in relation to their "own" emotional lives. Put another way, states and people hate, love, and need alike, but these emotions should be understand as emotional *situations*—in other words, states and people are *in* these emotions rather than being external to or in full control of them. Or, stated another way entirely, for Ahmed, all emotions (whether collective or individual) are part of a larger political economy that, while full of agents (both present and historical) cannot be described as agent-ful in any traditional sense. Individuals and collectives do have emotions—but ones they were given, without any strong ability to choose or synthesize what might be a disparate or discordant set of feelings.

This is an atypical conclusion about agency. However, Ahmed's finding that collective emotions exist and that such collective emotions find their genesis (at least in part) outside of the collective—and, as a result, prove as diverse or discordant as the emotional life any individual experiences—provides corroboration for the conclusion that the secular state's hate and love are not only real, but can flow from its dependency on the Islamic non-state.

In summary, building upon the insights offered by Nussbaum, Scott, and Ahmed, it is entirely reasonable to see states as feeling creatures. As such creatures, states have complex emotional lives worthy of analysis. I have offered one such analysis here. However, this is just one plausible analysis, and in fact, deliberate indeterminacy and intentional openness are built into it. Yet this does not mean analysis itself is unimportant. Rather, understanding the state's feelings is vital, if only because any particular analysis of

feelings has important implications. In closing, then, a few important implications of triangulating the secular Indian state's hate, love, and need of the Islamic non-state are suggested.

One crucial implication involves a certain kind of framing about the "reality" in India (and also elsewhere) concerning what the secular state can and cannot do. This is perhaps especially important in the present moment when, under the Narendra Modi regime, Hindu nationalism has become even more tightly intertwined with Indian secularism, while also appearing increasingly unstoppable and ugly. These dynamics, for example, have been evident in the recent legal controversies over triple *talaq* in India and in the resurgence and intensification of feelings about Muslim backwardness and the need to eradicate it/them. This personal law controversy has coincided with a very loud and violent debate over beef eating in India—stereotypically a largely Muslim (and not a Hindu) cultural practice—which has, in turn, been caught up in a number of gruesome lynchings of Muslims around India.[29] And now too there has been the simultaneous absorption—and otherizing—of the Muslim-majority Indian state of Kashmir through a perverse use of article 370 of the Indian constitution. As a result of all these developments, it would not be unfair to say that a certain level of despair and pessimism has gripped progressives in India.

It should be emphasized that these are not issues exclusively for India. In Europe and North America, for example, secularism and majoritarianism are increasingly synonymous with seemingly ominous prospects for minority Muslim populations. At the very least, we are seeing something like this in the United States under Donald Trump and his alliance with right-wing nationalists, and this has also been an accelerating theme of the French political system.[30] And to be sure, like India, neither North America nor Europe are innocents when it comes to genocide.

Without a doubt, then, there is much in the recent global discussion concerning Muslims and Islamic legality that is both idiotic and extremely worrisome. However, there is also much in the global discussion that is ironic—a reality upon which I hope the discussion here helps to shed light. Indeed, one especially important implication of viewing secular hate and secular love as triangulated with and symptoms of an underlying secular need is that "high moments" of Islamophobia—such as can be found presently around the globe—are more indicative of secular impotence than they are of destructive secular capability. Thus, without being at all sanguine about the current situation, it is possible to find some reason for feeling something less than total despair about the fact that Muslim communities

are being violently targeted in today's world by Islamophobia, or being the subject of aggressive efforts to assimilate them. One message of such Islamophobia is that the state needs Muslims more than ever.

There is also a caution for secularism and secularists here: the destruction of Muslims and their institutions will mean the destruction of secularism itself. In offering this prediction and implication, a certain distinction is being drawn between majoritarian secularism and fascism. Few people, whether non-Muslim or Muslim, can survive fascism when they are targeted by it. And because human history is wretched, there is always the future possibility that India could become a fascist regime targeting Muslims.

Yet India is not quite there yet—even if all warning signals are flashing—and there is also some reason to hope that South Asia's recent history and contemporary reality make this terrible prospect a distant one. This is, in part, because of the trauma of Partition and the blow to Indian nationalism that Pakistan did and still does represent more than seventy years later. While Pakistan is excoriated by many in India, it also operates as an object of loss and desire. Its loss during Partition was India's loss—territorially, but also ideologically—and, as a result, there is a continuing Indian desire for Pakistan—territorially, but in so many other ways as well. Such historical loss, in fact, embodies a set of unavoidable cautions for those urging another traumatic partition—this time, a more lethal one—through something like the destruction of Indian Muslims and their institutions in toto.

Clearly, the comments here demonstrate sympathy for the perils—and promises—facing both Muslims and Islamic legal actors in contemporary India. However, there are also cautions for these actors too, and not just those pertaining to the possibility of being banned, imprisoned, or killed if these actors become deemed too "dangerous" or "antinational." Those particular perils are well known. What is suggested here is a different kind of caution, namely in how ambitious non-state Islamic legal actors can be, both theoretically and practically speaking.

And indeed, while the focus here has been on secular need of the Islamic, there is an Islamic need of the secular in all this too—and, moreover, one that goes beyond the typical arguments of how Islamist movements have capitalized on bumbling, arrogant secular regimes, whether in the Arab Middle East or Western Europe. More fundamentally, the Islamic non-state cannot do it all; and if it were to purport to do so, it would soon encounter many of the same problems and pitfalls that the secular state has confronted. It would also likely face the same emotional dysfunction as secularism.

Such secular dysfunction brings us back, yet again, to why deep and critical analysis of the state is so important. Secular need may always engender secular hate and secular love. This may simply be the human condition, both in its individual and collective dimensions. However, that condition being the case, this secular need does not have to culminate in secular rage. Rather, there might be a less destructive path *through* the complicated predicaments and paradoxes that histories—Islamic and otherwise—have laid out for the contemporary secular state, even if there is no way *out*. While this path is uncertain, the place to begin involves a deep reckoning with the feeling state which is, at heart, a hateful state, a loving state, and a needful state.

NOTES

INTRODUCTION

1. See Kutty, "Judicial *Jihad* or Constitutional Imperative?"; Redding, "What American Legal Theory Might Learn from Islamic Law."
2. See Scott, *Politics of the Veil*; Langer, "Panacea or Pathetic Fallacy?"
3. See de Sousa Santos, "Legal Pluralism in Mozambique," 47–54.
4. See Roy, *Holy Ignorance*, 2–3 (arguing that "[t]here is a close link between secularization and religious revivalism, which is not a reaction against secularization, but the product of it. Secularism engenders religion."); Tibi, *Political Islam*, 8 (arguing that "the legitimacy crisis of the nation-state in the World of Islam has not been brought on by religious fundamentalism. It is, rather, the other way around: the crisis of legitimacy derives from the failure of the nation-state to strike roots in an alien civilization, and fundamentalism, seeing its opportunity, is the political articulation of the crisis.") (citation omitted).
5. See Fitzpatrick, "Law, Plurality and Underdevelopment"; Fitzpatrick, "Law and Societies."
6. See political scientist Gopika Solanki's recent work where she describes in detail how, with respect to Hindu and Muslim families alike, state law and non-state law in India is "interpenetrative." Solanki, *Adjudication in Religious Family Laws*, 48, 56. Solanki cautions the reader that with her "distinction between state law and societal law" she is not "affirm[ing] legal centralism or establish[ing] the hierarchy of state courts and law in all instances" (47). Historian Julia Stephens, in her recent work on secularism's relationship to Islamic legal practice during the colonial period, also uses this "interpenetrative" framing, describing how "[r]ather than operating as hermetically sealed arenas, [state and non-state legal] sites and structures of authority overlap and interpenetrate each other." Stephens, *Governing Islam*, 74–75.
7. See Griffiths, "Legal Pluralism," 36 (endorsing a view of legal pluralism that stresses "processes of interaction" in this pluralism's constitution); Macaulay, "Private Government," 449 (noting that "public and private governments are interpenetrated rather than distinct entities"); Merry, "Legal Pluralism," 880 (describing the "dialectic, mutually constitutive relation between state law and other normative orders"); Moore, "Law and Social Change," 722 (noting how "the inter-dependent articulation of many different social fields constitutes one of the basic characteristics of complex societies").

8. See Asad, *Formations of the Secular*. Asad's argument about the relationship of secularism and religion is complicated, but he does note his belief that "[a]ny discipline that seeks to understand 'religion' must also try to understand its other"—namely, the secular and secularism (22). Asad goes on to state that his work on the secular and secularism is interested in the "binaries that pervade modern secular discourse," including the "*sacred* and *profane*" (23).
9. See Agrama, *Questioning Secularism*.
10. Ibid., 1.
11. The late legal scholar John Griffiths still offers the most penetrating analysis of this tendency in the legal pluralism literature. See his "Legal Pluralism." By way of some specific examples of this tendency, when speaking of the state's involvement with "semi-autonomous social fields," anthropologist Sally Falk Moore has spoken of the ways in which the latter gets "invade[d]"—even if only partially—by state law; a kind of reverse power and agency for the social vis-à-vis the state is envisioned, but not fully developed by Moore; Moore, "Law and Social Change," 720, 723, 743. Additionally, anthropologist Sally Engle Merry has *consciously* endorsed a view of state law that gives it primary agency in the networks of legal orderings (both state and non-state) in which it is imbricated. Merry writes: "[A]re there ways in which the state-law system is fundamentally different from all other forms of ordering? I think it is essential to see state law as fundamentally different in that it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority. . . . [I]n many ways, it ideologically shapes other normative orders as well as provides an inescapable framework for their practice"; Merry, "Legal Pluralism," 879. More contemporarily, in his recent work on Egyptian secularism, anthropologist Hussein Ali Agrama argues that secularism is a "process of defining, managing, and intervening into religious life and sensibility" that "historically and remains today an expression of the state's *sovereign* power"; Agrama, *Questioning Secularism*, 26. In his identification of an agentive secularism and a passive religiosity, Agrama echoes the late anthropologist Saba Mahmood's description of this relationship. Mahmood writes, not only of "Euro-American societies," but also other ones: "[S]ecularism has entailed the legal and administrative intervention into religious life so as to construct 'religion'—in its spatial entailments, in its worldly aspirations, and the scope of its reasoning—along certain lines." Mahmood, *Politics of Piety*, 77. Both Agrama's and Mahmood's discussions of secularism are more complicated than space here permits me to discuss, but it is nonetheless interesting that both often see a strong and sovereign secularism rather than a dependent one.
12. See Migdal, *Strong Societies and Weak States*. Migdal's fascinating book only briefly discusses postcolonial India. While some of it seems to mischaracterize the situation on the ground in India—I am thinking in particular of his odd discussion of the *strengths* of the Indian state court system (see Migdal, *Strong Societies and Weak States*, 142–43)—Migdal's overall analysis of the ways in which fractious societies create weak states that are highly dependent on non-state actors is compelling. See also Galanter, "Justice in Many Rooms," 20 (observing that "law in modern society is plural rather than monolithic . . . it is private as well as public in character and . . .

the national (public, official) legal system is often a secondary rather than a primary locus of regulation") (citations omitted).

13. For work simultaneously analyzing and lamenting alternative dispute resolution, see Basu, *The Trouble with Marriage*; Fiss, "Against Settlement"; Resnik, "Diffusing Disputes." But also see Ahmed, *Religious Freedom*, 184 (arguing that "[r]eligious ADR . . . deserves to be taken seriously in debates on the reform of [India's personal law] system").
14. See Agnes, *Law and Gender Inequality*, 97 (finding that "the [Special Marriage] Act has not been well publicized and there seems to be a manipulation to subvert its provisions"); Agnes, *Family Laws and Constitutional Claims*, 92 (noting that "[t]hough the [Special Marriage] Act has been in existence for a long time, it is the least publicized legislation and is shrouded by misconceptions"). See also Mody, *The Intimate State*, 103–55.
15. The 1955 act was later amended in 1964, and again in 1976, to provide even more grounds for divorce than in the original act. See Menski, *Modern Indian Family Law*, 48.
16. For more discussion of how India's personal law system is different from some other prominent examples of this kind of legal ordering, see Sezgin, *State-Enforced Religious Family Laws*.
17. See Agnes, *Law and Gender Inequality*; Ahmed, *Religious Freedom*; Kapur and Cossman, *Subversive Sites*; Parashar, *Women and Family Law Reform*; Sangari, "Politics of Diversity"; Sezgin, *State-Enforced Religious Family Laws*.
18. For work on state-appointed *qazis* and their role in Muslim family law administration in India, see Vatuk, "Moving the Courts"; Vatuk, "Divorce at the Wife's Initiative." In personal correspondence with me, anthropologist Sylvia Vatuk has emphasized her belief that the state-appointed *qazis*, which she has researched, operate very much akin to *dar ul qaza qazis*—and, moreover, that the former cannot really be considered an integral part of the state. She did note, however, that the state-appointed *qazis* she studied—unlike the non-state *dar ul qazas* taken up in this book—did not offer women the option of *faskh* divorce. See also Vatuk, "Divorce at the Wife's Initiative," 222, n. 33.
19. For work on state-run *qazi* courts outside of India, see Hirsch, "Kadhi's Courts"; Messick, *The Calligraphic State*, 167–200; Peletz, *Islamic Modern*, 77; Rosen, *The Anthropology of Justice*; Stiles, *An Islamic Court in Context*.
20. For discussion of secular need in the historical, colonial period, Julia Stephens's recent work is helpful, including her description of how "[t]he shifting position of Muslim legal personnel, at once downgraded to assistants but nonetheless critical to the functioning of the colonial courts, reflected the more general balance between change and continuity during the first half-century of British rule." Stephens, *Governing Islam*, 28–29.
21. See Mahmood, *Politics of Piety*.
22. See Nader, *Harmony Ideology*.
23. Petitioner Aff. at 5, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (on file with author). For more on this public interest petition, see Redding, "Secularism, the Rule of Law, and 'Shariʿa Courts.'"

24. Hansen, "Recuperating Masculinity," 149.
25. See Hameed et al., *The Survivors Speak*, Section I(A).
26. See Concerned Citizens Tribunal, *Crime against Humanity (Volume I)*, 39. See also HRW, *Compounding Injustice*, 4 (repeating the Concerned Citizens Tribunal finding).
27. See Concerned Citizens Tribunal, *Crime against Humanity (Volume II)*, 23–24 (detailing the precise targeting of Muslim homes and businesses by what has been otherwise characterized as "random mob violence"). See also Concerned Citizens Tribunal, *Crime against Humanity (Volume II)*, 29 (describing how "[l]arge mobs running into thousands were led by well-known elected representatives from the BJP, leaders of the VHP, Bajrang Dal and RSS and even cabinet ministers"; and that "[f]rom the evidence before [the tribunal], it is clear that these leaders . . . quite often carried computer printouts of the names and addresses of Muslims['] homes and shops") and 45 (discussing additional examples of the particularized targeting of Muslim businesses).
28. For a general time line of events during this period of time, see HRW, *Playing the "Communal Card."*
29. HRW, *"We Have No Orders to Save You,"* 66.
30. PM High Level Committee, *Status of the Muslim Community.*
31. See ibid., 159.
32. See ibid., 166.
33. See ibid., 54.
34. See ibid.
35. In 2010, approximately 1.6 billion Muslims were living all over the globe, of which approximately 177 million (14.6 percent of India's population; 11 percent of the global Muslim population) lived in India. See Pew Research Center, *Future of the Global Muslim Population*.
36. Such constitutional provisions include the Constitution of India's declaration that "every religious denomination [in India] . . . shall have the right . . . to establish and maintain institutions for religious and charitable purposes . . . [and] to manage its own affairs in matters of religion" (Constitution of India, 1950, art. 26), as well as a more affirmative constitutional exhortation that "[t]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" (art. 38).
37. Since the inception of the Constitution of India, reservations have largely existed primarily for Hindu "untouchable" (also known as Dalit) communities. More recently, at the central government level (and in some states before that), some of these reservations have been extended to "other backward classes" (commonly known as OBCs). See Hasan, *Politics of Inclusion*, 78–125 (explaining the expansion of India's reservation system to OBCs). While Muslim Dalits (and also Christian Dalits) have never been legally recognized as fitting within the reservation (sub)system for untouchables—untouchability being conceived as a distinctly Hindu caste practice—some Muslim communities have found recognition as

OBCs, and have been able to access the reservations system in that way (see 198–202, 216). However, legal precedent suggests that any recognition of Muslims qua Muslims as OBCs would be unconstitutional (see 175, 178–79).

38. Sometimes the constitutional argument centers on equality, with Muslim reservations somehow violating that constitutional value; and sometimes the argument centers on secularism, with the precise argument being that legal recognition of a religious minority—Islam being fundamentally religious, while (Hindu) castes and tribes purportedly not being so—violates secular principles; see ibid., 160. See also Adcock, *Limits of Tolerance*, 160–66 (analyzing how [Muslim] religion and [Hindu)] caste became historically disassociated discourses).
39. Constitution of India, 1950, Preamble. See also above, n. 36.
40. See above, n. 38.
41. Smt. Sarla Mudgal v. Union of India, 1995 A.I.R. 1531 (SC).
42. This expression is my attempt to capture the uncertain religious identity of such men.
43. *Sarla Mudgal*, A.I.R. 1531, 1538.
44. Ibid., 1531, 1533 (emphasis added).
45. See ibid., 1531, 1538.
46. Mohd. Ahmed Khan v. Shah Bano Begum, 1985 S.C.R. (3) 844.
47. See Code of Criminal Procedure, 1973 (India) §125(1)(a).
48. *Mohd. Ahmed Khan*, S.C.R. (3) 844, 849–50 (citation omitted).
49. See Hurd, *The Politics of Secularism*, 7 (arguing that "negative associations of Islam not only run deep in . . . Euro-American secular traditions . . . but [also] help to constitute them").
50. Hansen, "Recuperating Masculinity," 148. Hansen is speaking specifically of the strategy deployed by the Rashtriya Swayamsevak Sangh (RSS), a Hindu nationalist political organization that he distinguishes from "traditional Hindu sects" with their overwhelming dedication to the "search for truth and perfection of the soul" (147).
51. Cohen, "Holi in Banaras," 408, 412–14 (emphasis added).
52. See Nussbaum, *The Clash Within*, 24.
53. See Roy, *Walking with the Comrades*, 38–39, 51–52.
54. See text accompanying n. 89 below.
55. Barry, *Culture and Equality*, 27.
56. See also contributions to the well-known edited volume from 1999, *Is Multiculturalism Bad for Women?* This volume consists of responses to a provocative essay by the philosopher Susan Moller Okin, the title of which also provides the title of this edited volume as a whole. In this essay, Okin proves herself largely hostile to multiculturalism and group rights. See Okin, "Is Multiculturalism Bad for Women?"
57. Taylor, "Politics of Recognition," 62–63 (emphasis added).
58. See text accompanying n. 57.
59. Historian Cassie Adcock discusses this in the context of her work on the influential reformist Arya Samaj sect of Hinduism. Describing a work by an Arya Samajist entitled, "The Fountain-Head of Religion, being a Comparative Study of

the Principal Religions of the World and a Manifestation of their Common Origin from the Vedas," Adcock describes how this work "claimed to show on scientific authority that Islam, Judaism, Christianity, Buddhism, and Zoroastrianism were all ultimately derived from the [Hindu] Vedic religion." Adcock, *Limits of Tolerance*, 64. Adcock goes on to discuss how the Arya Samaj's attempts to use the ritual practice of *shuddi* to convert Muslims to Hinduism was controversial among orthodox Hindus, but also how their resistance was partially overcome by "portray[ing] Indian Muslims as descendants of Aryas—followers of Vedic dharma—who had become Muslim in centuries past, some by force and some by choice, all under some duress" (139; see also 119, 132–42).

60. My use of "tolerance" here is different from the Indian "Tolerance" that Cassie Adcock identifies and discusses in her recent work. Adcock frames Indian Tolerance by noting that "[t]he Tolerance perspective on religious freedom in India rests on a certain way of classifying and ranking religions as either 'proselytizing' or 'nonproselytizing'" (ibid., 2). Thus, whereas for Adcock's project, Tolerance is understood as a value that helps preserve distinct religions by discouraging proselytizing, the tolerance discussed herein is one that finds expression not in the maintenance of religious pluralism but, instead, in its elision. In this respect, it is more akin to the (radical) Hindu "inclusivism" that anthropologist Peter van der Veer highlights when discussing Paul Hacker's work on Hinduism. See van der Veer, *Religious Nationalism*, 68.
61. Golwalkar, "Red Fort Grounds," 8–9.
62. See Cossman and Kapur, *Secularism's Last Sigh?* 69 (quoting RSS activist Balasaheb Deoras's 1984 book, *Answers Questions*).
63. For example, the biographer Stanley Wolpert quotes Nehru describing his feelings about Jinnah's claim that he represented the Muslims of India as a distinct political community in the following terms: "[W]ith all deference to Mr. Jinnah, may I suggest that [his] ideas are medieval and out of date? . . . To encourage a communal consideration of political and economic problems is to encourage reaction and go back to the Middle Ages." Wolpert, *Nehru*, 223.
64. Adcock, *Limits of Tolerance*, 144 (quoting Gandhi's 1924 essay, "Hindu-Muslim Tension: Its Cause and Cure").
65. Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, 1996 A.I.R. 1113 (SC).
66. Ibid., 1130–31 (emphasis added).
67. See text accompanying n. 28 above.
68. Ganpat v. Presiding Officer, 1975 A.I.R. 420 (SC). For more discussion and analysis of this case, see Redding, "Human Rights and Homo-sectuals," 462, n. 104.
69. *Ganpat*, A.I.R. 420, 423–24.
70. Chatterjee, *The Nation and Its Fragments*, 6, 12.
71. Legal scholar Stewart Macaulay makes a similar point, but uses different language, namely, that of "competition." He states that: "Colonial powers long imposed a version of the common law or a civil code on top of 'native law.' While, in theory, there were principles to coordinate the two systems, often the reality was legal pluralism and competition." Macaulay, "Private Government," 452.
72. van der Veer, *Religious Nationalism*, x (emphasis added).

73. See ibid., 107. For Peter Fitzpatrick, too, the family is an important aspect of understanding contemporary liberal governance, although in a different way. See text accompanying n. 5 above.
74. See Hansen, "Recuperating Masculinity."
75. Chatterjee writes: "Nationalist reforms do not, however, reach political fruition in the case of the Muslims in independent India, because to the extent that the dominant cultural formation among them considers the community excluded from the state, *a new colonial relation is brought into being*. . . . The inauguration of the national state in India could not mean a universalization of the bourgeois notion of 'man.' . . . Indeed, in setting up its new patriarchy as a hegemonic construct, nationalist discourse not only demarcated its cultural essence as distinct from that of the West but also from that of the mass of the people [including Muslims]." Chatterjee, *The Nation and Its Fragments*, 133–34 (emphasis added).
76. Hansen, "Recuperating Masculinity," 151–52. See also 139–40.
77. Hansen's work might be read as providing a clever flip on colonialism and its imputation of a native "lack"—and hence the need for colonialism. See van der Veer, *Religious Nationalism*, 21–22. Interestingly, this read of things would put Hansen—and this book—into some disagreement with recent prominent work on secularism which asserts that "although secularism is often defined negatively . . . it is not in itself neutral. Secularism should be seen as a presence." Calhoun et al., *Rethinking Secularism*, 5.
78. See Stephens, *Governing Islam*, 12 (observing that "[c]olonial officials, for whom ruling on the cheap often mattered more than ideological coherence, turned to religious communities and local elites to accomplish many of the day-to-day tasks of maintaining social order and mediating disputes").
79. Nader, "Moving On," 197–98.
80. Law can also be a religious phenomenon. Moreover, law can be legal, social, political, *and* divine, operating *simultaneously* along intertwined but non-reducible axes. I think historian Dipesh Chakrabarty describes the possibility of such simultaneity best when he writes: "[A major] assumption running through modern European political thought and the social sciences is that the human is ontologically singular, that gods and spirits are in the end 'social facts,' that the social somehow exists prior to them. I try, on the other hand, to think without the assumption of even a logical priority of the social. . . . I take gods and spirits to be existentially coeval with the human, and think from the assumption that the question of being human involves the question of being with gods and spirits." Chakrabarty, *Provincializing Europe*, 16.
81. See Cover and Aleinikoff, "Dialectical Federalism," 1101–2 (describing the relative un/willingness of US Supreme Court justices, in a case concerning the rights of criminal defendants, to acknowledge the legal unviability of prior precedent that had been previously sidestepped but not explicitly overruled).
82. Scheppele, "Constitutional Ethnography," 390.
83. Pandey, "In Defense of the Fragment," 34.
84. Ibid., 50.
85. Solanki, *Adjudication in Religious Family Laws*, 30.

86. See Schonthal, *Buddhism, Politics and the Limits of Law*, 17–19.
87. For an excellent overview of this methodology, see Magnússon and Szíjártó, *What Is Microhistory?*
88. See ibid. for an exhortation that "we must offer the reader the opportunity to participate with us in the research process, by providing information on the researcher's material (sources) and the gaps that exist in knowledge of the subject" (150).
89. H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010), https://www.sos.ok.gov/documents/questions/755.pdf (emphasis added).
90. See Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).
91. See Ontario Regulation 134/07, Family Arbitration (Arbitration Act, 1991).
92. See Shachar, "Privatizing Diversity," 584; Siddiqui, "Sensationalism Shrouds the Debate," A17.
93. Williams, "Civil and Religious Law in England."
94. One of the more recent controversies involves the possibility of lawyers drafting and courts enforcing "Sharia-compliant" wills. See Bingham, "Islamic Law Is Adopted by British Legal Chiefs." For detailed discussion of the situation in the United Kingdom, see Bano, *Muslim Women and Shariʿah Councils*; Bowen, *On British Islam*.
95. For discussion of relevant (albeit region-specific) Hindu practices and institutions, see Kumar, "Khap Panchayats"; Sangwan, "Khap Panchayats in Haryana." For relevant Indian case law on the legal validity (at least in the eyes of the state) of Christian "church divorces," see George Sebastian v. Molly Joseph, 1995 A.I.R. 16 (Ker. HC); Molly Joseph v. George Sebastian, 1997 A.I.R. 109 (SC); George Sebastian v. Molly Joseph, 2000 S.C.C. Online Ker. 271 (Ker. HC).
96. Bowen, *Islam, Law, and Equality*, 257 (emphasis added).
97. See Galanter and Krishnan, "'Bread for the Poor.'" See also Shackelford, "In the Name of Efficiency."
98. See the Gram Nyayalayas Act, 2008, §§23–25.

1. MUSLIM AND MUNDANE

1. Here I am thinking of anthropologist Hussein Ali Agrama's observation that religious institutions and individuals can actually be *disabled* (rather than empowered) by ascribing a certain kind of "hyper-agency" to them. In this vein, Agrama writes: "Rarely do we consider the possibility . . . that secular power works precisely by continually politicizing those traditions it designates as religious, and that it is the politicizing of these traditions that renders them irrelevant in significant ways." Agrama, *Questioning Secularism*, 25.
2. See Kabir, *Maulana Abul Kalam Azad*.
3. See Douglas, *Abul Kalam Azad*, 97–108.
4. See Metcalf, *Husain Ahmad Madani*, 117.
5. See Metcalf, *Islamic Revival in British India*, 13.
6. See Douglas, *Abul Kalam Azad*, 170–81.
7. Ashraf, "Appraisal of Azad's Religio-Political Trajectory," 100.

8. See Ghosh, "The Educational Leader," 101.
9. See Ahmad, "Azad's Careers," 122, 123.
10. Nehru, "The Passing of a Great Man," 2.
11. See Friedmann, "The Attitude of the *Jamʿiyyati-i 'Ulama-i Hind*."
12. Minault, *The Khilafat Movement*, 153, 123.
13. But see Faruqi, *The Deoband School*, 67, n. 1 (noting that while the JUH "started as a body of Muslim religious leaders belonging to different schools . . . it generally came to be dominated by the Deobandī ʿulamā'. There has always been in it, however, a number of non-Deobandī elements influential in their respective spheres").
14. The Barelvi sect is a Sunni Hanafi sect found across South Asia, yet one distinguishable from the similarly widespread Sunni Hanafi Deobandi sect. That said, many Barelvis would contest this characterization of their movement, even down to the appellation of "Barelvi." Indeed, many Barelvis prefer to call adherents of their way of thinking as "Ahl-e-Sunna wa Jamaʿat" (People of the Prophet Muhammad's Way of Life and Community) in order to suggest their links to a much wider, global, and historical Muslim community. In choosing this appellation, Barelvis also challenge efforts to characterize their community as a narrow "sect" that was "founded" in any recent sense; see Sanyal, *Devotional Islam and Politics in British India*, 8–9, 166. The "Barelvi" appellation is used by non-Barelvis to indicate the town Bareilly, where Maulana Ahmad Raza Khan, the person who many would consider the original leader of this sect, resided for most of his life (see 8).
15. See Sanyal, *Devotional Islam and Politics in British India*, 277, 297.
16. See Metcalf, *Husain Ahmad Madani*, 86, 96. See also Anshuman, "Jamiat Ulama-i-Hind."
17. For more information on Deoband, see Metcalf, *Islamic Revival in British India*.
18. Faruqi, *The Deoband School*, 117.
19. See Metcalf, *Husain Ahmad Madani*, 56–62, 92.
20. Zaman, *The Ulama in Contemporary Islam*, 33–34 (translating and quoting Husain Ahmad Madani, *Muttahida Qawmiyyat Aur Islam* [1938]).
21. See Metcalf, *Husain Ahmad Madani*, 52, 50.
22. See below, n. 26.
23. See Metcalf, *Husain Ahmad Madani*, 73 (noting that Madani's "commitment to Indian nationalism had become central to his commitment to Islam"), 102 (highlighting an instance where Madani insisted that it was "morally incumbent on [Muslims to cooperate with Hindus in the fight for India's independence] in light of the Prophet's example of cooperation with non-Muslims in a shared polity").
24. While this may sound remarkably similar to the idea of Pakistan itself, historian Ziya-ul-Hasan Faruqi reminds us that territory was key to the intra-Indian Muslim dispute over the goal of Pakistan. In this respect, Faruqi notes that "the main point of difference between the [pro-Pakistan] League and the Jamʿīyat centered around the *geographical* and political unity of India"; Faruqi, *The Deoband School*, 101 (emphasis added). More fundamentally, historian Ayesha Jalal argues that the differences among Indian Muslims at this time were a matter of misunderstanding and overstatement, because Muhammad Ali Jinnah's "real

aims" in advocating for Pakistan were not necessarily about territorial separatism but guaranteeing robust Muslim political representation—a goal shared by many; Jalal, *Self and Sovereignty*, 456.

25. See Ahmad, "Azad's Careers," 126–28, 166–68. See also text accompanying n. 7 above.
26. Any attempt to split the work neatly between the theological and the practical that Madani and Azad performed (respectively) with regard to the envisioning of Muslim governance in a united and independent India is bound to oversimplify. Indeed, at various times, Madani himself proposed different "practical" governance schemes for Muslims both before and after India's independence, in addition to his theological work aimed at securing both an independent and united India. Madani's proposals ranged from the creation of a Muslim self-protection force, to a Muslim veto over parliamentary legislation in India that affected Muslims in particular, to support for India's system of religiously particularistic personal laws; see Metcalf, *Husain Ahmad Madani*, 89–91, 140, 158. For an interesting discussion of the points of convergence and divergence between Madani's and Azad's careers, see ibid., 117–19.
27. Barbara Metcalf describes a somewhat similar scheme developed in the mid-nineteenth century in Bengal by a group of Muslims who came to be known as the Fara'izi movement; see Metcalf, *Islamic Revival in British India*, 68–70. Describing this scheme, Metcalf writes, "the [Fara'izi] sect [ultimately] accepted the framework of British rule [but] encapsulated itself, as best it could, religiously and socially. Dudhu Miyan [the son of this movement's founder and subsequent leader of the movement] organized each district where the sect had members under a locally based *khilafah* who taught, levied subscriptions, and protected the interests of the members. The *khalifas* and other elders were expected to arbitrate all differences among fellow members who were forbidden to use the British courts" (69–70).
28. See Ghosh, "*Muttahidah qaumiyat* in *aqalliat* Bihar," 2.
29. Ibid.
30. Ibid., 3. Gail Minault tells us that while some provinces followed Bihar's lead in selecting a provincial *amir*, most provinces did not; see Minault, *The Khilafat Movement*, 153–54. Additionally, Minault provides details about the inability of the JUH to agree on the election of an overall *Amir e Hind* at its November 1921 meeting in the Punjab. Indeed, though "[t]hey postponed the election until a meeting scheduled for December 1921 . . . the turnout at that meeting was so meager that no action could be taken" (154).
31. A separate Orissa was administratively carved out of the combined Bihar and Orissa province by the British in 1936. It was officially renamed Odisha in 2011. Jharkhand was only recently created as an independent political entity, as a result of the "splitting off" of a southern portion of the state of Bihar in 2000.
32. See above, n. 13, for a discussion of the way in which the JUH became dominated by Deobandis over time. See also text accompanying nn. 43–47 below for a discussion of non-Deobandi *dar ul qaza* analogs that have developed over time.
33. See Minault, *The Khilafat Movement*, 122–23, 153–54.
34. Hasan, *Legacy of a Divided Nation*, 314.

35. See Yaduvansh, "Qāḍīs in India," 156, 161–64 (discussing the factors behind the British decision in 1864 to eradicate this kind of, then existing, advisory role for *qazis*).
36. Barbara Metcalf describes how the JUH made proposals vis-à-vis "*qazi* courts," in 1931, at a critical juncture in discussions about the future governance of India and continued to argue up until Independence (and Partition) for the passage of what was known as the "Qazi Bill"; see Metcalf, *Hussain Ahmad Madani*, 103, 111, 141. Moreover, various proposals for an enhanced formal role for Islamic legal experts in the Indian state's system of legal governance have continued to be advocated in the contemporary period. See Ghildiyal, "Muslim Law Board Tones Down Stand" (discussing various proposals that the All India Muslim Personal Law Board had been advocating and considering as late as 2005).
37. See Hussain, "Shariat Courts and Women's Rights," 78. Hussain later confusingly states that either 28 or 33 *dar ul qazas* from this network existed in this part of India (see 86).
38. In her recent book, political scientist Gopika Solanki discusses the operations of a *dar ul qaza* operating in central Mumbai in the offices of the Jamiat Ulema E Maharashtra (which appears to be a local analog of the Jamiat Ulama-i-Hind, or JUH); see Solanki, *Adjudication in Religious Family Laws*, 279. Among other aspects of its operations and legal procedures, Solanki notes that the statistics gathered by her at this *dar ul qaza* indicate that it "resolved" 35 cases of divorce in its first two years of operation (279; see also 279–81). But see Wajihuddin, "First Shariah Court to Settle Civil, Marital Disputes" (indicating the establishment of the first Mumbai *dar ul qaza* in 2013, after the publication of Solanki's recent book). In my own preliminary fieldwork in 2006, I visited an AIMPLB-established *dar ul qaza* just outside of Mumbai, in the suburb of Thane.
39. See Falahi, "Darul Qaza" (locating *dar ul qazas* in a number of cities, including Lucknow, Indore, and Delhi).
40. Sabiha Hussain reports both 22 and 31 AIMPLB-coordinated *dar ul qazas* in operation; see Hussain, "Shariat Courts and Women's Rights," 78. Mumtaz Alam Falahi, however, reports an AIMPLB officer saying in 2009 that the AIMPLB coordinates 15–20 *dar ul qazas*; see Falahi, "Darul Qaza." In the counter-affidavit that the AIMPLB filed in the *Vishwa Lochan Madan* litigation, the AIMPLB reported the addresses of 15 AIMPLB-coordinated *dar ul qazas*, the addresses of 10 "other" *dar ul qazas*, and the addresses of 38 Imarat-e-Shariah *dar ul qazas*. See Respondent No. 9 Counter-Aff. at 157–61, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (on file with author).
41. An officer of the Jamaat-e-Islami in India told me of the existence of these non-state bodies during the course of my summer 2009 fieldwork in India, and their existence has also been reported by *Radiance Viewsweekly*, a magazine associated with the Jamaat-e-Islami. See "Punjab to Have Shariʿah Panchayat Soon."
42. Ziya-ul-Hasan Faruqi documents the JUH's original constitution and one of its professed goals; namely, to "establish 'maḥākim-i-Sharʿīyah' (religious courts) to meet the religious needs of the community." Faruqui, *The Deoband School*, 68.

43. Interview with senior member of the Indian judiciary in Delhi, India, June 27, 2009.
44. See "Our Activity," Markazi Edara-e-Sharia Patna Bihar. As to the Barelvi orientation of this organization, see Sajjad, "Muslims between the Communal-Secular Divide" (mentioning the "Idara-e-Shariah of the 'Barelwi' *maslak* (running since 1968)").
45. Gopika Solanki reports that few Barelvis use the (Deobandi origin) *dar ul qaza* network, but she does not discuss Barelvi analogs per se; see Solanki, *Adjudication in Religious Family Laws*, 303. Barbara Metcalf notes that Deobandis and Barelvis "[i]nitially . . . appealed to somewhat different social groups [but] . . . [o]ver time . . . attracted a . . . more sociologically heterogeneous following [and] . . . evolved similar institutional organizations"; Metcalf, *Islamic Revival in British India*, 264. The existence of the Barelvi Edara-e-Sharia helps confirm Metcalf's insight and is also interesting in light of recent developments whereby the AIMPLB has splintered along sectarian lines. Among other new institutional formations, the splintering of the AIMPLB resulted in the creation of a new Barelvi-oriented organization calling itself the "All India Muslim Personal Law Board (Jadid)." See Jones, "'Signs of Churning.'"
46. See Jamal, "A Model of Community Justice?"
47. For discussion of this kind of activity, see Lemons, "The Politics of Livability"; Tschalaer, *Muslim Women's Quest for Justice*, 159–70.
48. Hussain, "Shariat Courts and Women's Rights," 78. For additional writing by Sabiha Hussain on Imarat-e-Shariah *dar ul qazas*, see Hussain, "Male Privilege, Female Anguish." It is not clear on what basis Hussain traces the beginning of Imarat-e-Shariah *dar ul qazas* to 1917, before the creation of the Imarat-e-Shariah in 1921 and its nearly simultaneous setting up of *dar ul qazas*; see Ghosh, "*Muttahidah qaumiyat* in *aqalliat* Bihar," 3–4. To further confuse matters, the AIMPLB has stated that the Anjuman-e-Ulema in Bihar—a predecessor organization to the Imarat-e-Shariah (see Ghosh, 2)—"[i]n 1919 [set up] six Darul-Qaza . . . in Bihar province at Ara, Bankipur, Monger, Patna, Phulwari Shariff and Sahasaram." Respondent No. 9 Counter-Aff. at 33, *Vishwa Lochan Madan*, No. 386/2005.
49. Hussain actually uses three similar (yet differently configured) expressions in the course of her work, of which this is but one. See text accompanying n. 48 above.
50. See Falahi, "Darul Qaza." I highlight use of the word "dispose" here, because disposing a case does not necessarily mean a final decision was issued in the case. For example, some cases are "disposed" of by the parties reconciling and dropping their litigation at the *dar ul qaza*. See text accompanying nn. 51–54 below.
51. Dar ul Qaza, South Delhi (All India Muslim Personal Law Board), *Report on Cases filed between January 29, 2004 and December 1, 2005* (2005) (translated from Urdu by author; on file with author).
52. Ibid.
53. In the report, the Urdu description of this kind of conclusion to a filed case refers to a "farīqain ke mābain sāth rehne par muṣālaḥat." Ibid.
54. Ibid.
55. The poster-chart contained no information regarding the outcomes of the different legal matters, including whether they eventually reached the final determination

stage in the form of a *faislah*. For more on what a *dar ul qaza faislah* entails, see the discussion below.

56. See above, n. 55.
57. Gopika Solanki has also reported finding an appellate structure within the *dar ul qazas* that she looked at, although she does not report her source. See Solanki, *Adjudication in Religious Family Laws*, 58, n. 12.
58. The chart provided no information as to what a local *panchayat* (or, as the poster's Urdu put it, *maqāmī pancāyat*) comprises, or how it differs from a lower *dar ul qaza*. Here, the chart may be referring to any *dar ul qaza* located outside the Imarat-e-Shariah's headquarters as a *maqāmī pancāyat*, thereby distinguishing between appeals from (lower) *dar ul qazas* located outside the headquarters versus appeals from a (lower) *dar ul qaza* located within the headquarters. However, this is merely an attempt at explanation.
59. Vatuk, "Moving the Courts," 36.
60. Tschalaer, *Muslim Women's Quest for Justice*, 153.
61. For more information on this act, see text accompanying n. 91 below.
62. See text accompanying n. 51 above.
63. Metcalf, *Islamic Revival in British India*, 146. Metcalf does not provide clear dates for the data that she presents, noting that the Deoband Dar ul-Uloom has only kept a formal register of its *fatwas* since 1911, yet also declaring that "[a]t the conclusion of its first century [i.e., by 1967 presumably], the school counted a total of 269,215 *fatawa* that had been issued" (146).
64. See Hardy, *Muslims of British India*, 171.
65. The "non-state" versus "state" character of *fatwas* in South Asia has changed over time. During the Mughal period, for example, there was state patronage of *ifta* and, indeed, the famous *Fatawa-e-Alimgiri* is a collection of statements of Islamic law compiled during Emperor Aurangzeb's rule in the early seventeenth century. See Kozlowski, "Islamic Law," 227 (claiming that, despite the title of this collection, this was not a compilation of *fatwas* but "an anthology of statements from the masters of the Ḥanafī school"); Schacht, "Fatāwā al-ʿĀlamgīriyya," 475 (noting that this collection "is not a collection of *fatwās* but of authoritative passages and accepted decisions from the recognized works of the Ḥanafī school [of Islamic jurisprudence]"). Furthermore, in the early days of the British colonial presence in South Asia, the British financially supported the establishment of the Calcutta Madrassa, an institution dedicated to "the instruction of young students 'in Mahamadan law and other sciences.'" Cohn, *Colonialism and Its Forms of Knowledge*, 47 (quoting Gabriel, "Learned Communities and British Educational Experiments," 109).
66. Conversely, elsewhere in the Muslim world, historical records demonstrate how *qazis* have occasionally approached *muftis* for assistance with difficult legal questions. In doing so, a *qazi* will recount to the *mufti* a summary of the facts in the dispute with which the *qazi* is seeking help, and this version of the facts ends up in the final *fatwa*. See Powers, "Four Cases Relating to Women and Divorce."
67. To my knowledge, every *qazi* in the *dar ul qaza* network focused on in this chapter is male. However, other non-state Muslim dispute resolution institutions that

employ female *qazis* do exist. See Tschalaer, "Competing Model-Nikahnamas," 72, n. 17 (discussing the appointment of a female *qazi* near the city of Lucknow by the All India Muslim Women's Personal Law Board, an organization formed in 2005, in contradistinction to the All India Muslim Personal Law Board).

68. Of course, the practitioners of *qaza* and *ifta*, as well as the distinction between them, are a product of local cultural traditions and expectations just as much as they are a product of any pan-Islamic notion of their precise responsibilities. For example, Brinkley Messick's research in Yemen indicates that *muftis* there—in addition to their role as writers of *fatwas*—have sometimes acted as arbitrators between disputing parties and have performed some of the roles commonly associated with notaries and lawyers. See Messick, *The Calligraphic State*, 136.
69. See Metcalf, *Islamic Revival in British India*, 146–147.
70. Messick describes the contrast between the process of obtaining a *fatwa* versus legal disputing in Yemen as follows: "For a mufti's questioner, obtaining a fatwa is an information step, taken either to regulate the individual's personal affairs or with litigation or some other form of settlement in mind. Questioners appear as individuals, not in adversarial pairs; posing a question to a mufti and receiving his response is not a judicial procedure like that in a judge's court. Also, in Yemen, fatwas are not presented in court cases. Without being binding a fatwa authoritatively provides the fatwa seeker with a legal rule relevant to the matter in question." Messick, *The Calligraphic State*, 136–37 (citation omitted).
71. But see Powers, "Four Cases Relating to Women and Divorce," 384 (demonstrating that information presented to a *mufti* might sometimes be detailed).
72. In contrast, Hussein Ali Agrama describes how, in seeking a *fatwa* at Al-Azhar, the renowned Cairo institution of Islamic learning and practice, "[r]esponsibility for [the] truth [of the presented facts] is typically borne by the fatwa seekers themselves. The mufti takes the information supplied by his questioners on good faith, knowing that they bear final responsibility for it." Agrama, "Ethics, Tradition, Authority," 12.
73. Muslim Personal Law (*Shariat*) Application Act, 1937.
74. Ibid., §2.
75. This is, obviously, not the only available interpretation of the act. Other aspects of the 1937 act suggest a less pluralistically oriented implementation. For example, while seemingly general and relatively inclusive in scope, the act arguably managed at least one important set of exclusions. Notably, certain Shia sects with established presences in western India (for example, in the state of Gujarat) traditionally followed practices of inheritance commonly associated with Hinduism. See Rudolph and Rudolph, "Living with Difference in India," 52; Blank, *Mullahs on the Mainframe*, 116–17. The act appears, however, to contemplate such Hindu-associated practices as "customs or usage to the contrary" of the purpose of the 1937 act.
76. While I translate *talaq* here as "male-initiated divorce," it has been translated elsewhere as something like "divorce at the man's prerogative" or "man's unilateral right of divorce"; see Shamim Ara v. State of U.P., 2002 A.I.R. 3551 (SC), 3554. In *Shamim Ara*, the Indian Supreme Court proposed (only to subsequently disavow) the following description of *talaq*: "[T]he basic rule stated is that a Muslim

husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the Court. This power is known as the power to pronounce a talaq" (3554, citing Tahir Mahmood, *The Muslim Law of India*, 2nd ed. [Allahabad: Law Book Co., 1982]).

77. Historically, *talaq* has been an expansive right of men within classical Islamic legal traditions, in both India and elsewhere. Indeed, there have been hardly any (if any) requirements for men to either articulate or justify their reasons for uttering *talaq*. However, recently, the Indian state's judiciary has worked to introduce limitations and safeguards vis-à-vis men exercising this right of divorce in a rash or unconsidered manner. See *Shamim Ara*, A.I.R. 3551; Shayara Bano v. Union of India, 2017 A.I.R. 4609 (SC).
78. See the Dissolution of Muslim Marriages Act, 1939, § 2.
79. See K. C. Moyin v. Nafeesa, 1973 A.I.R. 176 (Ker. HC) (holding that "[t]o repudiate the marriage by 'Faskh' without the intervention of a [state] Court is opposed to the law of the land"). Indian Islamic legal scholar Tahir Mahmood has been critical of this decision, arguing that "as long as Muslim husbands are free to pronounce [a unilateral] extra-judicial divorce, Muslim wives' right to do the same cannot, and should not, be taken away"; Mahmood, *Islamic Law in Indian Courts*, 478. Of course, Mahmood's opinion here now has to be viewed through the lens of the Indian Supreme Court's recent efforts to delegitimate rash pronouncements of *talaq*; see *Shayara Bano*, A.I.R. 4609. In addition, during the colonial period, the Lahore High Court observed with some disparagement that: "Both the lower Courts appear to have treated a case of dissolution of marriage like any other case which could be settled by an oath or arbitration and in this both of them were mistaken. They should have taken care . . . that in a case of this kind it is the Court which has to perform the functions of a Qazi and it is the pronouncement of the Court which dissolves the marriage and that function could not be delegated by the Court to anyone else. . . . [The] dissolution of marriage [is] a function which cannot be exercised by any body or tribunal other than the Court and in no other way except on consideration of the evidence led in the case." Abdul Ghani v. Mt. Sardar Begum, 1945 A.I.R. 183 (Lah. HC) 184.
80. See the Indian Divorce Act, 1869, §§10, 18.
81. See Molly Joseph v. George Sebastian, 1997 A.I.R. 109 (SC).
82. Act No. XI of 1864 (Governor-General of India in Council) (An Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices), "Description of Act." For more information on this development, see Yaduvansh, "Qāḍīs in India."
83. See the Kazis Act, 1880.
84. Ibid., §4.
85. See ibid., §4(a).
86. See ibid., §4(c).
87. Menski, *Modern Indian Family Law*, 345.
88. For a discussion of this in the context of the United States, where US judges often restrict access to their decisions by not officially publishing them, see Hannon, "A Closer Look at Unpublished Opinions." The statutory universe could also be

considered relatively indeterminate as a result of the fact that, over time, statutes can increase or decrease in cultural-legal salience. See Albert, "Constitutional Desuetude," 643 (describing how "[s]tatutory desuetude occurs when some combination of the sustained non-application of a law, contrary practice over a significant duration of time, official disregard and the tacit consent of public and political actors leads to the implicit repeal of that law").

89. There are many more nuances to the organization of the lower judiciary in India, as legal scholar Nick Robinson highlights in his very helpful piece on the "architecture" of India's judiciary. See Robinson, "Judicial Architecture," 331–37.
90. Suretha Bibi v. Ispak Ansari (District Magistrate, Purulia District, Nov. 30, 1990) (on file with author).
91. Muslim Women (Protection of Rights on Divorce) Act, 1986, §3.
92. *Suretha Bibi*, Nov. 30, 1990, 1. I have corrected spacing errors that were in the original text.
93. See Indian Penal Code, 1860, §498A (criminalizing "harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand").
94. *Suretha Bibi*, Nov. 30, 1990, 1.
95. Ibid., 2. I have corrected spacing and other errors that were in the original text.
96. Ibid. I am quoting the chief judicial magistrate here.
97. Ibid. I have corrected spacing and other errors that were in the original text.
98. Ibid. I have corrected spacing and other errors that were in the original text.
99. Ibid. (emphasis added). I have corrected spacing errors that were in the original text. "Kaji" is an alternative (more Hindi-derived) transliteration of "qazi."
100. Ibid. I have corrected spacing and other errors that were in the original text.
101. It is not clear what this means, although the chief judicial magistrate again refers to it at another point in his decision, but this time as "dower." See ibid.
102. See ibid., 3. It is not clear which goods are covered by the 8,500 rupees awarded as part of the compensation to Suretha Bibi.
103. Bibi Jairun Nisa v. Md. Azamatullah Ansari (District Court, Godda District, 1996) (on file with author).
104. See *Bibi Jairun Nisa*, 1996, 1, 2–3.
105. Ms. Nisa claimed that she was assaulted by Mr. Ansari with a dagger; that he had tied her up with a rope and had beaten her while she was constrained; and that Mr. Ansari had poisoned her food. See ibid., 3.
106. Ibid.
107. Ibid., 2. I have corrected spacing and other errors that were in the original text. "Roksadi" appears to refer to what is more commonly transliterated as "*rukhsati*," or (a demand for) the return of an absconding wife.
108. Ibid., 4. I have corrected spacing and other errors that were in the original text.
109. See ibid., 5. I have corrected spacing errors that were in the original text.
110. Ibid., 4. I have corrected spacing errors that were in the original text. This plea is repeated later in the additional district court judge's decision. See ibid., 15.

111. See ibid., 14.
112. Ibid., 11–12 (emphasis added).
113. On this point, it is worth noting how both the lower state court and the appellate state court here concurred in their assessment that Islamic law is necessarily a carrier of male privilege and violence. While the two courts may have disagreed about *how much* Islamic patriarchy should be countenanced, in their essential assessment, both courts agreed that Islam sanctifies patriarchy and violence against women.
114. *Bibi Jairun Nisa*, 1996, 13. I have corrected spacing errors that were in the original text. "Sidestating" appears to be a reference to what many common law systems would refer to as "hearsay."
115. Or, put another way, adopted an expansive interpretation of the rules governing the exclusion of hearsay evidence.
116. See *Bibi Jairun Nisa*, 1996, 13. I have corrected spacing and other errors that were in the original text.
117. See ibid., 17–18.
118. Ibid., 16. I have corrected spacing errors that were in the original text. With his reference to "fisque," the judge appears to be awkwardly transliterating what is more commonly transliterated as *faskh*.
119. Ibid., 19.
120. Ibid., 18.
121. See Lawyers Collective Women's Rights Initiative, *Staying Alive*, 133 (noting how "[t]here is a strong tendency within the judiciary to seek reconciliation of matrimonial disputes in order to save the family from divorce").
122. See Solanki, *Adjudication in Religious Family Laws*, 308 (discussing a state court in Mumbai refusing to find for a Muslim woman on her maintenance claim, because the court felt that the wife's reasons for wanting to leave her husband were, according to Solanki, merely the "demand[s] of a modern, western wife who watched too much TV"); see also ibid., 100–104 (discussing state court policies and practices oriented towards marital compromise and reconciliation).

2. SECULARISM AND "SHARIʿA COURTS"

1. Or, to use the particular terminology of the Indian system, "counter-affidavits." See Respondent No. 9 Counter-Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (on file with author).
2. Petitioner Aff. at 32, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (on file with author).
3. Even here it is not clear where the line between "decision" and "indecision" lies; the Supreme Court of India's *decision*—for nine years—*to not issue a decision* in response to Madan's constitutional petition spoke volumes itself. And indeed, at least one High Court in India has recently capitalized on the indecisiveness of the 2014 Supreme Court decision in *Vishwa Lochan Madan v. Union of India* to reopen

many of the issues raised by this case. See Abdur Rahman v. Secretary to Government, Writ Petition No. 33059/2016, a 2017 decision of the Madras High Court (on file with author) (*Abdur Rahman*).

4. See Redding, "Institutional v. Liberal Contexts," 4.
5. Vishwa Lochan Madan v. Union of India, 2014 A.I.R. 2957 (SC) (*Vishwa Lochan Madan*).
6. *Vishwa Lochan Madan*, A.I.R. 2957, 2960–61 (emphasis added).
7. Petitioner Aff. at 45–46, *Vishwa Lochan Madan*, No. 386/2005.
8. Ibid., 46.
9. Ibid., 6.
10. Ibid., 5.
11. See text accompanying n. 9 above.
12. See text accompanying nn. 7–8 above.
13. Petitioner Aff. at 5–6, *Vishwa Lochan Madan*, No. 386/2005.
14. See ibid., 3.
15. Certainly, much public-interest litigation is highly dysfunctional at many levels. For an elaboration of this point, see Bhuwania, *Courting the People*.
16. According to an English translation of the *fatwa* in question provided in the counter-affidavit of another named defendant, namely the Deoband Dar ul-Uloom, this is because "[t]he woman with whom [a] father has copulated legally or had sexual intercourse illegally . . . the son can't keep physical relationship with her. The Holy Quran says: 'Marry not the woman whom your father copulated'." Annexure to Respondent No. 10 Counter-Aff., *Vishwa Lochan Madan,* No. 386/2005.
17. Ahmed, "Fatwa against Rape Victim."
18. Petitioner Aff. at K–L, *Vishwa Lochan Madan*, No. 386/2005. At another point in Madan's petition to the Supreme Court, the procedural history and deficiencies behind the Deoband Dar ul-Uloom's issuance of a *fatwa* in this matter, and the AIMPLB's support of this *fatwa*, are described as follows: "[T]he said two bodies/board . . . suo-motu assumed jurisdiction [in this incident]. Without indulging into slightest of judicial scrutiny and without hearing any of the rival parties concerned, the two bodies passed the declaratory decree dissolving the marriage of Ms. Imrana and Noor Mohammad and also passed a decree of Perpetual Injunction restraining their staying together as husband and wife" (23–24).
19. Karmakar, "Another Imrana."
20. Petitioner Aff. at 25–26, *Vishwa Lochan Madan*, No. 386/2005.
21. Rao, "Imrana Rewind."
22. Petitioner Aff. at 24–25, *Vishwa Lochan Madan*, No. 386/2005. At another point in Madan's petition to the Supreme Court, the following evidentiary procedural issue is also identified: "Maulana Allaudin at Siddique Madarsa, where the verdict was declared, added that as per Shariat Law, Ismail (alleged rapist father-in-law) could have been blamed, only if there had either been a witness to the case or the victim's husband had agreed to Asoobi's statement. [However, h]er husband, Zakir, flatly refused to believe that his father could have committed such a crime. *Noteworthy here is that the fatwa not only seeks to enforce the Muslim Personal Law, but also the*

Muslim Law of Evidence, which became a dead-letter in India after the enactment of Settlement Act, 1781" (25; emphasis added).

23. Ibid., 26, 32.
24. Ibid., 21.
25. Ibid., 19.
26. While Madan seems, at times, interested in the less advantaged sections of society, his concern in this respect is rarely expressed as a concern for the position of Muslim women specifically. Instead, the concern is more general and is expressed somewhat like the following example: "Gullible, uneducated Muslim *citizenry* is being forced to obey and submit to [*dar ul qazas*], using the name of Allah and the Holy Quran." Ibid., 32 (emphasis added). And in another example: "*Fatwas* are being issued and vows taken from the uneducated Muslims not to report matters to police and judicial machinery set-up [*sic*] under the Constitution of India" (32). However, in my interview with Madan in 2011, he did discuss the situation of Muslim women specifically. See text accompanying n. 83 below.
27. Constitution of India, 1950, art. 15, §1 (emphasis added).
28. Ibid., art. 15, §3 (emphasis added).
29. Ibid., art. 44. Article 44 is in a section of the constitution entitled "Directive Principles of State Policy." Such directives "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" (art. 37).
30. Petitioner Aff. at 29, *Vishwa Lochan Madan*, No. 386/2005.
31. Ibid., 30. Madan's characterization of the present situation as an insurrection is echoed in other language in the petition; for example, when Madan declares that "*camps* are being organized to train Qazis (Judges) . . . to administer justice according to Shariat" (30) (emphasis added).
32. See ibid., 35.
33. Ibid.
34. Ibid. (emphasis added).
35. See text accompanying n. 32 above for Madan's discussion of essentiality in religious practices.
36. Petitioner Aff. at 36, *Vishwa Lochan Madan*, No. 386/2005.
37. Ibid., 38. Later, in his rejoinder affidavit, Madan seems somewhat more ambivalent as to whether the Constitution of India can, in fact, condone the existence of personal law. In this respect, Madan argued: "On the one hand it would go straight-faced opposite to the 'Soul and Essence of Indian constitution', and on the other hand, Governance would simply become unworkable and impossible. It can never be that 15% of Indian citizenry is governed by Muslim-jurisprudence (*Fiqh*) and the remaining 85% according to the respective legal-systems and jurisprudence of various religions and ethnicities [that] India is proud to possess." Petitioner Rejoinder Aff. at 18–19, *Vishwa Lochan Madan,* No. 386/2005.
38. Petitioner Aff. at 38, *Vishwa Lochan Madan*, No. 386/2005.
39. See text accompanying n. 31 above.

40. Petitioner Aff. at 38, *Vishwa Lochan Madan*, No. 386/2005.
41. Ibid., 38–40.
42. Madan raised a few other legal and constitutional concerns at the end of his petition, but he did so in a somewhat miscellaneous manner. Perhaps the most interesting set of arguments here revolved around claims that the *dar ul qaza* network cannot be considered as simply providing another form of ordinary and thereby permissible arbitration, if only because "the matters relating to matrimonial causes can never be a subject-matter of arbitration." Ibid., 42. Moreover, Madan finds serious fault with the procedures followed (or, rather, ignored) by *fatwa*-giving individuals and bodies, as well as by the *dar ul qaza* network. He writes: "The pseudo-judicial approach of the so-called Dar-ul Qaza and Shariat Court has been exposed by the three episodes of Imrana, Asoobi and Jyotsana Ara, in so much as they do not even care to seek proper petitions, replies and evidence on record, before proceeding to give their fatwas and judgements" (43).

    Finally, in a section toward the end of his petition, Madan responded to concerns that his legal demands might create freedom of expression problems:

    > As per law laid down by this Hon'ble Court, right to freedom of speech and expression also includes the right to educate, to inform and to entertain. But, by no reasonable forensic reasoning can it stretch to passing judgements, remarks, statements and fatwas, specially on the marital status of fellow citizens, knowing full well that such remarks and fatwas would make the life of concerned persons and their staying together impossible. Expressing personal views on morality according to the religious texts is one thing, but to issue fatwa that a particular lady has no right to stay with her husband, exceeds the rightful limit of speech and expression. After all, right to privacy, right to live with human dignity, be that inconsistent with a code of conduct prescribed by any religious text, so long as it is not proscribed by the Substantive Law of India, are not in any way less precious rights than the right to speech and expression. (44–45)

43. Ibid., 46–47.
44. Another Muslim organization, the well-known Dar ul-Uloom in Deoband, is also named as a defendant by Madan, and is known as Respondent No. 10 in this litigation. Respondent No. 10 also filed a counter-affidavit in this litigation, but it will not be a focus of analysis here. This is because Respondent No. 10's arguments largely overlap with those of Respondent No. 9 (i.e., the AIMPLB), and also because Respondent No. 10's counter-affidavit occasionally specifically points to Respondent No. 9's counter-affidavit in support of its own arguments. Some interesting points of divergence between these two respondents' counter-affidavits include the opening portions of Respondent No. 10's counter-affidavit, in which this respondent delves into the historical role and preeminence (in India and also internationally) of the Dar ul-Uloom in Deoband, seemingly relying on this organization's renown and stature as a kind of legal defense. For example, at one point in its counter-affidavit, Respondent No. 10 notes the following: "The Muslim Ulema took very active part and performed leading role in the 1857 uprising and

started a noble fight for liberation of India, and thereafter a large number of Muslim scholars were killed by bullets and hanged by British Authorities, and an estimate shows that about lacs Muslims were killed including thousands of Ulemas therefore, the need to establish a centre for Islamic teachings and learning in northern India was felt and the foundation of Darul Uloom i.e. (place of learning) was laid on [May 13, 1866]." Respondent No. 10 Counter-Aff. at ¶ 5, *Vishwa Lochan Madan*, No. 386/2005.

As well, since the Dar ul-Uloom's relevant activities are far more related to issuing *fatwas* than issuing judgments/*qaza*, the Dar ul-Uloom's other counter-affidavit arguments largely address the qualifications and extensive training that go into becoming a *mufti*, and the way in which the Dar ul-Uloom's *fatwa*-giving has supposedly significantly reduced litigation loads in the Indian state courts—more than 700,000 *fatwas* have been issued by the Dar ul-Uloom since 1892, according to the Dar ul-Uloom (see ¶ 2)—as opposed to making claims about *qazis*, *qaza*, and the operations of a *dar ul qaza* network (such as that run by the AIMPLB and Imarat-e-Shariah). See ¶ 8(iii).

45. Respondent No. 1 Counter-Aff. at 1–2, *Vishwa Lochan Madan*, No. 386/2005 (emphasis added). Somewhat similarly, the State of Rajasthan, another named defendant (Respondent No. 6), replied in its counter-affidavit that, effectively, the vast majority of Madan's complaints "are related to the Respondent No. 9 and other [similar Muslim organizational] respondents." Respondent No. 6 Counter-Aff. at ¶ 5, *Vishwa Lochan Madan*, No. 386/2005. As a result, the State of Rajasthan asked the Supreme Court that Madan's petition be dismissed vis-à-vis the State of Rajasthan (see ¶ 7).
46. Petitioner Rejoinder Aff. at 60, *Vishwa Lochan Madan*, No. 386/2005; see also Prakash, "Centre 'Copied' Law Board Submissions." As a result of his view that the counter-affidavits of Respondents No. 1, 9, and also 10 are "materially and tangibly the same," Madan's rejoinder affidavit responded to all three counter-affidavits simultaneously: Petitioner Rejoinder Aff. at 1, *Vishwa Lochan Madan*, No. 386/2005.
47. Respondent No. 9 Counter-Aff. at 2, *Vishwa Lochan Madan*, No. 386/2005.
48. Ibid., 3.
49. See Constitution of India, 1950, art. 29.
50. See Respondent No. 9 Counter-Aff. at 4, *Vishwa Lochan Madan*, No. 386/2005.
51. Ibid., 5.
52. Ibid., 8. In this respect, the counter-affidavit also notes how

> [i]t is the unanimous view of the jurists of all the schools of Muslim law that setting up the system of administration of justice is a part of great responsibility entrusted by Allah to human beings. . . .
>
> . . . [T]he administration of justice is a collective obligation imposed on whole community. (6)

53. Ibid., 10.
54. Historian Julia Stephens notes, however, that the British at least occasionally continued to consult non-state Muslim legal personalities after 1864. See Stephens, *Governing Islam*, 80.

55. Act No. XI of 1864 (Governor-General of India in Council) (An Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices).
56. Ibid.
57. Respondent No. 9 Counter-Aff. at 21, *Vishwa Lochan Madan*, No. 386/2005.
58. Ibid., 21–22.
59. Ibid., 26.
60. See n. 26 above.
61. Respondent No. 9 Counter-Aff. at 30–31, *Vishwa Lochan Madan*, No. 386/2005.
62. Ibid., 31.
63. Ibid., 33.
64. Ibid., 35.
65. Ibid.
66. Ibid., 41.
67. Ibid., 42.
68. Ibid., 43.
69. *Vishwa Lochan Madan*, A.I.R. 2957.
70. See Former Judges. "Hon'ble Mr. Justice Chandramauli Kumar Prasad." *Supreme Court of India*. http://164.100.107.37/judges/bio/149_ckprasad.htm (accessed Aug. 21, 2017).
71. *Vishwa Lochan Madan*, A.I.R. 2957, 2958.
72. Ibid.
73. The Court refers to her as "Jatsonara." See ibid.
74. Ibid., 2959.
75. Ibid., 2960.
76. Ibid., 2961.
77. Ibid.
78. Ibid. (emphasis added).
79. Ibid.
80. Tully, *Strange Multiplicity*, 37–38.
81. See text accompanying n. 76 above.
82. See text accompanying n. 22 above.
83. Interview with Vishwa Lochan Madan. As to Muslim men themselves, Madan noted how, from their childhoods, "[i]nstead of going to, say, a school and then spending money and doing their thing, what they do is, they . . . child of, say, six year, or seven year, goes to the workshop. . . . Whether it is the modern workshop or a carpenter, this thing, seven, eight, he starts learning the trade. By the time he becomes eighteen, he is a full-fledged mechanic. . . . Nevertheless, he's uneducated." Ibid.
84. And, in fact, newspaper op-eds written around the time that Madan's petition was filed made this direct connection. For example, Firoz Bakht Ahmed, writing in the *Hindustan Times*, opined: "Strange and insane are the vagaries of how the *mullahs* interpret the Shariat. After Shah Bano, Gudiya and umpteen other cases, it's Imrana's turn to be in the jaws of the ranting clerics." Ahmed, "Where Is the Real Muslim?"

85. See Basu, "Separate and Unequal," 501 (observing that "something like 'the secular State saving Muslim women from Muslim men', has been a hallmark of post-1990s case law [in India]").
86. See Vatuk, "'Where Will She Go? What Will She Do?'"
87. Petitioner Aff. at 5, *Vishwa Lochan Madan*, No. 386/2005 (emphasis added).
88. See n. 26 above.
89. Interview with Vishwa Lochan Madan. The AIMPLB's counter-affidavit, unsurprisingly, contested this simplistic set of views about India's Muslim community. See text accompanying nn. 61–65 above.
90. See text accompanying n. 31 above.
91. See text accompanying n. 48 above.
92. See text accompanying n. 68 above.
93. See Galanter and Krishnan, "'Bread for the Poor.'" See also Shackelford, "In the Name of Efficiency."
94. See Law Commission of India, *One Hundred and Fourteenth Report on Gram Nyayalaya*. For an exposition of even earlier Indian discussions of village-level access to justice, see Galanter and Baxi, "Panchayat Justice."
95. See the Gram Nyayalayas Act, 2008, §§23–25.
96. See text accompanying n. 74 above.
97. *Vishwa Lochan Madan*, A.I.R. 2957, 2960.
98. See *Abdur Rahman*, No. 33059/2016.
99. Ibid., ¶ 13.
100. Ibid., ¶ 11.
101. See Subramani, "Madras High Court Bans Unauthorised 'Sharia Courts'" (describing how "Abdul Rahman, an MBA-holder from the United Kingdom, . . . approached [the shariat council] to be reunited with his wife. Though he sought to be reunited with his wife, the 'Sharia council' made him sign a 'letter of talaq' and got him separated from his wife. He then rushed to the high court with a PIL.").
102. *Abdur Rahman*, No. 33059/2016, ¶ 7. The Commissioner of Police for the Greater Chennai Police was named as a defendant in this case; this was apparently because, among other remedies, the plaintiff-husband sought a writ of mandamus from the Madras High Court, addressed to the police, ordering them to shut down the shariat council at issue (see ¶ 7). As this excerpt from the case suggests, however, the Chennai police themselves were not inclined to shut down the shariat council seeing that its operations reduced their workload.

3. SECULAR EMOTION AND THE RULE OF LAW

1. On this point, see legal scholar Peter Fitzpatrick's observations regarding how "the degenerate idea of custom and community that emerges in the West out of law's separation from and denial of custom can be matched term for term in the languages of imperialism—languages of lawyers and of legal and political theorists, of administrators and anthropologists. To take various formulations, custom . . . stands opposed to reason and reflection." Fitzpatrick, "'The Desperate Vacuum,'" 353.

2. This expression is taken from Chakrabarty, *Habitations of Modernity*, 111. As Chakrabarty sees it, "modern political philosophy"—in which the "law-state combine" figures prominently—depends on the "idea of the abstract, general, homogenized citizen and his rights and duties" for articulating any conception of justice (111, 113).
3. This is consistent with political theorist Partha Chatterjee's thesis that elite and subaltern domains—understood here to be embodied, respectively, in state and non-state legal venues—are products of "mutually conditioned historicities." Chatterjee, *The Nation and Its Fragments*, 13.
4. Petitioner Aff. at 32, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (on file with author).
5. Ibid., 39.
6. Throughout his petition, the petitioner used this term to refer to the *dar ul qaza* and similar systems of non-state, Muslim dispute resolution operating in India. See ibid., 30.
7. Ibid., 38.
8. I say "particularly those that are Muslim" here, because despite long-standing public discussions in India concerning other religious communities' non-state legal institutions—for example, Christian "church courts" and Hindu "caste panchayats"—Madan's Supreme Court petition is obsessively focused on non-state Islamic legal institutions. In this way, his rule of law concerns are not very different from other recent Islam-obsessed rule of law discussions in locations as diverse as Ontario and the United Kingdom. For more discussion on this point, see chapter 2. For some time now, in such national contexts, non-Muslim religious communities have operated institutionalized, non-state civil dispute resolution systems. However, few (if any) of these non-Muslim, non-state civil dispute resolution systems have faced the kind of public criticism and state regulation that comparable systems have found within Muslim communities. See Boyd, *Dispute Resolution in Family Law*, 68 (noting that "[m]any of those writing independently to the [Ontario governmental review of family law arbitration in Ontario] were clear that they were only opposed to allowing Muslim family law to be used. Some of these submissions were explicitly racist in content.").
9. See UN Security Council, S/2004/616; UN General Assembly, UN Security Council, A/61/636–S/2006/980 ("2006 UN Report").
10. Tamanaha, "Rule of Law and Legal Pluralism," 36 (citations omitted). The 2006 UN Report also minimized non-state law when it noted that

    [r]*ule of law in the context of long-term development* . . . comprises activities in the area of [s]trengthening of *national* justice systems and institutions . . . includ[ing] work to strengthen legal and judicial institutions (e.g. prosecution, ministries of justice, criminal law, legal assistance, court administration and civil law), policing, penal reform, the administration of trust funds and monitoring. *In addition, the following additional priority areas have been identified: customary, traditional and community-based justice and dispute resolution mechanisms*; victim and witness protection and

> assistance; combating corruption, organized crime, transnational crime and trafficking, and drug control; legal education; public law issues (e.g. land and property, registration, national identification, citizenship and statelessness); interim law enforcement and executive judicial functions performed by the United Nations; and security support to national police agencies. (UN General Assembly, UN Security Council, A/61/636–S/2006/980, ¶ 42; emphasis added)

11. In support of this position, see also Resnik, "Diffusing Disputes."
12. See Resnik, "Bring Back Bentham," 41, 46–50, 53.
13. Waldron, "The Rule of Law," 12. For an earlier version of Waldron's thoughts in this respect, see Waldron, "Concept and the Rule of Law."
14. Waldron, "The Rule of Law," 12.
15. See text accompanying nn. 9–12 above.
16. See, for example, Hayek's declaration that "[t]he chief function of rules of just conduct is . . . to tell each what he can count upon, what *material objects or services* he can use for his purposes, and what is the range of actions open to him." Von Hayek, *Mirage of Social Justice*, 37 (emphasis added). I believe that Waldron's notion of a "court" does not provide substantial guidance to litigants regarding which Hayekian "material objects or services" they should (or can) expect to be at their disposal when going to "court." I return to Waldron's definition of a court later in this section, for he does ultimately (if unsatisfactorily) flesh out somewhat his idea of what constitutes a court. That being the case, it seems clear that Waldron's definition cannot possibly satisfy Hayek's demands vis-à-vis legal "certainty," including certainty as to the legal institutions available to a person in time of need.
17. See text accompanying n. 12 above.
18. In his introduction to the tenth edition of Dicey's treatise, the late constitutional scholar E. C. S. Wade declared: "Let no one suppose that Dicey invented the rule of law"; Wade, "Introduction," xcvi–xcvii; see also Tamanaha, *On the Rule of Law* (discussing the long history of concepts relating to the rule of law). While there is truth to Wade's evaluation, Dicey's work has nevertheless been extremely influential since its initial publication in 1885 and has provided a foundation for much contemporary political and legal theorizing concerning the rule of law. Therefore, it would not be controversial to say that Dicey's treatise can be held responsible, at least in part, for many of the problems evident in contemporary rule of law theorizing.
19. He does tell us that "the ordinary courts of the country" consist of a "judge and jury." Dicey, *Study of the Law of the Constitution*, 250.
20. Ibid., 195–96 (citation omitted).
21. Ibid., 201 (emphasis added).
22. Ibid., 382 (emphasis added).
23. Ibid., 368 (describing an important mid-nineteenth century phase in the development of *droit administratif*; emphasis added). See also 381, 398–401, for discussion of argument-and-precedent-based development of *droit administratif*.

24. See Waldron, "The Rule of Law," 13–14, 18–23.
25. Ibid., 11 (emphasis added).
26. Raz, *The Authority of Law*, 105, 217.
27. Waldron, "The Rule of Law," 6.
28. Ibid.
29. Waldron recognizes something of a danger in being too culturally specific in his procedural recommendations, when he notes that "it would be a mistake to try to get too concrete given the variety of court-like institutions in the world." Ibid., 15. He also characterizes his discussion up to that point as "abstract" but nonetheless "captur[ing] a deep and important sense [of what is] associated foundationally with the idea of a legal system" (15). Ultimately though, in attempting to counter an ideology that veers toward a kind of sparseness and vacuity, and describes both everything and nothing, I believe that Waldron's suggestions end up suffering from *both* vagueness and cultural specificity—or, in other words, a kind of culturally specific vagueness—making them both impracticable and undesirable for many people.
30. Ibid., 6.
31. Ibid.
32. Ibid.
33. Ibid., 15, 16, 19.
34. See text accompanying nn. 13–14 above.
35. Petitioner Aff. at 43, *Vishwa Lochan Madan*, No. 386/2005.
36. Chakrabarty, *Provincializing Europe*, 29.
37. See also Solanki, *Adjudication in Religious Family Laws*, 267–69.
38. See "Ayesha," interview, Summer 2009. All quotations from Ayesha are from this interview unless otherwise noted. According to Ayesha, she was not trying to change her name on her passport after her divorce, but the passport authorities did inquire as to her marital status, and they did accept her *dar ul qaza faskh* papers as proof of her divorced status.
39. Nazeer v. Shemeema, 2016 S.C.C. OnLine Ker. 41064 (Ker. HC).
40. *Nazeer*, S.C.C. OnLine 41064, ¶ 4.
41. See Petitioner Aff., *Vishwa Lochan Madan*, No. 386/2005.
42. Petitioner Rejoinder Aff. at 16, *Vishwa Lochan Madan*, No. 386/2005. The rejoinder affidavit went on to assert that "[m]ostly those who ask the opinion of the Alims (scholars) are poor and illiterate people from rural or semi-urban areas" (31).
43. This concern with the costs and delays associated with litigation in the state's courts was echoed elsewhere in Ayesha's comments to me (see text accompanying n. 72), and has also featured prominently in formal responses to the constitutional petition in *Vishwa Lochan Madan v. Union of India*, both by the Indian government and by the All India Muslim Personal Law Board. Indeed, this perception of the problems that plague Indian state courts is a common one in Indian society. For more discussion of this common perception, as well as the Indian government's and the All India Muslim Personal Law Board's arguments in this case, see chapter 2.
44. English Rendering of Original *Ḥukm* in Urdu, 1 (on file with author).

45. Not her real name. Ayesha used the term "Auntie" (in a non-familial sense) when referring to "Khalida," which I will adopt for the purposes of this discussion.
46. At another point in our interview, Ayesha told me that her verbal communication with the *qazi* was conducted in Urdu, which was possible because "spoken Urdu is easy to understand," while written communication used a certain "kind of difficult words."
47. English Rendering of Original *Faislah* in Urdu, 1 (on file with author).
48. See text accompanying n. 47 above.
49. English Rendering of Original *Faislah* in Urdu, 2 (on file with author).
50. Ibid.
51. Ibid. For more discussion of the ominous implications of this statement, alluding to the fact that "suicide" is often actually (domestic) murder, see Mody, *The Intimate State*.
52. English Rendering of Original *Faislah* in Urdu, 2 (on file with author).
53. See text accompanying n. 52 above.
54. English Rendering of Original *Faislah* in Urdu, 2 (on file with author).
55. Commenting on the incompleteness of legal documents in themselves, and the need for ethnographic approaches in understanding such documents, Erin Stiles has observed: "It goes without saying that court documents do not tell the whole story. Although a study of documents like the [plaintiff's complaint] and [defendant's response] shows how the clerks present legal issues in a formulaic way, and the [court's judgment] illustrates the way in which a judge writes rulings, court ethnography reveals the legal understandings different parties bring to a case and sheds light on the strategies of representation involved in the creation of court documents." Stiles, *An Islamic Court in Context*, 63. See also Agmon, "Muslim Women in Court," which discusses the methodological challenges present when interpreting legal records and documents, with their many silences, siftings, and shiftings vis-à-vis reality.
56. English Rendering of Original *Faislah* in Urdu, 3 (on file with author).
57. See "Ayesha," interview, Summer 2009.
58. In his *faislah*, the *qazi* only quoted testimony from Witnesses No. 2, 4, 5, 6, and 7. See English Rendering of Original *Faislah* in Urdu (on file with author) (identifying witnesses only by number and not by name or gender).
59. Zeeshan again refused to participate in the proceedings. See "Ayesha," interview, Summer 2009.
60. English Rendering of Original *Faislah* in Urdu, 6 (on file with author).
61. Ibid., 7.
62. See text accompanying n. 13 above. See also Raz, *The Authority of Law*, 219 (advocating that "[t]he one area where the rule of law excludes all forms of arbitrary power is in . . . the judiciary where the courts are . . . to conform to fairly strict procedures").
63. See n. 3 above.
64. Shapiro, *Courts*, 1–8.
65. See Yeazell, *Civil Procedure*, 140–54, 474–78.

66. Hence, procedural rules may allow a default judgment to be set aside after it has been issued. See Fed. R. Civ. P. 55(c) (US) ("Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause.").
67. In my conversations with her, Ayesha's recounting of the numerous attempts to notify Zeeshan of the *dar ul qaza* proceedings is consistent with women's studies scholar Sabiha Hussain's findings with respect to *dar ul qazas* operating in Bihar. See Hussain, "Male Privilege, Female Anguish," 282.
68. I have in mind here a driver's license bureau as the prototypical such office. See Case, "Marriage Licenses," 1768–71, for a discussion of parallels between "marriage licenses" and "driver's licenses." Here, I think that we might also contemplate the implications of Case's discussion for something one might call a "divorce license."
69. The late legal philosopher Lon Fuller is one important rule of law theorist who has suggested that rule of law ideology and norms—including those relating to "adjudication" particularly—are both inapposite and inappropriate for family disputes. See Fuller, "Forms and Limits of Adjudication," 370–71.
70. See text accompanying nn. 65–66 above.
71. See Waldron's formulation in text accompanying n. 27 above.
72. "Ayesha," interview, Summer 2009.
73. See Messick, *The Calligraphic State*, 224; Moore, "Gender, Power, and Legal Pluralism," 531.
74. See "Ayesha," interview, Summer 2009. Describing these threats, Ayesha said to me: "[T]his is what we got to know through the insider, the person who's on the board. He gave us, uh, the impression he wouldn't tell us everything in detail, but that [Zeeshan], I think, through his lawyer, sent a letter to the *dar ul qaza* saying that, uh, if you were to give the *khula* without [Zeeshan's] consent . . . [t]hen, um, you will be in trouble. Something to that effect. Almost like threatening the *qazi*."
75. See text accompanying n. 27 above.
76. See "Ayesha," interview, Summer 2009.
77. Strictly speaking, Waldron does not explicitly declare that his "counsel" and "representation" must be state-accredited, but the general orientation toward the state in his discussion suggests as much. See text accompanying nn. 32–34 above.
78. See text accompanying n. 57 above.
79. In fact, one might view the *qazi* as actually being quite lenient in respect to Ayesha's claim, as he did not immediately "dismiss" it when it was apparent that she did not have her husband's consent to a *khula* divorce.
80. *Vishwa Lochan Madan,* A.I.R. 2957, 2960 (emphasis added).
81. Suretha Bibi v. Ispak Ansari (District Magistrate, Purulia District, Nov. 30, 1990) 2. I have corrected spacing and other errors that were in the original text.
82. *Suretha Bibi*, Nov. 30, 1990, 2. I have corrected spacing and other errors that were in the original text.
83. Ibid. I have corrected spacing errors that were in the original text. *Kaji* is an alternative (more Hindi-derived) transliteration of *qazi*. One might also note here briefly that, in the recent Supreme Court case of *Shayara Bano v. Union of India*—concerning the legal validity, in the eyes of the state, of Muslim men

pronouncing "triple *talaq*" against their wives—the one-sided nature of triple *talaq* as a method for effecting divorce drew particular opprobrium from lawyers and judges alike. Indeed, well-known Senior Advocate Indira Jaising explicitly linked the issue of triple *talaq* and *fatwas*, submitting to the Supreme Court that "[n]or [should] any 'fatwa' be issued, recognising unilateral 'talaq'. It was submitted [by Jaising], that for one party alone, the right to annul a marriage, by a unilateral private 'talaq', was clearly against public policy, and required to be declared as impermissible in law, and even unconstitutional." Shayara Bano v. Union of India, 2017 A.I.R. 4609 (SC) 4671.

84. *Suretha Bibi*, Nov. 30, 1990, 2 (emphasis added). I have corrected spacing errors that were in the original text. *Kaji* is an alternative (more Hindi-derived) transliteration of *qazi*.
85. Waldron, "The Rule of Law," 20.

4. SECULAR NEED AND DIVORCE

1. Indian Divorce Act, 1869, §2 (as amended by the Indian Divorce [Amendment] Act, 1926, and the Indian Divorce [Second Amendment] Act, 1927).
2. Ibid., §17 (as legislated in the original 1869 act). My use of scare quotes in this sentence is merely to suggest that, in many jurisdictions, the use of appellate courts to decide issues of fact and other evidentiary issues is viewed as unusual.
3. Indian Divorce (Amendment) Act, 2001, §12 (emphasis added). See also Subramanian, *Nation and Family*, 258 (discussing generally the changes to Indian Christian personal law wrought by the 2001 amendments).
4. See the Indian Divorce (Amendment) Act, 2001, §6.
5. For more discussion of this particular way of institutionally organizing India's personal law system, see my introduction to this book and, also, Sezgin, *State-Enforced Religious Family Laws*.
6. Basu, *The Trouble with Marriage*, 101 (emphasis added). The 1984 act referred to by Basu is the Family Courts Act, 1984.
7. Dissolution of Muslim Marriages Act, 1939. For an excellent discussion of the complex legislative and religious debates that led to this act, including a discussion of the act's incorporation of (Maliki) precepts of Islamic family law not usually embraced by South Asia's (Hanafi-majority) Muslims, see De, "Mumtaz Bibi's Broken Heart"; Masud, "Apostasy and Judicial Separation."
8. Law Commission of India, *Law Relating to Marriage and Divorce amongst Christians in India*, 1 (emphasis added).
9. Or, at least, a status consistent with "present conditions." See text accompanying n. 8 above. Political scientist Narendra Subramanian's recent work has also touched upon this modernity quest, noting how "[t]he majority of nationalist and communitarian projects give considerable attention to both modernity and authenticity, particularly in late-developing societies. They reconcile or fuse these considerations by presenting the changes they promote as emanations of group culture that would yield contextually appropriate forms of modernity. Official . . . Indian nationalism [is] representative of this pattern." Subramanian, *Nation and Family*, 67.

10. Law Commission of India, *Hindu Marriage Act, 1955*, 2.
11. Mohd. Ahmed Khan v. Shah Bano Begum, 1985 S.C.R. (3) 844. For more discussion of this case, see the introduction to this book.
12. *Mohd. Ahmed Khan*, S.C.R. (3) 844, 868.
13. Shayara Bano v. Union of India, 2017 A.I.R. 4609 (SC).
14. See the Muslim Family Laws Ordinance, 1961, §7. For more information on the history of the Muslim Family Laws Ordinance in Pakistan, including changing legal interpretations of its meaning, see Haider, "Islamic Legal Reform," 317–26; Yefet, "Constitution and Female-Initiated Divorce," 578–86.
15. See Ashraf, "Pakistan and 21 Other Countries."
16. *Shayara Bano*, A.I.R. 4609, 4778. Yet, despite making this observation, the chief justice proved reluctant to have the Supreme Court wade too deeply into mandating such reforms, instead strongly encouraging India's legislators to take the matter of reforming triple *talaq* under serious consideration (see 4779).
17. Or, in historian Vazira Zamindar's terms, because of a "long Partition." See Zamindar, *The Long Partition*.
18. Muslim Personal Law (*Shariat*) Application Act, 1937.
19. When Bangladesh (formerly East Pakistan) seceded from Pakistan in 1971, it retained Pakistan's Muslim Family Laws Ordinance, 1961 (see above, n. 14) and, with some amendments, it is still in effect in Bangladesh today. See the Muslim Family Laws Ordinance, 1961 (Bangladesh).
20. See text accompanying n. 10 above.
21. See text accompanying n. 10 above.
22. Law Commission of India, *Hindu Marriage Act*, *1955*, 2.
23. See De, "Mumtaz Bibi's Broken Heart," 116–17 (discussing how "[i]n colonial India, Muslim law was generally viewed as the most equitable legal system regarding women's rights and the least in need of reform. Muslim women, unlike their Hindu and Christian counterparts, had the right to arrange their own marriage, the right to remarry as a widow, the right to own and inherit property, be parties to a contract, the partial right to guardianship and custody of children and even had independent legal personhood during marriage"). See also 127 (noting how "[i]n the 1950s, divorce, inheritance by women and guardianship rights of the mother—while radical innovations to Anglo-Hindu law—were established precepts of Anglo-Mohammadan law").
24. See Madhukalya, "Meet Shayara Bano."
25. *Mohd. Ahmed Khan*, S.C.R. (3) 844, 850, 850–51 (emphasis added).
26. And, indeed, when considering the possibility of a more unilateral no-fault divorce regime for Hindu marital partners in 1978, the commission tried to strike a delicate balance when considering how long to expect marital partners to live apart before allowing them to divorce on the basis of "irretrievable breakdown" of the marriage. The commission stated: "[T]he only consideration that should be borne in mind is that the period should not be so long as to prove intolerable and be tantamount to a denial of relief, nor should it be too short as to amount to an encouragement to the seeking of divorce in haste without considering the

possibility of working the marriage in future notwithstanding its temporary failure in the past." Law Commission of India, *Hindu Marriage Act, 1955*, 27–28.

27. Basu, "Separate and Unequal," 501.
28. Ibid. (emphasis added).
29. Smt. Sarla Mudgal v. Union of India, 1995 A.I.R. 1531 (SC). For a more detailed discussion of this case, see the introduction to this book.
30. Shamim Ara v. State of U.P., 2002 A.I.R. 3551 (SC).
31. See also chapter 1's discussion of Hansen, "Recuperating Masculinity," and Hansen's discussion therein of the psycho-politics of Hindu nationalists' jealousy of Muslims.
32. Solanki, *Adjudication in Religious Family Laws*, 133.
33. Subramanian, *Nation and Family*, 249.
34. See *Shamim Ara*, A.I.R. 3551, 3555–56.
35. Or, at least, triple *talaq*. The court remarked that "[t]he divorce said to have been given . . . to [Shamim Ara] was a triple talaq though such a fact was not stated in the written statement." Ibid., 3553. However, more broadly, the court's observations and comments in its decision regarding the operation of *talaq* do not seem restricted to triple *talaq* only. On this point, Narendra Subramanian notes from his interview with the judge who wrote the *Shamim Ara* decision that he appeared hostile to "all forms of unilateral repudiation" of Muslim wives by Muslim husbands. Subramanian, *Nation and Family*, 250.
36. On this issue, toward the end of its decision, the Supreme Court noted with seeming disapproval that there had never been any "reasons substantiated in justification of [Mr. Ahmed's] talaq." *Shamim Ara*, A.I.R. 3551, 3557.
37. This point is also recognized by legal scholar Akhila Kolisetty. See Kolisetty, "Unilateral Talaq."
38. *Shamim Ara*, A.I.R. 3551, 3552–53.
39. According to the Supreme Court decision, as part of his original defense against Ms. Ara's (potentially postmarital) maintenance claims, Mr. Ahmed "also claimed protection behind the Muslim Women (Protection of Rights on Divorce) Act, 1986." Ibid., 3553.
40. Ibid.
41. At least, according to the Supreme Court description of the High Court's decision.
42. *Shamim Ara*, A.I.R. 3551, 3553.
43. Ibid.
44. Ibid., 3557.
45. See text accompanying nn. 36–38 above.
46. I use this latter term deliberately, as there is a kind of disgust operating here in relation to *talaq*. This impression is confirmed by some of the opinions held in respect of triple *talaq*, some of which are recorded in the chief justice's minority opinion in *Shayara Bano*: "The position adopted by [some counsel] was harsh[;] they considered [triple *talaq*] as disgusting, loathsome and obnoxious. Some even described it as being debased, abhorrent and wretched." *Shayara Bano*, A.I.R. 4609, 4775–76.

47. Subramanian, *Nation and Family*, 137–98, 199–265.
48. This argument is admittedly in some tension with Narendra Subramanian's view that "indigenous norms" have been, perhaps, even more responsible for reforms in Hindu personal law in India than have "Western precedents." Subramanian, *Nation and Family*, 145. In making this observation, he points to the Law Commission of India's Fifty-Ninth Report and its discussions concerning reform of the Hindu Marriage Act, 1955 (see 145–46). Yet, while a close examination of the report finds its introductory discussions extensively concerned with Hindu traditions and practices relating to family law, there are several subsequent instances in the report where English and other Western precedents are discussed and cited—a reality not explicitly acknowledged by Subramanian. See Law Commission of India, *Hindu Marriage Act, 1955, and Special Marriage Act, 1954*.
49. Basu, *The Trouble with Marriage*, 101 (emphasis added). See also Subramanian, *Nation and Family*, 169 (noting that "Section 23(2) of the [Hindu Marriage Act's provisions governing divorce] . . . require courts to attempt reconciliation before they decree divorce or judicial separation").
50. See De, "Mumtaz Bibi's Broken Heart," 120.
51. De notes that one strand of pro-DMMA argument was motivated by a view that "the Indian High Courts, by adopting a narrow doctrinal approach [to Muslim women's apostasy], had missed the spirit of [apostasy] doctrine and had treated [it] in the case of the wife as a privilege that which was intended to be a punishment." Ibid., 120–21. In his scholarship, religion scholar Muhammad Qasim Zaman has described the possibility that "several thousand" Muslim women had actually apostasized for the "privilege" of divorce in the decades before the passage of the DMMA. Zaman, *Ashraf ʿAli Thanawi*, 62 (quoting the influential theologian, Ashraf ʿAli Thanawi). Zaman has also noted that local, village-level Islamic scholars were slyly facilitating this apostasy (see 76–78).
52. Narendra Subramanian sees things differently. See Subramanian, *Nation and Family*, 211 (describing the DMMA as legally empowering for Muslim women).
53. Dissolution of Muslim Marriages Act, 1939, §4.
54. For more on these multipronged criminalization efforts, see "Cabinet Clears Ordinance to Criminalise Triple Talaq"; "Triple talaq: India criminalises Muslim 'instant divorce.'"
55. Unlike many other personal law acts for other Indian communities, the Muslim Personal Law (*Shariat*) Application Act, 1937, is written in an extremely open-ended manner, which leaves much of the applicable law uncodified and seemingly dependent on non-state discourses and actors. For the operative text of the 1937 act, see chapter 1.
56. *Shayara Bano*, A.I.R. 4609, 4775.
57. Admittedly, this observation is premised, not on any explicit limitations on the powers of the Indian Supreme Court (or other state lawmakers), but rather is based on the Indian state's historical reluctance to legislate (or re-legislate) Muslim personal law. On this reluctance, see Subramanian, *Nation and Family*, 232–35.
58. Recent efforts to criminalize triple *talaq* have amply demonstrated these instincts. See text accompanying n. 54 above.

59. See text accompanying nn. 50–53 above.
60. This inaccessibility was particularly suggested in chapter 1, with its presentation of statistics suggesting that Muslim women only rarely (at least relatively speaking) bring DMMA cases in state courts. And beyond the DMMA, the well-known Indian feminist Flavia Agnes has recently written of her despair at the inaccessibility of state courts for all kinds of women involved in all sorts of disputes concerning family law or family violence. See Agnes, "Blind in the Fold of Justice," where she observes: "While there have been many legislative reforms to safeguard women's rights, the infrastructure to actualise the ambitious and far-reaching reforms are sadly lacking within our court spaces."
61. For more on how a husband's pronouncement of *talaq* works in the context of *khula*, see chapter 3.
62. See Aliya v. Mumtaz, Case No. 187/14, 94 (on file with author). I have not listed this information with any specificity here so as to protect the privacy of the parties.
63. I detect this exasperation, not only in the extended amount of time the *qazi* spent at the beginning of his *faislah* recounting the various stops and starts he had to face in getting Mumtaz to appear and cooperate with the *dar ul qaza* proceedings, but also in the fact that, at the end of his opinion, the *qazi* recounted some of this all over again, and then noted how it reflected poorly on Mumtaz.
64. The Urdu used in the original text was the ambiguous *humeṉ*, which can be translated as "us" or "me" in this context. I have translated it as "us" here.
65. The Urdu used in the original text was the ambiguous *āp*, which can be translated as "you" (singular) or "you" (plural) in this context. I have translated it as referring to the (singular) defendant.
66. I am translating the Urdu word *barābar*, used in the original text, as "regularly."
67. *Aliya v. Mumtaz*, No. 187/14, 97–98. Later on in his *faislah*, the *qazi* again refers to directions that the Tis Hazari Court (apparently) gave to the defendant to appear, and participate, in the proceedings at the *dar ul qaza* (see 115–16).
68. Ibid., 101–2.
69. Formally known as the Crime Against Women Cell—a special unit of the police. For more information on this unit in the context of Delhi, see "Crime against Women Cell."
70. The original Urdu refers more obliquely to the "the defendant's side" having called the *panchayat*.
71. The more accurate transliteration of this Urdu word—referring to one's maternal uncle—is *māmūṉ*. In the rest of this translation, however, I will be using the more colloquial transliteration of *mamoon*.
72. There is a minor spelling error here, either in the original Urdu or in the Urdu transliteration provided to me.
73. This is a reference to the Tis Hazari court complex, which is a large civil and criminal court complex in the north of Delhi.
74. *Aliya v. Mumtaz*, No. 187/14, 102–3.
75. Ibid., 103. This was expressed a bit more obliquely in the original Urdu, which stated: *is se mujhe āzād karādiyā jā'e cā hai is se mujhe ṯalāq dilvādī yā is se merā nikāḥ faskh karādiyā.*

76. Ibid., 104.
77. In the original text, the plaintiff is referred to here as a *laṛkī*, or "girl."
78. Who precisely "they" refers to here is uncertain, but it seems to be referring at least to the plaintiff's family, if not also the plaintiff herself.
79. *Aliya v. Mumtaz*, No. 187/14, 104.
80. See text accompanying n. 75 above.
81. *Aliya v. Mumtaz*, No. 187/14, 105. There is a minor spelling error in relation to the word *panchayat*, either in the original Urdu or in the Urdu transliteration provided to me. The other Urdu word used here, *birādarī*, can be translated as "clan."
82. The original Urdu used in this respect was *pancāyat kā sharʿaʾī faiṣlah*.
83. *Aliya v. Mumtaz*, No. 187/14, 106. The *qazi* later notes in his *faislah* that a copy of a *fatwa*, obtained by Mumtaz from a seemingly well-known *madrasa* in Delhi, was filed at the *dar ul qaza* by Mumtaz during the course of the proceedings (see 113).
84. See text accompanying n. 74 above.
85. *Aliya v. Mumtaz*, No. 187/14, 105.
86. This is an abbreviation for Assistant Commissioner of Police.
87. These numbers refer to different provisions of the Indian Penal Code, 1860. Section 498A of the code criminalizes the commission of abuse accompanying any demand for a wife to provide postmarital dowry to her husband or husband's relatives. See Indian Penal Code, 1860, §498A (criminalizing "harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand"). Section 406 of the Indian Penal Code criminalizes "criminal breach of trust" (including the misappropriation of property of one's marital partner). See Indian Penal Code, 1860, § 406. Aggrieved wives sometimes try to initiate Section 406 charges in conjunction with Section 498A charges. See Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 S.C.C. 561 (SC). See also Lemons, "Sharia Courts and Muslim Personal Law," 623, for another instance of this kind of joint charging.
88. See *Aliya v. Mumtaz*, No. 187/14, 108.
89. Ibid., 107–8. The Urdu used in the original text indicates that this was a *ru<u>kh</u>ṣat* case.
90. See ibid., 108.
91. See ibid., 108–9.
92. Ibid., 109. In his summary of factual findings, the *qazi* also noted how "[t]he defendant has gotten cases filed against the plaintiff and her relatives in Tis Hazari Court, Delhi and, also, Muzaffarnagar. According to the defendant, he has also gotten a case registered against the plaintiff and her relatives in Ghaziabad" (111).
93. Ibid., 112.
94. See ibid., 114.
95. The Urdu used in the original text is actually a bit more ambiguous, referring simply to *āp* (i.e., "you" [plural]).
96. The actual Urdu verb used in the original text was *samjhānā*.
97. *Aliya v. Mumtaz*, No. 187/14, 115.
98. Ibid., 117.

99. See text accompanying nn. 86–88 above.
100. Admittedly, there is some uncertainty here. In her statements to the *dar ul qaza*, as recorded by the *qazi* in his *faislah*, Aliya does not mention pursuing any kind of divorce action in front of the state courts. However, Mumtaz refers to Aliya having done so. See text accompanying n. 89 above.
101. See text accompanying n. 75 above.
102. See Basu, *The Trouble with Marriage*, 86–117 (discussing the relatively lawyer-less family court system in India).
103. E.g., the nature of the judges.
104. E.g., the nature of the lawyers.
105. See the Protection of Women from Domestic Violence Act, 2005, §20.
106. See ibid., §18.
107. See Basu, *The Trouble with Marriage*, 213–14, for her vivid description of a situation that she observed where an abused woman was advised by lawyers to use the provisions of the Protection of Women from Domestic Violence Act, 2005, to quickly remedy her abuse because the woman's civil divorce would take quite a bit of time to effectuate.
108. See Agnes, "Blind in the Fold of Justice" (noting how "[t]he Protection of Women from Domestic Violence Act was enacted in 2005 to provide immediate protection to women facing violence and secure their rights of residence in their matrimonial home. The litigation arena was shifted from the [civil] family courts to the [criminal] magistrates' courts. . . . Yet, a decade later, a feeling of dejection persists among activists that this too is a failed project. . . . The lawyers in these criminal courts, unfamiliar with civil litigation, entangle women in unnecessary, long-drawn-out and multiple litigation").
109. Law Commission of India, *Need for Amendment of the Provisions of Chapter IX of the Code of Criminal Procedure, 1973*, 11–12.
110. See Law Commission of India, *Section 498A IPC*. Furthermore, in a recent widely reported decision by the Supreme Court, *Arnesh Kumar v. State of Bihar*, the court observed that "[t]he fact that Section 498-A IPC is a cognizable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision." Arnesh Kumar v. State of Bihar (2014) 8 S.C.C. 273 (SC) 276. The Supreme Court continues, describing some fairly significant statistics in relation to Section 498A, and noting that "its share is 6% out of the total persons arrested under the crimes committed under the [Indian] Penal Code. . . . [and t]he rate of charge-sheeting in cases under Section 498-A . . . is as high as 93.6%, while the conviction rate is only 15%, which is lowest across all heads" (277). The diagnosis of a "Section 498A problem" by the Law Commission and the Supreme Court has been controversial. Here, I am not endorsing this diagnosis, but merely using its existence to highlight how influential parts of the Indian state are increasingly viewing Section 498A as a law that many women are misusing—despite perhaps still being necessary. As a result of this "misuse," there is a backlog of cases afflicting the state's legal system, in addition to a perceived problem for Indian men.

111. Law Commission of India, *Section 498A IPC*, 2–3.
112. Ibid., 9.
113. Basu, *The Trouble with Marriage*, 177.

5. ILLEGITIMACY AND INDIGENEITY

1. See Foucault, "On Popular Justice"; Shapiro, *Courts*; Mukherjee, *India in the Shadows of Empire*.
2. Historian James Jaffe's discussion of British proceduralism, especially as it relates to the development of ostensibly more informal kinds of *panchayat* justice during the early colonial period, is helpful reading here. See Jaffe, *Ironies of Colonial Governance*.
3. It is also very much the case that the British colonial state itself never lived up to many of its professed ideals.
4. Galanter, "Displacement of Traditional Law," 65.
5. Foucault, "On Popular Justice," 1.
6. The "intervention" was a conversation conducted in early 1972 between Foucault and two other French leftists and was originally published in Jean-Paul Sartre's magazine, *Les temps modernes*. See Miller, *Passion of Michel Foucault*, 204. This piece is now included in a widely circulated volume of Foucault's essays, interviews, and the like. See Foucault, "On Popular Justice."
7. See Miller, *Passion of Michel Foucault*, 203–6.
8. Foucault, "On Popular Justice," 1.
9. Ibid., 8.
10. At one point in this conversation, Foucault states: "I hold firmly to the view that the organisation of courts, at least in the West, is necessarily alien to the practice of popular justice." Ibid., 9. Elsewhere, Foucault is drawn into a discussion of China by his interlocutors but generally tries to avoid making any categorical characterizations about the Chinese court system. See ibid., 8, 14, 28.
11. Ibid., 4.
12. See Shapiro, *Courts*.
13. This overview is based on Shapiro's discussion in ibid., 2–8 especially.
14. Ibid., 8.
15. Shapiro's discussion of these ideas is complicated, but a good sense of them is provided when he notes how—because of the problem of litigant consent—the loser to a modern state court dispute "must be convinced that the legal rule imposed on him did not favor his opponent. Thus the yearning for neutral principles of law found among contemporary lawyers." As well, such a loser "must be convinced that [the] judicial office itself ensures that the judge is not an ally of his opponent. Thus the yearning for a professional and independent judiciary." Ibid., 8 (citation omitted).
16. The access of state courts to the use of force is something that must be reckoned with, even if the ability to use force is a highly mediated and uncertain one. As we saw in the previous chapter's examination of the *dar ul qaza* case of *Aliya v. Mumtaz*,

state court judges and litigants often use the forceful tools of the state—for example, police and prisons—to try to compel compliance with the law. Yet brute force has its limitations; a fact recognized and elaborated upon by Robert Cover in an often overlooked article by him (and coauthor Alexander Aleinikoff). See Cover and Aleinikoff, "Dialectical Federalism." In this article, they explore how ostensibly powerful federal courts in the United States—including the US Supreme Court—face significant constraints on the enforceability of their decisions.

17. See Mukherjee, *India in the Shadows of Empire*.
18. Mukherjee also discusses the role of "justice as liberty" in India's colonial and postcolonial transitions, but here I concentrate on her discussion of the important role that "justice as equity" played. In her work, these two conceptions of justice work in conjunction with each other (see ibid., xxiii), so the conclusions drawn here are relatively robust, even though they specifically rely upon her "justice as equity" discussion.
19. See ibid., xxvii–xxx, 150–80.
20. See ibid., xxvii, 150, 167–68.
21. Historian Julia Stephens has artfully pointed out the difficulty, however, of demarcating the line between "domestic and economic transactions" and, more broadly, the borders of Muslim personal law. Stephens, *Governing Islam*, 53 and chap. 2.
22. The law of *waqf* (or Muslim endowments and trusts) is also usually considered to be part of Muslim personal law. And, without a doubt, *waqf* disputes (like many family disputes) implicate property in fundamental ways. However, statistics that I was shown at the Imarat-e-Shariah's headquarters (described in chapter 1) indicate that only 2% of cases initiated in the Imarat-e-Shariah *dar ul qaza* network over a twenty-five-year-period concerned property. To be sure, it is unclear whether this 2% aggregate figure included *waqf* cases. But given that the Urdu word used in this part of the statistics table—namely, *ḥaqqiyat*—is different from *waqf*, there is reason to believe that the 2% figure was not intended to include initiated *waqf* disputes. That said, if the 2% figure does encompass both *waqf* and non-*waqf* property disputes, then this merely implies that the case discussed in this section is even more unusual (seeing that this property dispute did not involve a *waqf* property or, at least, did not do so in any way easily discernible from the facts of the case presented in the *faislah*).
23. In this regard, the *qazi* noted that there was substantial agreement between the plaintiff and the defendant in their initial statements to the *dar ul qaza* as to the essential facts of the case. The *qazi* then noted that this led him to conclude there was no need to obtain additional evidence from either party. In other words, this appeared to be a case where the *qazi* felt that the dispute turned, not so much on "what the facts underlying the dispute really were," but rather what the proper interpretation of the law (of Islamic property) should be.
24. I am narrating here from the defendant's statement to the *dar ul qaza*. As only one party's position in a contested litigation, one obviously cannot take such a one-sided statement completely at face value. However, that said, there appeared to be at least some truth to the statement, as I was able to confirm that there is an

Indian Supreme Court decision dating from the 1980s concerning litigation between the two families—which, as the defendant reported, the defendant's family won. While this Supreme Court case is a matter of public record, in order to help preserve the anonymity of the parties involved in the *dar ul qaza* case discussed here, I have not provided the case citation.

25. See n. 24 above for a discussion of why I am not providing a case citation here to the Supreme Court decision.
26. And not just in the sense that Katherine Lemons identifies in her recent work "Sharia Courts and Muslim Personal Law."
27. See text accompanying n. 14 above.
28. See text accompanying n. 15 above.
29. Shapiro, *Courts*, 49.
30. On this point, see Sharafi, "The Marital Patchwork." In this piece, Sharafi observes how forum shopping is akin to engaging in a "legal lottery" with highly uncertain prospects of victory (1009). Thus, this kind of horizontal appeal is in fact akin to a "regular" vertical appeal, with its generally low rate of success for appellants.
31. Ibid.

CONCLUSION

1. Agrama, *Questioning Secularism*, 1.
2. Solanki, *Adjudication in Religious Family Laws*, 48, 56. Solanki cautions the reader that, with her "distinction between state law and societal law," she is not "affirm[ing] legal centralism or establish[ing] the hierarchy of state courts and law in all instances" (47).
3. Lemons, "Sharia Courts and Muslim Personal Law," 626.
4. This theme of non-state "resistance" to the state runs throughout Sezgin's recent thorough work on human rights and personal laws across Israel, Egypt, and India. See Sezgin, *State-Enforced Religious Family Laws*, 12, 36–37, 45.
5. For a broader discussion of the relationship between the arts and practices of secularism in India, see Zitzewitz, *The Art of Secularism*.
6. Shayara Bano v. Union of India, 2017 A.I.R. 4609 (SC), 4775.
7. Stoler, *Along the Archival Grain*, 70. Admittedly, Stoler's project (and question) in her work is somewhat different from the one here, as she is more interested in the ways that states foster rather than embody sentiment (see 63–64).
8. The current preamble to the Indian constitution declares that India is a "sovereign socialist secular democratic republic." Constitution of India, 1950, Preamble.
9. Multiple parts of the current Pakistani constitution are pointed to when the Pakistani state is characterized as an "Islamic state," but the provision that is perhaps most commonly invoked in this regard is Article 2 and its declaration that "Islam shall be the State religion of Pakistan." Constitution of the Islamic Republic of Pakistan, 1973, art. 2. Of course, there is also the fact that Pakistan's formal name is the "Islamic Republic of Pakistan." For more on Pakistan's Islamic (constitutional) identity, see Redding, "Constitutionalizing Islam."

10. Mahmood, "Religious Reason and Secular Affect," 84.
11. Self-consciously confessional or sectarian states—including Muslim varietals of this kind of state formation—might also be sites of anti-Muslim bias. In this respect, it is worth noting how Pakistan's constitution defines what it means to be a Muslim in a way that, in effect, minimizes the importance of self-identification. As a result, majoritarian versions of Islam are enabled to, potentially or actually, marginalize Muslim minorities (e.g., Ahmadis, Ismailis, feminist Muslims) in Pakistan. See Redding, "Constitutionalizing Islam"; Constitution of the Islamic Republic of Pakistan, 1973, art. 260(3) (which defines both what it means to be "Muslim" and "non-Muslim").
12. As I see it, this can be a genuine (albeit highly problematic) fear, and not the sort of manufactured fear that religion scholar Lorenz Trein identifies when he describes how "political players fabricate fears, which is to assume that Islamophobia appears to be rather an evoked and purposeful political fiction than something that really exists." Trein, "Governing the Fear of Islam," 46.
13. Nussbaum herself considers fear as an emotion in her recent work, while noting its distinctive aspects. See Nussbaum, *Political Emotions*, 315.
14. Ibid., 320–21.
15. See Schmitt, *Concept of the Political*. Schmitt is perhaps best known for highlighting the importance that political sovereigns attach to their ability to declare who is a "friend" and who an "enemy."
16. Nussbaum writes: "Fear, then, is a form of heightened awareness, but one with a very narrow frame, initially at least: one's own body, and perhaps, by extension, one's life, and people and things connected to it. . . . Fear *can* be[come] reasonable, based on well-grounded views of good and ill, and it can also be broadened to include the [welfare of the] entire community." Nussbaum, *Political Emotions*, 321 (emphasis added).
17. Scott, *Seeing Like a State*, 27.
18. Ibid., 4.
19. Ibid., 12–13.
20. See ibid., 15, 18.
21. Ibid., 348–49.
22. See Ahmed, *Queer Phenomenology*.
23. See ibid., 60, 112.
24. Ibid., 107.
25. See ibid., chap. 3. As Ahmed aptly describes her project in this chapter: "It is time for us to consider the significance of 'the orient' in orientation, or even 'the oriental': what relates to, or is characteristic of the Orient *or* East, including 'natives' or inhabitants of the East" (113).
26. Ibid., 114.
27. Ibid., 117.
28. Ibid., 118–19.
29. See Nair, "India's 'Beef Lynchings.'"
30. See Scott, *Politics of the Veil*.

BIBLIOGRAPHY

LEGAL CASES AND MATERIALS

Abdul Ghani v. Mt. Sardar Begum, 1945 A.I.R. 183 (Lah. HC)

Abdur Rahman v. Secretary to Government, Writ Petition No. 33059/2016

Aliya v. Mumtaz, Case No. 187/14

Annexure to Respondent No. 10 Counter-Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Arnesh Kumar v. State of Bihar (2014) 8 S.C.C. 273 (SC)

Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012)

Bibi Jairun Nisa v. Md. Azamatullah Ansari (District Court, Godda District, 1996)

Dr. Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte, 1996 A.I.R. 1113 (SC)

English Rendering of Original *Faislah* in the Case of Ayesha

English Rendering of Original *Ḥukm* in the Case of Ayesha

Ganpat v. Presiding Officer, 1975 A.I.R. 420 (SC)

George Sebastian v. Molly Joseph, 1995 A.I.R. 16 (Ker. HC)

George Sebastian v. Molly Joseph, 2000 S.C.C. OnLine Ker. 271 (Ker. HC)

K. C. Moyin v. Nafeesa, 1973 A.I.R. 176 (Ker. HC)

Mohd. Ahmed Khan v. Shah Bano Begum, 1985 S.C.R. (3) 844

Molly Joseph v. George Sebastian, 1997 A.I.R. 109 (SC)

Nazeer v. Shemeema, 2016 S.C.C. OnLine Ker. 41064 (Ker. HC)

Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 S.C.C. 561 (SC)

Petitioner Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Petitioner Rejoinder Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Respondent No. 1 Counter-Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Respondent No. 6 Counter-Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Respondent No. 9 Counter-Aff., Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Respondent No. 10 Counter-Aff., Vishwa. Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005

Shamim Ara v. State of U.P., 2002 A.I.R. 3551 (SC)

Shayara Bano v. Union of India, 2017 A.I.R. 4609 (SC)

Smt. Sarla Mudgal v. Union of India, 1995 A.I.R. 1531 (SC)
Suretha Bibi v. Ispak Ansari (District Magistrate, Purulia District, Nov. 30, 1990)
Vishwa Lochan Madan v. Union of India, 2014 A.I.R. 2957 (SC)

LEGISLATION AND CONSTITUTIONS

Act No. XI of 1864 (Governor-General of India in Council) (An Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices)
Code of Criminal Procedure, 1973 (India)
Constitution of India, 1950
Constitution of the Islamic Republic of Pakistan, 1973
Dissolution of Muslim Marriages Act, 1939 (India)
Family Courts Act, 1984 (India)
Federal Rules of Civil Procedure (US)
Gram Nyayalayas Act, 2008 (India)
Hindu Marriage Act, 1955 (India)
H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010). https://www.sos.ok.gov/documents/questions/755.pdf
Indian Christian Marriage Act, 1872
Indian Divorce Act, 1869
Indian Divorce (Amendment) Act, 1926
Indian Divorce (Second Amendment) Act, 1927
Indian Divorce (Amendment) Act, 2001
Indian Penal Code, 1860
Kazis Act, 1880 (India)
Muslim Family Laws Ordinance, 1961 (Bangladesh)
Muslim Family Laws Ordinance, 1961 (Pakistan)
Muslim Personal Law (Shariat) Application Act, 1937 (India)
Muslim Women (Protection of Rights on Divorce) Act, 1986 (India)
Ontario Regulation 134/07, Family Arbitration (Arbitration Act, 1991)
Protection of Women from Domestic Violence Act, 2005 (India)

OTHER SOURCES

Adcock, C. S. *The Limits of Tolerance: Indian Secularism and the Politics of Religious Freedom*. New York: Oxford University Press, 2014.
Agmon, Iris. “Muslim Women in Court according to the *Sijill* of Late Ottoman Jaffa and Haifa: Some Methodological Notes.” In *Women, the Family and Divorce Laws in Islamic History*, edited by Amira El Azhary Sonbol, 126–40. Syracuse, NY: Syracuse University Press, 1996.
Agnes, Flavia. *Law and Gender Inequality: The Politics of Women’s Rights in India*. New Delhi: Oxford University Press, 1999.
———. *Family Law, Volume 1: Family Laws and Constitutional Claims*. New Delhi: Oxford University Press, 2011.

———. “Blind in the Fold of Justice.” *The Hindu*, Jan. 24, 2016 (updated Sept. 22, 2016). https://www.thehindu.com/news/cities/mumbai/Blind-in-the-fold-of-justice /article14308413.ece.

Agrama, Hussein Ali. “Ethics, Tradition, Authority: Toward an Anthropology of the Fatwa.” *American Ethnologist* 37, no. 1 (2010): 2–18.

———. *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt*. Chicago: University of Chicago Press, 2012.

Ahmad, Aijaz. “Azad’s Careers: Roads Taken and Not Taken.” In *Islam and Indian Nationalism: Reflections on Abul Kalam Azad*, edited by Mushirul Hasan, 122–75. New Delhi: Manohar, 1992.

Ahmed, Farrah. *Religious Freedom under the Personal Law System*. New Delhi: Oxford University Press, 2016.

Ahmed, Farzand. “Fatwa against Rape Victim Divides Muslim Community in Uttar Pradesh.” *India Today*, July 11, 2005. https://www.indiatoday.in/magazine/nation /story/20050711-fatwa-against-rape-victim-divides-muslim-community-in-uttar -pradesh-787271-2005-07-11.

Ahmed, Firoz Bakht. “Where Is the Real Muslim?” *Hindustan Times,* July 6, 2005.

Ahmed, Sara. *Queer Phenomenology: Orientations, Objects, Others*. Durham, NC: Duke University Press, 2006.

Albert, Richard. “Constitutional Amendment by Constitutional Desuetude.” *American Journal of Comparative Law* 62, no. 3 (2014): 641–86.

Anshuman, Kumar. “Jamiat Ulama-i-Hind: Madani and Madani.” *Open*, Dec. 4, 2015. www.openthemagazine.com/article/india/jamiat-ulama-i-hind-madani-madani.

Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity*. Stanford, CA: Stanford University Press, 2003.

Ashraf, Ajaz. “If Pakistan and 21 Other Countries Have Abolished Triple Talaq, Why Can’t India?” *Scroll.in*, Apr. 18, 2016. http://scroll.in/article/806299/if-pakistan-and -21-other-counties-have-abolished-triple-talaq-why-shouldnt-india.

Ashraf, Ali. “Appraisal of Azad’s Religio-Political Trajectory.” In *Islam and Indian Nationalism: Reflections on Abul Kalam Azad*, edited by Mushirul Hasan, 100–121. New Delhi: Manohar, 1992.

“Ayesha” interview by Jeffrey A. Redding. Delhi, Summer 2009.

Bano, Samia. *Muslim Women and Shariʿah Councils: Transcending the Boundaries of Community and Law*. Basingstoke: Palgrave Macmillan, 2012.

Barry, Brian. *Culture and Equality: An Egalitarian Critique of Multiculturalism*. Cambridge: Polity, 2001.

Basu, Srimati. “Separate and Unequal: Muslim Women and Un-Uniform Family Law in India.” *International Feminist Journal of Politics* 10, no. 4 (2008): 495–517.

———. *The Trouble with Marriage: Feminists Confront Law and Violence in India*. Oakland: University of California Press, 2015.

Bhuwania, Anuj. *Courting the People: Public Interest Litigation in Post-Emergency India*. Cambridge: Cambridge University Press, 2017.

Bingham, John. “Islamic Law Is Adopted by British Legal Chiefs.” *Telegraph*, Mar. 22, 2014. www.telegraph.co.uk/news/religion/10716844/Islamic-law-is-adopted-by -British-legal-chiefs.html.

Blank, Jonah. *Mullahs on the Mainframe: Islam and Modernity among the Daudi Bohras*. Chicago: University of Chicago Press, 2001.

Bowen, John R. *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*. Cambridge: Cambridge University Press, 2003.

———. *On British Islam: Religion, Law, and Everyday Practice in Shariʿa Councils*. Princeton, NJ: Princeton University Press, 2016.

Boyd, Marion. *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*. Ontario: Ministry of the Attorney General, 2004.

"Cabinet Clears Ordinance to Criminalise Triple Talaq." *Times of India*, Sept. 20, 2018. https://timesofindia.indiatimes.com/india/cabinet-clears-ordinance-to-criminalise-triple-talaq/articleshow/65878986.cms.

Calhoun, Craig, Mark Juergensmeyer, and Jonathan Van Antwerpen. "Introduction." In *Rethinking Secularism*, edited by Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen, 3–30. New York: Oxford University Press, 2011.

Case, Mary Anne. "Marriage Licenses." *Minnesota Law Review* 89, no. 6 (2005): 1758–97.

Chakrabarty, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton, NJ: Princeton University Press, 2000.

———. *Habitations of Modernity: Essays in the Wake of Subaltern Studies*. Chicago: University of Chicago Press, 2002.

Chatterjee, Partha. *The Nation and Its Fragments: Colonial and Postcolonial Histories*. Princeton, NJ: Princeton University Press, 1993.

Cohen, Lawrence. "Holi in Banaras and the *Mahalanḍ* of Modernity." *GLQ: A Journal of Lesbian and Gay Studies* 2, no. 4 (1995): 399–424.

Cohn, Bernard S. *Colonialism and Its Forms of Knowledge: The British in India*. Princeton, NJ: Princeton University Press, 1996.

Comaroff, John, and Jean Comaroff. *Ethnography and the Historical Imagination*. Boulder, CO: Westview Press, 1992.

Concerned Citizens Tribunal. *Crime against Humanity (Volume I): An Inquiry into the Carnage in Gujarat—List of Incidents and Evidence*. Mumbai, India, 2002. https://www.sabrang.com/tribunal/tribunal1.pdf.

———. *Crime against Humanity (Volume II): An Inquiry into the Carnage in Gujarat—Findings and Recommendations*. 2002. https://www.sabrang.com/tribunal/tribunal2.pdf.

Cossman, Brenda, and Ratna Kapur. *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law*. New Delhi: Oxford University Press, 1999.

Cover, Robert M., and T. Alexander Aleinikoff. "Dialectical Federalism: Habeas Corpus and the Court." *Yale Law Journal* 86, no. 6 (1977): 1035–1102.

"Crime against Women Cell." Mar. 23, 2014. *Delhi Commission for Women*. http://delhi.gov.in/wps/wcm/connect/lib_dcw/DCW/Home/Projects/CICs/CAW+cell.

Dar ul Qaza, South Delhi (All India Muslim Personal Law Board). *Report on Cases filed between January 29, 2004 and December 1, 2005*. 2005.

De, Rohit. "Mumtaz Bibi's Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act." *Indian Economic and Social History Review* 46, no. 1 (2009): 105–30.

de Sousa Santos, Boaventura. "The Heterogeneous State and Legal Pluralism in Mozambique." *Law & Society Review* 40, no. 1 (2006): 39–75.

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. 10th ed. London: Macmillan, 1959.

Douglas, Ian Henderson. *Abul Kalam Azad: An Intellectual and Religious Biography*. Edited by Gail Minault and Christian W. Troll. Delhi: Oxford University Press, 1988.

Falahi, Mumtaz Alam. "Darul Qaza: More a Slogan than a Serious Issue for Muslim Personal Law Board?" *TwoCircles.net*, July 8, 2009. http://twocircles.net/node/154577#.U2gaIcZuFuY.

Faruqi, Ziya-ul-Hasan. *The Deoband School and the Demand for Pakistan*. New York: Asia Publishing House, 1963.

Fiss, Owen M. "Against Settlement." *Yale Law Journal* 93, no. 6 (1984): 1073–90.

Fitzpatrick, Peter. "Law, Plurality and Underdevelopment." In *Legality, Ideology, and the State*, edited by David Sugarman, 159–82. London: Academic Press, 1983.

———. "Law and Societies." *Osgoode Hall Law Journal* 22, no. 1 (Spring 1984): 115–38.

———. "'The Desperate Vacuum': Imperialism and Law in the Experience of Enlightenment." *Droit et Société* 13, no. 1 (1989): 347–58.

Former Judges. "Hon'ble Mr. Justice Chandramauli Kumar Prasad." *Supreme Court of India*. http://164.100.107.37/judges/bio/149_ckprasad.htm (accessed Aug. 21, 2017).

Foucault, Michel. "On Popular Justice: A Discussion with Maoists." In *Power/Knowledge: Selected Interviews and Other Writings (1972–1977)*, edited by Colin Gordon, translated by Colin Gordon et al., 1–36. Brighton, Sussex: Harvester Press, 1980.

Friedmann, Yohanan. "The Attitude of the *Jamʿiyyati-i ʿUlama-i Hind* to the Indian National Movement and the Establishment of Pakistan." In *Inventing Boundaries: Gender, Politics and the Partition of India*, edited by Mushirul Hasan, 157–77. New Delhi: Oxford University Press, 2000.

Fuller, Lon L. "The Forms and Limits of Adjudication." *Harvard Law Review* 92, no. 2 (1978): 353–409.

Gabriel, Ruth. "Learned Communities and British Educational Experiments in North India: 1780–1830." PhD diss., University of Virginia, 1979.

Galanter, Marc. "The Displacement of Traditional Law in Modern India." *Journal of Social Issues* 24, no. 4 (1968): 65–91.

———. "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law." *Journal of Legal Pluralism and Unofficial Law* 13, no. 19 (1981): 1–47.

Galanter, Marc, and Upendra Baxi. "Panchayat Justice: An Indian Experiment in Legal Access." In *Access to Justice: Emerging Issues and Perspectives*. Vol. III. Edited by Mauro Cappelletti and Bryant Garth, 341–86. Alphen aan den Rjin: Sijthoof and Noorfhoff, 1978. Reprinted in Marc Galanter, *Law and Society in Modern India*, 54–91. Delhi: Oxford University Press, 1989.

Galanter, Marc, and Jayanth K. Krishnan. "'Bread for the Poor': Access to Justice and the Rights of the Needy in India." *Hastings Law Journal* 55, no. 4 (March 2004): 789–834.

Ghildiyal, Subodh. "Muslim Law Board Tones Down Stand." *Times of India*, Aug. 22, 2005. http://timesofindia.indiatimes.com/india/Muslim-law-board-tones-down-stand/articleshow/1206829.cms.

Ghosh, J. C. "The Educational Leader." In *Maulana Abul Kalam Azad: A Memorial Volume*, edited by Humayun Kabir, 101–15. Bombay: Asia Publishing House, 1959.

Ghosh, Papiya. "*Muttahidah qaumiyat* in *aqalliat* Bihar: The Imarat i Shariah, 1921–1947." *The Indian Economic and Social History Review* 34, no. 1 (1997): 1–20.

Golwalkar, M. S. "From Red Fort Grounds" (speech). Nov. 14, 1965, Public Rally, Red Fort Grounds. Excerpted in *Organiser*, Nov. 21, 1965, 1, 8–9, 15.

Griffiths, John. "What Is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1–55.

Haider, Nadya. "Islamic Legal Reform: The Case of Pakistan and Family Law." *Yale Journal of Law and Feminism* 12, no. 2 (2000): 287–342.

Hameed, Syeda, Ruth Manorama, Malini Ghose, Sheba George, Farah Naqvi, and Mari Thekaekara. *How Has the Gujarat Massacre Affected Minority Women? The Survivors Speak*. April 16, 2002. http://cac.ektaonline.org/resources/reports/womensreport.htm.

Hannon, Michael. "A Closer Look at Unpublished Opinions in the United States Courts of Appeals." *Journal of Appellate Practice and Process* 3, no. 1 (2001): 199–250.

Hansen, Thomas Blom. "Recuperating Masculinity: Hindu Nationalism, Violence and the Exorcism of the Muslim 'Other.'" *Critique of Anthropology* 16, no. ii (1996): 137–72.

Hardy, Peter. *The Muslims of British India*. London: Cambridge University Press, 1972.

Hasan, Mushirul. *Legacy of a Divided Nation: India's Muslims since Independence*. London: Hurst, 1997.

Hasan, Zoya. *Politics of Inclusion: Castes, Minorities, and Affirmative Action*. New Delhi: Oxford University Press, 2009.

Hirsch, Susan F. "Kadhi's Courts as Complex Sites of Resistance: The State, Islam, and Gender in Postcolonial Kenya." In *Contested States: Law, Hegemony and Resistance*, edited by Mindie Lazarus-Black and Susan F. Hirsch, 207–30. New York: Routledge, 1994.

Human Rights Watch (HRW). *Playing the "Communal Card": Communal Violence and Human Rights*. 1995. https://www.hrw.org/reports/1995/communal.

———. *"We Have No Orders to Save You": State Participation and Complicity in Communal Violence in Gujurat*. 2002. https://www.hrw.org/reports/2002/india.

———. *Compounding Injustice: The Government's Failure to Redress Massacres in Gujrat*. June 30, 2003. https://www.hrw.org/report/2003/06/30/compounding-injustice/governments-failure-redress-massacres-gujarat.

Hurd, Elizabeth Shakman. *The Politics of Secularism in International Relations*. Princeton, NJ: Princeton University Press, 2008.

Hussain, Sabiha. "Male Privilege, Female Anguish: Divorce and Remarriage among Muslims in Bihar." In *Divorce and Remarriage among Muslims in India*, edited by Imtiaz Ahmad, 263–89. New Delhi: Manohar, 2003.

———. "Shariat Courts and Women's Rights in India." *Pakistan Journal of Women's Studies* 14, no. 2 (2007): 73–102.

Jaffe, James. *Ironies of Colonial Governance: Law, Custom and Justice in Colonial India*. Cambridge: Cambridge University Press, 2015.

Jalal, Ayesha. *Self and Sovereignty: Individual and Community in South Asian Islam since 1850*. London: Routledge, 2000.

Jamal, Arif A. "The Ismaili Conciliation and Arbitration Boards in India: A Model of Community Justice?" In *Being Muslim in South Asia: Diversity and Daily Life*, edited by Robin Jeffrey and Ronojoy Sen, 141–60. New Delhi: Oxford University Press, 2014.

Jones, Justin. "'Signs of Churning': Muslim Personal Law and Public Contestation in Twenty-First Century India." *Modern Asian Studies* 44, no. 1 (2010): 175–200.

Kabir, Humayun, ed. *Maulana Abul Kalam Azad: A Memorial Volume*. Bombay: Asia Publishing House, 1959.

Kapur, Ratna, and Brenda Cossman. *Subversive Sites: Feminist Engagements with Law in India*. New Delhi: Sage Publications, 1996.

Karmakar, Rahul. "Another Imrana, This Time in Assam." *Hindustan Times*, July 8, 2005.

Kolisetty, Akhila. "Unilateral Talaq and the Indian Supreme Court's Responsiveness to Perceptions within India's Muslim Community." *SHARIAsource* (blog), *Harvard Law School*, June 2, 2015. https://beta.shariasource.com/documents/311.

Kozlowski, Gregory C. "Islamic Law in Contemporary South Asia." *Muslim World* 87, nos. 3–4 (1997): 221–34.

Kumar, Ajay. "Khap Panchayats: A Socio-Historical Overview." *Economic and Political Weekly* 47, no. 4 (2012): 59–64.

Kutty, Faisal. "'Islamic Law' in US Courts: Judicial *Jihad* or Constitutional Imperative?" *Pepperdine Law Review* 41 (Special Issue 2014): 1059–90.

Langer, Lorenz. "Panacea or Pathetic Fallacy? The Swiss Ban on Minarets." *Vanderbilt Journal of Transnational Law* 43, no. 4 (2010): 863–951.

Law Commission of India. *Fifteenth Report: Law Relating to Marriage and Divorce amongst Christians in India*. 1960.

———. *Fifty-Ninth Report: Hindu Marriage Act, 1955, and Special Marriage Act, 1954*. 1974.

———. *Seventy-First Report: The Hindu Marriage Act, 1955—Irretrievable Breakdown of Marriage as a Ground of Divorce*. 1978.

———. *One Hundred and Fourteenth Report on Gram Nyayalaya*. August 1986. http://lawcommissionofindia.nic.in/101-169/Report114.pdf.

———. *One Hundred and Thirty-Second Report: Need for Amendment of the Provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to Ameliorate the Hardship and Mitigate the Distress of Neglected Women, Children and Parents*. 1989.

———. *Report No. 243: Section 498A IPC*. 2012.

Lawyers Collective Women's Rights Initiative. *Staying Alive: Evaluating Court Orders—Sixth Monitoring & Evaluation Report 2013 on the Protection of Women from Domestic Violence Act, 2005*. 2013.

Lemons, Katherine. "The Politics of Livability: Tutoring Kinwork in a New Delhi Women's Arbitration Center." *PoLAR: The Political and Legal Anthropology Review* 39, no. 2 (2016): 244–60.

———. "Sharia Courts and Muslim Personal Law in India: Intersecting Legal Regimes." *Law & Society Review* 52, no. 3 (2018): 623–29.

Macaulay, Stewart. "Private Government." In *Law and the Social Sciences*, edited by Leon Lipson and Stanton Wheeler, 445–518. New York: Russell Sage Foundation, 1986.

Madhukalya, Amrita. "Meet Shayara Bano, the Woman Who Wants to Ban Triple Talaq." *DNA*, Apr. 26, 2016. www.dnaindia.com/india/report-meet-shayara-bano-the-woman-who-wants-to-ban-triple-talaq-2206111.

Magnússon, Sigurður Gylfi, and István M. Szíjártó. *What Is Microhistory? Theory and Practice*. Abingdon, Oxon: Routledge, 2013.

Mahmood, Saba. *Politics of Piety: The Islamic Revival and the Feminist Subject*. Princeton, NJ: Princeton University Press, 2005.

———. "Religious Reason and Secular Affect: An Incommensurable Divide?" In *Is Critique Secular? Blasphemy, Injury, and Free Speech*, edited by Talal Asad, Wendy Brown, Judith Butler, and Saba Mahmood, 58–94. New York: Fordham University Press, 2013.

Mahmood, Tahir. *Islamic Law in Indian Courts since Independence: Fifty Years of Judicial Interpretation*. New Delhi: Institute of Objective Studies, 1997.

Masud, Muhammad Khalid. "Apostasy and Judicial Separation in British India." In *Islamic Legal Interpretation: Muftis and their Fatwas*, edited by Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, 193–203. Cambridge, MA: Harvard University Press, 1996.

McClintock, Anne. "Family Feuds: Gender, Nationalism and the Family." *Feminist Review*, no. 44 (1993): 61–80.

Menski, Werner F. *Modern Indian Family Law*. Richmond: Curzon, 2001.

Merry, Sally Engle. "Legal Pluralism." *Law & Society Review* 22, no. 5 (1988): 869–96.

Messick, Brinkley. *The Calligraphic State: Textual Domination and History in a Muslim Society*. Berkeley: University of California Press, 1993.

Metcalf, Barbara Daly. *Islamic Revival in British India: Deoband, 1860–1900*. Princeton, NJ: Princeton University Press, 1982.

———. *Husain Ahmad Madani: The Jihad for Islam and India's Freedom*. Oxford: Oneworld, 2009.

Migdal, Joel S. *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*. Princeton, NJ: Princeton University Press, 1988.

Miller, James. *The Passion of Michel Foucault*. New York: Simon & Schuster, 1993.

Minault, Gail. *The Khilafat Movement: Religious Symbolism and Political Mobilization in India*. New York: Columbia University Press, 1982.

Mody, Perveez. *The Intimate State: Love-Marriage and the Law in Delhi*. New Delhi: Routledge, 2008.

Moore, Erin P. "Gender, Power, and Legal Pluralism: Rajasthan, India." *American Ethnologist* 20, no. 3 (1993): 522–42.

Moore, Sally Falk. "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study." *Law & Society Review* 7, no. 4 (1973): 719–46.

Mukherjee, Mithi. *India in the Shadows of Empire: A Legal and Political History (1774–1950)*. New Delhi: Oxford University Press, 2010.

Nader, Laura. *Harmony Ideology: Justice and Control in a Zapotec Mountain Village*. Stanford, CA: Stanford University Press, 1990.

———. "Moving On—Comprehending Anthropologies of Law." In *Practicing Ethnography in Law: New Dialogues, Enduring Methods*, edited by June Starr and Mark Goodale, 190–201. New York: Palgrave Macmillan, 2002.

Nair, Supriya. "The Meaning of India's 'Beef Lynchings.'" *Atlantic*, July 24, 2017. https://www.theatlantic.com/international/archive/2017/07/india-modi-beef-lynching-muslim-partition/533739.

Nehru, Jawaharlal. "The Passing of a Great Man." In *Maulana Abul Kalam Azad: A Memorial Volume*, edited by Humayun Kabir, 1–4. Bombay: Asia Publishing House, 1959.

Nussbaum, Martha C. *The Clash Within: Democracy, Religious Violence, and India's Future*. Cambridge, MA: Harvard University Press, 2007.

———. *Political Emotions: Why Love Matters for Justice*. Cambridge, MA: Belknap Press, 2013.

Okin, Susan Moller. "Is Multiculturalism Bad for Women?" In *Is Multiculturalism Bad for Women?* edited by Joshua Cohen, Matthew Howard, and Martha C. Nussbaum, 7–24. Princeton, NJ: Princeton University Press, 1999.

"Our Activity." Markazi Edara-e-Sharia Patna Bihar. May 16, 2016. http://edaraesharia.blogspot.com/2016/05/our-activity.html.

Pandey, Gyanendra. "In Defense of the Fragment: Writing about Hindu-Muslim Riots in India Today." *Representations* 37 (1992): 27–55.

Parashar, Archana. *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality*. New Delhi: Sage Publications, 1992.

Peletz, Michael G. *Islamic Modern: Religious Courts and Cultural Politics in Malaysia*. Princeton, NJ: Princeton University Press, 2002.

Pew Research Center. *The Future of the Global Muslim Population: Projections for 2010–2030*. January 2011. https://www.pewforum.org/wp-content/uploads/sites/7/2011/01/FutureGlobalMuslimPopulation-WebPDF-Feb10.pdf.

Powers, David S. "Four Cases Relating to Women and Divorce in al-Andalus and the Maghrib, 1100–1500." In *Dispensing Justice in Islam: Qadis and Their Judgments*, edited by Muhammad Khalid Masud, Rudolph Peters, and David S. Powers, 383–409. Leiden: Brill, 2006.

Prakash, Satya. "Centre 'Copied' Law Board Submissions." *Hindustan Times*, Jan. 4, 2007.

Prime Minister's (PM) High Level Committee, *Cabinet Secretariat, Government of India, Social, Economic and Educational Status of the Muslim Community of India*. November 2006.

"Punjab to Have Shariʿah Panchayat Soon." *Radiance Viewsweekly*, Jan. 27, 2013. http://radianceweekly.in/portal/issue/corruption-in-high-ups-takes-centre-stage/article/punjab-to-have-shariah-panchayat-soon.

Rao, Raghvendra. "Imrana Rewind in Mewat." *Indian Express*, July 4, 2005.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

Redding, Jeffrey A. "Constitutionalizing Islam: Theory and Pakistan." *Virginia Journal of International Law* 44, no. 3 (2004): 759–828.

———. "Human Rights and Homo-sectuals: The International Politics of Sexuality, Religion, and Law." *Northwestern University Journal of International Human Rights* 4, no. 3 (Spring 2006): 436–92.
———. "Institutional v. Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems." *Journal of Islamic State Practices in International Law* 6, no. 1 (2010): 2–26.
———. "What American Legal Theory Might Learn from Islamic Law: Some Lessons about 'The Rule of Law' from 'Shariʿa Court' Practice in India." *University of Colorado Law Review* 83, no. 4 (2012): 1027–63.
———. "Secularism, the Rule of Law, and 'Shariʿa Courts': An Ethnographic Examination of a Constitutional Controversy." *Saint Louis University Law Journal* 57, no. 2 (Winter 2013): 339–76.
Resnik, Judith. "Bring Back Bentham: 'Open Courts,' 'Terror Trials,' and Public Sphere(s)." *Law & Ethics of Human Rights* 5, no. 1 (2011): 1–69.
———. "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights." *Yale Law Journal* 124, no. 8 (June 2015): 2804–939.
Robinson, Nick. "Judicial Architecture and Capacity." In *The Oxford Handbook of the Indian Constitution*, edited by Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, 330–48. Oxford: Oxford University Press, 2016.
Rosen, Lawrence. *The Anthropology of Justice: Law as Culture in Islamic Society.* Cambridge: Cambridge University Press, 1989.
Roy, Arundhati. *Walking with the Comrades*. New York: Penguin Books, 2011.
Roy, Olivier. *Holy Ignorance: When Religion and Culture Part Ways*. New York: Columbia University Press, 2010.
Rudolph, Susanne Hoeber, 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*, edited by Gerald James Larson, 36–65. Bloomington: Indiana University Press, 2001.
Sajjad, Mohammad. "Muslims between the Communal-Secular Divide." Seminar, Feb. 2016. www.india-seminar.com/2016/678/678_mohammad_sajjad.htm.
Sangari, Kumkum. "Politics of Diversity: Religious Communities and Multiple Patriarchies." *Economic and Political Weekly* 30, no. 51 (1995): 3287–3310.
Sangwan, K. S. "Khap Panchayats in Haryana: Sites of Legal Pluralism." In *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, edited by Kalpana Kannabiran and Ranbir Singh, 331–51. New Delhi: Sage Publications, 2008.
Sanyal, Usha. *Devotional Islam and Politics in British India: Ahmad Riza Khan Barelwi and His Movement, 1870–1920*. Delhi: Oxford University Press, 1996.
Schacht, J. "On the Title of the Fatāwā al-ʿĀlamgīriyya." In *Iran and Islam: In Memory of the Late Vladimir Minorsky*, edited by C. E. Bosworth, 475–78. Edinburgh: Edinburgh University Press, 1971.
Scheppele, Kim Lane. "Constitutional Ethnography: An Introduction." *Law & Society Review* 38, no. 3 (2004): 389–406.
Schmitt, Carl. *The Concept of the Political*. Chicago: University of Chicago Press, 2007.

Schonthal, Benjamin. *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka*. New York: Cambridge University Press, 2016.

Scott, James C. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven, CT: Yale University Press, 1998.

Scott, Joan Wallach. *The Politics of the Veil*. Princeton, NJ: Princeton University Press, 2007.

Sezgin, Yüksel. *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*. Cambridge: Cambridge University, 2013.

Shachar, Ayelet. "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law." *Theoretical Inquiries in Law* 9, no. 2 (July 2008): 573–608.

Shackelford, Scott J. "In the Name of Efficiency: The Role of Permanent Lok Adalats in the Indian Justice System and Power Infrastructure." In *Global Governance, Human Rights and Development*, edited by Manoj K. Sinha, 273–312. New Delhi, Satyam Law International, 2009.

Shapiro, Martin. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

Sharafi, Mitra. "The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda." *Law and History Review* 28, no. 4 (2010): 979–1010.

Siddiqui, Haroon. "Sensationalism Shrouds the Debate on Sharia." Op-ed, *Toronto Star*, June 12, 2005.

Solanki, Gopika. *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India*. Cambridge: Cambridge University Press, 2011.

Stephens, Julia. *Governing Islam: Law, Empire, and Secularism in South Asia*. Cambridge: Cambridge University Press, 2018.

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

Stoler, Ann Laura. *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense*. Princeton, NJ: Princeton University Press, 2009.

Subramani, A. "Madras High Court Bans Unauthorised 'Sharia Courts.'" *Times of India*, Dec. 20, 2016. https://timesofindia.indiatimes.com/city/chennai/madras-hc-bans-sharia-courts/articleshow/56061972.cms.

Subramanian, Narendra. *Nation and Family: Personal Law, Cultural Pluralism, and Gendered Citizenship in India*. Stanford, CA: Stanford University Press, 2014.

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004.

———. "The Rule of Law and Legal Pluralism in Development." In *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, edited by Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock, 34–49. Cambridge: Cambridge University Press, 2012.

Taylor, Charles. "The Politics of Recognition." In *Multiculturalism: Examining the Politics of Recognition*, edited by Amy Gutmann, 25–73. Princeton, NJ: Princeton University Press, 1994.

Tibi, Bassam. *The Challenge of Fundamentalism: Political Islam and the New World Disorder*. Berkeley: University of California Press, 1998.

Trein, Lorenz. "Governing the Fear of Islam: Thinking Islamophobia through the Politics of Secular Affect in Historical Debate." *ReOrient* 4, no. 1 (2018): 44–58.

"Triple Talaq: India Criminalises Muslim 'Instant Divorce.'" *BBC*, July 30, 2019. https://www.bbc.com/news/world-asia-india-49160818.

Tschalaer, Mengia Hong. "Competing Model-Nikahnamas: Muslim Women's Spaces within the Legal Landscape in Lucknow." *Journal of Law and Social Research* 3 (2012): 65–80.

———. *Muslim Women's Quest for Justice: Gender, Law and Activism in India*. Cambridge: Cambridge University Press, 2017.

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge: Cambridge University Press,1995.

UN General Assembly, UN Security Council. *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law—Report of the Secretary-General*. A/61/636–S/2006/980. Dec. 14, 2006. http://repository.un.org/handle/11176/19845.

UN Security Council. *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*. S/2004/616. Aug. 23, 2004. www.un.org/en/sc/documents/sgreports/2004.shtml.

van der Veer, Peter. *Religious Nationalism: Hindus and Muslims in India*. Berkeley: University of California Press, 1994.

Vatuk, Sylvia. "'Where Will She Go? What Will She Do?': Paternalism toward Women in the Administration of Muslim Personal Law in Contemporary India." In *Religion and Personal Law in Secular India: A Call to Judgment*, edited by Gerald James Larson, 226–48. Bloomington: Indiana University Press, 2001.

———. "Moving the Courts: Muslim Women and Personal Law." In *The Diversity of Muslim Women's Lives in India*, edited by Zoya Hasan and Ritu Menon, 18–58. New Brunswick, NJ: Rutgers University Press, 2005.

———. "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: Essays in Honour of B. Sivaramayya*, edited by Archana Parashar and Amita Dhanda, 200–35. London: Routledge, 2008.

Vishwa Lochan Madan interview. Delhi, India, December 2011.

von Hayek, Friedrich A. *The Mirage of Social Justice*. Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy. Vol. 2. London: Routledge & Kegan Paul, 1976.

Wade, E. C. S. Introduction to A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, xix–cxcviii. 10th ed. London: Macmillan, 1959.

Wajihuddin, Mohammed. "Mumbai Gets Its First Shariah Court to Settle Civil, Marital Disputes." *Times of India*, Apr. 29, 2013. http://timesofindia.indiatimes.com/city/mumbai/Mumbai-gets-its-first-Shariah-court-to-settle-civil-marital-disputes/articleshow/19772852.cms.

Waldron, Jeremy. "The Concept and the Rule of Law." *Georgia Law Review* 43, no. 1 (2008): 1–62.

———. "The Rule of Law and the Importance of Procedure." *Nomos* 50 (2011): 3–31.

Williams, Rowan. "Civil and Religious Law in England: A Religious Perspective." Lecture, Royal Courts of Justice, Feb. 7, 2008. https://doi.org/10.1017/S0956618X08001403.

Wolpert, Stanley. *Nehru: A Tryst with Destiny*. New York: Oxford University Press, 1996.

Yaduvansh, Uma. "The Decline of the Role of the Qāḍīs in India, 1793–1876." *Studies in Islam* 6 (1969): 155–71.

Yeazell, Stephen C. *Civil Procedure*. 7th ed. New York: Aspen Publishers, 2008.

Yefet, Karin Carmit. "The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb." *Harvard Journal of Law & Gender* 34, no. 2 (2011): 553–616.

Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change*. Princeton, NJ: Princeton University Press, 2002.

———. *Ashraf ʿAli Thanawi: Islam in Modern South Asia*. Oxford: Oneworld, 2008.

Zamindar, Vazira Fazila-Yacoobali. *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories*. New York: Columbia University Press, 2007.

Zitzewitz, Karin. *The Art of Secularism: The Cultural Politics of Modernist Art in Contemporary India*. London: Hurst & Co Ltd, 2014.

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