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### Secularism, the Rule of Law, and 'Shari'a Courts': An Ethnographic Examination of a Constitutional Controversy

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**SECULARISM, THE RULE OF LAW, AND ‘SHARI‘A COURTS’:  
AN ETHNOGRAPHIC EXAMINATION OF A CONSTITUTIONAL  
CONTROVERSY**

JEFFREY A. REDDING\*

*The [All India Muslim Personal Law Board] submits that the Petitioner has oblique motives to advance the cause of Muslim baiting and has camouflaged the same by wearing the shiny armour of a crusader to fight the cause of secularism and constitutionalism.*

- All India Muslim Personal Law Board<sup>1</sup>

INTRODUCTION

This Article both closely examines, and situates broadly, a constitutional dispute instigated in 2005 by a private attorney, Vishwa Lochan Madan, in the Supreme Court of India. Mr. Madan’s 2005 petition to the Supreme Court aimed to completely shut down a network of non-state Muslim dispute resolution service providers—or, what has been crudely and imprecisely referred to in a number of jurisdictions as a system of “shari‘a courts” or

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\* Assistant Professor, Saint Louis University School of Law; Chercheur, Centre National de la Recherche Scientifique (Paris, France) (Dec. 2010 - June 2011). This Article is a continuation of longstanding scholarship of mine concerning non-state dispute resolution in India, and especially as it pertains to India’s Muslim minority. Support for research leading to this Article was provided by the American Institute of Pakistan Studies, as well as the ‘JUST-India’ project on Justice and Governance in South Asia funded by the Agence Nationale de la Recherche, France, and also Saint Louis University School of Law. Previous versions of this Article were presented at the 2012 Annual Conference on South Asia’s Legal Studies Pre-Conference Workshop panel discussion of “Alternatives to the State: Dispute Processing, Justice and Minority Communities in India,” and also the 2012 Journal of Law & Religion conference on “Emerging Voices in Islamic Jurisprudence.” I thank participants at these presentations for their questions and comments, and also Daniela Berti, Devika Bordia, John Bowen, Lisa Damon, Rajeev Dhavan, Monica Eppinger, Chad Flanders, Marc Galanter, Katherine Lemons, Eric Miller, Efthimios Parasidis, Karen Petroski, Ali Rahnema, Mitra Sharafi, Gilles Tarabout, and Sylvia Vatuk for very helpful discussions elsewhere. Mohsin Alam, Leslie Dunlap, and Clifton Martin all provided very helpful research assistance in the course of researching and writing this Article.

1. Respondent No. 9 Counter-Aff. 64, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

“Muslim courts”—that has been operating in India for many years now.<sup>2</sup> This petition was dramatic, but so were the events instigating it, namely the “adjudication” by non-state Muslim legal actors 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 Mr. Madan’s petition, however; this petition also spoke broadly of the ways in which the existence of non-state Muslim dispute resolution service providers undermines liberal constitutional values, such as “secularism” and “the rule of law.”

Secularism has been the source of much contention in India, as it has been in many other places recently, and especially when it has been used to aggressively counteract a perceived Muslim threat.<sup>3</sup> Unsurprisingly then, Mr. Madan’s petition to the Supreme Court sparked a number of vigorous responses from the various defendants who were named in Mr. Madan’s original petition, as well as an equally vigorous counter-response in which Mr. Madan reacted to his named defendants’ responses. These exchanges will be examined in the course of this Article in order to conduct what this Article terms an “ethnographic examination” of a contemporary constitutional controversy.

The use of an ethnographic methodology is an untraditional approach in the study of constitutionalism. Accordingly, this Article will begin by explaining not only what it means by an “ethnographic examination” in the context of constitutionalism—where such an ethnographic examination largely concerns studying an archive of legal texts, rather than a community of live persons—but also why ethnographic examinations of constitutional controversies provide an essential viewpoint when trying to understand such controversies and also constitutionalism more broadly. In short, a “constitutional ethnograph[ic]” methodology—to borrow and adapt a term from Kim Lane Scheppele<sup>4</sup>—highlights the fragmentary quality to constitutionalism or, in other words, the multivalenced and often conflicting meanings, understandings, and implications of constitutional discussions for diverse and fractured polities. Thus, rather than understanding, or even desiring, constitutionalism to embody the same clear, decisive, and unambiguous rules for everyone, an ethnographic examination of constitutionalism brings to light the multiple (and often conflicting) cultural<sup>5</sup>

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2. See Petitioner Aff. 45–47, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

3. See generally JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007).

4. See generally Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 *LAW & SOC’Y REV.* 389 (2004).

5. I use the word “cultural” here but not in any monolithic or monologue-ic sense. Instead, following Jean and John Comaroff, I believe that we have to recognize the ambivalence—indeed, multivalence—of any culture. In the Comaroffs’ words, then, we have to understand that

and discursive roots, understandings, and implications of constitutional discussions within pluralistic polities. Indeed, following James Tully, one can describe “the *language* of contemporary constitutionalism . . . [a]s . . . akin to an *assemblage of languages* . . . composed of complex sites of interaction and struggle.”<sup>6</sup> It is this Article’s proposition that an ethnographic methodology, properly conceived, is best suited for highlighting and exploring the complex sites and meanings of constitutionalism.

As to Mr. Madan’s complicated constitutional petition itself, the constitutional litigation and exchanges that it sparked have presented the Supreme Court of India with an opportunity to reshape (yet again) Indian understandings and practices relating to secularism and the rule of law. As part of its ethnographic enterprise, this Article aims to examine these potential reshaping, but through the untraditional lens of examining the cultural and discursive *roots* of this constitutional controversy—including post-colonial Indian understandings, articulations, and enforcements of liberal values like secularism and the rule of law, as well as the positions of those who disagree either with these liberal values themselves or with their recent Indian implementation—and, hence, the multiple understandings and experiences of Indian liberal constitutionalism which will likely *result* from this still unresolved<sup>7</sup> litigation. These plural understandings and experiences—which are both *roots and results*—point away from, rather than toward, constitutionalism ultimately being about legal clarity, certainty, and fixity.

Resistance to liberalism in India exists, in part, because contemporary liberalism—including common articulations of it found in contemporary India—is deeply imbricated with Islamophobia, with the liberal value of secularism serving as a convenient vehicle for widespread antipathy towards

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any culture *does* present itself as relatively coherent, systemic, consensual, authoritative.

After all, whatever forms are powered by the force of habit are naturalized and uncontested; they do seem eternal and universal . . . . But alongside them are always countervailing forces: dialects that diverge, styles that do not conform, alternative moralities and world-maps.

JOHN COMAROFF & JEAN COMAROFF, ETHNOGRAPHY AND THE HISTORICAL IMAGINATION 30 (1992). The material I present in this Article confirms this notion of culture, both in my discussion of what is assumed and taken for granted *by both sides* of the constitutional dispute that is presented here, but also in my discussion of what is deeply contested by the different parties to this litigation.

6. JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 37–38 (1995) (emphasis added).

7. I describe the litigation this way to indicate that the Supreme Court of India has still not either held hearings or issued a judgment with respect to Mr. Madan’s petition. However, that being said, and per the methodological stance adopted by this Article, it is hard to see any constitutional issue as ever really being truly “resolved.”

Muslims around the world.<sup>8</sup> Indeed, Islamophobia has become so inseparable from secularism (and liberalism more generally), in both Indian and non-Indian political and legal discourses, that such a conjoining no longer seems “ideological” but, rather, simply “hegemonic.”<sup>9</sup>

Indeed, in the Indian context, one result of the contemporary intertwining of liberalism and Islamophobia is that aggressive, nationalist, and majoritarian—but also now very ordinary—articulations of Hinduism in India have been able to successfully see themselves through the lens of an allegedly tolerant secularism, though in the process working to antagonistically undermine different political and legal means that India’s Muslims might otherwise use to define, defend, and advance themselves.<sup>10</sup> As part of its ethnographic examination, this Article takes up this (continuing, successful, but also very tired) use of secularism against Muslims in India. However, unlike others’ extended focus on the problematic liberal value of secularism, this Article focuses on a “new” use of liberalism—and, in particular, liberalism’s exaltation of the rule of law—to accomplish Islamophobic goals. Mr. Madan’s petition to the Supreme Court of India is, indeed, one important example of this kind of use of the rule of law.

The rule of law, like secularism, is a prominent aspect of the psycho-moral terrain in which many Indians imagine themselves to be living. In other words, the rule of law (like secularism) is a norm to which many Indians would prefer to adhere, and a norm by which many Indians judge themselves and their government—even if, often enough, such a judgment comes about in the breach of the norm. For example, such a profession of belief in, and breach of, the rule of law comes together in the many “corruption” scandals that headline Indian newspapers and news broadcasts on a regular basis. In these scandals, the corruption of politics is contrasted with (the ideal of) a pure and pristine law; in other words, the rule of law is needed to control the lawlessness of politics and money.<sup>11</sup>

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8. See generally ELIZABETH SHAKMAN HURD, *THE POLITICS OF SECULARISM IN INTERNATIONAL RELATIONS* 7 (2008) (arguing that “negative associations of Islam not only run deep in . . . Euro-American secular traditions . . . but [also] help to constitute them”).

9. COMAROFF & COMAROFF, *supra* note 5, at 30.

10. See generally BRENDA COSSMAN & RATNA KAPUR, *SECULARISM’S LAST SIGH?: HINDUTVA AND THE (MIS)RULE OF LAW* (1999).

11. See, e.g., Jim Yardley & Heather Timmons, *Telecom Scandal Plunges India Into Political Crisis*, N.Y. TIMES, Dec. 13, 2010, at A1, A10 (describing how “[t]he issue is how a minister allied with the party sold cellphone operators the airwaves to provide their service in 2008. But the amounts involved, and subsequent revelations of how some of India’s richest men sought to exercise influence over political appointments and regulatory decisions, have surprised a nation seemingly inured to reports of corruption in politics”); *Megahurts: What a scandal says about government and business in India*, THE ECONOMIST, Feb. 11, 2012, available at <http://www.economist.com/node/21547280> (describing a major corruption scandal involving the Government of India’s issuance of mobile phone spectrum licenses and opining that “[i]t has

The rule of law, then, is an important part of the contemporary Indian cultural terrain. And so is Islamophobia. As a result, it is unsurprising that the Indian (liberal) assault on Muslims has recently utilized the rule of law, especially seeing that, unlike secularism, the rule of law is a relatively unexploited tool and vocabulary that the liberal arsenal makes available for liberalism's proponents/Islam's antagonists in India. Indeed, as this Article argues, in the context of explaining and exploring the many twists, turns, claims, and crevices of Mr. Madan's petition to the Supreme Court of India and the legal exchanges which this petition sparked, while "secularism" has certainly played a role in Mr. Madan's efforts to decimate non-state Muslim dispute resolution institutions and mechanisms operating in India, Mr. Madan's liberal arguments pertaining to the rule of law have played a much larger role. This "legal turn" in Indian liberalism's Islamophobic march is noteworthy and politically (and legally) important, but it remains underexplored.

While the stakes presented by Mr. Madan's petition are high, the Supreme Court has yet to issue a decision in response to it—eight years after its filing! Furthermore, it is difficult to predict how the Supreme Court will decide this petition when it decides to turn its attention to it. Nonetheless, in closing the Introduction to this Article, it is important to emphasize how potentially earth-shattering Mr. Madan's petition has been on its own, especially given that the basic goal of Mr. Madan's petition to the Supreme Court was to get the Supreme Court of India to "[d]eclare that the . . . activities being pursued by the All India Muslim Personal Law Board . . . and other similar [non-governmental] 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."<sup>12</sup> 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."<sup>13</sup> At its heart then, Mr. Madan's 2005 constitutional petition aimed to shut down a network of non-state Muslim dispute resolution service providers—or, what has been crudely and imprecisely referred to in a number of jurisdictions as a system of "shari'a

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taken the courts, not the political system, to act. Industry seems to be gripped by a culture of denial . . . There is anecdotal evidence that corruption is rife in most industries that interact with the government: those that require licences, access to natural resources or changes in the law.").

12. Petitioner Aff. 45–46, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

13. *Id.* at 46.

courts” or “Muslim courts”—that has been in operation in India for several decades.<sup>14</sup> In many respects, Mr. Madan’s goals here have been truly radical.

However, Mr. Madan’s petition located radicalism elsewhere—namely in the (allegedly) radical leadership that coordinates and directs non-state Muslim dispute resolution. Mr. Madan reserved for himself vocabularies—“secularism” and “the rule of law” most notably—emanating from the calm and mesmerizing register of liberalism. Simultaneously then, Mr. Madan’s petition has been both radical and normal, embodying calmly both intolerance and tolerance, and both Islamophobia and liberalism. A constitutional ethnographic methodology is important to engage in then, for it brings to light not only the different voices of different contributors to constitutional debates and constitutionalism, but also the multivalent voices of individual debate participants, such as Mr. Madan, themselves.

The rest of this Article engages in a more detailed explanation and analysis of Mr. Madan’s complicated petition to the Supreme Court of India, the various responses and reactions which this petition elicited, and also the contemporary Indian legal and social contexts which both enabled the filing of such a radical/normal petition and which will also be affected by this filing and the resistance to it. Before this explanation and analysis, however, some additional words about the “ethnographic” designation of this Article, including the ethnographic methodologies that it deploys, are necessary.

### I. SOME NOTES ABOUT METHODOLOGY

The methodological approach deployed in this Article takes inspiration from Kim Lane Scheppele’s observation as to the need for more of what she terms “constitutional ethnography.”<sup>15</sup> As Scheppele describes it, constitutional ethnography provides a particular lens on constitutionalism because it “does not ask about the big correlations between the specifics of constitutional design 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*.”<sup>16</sup>

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14. The constitutional petition’s aims are ambitious, aiming to silence not only a set of relatively recently developed non-state Islamic legal institutions that is commonly referred to as the “*dar ul qaza* system,” but also *muftis* giving *fatwas*—a long-standing practice since the early days of Islam. *Dar ul qaza* means “place of adjudication” in both Urdu and Arabic, and the contemporary (yet still several-decades-old) non-state *dar ul qaza* system in India is primarily coordinated by two different non-state Indian Muslim organizations. See text accompanying *infra* note 75. For more information on the interesting history behind the contemporary Indian *dar ul qaza* system, see generally Papiya Ghosh, *Muttahidah qaumiyat in aqalliat Bihar: The Imarat i Shariah, 1921-1947*, 34 INDIAN ECON. & SOC. HIST. REV. 1 (1997).

15. See Scheppele, *supra* note 4.

16. *Id.* at 390 (emphasis added).

Following Scheppele's description of a constitutional ethnographic methodology, this Article looks to all of the elements Scheppele identifies (e.g., political, legal, cultural) with the goal of illuminating the multiple logics operative within a particular constitutional context (i.e., India), as well as a particular dispute in that context concerning the meaning of liberal constitutional values. In emphasizing Scheppele's "multiple logics," this Article pays attention to the multiple and conflicting (textual) voices debating constitutional secularism and the rule of law in India, both generally and in the particular context of the specific constitutional dispute that this Article focuses on. Furthermore, in focusing on plural (constitutional) logics, this Article's methodology is not only consistent with Scheppele's approach to constitutional ethnography described above, but is also inspired by Scheppele's methodological commitment to "collecting *whole specimens* of social life"<sup>17</sup>—including, as this Article sees social life, competing and conflicting voices present in any given society.

While this Article is interested in contextual "logics"<sup>18</sup> and "interrelationships"<sup>19</sup> of different kinds of social, political, and legal elements within India, a certain focused scrutiny will also be brought to bear on the perverse ironies by which stereotypes about law and Muslims alike have come to populate arguments about secularism and the rule of law in the contemporary Indian context. In some important sense, then, distressing "illogics" pervades this constitutional petition and the socio-cultural context in which it sits; accordingly, these "illogics" are a particular focus of this Article.

However, before Part II's more concrete demonstration of how different contextual logics and illogics populate the arguments made by Mr. Madan in his constitutional petition to the Supreme Court of India, a number of additional words are in order as to why Mr. Madan's petition, the responses which it elicited from some of the parties named as defendants in this position, as well as other related materials, provide appropriate and necessary—and pluralistic—lenses on (Indian) constitutionalism. In that spirit, this Part turns now to a more-detailed exploration of what is bound up in this Article's use of an ethnographic methodology to study constitutionalism and, in particular, how the methodological decision to use an archive of non-traditional legal materials aligns with a certain understanding of and approach to law and constitutionalism alike.

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17. *Id.* at 397.

18. *See* text accompanying *supra* note 16.

19. *See* text accompanying *supra* note 16.



A. *Constitutionalism in Fragments: Constitutional Law and a Pluralistic Archive*

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.<sup>20</sup>

In exploring both the logics and illogics of Indian constitutionalism, this Article utilizes a wide variety of available textual materials, including texts produced by individuals and organizations that have been heretofore either unpublished, unavailable, and/or mostly unexamined. In its reliance on and use of contemporary primary sources (e.g., Mr. Madan’s initial petition to the Supreme Court and counter-petitions<sup>21</sup> filed in response to Mr. Madan’s petition), journalistic reports of the constitutional case and the incidents which preceded and sparked Mr. Madan’s initial petition, and, finally, historical legal materials, this Article’s methodology coincides with other kinds of scholarship which can be considered “ethnographic.”

Simultaneously, this Article’s methodology breaks from the methodological approach so often deployed when lawyers, judges, and law professors attempt to understand legal texts, including constitutions. For many such people, the point of law, including constitutions, is to tell people (whether working for the government or acting as private citizens) what they can and cannot do. “Law,” according to this particular view of it, should embody both clear commands and clear rules which enable the best-intentioned (including the best-educated) to behave and/or plan their lives. Moreover, as understood by such practitioners and academicians, “the law” is a discrete entity whose meaning can be discerned by those learned in the law (e.g., formally-trained lawyers, judges, and law professors), who can then impart (or enforce) its singular meaning to the larger populace. Furthermore, under this approach to law, one discerns “the law” by going to a law library and reading legal textbooks and/or a given jurisdiction’s Supreme Court cases.

The ethnographic approach to and understanding of law, including constitutionalism, which animates this Article, however, is quite different than the vision of law just sketched out. Indeed, one way to at least initially distinguish this Article’s alternative way of understanding law is to emphasize the relatively *uncertain* qualities of law that this Article’s investigation of law aims at highlighting, rather than law’s *fixed, unambiguous, and predictable*

20. COMAROFF & COMAROFF, *supra* note 5, at 34.

21. Or, to use the particular terminology of the Indian system, “counter-affidavits.” See, e.g., Respondent No. 9 Counter-Aff., *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

qualities. This is because law is a social and political phenomenon (at least in part<sup>22</sup>) and, like other such phenomena, is formed and reformed in dialectical processes. As a result of such dialecticism, law is rarely a discrete, separate, or stable 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 itself is commanded, shaped, occupied, poked, distorted, and retorted by all sorts of populations and forces which sit above, below, with, outside, and within legal spaces. Law, then, is master, slave, friend, enemy, and partner to the non-lawful. In other words, law is an extremely multivalent phenomenon, with different potential meanings and implications for different elements of diverse and fractured polities.

Such a view and understanding of law, in turn, requires a different and relatively atypical kind of investigation and conversation about “the law,” as well as the legal archive. Law—as a diffuse, dynamic, and multivalent phenomenon—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.<sup>23</sup> Like society and social relations themselves, and like any pronouncement about the state of society, the archive of law is essentially contestable and is contested, by actors both within<sup>24</sup> and without the law. As such, and as the Comaroffs remind us via the epigraph that opened this section, law’s archive—like other archives—has 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.

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22. Law can also be a religious phenomenon. Moreover, law can be legal, social, political, and divine, operating *simultaneously* along inter-twined but non-reducible axes. I think 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.

DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 16 (2000).

23. Indeed, even if one were to construct a perfect Alexandrian library, history shows us that libraries suffer fires, floods, and pests. Perhaps even more pernicious are judges’ habits of making many of their decisions publicly unavailable by refusing to publish them. *See generally* Michael Hammon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001).

24. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1101–02 (1977).

In this methodological view of the legal world, legal answers—and even legal questions<sup>25</sup>—are hard to know or predict. As a result, traditional investigations or simplistic answers concerning “what the law is,” or “how the law will deal with” a given situation are avoided,<sup>26</sup> not least because of their ideologically myopic qualities. Instead, this Article believes that a much more diffuse—but, arguably, more rigorous and less blinded—approach to understanding the multiple sources, meanings, and implications of any law (or constitution) is warranted.

This Article has labeled such an approach an “ethnographic” approach. This approach finds comfort in and echoes not only the words of Scheppele and the Comaroffs discussed above, but also Laura Nader’s when she writes the following:

[We 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

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25. The recent U.S. Supreme Court litigation concerning the constitutionality of the Affordable Care Act of 2010 (popularly known as ‘Obamacare’) illustrates this. Many American lawyers (including law professors) were shocked to see the Supreme Court consent to even hear this case, seeing that such lawyers viewed the constitutional issues raised by the case as simple and “settled.” This shock only increased during the oral arguments phase of this case, as seemingly once-settled jurisprudence on the Commerce Clause provision of the U.S. Constitution was questioned by several of the Supreme Court Justices. Finally, this shock boiled over into a kind of outrage as the final set of opinions in this constitutional case were issued, and a key opinion in the case (that of Chief Justice John Roberts) gave constitutional cover to the Affordable Care Act. Fueling this outrage was the fact that Robert’s opinion constitutionally legitimated the Affordable Care Act not as an exercise of Commerce Clause power—the provision of the Constitution upon which the vast amount of attention and dispute was centered—but, rather, as an exercise of a relatively obscure (at least in the context of this constitutional dispute) provision of the U.S. Constitution that few legal commentators had seen as very relevant, much less decisive. According to a view loudly expressed at this time, one should be able to “know the law” and, if not, at least know where to find the answer to one’s legal questions; moreover, at the very least, one should be able to at least know *what one’s questions actually are*. This Article’s methodology pushes back at these allegedly commonsensical positions. Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393 2012, at 27, 44 (U.S. June 28, 2012), Transcript of Oral Argument at 31, Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-398 2012 (U.S. Mar. 26, 2012), Transcript of Oral Argument at 4–5, 11, 15–16, 22, 25, 38, Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-398 2012 (U.S. Mar. 27, 2012), and Transcript of Oral Argument at 23–24, Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-400 2012 (U.S. Mar. 28, 2012).

26. Even when law is clear, the substrate of factual determinations and factual negotiations makes law unpredictable. *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 37–49 (1981) (explaining how court systems develop conveniently malleable legal fictions concerning “facts” in order to reach different social/political outcomes in different situations).

child's shirt burned so quickly takes us into the Nixon White House to examine election bribery, that is where we pursue the question . . . . In other words, in ethnography, the methods are subordinate to the questions being pursued.<sup>27</sup>

Following Nader's admonition about the unhelpfulness of boundaries, one can see at least the potential relevance of this Article's Introduction's conjoining of the radical with the normal, intolerance with tolerance, and Islamophobia with liberalism. Indeed, following Nader's lead, if the road leads to these (legal) ambivalences, then one must follow it rather than seek a (legal) shortcut.

Another way of stating the ambivalence of "the law" is to characterize law as "fragmented." This, again, is not a characterization of the law that most legal practitioners and academicians are comfortable with. For such people, the legal sausage-making process is best not observed: one really does not want to know what "parts" go into making a law, constitution, or judicial opinion. Here, however, the fragmented inputs to law-making are just as important as the ostensibly cohesive sausage that any legislative or judicial process outputs. Moreover, from the perspective of this Article's methodology, these legal inputs *are* (a crucial part of) the law and, at the least, very hard to distinguish

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27. Laura Nader, *Moving On—Comprehending Anthropologies of Law*, in PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS 190, 197–98 (June Starr & Mark Goodale eds., 2002). In the above excerpt, Nader both endorses ethnography, but also asks us to transcend it, in the process gesturing towards the reality that ethnography itself is a complicated and contested methodology both within and without its original academic home, namely the field of anthropology.

This indeterminacy in what constitutes an "ethnography" necessarily forms part of the backdrop to this Article's avoidance of characterizing its project as an "ethnography" per se, but rather more simply as "ethnographic." And indeed, many ethnographies do things—for example, deploy statistical analysis and/or engage in that most hallowed of anthropological methods known as "participant-observation"—that this Article will not (and cannot) do. With respect to participant-observation, such an ethnographic technique is largely precluded by the modes of private production that underlay drafting of texts that are relevant in constitutional-litigation. With respect to quantitative number-crunching in the process of conducting an ethnography, that too is difficult to accomplish when one's constitutional (litigation) sample size is "1." Yet despite this Article's failure to utilize methodologies common to ethnographies themselves, this Article will persist in describing its approach more modestly as "ethnographic," for the reasons outlined throughout this Part.

Finally, in endorsing Nader's open-ended approach to legal analysis, a question is potentially raised as to why this Article focuses on the legal petitions and counter-petitions filed in *Vishwa Lochan Madan v. Union of India* in order to understand the constitutional issues and implications of this case. Indeed, why not instead look to "non-legal" social polling, letters to the editor, and/or television dramas to understand what this case might mean? In fact, all of these materials *would* likely contribute to a richer understanding of this case and its potential meanings and implications. As a result, it is worth emphasizing again that the ethnographic view of this litigation laid out in these pages is only a partial one, and more "ethnographic" than an "ethnography" per se.

from the necessarily fragmented effects of any legal output produced in and by a pluralistic, multivalent polity.

Such a methodological perspective then does not decry the fact that, in the constitutional dispute examined by this Article, there is no final judgment from the Supreme Court adjudicating Mr. Madan's petition and the responses which this petition elicited from named defendants—or, in other words, that there is no macro-level, finished statement of “the law” here. Indeed, all we do have here are Mr. Madan's initial petition to the Supreme Court and the legal exchange at the Supreme Court which it initiated, as well as the attitudes towards law, constitutionalism, and Muslims alike which circulate in contemporary Indian society (captured, in part, by this Article's examination of journalistic reporting concerning the matters raised by Mr. Madan's petition) and which seemed to motivate Mr. Madan if not the Supreme Court itself.

This “incomplete” corpus of materials is far from lamentable, however. In fact, it might be celebrated, for the lack of an easily discernible and enforceable “output” helps one focus on the oft-ignored and pluralistic social, political, sexual, and economic “inputs” to law-making, of which Mr. Madan's 2005 petition is but one example. Petitions (such as Mr. Madan's) and counter-petitions are distinctly not final decisions; they resolve very little and they are each, on their own, necessarily only “part of the story.” Moreover, they each offer (like all legal argumentation) both disagreement with opposing narratives, positions, and parties, as well as internal inconsistencies or ambivalences.<sup>28</sup> In other words, such petitions and counter-petitions are not only fragments of a larger picture, debate, and social imagination, but they themselves are also fragmented. A legal kaleidoscope is the outcome. And as a result, another split emerges between the ethnographic methodology that this Article engages in and the methodology of constitutional lawyers, judges, and law professors—focused as they are on ostensibly clear and decisive final/majority decisions.

This is all to say, then, that there will be a close reading and serious consideration of constitutional “texts” in this Article, though ones that are—wrongfully—usually considered “non-authoritative” for many in the legal academy and quotidian practitioners of this kind of law. In everyday legal practice, for example, while attorneys practicing in the area of constitutional law would certainly be interested in the kinds of constitutional “texts” presented and analyzed herein—in fact, such attorneys are the authors of these

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28. In fact, some legal systems actively allow legal pleadings to present alternative/contradictory narratives of what has happened in a given legal situation/dispute. *See, e.g.*, FED R. CIV. P. 8(d) (stating that “[a] party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones,” and that “[a] party may state as many separate claims or defenses it has, regardless of consistency”).

kinds of texts, i.e., petitions and responses devoted to argument over the meaning of any given constitution—they likely would not consider either their own petition or an opposing petition representative of anything other than their or their adversary's respective positions or immediate interests. In other words, any petition, or opposing petition, would not be considered (part of) "the law." The ethnographic approach to constitutionalism, as understood and deployed in this Article, however, would respectfully disagree.

Before moving on to a detailed examination of the various legal texts produced by Mr. Madan and others in 2005, a few additional words are necessary about the boundaries of constitutionalism and, in particular, what cannot—or can—be considered authoritative in the constitutional "realm."

*B. One Last Note: (Non-State) Constitutionalism and Archival Question-Begging*

The quotidian legal practitioners just described above generally understand law differently than this Article does in that they would very likely show little interest in, following Laura Nader, taking constitutional analysis wherever it leads—for example, to "the construction of suburbia."<sup>29</sup> The beginning and end of their analysis would be limited to a domain delimited as "strictly constitutional." In addition, the vast majority of legal academics who are interested in constitutional law would also keep themselves firmly within the narrow domain of the strictly constitutional, though distinguishing themselves from "practicing" attorneys by devoting themselves more self-consciously to discerning either linkages or disconnects between different eras, ideologies, and sub-domains of constitutional and legal analysis. Often the goal here is to derive some Dworkin-esque "story" about "the constitution" (or a particular part of a constitution) and its singular meaning.<sup>30</sup>

Such approaches, while generally unsuitable to an understanding of how constitutionalism works "on the ground,"<sup>31</sup> are particularly unsuited to exploring and understanding the case of *Vishwa Lochan Madan v. Union of India* that Mr. Madan's petition instigated, seeing that the precise constitutional controversy raised by Mr. Madan concerns the parameters of

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29. See text accompanying *supra* note 36. Somewhat similarly, Jean Comaroff and John Comaroff urge us "not to rely on any preconstituted 'documentary record'" and, instead, to go off the beaten path to examine "traces found in newspapers and official publications as well as in novels, tracts, popular songs, even in drawings and children's games." COMAROFF & COMAROFF, *supra* note 5, at 33.

30. In this way, such academics are interested in what I will term here the "incessant march of a semiotically-seamless *stare decisis*."

31. See Scheppele, *supra* note 4, at 397–99, for her discussion of how her experience living in Hungary and observing the Hungarian Constitutional Court's operations in person was necessary to the development of her understanding as to how this court actually worked and what its judgments meant or were about in reality.

legitimate legalism itself. In other words, any attempt to strictly define constitutionalism—and, by extension, the appropriate scope of constitutional examination—would beg the important legal question that Mr. 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].”<sup>32</sup>

Seeking to avoid question-begging then, this Article does not assume *a priori* where constitutionalism (or “the rule of law”) begins and ends and what it does and does not require. Certainly, as the next Part discusses, the Government of India (i.e., the state) did get involved in this case via a response that it, as a named defendant, filed in *Vishwa Lochan Madan v Union of India*. However, this was essentially the limit of the state’s direct involvement in this still-undecided case. And even here, as will be explained below, it seems the state’s counter-affidavit was largely inspired by (if not actually drafted by) non-state (Muslim) organizations and actors.<sup>33</sup>

Ultimately then, this Article’s methodology attempts to maintain an openness to the various kinds of materials and influences which circulate in relation to constitutional controversies, instead of focusing on the “final decisions” of a Supreme Court. Here, in fact, it is not clear where the line between “decision” and “indecision” itself lies; the Supreme Court of India’s decision—for eight years now—to not issue a decision in response to this constitutional petition may speak volumes itself. This “non-decision-decision,” and also a wide range of other materials located both inside and outside the hazy juncture where state and non-state institutions, organizations, and individuals intersect, must be accounted for in this Article’s discussions. Otherwise, question-begging as to the meaning of constitutionalism itself will be an unfortunate result.

## II. PETITION/RESPONSES

The basic aims of Mr. Madan’s petition were described and quoted in the Introduction to this Article.<sup>34</sup> As Mr. Madan sees it, without the Supreme Court intervening to shut down non-state Muslim dispute resolution service providers, the future of Indian secularism and the rule of law in India are dark ones. Indeed, if one was to believe Mr. Madan’s petition, without the Supreme Court’s timely action, even the future of the Indian Supreme Court is at stake.

The existence of non-state Islamic legal providers is dangerous to the Supreme Court (and other state-sponsored courts in India), according to Mr. Madan’s petition, because of the corrosive influence that non-state legal actors

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32. Petitioner Aff. 32, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

33. See text accompanying *infra* note 78.

34. See text accompanying *supra* notes 12–13.

can have on what counts as a “court” or “law” in the first instance. In the petitioner’s own words, “[T]he pseudo-judicial functioning of religious-institution[s] [like the *dar ul qaza* system<sup>35</sup> 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.”<sup>36</sup> This possibility arises because, in part, such institutions allegedly “create a lot of confusion . . . in the mind of uneducated multitude of Indian Muslim Citizenry as regards the extent and nature of obedience to them.”<sup>37</sup> In other words, to the extent that “counterfeit” (i.e., “pseudo”<sup>38</sup>) non-state provision of dispute resolution corrodes the certainty and reality of centralized legal authority in India, they corrode the idea 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.

If Mr. Madan’s petition is to be believed then, there is an impending crisis in law and legality in India. On its face, this is a very big claim, and one that may seem wildly fanciful and also wildly ambitious in how it proposes to solve this problem—namely, to shutter all non-state Muslim dispute resolution service providers.<sup>39</sup> This claim comes across as even more peculiar when one considers that it is made, in all its grandeur, 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 legal profession.”<sup>40</sup> This kind of highly individualistic “Public Interest Litigation”<sup>41</sup> can easily be contrasted with other common examples of public interest litigation where, for example, a coalition of non-governmental organizations who share a great deal of experience with, and concerns about, the functioning of law in India raise a concern about some legal practice in front of an Indian high court. As a result, one has to wonder: Why this particular set of grandiose worries about the Indian legal system, and why *now*?

As it happens, there was a sparking set of events that caused worry amongst many people in India about the effective operations of the Indian legal system, Mr. Madan included. While his litigious reaction to this set of events was unique, the anxiety that his petition expresses about this sparking set of events was widespread. In what follows, this Part explains this set of events—

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35. See *supra* note 14 for a brief explanation of the *dar ul qaza* system.

36. Petitioner Aff. 6, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

37. *Id.* at 5.

38. *Id.* at 6.

39. See text accompanying *supra* notes 13–16.

40. Petitioner Aff. 5–6, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author)

41. See *id.* at 3.



concerning a series of *fatwas* issued by *muftis* and/or other non-state Islamic legal authorities<sup>42</sup> around India speaking to the appropriate civil and criminal law ramifications flowing from the rape of married Muslim women by their fathers-in-law—eventually telescoping outward from these events to the particular legal and sociological claims made by Mr. Madan’s petition, as well as the responses to Mr. Madan’s claims by Mr. Madan’s named defendants. Part III of this Article will then contextualize and analyze all these events and claims politically, socially, and legally. All three “views” of this petition—focusing on its precipitating events, the particular claims made within the petition itself and the responses which these claims elicited, and the broader socio-cultural context—are necessary to more fully understand this constitutional petition and its various potential meanings and effects for different parts of India’s pluralistic polity.

#### A. *Controversial Fatwas*

During the summer of 2005, right before the petition which instigated the case of *Vishwa Lochan Madan v. Union of India* was filed in the Supreme Court of India, a longstanding 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, this woman should no longer be considered the wife of her husband.<sup>43</sup> Moreover, this young woman, Imrana, was allegedly pressured by members of her local community into not bringing a criminal rape case against her father-in-law. 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 judicial system—seemed to demonstrate the ease by which religious and other non-state entities could “subvert” the Indian state’s criminal law processes, as well as the Indian state’s efforts to regulate 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 both raped and divorced, without the state being able to intervene in either case, was eminently frustrating for institutions and people

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42. I describe the particular (Muslim) opinion-givers in this indeterminate way because Mr. Madan’s petition itself targets a large, indeterminate, and ill-defined set of non-state Islamic legal actors in relation to the set of events which apparently sparked his petition. *See* text accompanying *infra* note 52.

43. According to an English translation of the *fatwa* in question, provided in the counter-affidavit of another named defendant, the Darul-Uloom Deoband, 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.’” Respondent No. 10 Counter-Aff. Annexure, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

who wanted to believe in the power of their “modern” state against “pre-modern” attitudes and practices.

For example, in the well-known and widely-distributed English-language national magazine, *India Today*, reporter Farzand Ahmed<sup>44</sup> 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 on how “[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.”<sup>45</sup>

“Imrana’s case,” then, was the most obvious spark for Mr. Madan’s petition to the Supreme Court of India, and his petition does not hesitate in describing to the Court the seemingly awful facts of “Imrana’s case” 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 4<sup>th</sup>, 2005. Police have filed a charge-sheet against the main accused on July 4<sup>th</sup>, 2005 containing details of victims’ 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 27<sup>th</sup>, 2005 supported the fatwa issued by the Islamic seminary Darul Uloom Deoband.

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44. This reporter’s name suggests that he is of Muslim background. It may be surprising for some readers to contemplate that a Muslim could engage in such a sensational, clichéd, and stereotypical portrayal of Islam. However, like any other “community,” vast differences of opinion exist within India’s Muslim community. By way of example of this intra-community debate, the English-language daily *Hindustan Times* reported on July 1, 2005 that, in response to the Imrana situation, “a panchayat organised by the All India Muslim Women’s Personal Law Board (AIMRLB) . . . said it would try to ensure that those who pronounced the ‘wrong’ verdict in the case were tried under the Indian Penal Code (IPC).” Vasistha Bardwaj, *Imrana Accepts Fatwa but Hopes for Justice*, HINDUSTAN TIMES, July 1, 2005; see also Justin Jones, “Signs of Churning”: *Muslim Personal Law and Contestation in Twenty-First Century India*, 44 MODERN ASIAN STUD. 175, 175–78 (2010).

45. Farzand Ahmed, *Perverse Justice*, INDIA TODAY, July 7, 2005.

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.<sup>46</sup>

Soon after the Imrana episode hit the Indian press, a similar case also received wide public exposure. As the widely-distributed English-language newspaper, *Hindustan Times*, succinctly described this case: “Another Imrana, this time in Assam.”<sup>47</sup> The same article went on to describe how “[t]ales of Imrana-like atrocities are tumbling out of the closet [throughout India].”<sup>48</sup> Not surprisingly, this “second” Imrana episode gets catalogued and described in Mr. 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 28<sup>th</sup> 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.<sup>49</sup>

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

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46. Petitioner Aff. K–L, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author). At another point in Mr. Madan’s petition to the Supreme Court, the procedural history and deficiencies behind the Darul Uloom Deoband’s issuance of a *fatwa* in this matter, and the All India Muslim Personal Law Board’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.

*Id.* at 23–24.

47. Rahul Karmakar, *Another Imrana, this time in Assam*, HINDUSTAN TIMES, July 8, 2005.

48. *Id.*

49. *Id.* at 25–26.

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.<sup>50</sup>

Mr. Madan’s petition takes note of this particular situation as well, describing vividly how

[a]nother hapless Muslim sister, Asoobi [aka Rukhsana from above newspaper article] experienced a similar trauma of being sexually violated by her father-in-law on June 12<sup>th</sup>, 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.”<sup>51</sup>

Ultimately, after laying out all three of these individual situations—those involving Imrana, Jyotsna Ara, and Asoobi—Mr. Madan’s petition ties all of them together, describing their relevance to this petition’s 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

50. Raghvendra Rao, *Imrana rewind in Mewat*, INDIAN EXPRESS, July 4, 2005.

51. Petitioner Aff. 24–25, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author). At another point in Mr. Madan’s petition to the Supreme Court, the following evidentiary procedural issue is also identified:

Maulana Allauddin 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. Her husband, Zakir, however 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.*

*Id.* at 25 (emphasis added).

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.<sup>52</sup>

Moreover, according to Mr. Madan's petition, these three incidents demonstrate how "Muslim bodies are . . . functioning to the detriment of welfare of Muslim women."<sup>53</sup> Mr. Madan's conclusion in this respect comes despite the fact that Mr. Madan, in his own petition, sets out and describes a contrary assessment by one of the named defendants, the All India Muslim Personal Law Board, that its own non-state *dar ul qaza* dispute resolution bodies<sup>54</sup> 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]."<sup>55</sup>

#### B. Particular Claims in Mr. Madan's Constitutional Petition

While Mr. 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) is not at the core of his legal and constitutional arguments to the Supreme Court concerning why non-state Muslim dispute resolution service providers should be shuttered.<sup>56</sup> 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,"<sup>57</sup> but also insisting that "[n]othing in this article shall prevent the State from making any special provision for women and children"<sup>58</sup>) nor Article 44 (urging "[t]he State [to] endeavour to secure for the citizens a uniform civil code throughout the territory of India"<sup>59</sup>) are invoked by Mr. Madan in his effort to shut down the non-state providers of Islamic legal services.

52. *Id.* at 26, 32.

53. *Id.* at 21.

54. *See supra* note 14 for a brief explanation of the *dar ul qaza* system.

55. Petitioner Aff. 19, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

56. While, at times, Mr. Madan seems interested in the less-advantaged sections of society, his concern in this respect is rarely expressed as a concern with 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 the [*dar ul qaza* system], using the name of Allah and the Holy Quran." *Id.* at 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." *Id.*

57. INDIA CONST. art. 15, § 1 (emphasis added).

58. *Id.* at art. 15, § 3 (emphasis added).

59. *Id.* at 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." *Id.* at art. 37.

Indeed, instead of relying on provisions of the Constitution of India which go to the social and legal position of women in India, Mr. Madan's petition begins its constitutional and legal argumentation by arguing that "[b]ecause a State with a Constitution, like India, must necessarily regard its Constitution, as a 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."<sup>60</sup> 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."<sup>61</sup> As a result, and because, according to Mr. Madan, "[one of] the respondent[s] . . . strives for the establishment of parallel Muslim Judicial System in India,"<sup>62</sup> this respondent (amongst others) may be seen to be engaging in an "open rebellion, which deserves to be curbed in the budding stage by the Sovereign State."<sup>63</sup>

Only following these arguments about the nature of law and constitutionalism, does Mr. Madan turn 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, Mr. Madan views the Constitution of India as a social-reform document, applicable to all of India's religious communities, Muslims included.<sup>64</sup> Writes Mr. 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.<sup>65</sup>

Because the Constitution is a religious-reform document, intended to "denounce[]"<sup>66</sup> and deter certain religious practices, Articles 25 and 26—provisions of the Constitution dedicated to religious liberty—must be read

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60. Petitioner Aff. 29, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

61. *Id.*

62. *Id.* at 30.

63. *Id.* Mr. Madan's characterization of the present situation as an insurrection is echoed in other language in the petition; for example, when Mr. Madan declares that "*camps* are being organized to train Qazis (Judges) . . . to administer justice according to Shariat." *Id.* (emphasis added).

64. *See id.* at 35.

65. Petitioner Aff. 35, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

66. *Id.*

through this reform lens. Indeed, according to Mr. 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*.”<sup>67</sup> By implication then, inegalitarian social practices—including, presumably, non-state Muslim dispute resolution service providers—must be eradicated.

Interestingly, in arguing for this understanding of secularism (and its conceptual cognate, religious liberty), Mr. Madan concedes that “essential” religious practices are 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.”<sup>68</sup> Even more interestingly, Mr. Madan concedes that Muslim Personal Law is 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.”<sup>69</sup>

However, while Muslim personal law is protected under Mr. Madan’s understanding of Indian constitutional secularism, non-state enforcers of this law are not. And this is where Mr. Madan’s understanding of secularism folds into the petitioner’s ultimate 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).<sup>70</sup>

Indeed, to allow such a “parallel” non-state system of law to operate would be to create a “chaotic situation,”<sup>71</sup> one that would

67. *Id.* (emphasis added).

68. *Id.* at 36.

69. *Id.* at 38. Later, in his rejoinder-affidavit, Mr. Madan seems somewhat more ambivalent as to whether the Constitution of India can, in fact, condone the existence of personal law. In this respect, Mr. Madan argues:

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. 18–19, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

70. Petitioner Aff. 38, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

71. *Id.*

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.<sup>72</sup>

Thus, Mr. Madan’s petition, while addressing a few other constitutional and legal issues,<sup>73</sup> essentially ends 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. While this concern with the rule of (state) law gets displaced through a concern with secularism, the petitioner’s core concern is with the rule of law. And, in fact, this basic concern with the rule of (state) law gets expressed again in the final section of Mr. Madan’s petition, where Mr. Madan makes demands which, beyond those mentioned in the Introduction to this Article, include the following demands:

-b- Declare that the judgments and *fatwas* pronounced by authorities not established under the Constitution of India or the Procedure established by

72. *Id.* at 38–40.

73. Mr. Madan raises a few other legal and constitutional concerns at the end of his petition, but he does so in a somewhat miscellaneous manner. Perhaps the most interesting set of arguments here revolve around claims that the *dar ul qaza* system cannot be considered as simply providing another form of otherwise-ordinary and thereby permissible arbitration, if only because “the matters relating to matrimonial causes can never be a subject-matter of arbitration.” *Id.* at 42. Moreover, Mr. 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* system. Writes Mr. Madan:

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 [sic].

*Id.* at 43. Finally, in a grab-bag section towards the end of his petition, Mr. Madan responds 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 [sic], 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 person 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.

*Id.* at 44–45.



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.<sup>74</sup>

### C. *Defendants' Responses*

While the Union of India was the lead named defendant in Mr. Madan's petition, the All India Muslim Personal Law Board (AIMPLB), as Respondent No. 9, appears to be the real focus of Mr. 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, instead of the Union of India's counter-affidavit. This is a less-than-problematic decision for at least three reasons.

First, the AIMPLB is India's most well-known Muslim organization and, for many Indian liberals, has posed one challenge after another to their deeply-held values. To read, interpret, and understand its 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 and relatedly, the AIMPLB (along with the Imarat-e-Shariah, another non-state Muslim organization<sup>75</sup>) coordinates a large number of non-

74. Petitioner Aff. 46-47, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

75. Another Muslim organization, the well-known Darul Uloom in Deoband is also named as a defendant by Mr. Madan, and is known as Respondent No. 10 in this litigation. Respondent No. 10 also filed a counter-affidavit in this litigation, but this counter-affidavit 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 All India Muslim Personal Law Board) and also because Respondent

state *dar ul qazas*—a form of non-state Muslim dispute resolution service provision<sup>76</sup>—around India; this organization's constitutional and legal defense of its own *activities* is thus arguably more relevant—for both Mr. 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 Mr. 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, if at all, having been claimed are claimed against the Ninth Respondent [the AIMPLB] which is a private body.*"<sup>77</sup> Third and finally, the Union of India's arguments in its counter-affidavit largely overlap with those of the AIMPLB. Indeed, similarities between the two defendants' counter-affidavits suggest that the state's counter-affidavit here

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/difference 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 pre-eminence (in India and also internationally) of the Darul 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 15, 1866].

Respondent No. 10 Counter-Aff. ¶ 5, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author). As well, since the Darul Uloom's relevant activities are far more related to issuing *fatwas* than issuing judgments/*qaza*, its other counter-affidavit arguments largely address the qualifications and extensive training that go into becoming a *mufti*, and the way in which its *fatwa*-giving has supposedly significantly reduced litigation loads in the Indian state courts—more than 700,000 *fatwas* have been issued by the Darul Uloom since 1892, according to the Darul Uloom, *see id.* at ¶ 2—as opposed to making claims about *qazis*, *qaza*, and the operations of a *dar ul qaza* system (such as that run by the AIMPLB and Imarat-e-Shariah). *Id.* at ¶ 8(iii).

76. *See supra* note 14 for a brief explanation of the *dar ul qaza* system.

77. Respondent No. 1 Counter-Aff. 1–2, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author) (emphasis added). Somewhat similarly, the State of Rajasthan, as another named defendant (Respondent No. 6), replies in its counter-affidavit that, effectively, the vast majority of Mr. Madan's complaints "are related to the Respondent No.9 and other [similar Muslim organizational] respondents." Respondent No. 6 Counter-Aff. ¶ 5, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author). As a result, the State of Rajasthan requested to the Supreme Court that Mr. Madan's petition be dismissed vis-à-vis the State of Rajasthan. *Id.* at ¶ 7.

was heavily influenced, if not actually drafted, by a lawyer for the AIMPLB itself. Indeed, in Mr. Madan's own counter-counter-affidavit (in Indian legal parlance, a "rejoinder-affidavit"), taking note of evident similarities between the Union of India's and the AIMPLB's counter-affidavits, Mr. Madan accuses 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.<sup>78</sup>

Focusing on the AIMPLB's counter-affidavit then, the AIMPLB's contempt for Mr. Madan and his petition's efforts are made clear in this counter-affidavit's opening sections. For example, early on in its counter-affidavit, the AIMPLB contests Mr. Madan's standing to bring his petition, characterizing Mr. Madan as a mere "busybody"<sup>79</sup> who "has filed the present Petition for no ostensible public purpose."<sup>80</sup> Moreover, "[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."<sup>81</sup>

Mr. Madan's unclean hands result from, as the AIMPLB characterizes the situation, his petition's attempt to "achieve cheap publicity/popularity and/or to achieve oblique political objective."<sup>82</sup> While the AIMPLB does not directly label the political objective allegedly motivating Mr. Madan—initially characterizing it as "oblique"<sup>83</sup>—the AIMPLB does 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,"<sup>84</sup> including certain Hindu and Christian communities.

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78. Petitioner Rejoinder-Aff. 60, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author); *see also* Satya Prakash, *Centre 'copied' law board submissions*, HINDUSTAN TIMES, Jan. 4, 2007. As a result of his view that the counter-affidavits of Respondents No. 1, 9, and also 10 are "materially and tangibly the same," Petitioner Rejoinder-Aff. 1, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author), Mr. Madan's rejoinder-affidavit responds to all three counter-affidavits simultaneously.

79. Respondent No. 9 Counter-Aff. 2, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

80. *Id.*

81. *Id.*

82. *Id.* at 3.

83. *Id.*

84. *Id.*

After this contentious opening reply, the AIMPLB's counter-affidavit continues onward to argue that Articles 25, 26, and 29 of the Constitution of India protect the operation of the AIMPLB's non-state *dar ul qaza* system.<sup>85</sup> As a result, "any interference with the functioning of Dar-ul-Qaza will amount to the breach of Fundamental Rights of the Muslims."<sup>86</sup> The AIMPLB's interpretation of Articles 25, 26, and 29 here is in direct conflict with Mr. Madan's interpretation/belief that these constitutional provisions can be read to simultaneously support Indian secularism—and its allowance of different personal laws for different Indian religious communities—but eradication of different religious communities' non-state dispute resolution providers. Indeed, the AIMPLB believes that not only do these constitutional provisions protect non-state Muslim dispute resolution providers, including the *dar ul qaza* system, but also that to interfere with these non-state Islamic legal providers would "malign[] the entire system of personal laws of the Muslims."<sup>87</sup> 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."<sup>88</sup> In sum then, for the AIMPLB, without non-state Islamic legal service providers there can be no Muslim personal law, and if there is no Muslim personal law, there is 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 turns to a discussion of legal history. In this respect, the AIMPLB argues that historical systems of Islamic dispute resolution (including historical predecessors to the contemporary *dar ul qaza* system), present in India since pre-colonial times, were never superseded or extinguished by the British colonial regime. Thus, they remain legally legitimate institutions in a post-colonial India, which inherited a great deal of legislation from the British colonial period. Indeed, the AIMPLB's counter-affidavit describes 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

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85. See Respondent No. 9 Counter-Aff. 4, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author)

86. *Id.*

87. *Id.* at 5.

88. *Id.* at 8. In this respect, the counter-affidavit 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.

*Id.* at 6.

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.<sup>89</sup>

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. This 1864 Act—coming in the aftermath of the 1857 anti-colonial revolt throughout much of British colonial India, and the subsequent formal absorption in 1858 of East India Company possessions into the British Empire—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. This 1864 Act is a short one, simply declaring 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 thus any previous colonial regulations pertaining to such official offices and appointments are henceforth repealed.<sup>90</sup>

That being said, the 1864 Act also states 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.”<sup>91</sup> The AIMPLB's counter-affidavit terms this second part of Act No. XI of 1864 a “saving clause,” going on to describe the effect of it 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

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89. *Id.* at 10.

90. Act No. XI of 1864, Governor-General of India in Council, 1864 (India).

91. *Id.*

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.<sup>92</sup>

After describing the impact of the 1864 Act in this way, the AIMPLB counter-affidavit moves chronologically forward in its historical legal analysis, bringing the same kind of perspective as it did to the 1864 Act to Act No. XII of 1880, or what the counter-affidavit terms the Kazi Act of 1880. Here too, the counter-affidavit identifies a “savings clause”<sup>93</sup> in this Act<sup>94</sup> such that, no matter what the rest of the Act aims to be doing, there is, according to the counter-affidavit, a “recogni[tion of] the prevailing system of administration of justice under the Muslim administration of justice under the Muslim law.”<sup>95</sup>

After this exposition of legal history, the AIMPLB’s counter-affidavit proceeds to engage in an effort to demonstrate that its *dar ul qaza* system, contra Mr. Madan’s depiction of it as authoritarian and preying on the poverty and relative ignorance of the Indian Muslim community, “rests on sustained public confidence in its moral sanction.”<sup>96</sup> In this regard then, the counter-affidavit begins an exposition of 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.”<sup>97</sup> The efforts described here include the precursor to the contemporary *dar ul qaza* system 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 Anjuman-e-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.<sup>98</sup>

92. Respondent No. 9 Counter-Aff. 21–22, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

93. *Id.* at 26.

94. The Kazis Act, No. XII of 1880, *available at* <http://indiacode.nic.in>.

95. Respondent No. 9 Counter-Aff. 26, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

96. *Id.* at 30–31.

97. *Id.* at 31.

98. *Id.* at 33.

In this excerpt, one can see two simultaneous gestures. The first is towards the deep history underlying the contemporary *dar ul qaza* system, thereby attempting to justify its future continuance by pointing to its deep historical pedigree. The second is to the procedural features that this system *shares* with contemporary standards of procedural adequacy and fairness—indeed, like the Indian state system, the non-state *dar ul qaza* system too ensures appeals according to the AIMPLB.

This second theme is then picked up and continued within the remaining portion of the AIMPLB's counter-affidavit. For example, "Respondent No 9 contends that the process of training of Qazis is highly [sic] rigorous and is in consonance with the onerous functions that they have to perform."<sup>99</sup> This seems to suggest that *qazis* working in the *dar ul qaza* system have as much, or possibly more, training than judges in the state court system. However, this is not to suggest that there is *competition* per se between the state court system and the *dar ul qaza* system, at least according to the AIMPLB's counter-affidavit. Indeed, at this point in the counter-affidavit the AIMPLB turns to an explanation of how the *dar ul qaza* system only operates in a manner either supplementary or complementary to, but not competitive 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.<sup>100</sup>

On the issue of *faskh* divorce, and responding to Mr. Madan's contentions as to the exclusive jurisdiction of state courts over matrimonial matters, the AIMPLB's counter-affidavit specifically disagrees with Mr. Madan on this matter, contending that marriage matters are civil matters, and both Sections 9 and 89 of the Civil Procedure Code, as well as the Arbitration and Conciliation Act of 1996, allow for arbitration in civil matters like matrimonial disputes. Indeed, according to the AIMPLB's counter-affidavit,

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99. *Id.* at 35.

100. *Id.*

[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.<sup>101</sup>

Picking up on its observations here as to the Indian state's earlier creation of an alternative system of cheaper and quicker state courts (known as *lok adalats*), for reasons pertaining to the costs and delays associated with the state's traditional court system, the AIMPLB's counter-affidavit then observes that

settlement of disputes under Muslim law in Darul-Qaza 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.<sup>102</sup>

And, indeed, like *lok adalats* and other similar state-sponsored alternatives to the traditional state court system, the *dar ul qaza* system “relieves the Court of its burden and serves great public interest.”<sup>103</sup>

### III. THE MULTIPLE MEANINGS AND IMPLICATIONS OF LAW AND CONSTITUTIONALISM

In closing this Article, this final Part engages in an exploration of what the previous Part's excavation of the ongoing constitutional controversy in India that Mr. Madan's petition instigated suggests about the multiple meanings and implications that may result when the Supreme Court finally issues an opinion in reaction to Mr. Madan's petition, or even if it does not. As the Introduction to this Article explained, following James Tully, one can describe “the language of contemporary constitutionalism . . . [a]s more akin to an assemblage of languages . . . composed of complex sites of interaction and struggle.”<sup>104</sup>

This Part cannot analyze all of the languages deployed in the litigation, but it will focus here on two in particular. In the process, this Part demonstrates different valences to this litigation and the different ways it may be understood and enforced in the future, whether by the Supreme Court, other state institutions, or in the realm of the non-state/civil society. These two languages

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101. Respondent No. 9 Counter-Aff. 41, *Vishwa Lochan Madan v. Union of India*, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

102. *Id.* at 42.

103. *Id.* at 43.

104. TULLY, *supra* note 6, at 37–38.



are those concerning (1) the well-being and rights of women, and (2) liberal Islamophobia and, namely, Islamophobic conceptions of secularism and the rule of law. In focusing on these two languages, the intention is not to suggest that each of these languages is a water-tight vessel with no relation to the other (or any other) language. Like many sets of languages, the two chosen here for analysis share genealogies, vocabularies, and meanings. For example, discussions about women's equality have, for some time, relied on notions of "equality" and "woman" which are hostile to the experiences and desires of many *Muslim* women.<sup>105</sup>

#### A. *Well-Being and Rights of Women*

As discussed in Part II, Mr. Madan's petition appears to have been instigated by publicity concerning *fatwas* issued by different non-state Islamic legal service authorities around India, each allegedly affecting the marital status of a woman who claimed to have been raped by her father-in-law. Mr. Madan's petition describes these three women in a way that suggests that they are abject and needing of a certain kind of intervention by the state. For example, Asoobi is described as "[a]nother hapless Muslim sister,"<sup>106</sup> following in the hapless footsteps of Jyotsna Ara and Imrana.

In this way, Mr. Madan's petition and the debate it has engendered loudly echoes 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 Mr. Madan's petition, in a way strongly evocative of the way the "Shah Bano affair" earlier became a cultural shorthand for all the alleged problems with Islamic law, Muslim men, and the situation of Muslim women in India. One genealogy that Mr. Madan's petition might easily be slotted into then—and thus also one way its resolution might come to be understood—is as a continuation of the Indian judiciary's concern with the situation of women's well-being and rights, and particularly *Muslim* women's well-being and rights.<sup>107</sup>

To briefly summarize this previous crisis-like situation dating from the 1980s, Shah Bano was a 73-year-old Muslim divorcee who had sought post-divorce support payments from her Muslim ex-husband. This ex-husband had

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105. See generally SCOTT, *supra* note 3.

106. See text accompanying *supra* note 51.

107. And, in fact, newspaper op-eds written around the time that Mr. 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." Firoz Bakht Ahmed, *Where is the real Muslim?*, HINDUSTAN TIMES, July 6, 2005.

previously divorced Shah Bano after 46 years of marriage. Shah Bano argued that such financial support was hers to claim under Section 125 of the Indian Code of Criminal Procedure. However, Shah Bano's ex-husband resisted this application of Section 125 to his and Shah Bano's (expired) marriage, arguing that the Indian Code of Criminal Procedure's requirement that a man indefinitely financially maintain his ex-wife after a divorce if she is "unable to maintain herself"<sup>108</sup> was not applicable to Muslim men, who supposedly have more limited responsibilities toward their ex-wives under classical Islamic family law.<sup>109</sup> This legal controversy ultimately moved to the Supreme Court of India, which handed down its decision in this matter in the 1985 decision of *Mohd. Ahmed Khan v. Shah Bano Begum*.<sup>110</sup> In this landmark decision, the Supreme Court held that (1) the Code of Criminal Procedure's requirements superseded any contradictory Islamic law,<sup>111</sup> and (2) nothing in Islamic law itself forbade indefinite maintenance to a divorced wife "who is unable to maintain herself."<sup>112</sup>

Arguably, the first holding was sufficient to have settled the case, and it was gratuitous and provocative for the Supreme Court to have interpreted the Muslim community's personal law. This seems especially the case given that other portions of the Court's opinion took a patronizing tone in regards to the content of such personal law. For example, the lead paragraph in this opinion included the following 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.'"<sup>113</sup>

The *Shah Bano* opinion ignited large protests by conservative Muslims across India.<sup>114</sup> As a result, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim demands to pass a statute eliminating Muslim—and only Muslim—women's rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.<sup>115</sup> In

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108. INDIA CODE CRIM. PROC. § 125(1)(a).

109. Under most classical interpretations of Islamic divorce law, it is generally the rule that a man is required to financially maintain his (ex-)wife up until she has menstruated three times, post-divorce. See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 182–84, 280–82 (3d ed. 1998).

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

111. *Id.* at 854–56.

112. *Id.* at 859–62.

113. *Id.* at 849–50.

114. Counter-protests by a number of dissident Muslim women and their allies also ensued, adding fuel to the fire. See Kirti Singh, *The Constitution and Muslim Personal Law*, in *FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE* 96, 101–03 (Zoya Hasan ed., 1994).

115. See The Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986, available at <http://indiacode.nic.in/>.

response, cries of “appeasement” were effectively raised by Hindu nationalist quarters, which eventually helped lead to the national electoral successes of the Hindu-nationalist BJP political party. These successes, in turn, led to a severe polarization in Hindu-Muslim relations in India, a corresponding increase in violence between the two communities, and the drawing of new and sharper boundaries between the two communities.

These communal problems and the challenges they present for legislation and judicial decision-making in the area of personal law persist today. For example, while Mr. Madan’s petition suggests that, in the process of trying to shutter non-state Muslim dispute resolution service providers, he is interested in protecting helpless Muslim women, the AIMPLB strongly disagrees with Mr. Madan’s assessment of what constitutes Muslim women’s interests in the first place, as well as any detrimental effects that non-state Islamic legal actors specifically pose for Muslim women.<sup>116</sup>

Moreover, these different positionalities vis-à-vis the “women’s issues” at stake in Mr. Madan’s petition are not only evident in the different arguments put forth by the different parties in the various texts produced in the course of this litigation, but will also likely affect how any future Supreme Court decision concerning Mr. Madan’s petition gets “implemented.” For example, in the aftermath of the *Shah Bano* decision, one response to the Indian *state* legal system’s attempt to develop and hegemonically enforce its own particularistic interpretations of Muslim personal law was the further development of *non-state* Islamic legal spaces—such as those attacked by Mr. Madan’s petition—to privately adjudicate Muslim couples’ matrimonial affairs. While it is not possible to predict precisely what might be the reaction to a Supreme Court of India decision silencing non-state *muftis* and *qazis*, one can imagine and anticipate artful ways in which the non-state will again resist, if not also simultaneously occupy, the empire of state law and legal institutions.<sup>117</sup> Thus, Mr. Madan’s petition and the responses to it not only evidence different positionalities vis-à-vis women’s rights in India, but potentially different outcomes with respect to women’s welfare in the different arenas of India’s pluralistic polity.

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116. See, e.g., text accompanying *supra* note 55.

117. I use the word “empire” here deliberately in order to reference Peter Fitzpatrick’s observations as to how “the degenerate idea of [non-state] custom and community that emerges in the West out of [state] law’s separation from and denial of custom can be matched term for term in the languages of imperialism—languages of lawyers and . . . of administrators.” Peter Fitzpatrick, “*The desperate vacuum*”: imperialism and law in the experience of Enlightenment, 13 DROIT ET SOCIÉTÉ 343, 353 (1989).

### B. *Liberal Islamophobia*

The ways in which the Shah Bano affair was utilized by Indian political, social, and cultural elements to disparage Indian Muslims demonstrate the ways in which the language of women's equality has become imbricated with hostility towards Muslim communities, both in India and elsewhere, and especially the religious and political leadership of these communities. Moreover, Mr. Madan's petition itself demonstrates this kind of hostility towards this Muslim leadership, and in the context of making constitutional arguments pertaining to two liberal values, namely secularism and the rule of law.<sup>118</sup>

Generally speaking, in attempting to make out its liberal credentials, Mr. Madan's petition in this case relies on a depiction of a certain kind of authoritarian Islam—which Mr. Madan aims to counter—full of Muslim leaders taking advantage of the uneducated masses who make up the majority of adherents to Islam in India. For example, in describing one of the legal questions it was posing to the Supreme Court for resolution, Mr. 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?<sup>119</sup>

As Part II demonstrated and discussed, Mr. Madan's petition makes other such statements about India's Muslim community.<sup>120</sup> The AIMPLB's counter-affidavit, however, contests this simplistic depiction of India's Muslim community,<sup>121</sup> as one might expect any Muslim organization to do when confronted with preconceptions and misconceptions about Islam and Muslims alike—or, in other words, Islamophobia.

As the above excerpt demonstrates, Mr. Madan's Islamophobia gets expressed in the context of his petition's discussion of "Secular India."<sup>122</sup> Secularism, however, is not the only liberal vocabulary that Mr. Madan's petition deploys. As Part II demonstrated, Mr. Madan's petition also utilizes a number of arguments as to how the rule of (state) law is threatened by non-

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118. See, e.g., *supra* note 56.

119. Petitioner Aff. 5, Vishwa Lochan Madan v. Union of India, Writ Petition (Civil) No. 386/2005 (India) (on file with author).

120. See, e.g., *supra* 56.

121. See, e.g., text accompanying *supra* notes 96–98.

122. See text accompanying *supra* note 119.

state Islamic legal institutions. However, as the AIMPLB noted, such arguments conveniently ignore parallel non-state Hindu and Christian practices,<sup>123</sup> and also conveniently forget numerous profound (and arguably enviable) changes in India's "formal" legal institutions over the past thirty years.<sup>124</sup>

For example, over the past couple of decades, there has been a vast 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 (e.g., motor-vehicle accident claims, quarrels with public utility companies, and civil family law matters).<sup>125</sup> 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 more-recent and related development has been Parliament's recent approval of the Gram Nyayalayas Act of 2009. This Act of Parliament established 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 was the 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. 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 seeping in—in civil disputes handled by *gram nyayalayas*, the Indian Code of Civil Procedure can be disregarded. Demonstrating a similar hostility towards the usual state court procedures and state court rules vis-à-vis evidence, the Act also states that a *gram nyayalaya* may receive as evidence any report, statement, document, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. Ultimately, then, a more locally-informed set of state-premised legal institutions was created in India in 2009, in response to the institutional failures of the state's existing legal institutions.

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123. See text accompanying *supra* note 84.

124. See text accompanying *supra* note 101.

125. See generally Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L. J. 789 (2004); see also Scott J. Shackelford, *In the Name of Efficiency: The Role of Permanent Lok Adalats in the Indian Justice System and Power Infrastructure*, in GLOBAL GOVERNANCE, DEVELOPMENT AND HUMAN RIGHTS (Manoj Kumar Sinha ed., 2009).

Ultimately then, while Mr. Madan's petition engages with the language of liberal constitutionalism, it also—on its face—targets one religious group in India (Muslims), in the process indulging in stereotypes about Indian Muslims, and also the Indian state's judicial system itself. For the AIMPLB and other named defendants, Mr. Madan's petition represents less of a mixture of liberal tolerance and Islamophobic intolerance than it does unadulterated Islamophobia, which—in the words of the epigraph which opened this Article—aims to violently harm Muslims like “crusader[s]”<sup>126</sup> of the past did. Indeed, even if the Supreme Court were to agree with Mr. Madan's rule of law arguments, and write an opinion affecting every Indian religious community's non-state legal institutions, it seems likely that the AIMPLB would view this result as less about “equal treatment” than the consequence of a Supreme Court cost/benefit analysis which views Muslims' “shari'a courts” as so problematic that any social and institutional price must be incurred in the price of eradicating them.

Such different positionalities suggest again, then, the different ways any future Supreme Court decision on Mr. Madan's petition might not only be understood but also be “implemented” in the different arenas of India's pluralistic policy. With respect to these different arenas, it is hard to see how Mr. Madan's rule of law arguments could be implemented to their logical conclusion, in the process erasing decades of innovation (e.g., *lok adalats*) within the Indian state's judicial system. At the very least then, it seems as if any Supreme Court ruling favorable towards Mr. Madan's petition would end up, either explicitly or implicitly, carving out different rules for different arenas of both the state and non-state.

Moreover, with respect to the non-state, if non-state Islamic legal institutions were particularly targeted for closure by the Supreme Court, the threat that “Indian law” poses to Indian Muslims would be more evident than ever before. One potential result might be a “hardening” of the personal law system, such as was seen after the Shah Bano affair. For example, a Muslim response could take the form of not only attempting to again occupy the empire of Indian state law through renewed efforts to legislate new norms within the state's Islamic personal law statutes,<sup>127</sup> but also engaging in efforts to restore the nineteenth-century role of private *qazis* advising state courts in Muslim personal law matters. While the future cannot be predicted with certainty, what is clear is that whatever strategies India's Muslims adopt in response to the aftermath of Mr. Madan's petition, they will likely demonstrate a very different understanding of “the promise” of Mr. Madan's own legal position, and also

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126. See text accompanying *supra* note 1.

127. As happened after the Shah Bano affair with the legislation of the Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986. See text accompanying *supra* note 113.

create a new set of plural and unpredictable questions, challenges, and opportunities.

#### CONCLUSION

This Article has argued the messy unpredictability of constitutionalism, especially as it relates to complicated and contested areas of social, political, and religious life. Moreover, this Article has demonstrated the importance of an ethnographic methodology in coming to terms with constitutionalism and how it becomes understood and implemented “on the ground” in diverse and pluralistic polities. India is one such pluralistic polity and, moreover, one that is confronting serious questions as to its ability to relate to and govern Muslims fairly. The lessons that Indian constitutionalism provides in relation to secularism, the rule of law, and the rights of Muslims are important ones for all of us, in both their substantive and methodological dimensions.