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PERSONAL LAWS IN INDIA: A THEORETICAL INVESTIGATION FROM THE PERSPECTIVE OF MUSLIM PERSONAL LAW[1]

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PERSONAL LAWS IN INDIA: A THEORETICAL INVESTIGATION FROM THE PERSPECTIVE OF MUSLIM PERSONAL LAW

Nizamuddin Ahmad Siddiqui*

Abstract

There has been a lot of discussion around Personal Laws, especially Muslim Personal Law in India, in recent times. Where most of the discussions have centered around women's rights, the authority of the State, and the Constitutional freedoms, there has been very little deliberation over the theoretical understanding of Personal Laws and the role played by the State in this regard. The article attempts to address this gap.

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I. Introduction

The article talks about legal pluralism in the context of Muslim Personal Law in India. It attempts to investigate the understanding that is built around the presence, absence and operation of the personal law systems in a Constitutional democracy. As such, it takes the following form. The second part highlights the theoretical aspects of the Personal Law debate. Here I attempt to identify three separate sets of questions that establish the foundational discourse on the issue. The third part digs deeper to understand the debate in the context of Muslim Personal Law in India. I focus here mainly on the wrongful implications of the *Shayara Bano* ruling of the Supreme Court and the Triple Talaq Act of 2019. The fourth part underscores what I have called the 'contested' understandings, stemming from the state and community perspectives. I argue that Personal Laws are afflicted by twin affiliations, and, therefore, have a difficult terrain to follow within the legal system. In conclusion, I highlight what could be the probable solutions; the pursuance of which I call the "road beneath".

II. The Ideas: Theoretical Constructs

Personal Laws demonstrate the existence of multiple affiliations towards the legal system within a State. While on the one hand, there is a need for conformity towards the Constitutionally recognised standards, especially in the form of religious freedom and the related fundamental rights; on the other hand, religious norms generate their own standards of behaviour for the members of the community. The multiplicity of legal norms, therefore, is an existing reality; and, we cannot ignore the multiple legal identities which exist within any society.[1] In a plural society, it seems wrong to assume that State would be the only legally tenable construction by the individuals; and, only positive law could be the legally possible solution.[2] Where laws and legal systems revolve around the fulcrum of authority, it seems equally probable that members of the society also construct authorities that operate legally but at the same time are not recognised as part of the State legal system. The validity of such legal norms and therefore, alternate legal systems, could only be tested at the instance of the State on the grounds of reasonability identified through legislation, an executive order or a judicial decision. For instance, in *Vishwa Lochan Madan v. Union of India*,[3] the Supreme Court of India dabbled with the question whether the *fatwas* (legal opinions) issued by Muslim religious institutions are legally valid or not?

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[1] See generally, J. Griffiths, What is Legal Pluralism?, 18(24) J. Leg. Plur. Unoff. Law 1 (1986).

[2] id. At 3-4 (*'In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from a sovereign command…or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s).'* (references omitted); and *'The ideology of legal centralism has not only frustrated the development of general theory, it has also been the major hindrance to accurate observation.'*)

[3] AIR SC 2957 (2014).

In this backdrop, the first set of relevant questions could be - how do we understand a legal system? How do we identify its components? How do we organize its elements? And finally, how do we understand its working?

The creation of a State gives rise to national identity. However, nationality is only one of the identities, among many, which any individual carries within a State. For instance, a man and a woman seldom marry on the ground of their national identity (though nationality might become an issue later). Instead, they do so on the basis of their individual interests, religion, ethnicity, domicile, economic status etc. The multiple identities which any individual carries, therefore, might also give rise to legal implications which do not spring directly from the national status. These implications might emanate from a well flourishing system of socio-legal norms prior and independent of the existence of the State itself.

Could we in such situations assume a multiplicity of legal systems within a State? Is multiplicity possible when members of the society have themselves constituted State (as a political reality) through the Constitution (as a politico-legal instrument)? Are other identities, which individuals within a State enjoy, for instance, religious identity, a mere derivative of their national identities, or nationality is the final test for the enjoyment of all the other identities? What happens to prior existing identities, legal norms and legal systems when a State is constituted – whether they are abrogated, subsumed or standardised with the creation of the State? These constitute the second set of inquiries.

Multiple identities and, legal norms operating at the same time, give rise to a conflict among the legal formulations. For instance, when a Muslim man divorces his wife, should we decide 'maintenance' in accordance with the Muslim Personal Law (*Shari'a*) or Section 125 of the Code of Criminal Procedure?[4] In deciding such formulations, a middle path is normally intended. In most instances, it is the judiciary that attempts to mediate between the conflicting norms. However, since the judiciary itself is guided by the Constitutional norms and its formulations, there are inherent limitations embedded in its approach. It is here that due to a general lack of appreciation from the judicial institution, the non-State legal norms in the longer run acquire redundancy on the legal plane.[5]

Though people can imagine, practice and even propagate these norms, they cannot do so employing the language of the law. The language of these norms

[4] Mohd. Ahmed Khan v. Shah Bano Begum, 3 SCR 844 (1985).

[5] For instance, see the dissenting opinion of CJI J.S. Khehar and Abdul Nazeer J. in *Shayara Bano* (arguing the following - *''talaq-e-biddat', is a matter of 'personal law' of Sunni Muslims, belonging to the Hanafi school. It constitutes a matter of their faith'*, ¶ 192; *'Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion'*, ¶ 193; *'the challenge raised [against triple talaq] is in respect of an issue of 'personal law' which has constitutional protection'*, ¶ 194. The judgment of the majority, however, did not much appreciate the dominant religious aspects of the debate as against the secular law provisions. See infra.

and its construction over time, then, results into non-legal, extra-legal and illegal effects. Take for instance, the question of *Talaq* (divorce at the instance of husband) under Muslim Law. The question - whether pronouncement of *Triple Talaq* is valid, has resulted into diverse interpretative exercises – first, *Triple Talaq* as deviant interpretation in *Shari'a* (rather it should be recognised as lesser acceptable interpretation); second, *Triple Talaq* as illegal in law;[6] and third, the pronouncement of *Triple Talaq* as a criminal act - The Muslim Women (Protection of Rights on Marriage) *Act,* 2019 (hereinafter referred to as *Triple Talaq* Act, 2019).

In these situations, and in the absence of an unbiased mediation, it only remains a matter of time when the judiciary occupies for itself the sovereign role of the ultimate law-giver by abrogating the multiplicity of legal norms.[7] The positivisation and formalization of law at the hands of the State then creates unnatural results. Every conflict of interest is seen as a 'dispute' and every dispute results in legal ramifications.[8] Minor conflicts turn into a battle for 'rights' and every interest breeds legality. For instance, *Triple Talaq* Act, 2019 has brought criminal law implications within a purely civil relationship. It seems that this over-legality, or in other words 'overt legality', further strengthens the authority of the State over its subjects; and now, with attached political implications.[9]

The third set of questions relate to the existence of non-State legal formations – in what manner do they operate within the State dominated legal system? Who determines their contents and their application?

III. The Form: Existing Realities

When matters under Personal Laws go before the court, the comprehension of nuances concerning legal construction is the first challenge which the judges encounter. The court has the liberty to escape the stage of comprehension and directly move to test the issues on the plank of law. However, in my submission, that would be employing the wrong methodology. While facing personal law matters, especially pertaining to Muslim Personal Law, the Indian courts seem to have made limited attempts to understand and appreciate the intricacies of *Shari'a*. They have instead tended to discuss the inefficiencies of its workings using the prism of the Constitution.[10]

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[6] Shayara Bano v. Union of India, AIR 9 SC 1 (2017).

[7] Faizan Mustafa, Supreme Court as Clergy, The Tribune (May 20, 2017), https://bit.ly/3GrnUNF.

[8] Griffiths, supra, 2 at 3 (*'Precisely because it is an ideology, a mixture of assertions about how the world ought to be and a priori assumptions about how it actually and even necessarily is, legal centralism has long been the major obstacle to the development of a descriptive theory of law.'*).

[9] Id. (*'the necessary connection between the conception of law as a single, unified and exclusive hierarchical normative ordering and the conception of the state as the fundamental unit of political organization.'*).

[10] E.g., Shayara Bano, supra, 6 (Triple Talaq Case; hereinafter *Shayara Bano*…wherein the Supreme Court of India held the pronouncement of *Talaaq ul Bain* or Triple Divorce as unconstitutional and directed that the Parliament should take proper legislative measure

The method employed by the Courts in India seems deeply flawed; and, at various counts. First, they attempt to understand *Shari'a* through Personal Laws. Second, they test the validity of religious principles against the Constitutional standards. Third, they assume religious principles governing personal matters as purely legal. Fourth, they expect these principles to conform to the standards of a secular constitutional democracy. Fifth, they attempt to interpret *Shari'a* by themselves while remaining oblivious of its technicalities and workings. Sixth, they attempt to hegemonize the dispute settlement processes. Seventh, they bring in formal institutions of dispute settlement from periphery to the core of dispute resolution processes. Eighth, they promote overt-legalization of conflicts. Ninth, they hinder democratic decision making processes and individual autonomy. Finally, they hegemonize legal communication processes and patterns.

I will discuss each point briefly below.

i. Understanding Shari'a through Personal Laws

Shari'a in itself is a very amorphous term. It can have many connotations ranging from moral values, ethical codes, standards of behaviour or even legal rules.[11] Therefore, to understand *Shari'a* as law *stricto sensu* would be a wrong approach. Moreover, to understand it as a product of positive law in the form of personal laws, would be even bigger mistake. While the Muslim representatives throughout the country fight for the protection of Personal Laws, no religious scholar in his/her individual capacity uses the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, Dissolution of Muslim Marriages Act, 1939 or Triple Talaq Act, 2019.

Scholars even today use the uncodified versions of *Shari'a* as found in the classical Islamic literature. This clarifies three things. First, the battle for Personal Laws is not based in faith or religion, rather it is based in religious identity and the dangers of codification based in majoritarian politics.[12] Second,

against the practice). The Muslim Women (Protection of Rights on Marriage) Act, 2019 (Act no. 20 of 2019) was subsequently passed by the Parliament and later assented to by the President of India on 31 July 2019. It was made retrospectively operative from 19 September 2018. It is a different matter that the minority opinion of CJI J.S. Khehar and Abdul Nazeer J. did attempt to look into certain religious aspects of *Talaq*. See also, Dixie Morrison, Shamim Ara v. State of U.P. & Anr (Supreme Court of India 2002) and the "Judicialization" of Divorce, 1 J. Islam. Stud. (2020). (Shamim Ara's *significance lies in its "judicialization" of divorce, transferring Muslims' family law from the private to the public sector and, in so doing, removing an essential aspect of its Islamic legal character.'*).

[11] See generally, Hussein Ali Agrama, Ethics, Tradition, Authority: Toward an Anthropology of the Fatwa, 37(1) Am. Ethnol. 2 (2010).

[12] During the 25th All India Muslim Personal Law Board (AIMPLB) Conference in November 2016 a '*Six-Point Kolkata Declaration*' was adopted. Unfortunately, the entire event went unreported in the national media – both print and electronic, barring a few local Urdu language newspapers. The Resolution underlined the following aspects – 1. Shari'a laws are binding as Shariat Application Act 1937; Dissolution of Muslim Marriages Act, 1939; Cutchi Memons Act 1938 and Waqf Act, 2013 are applicable on Muslims and Muslim Waqfs; 2. Since Articles 25, 26 and 29 of the Constitution of India guarantees every citizen of the country belonging to any religion or cultural group the right to maintain his religious and cultural identity; 3. Muslims also have the fundamental right to follow their Shari'a laws

Personal Laws help only the Courts in resolving matters concerning personal disputes.[13] Third, Muslim religious scholars (hereinafter called as *Ulema*) and dispute settlement institutions (*Darul Qazas*) continue to be guided by *Shari'a* and not by the State-recognized body of positive law.

The positivization of *Shari'a,* therefore, in the form of Muslim Personal Law defeats its very objective and purpose, which is to guide the lives of Muslims, with or without the involvement of the agency of the State.

ii. Religious principles and Constitutional standards

It is true that in a Constitutional democracy, the ultimate test for legitimacy of legal norms, principles and rules spring from the Constitution. However, that does not mean that the Constitutional standards would govern the very essence of religious legal principles. The purpose of Constitution is not to venture into content debate but to create the ultimate test for the legitimacy of legal norms.

This means that the legal norms would first have to pass the test of legitimacy in accordance with the standards set by their own corpus, i.e., the source where they spring from. Hence, to assert that certain norms of *Shari'a* violate the rights of women would be a wrong assertion. In order to violate these rights, the norms should first spring from *Shari'a.* Therefore, to understand whether *Triple Talaq* is a valid practice or not, it is required that an investigation into its basis in *Shari'a* is done first. This can only be done in consultation with *Ulema* and not merely by engaging into discussions over rights.[14]

Once it is found to be a part of *Shari'a,* then the question as to whether it can be applied in normal circumstances or not, arises (majority of scholars identify it as an exceptional situation).[15] Answer to this question can again only be ascertained

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without any inhibition which the court of law of the country also accede; 4. Muslims cannot agree to any changes in their personal laws as it would be like desecrating the Constitution; 5. Uniform Civil Code (UCC) cannot be implemented in a country like India inhabited by people of multi-religion, faith and multi-culture. The Muslims and other minorities along with tribals and Adivasis cannot accept UCC at any cost; 6. UCC under Article 44 is a highly inflammable issue, which divides the nation, creates discomfort among citizens, creates a sense of insecurity among law abiding Muslim citizens and also alienates them from the national mainstream. See also, Furqan Ahmad, Role of Some Indian Muslim Jurists in Development and Reform of Muslim Personal Law in India, 34(4) JILI 563, 563 (Oct.-Dec. 1992) (*'The most significant, and indeed the formative period in the recent history of Muslim law in the Indian sub-continent has been the first half of the present century. During this period, a number of Muslim jurists actively shaped the scope, extent and form of Muslim personal law. Most notable among them were Allama Shibli Nomani of Azamgarh and Maulana Ashraf Ali Thanvi of Muzafarnagar, both belonging to the eastern and western parts of the state of Uttar Pradesh, respectively.'*).

[13] See generally, Ebrahim Moosa, *Colonialism and Islamic Law*, in *ISLAM AND MODERNITY: KEY ISSUES AND DEBATES* 158. 173 (MK Masud et al. eds., EUP, 2009) ('*A Cambridge-educated lawyer and later an Indian civil servant, [Asaf A.A.] Fyzee framed Muslim law within the confines of a nation state.*)

[14] E.g., Muscat Document of the Uniform Code (the Law) of Personal Status for GCC Countries (1422A.H./2001 A.C.), Al Adl (47) 199.

[15] Nehaluddin Ahmad, A Critical Appraisal of 'Triple Divorce' in Islamic Law, 23 Int. J. Law Policy Fam. 53 (2009) (observing that the diversity of views on instant divorce needs

by looking into the scholarly opinions, discussions and debates – both classical and contemporary, often also looking into the comparative perspective.[16] Only when answer to the second question also comes out in the affirmative, a question of validity against the Constitution standards arise. Therefore, if the practice is either found not to be a part of *Shari'a*, or not to be applicable in normal circumstances, the test against rights does not arise.

iii. Religious doctrines as legal principles

As mentioned above, *Shari'a* can be interpreted in variety of ways. Therefore, to limit its understanding to the performance of legal function only would be a wrong assumption. The principles of Islamic Law as they spring from *Shari'a* remain equally relevant for Muslims even in the absence of a State-recognized body of Muslim Personal Law.[17] Therefore, it would be a wrong assumption to understand the religious institutions and their functions as purely legal. For instance, to equate *fatwas* given by a religious scholar with judicial function would be a wrong assumption. They are merely scholarly opinions whose function is not to settle disputes between parties but to provide opinions on matters at hand. Hence, the ruling of the Court that fatwas are not legally valid in *Vishwa Lochan Madan* Case,[18] is not legally tenable, for neither their nature nor their purpose is purely legal.

iv. *Shari'a* and the standards of a secular constitutional democracy

It is a wrong assumption to consider that the principles of *Shari'a* must in all capacities conform to the standards of secular constitutional democracy. Since, the legal principles as part of *Shari'a* do not spring from the Constitution, i.e., they are neither part of the Constitutional framework not derive their existence from it. With regards to testing their validity against the standards of the Constitution, there are certain limits. Where validity as to their content is concerned, Constitution does not play any role. However, in the instances where their operation is invoked, it is the Constitutional framework which decides their fate. The reason is obvious – even if *Shari'a* does not spring from secular constitutional democracy, it exists within the legal framework of the Constitution. Therefore, the legal limits as determined by the Constitution would operate.

v. Interpretation of *Shari'a* by the Courts

Since courts in a secular constitutional democracy not merely derive their existence but also work under the authority of the Constitution, they remain faithful to its dictates. Therefore, in one way or the other, Courts in their

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to be accounted for.) I do not, however, agree with his observation that *Triple Divorce* violates the fundamental principle of Islam. In my opinion it is very much a part of Islamic jurisprudence. What can be questioned is the extent to which this interpretation could be appreciated. It is here that the *Ulema* hold difference of opinion, with majority of the Sunni schools holding it to be a non-applicable interpretation. But none of them hold that this kind of an interpretation could never exist, or instead did never exist, at all.

[16] Furqan Ahmad, Understanding the Islamic Law of Divorce, 45 JILI 484 (2003).

[17] Agrama, supra, 11 (arguing that the authority of the *fatwas* spring from the ethics of the legal tradition and from nowhere else.)

[18] AIR SC 2957 (2014).

functioning would always promote the ideals of the Constitution, which is completely justified. However, this creates methodological problems when any matter involving *Shari'a* is taken before the secular courts. There exists an inherent bias in favour of the Constitutional framework. In situations where there is a question of mutual rights and duties between the spouses, for instance, *Triple Talaq,* the court would look into the standards recognized by the Constitution in the name of rights of women covering instances of divorce, maintenance of wife, custody of children etc. The religious discourse of *Shari'a* would be severely impaired, for the Courts have to be faithful to the Constitutional framework and not otherwise.

Since personal matters many a times involve discourse on rights, courts have to strike a balance between the demands of secular legal system and religious legal principles. For courts, it is a question of fidelity towards the Constitution. Therefore, they end up testing the standards of *Shari'a* against constitutional mandate, for instance, of equality between spouses, maintenance of women beyond the period of *iddat* etc. This, however, cannot be done without entering into religious discourse. Courts in India, have thus evolved the 'essential religious practices' test.[19] Through this test the Court enters into the debate as to what could or could not essentially be part of a religious tradition.[20] This is a problematic terrain as the Court in the garb of ruling on the permissibility of any religious act ends up in deciding whether it is part of the religious doctrine to begin with.[21]

vi. Hegemonisation of the dispute settlement processes

Dispute settlement is one of the chief functions of law. However, it does not mean that disputes can only be settled through the machinery of law. Disputes by their very nature are fluid and therefore they can also be settled through extra-legal means. For instance, the entire corpus on Alternative Dispute Resolution (ADR) mechanisms is based upon employing extra-legal measures to resolve disputes.

It is important to understand that law is just one of the tools to resolve disputes. In fact, as secular law is capable of resolving disputes, so is *Shari'a.*[22] It is also

[19] The test has been part of several judicial pronouncements in India - The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, AIR SC 282 (1954); Dargah Committee, Ajmer v. Syed Hussain Ali, AIR SC 1402 (1961); Sardar Syedna Tahir Saifuddin v. State of Bombay, 2 SCR Supl. 496 (1962). Most recently discussed in Shayara Bano, supra, 6.

[20] Nabeela offers a beautiful narrative about the Indian courts' response to questions posed on the permissibility of hijab, beard and other Muslim identifications in public spaces - Nabeela Jamil, Should Only Indian Muslims Bear the Burden of Skewed Ideas of Secularism?, The Quint (31 October 2021) <https://bit.ly/3rGw4xv> (last accessed on 8 December 2021)

[21] E.g., Shayara Bano, supra, 6.

[22] It needs to be emphasized here that there are avenues where family disputes can be arbitrated by employing religious legal principles, through *Shari'a Arbitration.* E.g., Nizamuddin Ahmad Siddiqui, Shari'a in a Secular State: Resolving Disputes through Civil Arbitration in United Kingdom*,* Society of International Law and Policy Blog WBNUJS-Kolkata (Jan. 22, 2016), https://bit.ly/2Zzfm79. The *Qaziyat* system have been functional in

erroneous, therefore, to perceive the courts as the sole avenues for dispute resolution. They may be appropriate for resolving disputes that arise in the nature of rights and/or the ones which spring from positive law.

The question seems pertinent - whether the application for divorce by a Muslim woman should attract an interest based or a rights-based mechanism? If the dispute is interest based, we could use ADR. If it is based in rights, there is no other way than to take the case before the courts. Infact, most of the family disputes carry both the elements, which is one of the reasons for the recognition of Court Annexed Mediations under Section 89, Code of Civil Procedure, 1908.[23] Since most of the Muslim family law matters are based in religious principles, as mentioned above, it seems necessary to develop methods that could bring better appreciation of the religious principles.

vii. Dispute resolution mechanism

Disputes need to be resolved based upon both the intention and aspiration of the parties as well as the demands of justice, order and security in the society. The dispute resolution mechanisms under the present scheme seem to falter at both the levels. Neither they fully satisfy the intention and aspirations of the parties nor do they serve the interests of justice, order and security completely.

In many instances, a party moves to the court to harass the other party and not to achieve a settlement of the issues at hand. What then about the religious mechanisms? Do they also suffer from these deficits? It seems that the religious dispute settlement mechanisms suffer from far greater limitations than the formal mechanisms. However, a possibility for these mechanisms being an extension of ADR processes could still be imagined.[24]

viii. Overt-legalization of conflicts

It is relevant to understand that disputes are based in conflicts. However, every conflict may not result into a legal dispute. Additionally, a legal dispute may not always result into illegality; and then also breed criminality. But then what has happened in the context of *Triple Talaq* is alarming. After Supreme Court held *Triple Talaq* invalid in law, Lok Sabha passed the Bill to criminalise the act;

India for centuries now. The method that they employ to settle the dispute is more similar to mediation though.

[23] Salem Advocate Bar Association v. Union of India, 1 SCC 49 (2003).

[24] This is not a new approach though. If one compares the methodology adopted by the traditional scholarship and the approach followed by the mainstream scholarship, it will become clear that the traditional scholarship has continued to espouse the non-codified version of *Shari'a* and reliance upon the authority of the juristic opinions. For instance, one can find a relevance of this methodological investigation by comparing the methodologies adopted by Asaf A. A. Fyzee (author of *Outlines of Muhammadan Law*) and Abu-l-Mahasin Muhammad Sajjad in dealing with Muslim personal law issues. For more see, Ebrahim Moosa, supra, at 158, 174 (*'If Fyzee advocated a secular civil law, then…[Abu-l-Mahasin Muhammad Sajjad]…advocated a communitarian notion of* sharia *governance.'*). See also, FARRAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (OUP, 2016) (critiquing personal law system as restraining individual autonomy); Farrah Ahmed, Remedying Personal Law Systems, 30(3) Int. J. Law Policy Fam. 248 (2016) (proposing ADR mechanisms as better choices for settling religious personal matter disputes).

turning a civil matter into a criminal offence. These developments indicate a step in the direction of the 'overt-legalization' of private disputes.[25]

ix. Hindering democratic decision making processes and individual autonomy

Democracy thrives not merely at the level of individual but also through community participation. When judicial and legislative organs start engaging into discourses which are methodologically incorrect, it doesn't work well for the 'democratic' system of the State. In instances, where religious principles are not understood and applied in their proper essence, the constitutional mandate of fidelity towards the protection of community identity, including on religious grounds, seem to wither away in the longer run. For instance, when marriage has happened following the dictates of *Shari'a,* how could it not be terminated through the same method?[26]

Triple Talaq Act, 2019 under Section 3 criminalises pronouncement of Talaq by the husband thrice at one go and categorises the act as void. All the schools of *Sunni Fiqh* recognize that in such circumstance, atleast one *Talaq* would be established (for *Hanafi Fiqh* it might establish all the three pronouncements of divorce at once, but with conditions attached). Categorising such an act as void makes it as if no *Talaq* was established. This brings conflicting understandings of the *Shari'a* itself*;* and, in a manner which is quite contrary to the longstanding tradition of scholarship in the religion. It also makes it difficult for the spouses to separate through divorce, for it would be easier for the husband to desert his wife than to give her divorce.

x. Hegemonisation of legal communication processes

When State organs, including the Courts, start determining the content of non-State legal norms, it becomes extremely difficult to appreciate the existing multiplicity of norms. Applying the Constitutional tests of 'rights' from outside without understanding the contextual contours of such legal norms (especially religious norms) would dilute these norms in the longer run. In the process, legal communication processes – what could be called as legal? How to apply legal standards? How to identify violation of legal norms etc. also seem to be hegemonised by the State. The problem of double affiliation also arises. For instance, a Muslim individual might not get divorce from the Court, even though on religious grounds, the marriage has already been pronounced to be broken. How then can one resolve such contradictory interpretations?

IV. The Reality: Contested Understandings

The Personal Law regime as part of religious law as well as religious identity seems to be a victim of contested understanding. There are two ways to look at

[25] Sohaira Z. Siddiqui, Triple Divorce and the Political Context of Islamic Law in India, 2 Journal of Islamic Law 5 (2021).

[26] Y. Narasimha Rao v. Y. Venkatalakshmi, AIR SC 821 (1991) (where the Supreme Court refused to recognize the *ex parte* decree of divorce by New Mexico court using New Mexican law arguing that only Hindu law can decide as marriage happened under Hindu Law).

this picture – from the perspective of the State and its institutions, like the legislature and the judiciary; and, from the perspective of the community which recognizes itself with the personal law regime (in case of Muslims, it is *Shari'a* or Muslim Personal Law).

From the perspective of State, law is something which the State promulgates or the State-centered legal system allows to operate. Indian Constitution through Article 372 allows enforceability of prior existing laws and Article 13 identifies what could be called as 'law'.[27] Till recently personal law regimes could continue to exist and operate without even invoking Article 13.[28] However, as expected for all such non-State legal regimes, its contours cannot be defined by the State completely, for the State could only decide the space within which such legal regimes should be allowed to operate. The problem then remains as to who decides and in what manner, about the operationability of personal laws. Whether it is the State which actually decides the contours of the Personal Law or whether it is the community through its representatives which decides its fate? This brings us to the second aspect of the picture – personal laws from the perspective of the community. When we look at the community level understanding of personal matters, the question is who constructs it for the community?

The concepts that often fall within the domain of personal laws, are understood through an understanding of *Shari'a* expounded by the *Ulema*. It is the *Ulema* who in reality have a final say over the relevant personal law matters based in the classical understanding about the religion. Interestingly, here legal principles exist without any dependency upon the State.

We end up facing two parallel narratives about the religious principles – the State narrative routed through the Muslim Personal Law codification in positive law, and the narrative developed by Muslim Scholars through the religious doctrine. Both of these narratives are accepted by Muslim population within a State and in two different capacities. By virtue of nationality or presence in the national territory, a Muslim becomes the subject of the Constitutional framework on the touchstone of rights like equality, non-discrimination, expression etc. However, as a religious subject, a Muslim is also nourished by the religious narrative developed by the *Ulema* against the touchstone of faith, worship, obedience to Allah etc. While entering into any civil relationship where religion plays a role, a Muslim individual has to choose between these narratives. Since the State's legal framework already allows expression and enjoyment of faith-based identity (which is to avoid conflicts of legal interests), for a Muslim it becomes easier to adopt both the legal narratives.

However, problem arises when one narrative is pitched against the other, for instance in the recent *Triple Talaq* controversy. In such situations, the secular

[27] India Const. art. 13: *'Unless the context otherwise requires: (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law…'.*

[28] State of Bombay v. Narasu Appa Mali, AIR Bom 84 (1952).

democratic institutions of the State pursue one interest at the cost of the other. I have already discussed how judiciary favours fidelity towards the Constitution over appreciation of religious principles. In such situations, judiciary ends up entering into a debate over 'essential religious practices' and takes up the function of final decision-maker. This is a wrong method for it not only usurps the domain of the *Ulema* to determine the content of religious principles, but also withers the religious identity of the individuals and the community in the longer run.

V. The Proposal: The Road Beneath

I do not call the solution as the 'road ahead' for there are two parallel narratives as to identity of individuals that run at the same time. Mathematically speaking, two lines (here narratives) can be said to be parallel only if they meet at infinity. I therefore call the vision as the 'road beneath'. There is another reason for giving it such a name i.e. we need to find a space of convergence for both the narratives to co-exist, co-function and co-operate.

It is proposed that instead of attempting to engage in direct interpretations of the religious principles (especially *Shari'a*), the State should engage with the *Ulema* to first ascertain the pith and substance of these principles. Similarly, the Courts should engage with the scholars in the judicial process to find solution to problems at hand. This could be achieved by engaging with a committee of scholars in a consultative capacity, for instance, as *amicus curiae* for the court (whether the current Muslim bodies serve the required representative purpose towards the consultation process, however, remains a matter of investigation).

This process would serve at least three purposes. First, it would allow appreciation of religious legal principles and identities in their original essence and would prevent their withering, which the Constitution itself provides for. Second, it would discourage the current debate between the State and the Muslim community from being escalated. The discussions over *Triple Talaq* have adversely affected the Muslim community along both religious and gender lines, which is not a welcome trend. Third, it would allow the State to build a healthy relationship with the community.

While this is proposed, bigger strands of the debate would still remain unaddressed – autonomy of individuals to choose between religious law and secular law, individual understandings about religion and religious identities, issues around women's rights and gender inequality etc. It needs to be understood that these are problems of a different nature. I have discussed here only the problems as to the understanding of religious principles by the State and its institutions. The discussion undertaken in this article over what is part of religion and what cannot be, is a debate separate from the enjoyment of religious and secular identities.