

COMPARATIVE LAW: In Search of a Muslim Identity Between the Two Extremes of Secularism and Religious Law

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Abstract: *This paper analyses the development of the Indian Muslim identity with respect to the coexistence of Shariat and sovereign laws. The period of analysis is post-colonial India. The paper analyses the different conflicts of legal philosophy and practice that exist between the judiciary of India and that of the parallel Islamic system. The conflict is such that private citizens suffer from wrongful interpretation of religious law and there is an infringement of the fundamental right to justice as guaranteed by the sovereign laws to every Indian citizen. The analysis begins with a brief discussion of a case that involved a conflict of laws and, vicariously, a conflict of legal ideology between the two systems. The paper mentions other similar cases in corroboration of the primary claim—conflict of legal philosophy. The views of the Indian State are considered with special reference to the idea of secularism in the Indian context. The Constitution of India is analysed to establish as to what the word 'secular' means under the Supreme Law of the Indian State. The analyses reveal that the parallel system, although impractical serves the cause of meeting the Indian idea of secularism. The paper concludes that the secular ethos of Indian democracy allow for infringement of certain Common Law values to make space for certain religious laws, even though they are more conflictive than complimentary.*

On the night of June 6th, 2005, Imrana, a woman in her 20s and a mother of five children, was raped by her father-in-law in a village in the Indian state of Uttar Pradesh.

¹ Imrana, and the family that she married into, was Muslim. Imrana's case was not reported and was not directly absorbed by the appropriate Criminal-Justice System as prescribed by Indian statute. Instead, the case was subjected to an informal parallel system of resolving Muslim communal disputes. On first instance, the local leaders of the village's Muslim community decided, relying on their interpretation of Islamic Law, as defined by the Quoran and the Hadith², that Imrana's marriage to her husband was void and that she must be married to her father-in-law. On a second instance of judicio-religious intervention, the editor of a local newspaper posed a question to a Muslim scholar, a *Darul Uloom*³, of the Deobandi⁴ school of thought asking for an opinion on the matter. The *Darul Uloom* concurred with the pronouncement of the Muslim village leaders.⁵ In the whole judicio-religious process, none of the adjudicators were recognised by law or statute and none of the enquirers like the journalist were closely related to the case. The village leaders and the Muslim scholars, like the *Darul Uloom*, derive legitimacy for their

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¹ Vishwa Lochan Madan Versus Union of India & Others. Supreme Court of India. 07 July 2014. Print.

² The body of traditions relating to Muhammad, which now form a supplement to the Qur'an, called the Sunna. "Hadith, n." OED Online. Oxford University Press, March 2015. Web. 20 April 2015.

³ A Muslim Scholar who has knowledge and training in Judicial matters pertaining to Islam. Essentially, a judge for Islamic Law.

⁴ Considered to be a radical school of thought by authors like Salman Rushdie. Rushdie compares the Deobandis to the Taliban in Afghanistan.

⁵ Vishwa Lochan Madan Case

pronouncements or *fatwas*⁶ through the reverence that is bestowed upon them by the members of the Muslim community for their theocratic knowledge and study. Vishwa Lochan Madan, in his capacity as a citizen of India, filed a Civil Writ Petition in the Supreme Court of India asking for the abolishment and admonishment of the above illustrated judicio-religious system. The petitioner believed that such individuals and courts undermine the constitutional authority of the judiciary and that they use extralegal means to decide cases on the basis of unrecognised law. While eventually the sovereign law took its course and the father-in-law was found guilty of rape by virtue of a criminal case that was filed against him, the parallel system demonstrated no evidence of changing its position on the civil status of the marriage. The judge in the criminal case did not attempt to analyse the status of the marriage (a Civil Law subject) because of the criminal nature of the case.

The Imrana case illustrates an incompatibility between the coexistence of Shariat and statutory law. The conflict is such that the sovereign jurisprudence criminalises an individual for the rape of his daughter-in-law, while at the same time, the applied Islamic law declares the victim's marriage void and advises for the establishment of marriage between the rapist and the victim. Although the judicial system of India espouses to reflect the values of the prevailing societal culture, the legal tolerance for Shariat Law is more conflictory than complimentary to India's secular judicial structure. The sovereign judicial system allows for coexistence on the presumption of superiority over the parallel system. However, in practice, the two systems have equal and comparable powers. The matter is further complicated by the prioritisation order. While the judicial system prioritises the criminal aspect, paying little heed to the civil status of the marriage, the parallel system analyses the case from the standpoint of the civil ramifications. This illustrates a difference in legal philosophy and therefore a difference in the *modus operandi* of the two systems, demonstrating a fundamental conflict.

In 1947, after achieving independence from the British crown, India was geographically partitioned to create two dominions – India and Pakistan. Pakistan occupied two areas of the subcontinent, the north-western and eastern⁷. In basic terms, Pakistan was created from those areas of the Indian subcontinent where the Muslims were in majority with the exception of Kashmir. The ensuing population transfer due to the partition resulted in widespread violence and bloodshed between the Hindus (and Sikhs) coming from and the Muslims going to Pakistan. Currently, India is the largest democracy in the world with a secular system of governance. Pakistan is an Islamic Republic with a similar system of governance as India and has a judicial system that accommodates Islamic Law and jurisprudence to the extent that the requirement of a parallel system is null and void. India and Pakistan have comparable number of Muslims but India's secular nature and majority Hindu population complicate the practical realities of governance and judicial exercise with respect to Shariat Law and hence the parallel system.

While Indian Law has some accommodation for Islamic principles and practices, it is not an Islamic Republic with dedicated infrastructure to deliver justice in a purely Islamic fashion. This paper analyses the Indian Muslim's identity with respect to the prevailing judicial system and the system's capacity to absorb the values, traditions and customs of the Muslims of India. Although the paper does not directly compare the judicial systems of India and Pakistan, it attempts to decipher whether India's secular judicial machinery has the ability to protect and preserve Islamic principles and tenets as much as it perceives an Islamic Republic to.

⁶ A religious decree issued by a competent Muslim scholar or authority.

⁷ After the 1971-72 India-Pakistan War, East Pakistan declared itself independent of Pakistan and renamed itself as the People's Republic of Bangladesh.

Although Partition created a dichotomy in the Indian Muslim's identity post-1947, the partition itself did not affect most Muslims of the subcontinent. The Indian Muslim, who was not affected by partition, did not feel the pressure of choosing a side and continued to enjoy the comforts of secularism while maintaining *Indianess* and *Muslimness*, simultaneously. Burjor Avari, in his book, *Islamic Civilisation in South Asia* corroborates this claim by stating, "in most parts of India, partition made little difference to Muslim leading their lives."⁸ The purpose of this observation is to note that Indian secularism is neither a newly constructed socio-legal phenomenon nor is it an idea created for the protection of Muslims in post-colonial India. Secularism in India exists independent of the interests of any one community and gives a sense of security to the Muslims. Again, not that it was created for the Muslims but that the Muslims derive legal security from it. Avari mentions this aspect in his book while discussing the creation of the Supreme Law of the land, the Constitution of India. "[A] factor in the Muslims' sense of security was the promulgation of the new constitution in 1950, under the direction of Dr. Bhimrao Ambedkar (1891–1956), the leader of the Dalit community, the most deprived section of people within the Hindu world."⁹ Dr. Ambedkar was born a Hindu but subsequently converted to Buddhism due to the ills of the Caste System¹⁰. He is celebrated as the father of the Indian Constitution. "Ambedkar's strong sense of justice, fairness and egalitarianism is manifest throughout the constitution; and every group and community in India can seek redress [from the judicial system] for injustice or inequality [as enshrined in] this secular constitution."¹¹ In the Indian context, not only does Islamic Law have legitimacy, it also has the right to thrive, as promised by the secular ethos of the Constitution.

In the Western world the term 'secular' normally implies a non-religious or an anti-religious outlook. In India, it has a different connotation. The Indian constitution is not non-religious or anti-religious; it aims to maintain a neutral position in an arena of diverse religions. The Indian state actually often provides help and encouragement to its citizens in the maintenance of their respective faiths.¹²

The spirit of this paper does not allow for judgement or assessment of the morality of communal customs but merely permits analysis from an academic perspective. The analysis focuses on the ramifications of such customs on the development of identity in a secular and diverse judicial environment. Pursuant to its secular structure, the judiciary allows for the recognition of religious law and even enforces it in cases adjudicated by its sovereign courts. Moreover, it does not object to the creation and operation of a *de facto* parallel judicial systems that aim to propagate and promote religious law. The only caveat, as stated in the Vishwa Lochan Case in an advisory form, is the requirement for the "consent of the affected parties".¹³ The court reasons that such 'parallel' systems are akin to Alternate Dispute Resolution Mechanisms (or ADRMs), which are widely recognised in most, if not all, jurisdictions and therefore, allowable.

⁸ Avari, Burjor. *Islamic Civilization in South Asia: A History of Muslim Power and Presence in the Indian Subcontinent*. London: Routledge, 2013. Print., 228.

⁹ Ibid.

¹⁰ A hierarchical social system that existed in erstwhile Hindu society, remnants of which are still visible in contemporary Hindu society.

¹¹ *Islamic Civilization in South Asia*, 228.

¹² Ibid., 228-29.

¹³ Vishwa Lochan Madan Case

Consent is a particularly important legal concept while discussing civil cases. The court in the Vishwa Lochan case noted that Imrana's case was being discussed without her consent or her direct involvement. The *Darul Uloom* ordered an injunction for an infinite period disallowing Imrana and her husband from continuing their marital life even though none of them approached the *Darul Uloom*. The question is whether the act of seeking a judicio-religious opinion in the absence of the affected party permitted? The sovereign judicial system advises against it and the parallel system functions regardless. This illustrates another fundamental difference in legal philosophy and creates a conflict of an elementary nature.

Moreover, religious 'ADRM's' are not really conventional ADRLMs. Non-conformance of a conventional ADRLM decision does not result in communal ostracisation and social death, while non-conformance with judicio-religious decisions do lead to such severe consequences. Further, the unique phenomenon of honour killings¹⁴ also raises the possibility of murder by family members in the event of non-compliance with judicio-religious decisions. In such circumstances, a decision of a judicio-religious authority reaches the value of a sovereign court's order. The psychological pressure from the judicio-religious authority and the law enforcement's power become comparable. While sovereign judicial power possessed by courts is accountable, the judicio-religious power held by religious clerics is unaccountable. This dichotomy of power allows individuals like Imrana to face the possibility of being married to her rapist, exemplifying another clear mismatch between the two systems. The mismatch is such that the same case can be decided differently with diversely different results depending on what law is applied, giving birth to mismatching concepts of justice.

Although the Indian constitution refrains from granting special privileges to Muslims, it allows for Muslims to approach Shariat Courts and forums for adjudicating matters with respect to marriage, divorce, inheritance, death etc. The All India Muslim Personal Law Board (AIMPLB) is a non-governmental organisation that was formed in the 1970s by virtue of a Convention of Muslim scholars and jurists who rose in opposition of a parliamentary bill that wanted to establish a Uniform Civil Code at the time. The establishment of such a code would have circumvented the applicability of Muslim Personal Law (Shariat Law) in civil cases that applied to Muslims. AIMPLB, *inter alia*, aims to limit government intervention in Shariat matters, protect the retention and implementation of the Shariat Act, initiate studies on the different schools of Islamic jurisprudence. AIMPLB is one of the principal actors in the active effort to establish a parallel informal judicial system for matters relating to the applicability of Shariat Law. AIMPLB functions like an ADRLM but because of its social status and intellectual reverence, it serves the purpose of strong and independent judicial system for Muslim Personal Law matters. Further, the AIMPLB, while deciding cases, relies on its interpretation of Islamic Law, which may or may not be in alignment with statutory enactments. However, there are certain parliamentary enactments that recognise and enforce specific fundamental tenants of Shariat Law. Dissolution of the Muslim Marriages Act, 1939 and the Muslim Personal Law (Shariat) Application Act, 1937 are examples of codified law that are judicially enforceable through sovereign judicial courts. Even with such laws in place, independent actors such as the AIMPLB felt the requirement of expanding the applicability of Shariat, which is achieved through the parallel system. The very existence of the parallel system provides evidence of failure of coexistence. The secular system did not plan for the parallel system and assumed the smooth resolution of affaires through State judicial machinery, which is more ideological than

¹⁴" The killing of a relative, especially a girl or woman, who is perceived to have brought dishonour on the family." *OxfordDictionaries.com*. Oxford Dictionaries, 2015. Web. 24 April 2015

practical. Hence, although they are conflictory, the parallel system attempts to fill the void left by the judicial system.

Most scholars agree and I concede that the parallel structure has helped more than it has harmed. Further, the existence of such judicio-religious systems is a symbol of religious tolerance and secular ethos – positive characteristics of a robust democracy. However, there are ample cases that illustrate the ills of an unaccountable and conflictory adjudicatory body. In another similar case, Asoobi, a young girl, was raped by her father-in-law and a *fatwa* declared that the father-in-law could only be found guilty of rape if there was a witness to testify or if her husband endorsed her allegation. Further, the *fatwa* disallowed her from filing a Police complaint against her rapist.¹⁵ In yet another similar case, Jatsonara, by virtue of a *fatwa*, was asked to recognise her rapist father-in-law as her legitimate husband and divorce her existing husband.¹⁶ Both cases were cited by the petitioner in the Vishwa Lochan case as examples of a prevalent network of laws and proceedings that lack legal-backing but have psychological force equivalent to that of an enforceable judicial order.

A brief analysis of the Asoobi case reveals a larger systemic conflict. The *fatwa* debarred Asoobi from filing a Police complaint, which is her right as a citizen of India and more importantly, a matter of state judicial procedure. The situation is such that the parallel system forbids her from pursuing her right for justice, which is a fundamental right that the Indian State strives to guarantee. Further, the two systems have dissimilar and conflicting procedures for fact-finding and evidence submission. Asoobi was required to either produce a witness or convince her husband of the occurrence of rape in order to prove the father-in-law's guilt. Such evidencing procedures are neither recognised nor recommended by the sovereign judicial system. The Asoobi case reflects a direct conflict between the judicio-religious system and that of the Indian judiciary in terms of relevant fact-finding procedures. India follows an Adversarial System of Judicial proceeding enshrined with the principles of the Common Law, one of which was put into words by the English Jurist William Blackstone. "It is better that ten guilty persons escape than that one innocent suffer."¹⁷ What Blackstone said and wrote in 1769 holds as a fundamental principle in most Common Law jurisprudences. While the Imrana, Asoobi and Jatsonara cases reflect scenarios where the victim is victimised for the purpose of enforcing 'divine' law, the legal philosophy of India's sovereign judicial system does not permit even a slight deviation that causes an innocent to suffer. This, yet again, demonstrates a mismatch and incompatibility between the legal philosophy of India and that of the parallel Islamic system.

Islamic legal philosophy allows for interpretation and the use of human judgement in order to adjudicate cases in conformance with prevailing customs, traditions and requirements of a given geographic region. Avari, in his book, mentions this aspect while discussing the Quoran and the practices of the Prophet to describe the origins of Shariat. "Wise and learned human beings can interpret the law in line with customs and conventions of a prevailing age or a particular part of the world, but they must do so without infringing the limits set by the divine law."¹⁸ Although the Indian judiciary allows for the existence of parallel systems practicing different schools of Islamic legal thought, there is no definition for what is permitted and what is prohibited. The lack of definition is justified and rationalised by a self-constructed façade of religious freedom and tolerance. This allows for absurd ideas of justice and governance, which

¹⁵ Vishwa Lochan Madan Case

¹⁶ Ibid.

¹⁷ Blackstone, William. *Commentaries On The Laws Of England*. Oxford: Clarendon, 1769. Print.

¹⁸ *Islamic Civilization in South Asia*, Pg. 5

create villains out of victims and absolve criminals of crime. The purpose of this observation is to highlight the lack of definition that could, perhaps, cause a few mislead 'scholars' to stretch 'divine' law to meet outdated societal expectations.

The *Deobandi* school of thought from the Imrana case has a reputation of harbouring and nurturing outmoded and irrelevant ideas of justice that many Indian Muslims do not prescribe or adhere to. To qualify this observation, in the Imrana case, the *Darul Uloom* equated adultery to rape and therefore, did not consider the criminal aspect of the case and only focused on the civil ramifications to the existing marriage. The procedure to prove rape was so outdated that there was no admissible evidence in the eyes of the *Darul Uloom*. The sovereign judicial system refrains from extreme measures of outlawing such practices and procedure in the fear of being termed as an anti-minority system. This exemplifies an untreated and unmitigated conflict of procedure and practice between the two systems, demonstrating incompatibility.

The Indian state does not take responsibility for the enforcement of the adjudications of the parallel system but only recognises the right of such courts and institutions to exist.¹⁹ Scholars who argue in favour of compatibility between sovereign judicial system and the parallel system often cite the origins of the modern-day Islamic movement as evidence for compatibility. Mian Abdur Rashid, a Pakistani author, in his book, *Islam in the Indo-Pakistan Subcontinent*, mentions the origins of two reactionary movements stemming from the time of the British colonial period.²⁰ One of these reactionary movements is the *Deobandi* movement, as referenced in the Imrana case. The movement commenced as an anti-British movement to rid Islam of Western influence and gain autonomy for Islamic thought, including Islamic legal thought. Rashid mentions that the *Deobandis* joined forces with the Indian nationalists, who were predominantly Hindu, to achieve their larger goal for Islam in an independent India.²¹ Although the *Deobandis* viewed Indian nationalism as a product of narrow-minded non-Islamic Western-influenced thought, they worked side by side with the Indian nationalists in the hope of creating a State wherein they could achieve their goals. The idea was to compromise in the present for a brighter and better future. The *Deobandi* school of thought established itself to purify Orthodox Islam to make it comparable to what it was during the glory years of the Prophet. However, such reformation fails to account for changing times, practices and wishes of the newer generation of Muslims, which Islamic Law actually allows for. Owing to such myopic vision and operation, the *Deobandis* have been losing followers. Their practice of Shariat is often deplored for its misinterpreted strictness.

The Muslim identity with respect to the judiciary in modern-day India is moulded by two simultaneous yet opposing forces. In maintenance of a secular ideology, the State recognises and encourages a parallel system that opposes the sovereign judiciary's practical (not legal) legitimacy. The parallel system would prefer that all Muslims be subjected to their legal philosophy but the State emphasises the requirement of "consent". The State also attempts to remedy the multiple failings of the parallel system, as seen in the Imrana, Asoobi and Jatsonara cases. In the whole process of locating identity, the Indian Muslim is offered a hybrid judicial system that is a product of a conflict of legal philosophy. The coexistence of these two systems is neither efficient nor sustainable but it serves the dual purposes of maintaining secular status and assuring the Muslims of the protection of their legal philosophy.

¹⁹ Vishwa Lochan Madan Case, Judgement, Pg 13. Print.

²⁰ Rashid, Mian Abdur. *Islam in the Indo-Pakistan Subcontinent: An Analytical Study of the Islamic Movements*. Lahore: National Book Foundation, 1977. Print., Pg. 59

²¹ Ibid. Pg. 60-61

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