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Institute of South Asian Studies
National University of Singapore
29 Heng Mui Keng Terrace
#08-06 (Block B)
Singapore 119620
Tel: (65) 6516 4239 Fax: (65) 6776 7505
www.isas.nus.edu.sg
http://southasiandiaspora.org

The Triple *Talaq* Judgement: A Balancing Act by the Indian Supreme Court

The Indian Supreme Court, in a split verdict, has held the practice of triple talaq (divorce) unconstitutional. The Supreme Court's invalidation of triple talaq has raised the question of whether this could mark the beginning of a move to reform Muslim personal law, which is still governed by the Shariat Act of 1937. The political reaction to the judgement, however, seems to suggest that larger changes to Muslim personal law are not in the offing in the near future.

Ronojoy Sen[1]

The Indian Supreme Court's decision on 22 August 2017 to hold the practice of triple *talaq* (divorce) invalid is a momentous one. In a 3-2 verdict, a five-judge bench of the Court ruled that *talaq-e-biddat* (triple talaq) – where Muslim men can divorce their wives by uttering *talaq* three times in quick succession – was unconstitutional.[2] The Supreme Court's ruling came in response to a host of petitions by Muslim women challenging the practice of triple *talaq*. The judgement was welcomed across the political spectrum, an indication that this was a practice which had few takers.

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[1] Dr Ronojoy Sen is Senior Research Fellow and Research Lead (Politics and Governance) at the Institute of South Asian Studies (ISAS), an autonomous research institute at the National University of Singapore (NUS). He can be contacted at isasrs@nus.edu.sg. The author bears full responsibility for the facts cited and opinions expressed in this paper.

[2] http://supremecourtofindia.nic.in/pdf/LU/Supreme%20Court%20of%20India%20Judgment%20WP(C)%20No.118%20of%202016%20Triple%20Talaq.pdf.

The Supreme Court's judgement was, however, a divided one. The minority judgement, delivered by Chief Justice J S Khehar,[3] said the practice of triple *talaq* enjoyed constitutional protection, whereas the majority judgement found the practice "manifestly arbitrary" and a violation of the Constitution. The two lines of reasoning reflect, in many ways, the complexity of India's constitutional secularism and the somewhat contradictory approach taken by the court historically in deciding cases related to religion.

The Majority Judgement

The majority ruling consisted of two judgements delivered by Justice Rohinton Nariman on his and Justice Uday U Lalit's behalf, and a separate judgement by Justice Kurian Joseph. Justice Nariman's ruling was premised on the fact that the Supreme Court was narrowly concerned with only the practice of triple *talaq* and not other forms of *talaq*. Importantly, he also made clear the Supreme Court was not concerned with Muslim personal laws as a whole.

Justice Nariman made three broad points to justify declaring triple *talaq* illegal. First, triple *talaq* was recognised and enforced by the British-era Muslim Personal Law (Shariat) Application Act, 1937, and, therefore, could be construed as a "law in force" under Article 13(3)(b) and liable to be struck down under Article 13(1),[4] if found to be inconsistent with the fundamental rights enumerated in the Constitution. Second, Justice Nariman rejected the argument that triple *talaq* could be regarded as an "essential" part of Islam and, hence, protected by Article 25, which guarantees freedom of religion.[5] According to him, though triple *talaq* is "permissible in Hanafi jurisprudence [one of the four schools of Sunni law and

[3] He has since retired as Chief Justice of India.

[4] Article 13: Laws inconsistent with or in derogation of the fundamental rights – (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, 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; (*b*) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

[5] Article 25(1): Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

widely prevalent in India], yet, that very jurisprudence castigates Triple Talaq as being sinful. It is clear, therefore, that Triple Talaq forms no part of Article 25(1)." The application of the "essential practices" test,[6] which is characteristic of the Indian Supreme Court's jurisprudence on religion and often involves investigation into religious texts and theology, was part of Justice Joseph's ruling too. Justice Joseph examined, in some detail, the Islamic sources of *talaq*. Combining this with an analysis of earlier court judgements on *talaq*, he concluded that the practice of triple *talaq* could not be "considered integral to the religious denomination in question" and that it was not part of Muslim personal law.

Third, Justice Nariman applied the test of "manifest arbitrariness" to rule triple *talaq* as violating Article 14 which grants equality before law. He ruled that triple *talaq* is "manifestly arbitrary in the sense that marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right under Article 14 of the Constitution of India."

The Minority Judgement

The minority verdict, delivered by Justice Khehar, disagreed with the majority judgement virtually on all the major points and reflected a strong defence of community rights. First, he ruled that triple *talaq* was "integral" to the milieu of the Sunnis belonging to the Hanafi School and was a part of their personal law. Second, on the question of whether *talaq*, as codified by the 1937 Shariat Act, could be considered as "personal law" of the Muslims, Justice Khehar answered in the affirmative. He cited the 1952 Narasu Appa Mali judgement,[7] in which the Bombay High Court had kept personal laws outside the purview of Article 13. Following from that proposition, Justice Khehar argued that triple *talaq* could be challenged only on the ground that it infringed Article 25.

Dwelling on the question of whether triple *talaq* impinged on public order, morality or health – grounds on which a religious practice can be declared illegal – Justice Khehar answered in the negative. He then proceeded to examine whether triple *talaq* violated the fundamental

[6] See Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*, (New Delhi: Oxford University Press, 2010), Chapter 2.

[7] AIR 1952 Bom 84.

rights enshrined in Part III of the Constitution, which is the other ground under Article 25 on which a religious practice can be invalidated. The petitioners in the case had specifically raised the violation of Article 14, the equality clause, Article 15, which prohibits discrimination, and Article 21, which guarantees the protection of life and liberty. Here too, Justice Khehar answered in the negative, saying *talaq* was a "matter of faith" and did not violate any fundamental right. He stated that personal laws had been "elevated to the stature of a fundamental right" and that it was not for the Supreme Court to "determine whether religious practices were prudent or progressive or regressive."

Justice Khehar did, however, concede that triple *talaq* was "gender discriminatory" and that several countries had done away with the practice through legislation. Accordingly, he said the Court should exercise its power under Article 142 and direct Indian Parliament to consider "appropriate legislation" with regard to triple *talaq*.

Reaction to the Judgement

The Supreme Court's invalidation of triple *talaq* has raised the question of whether this could mark the beginning of a legislative move to reform Muslim personal law, which is still governed by the Shariat Act of 1937. This has been noted by analysts such as Pratap Bhanu Mehta who have pointed out that the Supreme Court cannot "bear the entire burden of reform or of forging a consensus" on personal laws.[8] The central government, headed by the Bharatiya Janata Party (BJP), had argued for the abolition of triple *talaq* before the Supreme Court. Unsurprisingly, both Prime Minister Narendra Modi and BJP President Amit Shah have hailed the verdict as "historic". However, no one in the government has expressed any official intent for a more thorough reform of Muslim personal law. In this context, neither has anybody from the BJP talked of a uniform civil code which is a goal mentioned in the Directive Principles of the Indian Constitution[9] and has been a long-standing demand of the party. Importantly, the Supreme Court, unlike in earlier instances such as the 1985 Shah Bano judgement,[10] has not made a reference to a uniform civil code. Indeed, in the Shah Bano

8 "Small step, no giant leap", Pratap Bhanu Mehta, *Indian Express*, 23 August 2017.

9 Article 44 of the Indian Constitution states "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

10 AIR 1985 SC 945.

judgement, which dealt with the maintenance of a divorced Muslim woman and whether that should be governed by Muslim personal law, the Court had explicitly asked for a uniform civil code. This had then created a huge controversy.

The other political parties, including the Congress, have voiced positive reactions to the Supreme Court's verdict on triple *talaq*. Following the ruling, the Congress spokesperson stated that, since the Supreme Court had declared triple *talaq* illegal, there was no need for a separate legislation by the Parliament. Muslim representatives, too, have welcomed the judgement but reiterated that it did not represent any interference in Muslim personal law. The All India Muslim Personal Law Board (AIMPLB), which was a party to the triple *talaq* case, has sought to portray the judgement as a vindication of its stand. One of the AIMPLB members, Kamal Farooqui, noted that the Supreme Court judgement validated the protection of personal laws. This was in contrast to the strong reaction of the AIMPLB in 1985 against the Shah Bano judgement, which led to the passage of the Muslim Women (Protection of Rights on Divorce) Act. Interestingly, one of the prominent legal experts in the Muslim community, Tahir Mahmood, has pointed out that the Supreme Court need not have spent so much time and effort justifying the banning of triple *talaq* when the basic thrust of the argument was already present in an earlier Court ruling. In the 2002 Shamin Ara ruling, the Supreme Court had pronounced that *talaq* by a Muslim husband must comply with the true Islamic procedure.

Conclusion

The Supreme Court's judgement on triple *talaq* is a balanced one, which upholds the women's rights without undermining the Muslim personal law. The larger question of changes to the Muslim personal law, especially those provisions that are seen to be discriminatory against women, still remains unresolved. This is something that the Parliament, and not the courts, will have to address. There are those who believe that the time might be propitious for a reform of the Muslim personal law. Within the Muslim community, there are far more voices now favouring reform compared to the period when the Shah Bano judgement was delivered in the 1980s. The All India Muslim Women's Personal Law Board is one such body which has opposed triple *talaq* and other provisions which discriminate

against women. The political reaction to the triple *talaq* judgement, however, seems to suggest that a larger reform of the Muslim personal law is not in the offing in the near future.

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