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Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice

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I. Introduction

On August 22, 2017 the Indian Supreme Court declared Muslim divorce through triple *talaq* unconstitutional. By way of triple *talaq* (*talaq–e–biddat*) Muslim men could divorce their wives instantly and without state intervention by pronouncing the word "talaq" thrice. The case had been brought before the court by the petitioner Shayara Bano and other women who had been divorced in this way. Different Muslim women's groups had intervened to support them. On the outcome, the court was split three to two. The three judges in the majority regarded triple *talaq* invalid, but used different reasoning to arrive at their conclusion: Justices Rohington Nariman and U. U. Lalit held that the 1937 *Muslim Personal Law (Shariat) Application Act,* in so far as it refers to triple *talaq,* violated Article 14 of the Indian constitution - the right to equality. Justice Kurian Joseph instead argued that triple *talaq* was not a valid practice in Islam and was therefore illegal. The minority view, held by Chief Justice Jagdish Singh Khehar and Justice Abdul Nazeer, was that though triple *talaq* was undesired, the courts could not strike it down, and only the parliament could regulate on the matter. The judgement is a landmark case in the Indian women's movement's agitating for more rights under religion based personal laws. At the same time, however, the aspect of gender equality unfortunately did not play such a strong role in the argumentation as it could have, and the judgement does not provide a clear road map for dealing with other discriminatory aspects in the personal law system in the future.

II. Muslim Personal Law in India

Like many other post-colonial states, India maintains a personal law system, according to which certain family and property matters (marriage, divorce, maintenance, guardianship, adoption, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as

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Jews are governed by their respective religious laws.[1] While personal laws per se are an ancient phenomenon, the Indian personal law system in its present form has been shaped considerably during the colonial rule.[2] After independence, the goal of enacting a Uniform Civil Code (UCC) in the area of family law was placed in India's new constitution (Article 44). However, as of the present day, such a UCC has not been implemented. Rather, while maintaining the plurilegal system as such, the different personal laws have been reformed to varying degrees via legislation and judicial interpretation.

From a gendered point of view, the personal laws (of all religious communities, not only those of Muslims) are problematic as they contain inherent inequalities between men and women, for instance with regard to inheritance rights, polygamy, divorce grounds, child adoption or guardianship rights.[3] Reforming the personal laws in some way or another has therefore long been on the agenda of the Indian women's rights movement. Suggestions on how to go about doing this range from small step by step community-led reforms to large state-led reforms such as the introduction of a secular UCC.[4] Muslim women's rights activists and organisations have played an active role in calling for reforms of Muslim personal law, thereby forming part of broader Islamic feminist movements.[5]

The key legislation in the case at hand is the *Muslim Personal Law (Shariat) Application Act* of 1937 (also referred to as the 1937 Act).[6] Section 2 of this Act declares Muslim

1 Buddhists, Jains and Sikhs are counted in the Hindu-category (see for instance Section 2(1)(b) of the *Hindu Marriage Act* of 1955).

2 *Rochana Bajpai*, Debating Difference: Group Rights and Liberal Democracy in India, New Delhi 2011, p. 183; *Werner Menski*, Hindu Law: Beyond Tradition and Modernity, New Delhi 2003, p. 161; *Archana Parashar*, Just Family Law: Basic to all Indian Women, in: Indira Jaising (ed.), Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia, New Delhi 2005, p. 62; *Alamgir Muhammad Serajuddin*, Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism, Karachi 2011, p. 62.

3 For a more in-depth analysis of the problematic aspects of different personal laws see, for instance, *Flavia Agnes*, Family Law Volume I: Family Laws and Constitutional Claims, New Delhi 2011; *Laura Dudley Jenkins* Diversity and the Constitution in India: What is Religious Freedom? Drake Law Review 57(4) (2009); *Parashar*, note 2.

4 On small scale reforms within the personal laws see *Flavia Agnes*, Minority Identity and Gender Concerns, Economic and Political Weekly 36 (2001); on suggestions to introduce a UCC see *Parashar*, note 2; and *Farrah Ahmed*, Remedying Personal Law Systems, International Journal of Law, Policy and the Family 30(3) (2016). For an overview on the different feminist standpoints and the shifts throughout time see *Tanja Herklotz*, Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court, Verfassung und Recht in Übersee 49(2) (2016).

5 *Mengia Hong Tschalaer*, Muslim Women's Quest for Justice: Gender, Law and Activism in India, Cambridge 2017; *Silvia Vatuk*, Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law, Modern Asian Studies 42 (2008).

6 Other Acts that are of relevance in Muslim Personal Law are the *Dissolution of Muslim Marriages Act*, 1939 and the *Muslim Women (Protection of Rights on Divorce) Act*, 1986. They are not directly relevant in the case at hand as they regard the dissolution of Muslim marriage at the behest of Muslim wives and post-divorce maintenance, respectively.

personal law (*Shariat*) applicable to the adjudication of cases between Muslims, while negating "customs and usages". The Act specifically refers to "provisions of Personal Law, marriage, dissolution of marriage, including talaq".

Muslim personal law regards marriage as a dissoluble contract and provides for different modes of divorce both at the wife's and the husband's initiative. While the Quran itself only refers to divorce to a limited extent, it is Islamic legal scholarship that has categorised the modes of divorce more clearly. *Talaq* is divorce at the husband's initiative and three different modes of this form of divorce are usually distinguished: *talaq-e-ahsan, talaq-e-hasan*, and that discussed here, *talaq-e-biddat* or triple *talaq*. Other than in the former two forms of *talaq* (in which a defined time period lies between the first pronouncement of *talaq* and the point at which the divorce becomes effective), triple *talaq* refers to three pronouncements of the word "talaq" in one sitting; it is effective forthwith and is irrevocable. Muslim wives do not enjoy an equivalent right. The immediate effectiveness of this form of *talaq,* which leaves no room for planning and preparing for divorce makes it particularly problematic. With modern technology, there have been instances where wives have been divorced through triple *talaq* being pronounced over Skype, Whatsapp or Facebook.[7] Notably, triple *talaq* is not acknowledged by all Muslims. Shia Muslims and some schools among the Sunni Muslims do not recognise it, while the Hanafi school of Sunni Muslims does accept it as legally valid.

With regard to the constitutionality of religion-based personal laws in general, and triple *talaq* in particular, a number of constitutional provisions play a role. First of all, the preamble of India's constitution, which the Supreme Court regards as part of the constitution's "basic structure",[8] defines India as a secular state. However, other than, for instance, the US-American understanding of secularism as a strict divide between church and state, the Indian notion of secularism is generally understood as one of equal protection of all religions and an equal distance towards all of them.[9] Consequently, the existence of different personal laws for different religious communities does not conflict per se with the principle of secularism. Nor is the call for a UCC in Article 44 in conflict with the existence of personal laws. On the one hand, the provision leaves open whether such a UCC would actually replace or simply complement the personal laws. On the other hand, contrary to the fundamental rights in part III of the constitution, directive principles in part IV such as Article 44 are not enforceable by the court (see Article 37). They do not directly create any justiciable

7 *BBC*, Triple Talaq: How Indian Muslim Women Fought, and Won, the Divorce Battle, August 22, 2017, http://www.bbc.co.uk/news/world-asia-india-40484276 (last accessed on 18 September 2017).

8 *S.R. Bommai v. Union of India* (1994) 2 SCC1.

9 *Gary Jeffrey Jacobsohn*, The Wheel of Law: India's Secularism in Comparative Constitutional Context, Princeton and Oxford 2003, p. xii et seq.; *Rajeev Bhargava*, Should Europe learn from Indian Secularism? http://www.india-seminar.com/2011/621/621_rajeev_bhargava.htm (last accessed on 18 September 2017).

rights in favour of individuals, nor can a law be declared unconstitutional on the sole ground that it contravenes a directive principle.[10]

However - and here things become a little more interesting - Article 13(1) provides that "[a]ll 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 [part III - the fundamental rights], shall, to the extent of such inconsistency, be void". The fundamental rights in part III of the constitution include the right to equality, enshrined in Articles 14 (equality before the law) and 15 (no discrimination on grounds of religion, race, caste, sex or place of birth) as well as the right to life, guaranteed under Article 21 (generally interpreted in a broad sense as including personal liberty and the right to live with human dignity[11]). Interestingly, in 1952, in the case *Narasu Appa Mali*[12] the Bombay High Court held that (uncodified) "personal laws were not included in the expression 'laws in force' used in Article 13(1)" (para 13).[13] Consequently, the court held that (uncodified) personal laws were not void even when they came into conflict with the provision of equality under the constitution. While the Indian Supreme Court has never directly overruled this judgement,

10 *Durga Das Basu*, Introduction to the Constitution of India (21 ed.), Gurgaon 2013. The Supreme Court has, indeed, in some cases "read" directive principles "into" fundamental rights (see for instance *Mohini Jain v. State of Karnataka and others* (1992) 3 SCC 666 or *Unii Krishnan J.P. and others v. State of Andhra Pradesh and others*, (1993) 1 SCC 645). This has, however, not been the case with regard to Article 44.

11 *Maneka Gandhi vs. Union of India*, 1978 SCR (2) 621.

12 *The State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84.

13 In this case, the claimant challenged the *Bombay Prevention of Bigamous Marriages Act,* 1946, which imposed monogamy on Hindus, whereas Muslim personal law allowed Muslim men to practise polygamy. The Court did engage with the question of whether or not the Act violated Article 25, 14 and 15. With regard to Article 25 it denied a violation with the argument that "even assuming that polygamy is a recognized institution according to Hindu religious practice, the right of the State to legislate on questions relating to marriage [under Article 25(2)] cannot be disputed" (para 7). With regard to Articles 14 and 15 (discrimination on grounds of religion) the court also denied a violation, arguing that the State "may rightly decide to bring about social reform by stages" along the lines of religious communities (para 10). Interestingly, the court then engaged with the question of whether with the introduction of the Indian constitution uncodified Muslim personal law that permits polygamy had become void as a violation of Article 14 and 15 (discrimination on the grounds of sex) and whether therefore the *Bombay Prevention of Bigamous Marriages Act,* 1946 was discriminatory as it only applied to Hindus (para 13). It is with regard to this test of constitutionality of uncodified Muslim personal law, that the court stated that "personal laws" were no "laws in force" within the purview of Article 13. The court held that it was the constitution making body's intention to exclude personal law from the purview of Article 13. This opinion draws on the understanding that the explicit regulations in Article 17 (abolishment of untouchability) and Article 35(3) (the opening of Hindu religious institutions to Hindus of all casts) would have been unnecessary, had these practices been unconstitutional and void under Article 13 already (para 13). Furthermore, the judgement holds that Article 44 itself recognises and therefore acknowledges the existence of personal laws (para 13).

it did in an *obiter dictum* in the *Masilamani Mudaliar* case in 1996[14] articulate an opposing viewpoint by stating: "The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violated fundamental rights."[15]

On the other hand, the constitution also guarantees the right to freedom of religion (Article 25), which includes freedom of conscience and free profession, practice and propagation of religion. According to Article 25(1), the right to freedom of religion is "[s]ubject to public order, morality and health and to the other provisions of this Part [part III - the fundamental rights]". Article 25(2) further states that "nothing in this article shall affect the operation of any existing law or prevent the State from making any law [...]". According to Indian jurisprudence, only "essential religious practice" is protected under Article 25.[16] Whether or not triple *talaq* constitutes such an essential religious practice was a central question in the case at hand.

In the past, the Indian Supreme Court has been rather reluctant in positioning itself vis-à-vis the personal laws. In particular against the backdrop of the court's power of judicial review and its reputation as an independent and activist court, it was noticeable that with regard to the personal laws, the apex court practised a "hands-off approach".[17] Often, it refrained from taking a decision by referring the matter to the legislator.[18] In some of the cases where the court did take a position - most prominently in the 1985 *Shah Bano* case[19] - it has been criticised for drawing on anti-Muslim stereotypes, rather than engaging with the issue of gender equality.[20] As well as the fact that in this specific case, five Hindu judges

14 *C. Masilamani Mudaliar and Others vs. The Idol of Sri Swaminathaswami Thirukoli and Others*, (1996) 8 SCC 525.

15 *ibid.* para 15.

16 See for instance *The Commissioner Of Police & Ors vs Acharya Jagdishwarananda*, Supreme Court of India on March 11, 2004.

17 *Indira Jaising*, Gender Justice and the Supreme Court, in: B. N. Kirpal et al. (eds.), Supreme but not Infallible: Essays in Honour of the Supreme Court of India, New Delhi 2000, p. 290.

18 *Maharshi Avadhesh v. Union of India* (1994) Suppl (1) SCC 713 and *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573.

19 *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*, AIR 1985 SC 945. The case dealt with a claim for maintenance filed by a divorced Muslim woman against her ex-husband. The Supreme Court rejected the ex-husband's claim that under Muslim personal law he was not required to pay maintenance after the *iddat* period (roughly three months) and after having paid her an amount as *mehr* (a form of dower). Instead, the judges held that the secular provision of Section 125 *Code of Criminal Procedure* (CrPC) applies to all citizens irrespective of their religion and hence overrides the personal laws. The judgement led to severe agitation among the Muslim population, stirred further by the *All India Muslim Personal Law Board*, which regarded it as an interference by the court in Muslim personal law, see *Bajpai*, note 2, pp. 180-181.

20 *Madhu Kishwar*, Pro Women or Anti Muslim? The Shah Bano Controversy, Manushi 32 (1986).

made an attempt to interpret Muslim personal law, the language the judgement used was also heavily criticised and perceived as an attack on the Muslim community.[21]

This critique, however, should not undermine the fact that some positive development in the jurisdiction on personal laws has been seen too. Specifically, with regard to triple *talaq*, the Indian judiciary has slowly but steadily fostered the rights of Muslim women. Courts have shifted away from the earlier understanding that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and that triple *talaq* was valid even in the absence and without the knowledge of the wife,[22] towards testing the divorce practice against a strict set of standards. The Gauhati High Court[23] held that *talaq* was only valid if there was a reasonable cause for the divorce and if it was preceded by unsuccessful attempts at reconciliation between the husband and wife, involving two arbiters - one from the wife's family and the other from the husband's. Other judges have regarded triple *talaq* as one revocable *talaq*, meaning that after its pronouncement the husband has time to rethink his decision and an opportunity to revoke the same during the so-called *iddat* period (roughly three months),[24] or have demanded the legislator regulate on the issue.[25] The Supreme Court, in *Shamim Ara,*[26] followed the Gauhati High Court, in that triple *talaq* without a reasonable cause or without a previous attempt of reconciliation was considered invalid. Thus, one might argue that in a way the issue had already been settled before the *Shayara Bano* case came up and made it to the headlines of the international media.

III. The Case at Hand

The decision at hand brought together five writ petitions filed by Muslim women who had been divorced by way of triple *talaq*. Among them was the petitioner who gave the case its name, Shayara Bano, a 35-year old women, who has two children from her marriage and

21 The court, for instance, stated that the introduction of a UCC would "help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies". It is clear that this is a reference to the Muslim community, which, the court assumed, had delayed the process of legal unification. The judgement deploys negative stereotypes against Islam as "ruthless in its inequality" and singles out the helpless situation of Muslim women; see *Agnes*, note 3, p. 157 and *Kishwar*, note 20. Similar anti-Muslim biases were articulated in later judgments, most prominently in *Sarla Mudgal v. Union of India* (1995) 3 SCC 635, where the court stated: "Those who preferred to remain in India after the partition," knew that "in the Indian Republic there was to be only one Nation" and hence, "no community could claim to remain a separate entity on the basis of religion".

22 See for instance *Rashid Ahmad v. Anisa Khatun*, AIR 1932 PC 25.

23 See *Jiauddin Ahmed v. Anwara Begum* (1981) 1 Gau.L.R. 358 and *Must. Rukia Khatun v. Abdul Khalique Laskar* (1981) 1 Gau L.R. 375.

24 *Masoor Ahmed v. State* (NCT of Delhi), 2008 (103) DRJ 137, para 27.

25 *Nazeer v. Shemeema* 2017 (1) KLT 300.

26 *Shamim Ara vs State of U.P. & Anr.* (2002) 7 SCC 518.

was divorced by her husband in October 2015 after 15 years of marriage. Muslim women's groups - the *Bharatiya Muslim Mahila Andolan* and *Bebak Collective* - intervened in the matter to support the petitioners. A key player defending the practice of triple *talaq* was the *All India Muslim Personal Law Board* (AIMPLB). The court directed the registration of a public interest litigation (PIL) case, entitled *In Re: Muslim Women's Quest For Equality vs Jamiat Ulma-I-Hind*. The deliberative decision to put five judges of five different religious communities, namely a Sikh, a Christian, a Parsi, a Hindu and a Muslim (all male) on the bench to decide this case was clearly an attempt not to repeat the mistakes made in *Shah Bano* and possibly also a signal to the Muslim community that their concerns were being taken seriously and that the case would be looked at in the most objective manner.

The petitioner and the intervening women's groups based their contention mainly on the argument that triple *talaq* violated fundamental rights, namely Articles 14, 15 and 21. With reference to *Masilamani Mudaliar*[27] as well as other cases[28] in which the Supreme Court has tested the personal laws on the touchstone of fundamental rights, it was opined that Muslim personal law should be considered as "law in force" within the meaning of Article 13(1). Triple *talaq*, it was argued, was arbitrary and discriminatory and thus a violation of Articles 14 and 15. As held in *Kesavananda Bharati*[29] and *Minerva Mills*,[30] it was the courts' duty to intervene in cases of violation of any individual's fundamental right, and to render justice. This was even more so in cases where the parliament was reluctant in bringing out legislation - presumably due to political considerations. It was further held that the Constitution's provisions on religious freedom did not in any manner impair the jurisdiction of the Court. Article 25 itself postulated that religious freedom was subject to other provisions in part III. Articles 14 and 15, on the other hand, were not subject to any restrictions. Triple *talaq* was in fact not even protected by Article 25, because it would not form an "essential practice" of religion.

Additionally, the argumentation also relied on international treaties and covenants to which India is a party, such as the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women and the respective references to gender equality, non-discrimination and human dignity therein. Beyond that, it was held that triple *talaq* was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. It was held that triple *talaq* should be abolished in the same manner as the state had done away with practices once prevalent in the Hindu community, such as *sati*, *devdasi* and polygamy. The fact that a number of countries, including theocratic states and countries with large Muslim majorities, had prohibited triple *talaq* not

27 Note 14.

28 For instance, *Danial Latifi v. Union of India* (2001) 7 SCC 740; *Shah Bano*, note 19 and *John Vallamatom v. Union of India* (2003) 6 SCC 611.

29 *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

30 *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 225.

only showed that the state was indeed capable of interfering with personal law, but also led to the paradox that Muslim women in secular India had lesser rights than Muslim women in Islamic states.

The rebuttal of the petitioners' contentions drew on *Narasu Appa Mali*[31] and *Ahmedabad Women Action Group*[32] and held that the constitutionality of personal laws could not be tested by the court. It was argued that there was a clear distinction between "laws" and "laws in force" in Article 13 and that this article would have to be read along with Article 372, which mandates that all laws in force in the territory of India immediately before the commencement of the constitution would continue to remain in force, until altered, repealed or amended by a competent legislature or other competent authority. Triple *talaq*, could therefore only be interfered with by way of legislation. Other countries, too, had banned triple *talaq* through legislative acts. It was further opined that triple *talaq* - a mode of divorce that had been practised for 1400 years - was part and parcel of the personal law and thus part of the faith of Sunni Muslims belonging to the Hanafi school. The practice was therefore protected under Article 25. Furthermore, it was argued that individual Muslim couples were free to declare triple *talaq* invalid in their marriage contract (*nikahnama*) or opt to be governed under the secular *Special Marriage Act* and could thus decide for themselves whether or not triple *talaq* would be valid in their case. Generally, it was held that social reforms with reference to personal laws should emerge from the concerned community itself without the court's interference. The Indian state had followed a policy of non-interference in personal law affairs. As a part of this policy, India had also expressed clear reservations in regard to the mentioned international conventions, which was why international law provisions were not applicable here.

IV. The Judgment(s)

The constitutionality of triple *talaq* was tested by the court in different steps. The first question to answer was whether triple *talaq* had been codified into statutory law by the *Muslim Personal Law (Shariat) Application Act*, 1937. If this were the case, it would be subject to fundamental rights scrutiny. If it were not the case, the following question would be whether triple *talaq* was part of uncodified personal law and whether as such it could be tested against the constitution. The first question was decided in different ways by the different judges. Justices Nariman and Lalit argued that the 1937 Act did indeed codify triple *talaq* under statutory law. They held that "all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq" (para 18). As a pre-constitutional law, the 1937 Act would fall within the expression "laws in force" and would be "hit by Article 13(1) if found to be inconsistent with the provisions in Part III of the Constitution" (para 19).

31 Note 12.

32 Note 18.

Justices Joseph, Khehar and Nazeer disagreed with this opinion. In the words of Justice Joseph, "[t]he 1937 Act simply makes Shariat applicable as the rule of decision [...]. Therefore, while talaq is governed by Shariat, the specific grounds and procedures for talaq have not been codified in the 1937 Act" (para 4). The question that followed - and again found different answers - was whether triple *talaq*, was instead part of uncodified Muslim personal law. Justice Joseph answered this question in the negative, while Justices Khehar and Nazeer answered it in the affirmative. Justice Joseph arrived at his opinion through an engagement with the Quran and Islamic legal scholarship. The Quran, in his understanding, permits *talaq* only when there has been a previous attempt at reconciliation. However, since in the case of triple *talaq*, reconciliation is not possible, the practice must be held to be "against the basic tenets of the Holy Quran and consequently, it violates Shariat" (para 10). This argumentation resembles the above-mentioned judgements by the Gauhati High Court[33] as well as the Supreme Court's opinion in *Shamim Ara*.[34] Justice Joseph stated: "Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible" (para 24) and concluded: "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well" (para 26).

Justices Khehar and Nazeer, on the other hand, regarded triple *talaq* as a part of uncodified Muslim personal law (for Sunni Muslims belonging to the Hanafi school) (para 145) and consequently had to answer whether or not the same could be tested against the constitution by the court. The two justices answered this question in the negative. This was because, in their opinion, the personal laws of any religious community were "protected from invasion and breach, except as provided by and under Article 25" (para 146). This interpretation in particular has been criticised, as it regards a law rather than an individual as being protected under Article 25.[35] The justices did not see a reason to engage with the relationship between Articles 25 vis-à-vis Articles 14, 15 and 21 as "other provisions of this part", which the freedom of religion is "subject to" (Article 25(1)), as they held that these rights were only applicable to State action against individuals (para 165). They concluded that the court "cannot nullify and declare as unacceptable in law, what the constitution decrees us, not only to protect, but also to enforce. [...] Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination" (para 195). The judges "direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat'" (para 199).

33 Note 23.

34 Note 26.

35 *Gautam Bhatia*, The Supreme Court's Triple Talaq Judgment, Indian Constitutional Law and Philosophy, 22 August 2017, https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/ (last accessed on 18 September 2017). *Jhuma Sen*, The Gender Question, Frontline 15 September 2017, http://www.frontline.in/the-nation/the-gender-question/article9834658.ece (last accessed on 18 September 2017).

Returning to the judgement by Justices Nariman and Lalit, who had regarded triple *talaq* as codified into statutory law by the 1937 Act and thus subject to fundamental rights scrutiny, the next question was whether Section 2 of the 1937 Act, to the extent that it authorised triple *talaq,* actually violated any constitutional provisions and was therefore insofar unconstitutional and void. Before engaging with a violation of Article 14, the justices - in a similar vein to Justices Khehar and Nazeer above - proved whether triple *talaq* was "saved" by Article 25. Other than their fellow judges, however, Nariman and Lalit denied such a saving through Article 25. They argued instead that triple *talaq* - which was perceived as sinful in theology - did not constitute an "essential religious practices" and was therefore not protected under Article 25(1) (para 25). The judges held that there was no need that "the ball must be bounced back to the legislature" (para 25), and that the court could decide on the matter. The Supreme Court's judgement in the *Ahmedabad Women Action Group* case[36] was in this context dismissed as having "no ratio" and being contradictory in itself (para 30).

Having said this, the judges engaged with the core issue of the case: the question of whether the 1937 Act, insofar as it seeks to enforce triple *talaq,* was a violation of any constitutional provision, in this case Article 14. With extensive reference to the Supreme Court's jurisprudence, the judges argued that "legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution" (para 54). This "test of manifest arbitrariness" was then applied to the case at hand. Since triple *talaq* was valid without any "reasonable cause" and did not allow for "any attempt at reconciliation between the husband and wife" (para 56), the judges concluded that:

> *"this form of Talaq is manifestly arbitrary in the sense that the 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 contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression 'laws in force' in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq" (para 57).*

Overall, though via a different argumentation, Justices Nariman and Lalit thereby came to the same conclusion as Justice Kurian Joseph and by a majority of 3:2 the practice of triple *talaq* was set aside.

V. Evaluation and Critique

Compared to the court's earlier strategy of avoiding to engage in-depth with the personal laws, this judgement was indeed rather bold and might rightfully be called a "landmark de-

36 Note 18.

cision",[37] which marks "a signpost moment of the women's movement in India."[38] The multi-faith composition of the bench, which aimed at providing a "neutral" and differentiated view on the matter, was also a laudable approach. This is not to undermine, however, the lack of a more gender balanced composition of the bench (and of the Indian Supreme Court in general).

As feminist scholars[39] have pointed out, the gender aspect fell rather short in the judgement. While Articles 14 and 15 - to varying degrees - played a role in the different argumentations, the judgement did not engage with the intersectionality of gender and religious identity. While a large number of Islamic legal scholars were quoted in the judgement, feminist legal scholars did not find their way into the considerations of the judgement. As Ratna Kapur[40] points out, even the much hailed opinion of Justices Nariman and Lalit was ultimately not concerned with women's rights, but rather with the preservation of marriage, when it found fault with triple *talaq* on the basis that "the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it" (para 57).

Thus, while the decision was a step in the right direction, it did not go as far as it could have gone, had gender equality been taken seriously. Despite long elaborations on whether or not triple *talaq* was "protected" by Article 25, the court did not position itself clearly on the relationship between gender equality (Article 14 and 15) and religious freedom (Article 25). It also refrained from expressively overruling *Narasu Appa Mali*.[41] And since the court only set aside one specific form of *talaq*, this means that the other forms - *talaq-e-ahsan* and *talaq-e-hasan* - remain in place and Muslim men retain their right to divorce their wives by pronouncing *talaq* over a period of a few months. But these other forms of *talaq* do not fulfil the standards of gender equality either, as Muslim husbands are granted a unilateral right to divorce their wives, which Muslim women do not enjoy in the same manner. Thus, the decision is limited insofar as it constrains itself to a small aspect of law and does not actually set a precedent in terms of generally applicable standards for further engagements with discriminatory personal law provisions.

It is also questionable whether the lengthy elaborations on Islam and Muslim personal law (especially in the judgement of Justices Khehar and Nazeer) were actually necessary. It seems that - to a certain degree - due to the sheer number of pages dedicated to Islam and Muslim personal law, the judges also sought to show the Muslim community that their concerns are being taken seriously. This, however, bears problems: the longer the judgement is

37 *BBC*, Triple Talaq: India Court Bans Islamic Instant Divorce, 22 August 2017, http://www.bbc.co.uk/news/world-asia-india-41008802 (last accessed on 18 September 2017).

38 *Sen*, note 35.

39 *Ratna Kapur*, Triple Talaq Verdict: Wherein Lies the Much Hailed Victory? The Wire, 28 August 2017, https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/ (last accessed on 18 September 2017); *Sen*, note 35.

40 *Kapur*, note 39.

41 Note 12.

and the more inner contradictions its argumentation contains - and there are quite a few contradictions in this judgement - the more can it later be (mis)used by cherry picking those arguments that were made in *obiter dictum* statements of this case.

Overall, this judgement was indeed a step in the right direction. But it was only one step and more steps need to follow. The debates that the case has sparked on discriminatory aspects in other legal areas - such as other personal laws[42] or in the Indian rape law[43] - are a positive development, as they show us that the ball has been set rolling again.

42 *Subhashini Ali*, The Triple Talaq Ruling Is a Step Forward, but There Is a Long Way to Go for Gender Justice Laws, The Wire, 24 August 2017, https://thewire.in/170364/triple-talaq-uniform-civil-code-gender-justice/ (last accessed on 18 September 2017); *Shalaka Patil*, After Triple Talaq, a Look At the Other Discriminatory Personal Laws That Need to Go, The Wire, 28 August 2017, https://thewire.in/171451/personal-law-reform-gender/ (last accessed on 18 September 2017); *Narendra Subramanian*, Beyond Triple Talaq, India Needs a Debate on How to Reform Muslim, Hindu Law, 27 June 2017, The Wire, https://thewire.in/151585/democratising-family-nation-triple-talaq-pluralistic-equality/ (last accessed on 18 September 2017).

43 *Maya Mirchandani*, Triple Talaq and Marital Rape: Politics and Patriarchy Trump Gender Justice, The Wire, 31 August 2017, https://thewire.in/172469/triple-talaq-marital-rape-patriarchy-politics-gender-justice/ (last accessed on 18 September 2017).