Two cheers for the Supreme Court

On the 4th of November, 1948, Dr. B.R. Ambedkar rose to address the Constituent Assembly, and proudly stated that “the... Constitution has adopted the individual as its unit”. On Tuesday, this constitutional vision, under siege for much of India’s journey as a democratic republic, came within a whisker of destruction at the hands of the Supreme Court. But when all the dust had cleared in Courtroom No. 1, it finally became evident that Chief Justice J.S. Khehar had been able to enlist only one other judge, out of a Bench of five, to support his novel proposition that the religious freedom under the Indian Constitution protected not just individual faith, but whole systems of “personal law”, spanning marriage, succession, and so on. This view would not only have immunised instantaneous triple talaq (*talaq-e-biddat*) from constitutional scrutiny, but would also — in the Chief Justice’s own words — have ensured that “it is not open for a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion”.

Had the Chief Justice managed to persuade one other judge to sign on to his judgment, we would have found ourselves living under a Constitution that sanctions the complete submergence of the individual to the claims of her religious community. A reminder, perhaps, of how even the most basic constitutional values, often taken for granted, hang by nothing more than the most fragile of threads. But if the relegation of the Chief Justice’s argument to a legally irrelevant dissenting opinion narrowly averted disaster, the separate opinions of three judges invalidating the practice of *talaq-e-biddat* gave us something to cheer about — but not much. By a majority decision, instantaneous triple talaq is now invalid, a significant victory that is the result of many decades of struggle by the Muslim women’s movement for gender justice. That is something that must be welcomed. However, the value of a Supreme Court judgment lies not only in what it decides, but also in the possibilities and avenues that it opens for the future, for further progressive-oriented litigation. In that sense, the triple talaq verdict is a disappointment, because even the majority opinions proceeded along narrow pathways, and avoided addressing some crucial constitutional questions.

Justice Rohinton F. Nariman, writing for himself and Justice U.U. Lalit, held that the 1937 Muslim Personal Law (Shariat) Application Act had codified all Muslim personal law, including the practice of triple talaq. This brought it within the bounds of the Constitution. He then held that because *talaq-e-biddat* allowed unchecked power to Muslim husbands to divorce their wives, without any scope for reconciliation, it was “arbitrary”, and failed the test of Article 14 (equality before law) of the Constitution. The practice, therefore, was unconstitutional.

Justice Nariman’s reasoning, while technically faultless, avoided the elephant in the room that had been ever-present since the hearing began. Under our constitutional jurisprudence, codified personal law — that is, personal law that has been given a statutory form, such as the Hindu Marriage Act — is subject to the Constitution. However, uncodified personal law is exempted from constitutional scrutiny. In other words, the moment the state legislates on personal law practices, its actions can be tested under the Constitution, but if the state fails to act, then those very practices — which, for all relevant purposes, are recognised and enforced by courts as law — need not conform to the Constitution. This anomalous position, which had first been advanced by the Bombay High Court in a 1952 decision called Narasu Appa Mali, and has never seriously been challenged after that, has the effect of creating islands of “personal law” free from constitutional norms of equality, non-discrimination, and liberty.

By holding that the 1937 Act codified all Muslim personal law, Justice Nariman obviated the need for reconsidering this longstanding position, even as he doubted its correctness in a brief, illuminating paragraph. As a matter of constitutional adjudication and judicial discipline, he was undoubtedly right to do so. However, it is impossible to shake off the feeling that the court missed

an excellent opportunity to review, and correct, one of its longstanding judicial errors. It seems trite to say that in our polity, there should not exist any constitutional black holes. The basic unit of the Constitution, as Ambedkar said, is the individual, and to privilege state-sanctioned community norms over individual rights negates that vision entirely.

In a separate opinion — which turned out to be the "swing vote" in this case — Justice Kurian Joseph did not go even that far. He simply held that *talaq-e-biddat* found no mention in the Koran, and was no part of Muslim personal law. Effectively, he decided the case on the ground that *talaq-e-biddat* was un-Islamic, instead of unconstitutional — begging the question whether secular courts should be adjudicating such questions in the first place. If Justice Nariman's opinion was narrow and technical, Justice Joseph's was narrow and theological. Therefore, in a case that involved, at its heart, issues of the intersection between personal law, the Constitution, and gender discrimination, there is no majority view on any of these topics.

This brings us back to the dissent. Not only did the dissenting opinion privilege community claims over individual constitutional rights, it also conflated the freedom of religion with personal law, thereby advancing a position where religion could become the arbiter of individuals' civil status and civil rights. Here again, it had been Ambedkar, extraordinarily prescient, who had warned the Constituent Assembly on the 2nd of December, 1948: "The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death... if personal law is to be saved, I am sure... that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extent beyond beliefs and rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion."

Ultimately, what separates religious norms and personal law systems — and this includes all religions — from the laws of a democratic republic is the simple issue of consent. This is why the Chief Justice's conflation of religious freedom and personal law was so profoundly misguided: because, in essence, he took a constitutional provision that had been designed to protect an individual, in her faith, from state interference, and extended it to protect a personal law system that claims authority from scriptures — scriptures whose norms are applied to individuals who had no say in creating them, and who have no say in modifying or rejecting them. The Muslim women challenging triple talaq invoked the Constitution because there was no equivalent within their personal law system; the Chief Justice would have denied not only them that possibility, but would have denied to every other individual, who felt oppressed and unequally treated by her religious community, for all time — and told them, as he did in this case: "Go to Parliament, but the Constitution has nothing for you."

At the very least, the Majority judgments did not close that window. For that, we must say: two cheers to the Supreme Court.

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