How the numbers compute

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Tasked with determining if instant triple talaq is gender discriminatory under the Constitution, a terse order at the end of Tuesday's Supreme Court verdict summarises the results of its labours: "By a majority of 3:2 the practice of 'talaq-e-biddat' – triple talaq is set aside". Score-sheet summaries of this kind have been deprecated ever since the Supreme Court's decision in *Kesavananda Bharati* (1973). From a careful reading of the three separate judgments that make up the court's decision in the instant case, it is not at all entirely clear that triple talaq was in fact "set aside" by a majority of 3:2.

In one common judgment, two of the five judges (Rohinton F. Nariman and U.U. Lalit) held that triple talaq was an element of statutory law — the Muslim Personal Law (Shariat) Application Act, 1937 — and, being arbitrary, was unconstitutional. They declined to express an opinion on the more general question of whether religious personal laws were immune from constitutional scrutiny under Article 25, which guarantees all citizens the right to freely practise their religion. (The Shariat Act of 1937 contained no reference to triple talaq and merely declared that the Shariat would be applicable uniformly to all Muslims in India in determining issues such as marriage, divorce, etc. Before the passage of this Act, Hindu inheritance laws were applied to certain Muslim communities in the North-Western Provinces, Punjab and Gujarat. This had a particularly pernicious effect on the rights of Muslim women which were relatively better secured under the Shariat.)

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In a second common judgment, Chief Justice J.S. Khehar and Justice S. Abdul Nazeer held that the practice of triple talaq, being a component of personal law, was protected by Article 25 of the Constitution and could not be interfered with by the court. In the same breath they directed that this practice be abrogated by Parliament through legislation.

Matters standing thus evenly divided, the entire weight of the decision shifted to the opinion of the fifth judge, Justice Kurian Joseph. From the summary, we would expect him to have concurred with Justices Nariman and Lalit on the unconstitutionality of triple talaq. Astonishingly, his decision (a meagre 27 pages in a 397-page judgment) goes neither way. Justice Joseph holds triple talaq to be inoperative not because it violates fundamental rights, but because it is, on his reading, "Anti-Quran" and hence violative of the Shariat. Tellingly, he disagrees with Justices Nariman and Lalit on whether "the 1937 Act is a legislation regulating triple talaq and hence, [would be subject to the test] of Article 14". This is a central pillar holding Justice Nariman and Justice Lalit's argument together, and on no reasonable view can Justice Joseph's judgment be understood as 'concurring' with theirs.

What we are left with is two judges who uphold the constitutional immunity of triple talaq, two who strike it down as unconstitutional, and one who does not think it is even law.

In light of this radical discord between Justice Joseph and Justices Nariman and Lalit, what are we to make of the misleading "3:2" majority by which triple talaq was allegedly set aside as unconstitutional?

Whatever else one might read into the decision, it is clear that three judges of the *Shayara Bano v. Union of India* case did not come to the determination that triple talaq is gender discriminatory and hence unconstitutional — the very question that they were tasked with answering.

It is possible to cosmetically unite the three 'majority' judges at the level of an abstract intention,

evinced in their judgments, that triple talaq is an undesirable practice and ought not to remain law. Such an indulgent interpretation however would reduce the complex task of judgment to the arbitrary, whimsical exercise of signing a summary — hardly worth the serious judicial time that this case has consumed. Undoubtedly, over time, this decision will come to be misdescribed in textbooks and judgments as one that 'declared triple talaq unconstitutional'. In this process, 27 pages of Justice Joseph's writings will probably be rendered mute in order to furnish the decision with an identifiable *ratio*.

As officers of the highest court in the land, judges of the Supreme Court ought to be held accountable to high standards in their task of clarifying the law. They need reminding that the analytical rigour, clarity and consistency that their judgments lack will not somehow assemble in the minds of subordinate judges and students of the law, and that achieving a mathematical result (3:2) is no substitute for a reasoned decision.

Despite a 397-page judgment from the highest court in the land, 'somehow' is the best answer we have to the question of why triple talaq is no longer law.

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The new U.S. Fed Chairman is unlikely to opt for policies that might upset the President's plan

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