To clear the path ahead

Without a doubt, the August 22 **Constitution Bench judgment on instant talaq** (*talaq-e-bid'a*) was a historic one. For the first time in Indian history *talaq-e-bid'a* was specifically debated and set aside by the Supreme Court. In the 2002 Shamim Ara case a two-judge bench of the Apex Court had delegitimised this medieval practice only when it was not properly pronounced and preceded by attempts at reconciliation. But the latest ruling completely and unconditionally invalidates *talaq-e-bid'a and renders it bad in law*. The Koranic procedure of talaq is the only way by which a Muslim husband will be able to divorce his wife from now on. It is time then to recap the judgment to chart out the next steps.

The path that was taken to arrive at this landmark decision was tortuous, but intellectually invigorating. Justices R.F. Nariman and U.U. Lalit started off by correctly concluding that *talaq-e-bid'a* cannot be excluded from the definition of "talaq" mentioned in Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. Additionally, they declared that as the Shariat Act was a law made by the legislature before the Constitution came in force, it would fall within the expression "laws in force" in Article 13(3)(b), and would be hit by Article 13(1) if found to be inconsistent with Part III of the Constitution, to the extent of the inconsistency.

Letting go of instant triple talaq

Surprisingly, the two judges chose not to examine if the *Narasu Appa Mali* ruling was a good law. This judgment had held that personal laws cannot be tested against the provisions of Part III of the Constitution. Nonetheless, having brought the 1937 Act under the ambit of Article 13, the judges analysed several engrossing Supreme Court pronouncements to show how capricious, excessive and disproportional laws are "manifestly arbitrary" and the very antithesis of equality.

But the biggest achievement of Justices Nariman and Lalit is their harmonisation of constitutional equality with Koranic egalitarianism. This was done by endorsing the Koranic law of talaq mentioned in *Shamim Ara* and declaring *talaq-e-bid'a* to be "manifestly arbitrary" and violative of Article 14 because it allows a Muslim man to break the marriage "capriciously and whimsically" without attempting to save it through reconciliation. On these grounds, Section 2 of the 1937 Act was struck down as being void to the extent that it recognises and enforces instant talaq.

Interestingly, Justice Kurian Joseph, even while fully agreeing with the doctrine of manifest arbitrariness on the pure question of law, disagreed with Justices Nariman and Lalit that the 1937 Act regulates instant talaq and hence can be brought under Article 14. In his view, *talaq-e-bid'a* can be set aside without testing any part of the 1937 Act against Part III of the Constitution. As the whole purpose of the Shariat Act was to declare *Shariah* as the "rule of decision", any practice that goes against the *Shariah* cannot be legally protected. *Talaq-e-bid'a* falls outside the *Shariah* because it goes against its primary source, the Koran. Therefore, what is bad in theology is bad in law as well.

From suo motu to judgment: The arguments for and against triple talaq

Those who criticised the authors of the majority judgment for grounding the crux of their ruling in the Koran ignore the fact that personal laws of all communities in India enjoy constitutional protection. And as these laws are sourced from religious scriptures in most cases the Apex Court cannot but uphold the right of individuals and groups to profess, practise and propagate everything that forms an essential part of their religious scripture, subject to the provisions of Article 25(1). It may be pointed out here that the Koranic procedure of talaq that was implicitly upheld in this judgment does not in any way violate our constitutional values.

In their 272-page ruling former Chief Justice J.S. Khehar and Justice S. Abdul Nazeer, in contradiction to the majority judgment, declared *talaq-e-bid'a* to be an essential part of the Hanafi faith and gave it protection under Article 25(1). However, this view does not stand up to scrutiny as it is based on the flawed theological premise that a religious custom which has been in vogue for several centuries automatically becomes integral to the denomination that practises it. Such a stance is not consistent with the teachings of the Koran.

Had Justices Khehar and Nazeer given weight to the overwhelming evidence in the Koran and authentic hadeeses against instant talaq they could have avoided the problematic invocation of Article 142 to direct the state to enact an "appropriate legislation" on *talaq-e-bid'a*. One fails to understand how after having declared instant triple divorce a fundamental right under Part III of the Constitution the judges could direct the state to bring a law against it. Article 13(2) clearly states that 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." Even Justice Kurian had expressed "serious doubts" if the exercise of a fundamental right can be injuncted under Article 142.

Historic day for Muslim women: Shayara Bano on triple talaq verdict

The minority view also failed to appreciate the fact that hadeeses quoted by the AIMPLB were comparatively less authentic than those cited in High Court judgments relied upon by the petitioners which were from the six most authentic Sunni hadees books (*Sihah Sitta*). The AIMPLB cited just one report from Sihah Sitta (Hadees No. 5259 from Sahih Bukhari) in which instant talaq is mentioned. But this hadees does not show any Prophetic support for *talaq-e-bid'a*. It clearly states that the man who pronounced "triple talaq" did so "without the Prophet's command."

As pointed out above, the biggest goal attainment for Muslim women is the realisation that *talaq-e-bid'a* in any of his manifestations will not dissolve the marriage. This renders redundant not just halala but the incorporation of a platitudinous advisory against instant talaq in the *nikahnama*. There is also scope now to amend the 1937 Act, even without designating it as statutory law, to exclude *talaq-e-bid'a* from the definition of the word "talaq" mentioned in Section 2, and make the Koranic procedure of talaq gender-neutral. Indeed all provisions of the *Shariah* mentioned in the 1937 Act can be similarly redefined to bring them in conformity with the humanitarian teachings of the Koran and the Prophet.

This judgment will also encourage legally and theologically informed Muslim intellectuals to establish mediation centres across India under the Alternative Dispute Resolution (ADR) mechanism to help Muslim couples amicably resolve their marital disputes. To echo the feelings of many, this is not the end but the beginning of the process of reforms in the Muslim personal law. The biggest challenge, however, would be to inform the Muslim masses that the abolition of *talaq-e-bid'a* is not against the *Shariah* but has, on the contrary, brought it closer to the original principles of Islam.

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