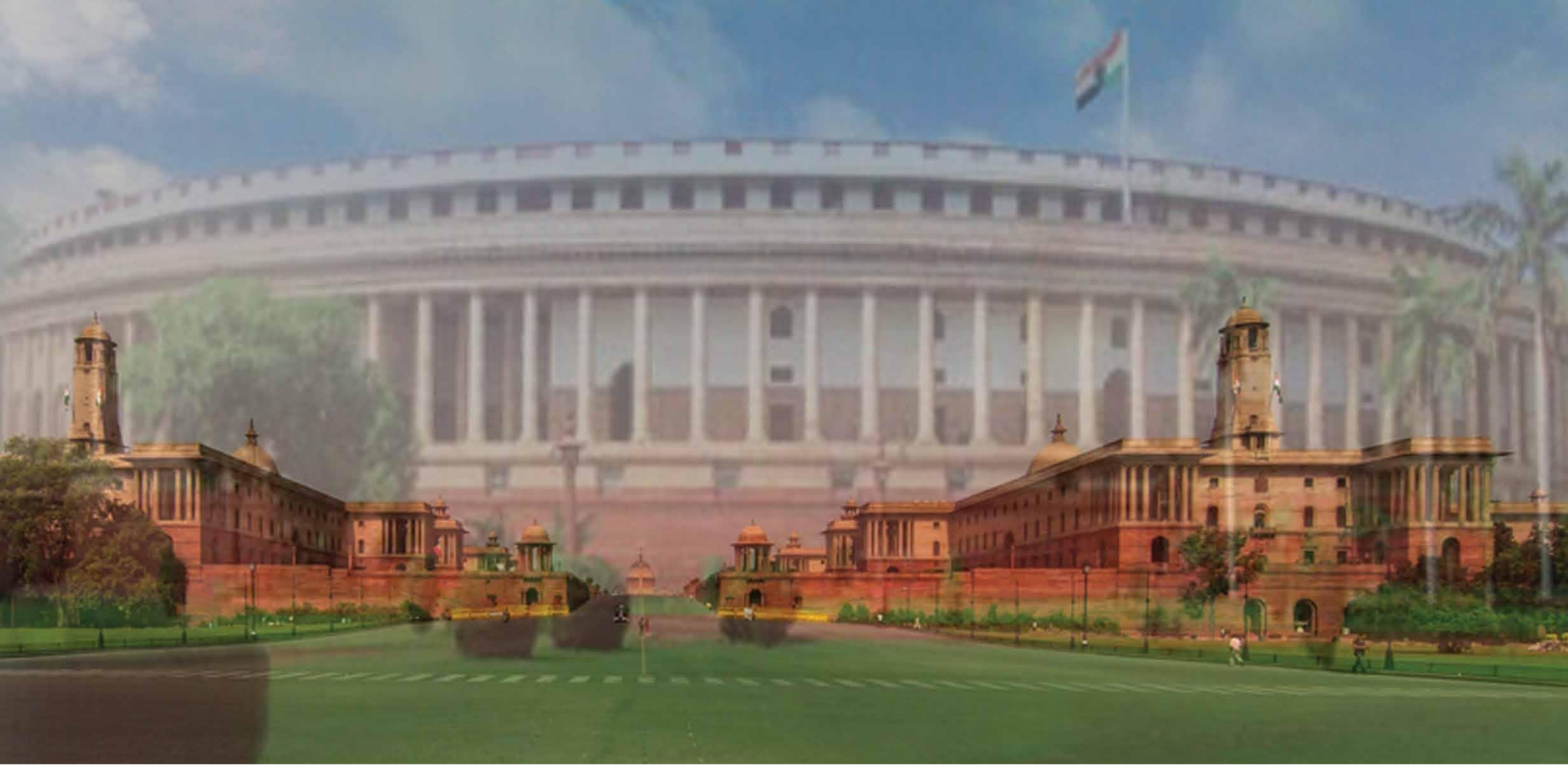

Policies & Perspectives

VIVEKANANDA INTERNATIONAL FOUNDATION

Walking Through the Legal Minefield of Triple Talaq

Rajesh Singh

29 Aug 2017

A holistic understanding of the Supreme Court's historic verdict that has held the practice of instant triple divorce (talaq-e-biddat) among the Muslim community as unconstitutional, can be had by seizing upon three aspects of the issue: legal, political and social. That it should have taken the court to establish a law which ought to have come through a legislative process decades ago, is especially instructive. No Government had dared to take the bull by the horns — or bell the cat, if you may — for fear of ruffling minority feathers, even though it were the case that many sections within the Muslim community had begun to openly complain about the discriminatory and arbitrary nature that governed the process of divorce. The political fallout is all too obvious and will continue to be played out for some time to come. The social outcome will also unravel sooner than later. But it is the legal aspect that is the most fascinating, and which offers one an indication of the road ahead — and it's here that we must stabilise our attention for now.

A significant step had been taken by the apex court in 1985, when it ruled in favour of a Muslim divorcee, Shah Bano, and granted her an alimony (a sum of less than Rs 250 per month), on the ground that Section 125 of the Code of Criminal Procedure applied to Muslim women too. But organisations such as the All India Muslim Personal Law Board strongly objected, claiming that the decision had violated the community's personal laws. What happened thereafter is too well known to be detailed here. Suffice it to say that the then Rajiv Gandhi Government capitulated to fundamentalist opinion and brought in a legislation —the Muslim Women (Protection of Rights on Divorce) Act, 1986, which negated the court's judgement. Arif Mohammad Khan, one of the Ministers who had defended the apex court's ruling on the floor of Parliament, quit in protest.

In the present case too, it was the Supreme Court which came to the rescue of Muslim women who were given instant divorce by their husbands, with no recourse to reconciliation. Like in the Shah Bano case, this time also the clerics and other fundamentalists opposed the matter in the court with the old argument that any opposition to talaq-e-biddat would be a violation of the Muslim personal laws. But there was a major difference from the Shah Bano case. The Union Government, which had been asked by the apex court to state its position on the matter, unambiguously backed the petitioners and spoke out against the practice. It can be argued that even the Rajiv Gandhi regime was at heart supportive of the court's verdict in the Shah Bano case. Indeed, Arif Mohammad Khan's speech in Parliament had drawn praise from Rajiv Gandhi. But his capitulation before the fundamentalists without reason — he headed a regime with an overwhelming majority, enjoyed tremendous goodwill among the electorate, and was seen as a reformist and modernist — destroyed his progressive credentials. More importantly, it brought to naught an important initiative which, had it been built upon, could have resulted in far-reaching welcome changes in gender justice among the minority communities. Quite possibly, issues such as instant triple divorce, polygamy etc. could have been addressed effectively soon thereafter.

There is one other difference between the developments of 1985 and those of the present. While the Shah Bano case was widely discussed, there wasn't then the kind of pressure from gender rights organisations that we have witnessed today in support of the petitioners who dared to approach the Supreme Court for justice. Rights activists cutting across their political leanings, used public forms such as the media and democratic methods such as peaceful street protests to highlight the issue. With the Modi Government also adding its support to their demand, the opponents were left stranded. The All India Muslim Personal Law Board had initially taken the rigid position that instant triple divorce was part of Muslim personal law. Later, it diluted it somewhat and said it was opposed to this form but that the community was competent enough to self-regulate. This was an attempt at a face-saver. Neither the Board nor its supporters have really changed their mindset. The Darul Uloom Deoband, for instance, opposed the verdict and stated that instant triple talaq was "part of the Muslim personal law, which in turn is part of the Constitution of India". It also claimed, rather funnily, that the "rights of Muslim women are our priority and they are never compromised". If that indeed had been the case, why were the victims of instant triple divorce compelled to seek relief from the apex court?

Let's now deal with the legal aspect that the verdict has offered us an opportunity to examine. The five-judge Bench's ruling was not unanimous. Three judges struck down the practice of instant triple divorce as unconstitutional while two others refused to do so. Obviously the majority verdict carried the day and is now law. But the differing approach of the sets of judgements are lessons in themselves and give an indication of the complexity of the issue. Simplistically put, the majority opinion held that instant triple talaq had no protection under Article 25 of the Constitution (which deals with freedom of religion). The minority verdict was that the practice was an inherent part of Islam and could, therefore, not be tampered with. Of the five judges, Chief Justice of India JS Khehar and Justice S Abdul Nazeer were in the minority while Justices RF Nariman, Kurian Joseph and UU Lalit gave the majority verdict. Interestingly, Justice Joseph wrote his own order while the other set of majority opinion was authored jointly by Justices Nariman and Lalit. While these two verdicts reached the same conclusion, different methods were used for the purpose. The process is indeed illuminating. And since the majority ruling referred in places to the minority opinion, it is preferable to understand the latter first.

Chief Justice Khehar and Justice Nazeer arrived at the conclusion that talaq-e-biddat "is a matter of personal law of Sunni Muslims belonging to the Hanafi School. It constitutes a matter of their faith. It has been practiced by them for at least 1,400 years". They added that in their view, it did not breach Article 25. In fact, they said, since instant triple talaq was a "component of personal law", it had this Article's protection. The honourable judges then entered the realm of the abstract, and stated, "Religion is a matter of faith, and not logic. It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion". Elsewhere in their order, the two dissenting judges maintained that "the judiciary must, therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem".

Having thus repeatedly expressed their resolve to not intervene in what they considered a matter of religious faith, and by this argument, the faith being quite in keeping with Article 25 — never mind issues of gender discrimination etc. — the judges lobbed the ball in the legislature's court, asking the Government to enact a law within six months to resolve the matter. Until then, they ordered an injection against instant triple talaq, adding that failure to bring such a legislation within the time given would reinstate the practice. The six-month suspension of instant triple divorce was the farthest the two Justices were willing to go, when they said, "We, therefore, hereby direct the Union of India to consider appropriate legislation, particularly with reference to talaq-e-biddat. We hope and expect that the contemplated legislation will also take into consideration advances in Muslim personal law — Shariat, as have been corrected by legislation the world over, even by theocratic Islamic states". But the two judges had rested such hopes on the weak belief that the fundamentalist Muslim clergy, who could not digest a court's alimony order, and consistently operated a system which has discriminated against women in matters of marriage, divorce and property rights, will suddenly become reformist.

The majority opinion was scathing towards the arguments presented by the Chief Justice of India and Justice Nazeer. The observations to this effect are not just a matter of academic interest; they offer light to related issues that the courts and even the legislature may have to — indeed, will inevitably have to — deal with, in the near future. Let's take a few of them. Justice Kurian Joseph pooh-poohed the contention that instant triple talaq was in practice for 1,400 years, and said, "Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible." In saying so, Justice Kurian deftly used Islamic law, The Muslim Personal Law (Shariat) Application Act, 1937. While admitting that "talaq is governed by Shariat", he pointed out that the "specific grounds and procedure for talaq have not been codified in the 1937 Act". Having taken the position that the 1937 Act did not codify either the grounds or the procedure for divorce, Justice Joseph dismissed the need even for it to be tested on the anvil of Article 14.

A good part of Justice Joseph's decision was based on his understanding of the Shamim Ara versus State of UP case verdict. He pointed out that "Shamim Ara has since been understood by various High Courts across the country as the law deprecating triple talaq as it is opposed to the Holy Quran. Consequently, triple talaq lacks the approval of Shariat". The Shamim Ara case judgement dates to October 2002, and came from a two-judge Bench of the apex court. Shamim Ara was married in 1968 and 11 years later, she filed an application against her husband under Section 125 of the Criminal procedure Code on grounds of desertion and cruelty by her husband. The legal fight thereafter commenced and reached the apex court's doors. The Bench had noted that "there are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded" (the divorce). This observation assumes added relevance given that the recent instances of triple talaq were given by husbands through electronic communication means, and without ascribing any reason.

Justices Nariman and Lalit also struck down instant triple talaq as being unconstitutional, but, as said earlier, they took a different route to do so. In the first place, they targeted the attempt of the All Indian Muslim Personal Law Board's argument that Section 2 of the 1937 Act did not recognise or enforce triple talaq. This was of course a desperate attempt by the Muslim body to wriggle out of the embarrassment that it recognised lay ahead. The Justices maintained that "all forms of talaq recognised and enforced by Muslim personal law are recognised and enforced by the 1937 Act. This would necessarily include triple talaq when it comes to Muslim personal law applicable to Sunnis in India". Now, since the 1937 Act is a legislation and anything contained in it is law, then triple talalq too was. At the same time, the practice was considered 'sinful' by the Hanafi school which, in the words of the two Justices, "tolerates it". The inference drawn was clear: If a practice is sinful, how could it be considered as part of a religious practice?

Justices Nariman and Lalit, having first established that triple talaq had no protection of Article 25(1), because it was not an intrinsic religious practice in Islam, dismissed the All Indian Muslim Personal Law Board's contention that the matter must be referred to the legislature under Article 25(2) (b). They said that such a reference would only apply if the matter was first covered under Article 25(1).

The two honourable Justices then shifted their attention to the prospect of the 1937 Act insofar as triple talaq was concerned, being violative of Article 14 — a provision in Part Three of the Constitution that enumerates Fundamental Rights. Article 14 guarantees every Indian citizen the "right to equality before the law or the equal protection of the laws within the territory of India". One of the grievances of the petitioners who were victims of instant triple talaq was that they had been discriminated against and that the law of the land was not being applied equally to them. Once the Justices had established that this form of talaq was not sanctioned by Islam, was not a core part of the Muslim religious practices, and did not have protection under Article 25, it must have become easier for them to apply their legal acumen to the fundamental rights' issue. After delving into a bit of legal history, Justices Nariman and Lalit observed that "the thread of reasonableness runs through the entire fundamental rights chapter". The reasonableness is the following: "What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law". Such situation would, needless to add, violate Article 14.

And so, in the context at hand, the judges held that triple talaq was manifestly arbitrary and, therefore, unreasonable; and violative of Article 14 of the Constitution of India. The Justices held it arbitrary because, in their own words, 'triple talaq is a form of talaq which is itself considered to be something innovative, namely, that it is in the Sunna... being an irregular or heretical form of talaq". They then added to the manifest arbitrariness argument by pointing out that instant triple divorce was irrevocable and gave no scope for any reconciliation, and this made the practice unreasonable as well. They rounded off their verdict by stating that since they had declared Section 2 of the 1937 Shariat Act — which deals with the application of Muslim personal laws in various areas — as void on the ground that it was arbitrary, there was no need to probe the grounds of discrimination which the Attorney General of India had argued before the court.

In sum, it would be interesting to note that while the minority verdict linked instant triple talaq to intrinsic Islamic practice, the majority ruling saw it as not being so. It was not before the court to decide whether any personal law, if it is violative of fundamental rights, can stand legal scrutiny through the protective shield of Article 25. But for now, there is speculation on whether moves to bring a draft uniform civil code before Parliament will gain momentum after triple talaq has been declared unconstitutional.

(The writer is senior political commentator and public affairs analyst)

About VIF

Vivekananda International Foundation is a non-partisan institute for dialogue and conflict resolution from a nationalist perspective. Some of India's leading experts in the fields of security, military, diplomacy, governance, etc have got together under the institute's aegis to generate ideas and stimulate action for greater national security and prosperity, independently funded.

VIF is not aligned to any political party or business house.

Vivekananda International Foundation

3, San Martin Marg, Chanakyapuri, New Delhi - 110021
Phone No: +91-011-24121764, +91-011-24106698
Fax No: +91-011-43115450
E-mail: info@vifindia.org
www.vifindia.org
@vifindia