How not to Divorce Muslim Women in India

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Five years ago, during an extended tea break in Cambridge's architecturally underwhelming University Library, a grad school friend of mine observed that her research topic, the Uniform Civil Code in India, evoked mixed reaction in our otherwise ideologically streamlined friendship circle (left-liberal to far left, no surprises here). Most of us championed to keep personal laws based on religious scriptures. Though only of few of us were overtly religious, the constituent assembly's dream that one day all Indians would be unified under a single juridical umbrella in family law matters, seemed naïve at best, and majoritarian at worst. For vast swathes of India's past 70-years, the Uniform Civil Code has failed to pick up steam. When it did then mainly as a slogan for right-wing Hindu outlets in the late 80s, the types that tore down mosques and burnt Muslims in slums after tattooing religious symbols on their foreheads while barking "one nation, one law".

The Nehruvian intelligentsia detested such raw populism. Their children did, too. If we travel further back in time and eavesdrop on a similarly placed Indian student group 100 years ago discussing the merits of the Uniform Civil Code, there would have been a clearer consensus against its introduction. For Indians a century ago, as for many Indian today, any country-wide implementation of a one-size-fits-all personal law solution meant a direct intervention into their religious traditions and practices. Before 1947, it also meant ceding control to the British colonial state.

"Hold your breath", quibbles the postcolonial theorist, "religious tradition has little to do with religion or tradition". History as a way of thinking chronologically about time, where events are neatly lined up on a linear scale, and religion as an organised form of social life are Western imports, shoved down Indian throats to secure the colonial state's extractive rule over India. This may not be exactly what Foucault had in mind when he spoke of governmentality, but that's how most people understand him today. With her caste based politics and reserved seats for historically backward groups in all public institutions, democratic India has improved the *Lebenswelt* of many citizens, hand in hand with strengthening the group identities of these disempowered. The constitution reflects this with special provisions for minorities, be it for the establishment of cultural institutions, or, as in Article 25, for the protection of practices that are essential or integral to a particular religion.

Most contagious amongst the religiously tinted personal law rules are issues concerning inheritance, divorce, and alimony. Here women have been at a disadvantage (feminists would say: yet again). Christians have to wait for two years to push a divorce through, Hindu women have only in the last decade been granted the right to inherent some ancestral property, and Muslim women, while at least on paper entitled to a small strip of their parent's wealth, could be divorced by simply repeating the word divorce three times (*talaq-e-biddat*). Muslim women have the right to divorce their husbands, too, but this process, called *khula*, is a lot more time consuming. In the digital age husbands are known to have made use of *talaq-e-biddat* through text messages, what's app, and skype; though no Muslim man has yet been brazen enough to invite his four wives into the same what's app group and divorce them simultaneously by posting: "tlq, tlq, tlq".

After decades of complacency, with the shrewd worry of the courts that introducing constitutional law into family law was like "introducing a bull in a china shop", the Supreme Court of India decided this week in a historic 3-2 decree that *talaq-e-biddat* was void, illegal, and unconstitutional. The majority opinion was split.

Justice Kurian Joseph sought an easy exit. With the Muslim Personal Law (Shariat) Application Act, 1937 in tow, he ventured to explain that "the rule of decision in cases where the parties are Muslims" was "Muslim Personal Law", which meant that Sharia was part of the Indian Constitution in personal law matters. In his next move, mustering courage, Justice Kurian collapsed aesthetics into ethics to arrive at a normative yardstick with which he can help us to "see what the Shariat is". With the support of Asaf Ali Asghat Fayzee's mid-century book Outlines of Muhammad Law––a book where Fayzee churns out whatever Muslim legal thought he was able to acquire from the Orientalist Reynold Nichols during his undergraduate at Cambridge––Justice Kurian moulds his ethico-aesthetic theory in the following way:

> *What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and indubitably ugly.*

To make a long story short, what's beautiful for Muslims, he finds, is the Quran followed in short succession by Hadith, Ijma (consensus) and Qiyas (analogy). Since the Quranic words reign supreme, Justice Kurian tramples down the sandy path of the seventeenth century textualist Muhammad ibn Abd al-Wahab––to decipher what the Quran really says. And just like Abd al-Wahab, Justice Kurian, after quoting several Quranic verses at length, arrives at the following: "these instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as *talaq* is concerned." Oh, well. Leaving historical methodology and semiotics hair-splitting to the haters, Justice Kurian concludes that the Quran encourages matrimony over divorce. One has to undertake several efforts for reconciliation before divorce becomes *halal*-ified. In *talaq-e-biddat*, where divorce occurs swiftly in one go, the reconciliation-door would be closed permanently. Therefore, *talaq-e-biddat* violates Quranic teachings, and in sweeping domino effect, the Sharia, Muslim Personal Law, and the Indian Constitution.

For Justices Rohinton Fali Nariman and Uday Umesh Lalit, both astonished by the modern nature of Muslim marriages through contracts, pretty much agreed with the above. To be on the safe side, and with a few nods to the U.S. Supreme Court, they highlighted that insofar as the 1937 Act "seeks to recognize and enforce triple *Talaq* (...) [the Act] must be struck down as being void to the extent that it recognizes and enforces Triple *Talaq*."

The two dissenting voices, Justice Jadish Singh Khehar and Justice Abdul Nazeer, the sole spokesman for Indian Muslims on the bench, directed the Union of India to consider fresh legislation for Muslim divorces, or preferably a wider reform of Muslim Personal Law. But ultimately, for these two men, this was a political issue not a legal one.

In an interview given to a mainstream television channel hours after the ruling, the outspoken Muslim parliamentarian from Hyderabad, Assaddudin Owaisi (wrist-check: Paul Newman '69 panda dial) cautioned that the decision was not necessarily going to have the desired effect in a country where Muslims consider divorce more of a social affair than a legal one. The legal tearing up of the marriage contract was a nice gimmick, but Muslim women who receive *talaq-e-biddat* after the judgement will still be considered divorcees. In fact, if they want to remarry that process has just gotten a lot harder. Legally they were still married. Muslim men on the other hand had it easier, with polygamy allowing them to marry without seeking a lengthy divorce.

Much has been won, and India has come a long way for us to enjoy televised pictures of fully veiled women feeding celebrations-sweets (*jalebi*) to saffron-clad swamis. It makes one not want to delve too deeply into the wider political implications; the ways in which a majoritarian vision of the nation is projected onto the body of Muslim women, the communal chorus on social media that other minority provisions should fall too, and so on. Let's see if the Supreme Court of India continues with the same interventionist rigour in the upcoming *Babri Masjid* case later this year, where a massive fifteenth century mosque was torn down because the birthplace of a Hindu deity was suspected

underneath it. With the current judgement, the Supreme Court, sporting its progressive social-engineering cloak, has remedied some of India's cultural ills, and, as one BJP supporter declared spontaneously in a since deleted tweet: "Finally, the SC has put faith back into the Indian Constitution!!".

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