
THE INSTANT TRIPLE TALAQ JUDGMENT—ITS CONTENTS AND
DISCONTENTS

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Abstract. Can religion-based personal laws be challenged on grounds of equality or other fundamental rights under the Indian Constitution? Historically, the Supreme Court of India has been curiously silent on this question. In this article, we argue that its recent decisions in *Shayara Bano v. Union of India* and *Indian Young Lawyers Association v. State of Kerala* represent two lost opportunities to set a precedent in deciding how to balance the constitutional rights of freedom of religion and equality.

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INTRODUCTION

In this article, we critically examine the decision of the Supreme Court of India (SC) on the controversial subject of instant triple talaq (ITT) in *Shayara Bano v. Union of India*.¹ Part I briefly explains the practice of ITT. Part II introduces the *Shayara Bano* decision and identifies the crucial constitutional question in this case—whether religion-based personal laws can be challenged on grounds of equality or other fundamental rights under the Indian Constitution. We also examine how the SC has attempted to answer (or avoid answering) this question in previous cases. Part III summarizes and tabulates the various opinions which form part of the *Shayara Bano* decision. Here, we attempt to decipher what it is that the SC has really said. Part IV critically analyses the scope and ramifications of this decision in the current socio-cultural context. Finally, Part V examines two further developments in the law. First, the Muslim Women (Protection of Rights on Marriage) Act 2019 which criminalized ITT. And last but not least, the SC decision in *Indian Young Lawyers Association v. State of Kerala* (better known as the Sabarimala temple entry case),² on the long-standing customary practice banning women aged between 10-50 years from entering the Sabarimala temple. In conclusion, we argue that the SC has made very slow progress on the journey to *Shayara Bano* and onwards to *Sabarimala*. Far from advancing women’s rights, the SC has lost two magnificent opportunities to set a precedent for future cases in deciding how to balance the constitutional protection of freedom of religion vis-a-vis the constitutional protection of equality.

PART I: INSTANT TRIPLE TALAQ

ITT is the immediate and unilateral repudiation of his wife by a Muslim husband.³ This is typically pronounced by the (verbal or written) statement “talaq, talaq, talaq” (“I divorce you,” repeated thrice).⁴ The word “talaq” itself is an Arabic word which means to repudiate (from the root tallaqa which means to undo or release from a knot, denoting the release of a Muslim woman from her marital ties).⁵

Islamic law generally provides that the initial pronouncement is considered revocable for a period of 3 to 3.5 months (called the iddat period), during which efforts at spousal reconciliation are recommended.⁶ The Indian judicial system has generally recognized the legal validity of ITT based on uncodified Muslim legal traditions, the Quran and judicial precedent from colonial times.⁷

¹ *Shayara Bano v. Union of India* (2017) 9 SCC 1 (India).

² *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1 (India).

³ See Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 L. & SOC. INQUIRY 631, 641 (2008).

⁴ *Id.*; Ragini Sahay, *Divorce in Muslim Society, Laws and Reality: A study among Telis in Delhi*, 28 INDIAN ANTHROPOLOGIST 49, 49 (1998). The words used must indicate a clear and unambiguous intention to dissolve the marriage. See Furqan Ahmad, *Understanding The Islamic Law Of Divorce*, 45 J. OF THE INDIAN L. INST. 484, 488-489 (2003).

⁵ Ahmad, *supra* note 4, at 488.

⁶ *Id.* at 488-489, 491-494; Subramaniam, *supra* note 3, at 641; Sahay, *supra* note 4, at 49-52.

⁷ Subramaniam, *supra* note 3, at 650 citing *Sarabai v Rabiabai*, ILR. 35 Bom. 537 (1906) (India) (ITT is “good in law, though bad in theology”). See also *Asha Bibi v. Kadir Ibrahim Rowther*, ILR 33 Madras (1910) (India). However, courts have imposed certain restrictions, holding that ITT can be validly pronounced only based on reasonable grounds and following attempts at reconciliation. See generally *Jiauddin Ahmed v. Anwara Begum*, 1 GLR 358 at paras 14-15 (1981) (India); *Rukia Khatun v. Abdul Khalique Laskar*, 1 GLR 375 at paras 10-11 (1981) (India) (citing *A. Yousuf Rawther v. Sowramma*, AIR Ker. 261 (1971) (India)).

PART II: THE INSTANT TRIPLE TALAQ JUDGMENT

“It’s amazing how you can speak right to my heart
Without saying a word you can light up the dark
Try as I may I could never explain what I hear when you don’t say a thing . . .
. . . you say it best when you say nothing at all”

~ Paul Overstreet and Don Schlitz, *When You Say Nothing at All*⁸

The SC judgment on ITT in *Shayara Bano* evoked two kinds of reactions. The first kind was complete and utter confusion. Initial media reports claimed that the SC had held that ITT was valid while later reports clarified that ITT had been struck down 3:2 as unconstitutional.⁹

This prompted the second kind of reaction—adulation and admiration.¹⁰ The decision has been lauded as a historic verdict in favour of women’s rights where “*the true meaning and spirit*” of “*Quranic provisions relating to gender and spousal equality in wedlock*” has been outlined on the “*anvil of individualism, the rule of law and human rights enunciated in the Constitution.*”¹¹ One of the issues we address in Part IV of this article is whether the decision was truly a victory for women’s rights. First, however, it is important to decipher what exactly the SC has said in this decision.

Looked at closely, we argue that there is no clear majority decision in this case since the SC split 2:1:2 rather than 3:2 on whether ITT is unconstitutional. But why does this matter? After all, if we look at the result, the SC has struck down ITT, which had been almost universally accepted as an unjust and discriminatory practice.¹² Some might argue that justice has been done and has—very visibly—been seen to be done.

We believe that it matters because this case was not just about ITT. One of the important issues raised in this case was whether religion-based personal laws can be challenged on grounds of equality or other fundamental rights.¹³

⁸ “When You Say Nothing at All” is a country song written by Paul Overstreet and Don Schlitz. Popular versions of the song have been released by Keith Whitley in 1988, Alison Krauss in 1995, and most popularly by Ronan Keating in 1999 for the soundtrack to the 1999 film *Notting Hill*.

⁹ Abdul Hafiz Gandhi and Nazia Khan, *Unanswered Questions In Triple Talaq Judgment: Will TT Be Counted As One Or Are They Void Having No Effect On The Validity Of Marriage?*, THE WIRE (Sept. 13 2017), <https://livelaw-nlul.refread.com/unanswered-questions-triple-talaq-judgment-will-tt-counted-one-void-no-effect-validity-marriage/> [https://perma.cc/7R9W-DLPY]; *Centre to issue advisory to all States to ensure compliance of SC order on triple talaq*, THE HINDU (Aug. 22, 2017), <http://www.thehindu.com/news/national/live-sc-to-pronounce-verdict-on-triple-talaq/article19538487.ece> [https://perma.cc/4AB7-CTRJ] (hereinafter referred to as “THND”); Scroll Staff, *Supreme Court strikes down triple talaq, calls it unconstitutional*, SCROLL.IN (Aug. 22, 2017), <https://scroll.in/latest/848043/supreme-court-strikes-down-triple-talaq-calls-it-unconstitutional> [https://perma.cc/45WA-TQSK].

¹⁰ THND, *supra* note 9 (citing several advocates, politicians and celebrities praising the decision as “historic” and “progressive”).

¹¹ Gandhi and Khan, *supra* note 9.

¹² Even supporters of ITT accept that it is a “sinful form of divorce” or a “necessary evil.” See Asghar Ali Engineer, *Abolishing Triple Talaq—What Next?*, 39 ECON. AND POL. WKLY. 3093, 3093 (2004); Ahmad, *supra* note 4, at 484.

¹³ Intervenors Bebak Collective and Centre for Study of Society and Secularism argued that the issues in this case transcended any particular religion or any particular religious practice and struck at the “centrality of Part III of The Constitution in the lives of the Indian citizens, irrespective of religion, region, caste or gender” since allowing personal laws which govern a

As is the case with most such questions of constitutional law in India, there was a detailed discussion on this issue during the Constituent Assembly debates.¹⁴ Some Constituent Assembly members specifically proposed amendments which provided that religious communities would not be obliged to give up their personal law in favour of a Uniform Civil Code (UCC) without their prior consent.¹⁵ These amendments were opposed on the grounds that the purpose of the UCC was to “*divorce religion from personal law*” in favour of a “*unified and secular*” law.¹⁶ If religion-based personal laws on marriage, inheritance and succession were considered as part of religion, it would contradict constitutional guarantees regarding the fundamental rights of equality and non-discrimination on the basis of sex. Dr. Ambedkar himself argued that social reform would come to a standstill if such personal laws were considered as part of religion.¹⁷ As such, he argued, constitutional protection for freedom of religious belief should be limited only to such beliefs and rituals which are “essential religious practices.”¹⁸ However, an assurance was provided that the enforcement of the UCC may initially be “*purely voluntary*.”¹⁹ Ultimately, the proposed amendments were defeated, demonstrating that the Constituent Assembly did not consider such personal laws sacrosanct. However, the inherent tension between religion-based personal laws and fundamental rights of equality and non-discrimination remained unresolved. Perhaps the best example of this tension is the UCC itself. More than 70 years after the Constituent Assembly debates, the UCC has proved to be too controversial for any government to even attempt to introduce.²⁰

large part of an individual’s life to remain outside the purview of fundamental rights is “to make a mockery of The Constitution.” Written Submissions on behalf of Bebak Collective and Centre for Study of Society and Secularism, WRIT PETITION (C) NO. 118, 4 (para 2.7)(2016), <http://www.lawyerscollective.org/wp-content/uploads/2017/05/Bebak-Collective-Written-submission-.pdf> [https://perma.cc/947V-YTX9] [hereinafter Written Submissions of BC/CSS].

¹⁴ See generally CONSTITUENT ASSEMBLY DEBATES, Vol. VII (4th November 1948 to 8th January 1949), available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/vol7.html> [https://perma.cc/WTG5-TF6P]. The Constitution of India 1950 was enacted by the Constituent Assembly on 26 November 1949 (and came into force on 26 January 1950) following deliberations over the course of three years. These deliberations have been published as the Constituent Assembly Debates.

¹⁵ See e.g., CONSTITUENT ASSEMBLY DEBATES, Vol. VII (23rd November 1948), available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C23111948.html> [https://perma.cc/E567-QZPP].

¹⁶ *Id.*

¹⁷ Constituent Assembly Debates, Vol. VII, 2 December, 1948 to 8th January, 1949, https://www.constitutionofindia.net/constitution_assembly_debates [https://perma.cc/3FET-ZBMD]. (“*The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters, we will come to a stand still . . . After all, what are we having this liberty for? We are having this liberty in order to reform our social system which is so full of inequities, so full in inequities, discrimination and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State.*”) Dr. Bhimrao Ramji Ambedkar was the Chairman of the Drafting Committee of the Constituent Assembly and is widely regarded as the “father of the Indian Constitution” for his critical role in the constitution making process B.R. Ambedkar, CONST. OF INDIA, https://www.constitutionofindia.net/constituent_assembly_members/b_r__ambedkar [https://perma.cc/X6Y9-JLFQ].

¹⁸ Over time, the SC has developed voluminous jurisprudence on the “essential religious practices” test. See Akilesh Menezes & Priyanshi Vakharia, *To Practice What is Preached: Constitutional Protection of Religious Practices vis-à-vis Reformatory Secularism*, 7(1) NLUJ L. REV. 211, 216-217 (2020).

¹⁹ See CONSTITUENT ASSEMBLY DEBATES, Vol. VII (23rd November 1948), available at <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C23111948.html> [https://perma.cc/E567-QZPP].

²⁰ Tanja Herklotz, *Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women’s Movement and the Indian Supreme Court*, Südasien-Chronik – S. ASIA CHRON. 6/2016, S. 61-92, <https://edoc.hu-berlin.de/bitstream/handle/18452/9168/55.pdf?sequence=1> [https://perma.cc/EP8X-BK38]; See LAW COMMISSION OF INDIA, CONSULTATION PAPER ON

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Unfortunately, the SC has a long history of (deftly and determinedly) saying very little on this issue:

(1) In *Mary Roy v. State of Kerala*,²¹ Mary Roy challenged the provisions of the Travancore Christian Succession Act 1916 (TCSA) on the grounds that it discriminated against women in matters of intestate succession. Neatly avoiding this question, the SC held that the TCSA had been impliedly repealed when the Indian Succession Act 1925 was extended to the state of Travancore-Cochin in 1951. By doing so, the SC tried to achieve a satisfactory result for Mary Roy and others like her who would be entitled to receive their fair share of their inheritance (although it seems that the actual repercussions of this decision may have been limited in practice).²² At the same time, the SC would not have to say anything at all on the question of constitutionality.

(2) In *Madhu Kishwar v. State Of Bihar*,²³ Madhu Kishwar challenged the constitutionality of the Chota Nagpur Tenancy Act 1908 (CNTA) on the grounds that it discriminated against tribal women in matters of succession. Again, the SC tried to achieve what may superficially be regarded as a satisfactory result for tribal women without having to say anything of substance on the question of constitutionality.²⁴ The SC declared that the exclusive right of male succession under the CNTA would remain in suspended animation until the right to livelihood of the female members of the family was satisfied. It remains unclear if the judgment was enforced in practice since it seems unlikely that tribal women in general would have been aware of the SC's largesse in this case to enforce their rights.

(3) In *Ahmedabad Women Action Group v. Union of India*,²⁵ Ahmedabad Women Action Group challenged the constitutionality of various Hindu, Muslim and Christian personal laws on the grounds that they discriminated on the basis of gender. The SC refused to concern itself with “*issues of State policies*” which should be addressed by the legislature. Referring to the Bombay High Court decision

REFORM OF FAMILY LAW 5 (2018) <https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> [<https://perma.cc/7K9A-X4JK>]; See Shambhavi, *Uniform Civil Code: The Necessity and the Absurdity*, 1 INDIAN L. INST. LAW REV. (2017), <https://ili.ac.in/pdf/paper217.pdf> [<https://perma.cc/N53S-6RGL>].

²¹ *Mary Roy v. State of Kerala* AIR 1986 SC 1011 (1986) (India).

²² Interestingly, Mary Roy only received the final decree in her favour from the local courts in 2010. See George Jacob, *Final Decree in Mary Roy Case Executed*, THE HINDU (Oct. 21, 2010), <http://www.thehindu.com/todays-paper/Final-decree-in-Mary-Roy-case-executed/article15786386.ece> [<https://perma.cc/RG3V-HAD7>]. In the meanwhile, the retrospective application of the decision was heavily criticized by the church and the local community expecting a flood of legal challenges against past succession transactions. See Sebastian Champappillya, *Christian Law of Succession and Mary Roy's Case*, 4 SCC Jour 9 (1994) (citing to two articles from 1993 that expressed the views of Catholics who said the retrospective effect of the decision caused hardship for the community). However, very few cases have been filed in practice. See Venu Menon, *The Matriarch, The Real McRoy*, OUTLOOK, (November 3, 1997), <https://www.outlookindia.com/magazine/story/the-matriarch-the-real-mcro/204514> [<https://perma.cc/6H8F-YRS9>].

²³ *Madhu Kishwar v. State of Bihar* AIR 1996 SC 1864 (1996) (India).

²⁴ It has been suggested that the SC may have been reluctant to rule the CNTA unconstitutional since that would mean that “*there would be no norms governing such tribal communities on matters of succession, giving rise to the possibility of either the Supreme Court fashioning a new custom (an absurd notion) or the imposition of the Hindu Succession Act, 1956 (an entirely alien legal regime)*.” See Alok Prasanna Kumar, *The Supreme Court judgement on triple talaq is noteworthy for what it did not say*, SCROLL.IN, (Aug. 24, 2017), <https://scroll.in/article/848278/the-supreme-court-judgement-on-triple-talaq-is-noteworthy-for-what-it-did-not-say> [<https://perma.cc/2VFX-SE2A>]. We find it difficult to accept this charitable view since reading down the challenged provisions (as the SC preferred to do) basically amounts to the SC “*fashioning a new custom*.” In any event, the SC could also have held the challenged provisions (in their current form) to be unconstitutional and suitably read them down to ensure consistency.

²⁵ *Ahmedabad Women Action Group v. Union of India*, 3 SCC 573 (1997) (India).

in *State of Bombay v. Narasu Appa Mali*,²⁶ the SC held that it is constitutionally permissible for social reform legislation to address different religious communities and that religion-based personal laws are not subject to fundamental rights.²⁷

(4) In *Githa Hariharan v. Reserve Bank of India*,²⁸ Githa Hariharan and Vandana Shiva challenged the provisions of the Hindu Minority and Guardianship Act 1956 (HMGA) on the grounds that it discriminated against women in matters of custody and guardianship of minors. Once again, the SC neatly avoided this question and held that the HMGA could be interpreted in a non-discriminatory manner such that the mother would have (almost) similar custody and guardianship rights as the father.

(5) In *Danial Latifi v. Union of India*,²⁹ Danial Latifi challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act 1986 (MWPRDA) on the grounds that it discriminated between Muslim women and women of other religious communities. Once again, the SC tried to achieve a satisfactory result without having to rule on the question of constitutionality. It upheld the constitutional validity of the MWPRDA based on the interpretation that fair and reasonable maintenance meant lifelong post-divorce maintenance to be paid within the iddat period or 90 days. This may have been a beneficial outcome for Muslim women who received a fair lump-sum amount as maintenance within the iddat period immediately after the divorce instead of receiving a monthly dole under Section 125 of the Criminal Procedure Code 1973.³⁰

(6) In *John Vallamattom v. Union of India*, John Vallamattom challenged the provisions of the Indian Succession Act, 1925 (ISA) on the grounds that it discriminated against Christians in matters of testamentary succession.³¹ The SC held that the provisions of the ISA violated Article 14 of the Constitution since they unreasonably and arbitrarily discriminated against Christians in matters of testamentary succession.³²

²⁶ *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom. 84 (1951) (India).

²⁷ In *Narasu Appa Mali*, the Bombay High Court seemed to be under the misconception that “personal laws do not derive their validity on the ground that they have been passed or made by a Legislature or other competent authority” and that the “foundational sources” of such laws are their “respective scriptural texts.” *Id.* at para 20. This is completely at odds with the history of codification of personal laws in colonial and post-colonial India. See Bernard S. Cohn, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA 57-75 (Princeton University Press 1996); See generally NANDINI BHATTACHARYA-PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL INDIA, (Oxford University Press 2008).

²⁸ *Githa Hariharan v. Reserve Bank of India*, 2 SCC 228 (1999) (India).

²⁹ *Danial Latifi v. Union of India*, 7 SCC 740 (2001) (India).

³⁰ See Anusha Rizvi, *The Indian Media's Focus on Shayara Bano Betrays an Ignorance of Important Precedents*, THE WIRE, <https://thewire.in/42276/the-indian-medias-focus-on-shayara-bano-betrays-an-ignorance-of-important-precedents/> [https://perma.cc/37WD-8RPP]. Narendra Subramanian suggests some judges may have been inclined to decide that some provisions of the MWPRDA violated constitutional rights but decided instead that it would have been difficult to achieve consensus on the bench under these circumstances and the political elite might have found it difficult to support such a judgment in the face of strong public opposition. See Subramanian, *supra* note 3, at 648. Subramanian has also argued that in such cases, courts are influenced by legal mobilization (especially by women's organizations, other rights organizations, and community organizations to promote visions of group identity and to uphold particular versions of group law), policy makers' orientations toward the regulation of family life, their understanding of group norms and group initiatives, and their normative vision of family life. See *id.* at 654-664.

³¹ *John Vallamattom v. Union of India*, 6 SCC 611 (2003) (India).

³² *Id.* This judgment echoes the revolutionary strains of *T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356 (1983) (India), where the Andhra Pradesh High Court held that provisions for restitution of conjugal rights in the Hindu Marriage Act,

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As we can see from these decisions, the SC has generally preferred to say nothing at all on the question of constitutionality in most of the cases (*Mary Roy, Madhu Kishwar, Githa Hariharan and Danial Latifi*). In one case (*Ahmedabad Women Action Group*), the SC unequivocally held that religion-based personal laws are not subject to fundamental rights. In another (*John Vallamattom*), the SC held that provisions of codified personal law which violated fundamental rights were void. Barring these two outliers at opposite ends of the spectrum, it is remarkable how the SC managed to achieve almost satisfactory outcomes without answering the major issues in most cases—as if the SC was trying to speak right to our hearts and (without saying a word) light up the dark. Try as we may, however, we could never explain what it was the SC had said in these judgments where they don't say a thing on the crucial question of whether religion-based personal laws are subject to fundamental rights. It is in this context that we evaluate whether the *Shayara Bano* decision is truly worthy of accolades for advancing women's rights.

PART III: THE INSTANT TRIPLE TALAQ JUDGMENT—ITS CONTENTS

To understand what the SC has said on this subject in *Shayara Bano*, we need to take a more detailed look at the contents of the judgment. In this part, therefore, we will analyze the three issues before the SC and attempt to discern what the judges have held on each question. Once we have identified the majority and minority opinions for each question, it will become clear that there is no clear majority decision in this case.

The three major issues before the SC were:

1. Is IIT codified through the Shariat Act 1937? Can IIT be challenged on the basis of other fundamental rights?
2. Is IIT constitutionally protected as part of the fundamental right of freedom of religion?
3. Does IIT violate other fundamental rights such as equality?

Here is how the SC ruled on each question:

1. Is IIT codified through the Shariat Act 1937? Can IIT be challenged on the basis of other fundamental rights?

| Issue | | | |
|---------|---|---|--|
| Summary | Chief Justice Jagdish Singh Khehar and Justice S. Abdul Nazeer: IIT is not codified through Section 2 of the Shariat Act 1937. IIT | Justice Kurian Joseph: IIT is not codified through Section 2 of the Shariat Act 1937. IIT cannot be tested against Fundamental Rights. | Justice Rohinton Fali Nariman and Justice Uday Umesh Lalit: IIT is enforced through Section 2 of the Shariat Act 1937. IIT can be |

1955 violated Article 14 and Article 21 of the Constitution. Unfortunately, within a year, the SC overruled the decision in *Saroj Rani v. Sudarshan Kumar Chadha*, AIR 1984 SC 1562 (198) (India). In doing so, the SC affirmed the decision of the Delhi High Court in *Harvinder Kaur v. Harmander Singh Choudhry*, AIR 1984 Del. 66 (1983) (India), which infamously held that “[i]ntroduction of constitutional law in the home is . . . like introducing a bull in a china shop.”

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| | cannot be tested against Fundamental Rights. | | tested against Fundamental Rights. |
| Is IIT codified through the Shariat Act 1937? | No. Section 2 of the Shariat Act does not codify Muslim personal law but merely recognizes it as the “rule of decision” by negating customs and usages, which were prevalent at the time (para 156). | No. IIT is not codified through Section 2 of the Shariat Act 1937 and therefore cannot be tested against Fundamental Rights (para 206). | Yes. All forms of talaq (including IIT) are enforced through Section 2 of the Shariat Act 1937 (para 246). |
| Can IIT be challenged on the basis of fundamental rights? | No. Since Muslim personal law is uncodified, it is not based on State action and cannot be tested against Fundamental Rights (paras 157, 165). | No. Since IIT is not codified through Section 2 of the Shariat Act 1937, it cannot be tested against Fundamental Rights (para 206). | Yes. All forms of talaq (including IIT) are enforced through Section 2 of the Shariat Act 1937 (para 246) and can therefore be tested against Fundamental Rights (para 247). |
| Can personal law be challenged on the basis of fundamental rights? | No. Personal law cannot be tested against Fundamental Rights (paras 160-162). | Not discussed | No definitive answer. The position that personal law cannot be tested against Fundamental Rights may not be good law (para 258). |

On this particular question, the majority opinion seems to be that of C.J. Khehar and J. Nazeer, joined by J. Joseph who held that IIT is not codified through the Shariat Act but merely enforced through it. As such, they held, it cannot be tested against fundamental rights. This convoluted distinction seems to be irrelevant since the SC has long held that it is the effect of a statute which must be considered when analyzing its constitutional validity.³³

The minority opinion on this particular question seems to be that of J. Nariman and J. Lalit who correctly held that IIT could be challenged on the basis of fundamental rights since it was enforced through the Shariat Act. As such, they held, Muslim personal law is not a private matter but a matter of law.³⁴

³³ R.C. Cooper v. Union of India, AIR 1970 SCR 564 (1970) (India); Bennett Coleman v. Union of India, AIR 1973 SC 106 (1972) (India).

³⁴ This position has been recognized by the Delhi High Court in *Masroor Ahmed v. State*, ILR 2. Del. 1329 (2007) (India) (NCT of Delhi), which has been affirmed by the SC in *Juweria Abdul Majid Patni v. Atif Iqbal Mansoori*, 10 SCC 736 (2014) (India). It has long been accepted in sociological literature that divorce laws are part of the regulatory family policy of the government.

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The minority on this particular question (J. Nariman and J. Lalit) also held that the position that personal laws are not subject to fundamental rights may not be good law but refused to take this further and decided to wait for a “suitable case” instead.³⁵ While this may not have any practical implications since they formed the minority on this particular question, J. Nariman J. Lalit lost a fantastic opportunity to lay down a powerful dissent contesting the line of reasoning in *Narasu Appa Mali* and *Ahmedabad Women Action Group* which—as we saw previously—held that religion-based personal laws are not subject to fundamental rights.³⁶

Of the three judges in the majority on this particular question, J. Joseph expressed no opinion on the question of whether codified personal laws are subject to fundamental rights.³⁷ C.J. Khehar and J. Nazeer held that personal law in general cannot be challenged on the basis of fundamental rights without citing any authority or following a particular line of reasoning.³⁸

2. Is ITT constitutionally protected as part of the fundamental right of freedom of religion?

| Issue | | | |
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| Summary | Chief Justice Jagdish Singh Khehar and Justice S. Abdul Nazeer: ITT is an essential religious practice, which enjoys constitutional protection as part of the fundamental right of freedom of religion under Article 25. | Justice Kurian Joseph: ITT violates the Quran and is therefore not legally valid as per the decision of the SC and various High Courts. | Justice Rohinton Fali Nariman and Justice Uday Umesh Lalit: ITT would not constitute an essential religious practice and therefore does not enjoy constitutional protection as part of the fundamental right of freedom of religion under Article 25. |
| Is ITT an essential religious practice? | Yes. All three forms of talaq are not mentioned in the Quran but have their origins in hadiths and Muslim jurisprudence (para 121). ITT has the sanction of law since it has been practiced for more than 1400 years (para 127). ITT is integral to the religious practices of Sunnis of the Hanafi | No. ITT violates the Quran, which accords sanctity and permanence to matrimony and permits divorce only after attempts toward reconciliation fail (para 211). The fact that a practice, which does not have religious sanction, has continued for long cannot make it integral to the religion (para 225). | No. Only essential religious practices are constitutionally protected under Article 25 (para 252). ITT would not constitute an essential religious practice since the fundamental nature of Islamic religion would not change without ITT (para 253). |

See Dorothy M. Stetson, *The Two Faces of Policy: Divorce Reform in Western Democracies*, 6 J. OF COMPAR. FAM. STUD. 15, 27 (1975).

³⁵ Shayara Bano v. Union of India, 9 SCC 1, para. 22 (2017) (India).

³⁶ See generally *Narasu Appa Mali*, AIR 1952 Bom. 84 (1952); *Ahmedabad Women Action Group*, 3 SCC (1997).

³⁷ Shayara Bano, 9 SCC (2017), para. 26.

³⁸ *Id.* para. 156, 165.

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| | school and is a part of their personal law (para 145). | | |
| Is ITT legally valid? | Yes. The decisions of various High Courts on ITT were based on an incorrect appreciation of relevant and applicable hadiths (paras 135, 137). The remarks on ITT in the SC decision in Shamim Ara v State of Uttar Pradesh (2002 7 SCC 518) are not binding since they were not based on detailed arguments (para 138). | No. ITT is not legally valid since the SC decision in Shamim Ara v State of Uttar Pradesh (2002 7 SCC 518) is binding under Article 141 (paras 202, 212, 216). It has also been endorsed by various High Courts (paras 212, 218-224). | Same as above |
| Does ITT violate public order, morality or health? | No. ITT does not violate public order, morality or health (para 164). | Not discussed | Not discussed |
| | | | |

On this particular question, the minority opinion seems to be that of C.J. Khehar and J. Nazeer who held that ITT is an essential religious practice that enjoys constitutional protection as part of the fundamental right of freedom of religion.³⁹ However, they seem to have confused historical sanction for a practice with a mandate for such practice. Merely because Islam sanctions ITT does not necessarily make ITT integral to Islam.

As J. Nariman and J. Lalit correctly held, ITT is not an essential religious practice since the fundamental nature of Islamic religion would not change without ITT.⁴⁰ Since J. Joseph held that ITT violates the Quran, he may be considered to have joined J. Nariman and J. Lalit in forming the majority opinion on this particular question in deciding that ITT does not constitute an essential religious practice.⁴¹

3. Does ITT violate other fundamental rights such as equality?

| Issue | | | |
|---------|---|------------------------------|--|
| Summary | Chief Justice Jagdish Singh Khehar and Justice S. Abdul Nazeer | Justice Kurian Joseph | Justice Rohinton Fali Nariman and Justice Uday Umesh Lalit: ITT is manifestly arbitrary and violates the fundamental right to equality. Section 2 |

³⁹ *Id.* para. 145.

⁴⁰ *Id.* para 253.

⁴¹ *Id.*

THE INSTANT TRIPLE TALAQ JUDGMENT—ITS CONTENTS AND DISCONTENTS

| | | | |
|---|---------------|---|--|
| | | | of the Shariat Act 1937 is therefore void to the extent that it enforces ITT. |
| Does arbitrariness doctrine in Article 14 apply to any legislation, subordinate legislation and executive action? | Not discussed | Yes. Any legislation, subordinate legislation and executive action can be challenged on the ground of arbitrariness (para 206). | Yes. The arbitrariness doctrine in Article 14 would apply to any legislation, subordinate legislation and executive action (paras 269, 272). Manifest arbitrariness is obviously unreasonable and contrary to rule of law and would therefore violate Article 14 (para 273). |
| Is ITT manifestly arbitrary? | Not discussed | Not discussed | Yes. ITT is manifestly arbitrary since marital ties can be broken unilaterally without any attempt at reconciliation (para 285). Section 2 of the Shariat Act 1937 is void to the extent that it enforces ITT (para 285). |

On this particular question, C.J. Khehar, J. Nazeer, and J. Joseph had nothing to say since they had already held that ITT could not be challenged on the basis of Fundamental Rights.⁴²

The minority opinion on this particular question seems to be that of J. Nariman and J. Lalit who held that ITT was manifestly arbitrary and therefore violated Article 14.⁴³ While their analysis of manifest arbitrariness lays down an important position of constitutional law, J. Nariman and J. Lalit could and should have gone further and held that ITT was unconstitutional because it discriminated against women as well as being manifestly arbitrary.⁴⁴

At last count, the only clear majority opinions on the three questions itemized above are as follows:

- ITT is not codified through Section 2 of the Shariat Act 1937 (3:2);
- ITT does not constitute an essential religious practice (2+1:2); and
- ITT cannot be challenged on the basis of Fundamental Rights (3:2).

Is that sufficient to decide that ITT is legally invalid? After all, ITT has not been declared unconstitutional—only two judges held that ITT is unconstitutional. Similarly, as only one judge held that ITT violates the Quran, it has not been declared un-Islamic. As such, even though the SC held

⁴² See *Shayara Bano* 9 SCC (2017).

⁴³ *Id.* at para. 285

⁴⁴ For a more detailed analysis, see *infra* Part IV.

ITT is legally invalid, there is no clear majority decision as to *why* ITT is legally invalid.

So how do we get from these split decisions to the decision that ITT is legally invalid? The answer lies in the algebra of common law justice which looks at results rather than reasoning in deciding the outcome of cases,⁴⁵ but it is the reasoning or *ratio decidendi* rather than the results which set binding precedent for future cases.⁴⁶

Since three judges (J. Nariman, J. Lalit, and J. Joseph) had held ITT to be legally invalid (albeit on completely different and perhaps even mutually contradictory reasoning), the SC declared ITT legally invalid. However, since the SC could not agree on the reasoning, there is no clear basis on which ITT has been declared legally invalid. As such, the ITT decision would not set a precedent for future cases as to whether religion-based personal laws are subject to fundamental rights. Once again, it seems, the SC has said nothing at all.

PART IV: THE INSTANT TRIPLE TALAQ JUDGMENT—ITS DISCONTENTS

Having analyzed the contents of the decision in Part III, this part analyzes its discontents. Starting with the various criticisms which have been leveled against this decision, we argue that critics have either been far too effusive in their praise or have not been sufficiently damning in their criticism simply because they have failed to understand the limited scope of this decision.

A. Lack of Clarity

Some have criticized the judgment of C.J. Khehar and J. Nazeer for lack of clarity and internal consistency.⁴⁷ Having held that reforms in ITT could take place only through legislation, C.J. Khehar and J. Nazeer decided to exercise the SC's discretion to do "complete justice" under Article 142. Therefore, they directed the Indian government to consider legislation regulating ITT within six months and issued an injunction against Muslim husbands from pronouncing ITT during this period. Critics have argued that this was contradictory.⁴⁸ How could the government regulate ITT by legislation if it was constitutionally protected as a part of freedom of religion under Article 25? And could the SC injunct a constitutionally protected essential religious practice to do "complete justice" under Article 142?

Some of this criticism is unfounded. C.J. Khehar and J. Nazeer suggested that ITT could be

⁴⁵ See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161 (1930) ("The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.").

⁴⁶ *Id.* at 161. The SC has held that only where courts lay down a principle of law that the decision will amount to a precedent; orders which do not lay down any principle of law do not have any binding value as precedent. *Indian Drugs & Pharmaceuticals Ltd. v. Workman, Indian Drugs & Pharmaceuticals Ltd.*, 1 SCC 408 para. 44-45 (2007) (India) (citing *Municipal Committee, Amritsar v. Hazara Singh*, AIR SC 1087 (1975)) (India); *State of Punjab v. Baldev Singh* 6 SCC 172 (1999) (India); *Delhi Administration v. Manoharlal*, AIR SC 3088 (2002) (India); *Divisional Controller, KSRTC v. Mahadeva Shetty*, 7 SCC 197 (2003) (India).

⁴⁷ Tahir Mahmood, *All's well that ends well*, INDIAN EXPRESS (Aug. 23, 2017), <http://indianexpress.com/article/opinion/columns/all-well-that-ends-well-triple-talaq-4809006/> [<https://perma.cc/4CTM-GBGT>]. See also Gandhi and Khan, *supra* note 9.

⁴⁸ Mahmood, *supra* note 47.

reformed through legislation under Article 25(2). Article 25(2) permits the State to legislate regulating “any economic, financial, political or other secular activity which may be associated with religious practice” or providing for “social welfare and reform.” As such, Article 25(2) may permit the State to reform ITT through legislation even if it was constitutionally protected under Article 25. The real question, however, is whether the State would do so. One of the main criticisms of the plural family law system followed in India is that it provides limited scope for legal change to keep abreast of social change. This is because policy makers claim that the concerned groups ought to initiate changes in these laws themselves. However, it is conservative religious and political elites who are often regarded as the relevant group representatives and they are—quite obviously—usually unwilling to initiate such changes.⁴⁹

As regards the injunction, the SC has previously held that the power under Article 142 is of “*very wide amplitude*” and cannot be curtailed by legislation. However, it should not be exercised in contravention of any legislation. What applies for statutes must apply equally for the Constitution. As such, this criticism seems to be valid.

However, such criticism ignores the much more disturbing lack of clarity and coherence in the final decision of the SC that ITT is legally invalid. For example, the decision does not clarify whether it would apply retrospectively. When the SC strikes down a statute, the effect is generally retrospective.⁵⁰ Would this decision invalidate all prior declarations of ITT? If so, there may be significant ramifications since some of the men and women affected may be married to others as of date. Retrospective application of this ITT decision may significantly affect their civil status and associated rights such as succession as well as the rights of their descendants.⁵¹ Only J. Nariman, J. Lalit, and J. Joseph could have answered this question and they have said nothing at all.

⁴⁹ Subramanian, *supra* note 3, at 632. *See generally* RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POST-COLONIAL INDIA (2003); GARY J. JACOBSON, THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT (2003); BRENDA COSSMAN & RATNA KAPUR, SECULARISM’S LAST SIGH: HINDUTVA AND THE (MIS)RULE OF LAW (2002); ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA (1992). In this particular case, however, the Centre has been described by some as “inordinately keen” to reform ITT for political ends. A. Faizur Rahman, *A Case to Withdraw the Triple Talaq Bill*, THE HINDU (Apr. 9, 2018, 8:55 AM), <http://www.thehindu.com/opinion/op-ed/a-case-to-withdraw-the-triple-talaq-bill/article23474331.ece> [https://perma.cc/FX4T-5FCC]. According to media reports, the Minister of Law and Justice stated that a hundred cases of ITT had been reported in the country in the four months since the SC judgment. *See 100 cases of instant triple talaq in the country since the SC judgement*, THE TIMES OF INDIA (Dec. 28, 2017, 3:15 PM), <https://timesofindia.indiatimes.com/india/66-cases-of-triple-talaq-in-the-country-since-the-sc-judgement-law-minister/articleshow/62279519.cms> [https://perma.cc/5UTQ-3NHE]. Other more recent media reports have claimed that the number of ITT reported in the 9 months since the SC decision is sixty-seven. *See* Raghav Ohri, *Government to move Ordinance for new law on triple talaq, 3-year jail term for guilty*, ECON. TIMES (May 2, 2018, 1:36 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/government-to-move-ordinance-for-new-law-that-on-triple-talaq/articleshow/63997913.cms> [https://perma.cc/W7FF-2DLA].

⁵⁰ This makes a lot of sense. Imagine a scenario where the State enacts legislation today, which makes a particular activity—say, writing articles in legal journals—illegal and successfully prosecutes one writer per day for the next 100 days. On the 101st day, the SC strikes down this law as manifestly arbitrary and hence unconstitutional. If the decision of the SC applies prospectively, 100 otherwise blameless writers would continue to languish in prison merely because it had taken the SC 100 days to strike down an obviously unconstitutional law.

⁵¹ *See e.g.*, Aarefa Johari, *Triple talaq has been declared unconstitutional—but not everyone is celebrating*, SCROLL.IN (Aug 23, 2017, 6:32 PM), <https://scroll.in/article/848118/triple-talaq-has-been-declared-unconstitutional-but-every-one-is-celebrating> [https://perma.cc/9N2H-2LVL] (citing several instances of women who have been given ITT who are eager to understand the ramifications in their particular cases).

Even if this decision applies prospectively, would future declarations of IIT be treated as void or as a single pronouncement of talaq?⁵² For example, talaq-e-ahsan requires a single pronouncement of talaq followed by a 90-day period of abstinence during which reconciliation efforts may take place. If a declaration of IIT is coupled with a 90-day period of abstinence during which some reconciliation efforts take place but fail, would that automatically make such a declaration valid and effective?⁵³ Once again, J. Nariman, J. Lalit, and J. Joseph have said nothing at all.

B. *Victory for Women's Rights/Gender Justice?*

As we noted previously, we also question whether this decision was truly a victory for women's rights. The writ petition filed by Shayara Bano challenged IIT as violating Articles 14, 15 and 21 of the Constitution arguing that it was discriminatory against women on multiple grounds.⁵⁴ The petitioner argued that the "unqualified, untrammelled, unguided, untested and absolute" right of a Muslim husband to divorce his wife by way of IIT violates Articles 14, 15 and 21 of the Constitution since Muslim wives required court intervention on specific grounds for divorce.⁵⁵

Similarly, intervenors Bebak Collective and Centre for Study of Society and Secularism (BC/CSS) also submitted that IIT violates Articles 14, 15 and 21 to the extent that a Muslim man exercises power to declare a unilateral divorce and the Muslim woman has no control over such an unilateral, arbitrary, extrajudicial divorce which irrevocably alters the civil status of Muslim women for the worse.⁵⁶ Having no control over one's own marital status, argued BC/CSS, where one may be unilaterally divorced at any moment with no judicial recourse, totally denudes the woman of her agency as well as decision-making power vis-à-vis her own marriage and imposes significant limitations on a woman's autonomy, liberty and freedom which should not be countenanced by any civilized society.⁵⁷

In this context, the SC's omission to properly deal with this argument is the real tragedy for women's rights.

Divorce reform has long been considered a women's rights issue especially since obtaining

⁵² See Gandhi and Khan, *supra* note 9.

⁵³ Similar questions have been raised previously by women's rights advocates in India and elsewhere questioning whether women would really benefit if the only impact of declaring IIT invalid were that divorce would be granted over three sittings instead of one. See e.g., Flavia Agnes, *Triple Talaq Judgment: Do Women Really Benefit?*, 29 ECON. & POL. WKLY. 1169, 1169-70 (1994); Khalid al-Azri, *One or Three? Exploring the Scholarly Conflict over the Question of Triple Talaq (Divorce) in Islamic Law with Particular Emphasis on Oman*, 25 ARAB L.Q. 277 (2011).

⁵⁴ See Writ Petition (C) No. 118 of 2016, at 4-5, *Bano v. Union of India*, (2017) 9 SCC 1 (India), <http://www.lawyerscollective.org/wp-content/uploads/2017/05/Shayara-Bano-Written-Submissions-.pdf> [<https://perma.cc/TCS2-ASTE>] [hereinafter *Written Submissions of Shayara Bano*]. The petition argues that IIT is not codified through the Shariat Act 1937 since it is "good in law though bad in theology" as it is rooted in the notion that "women are chattel belonging to men, which the Holy Quran does not brook." See *id.* at 3-4, (citing *A. Yousuf Rawther v. Sowramma*, AIR 1971 Ker 261 (1970) (India), *Sri Jiauddin Ahmed v. Mrs. Anwara Begum*, 1 GLR 358 (1981) (India), *Must. Rukia Khatun v. Abdul Khalique Laskar*, 1 GLR 375 (1981) (India), *Shamim Ara v. State of Uttar Pradesh*, 7 SCC 518 (2002) (India). This is based on earlier judgments. See *Subramanian*, *supra* note 3, at 650-652.

⁵⁵ *Written Submissions of Shayara Bano*, *supra* note 54, at 32-33.

⁵⁶ *Written Submissions of BC/CSSS*, *supra* note 13, at 8-9, 11-12.

⁵⁷ *Written Submissions of BC/CSSS*, *supra* note 13, at 12.

divorce has, historically speaking, been difficult for women.⁵⁸ Even where divorce reform has been enacted and women have the formal legal right to opt for divorce, there may be socio-economic barriers to enforcing such rights. Since women have traditionally been tasked with child rearing and maintaining a family,⁵⁹ divorce is seen as stigmatic for a woman especially in highly patriarchal cultures with strong traditional gender ideology.⁶⁰

In fact, the easy availability of divorce may actually increase gender inequality in highly patriarchal cultures.⁶¹ The World Bank World Development Report 2012 on Gender Equality and Development observes that highly patriarchal cultures generally have higher levels of gender inequality.⁶² This implies that women in highly patriarchal societies would generally experience lower relative freedoms and socioeconomic rights. Since women often experience declines in economic well-being after divorce,⁶³ with even lower relative access to educational, economic and political resources than before,⁶⁴ the easy availability of divorce in cultures with relatively higher levels of gender inequality can be a powerful threat to control women's attempts to strive for equality.⁶⁵ This forms a vicious cycle since higher levels of socioeconomic rights are also strongly correlated with women's ability to opt for divorce,⁶⁶ and higher divorce rates are strongly correlated with higher filing rates by women.⁶⁷ Quite simply, women find it easier to opt for divorce when they have more legal rights, are better educated and are economically self-sufficient—which is generally the case in less patriarchal cultures. Where this is not the case—such as more patriarchal cultures with high gender inequality—the easy availability of divorce does not help women since they would find it difficult to opt for divorce due to the social stigma and adverse socioeconomic consequences. In fact, the easy availability of divorce combined with

⁵⁸ Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. (1999), 475, 477-478. This has been true across countries and cultures.

⁵⁹ Roger Clark, *Economic Dependency and Divorce: Implications for the Private Sphere*, 20 INT'L J. SOCIO. FAM. 47, 50-51 (1990).

⁶⁰ Lawrence M. Friedman and Robert V. Percival, *Who Sues for Divorce? From Fault through Fiction to Freedom*, 5 J. LEGAL STUD. 61, at 76 (1976).

⁶¹ Katherine Trent and Scott J. South, *Structural Determinants of the Divorce Rate: A Cross-Societal Analysis*, 51 J. MARRIAGE & FAM. 391, 394 (1989); Carrie Yodanis, *Divorce Culture and Marital Gender Equality*: 19 GENDER & SOC'Y 644, 646 (2005); Delia Furtado, Miriam Marcén and Almudena Sevilla, *Does Culture Affect Divorce? Evidence From European Immigrants in the United States*, 50 DEMOGRAPHY 1013, 1035 (2013).

⁶² See generally WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT (Int'l Bank for Reconstruction and Dev. ed., 2011); Uri Gneezy, Kenneth L. Leonard and John A. List, *Gender Differences in Competition: Evidence from a Matrilineal and a Patriarchal Society* 77 ECONOMETRICA, 1637, 1637-1664 (2009) (suggesting that study finding higher rates of competitiveness of women from matriarchal societies than of women from patriarchal societies implies that gendered structures of society can influence gender gaps).

⁶³ Jeffrey S. Gray, *The Economic Impact of Divorce Law Reform*, 15 POPULATION RSCH. & POL'Y REV. 275, 275 (1996); Mark A. Fine & David R. Fine, *An Examination and Evaluation of Recent Changes in Divorce Laws in Five Western Countries: The Critical Role of Values*, 56 J. MARRIAGE & FAM. 249, 258 (1994); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 641 (1988).

⁶⁴ Clark, *supra* note 59, at 50. See also ESTER BOSERUP, WOMEN'S ROLE IN ECONOMIC DEVELOPMENT (1970); CLAUDE MEILLASSOUX, MAIDENS, MEAL AND MONEY 70 (1981). See generally KATHRYN WARD, WOMEN IN THE WORLD-SYSTEM: ITS IMPACT ON STATUS AND FERTILITY (1984) (discussing the relationship between women's political status and economic status in the context of family and fertility).

⁶⁵ Clark, *supra* note 59, at 49, 51.

⁶⁶ Trent and South, *supra* note 61, at 393; Yodanis, *supra* note 61, at 645; Clark, *supra* note 59, at 61.

⁶⁷ Friedman and Percival, *supra* note 60, at 75.

the social stigma and adverse socioeconomic consequences of divorce may in fact detract from gender equality in practice. As we saw, this is the exact argument made by the intervenors BC/CSS in this case.

Case studies have shown that this is, in fact, the reality. Muslim women in India are generally unaware of their legal rights in case of divorce and most assume that divorce is a man's privilege, even if it is given on flimsy grounds or to avoid marital responsibilities and family commitments.⁶⁸

To put this in perspective, women constitute approximately 48% of the Indian population.⁶⁹ Muslims constitute the second largest religious group in India (and are therefore the largest religious minority)⁷⁰ at approximately 14% of the population.⁷¹ Although there do not seem to be any statistics estimating the number of Muslim women in India or the number of Muslim women in India divorced through ITT,⁷² media reports suggest that the numbers would not be insignificant.⁷³ While it goes without saying that the rights available under Part III of The Constitution are available to every individual regardless of the number of individuals affected, it is a tragedy that the SC—the guardian of such Fundamental Rights—has refused to say anything at all on whether ITT in particular or personal laws in general violate the rights of such a sizeable chunk of the population.

While we cannot claim to be experts on Muslim personal law, some experts have discussed how Islam treats marriage as an everlasting social contract, which protects the rights of all stakeholders including spouses, children and society at large.⁷⁴ Divorce, they argue, is seen as “the most detestable among the permissible acts” as a last resort for estranged couples.⁷⁵ These experts argue that Muslim personal law has largely been misunderstood and misinterpreted by theologians in order to provide legitimacy to ITT.⁷⁶

Whatever the reasons, it is clear that Muslim Personal Law discriminates in favour of men so far as divorce is concerned. While women are required to approach a court for a divorce under specific recognized grounds (desertion, neglect, imprisonment, abstinence, impotence, insanity, child marriage,

⁶⁸ Sahay, *supra* note 4, at 59.

⁶⁹ See CENSUS 2011 INDIA, (last visited Sept. 27, 2021), <https://www.census2011.co.in/> [<https://perma.cc/2ZNV-U8CY>]. The total population as per the 2011 Census is 1,210,193,422 of which 586,469,174 are women.

⁷⁰ Prime Minister's High Level Committee, Social, Economic and Educational Status of the Muslim Community of India 2 (New Delhi: Ministry of Human Resource Development, 2006) (report prepared by High Level Committee, Chairperson Justice Rajindar Sachar, for Government of India) [hereinafter Sachar Committee Report]. See also SEEMA KAZI, MINORITY RTS. GRP. INT'L, MUSLIM WOMEN IN INDIA 24-25 (1999) [hereinafter MRGI Report].

⁷¹ *Religion Census 2011*, CENSUS 2011 INDIA, (last visited Sept. 27, 2021), <https://www.census2011.co.in/religion.php> [<https://perma.cc/U9KV-AWUD>].

⁷² Even in more developed countries, it is an accepted fact that the quality of statistics and studies on divorce is limited due to various social issues. See Colter Mitchell, *Are Divorce Studies Trustworthy? The Effects of Survey Nonresponse and Response Errors*, 72 J. MARRIAGE & FAM. 893, 893 (2010).

⁷³ Engineer, *supra* note 12, at 3093.

⁷⁴ Shagufta Omar, *Dissolution of Marriage: Practices, Laws and Islamic Teachings*, 4 POL'Y PERSPECTIVES 91, 91 (2007).

⁷⁵ *Id.* at 92; Ahmad, *supra* note 4, at 484.

⁷⁶ Sahay, *supra* note 4, at 49-52; See generally Engineer, *supra* note 12, at 3093; Ahmad, *supra* note 4, at 503-506; Anees Ahmed, *Reforming Muslim Personal Law*, 36 ECON. & POL. WKLY. 618 (Feb. 24 - Mar. 2, 2001). See also, Written Submissions of Shayara Bano, *supra* note 54, at paragraphs 2.2, 2.3, 2.4, 2.5 (citing A. Yousuf Rawther v. Sowramma, AIR 1971 Kerala 261 (1970) (India); Sri Jiauddin Ahmed v. Mrs. Anwara Begum, 1 GLR 358 (1981) (India); Must. Rukia Khatun v. Abdul Khalique Laskar, GLR 375(1981) (India); Shamim Ara v. State of Uttar Pradesh, 7 SCC 518 (2002) (India)).

and cruelty),⁷⁷ men have an unfettered discretion to pronounce ITT or other forms of customary divorce such as *Zihar* and *Ila*.⁷⁸ Although customary forms of divorce also exist for Muslim women, these do not seem to be available to Muslim women in India in practice. These are:

1. *Talaq-i-tafweez* - In this form, a husband may delegate the unilateral, unconditional right to divorce to his wife in a premarital agreement.⁷⁹ Since such rights are only available if expressly delegated by the husband, it is likely that most Muslim wives would not enjoy this right.

2. *Lian* - The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery.⁸⁰

3. *Khula* - A divorce initiated by the wife by giving up her settled dowry or some property is known as *Khula*.⁸¹ Despite scholarly disagreement,⁸² Indian courts have held that the husband must clearly and unambiguously give his consent in order for the *Khula* to be valid.⁸³ Since such rights are only available with the express consent of the husband, it is likely that most Muslim wives would not enjoy this right.

It seems clear that the right to opt for divorce of their own accord is rarely (if ever) a reality for Muslim women in India. Moreover, their poor socio-economic position, lack of education, and lack of personal freedoms act as further barriers for access to justice.⁸⁴ A report by the Minority Rights Group International in 1999 noted that while Muslims as a whole have a poor socio-economic status with a marginal presence in public life,⁸⁵ Muslim women have the lowest work participation rate among all three categories of work (self-employed, regular workers and casual workers) at 11.4%, which is significantly lower than that of Hindu and Christian women at 23.6% and 15.9%, respectively.⁸⁶ Similarly, the statistics for Muslim women's employment as regular workers in urban areas (15.7% as compared to 27.7% for Hindu women and 51.5% for Christian women) highlight their marginal presence in salaried jobs and their "invisibility" as informal workers.⁸⁷ Similarly, literacy levels of Muslim

⁷⁷ The Dissolution of Muslim Marriages Act, 1939, § 2 (India).

⁷⁸ In the *Zihar* form of divorce, the wife may obtain a divorce on the ground that the husband swears that the wife is like the "back of his mother" and does not revoke this declaration. Although it is recognized under Section 2 of the Shariat Act of 1937, this form is said to be uncommon in India. In the *Ila* form of divorce, the husband swears not to have intercourse with the wife and abstains for at least four months. Although it is recognized under Section 2 of the Shariat Act of 1937, this form is said to be obsolete in India. See Ahmad, *supra* note 4, at 494.

⁷⁹ Nanda Chiranjeevi Rao, *Marriage Agreements Under Muslim Law - A Weapon In The Hands Of Muslim Women*, 55 J. OF THE INDIAN L. INST. 94, 98-100 (2013); Ahmad, *supra* note 4, at 495.

⁸⁰ See *Nurjahan Bibi v. Md. Kajim Ali*, AIR 1977 Cal 90 (India).

⁸¹ Ahmad, *supra* note 4, at 496.

⁸² *Id.* at 496-497 (arguing that Indian jurisprudence has ignored the liberal position of Islamic law on *khula* divorce).

⁸³ *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori*, 10 SCC 736, para. 16 (2014) (India); *Zohara Khatoun v. Mohd. Ibrahim*, AIR 1981 SC 1243, 1243 (1981) (India); *Mohd. Arif v. Bibi Jamila Khatoun*, 1989 (2) B.L.J 671, para. 34 (1988) (India).

⁸⁴ Zoya Hasan, *Gender, Religion and Democratic Politics in India*, 31 THIRD WORLD Q., no. 6, 939 at 950 (The Unhappy Marriage Of Religion And Politics: Problems And Pitfalls For Gender Equality, 2010); Z. HASAN AND R. MENON, *UNEQUAL CITIZENS: A STUDY OF MUSLIM WOMEN IN INDIA* (Oxford University Press, Delhi, 2004). See also Sonalde Desai and Gheda Temsah, *Muslim and Hindu Women's Public and Private Behaviors: Gender, Family, and Communalized Politics in India*, 51 DEMOGRAPHY 2307 (2014).

⁸⁵ MRGI Report, *supra* note 70, at 26.

⁸⁶ MRGI Report, *supra* note 70, at 24.

⁸⁷ *Id.* at 25.

men and women are dismal with the illiteracy rate being 76.1% for Muslim women in rural India and 59.5% in urban India.⁸⁸

According to Census 2001, the literacy rate among Muslims (59.1%) was far below the national average (65.1%) while NSSO 2007-08 confirmed that Muslim women (47.3%) count amongst the most illiterate segments of the society.⁸⁹

The Sachar Committee Report on the Social, Economic, and Educational status of the Muslim Committee of India later affirmed this position in 2006. The Committee ascribed educational backwardness to various factors such as abject poverty (owing to which children and especially girl children are forced to drop out),⁹⁰ the widespread belief of Muslims that education does not necessarily translate to formal employment,⁹¹ poor access to schools,⁹² and poor quality of available schools.⁹³ The Committee also noted that Muslim women are overwhelmingly self-employed (engaged in home-based work) such as sewing, embroidery, *zari* work, *chikan* work, readymade garments, *agarbatti* rolling, *beedi* rolling, and that their work conditions are characterized by low income, poor work conditions, absence of toilet and crèche facilities, lack of social security benefits like health insurance and the absence of bargaining power and that home-based industry has virtually collapsed in several states, leaving already poor Muslim women spiraling downwards to penury.⁹⁴

This makes it amply clear that exercising the right to opt for divorce by any means is not a feasible option for Muslim women in India and the SC's silence on this issue further compounds the issue.

PART V: RECENT DEVELOPMENTS

Unfortunately, the legislature has not fared any better. The Muslim Women (Protection of Rights on Marriage) Bill 2017 (Bill) was introduced in the Lok Sabha on 28 December 2017, only a few months after the SC decision.⁹⁵ The Bill was re-introduced in Lok Sabha on 21 June 2019 and was passed by both the Lok Sabha and the Rajya Sabha on 25 July 2019 and 30 July 2019 respectively, thus becoming the Muslim Women (Protection of Rights on Marriage) Act 2019 (“ITT Act”).

The ITT Act states that it is intended to “*protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands.*”⁹⁶ It does so by providing that all forms of “instantaneous

⁸⁸ MRGI Report, *supra* note 70, at 25-26.

⁸⁹ Lakshmi Devi, *Socio-Economic Development Of Muslim Women: Impact Of Education*, 60(3) INDIAN J. OF PUB. ADMIN. 660, 661 (July-September 2014).

⁹⁰ Sachar Committee Report, *supra* note 70, at 15.

⁹¹ Sachar Committee Report, *supra* note 70, at 15-16.

⁹² Sachar Committee Report, *supra* note 70, at 16.

⁹³ *Id.*

⁹⁴ Sachar Committee Report, *supra* note 70, at 22.

⁹⁵ The Bill was passed in the Lok Sabha but failed to clear the Rajya Sabha. Media reports at the time claimed that the Centre may pass an Ordinance to give effect to the Bill. *See* Ohri, *supra* note 49. Such speculation was (belatedly) proved correct when the government issued such an Ordinance on 21 February 2019. *See* The Muslim Women (Protection of Rights on Marriage) Bill, 2019, Bill No. 82 of 2019, (June 14, 2019), (as available at <https://prsindia.org/billtrack/the-muslim-women-protection-of-rights-on-marriage-bill-2019>) [<https://perma.cc/K6MH-ZLEE>].

⁹⁶ The Statement of Objects and Reasons of the Act states that the *Shayara Bano* decision vindicates the position that ITT is “against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity.”

and irrevocable divorce pronounced by a Muslim husband”⁹⁷ are void and illegal (Section 3 of the Act) and that whoever pronounces such divorce shall be punished with imprisonment upto three years and fine (Section 4 of the Act).⁹⁸ While the Act does clarify that all declarations of ITT would be void, thus resolving the question of whether declarations of ITT may be treated as a single pronouncement of talaq for the purposes of talaq-e-ahsan, it does not address whether all past declarations of ITT are also to be treated as void and the implications thereof. The Act also has some laudable provisions—such as those clarifying that Muslim women against whom ITT is pronounced shall be entitled to subsistence allowance from their husband (Section 5 of the Act) and custody of her minor children (Section 6 of the Act).⁹⁹ However, the Act does not—and cannot—address the fundamental question of whether religion-based personal laws are subject to fundamental rights. Only the SC can do that.

Fortunately, the SC got another opportunity to do so in the Sabarimala temple entry case, where the petitioners challenged the customary ban against women between the ages of 10-50 years from entering the Sabarimala temple as being violative of Articles 14, 15, 21, 25 and 26 of the Constitution. In this part, we will summarize the issues before the SC and attempt to discern what the judges have held on each question.

The major issues before the SC were:

1. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules 1965 (“Kerala Rules”) violate the fundamental right to freedom of religion under Article 25(1) of the Constitution?
2. Is the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules an “essential religious practice”?
3. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right to equality under Article 14 of the Constitution?
4. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right against non-discrimination on the basis of sex under Article 15 of the Constitution?

Statement of Object & Reasons of The Muslim Women (Protection of Rights on Marriage) Bill, 2019, Bill No. 82 of 2019, (June 17, 2019). As we have seen, it does not such thing.

⁹⁷ It would seem that the Act is limited to ITT and does not apply to *talaq-e-ahsan* since *ahsan* form of divorce is not instantaneous. However, the definition is ambiguous and has been criticized by scholars of Islamic law. See Ajaz Ashraf, *Interview: To punish a man for talaq that has no legal effect is like multiplying a number by zero*, SCROLL.IN (Jan. 11, 2018), <https://scroll.in/article/863942/indian-triple-talaq-bill-wont-protect-women-will-expose-men-to-new-dangers-pakistani-legal-expert> [<https://perma.cc/KEU9-DQT4>].

⁹⁸ Critics have argued that it is somewhat contradictory to consider mere pronouncement of ITT as void as well as a criminal offence, arguing that pronouncement of ITT should be coupled with abandonment or economic abuse for it to be punishable. See Saumya Saxena, *The triple talaq Bill: A mediocre legislation and a missed opportunity*, THE INDIAN EXPRESS (Jan. 9, 2018), <http://indianexpress.com/article/gender/the-triple-talaq-bill-a-mediocre-legislation-and-a-missed-opportunity-5017088/> [<https://perma.cc/G9K9-K4YH>]; see also Ashraf, *supra* note 97, (“How can you punish a man for an action that has no legal effect? Whether he said it three times does not matter at all. To punish a man for giving talaq that has no legal effect is like multiplying a number by zero.”).

⁹⁹ Critics have argued that it is somewhat contradictory to expect the husband to pay subsistence allowance from jail. See *Re-examine the Bill*, THE HINDU (Jan. 8, 2018), <http://www.thehindu.com/todays-paper/tp-opinion/re-examine-the-bill/article22393244.ece> [<https://perma.cc/7SAV-DJVU>]; See Saxena, *supra* note 98; See also Ashraf, *supra* note 97. Critics have also argued that the Bill fails to make Muslim divorce truly gender neutral by allowing both husbands and wives the right to opt for *ahsan* form of divorce.

5. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right against untouchability Article 17 of the Constitution?

6. Is Rule 3(b) of the Kerala Rules ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 (“Kerala Act”) which is its parent legislation?

Here is how the SC ruled on each question:

1. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules 1965 (“Kerala Rules”) violate the fundamental right to freedom of religion under Article 25(1) of the Constitution?

| Issue | Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate Article 25(1)? | |
|---|---|--|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | Yes | Freedom of religion under Article 25(1) is available equally to all persons including women (para 144(ii)). Women of any age group have the right under Article 25(1) to visit and enter a temple to freely practice a religion (para 100-101). Hence, Rule 3(b) is a violation of Article 25(1) (para 104-105). The exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violates the right of Hindu women to freely practice their religion under Article 25(1) (para 144(iii)-(iv)). |
| Justice Rohinton Fali Nariman (concurring) | Yes | Freedom of religion under Article 25(1) is available equally to all persons (para 166). The exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violates the right of Hindu women to freely practice their religion under Article 25(1) (paras 174, 177). |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | Yes | Women have equal entitlement to constitutional rights. Exclusion of women from worship is incompatible with equality, liberty and dignity (paras 231, 296(2)). |
| Justice Indu Malhotra (dissenting) | No | Article 25 provides equal entitlement of every individual to freely practice their religion subject to the essential beliefs and practices of any religion. Equality in matters of religion must be viewed in the context of the worshippers of the same faith (para 304.1). The right to gender equality to offer worship is protected by permitting women of all ages to visit all other temples (para 304.5). |

This question was answered in the affirmative by a majority of 4:1 with only J. Malhotra dissenting. This is almost ironic. As we have seen in Part II, the SC has almost never made a clear finding on whether religious practices can violate fundamental rights. This is the first time that the SC has unequivocally held that the religious practice in question violates fundamental rights. The irony

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here is that the fundamental right which the SC held to be violated is not the right to equality, liberty or dignity, but the right to freedom of religion itself.

2. Is the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules an “essential religious practice”?

| Issue | Is the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules an “essential religious practice”? | |
|---|---|--|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | No | The exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules does not constitute an “essential religious practice” (para 144(vii)-(viii)). Exclusion of women of any age group cannot be regarded as an “essential religious practice” of Hindu religion (para 122) since the nature of Hindu religion would not change by allowing women to enter the Sabarimala temple (para 106). |
| Justice Rohinton Fali Nariman (concurring) | Not discussed | |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | No | No evidence that the practice of excluding women is an “essential religious practice” (paras 227, 229, 296(3)). Constitutional legitimacy cannot be granted to practices which derogate from the dignity of women and to their entitlement to an equal citizenship (para 296(3)). |
| Justice Indu Malhotra (dissenting) | Not decided | The issue of what constitutes an essential religious practice is for the religious community to decide (paras 304.6, 306.1 and 309.6).). |

This question was answered in the negative by a majority of 3:2 with C.J. Misra, J. Khanwilkar and J. Nariman forming the majority with J. Nariman and J. Malhotra not discussing the question.

3. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right to equality under Article 14 of the Constitution?

| Issue | Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate Article 14? | |
|---|--|-----------|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | Not discussed | |

| | | |
|---|---------------------------------|---|
| Justice Rohinton Fali Nariman (concurring) | Not discussed | |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | Yes, but no separate discussion | No evidence that the practice of excluding women is an “essential religious practice” (paras 227, 229, 296(3)). Constitutional legitimacy cannot be granted to practices which derogate from the dignity of women and to their entitlement to an equal citizenship (para 296(3)). |
| Justice Indu Malhotra (dissenting) | No | Religious customs and practices cannot be solely tested on the touchstone of Article 14 (para 304.1). Courts cannot determine which religious practices are to be struck down unless they are pernicious, oppressive or a social evil (para 304.2). The exclusionary practice is not arbitrary since it is the only practical way of ensuring the limited restriction on the entry of women (para 304.4). The right to gender equality to offer worship is protected by permitting women of all ages to visit all other temples (para 304.5). The fundamental right to equality under Article 14 does not override the fundamental right to freedom of religion under Article 25 in accordance with the tenets of such religion (para 312(ii)). Constitutional Morality in a secular polity implies the harmonisation of fundamental rights (para 312(iii)). |

There is no clear answer to this question since J. Malhotra held that it did not, J. Chandrachud held that it did (but without a detailed discussion on Article 14 separately) while the other three judges did not discuss the question at all. The count is 3 undecided: 1 yes: 1 no. As such, there is no clear majority decision that the exclusionary practice at the Sabarimala temple violates the fundamental right to equality.

4. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right against non-discrimination on the basis of sex under Article 15 of the Constitution?

| Issue | Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate Article 15? | |
|---|--|--|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | Not discussed | |
| Justice Rohinton Fali Nariman (concurring) | Yes | The exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violates the right of Hindu women against non-discrimination on the basis of sex under Article 15(1) (paras 174, 177). |

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| | | |
|---|---------------------------------|---|
| | | Rule 3(b) of the Kerala Rules violates Article 15(1) as it discriminates against women on the basis of sex (para 174). |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | Yes, but no separate discussion | |
| Justice Indu Malhotra (dissenting) | No | Article 15 of the Constitution prohibits differential treatment of persons on the ground of 'sex' alone (para 305.1). Exclusion from places of worship would not be included under Article 15 (para 305.1). |

Again, there is no clear answer to this question since J. Malhotra held that it did not, J. Chandrachud and J. Nariman held that it did while the other two judges did not discuss the question at all. The count is 2 undecided: 2 yes: 1 no. As such, there is no clear majority decision that the exclusionary practice at the Sabarimala temple violates the fundamental right to non-discrimination on the basis of sex.

5. Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate the fundamental right against untouchability Article 17 of the Constitution?

| Issue | Does the exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violate Article 17? | |
|---|--|--|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | Not discussed | |
| Justice Rohinton Fali Nariman (concurring) | Not discussed | |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | Yes | Any form of stigmatization which leads to social exclusion is violative of human dignity and would constitute a form of untouchability, which violates Article 17 (para 252). Social exclusion against menstruating women which has been practiced and legitimized on notions of purity and pollution is also a form of untouchability (paras 253, 258, 296(4)). The issue of temple entry is not just about the right to practice right to freedom of religion but about freedom from societal oppression and untouchability from stigmatized understanding of menstruation (para 259). |
| Justice Indu Malhotra (dissenting) | No | All forms of exclusion would not constitute untouchability which is limited to caste-based exclusion and does not include discrimination against women (paras 310.2, 310.3 and 310.5) |

| | | |
|--|--|--|
| | | The limited restriction on the entry of women in the age-group of 10-50 does not violate Article 17 (para 312(v)). |
|--|--|--|

Again, there is no clear answer to this question since J. Malhotra held that it did not, J. Chandrachud held that it did while the other three judges did not discuss the question at all. The count is 3 undecided: 1 yes: 1 no. As such, there is only a minority opinion that the exclusionary practice at the Sabarimala temple violates the fundamental right against untouchability.

6. Is Rule 3(b) of the Kerala Rules ultra vires the Kerala Act which is its parent legislation?

| Issue | Is Rule 3(b) of the Kerala Rules ultra vires the parent Act? | |
|---|--|--|
| | Answer | Reasoning |
| Chief Justice Dipak Misra and Justice Ajay Manikrao Khanwilkar | Yes | <p>Rule 3(b) of the Kerala Rules is ultra vires both Sections 3 and 4 of the Kerala Act (para 144(x)-(xii)).</p> <p>Section 3 of the Kerala Act states that every place of public worship which is open to Hindus generally (or any section or class thereof) shall be open to all sections and classes of Hindus notwithstanding any law or custom to the contrary (paras 129-130). This would apply equally to all genders (para 131).</p> <p>Section 4 of the Kerala Act states that rules made under the Kerala Act shall not discriminate against any Hindu on the grounds that they belong to a particular section or class of Hindus (para 134). This would apply equally to Hindu women (para 135).</p> <p>Rule 3(b) of the Kerala Rules provides that Hindu women shall not be entitled to enter such places of public worship where such an exclusion is in accordance with custom and usage (para 136). Since delegated legislation made under a statute must be exercised within the confines of such parent statute (para 137), Rule 3(b) is ultra vires both Sections 3 and 4 of the Kerala Act (paras 141-142).</p> |
| Justice Rohinton Fali Nariman (concurring) | Yes | <p>The exclusionary practice at the Sabarimala temple under Rule 3(b) of the Kerala Rules violates Section 3 of the Kerala Act (paras 173-174, 177).</p> <p>Rule 3(b) is ultra vires Section 3 of the Kerala Act (paras 174, 177).</p> <p>Section 3 of the Kerala Act states that every place of public worship which is open to Hindus generally (or any section or class thereof) shall be open to all sections and classes of Hindus notwithstanding any law or custom to the contrary (para 173). The exclusionary practice at the Sabarimala temple violates Section 3 of the Kerala Act (para 173).</p> |

| | | |
|---|-----|---|
| | | <p>Rule 3(b) of the Kerala Rules provides that Hindu women shall not be entitled to enter such places of public worship where such an exclusion is in accordance with custom and usage (para 174). Rule 3(b) is ultra vires Section 3 of the Kerala Act (para 174).</p> <p>The exclusionary practice at the Sabrimala temple under Rule 3(b) of the Kerala Rules violates the right of Hindu women to freely practice their religion under Article 25(1) which includes their right to worship at any temple of their choice (para 174).</p> |
| Justice Dhananjaya Yeshwant Chandrachud (concurring) | Yes | <p>Section 3 of the Kerala Act states that every place of public worship which is open to Hindus generally (or any section or class thereof) shall be open to all sections and classes of Hindus notwithstanding any law or custom to the contrary (paras 203, 263). Hindu women constitute a section or class of Hindus (paras 263, 267).</p> <p>Section 4 of the Kerala Act states that rules made under the Kerala Act shall not discriminate against any Hindu on the grounds that they belong to a particular section or class of Hindus (paras 203, 265).</p> <p>Rule 3(b) of the Kerala Rules provides that Hindu women shall not be entitled to enter such places of public worship where such an exclusion is in accordance with custom and usage (paras 203, 265). Since delegated legislation made under a statute must be exercised within the confines of such parent statute (para 266), Rule 3(b) is ultra vires Section 3 of the Kerala Act (paras 264, 267, 296(5)-(6)).</p> |
| Justice Indu Malhotra (dissenting) | No | <p>Kerala Act provides for the throwing open of Hindu places of public worship. Proviso to Section 3 of the Kerala Act carves out an exception to the applicability of the general rule contained in Section 3 with respect to religious denominations or sects to protect their right to manage their religious affairs without outside interference. Rule 3(b) gives effect to the Proviso of Section 3 by making provision for restricting the entry of women at such times when they are not allowed to enter of place of public worship by custom or usage (paras 306.9, 311.1-311.6, 312(vi)).</p> |

This question was answered in the affirmative by a majority of 4:1 with only J. Malhotra dissenting. As such, there is a clear majority decision that the exclusionary practice at the Sabarimala temple violates the provisions of the Kerala Act which provide that Hindu places of worship shall be equally open to all Hindus.

Thus, the only clear majority opinions on each particular question are:

- The exclusionary practice at the Sabrimala temple violates the fundamental right to freedom of religion under Article 25(1) (4:1);
- The exclusionary practice at the Sabrimala temple is not an “essential religious practice” (3:2);

— Rule 3(b) of the Kerala Rules is ultra vires the Kerala Act which is its parent legislation (4:1).

This represents a major step forward from the *Shayara Bano* decision as there is at least a clear majority decision on why the religious practice is being struck down. Here, the SC has clearly held that the Sabarimala temple practice is ultra vires the provisions of the Kerala Act which provide that all Hindus shall be entitled to enter all Hindu places of worship. It also held that it violates the right of Hindu women to freedom of religion under Article 25. As we saw previously, such a clear majority was conspicuously missing in *Shayara Bano*.

Further, the SC has clearly held that the religious practice in question is unconstitutional. This sets a clear precedent that religious practices can be challenged on grounds of constitutionality. As we pointed out earlier, the irony is that the grounds on which such an exclusionary religious practice was struck down was that it violated the right to freedom of religion itself rather than on the basis that it violated the right to equality and non-discrimination.

CONCLUSION

To recap, the SC lost two magnificent opportunities to set a precedent for future cases in deciding how to balance the constitutional protection of freedom of religion vis-a-vis the constitutional protection of equality. Far from advancing women's rights, the SC avoided a detailed discussion on ITT and its consequences in the context of Articles 14, 15 and 21 in *Shayara Bano*. In doing so, the SC refused to acknowledge the lived realities of Muslim women and therefore seems to be divorced from the current context.

In Sabarimala—where the SC at least sets a precedent that religious practices can be challenged on the grounds of fundamental rights—the advancement to women's rights was largely in the context of the right to freedom of religion rather than liberty, equality, and dignity as a whole. The discussion on liberty, equality and dignity remained confined to the concurring opinions of J. Chandrachud and J. Nariman.

The SC's curious aversion to affirmatively stating whether religious practices can be challenged for violating fundamental rights to liberty, equality and dignity only means more litigation on the subject. Two other petitions involving the same question are currently pending before the SC. In *Goolrokh M. Gupta v. Burjor Pardiwala*,¹⁰⁰ a Parsi woman married to a Hindu man has challenged the decision of the Valsad Parsi Anjuman Trust to restrain her from attending and participating in the funeral rites of her parents in the Zoroastrian Fire Temple. While in *Sunita Tiwari v. Union of India*,¹⁰¹ the religious practice of Khatna or Female Genital Mutilation prevalent among the Dawoodi Bohra Muslims and certain Sunni Muslims in India has been challenged as violative of the fundamental rights to equality and non-discrimination, dignity, privacy, and freedom of religion. We eagerly look forward to seeing how the SC answers the crucial constitutional questions raised in these petitions.

It may be our duty as citizens to make the SC understand that it should abandon the idea that

¹⁰⁰ *Goolrokh M. Gupta v. Burjor Pardiwala*, SLP(C) No.18889/2012 (India), <https://www.scoobserver.in/court-case/parsi-excommunication-case> [<https://perma.cc/UB5Z-6RHS>]. Even though the petition was filed in 2012, the first batch of hearings only occurred in December 2017. No further hearings have taken place since then.

¹⁰¹ *Sunita Tiwari v. Union of India*, W.P. (C) 286/2017 (India), <https://www.scoobserver.in/court-case/ban-on-female-genital-mutilation> [<https://perma.cc/8SNB-WP87>]. The petition was filed in 2017 and has not been taken up for further hearing since 2018 when it was referred to the Chief Justice of India for a larger bench to be constituted.

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the way to speak to our hearts on this issue is by saying nothing at all. After all, we are just a nation standing in front of its Supreme Court, asking it to do its job.