Lessons from a fiasco

NEET should be made more accessible by basing it on a fresh syllabus

It is a matter of immense relief that the prolonged uncertainty over the medical admission process in Tamil Nadu is over. The entire process has been marked by anxiety for students and parents. That phase has ended, thankfully, but not without lessons for the State government. Unable to introduce legislative measures – or get favourable judicial orders – to exempt the State from the National Eligibility-cum-Entrance Test (NEET), which the Supreme Court says must be the sole basis for medical admissions across the country, Tamil Nadu has at last released the merit list for MBBS seats based on NEET rankings. The Supreme Court gave a peremptory direction to the State to complete admissions by September 4 after a volte-face by the Centre, which had previously cleared an ordinance prepared by the State government to grant a year's exemption from NEET for the State. This week the Centre informed the court that it was not in favour of giving "undue advantage" to one State. In any case, it was apparent that the ordinance would run into a judicial barrier. It was known that the Supreme Court would take a dim view of legislation aimed at giving selective exemption to one State. Last year, when the Centre granted a one-time exemption to the entire country, the Supreme Court had made its displeasure obvious. Against this backdrop, it may be valid to ask if giving the nod to the ordinance and then making an about-turn were no more than political manoeuvres on the part of the Centre.

The Tamil Nadu Assembly had passed two Bills to exempt the State from NEET permanently and sent them to the Centre for the President's assent. When for months the assent did not come, the State government ought to have advised students to get ready for NEET. Closer to the admission season, it came out with a controversial order earmarking 85% of medical seats for State Board students. Predictably, it was struck down by the courts. Not chastened by judicial setbacks, the State government continued its ineffectual efforts to get an exemption, possibly because it could not admit its own failure to make the requisite changes in the school curriculum to make students NEET-ready. There is a flip side to the controversy: whether in the interest of uniform admission norms, an unwilling State should be forced to adopt a national test prepared on the basis of a syllabus not familiar to a majority of its students, especially rural students. With NEET becoming the sole admission gate, there may be no scope for an exemption, but the test itself could be made more accessible. The long-term solution for Tamil Nadu lies in upgrading academic standards in its schools. As for the Centre, it could help by drawing up a fresh syllabus standard for NEET after consulting the States, which necessarily have differing school-level standards. Tamil Nadu cannot afford a repeat of this year's fiasco.

And the war goes on

Donald Trump's plan for Afghanistan is still too short on specifics

U.S. President Donald Trump's decision to deepen the country's military engagement in war-torn Afghanistan signals a significant shift in the position he has held for years. Mr. Trump had campaigned to end American involvement in foreign conflicts and was particularly critical of the Afghan war, which he said was "wasting" American money. His announcement on Monday of the decision to send more troops to the country reflects a realisation that the U.S. does not have many options in dealing with its longest military conflict. This is also a grim reminder of the precarious security situation in Afghanistan. Sixteen years since George W. Bush ordered the American invasion of Afghanistan and toppled the Taliban regime, the insurgents are on the ascendent again. More than half the country's territory, mostly in rural, mountainous areas, is now controlled by the Taliban, while the Islamic State has set up base in eastern Afghanistan. In recent years, both the Taliban and the IS have carried out a number of terror attacks in the country, including at highly fortified military locations, raising questions about the very survival of the government in Kabul. This is a worry point for Mr. Trump's generals, who want to avoid the kind of vacuum left behind by the Soviet withdrawal in the late 1980s that plunged Afghanistan into a protracted civil war; the Taliban eventually took over.

But it is not going to be easy for Mr. Trump. He is the third consecutive American President to send troops to Afghanistan. Mr. Bush and Barack Obama failed to swing the situation sufficiently to ensure a long-lasting difference in Afghanistan's battleground. It is not clear if Mr. Trump can win a war they lost. His strategy can be summed up as Obama-plus – it builds on the premises of the Obama plan of additional troops and regional diplomacy. But unlike Mr. Obama, who set a timetable for the withdrawal of troops, Mr. Trump is ready for an open-ended engagement. He also said the focus of the American mission should narrow down to fighting terrorists, not rebuilding Afghanistan "in our own image". Third, Mr. Trump minced no words while calling Pakistan a country that shelters terrorists. He also wants India to play a greater role in providing economic and developmental assistance to Afghanistan. India has welcomed Mr. Trump's strategy, as the U.S.'s objectives in building a stable Afghanistan and ending Pakistan's sponsorship of terrorism are exactly in line with India's own goals for the region. It has, however, correctly reminded Mr. Trump that it does not need his request, never mind his coarse reference to "billions of dollars" made in bilateral trade with the U.S., in order to fulfil its commitment to Afghanistan's economic development. Such open transactionalism will not serve the U.S.'s efforts in winning allies for its new Afghanistan policy, nor indeed will it further its mission in a country that is not unfairly called the "graveyard of empires".

Two cheers for the Supreme Court

While a significant victory, even the majority opinions in the triple talaq verdict were along narrow pathways

GAUTAM BHATIA

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On the 4th of November, 1948, Dr. B.R. Ambedkar rose to address the Constituent Assembly, and proudly stated that "the... Constitution has adopted the individual as its unit". On Tuesday, this constitutional vision, under siege for much of India's journey as a democratic republic, came within a whisker of destruction at the hands of the Supreme Court. But when all the dust had cleared in Courtroom No. 1, it finally became evident that Chief Justice J.S. Khehar had been able to enlist only one other judge, out of a Bench of five, to support his novel proposition that the religious freedom under the Indian Constitution protected not just individual faith, but whole systems of "personal law", spanning marriage, succession, and so on. This view would not only have immunised instantaneous triple talaq (*talaq-e-biddat*) from constitutional scrutiny, but would also – in the Chief Justice's own words – have ensured that "it is not open for a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion".

Had the Chief Justice managed to persuade one other judge to sign on to his judgment, we would have found ourselves living under a Constitution that sanctions the complete submergence of the individual to the claims of her religious community. A reminder, perhaps, of how even the most basic constitutional values, often taken for granted, hang by nothing more than the most fragile of threads. But if the relegation of the Chief Justice's argument to a legally irrelevant dissenting opinion narrowly averted disaster, the separate opinions of three judges invalidating the practice of *talaq-e-biddat* gave us something to cheer about – but not much. By a majority decision, instantaneous triple talaq is now invalid, a significant victory that is the result of many decades of struggle by the Muslim women's movement for gender justice. That is something that must be welcomed. However, the value of a Supreme Court judgment lies not only in what it decides, but also in the possibilities and avenues that it opens for the future, for further progressive-oriented litigation. In that sense, the triple talaq verdict is a disappointment, because even the majority opinions proceeded along narrow pathways, and avoided addressing some crucial constitutional questions.

The majority

Justice Rohinton F. Nariman, writing for himself and Justice U.U. Lalit, held that the 1937 Muslim Personal Law (Shariat) Application Act had codified all Muslim personal law, including the practice of triple talaq. This brought it within the bounds of the Constitution. He then held that because *talaq-e-biddat* allowed unchecked power to Muslim husbands to divorce their wives, without any scope for reconciliation, it was "arbitrary", and failed the test of Article 14 (equality before law) of the Constitution. The practice, therefore, was unconstitutional.

Justice Nariman's reasoning, while technically faultless, avoided the elephant in the room that had been ever-present since the hearing began. Under our constitutional jurisprudence, codified personal law – that is, personal law that has been given a statutory form, such as the Hindu Marriage Act – is subject to the Constitution. However, uncodified personal law is exempted from constitutional scrutiny. In other words, the moment the state legislates on personal law practices, its actions can be tested under the Constitution, but if the state fails to act, then those very practices – which, for all relevant purposes, are recognised and enforced by courts as law – need not conform to the Constitution. This anomalous position, which had first been advanced by the Bombay High Court in a 1952 decision called Narasu Appa Mali, and has never seriously been challenged after that, has the effect of creating islands of "personal law" free from constitutional norms of equality, non-discrimination, and liberty.

By holding that the 1937 Act codified all Muslim personal law, Justice Nariman obviated the need for reconsidering this longstanding position, even as he doubted its correctness in a brief, illuminating paragraph. As a matter of constitutional adjudication and judicial discipline, he was undoubtedly right to do so. However, it is impossible to shake off the feeling that the court missed an excellent opportunity to review, and correct, one of its longstanding judicial errors. It seems trite to say that in our polity, there should not exist any constitutional black holes. The basic unit of the Constitution, as Ambedkar said, is the individual, and to privilege state-sanctioned community norms over individual rights negates that vision entirely.

In a separate opinion – which turned out to be the "swing vote" in this case – Justice Kurian Joseph did not go even that far. He simply held that *talaq-e-biddat* found no mention in the Koran, and was no part of Muslim personal law. Effectively, he decided the case on the ground that *talaq-e-biddat* was un-Islamic, instead of unconstitutional – begging the question whether secular courts should be adjudicating such questions in the first place. If Justice Nariman's opinion was narrow and technical, Justice Joseph's was narrow and theological. Therefore, in a case that involved, at its heart, issues of the intersection between personal law, the Constitution, and gender discrimination, there is no majority view on any of these topics.

The dissent

This brings us back to the dissent. Not only did the dissenting opinion privilege community claims over individual constitutional rights, it also conflated the freedom of religion with personal law, thereby advancing a position where religion could become the arbiter of individuals' civil status and civil rights. Here again, it had been Ambedkar, extraordinarily prescient, who had warned the Constituent Assembly on the 2nd of December, 1948: "The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death... if personal law is to be saved, I am sure... that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extent beyond beliefs and rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion."

Ultimately, what separates religious norms and personal law systems – and this includes all religions – from the laws of a democratic republic is the simple issue of consent. This is why the Chief Justice's conflation of religious freedom and personal law was so profoundly misguided: because, in essence, he took a constitutional provision that had been designed to protect an individual, in her faith, from state interference, and extended it to protect a personal law system that claims authority from scriptures – scriptures whose norms are applied to individuals who had no say in creating them, and who have no say in modifying or rejecting them. The Muslim women challenging triple talaq invoked the Constitution because there was no equivalent within their personal law system; the Chief Justice would have denied not only them that possibility, but would have denied to every other individual, who felt oppressed and unequally treated by her religious community, for all time – and told them, as he did in this case: "Go to Parliament, but the Constitution has nothing for you."

At the very least, the Majority judgments did not close that window. For that, we must say: two cheers to the Supreme Court.

Gautam Bhatia is a Delhi-based lawyer

A BIT of critique

The Srikrishna committee has lost an opportunity to push for the recalibration of the Indian BIT regime

PRABHASH RANJAN

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The recent report of the Justice B.N. Srikrishna committee, constituted to prepare a road map to make India a hub of international arbitration, has recommended many changes in Indian arbitration law and institutional mechanisms to promote arbitration in India. Its recommendations on bilateral investment treaty (BIT) arbitration assume importance as India is currently battling 20-odd BIT disputes. These recommendations are largely on the issue of managing and resolving BIT disputes.

Dispute management

For better management of BIT disputes, the committee recommends the creation of an inter-ministerial committee (IMC), with officials from the Ministries of Finance, External Affairs and Law. It also recommends hiring external lawyers having expertise in BITs to boost the government's legal expertise; creating a designated fund to fight BIT disputes; appointing counsels qualified in BITs to defend India against BIT claims; and boosting the capacity of Central and State governments to better understand the implications of their policy decisions on India's BIT obligations.

The most significant recommendation is the creation of the post of an 'international law adviser' (ILA) to advise the government on international legal disputes, particularly BIT disputes, and who will be responsible for the day-to-day management of a BIT arbitration. The intent here is laudable, i.e. augmenting the government's expertise on BITs and designating a single authority to deal with all BIT arbitrations. However, this recommendation will amount to duplicating the existing arrangement to offer advice on international law, including BITs, to the government.

The Legal and Treaties (L&T) division of the External Affairs Ministry is mandated to offer legal advice to the government on all international law matters including BIT arbitrations. Instead of creating a new office – which will only intensify the turf wars between ministries, and deepen red tape – the L&T division should be strengthened. This division could be made the designated authority to deal with all BIT arbitrations and thus act as the coordinator of the proposed IMC. Furthermore, the IMC should have a member from the Commerce Ministry as well. This ministry, while dealing with India's trade agreements – that also cover investment protection – works in tandem with the Finance Ministry. Thus it is only prudent that both be a part of an IMC on BIT dispute management.

Dispute resolution

In resolving BIT disputes, the committee has made some useful interventions such as mentioning the possibility of establishing a BIT appellate mechanism and a multilateral investment court. However, its conclusion that the investor-state dispute settlement (ISDS) mechanism, given in Article 15 of the Indian Model BIT, provides an effective mechanism for settling BIT disputes between an investor and state is problematic for the following reasons.

First, Article 15 requires foreign investors to litigate in domestic courts at least for a period of five years. Assuming that proceedings end in five years but the investor is not happy with the outcome, the investor can initiate a BIT claim provided it is done within 12 months from conclusion of domestic proceedings. Out of these 12 months, the next six months must be spent trying to amicably settle the dispute with the state. If not, then the investor has to serve a 90-day notice period to the state, and only after this can she actually submit the dispute for BIT arbitration. In short, even if an investor is extremely alert, she only has a window of three months to actually submit a dispute for BIT arbitration. Such strict limitation periods dilute the effectiveness of the ISDS mechanism. Second, there are many other jurisdictional limitations given in Article 13 that also limit the usefulness of ISDS. Third, the ISDS mechanism in the Indian Model BIT extends from Articles 13 to 30 covering issues such as appointment of arbitrators, transparency provisions, enforcement of awards, standard of review, which have a bearing on the efficiency of the ISDS mechanism. The report is silent on all these critical issues.

A wish list

BIT arbitration has three aspects: jurisdictional (such as definition of investment), substantive (such as provision on expropriation) and procedural (ISDS mechanism). While the commission's mandate was to focus on BIT arbitration, i.e. on all the three parts, strangely, it narrowed it down to just the procedural aspect. This is even more surprising because the committee had organised a conference earlier this year to brainstorm on topics covering all three aspects mentioned earlier, especially in the context of Indian Model BIT. The committee's explanation that since issues like expropriation require greater debate, it decided not to make any recommendations on these issues is weak. Despite making some useful suggestions, the committee has squandered a great opportunity to comprehensively push for the recalibration of the Indian BIT regime, which has oscillated from being pro-investor to being pro-state.

Prabhash Ranjan, Assistant Professor of Law at South Asian University & Visiting Scholar at Brookings India, was consulted by the Srikrishna Committee. The views expressed are personal

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

No, no no

The Supreme Court judgment declaring the retrograde practice of instant triple talaq as unconstitutional is most welcome ("No, no, no: SC on instant triple talaq" and Editorial - "Undoing justice", both August 23). This is a historic verdict, with far-reaching ramifications and long overdue. It comes as a shot in the arm for gender justice. It ought to be remembered that while many Islamic countries have already done away with this obnoxious practice, India had the dubious distinction of retaining it.

It needs to be emphasised here that a nation aspiring to be a superpower can attain such a position only if it adapts itself to changing times. The need of the hour requires shunning religious obscurantism and regressive practices such as triple talaq which are out of tune with modern life. Now that the Supreme Court has put an end to this, civil society should initiate steps towards banning age-old rituals and superstitions such as bird/animal sacrifices in temples that go on in the name of religion. Are the champions of Hinduism listening?

B. SURESH KUMAR,
Coimbatore

■ At last Muslim women in India can heave a sigh of relief. The verdict is morale-boosting and uplifting for all women in India. Unlike politicians who have many axes to grind in making decisions on such sensitive issues, the judges seem to have been fair and objective. The danger of instant triple talaq is that it could be uttered callously in a given circumstance which could instantly ruin the life of a woman.

LEELA KALLARACKAL,
Chennai

■ There were still two dissenting judges who held that it cannot be set aside by judicial intervention. Therefore, we cannot claim that the controversy has been laid to rest. If the case is taken up for review or to a larger Bench, the outcome cannot be predicted. While the majority judgment has rightly upheld the rights of Muslim women, the general observation that the practice is against the tenets of Islam is likely to be objected to by clerics. They could claim, not without basis, that it is not in the domain of the court in a secular state to question, interpret or lay down religious practices. Interpretation of religious scripts can be attended to by religious leaders. Courts and legislative bodies can be watchful to ensure that these practices do not violate fundamental rights and deprive any section of the followers of any faith of rights enshrined in the Constitution.

S.V. VENKATAKRISHNAN,
Bengaluru

■ As the judgment brings huge relief to Muslim women who are now entitled to live life with dignity without discrimination of any sort, the Centre and States must see to it that the ruling is implemented in toto without giving any scope for manipulation by men.

K.R. SRINIVASAN,
Secunderabad

■ No hair-splitting arguments by pundits and legal experts are required to conclude that triple talaq is terrible. That the Koran, very reasonable in almost all its exhortations, is mute on the subject is itself evidence against the practice. The court verdict will be a great relief to Muslim women.

V.K. BABU,
Kochi

Whither governance

O. Panneerselvam and Edappadi K. Palaniswami may have come together but in the end, the sufferers are the people of the State (Editorial - "Fusion and fission", August 23). The ruling party seems to have forgotten what it is to be a government and why it was elected to power in May 2016. Governance has taken a backseat with many seats in government bodies vacant. Who will occupy the Chief Minister's seat seems to be a game of musical chairs. Agrarian distress has been forgotten and a State which once occupied pride of place on the industrial map of India is now starving for new investment. This game has to end. The government has to prove its majority. Once this is done, it can at least concentrate on governance. Governments may come and go but there cannot be a break in good, corruption-free governance. A faction now heading to a resort in Puducherry should not lead to another Koovathur episode. The people are fast losing faith in their leaders.

M.M. KARTHIK,
Modakkurichi, Erode, Tamil Nadu

Mirror to India

Although Sonalde Desai's article is on America, "The deep divide within White Americans" (August 23), it is still so relevant to understand our current Indian politics. The reader will only have to just replace the word 'white' with Hindu and 'black' with Muslim. Who in India bothers to know about Muslims still being in a dire social and economic state even a decade after the Sachar Committee report, 2006? Yet, the 'appeasement' of the community works so successfully from one election to another!

Next on the chopping block is West Bengal. Since communal politics has been serving the right-wing parties well, why should they not play the trick there too, and before that in Odisha and Karnataka? Another relevant point for us to understand is the sense of insecurity among underprivileged Hindus – poor whites in America. Since it is a tall order to deal with disparity of income and wealth within the community, is it not much easier to find a scapegoat – in America blacks and immigrants, and in India Muslims?

PARTHA S. GHOSH,
New Delhi

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