Zeitschrift für Recht & Islam

Journal for Law & Islam

ZR&I

Jahrgang 9 (2017)

Herausgegeben von
Hatem Elliesie
Peter Scholz
Beate Anam
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durch die
Gesellschaft für Arabisches und Islamisches Recht e.V.

جمعية دراسات الشريعة الإسلامية وقوانين البلاد العربية

ISSN 2192-6050

ZRI – Zeitschrift für Recht und Islam / Journal for Law & Islam 9 (2017), S. 179–204

Walking a Tightrope: Balancing Law, Religion and Gender Equality in the Aftermath of the Indian Supreme Court's *Triple ṭalāq Ban*

Tanja Herklotz

I. Introduction

In August 2017, the Indian Supreme Court gave its long-awaited judgment in the case *Shayara Bano v Union of India*.[1] The Court in a three-to-two decision invalidated the Muslim practice of divorce by triple *ṭalāq* (*ṭalāq-e-biddat*) – a form of instant divorce at the initiative of the husband which became effective when he pronounced the word '*ṭalāq*' thrice in one sitting. This form of divorce required no state intervention, was deemed effective forthwith and irrevocable, and the sole prerogative of the husband. The judgment considered five writ petitions filed by Muslim women who had been divorced by way of triple *ṭalāq*. Among them was Shayara Bano, one of the named petitioners. In her attempt to have triple *ṭalāq* declared unconstitutional, Shayara Bano was supported by a number of Muslim women's rights groups that considered the practice gender discriminatory and had long campaigned for a reform of the so-called 'Muslim personal law'. Their attempt was opposed by the All India Muslim Personal Law Board (AIMPLB) that argued against the ban of triple *ṭalāq* and for maintenance of the legal status quo.

By historically contextualising this judgment, this paper argues, that *Shayara Bano* was a deviation from the earlier position of the Indian State vis-à-vis Muslim personal law and might even mark a historical turning point. While the State had previously refrained from interfering in this domain, and thereby practically granting the Muslim clergy authority over the interpretation of the community's personal laws, it now assumed some new authority in this area. The paper further analyses the developments that followed the *Shayara Bano* case. It therefore largely draws on newspaper articles and blog posts as sources. It argues that *Shayara Bano* has brought about both potential benefits and risks: On the one hand, the landmark judgment has been a great step forward in the advancement of gender equality and has been hailed as a boon by women's groups. It has initiated a new discourse on gender equality in the Indian legal system and may well back up other movements in their attempts to pursue legal activism for social change. On the other hand, in the wake of *Shayara Bano* there have also been incidences where under the guise of women's rights, Hindu nationalist political parties and other forces pursue anti-Muslim politics. The drafting of the Muslim Women (Protection of Rights on Marriage) Bill 2017, passed by the Indian lower house of parliament in December 2017, which attempts to criminalise Muslim husbands who pronounce triple *ṭalāq* with up to three years of imprisonment is one such worrying example.

This paper will first provide an overview of the Indian personal law system in its constitutional context (II). It will then depict three particular actors that largely shape the dis-

[1] *Shayara Bano v Union of India and Others* AIR 2017 SC 4609.

course around Muslim personal law: the Indian State; the Muslim clergy; and Muslim women's organisations – and the arguments that these actors deploy to advance their interests (III). In sections (IV) and (V), the paper will demonstrate the extent to which *Shayara Bano* was a deviation from the state's earlier positioning vis-à-vis Muslim personal law. Firstly, using a number of examples, it will be demonstrated that the State largely refrained from any interference with Muslim personal law until *Shayara Bano* (IV). Secondly, a contextualised analysis of the *Shayara Bano* case in which both the Muslim clergy and the Muslim women's groups played a significant role will show that this was indeed a landmark decision that shackled the power balances between the three actors (V). Against this backdrop, the paper will engage with the potentials and risks that the judgment produced (VI), before finishing with a brief concluding section that addresses possible future directions the three actors could move to (VII).

II. Personal Laws in the Indian Constitutional Context

Why was it possible in the first place for Shayara Bano's husband to divorce his wife by way of triple *ṭalāq*? The reason lies in the fact that in India, Muslims, like other religious communities (particularly Hindus, Christians and Parsis[2]), are granted the right to govern the family and property matters of their community members according to religion-based personal laws. Such personal law systems, which exempt family and inheritance law from the purview of state law are also known in other post-colonial contexts.[3] Notwithstanding the debates about a replacement of the Indian personal law system with a Uniform Civil Code (UCC) which date back to pre-Independence times,[4] to date, the personal laws have been maintained and the constitution's directive principle to "endeavour to secure for the citizens a uniform civil code" (Article 44) remains unfulfilled.

Notably, the different personal laws cannot be taken to be single homogenous sets of rules. As Werner Menski points out, Hindu personal law is "a *family* of laws rather than one single unit".[5] The same can be said for Muslim personal law which in its present form is a conglomerate of norms based on religious scriptures and Anglo-Saxon principles which found their way into the Indian personal law system through the administration of these laws by the British during colonialism.[6]

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[2] Buddhists, Jains and Sikhs are counted in the Hindu-category: see for instance, Hindu Marriage Act 1955, s 2(1) (b). See also explanation II to Article 25 of the Indian Constitution.

[3] See for instance Alamgir Muhammad Serajuddin: *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism*, Karachi 2011; Yüksel Sezgin: *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt, and India*, Cambridge 2013.

[4] Granville Austin: Religion, Personal Law, and Identity in India, in: *Religion and Personal Law in Secular India: A Call to Judgment*, ed. by Gerald James Larson, Bloomington 2001.

[5] Werner Menski: *Hindu Law: Beyond Tradition and Modernity*, New Delhi 2003, p. xvi (his emphasis).

[6] See for instance Archana Parashar: *Women and Family Law Reform In India: Uniform Civil Code and Gender Equality*, New Delhi 1992; Menski: *Hindu Law* (n. 5); Siobhan Mullally: Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case, in: *Oxford Journal of Legal Studies* 24.4 (2004), pp. 671–692; Rina Verma Williams: *Postcolonial Politics and Personal Laws: Colonial Legacies and the Indian State*, New Delhi 2006.

Muslim personal law consists of some codified laws and large parts of uncodified and customary rules. The customary rules again vary along the lines of the Shia and Sunni divide, different schools of thought as well as different regions. Among the codified laws are the Muslim Personal Law (Shariat) Application Act of 1937 and the Dissolution of Muslim Marriages Act, 1939, which both date back to colonial times.

From a gendered point of view, the personal laws of all religious communities – and not only those of the Muslim community – are problematic as they contain inherent inequalities between men and women, for instance with regard to inheritance rights, polygamy, divorce grounds, child adoption or guardianship rights.[7] These inequalities conflict with the constitutional right to equality enshrined in Articles 14 (equality before the law) and 15 (no discrimination on grounds of religion, race, caste, sex or place of birth) and would thus, on the basis of Article 13, have to be declared unconstitutional.[8] Some of the personal law provisions might further be regarded as in conflict with the right to life, guaranteed under Article 21 and generally interpreted in a broad sense as including personal liberty and the right to live with human dignity.[9] They could also be seen as problematic with regard to international human rights law, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Universal Declaration of Human Rights.[10]

On the other hand, it is also argued, that (at least some) practices that fall within the ambit of personal laws are protected under Article 25, which deals with the right to freedom of religion and includes freedom of conscience and free profession, practice and propagation of religion. According to Article 25(1), freedom of religion is, however, subject to public order, morality and health and to the other fundamental rights provisions. A balancing with

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[7] For a more in-depth analysis of the problematic aspects of different personal laws see, Flavia Agnes: *Family Law Volume I: Family Laws and Constitutional Claims*, New Delhi 2011; Laura Dudley Jenkins: Diversity and the Constitution in India: What is Religious Freedom?, in: *Drake Law Review* 57.4 (2009); Archana Parashar: Just Family Law: Basic to all Indian Women, in: *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia*, ed. by Indira Jaising, New Delhi 2005.

[8] Article 13(1) of the Indian constitution provides that "[a]ll laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part [part III – the fundamental rights], shall, to the extent of such inconsistency, be void". Article 13(2) states that "[t]he State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." Whether or not the personal laws can be tested against the equality provisions is debated. The Mumbai High Court in *The State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84 held that (uncodified) personal laws were not "laws in force" within the purview of Article 13 of the Constitution and were therefore not void even when they came into conflict with fundamental rights. The Supreme Court held a different view in an obiter dictum in *C Masilamani Mudaliar & Ors v The Idol of Sri Swaminathaswami Thirukoil* AIR 1996 SC 1697 and also tested the personal laws against fundamental rights in a number of cases, most recently in *Shayara Bano*.

[9] *Maneka Gandhi vs. Union of India*, 1978 SCR (2) 621.

[10] It is worthwhile to note here that while India signed and ratified the CEDAW in 1980 and 1993 respectively, it made reservations to specific provisions. Most importantly, the Indian Government declared with regard to Articles 5 (a) and 16 (1) of the CEDAW, that it ensures "these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent".

the right to equality would thus be necessary here. Furthermore, according to Article 25(2) (b), the same article does not "prevent the State from making any law [...] providing for social welfare and reform". Under this subsection, for instance, the provisions of the Hindu Marriage Act, 1956, have been considered to be protected.[11]

In addition, there are other constitutional provisions that play a role in the engagement with religion-based personal laws. One such provision is the principle of secularism, that is enshrined in the constitution's preamble and which the Supreme Court regards as part of the Constitution's "basic structure."[12] While at first sight, religion-based personal laws might be seen as in conflict with this principle, it is noteworthy that in India, secularism is generally understood slightly different than in European countries or in the USA: not as a strict divide between church and state, but as a principle of equal protection of all religions and equal distance towards all of them.[13] Secularism is then not necessarily a hindrance to the existence of personal laws. Another key provision is the previously mentioned Article 44, which calls for the introduction of a Uniform Civil Code. Article 44 is, however, not a fundamental right, but a directive principle, i. e. a non-enforceable guideline to the state. A law cannot be declared unconstitutional on the sole ground that it contravenes a directive principle.[14]

In the discourse around personal laws, Muslim personal law certainly has a special role. The Muslim community – which in itself is obviously not a homogenous block, but a group that is disaggregated in terms of caste, race, class and of the urban-rural divide[15] – is India's largest minority community comprising 172 Million people.[16] While this seems to be an impressive number, in a huge country such as India, this only constitutes 14.2 % of the whole population. Ever since Independence, India has time and again witnessed acts of hostility between Hindus and Muslims on varying scales and in varying degrees. Indian Muslims have suffered in particular from violent actions of Hindu nationalists who believe that India should be a country for Hindu's only. Against this backdrop, Muslim personal law has regularly functioned as a crucible in which larger conflicts between different religious groups are concentrated. For some, Muslim personal laws are a crucial marker of Muslim minority identity, which grants them a feeling of belonging. For others, the laws are an example where Muslims are unfairly being granted more rights than other parts of the population.

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[11] See, for instance, Vijaya Narain Shukla / Mahendra Pal Singh: *V. N. Shukla's Constitution of India*, Lucknow [12]2013, on Article 25.

[12] *S. R. Bommai v. Union of India* (1994) 2 SCC1.

[13] Gary Jeffrey Jacobsohn: *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, Princeton 2003, pp. xii ff.; Rajeev Bhargava: *Should Europe learn from Indian Secularism?*, see: www.india-seminar.com/2011/621/621_rajeev_bhargava.htm (last access 15. 03. 2018).

[14] Durga Das Basu: *Introduction to the Constitution of India*, Gurgaon [21]2013. However, there are also instances where the Supreme Court has "read" directive principles "into" fundamental rights (see for instance *Mohini Jain v. State of Karnataka and others* (1992) 3 SCC 666 or *Unii Krishnan J. P. and others v. State of Andhra Pradesh and others* (1993) 1 SCC 645). This has, however, not been the case with regard to Article 44.

[15] Mengia Hong Tschalaer: *Muslim Women's Quest for Justice: Gender, Law and Activism in India*, Cambridge 2017, p. 42.

[16] *Census of India* (2011), see: www.censusindia.gov.in-/2011census/C-01.html (last access 15. 03. 2018).

III. Actors in the Discourse around Muslim Personal Law

This paper distinguishes three key protagonists that largely shape the discourse around Muslim personal law: the Indian State; the Muslim clergy; and Muslim women's organisations.[17] It is clear that each of the three actors itself consists of different institutions, groups or persons with varying viewpoints on Muslim personal laws. For the purpose of this paper, however, these sub-divisions and inner differences are less important, as the aim here is to engage with the personal law discourse on a macro and not on a micro-level and to compare and contrast these actors, their positions and arguments in the larger socio-political context.

1. The State: The Indian Legislature and the Indian Higher Judiciary

For the purpose of this study, the category of 'the State' refers to the Indian parliament as the lawmaker and the Indian higher judiciary, as the law interpreter (and sometimes second lawmaker). The Indian parliament consists of two houses, the *Lok Sabha* (House of the People) and the *Rajya Sabha* (House of States).[18] Articles 107–108 of the Indian Constitution stipulate that one of the key functions of the parliament is that of legislation. Regular bills may be introduced in either of the houses (Art. 197 (1)). They become law once they are passed by both houses and received the assent of the President. The Indian higher judiciary refers to the Indian Supreme Court and the high courts.[19] The Supreme Court performs several roles, one of which is that of a constitutional court, which among other aspects engages with cases where fundamental rights violations are alleged under Article 13 (1) read with Article 32.[20]

When the Indian parliament is compared with the Indian higher judiciary (particularly the Supreme Court), it is interesting that not only does the latter feature more prominently in legal academic scholarship, but it also has a better reputation among the Indian population at large.[21]

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[17] Another actor, that is not part of this study, but which should be kept in mind as a fourth actor impacting the discourse is the media. For a detailed study showing how media portrayal of Muslim personal law has changed over time, see Nadja-Christina Schneider: *Zur Darstellung von "Kultur" und "kultureller Differenz" im indischen Mediensystem: die indische Presse und die Repräsentation des Islams im Rahmen der Zivilrechtsdebatte, 1985–87 und 2003*, Berlin 2005.

[18] The *Lok Sabha* is the more significant institution; its members are elected from country-wide general constituencies. The *Rajya Sabha* is an indirectly elected body whose members are elected by the various State legislative assemblies and Union Territories.

[19] The Indian judiciary consists of a three tire system, which besides the Indian Supreme Court and the 24 high courts includes the subordinate judiciary.

[20] In addition, the Court also functions as a court of final appeal in a range of constitutional, civil and criminal cases; it can accept appeals by 'special leave' (Article 136) and it has inherent powers that allow it to do 'complete justice' and to review its own judgments (Articles 137 and 142). Less than 3 % of the cases heard by the Supreme Court are proper constitutional cases. See Arun Thiruvengadam: *The Constitution of India: A Contextual Analysis*, Oxford 2017, pp. 110 f.

[21] Alfred Stepan / Juan J. Linz / Yogendra Yadav: *Crafting State-Nations: India and Other Multinational Democracies*, Baltimore 2011, pp. 75 ff. The authors point to different statistics that show that there is more trust in the 'legal system' than in 'parliament' and that there is particularly low trust in the police and political parties. See also Devesh Kapur / Pratab Bhanu Mehta: *The Indian Parliament as an Institution of*

The Indian parliament is largely regarded as ineffective or even dysfunctional, a place of "rowdiness and disorder and theatrics replacing debate".[22] This impression is related to the fact that large numbers of parliamentarians have criminal cases registered against them[23] and to the phenomenon of family or dynastic connections among the MPs.[24] While the Indian parliament has over time generally become more representative of the different social classes among the Indian population, the representation of women and Muslims in parliament is still very low.[25] For several decades, the question of quotas for these two groups have been debated, but so far without any significant outcome.[26]

The Indian Supreme Court, on the other hand, enjoys a positive image as a powerful guardian of the people. Austin's famous dictum of the Court as the "guardian of the social revolution"[27] very much shaped how the Supreme Court perceived its own role[28] and how it was understood by the people at large and by legal academics. The Supreme Court's power of judicial review[29] and its development of Public Interest Litigation (PIL)[30], have les schol-

Accountability, United Nations Research Institute for Social Development, Programme Paper Number 23 (2006), p. 16.

[22] Kapur / Mehta (n. 21), p. 29.

[23] Ibid., (n. 21), p. 17; Thiruvengadam (n. 20), p. 62.

[24] Thiruvengadam (n. 20), p. 62.

[25] Of the 543 MPs elected to the 16th *Lok Sabha* (2014–present), only 22 are Muslims and 62 are women. For statistics, see: www.prsindia.org/media/media-updates/profile-of-the-16th-lok-sabha-3276 (last access 15. 03. 2018). See also Thiruvengadam (n. 20), pp. 62 f.

[26] Ibid., p. 63.

[27] Granville Austin: *The Indian Constitution: Cornerstone of a Nation*, Delhi 1966, p. 169.

[28] In *S. P. Gupta vs President Of India And Ors* (AIR 1982 SC 149) (para. 27) the Supreme Court held that "[t]he judiciary has [...] a socio-economic destination and a creative function. It has to use the words of Granville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man."

[29] Notably, the text of the Constitution does not vest important powers in the courts. But through a process of judicial interpretation, the judiciary has largely expanded its own powers. Particularly Article 13, which *implies* the judiciary's power to strike down parliamentary laws that contravene with the fundamental rights, has been the source for judicial review over legislative and administrative action. See Thiruvengadam (n. 20), p. 104.

[30] For a detailed description of the development of PIL see S. P. Sathe: *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Delhi [2]2002; Menaka Guruswamy / Bipin Aspatwar: Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court, in: *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, ed. by Daniel Bonilla Maldonado, Cambridge 2013; or Anuj Bhuwania: *Courting the People: Public Interest Litigation in Post-Emergency India*, Cambridge 2017. Importantly, there are different aspects to PIL. On a procedural level, the Supreme Court held it no longer necessary that the petitioner of a case was also the party injured or wronged, but allowed citizens to bring cases on behalf of others. Furthermore, the Court gave up the formal requirement of filing a petition when, in a series of cases it treated letters and postcards as legitimate writ petitions. In addition, the Court appointed commissions to gather evidence and it expanded its own role to that of a monitor of implementation body by ordering far-reaching remedial measures and supervising the execution of these.

led scholars to call it "the most powerful court in the world"[31] and to hail it for "taking [people's] suffering seriously."[32] And indeed, the Supreme Court has taken very bold and far-reaching decisions in many areas of law (particularly concerning socio-economic rights and environmental aspects),[33] thereby protecting the interests of many marginalised groups such as under trials, bonded labourers, but also women.[34] It is only more recently, that the Supreme Court's far-reaching decisions have also been harshly critiqued.[35]

Since India is a secular country, both the parliament as well as the judiciary are secular institutions. India thus differs from other countries, such as Pakistan, where the Federal *Shariat* Court examines whether the laws of the country comply with Islamic law. However, in practice, both the Parliament and the Supreme Court, are dominated by (male) Hindus and there have been instances where Supreme Court judges have been criticised for misusing their authority to "become theologians"[36] and for using their power to foster Hindu interests or to defame Muslims.[37]

2. The Muslim Clergy

However, the State is not the only or even the primary maker and interpreter of personal law. Rather, scholarship has pointed out that personal laws are largely debated, negotiated, applied and shaped outside of the purview of the state and within the religious communities.[38]

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[31] Indira Jaising: An Outsider, Inside, in: *Making a Difference: Memoirs from the Women's Movement in India*, ed. by Ritu Menon, New Delhi 2011; Sathe (n. 30), p. 249.

[32] Upendra Baxi: Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, in: *Third World Legal Studies* 3 (1985), pp. 107–132.

[33] For an overview, see Guruswamy / Aspatwar (n. 30).

[34] Avani Mehta Sood: Gender Justice through Public Interest Litigation: Case Studies from India, in: *Vanderbilt Journal of Transnational Law* 41.3 (2008), pp. 833–906.

[35] Critics stress that the Court has been overstepping its powers by interfering with the role of the legislator as well as the government; see Sathe (n. 30); Bhuwania (n. 30). Other scholars have bemoaned the ideological approach of more recent PIL cases. The Supreme Court, it is argued, has turned away from its earlier constituency of the poor and the marginalised to follow a neo-liberal path, thereby giving up some of its former ideals of human rights and social justice; see Usha Ramanathan: Of judicial power, in: *Frontline* (March 16–29, 2002), see: www.frontline.in/static/-html/fl1906/19060300.htm (last access 15. 03. 2018); Balakrishnan Rajagopal: Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective, in: *Human Rights Review* 18.3 (2007), pp. 157–187.

[36] Ronojoy Sen: Secularism and Religious Freedom, in: *The Oxford Handbook of the Indian Constitution*, ed. by S. Choudhry, M. Khosla and P. Mehta, Oxford 2016, pp. 885–902 (896 f.).

[37] In *Mohd Ahmed Khan v Shah Bano Begum and Ors* AIR 1985 SC 945, the fact that a Supreme Court bench consisting of five Hindu judges interpreted Muslim personal law and drew on rather biased stereotypes against the Muslim community, led to severe critique. In the case of *Dr. Ramesh Y. Prabhoo v P. K. Kunte* (1995 S. C. A. L. E. 1) the Supreme Court's judgment characterised Hinduism as a 'way of life', a statement that was promptly appropriated by the Hindu nationalists and found mention in the BJP's political manifesto for the General Elections in 1999, see Thiruvengadam (n. 20), p. 202; Ratna Kapur / Brenda Cossman: Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy, in: *Harvard International Law Journal* 38.1 (1997), pp. 113–170.

[38] Gopika Solanki: *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India*, Cambridge 2011; Tschalaer (n. 15).

One organisation that is largely perceived as the representative body of Indian Muslims is the *All India Muslim Personal Law Board* (AIMPLB). Founded in 1973, it was long unrivalled as the representative forum of Indian Muslims, until its authority was challenged both by Shia Muslims and Muslim women, who in 2005 each formed their own organisations because they did not see their respective interests being represented adequately by the Board.[39]

The AIMPLB strongly resists all state intervention into Muslim personal law from the side of the state, be it via legislation or through judicial interpretation.[40] Among its "Aims and Objectives", the organisation states that it aims:

> a) To take effective steps to protect the Muslim Personal Law in India and for the retention, and implementation of the Shariat Act.
> b) To strive for the annulment of all such laws, passed by or on the anvil in any State Legislature or Parliament, and such judgments by courts of Law which may directly or indirectly amount to interference in or run parallel to the Muslim Personal Law or, in the alternative, to see that the Muslims are exempted from the ambit of such legislations.[41]

This rejection of state interference is based mainly on two arguments, firstly the notion that Muslim personal law is somewhat "sacrosanct" and thus immune to change, because personal laws "are derived from religious texts or scriptures"; and secondly the understanding that the personal laws are of "unique relevance" for "cultural identity" and consequently "any kind of interference [...] is not only a violation of religious freedom in the constitution but will put an end to [the community's] unique cultural identity".[42]

The AIMPLB would like the state to stay completely away from Muslim personal law and indeed favours a situation where the Muslim population is governed by Muslim institutions independent of the state. One important project, fostered by the AIMPLB was the setting up of *darul qazas* (sometimes also termed *Shariat* courts) in different Indian cities. These are alternative dispute resolution mechanisms for Indian Muslims that resolve family issues in accordance with the *Šarīʿat* and the *Qurʿān*. The setting up of these institutions benefited from Article 26 of the Indian Constitution, which stipulates freedom for religious groups to maintain and establish institutions for religious and charitable purposes, and to manage their own affairs in matters of religion. These highly bureaucratised and formalised institutions have become an integral part of India's plurilegal landscape, especially in the northern part of the country, where Islam is more prevalent.[43] The *qazi* (the judge of such courts) for many Muslims is a spiritual, moral and legal authority.[44]

Although the *darul qazas* are located outside of the state legal system (the verdicts of *darul qazas* are not enforceable by state au-

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[39] These organisations were the All India Shia Personal Law Board (AISPLB) – a reaction to the impression that the issues of the Shia community had been side-lined by both the Indian government as well as the Sunni dominated AIMPLB and the All India Muslim Women Personal Law Board (AIMWPLB), which was founded by Shia and Sunni women. See Tschalaer (n. 15), pp. 61–63.

[40] Tschalaer (n. 15), pp. 53 f.

[41] See: www.aimplboard.in/objectives.php (last access 15. 03. 2018).

[42] See, for instance, a press note of the AIMPLB and other Muslim Organisations. Available at: aimplboard.in/images/media/Press13-10-2016%20ENGLISH.pdf (last access 15. 03. 2018).

[43] Tschalaer (n. 15), p. 53.

[44] Ibid., p. 54.

thorities and dissatisfied parties cannot approach the state courts to enforce or appeal the verdicts[45]), the Indian State acknowledges these institutions as cheap community based alternative dispute settlement bodies.[46] In response to a Public Interest Litigation claim, the Supreme Court ruled that *darul qazas* were not unconstitutional, but that "no Dar-ul-Qazas [...] shall give verdict or issue Fatwa touching upon the rights, status and obligation, of an individual unless such an individual has asked for it".[47]

3. Muslim Women's Groups

The third actor involved in the discourse around Muslim personal law is Muslim women's groups. While the Indian women's movement, for the most part, evolved in the mid-1970s, most Muslim women's groups were established later and against the backdrop of a perceived Hindu bias among the Indian women's movement and an understanding that more intersectional approaches were necessary to represent India's women adequately.[48] Muslim women's groups are distinct from other presumably secular women's organisations in so far as their constituency is largely comprised of Muslim women and that they therefore are concerned primarily with the concerns and interests of Muslim women. They draw largely on Quranic principles and argue that the Quran guarantees women certain rights, which are in practice largely denied to them as a consequence of prevailing patriarchal interpretations of Islam and Muslim law.[49] With this understanding, Indian Muslim women's groups are part of and influenced by transnational Islamic feminism.[50] In their argumentation, Muslim women's groups and activists draw on both Islamic scriptures as well as Indian constitutional law and international human rights law,[51] as illustrated by a quote from a member of the Mumbai-based *Bharatiya Muslim Mahila Andolan* (BMMA):

> [W]e believe that we have to ensure rights for women from wherever it comes. If it's coming from CEDAW, we will look at CEDAW,

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45 Ibid., p. 53.

46 Ibid.

47 *Vishwa Lochan Madan vs Union Of India & Ors*, Supreme Court of India, on 7 July, 2014, Writ Petition (Civil) No. 386 OF 2005.

48 For instance, the founding of the *Bharatiya Muslim Mahila Andonan* in 2007 grew out of an understanding that the Indian women's movement assumed "the homogeneity of women's identity and thus could not effectively address the concerns of the many excluded and minority groups" like Dalits, Muslims and Adivasis; see: bmmaindia.com/2017/01/31/milestones-in-a-10-year-journey-2007-to-2016 (last access 15. 03. 2018). On the Hindu dominance among the early Indian women's movement see Flavia Agnes: Redefining the Agenda of the Women's Movement within a Secular Framework, in: *Women and Right-Wing Movements: Indian Experiences*, ed. by Tanika Sarkar and Urvashi Butalia, London 1995, pp. 136–157; Radha Kumar: *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800–1990*, New Delhi 1993, p. 106.

49 Nadja-Christina Schneider: Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – or Vice Versa?, in: *Journal of International Women's Studies* 11.1 (2009), pp. 56–61; Sylvia Vatuk: Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law, in: *Modern Asian Studies* 42.2 (2008), pp. 489–518.

50 Schneider: Islamic Feminism (n. 49); Vatuk (n. 49).

51 I disagree with Vatuk, who stresses that "[i]n justifying their demands, these women activists refer neither to the Indian Constitution nor to the universalistic human rights principles that guide secular feminists campaigning for passage of a gender-neutral uniform civil code of personal law, but rather to the authority of the Qur'an", Vatuk (n. 49), p. 489.

> if it's coming from the constitution of India, we will take it from there, if it's coming from the Qur'an, we will take it from there. Wherever a woman is being supported to fight for her rights, we take that, why should we not take it?[52]

This statement can be understood as a pragmatic course of action, using whatever is deemed helpful in the advancement of Muslim women's rights. But it can also be regarded as a process of "vernacularisation"[53] of international human rights norms to the local context.

While media often depicts the scenario as one in which progressive Muslim women's groups fight against a regressive Muslim clergy,[54] the demarcation lines are often not as clear-cut. Indeed, Muslim women's rights activists have openly challenged the religious and legal hegemony of the AIMPLB and the *darul qaza* system as biased against women. But it is also true that many Muslim women's rights activists in India face a dilemma when positioning themselves *vis-à-vis* their religion and Muslim personal law. On the one hand they strive for gender equality and against patriarchal oppressive structures; and on the other hand, they also see the dangers and difficulties in rebelling against a legal system that is largely regarded as an important identity marker of their religious community. Avoiding an either-or-decision, many Muslim feminists have pursued avenues where they sought to balance their attempt to bring about gender equality with respect for culture, tradition and religious beliefs.[55] In her description of Muslim women's rights activism in the city of Lucknow, Tschalaer, for instance, draws on Kandiyoti's concept of "bargaining with patriarchy"[56] to describe a phenomenon in which women challenge certain norms of their communities, while at the same time acting in ways that conform with patriarchal ideas of women's modesty and purity.[57]

For many Muslim women's organisations, such a balancing act means that they reject a replacement of Muslim personal laws by a secular UCC. Instead, they want to maintain Muslim personal law, but seek a reform with regard to those provisions that discriminate against women, for instance, Muslim men's rights to practice polygamy or to divorce their wives by triple *ṭalāq*, unequal inheritance laws or discriminatory provisions regarding guardianship.[58]

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[52] Noorjehan Noorjehan Safia Niaz: BMMA, interview with the author on 29 December 2015.

[53] Sally Engle Merry / Peggy Levitt: Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States, in: *Global Networks* 9.4 (2009), pp. 441–461; Sally Engle Merry et al.: Law From Below: Women's Human Rights and Social Movements in New York City, in: *Law & Society Review* 44 (2010), pp. 101–128.

[54] See for instance R. Ilangovan / Sagkik Dutta: Taking on patriarchy, in: *Frontline* (6 September 2013), p. 11, who speak about Muslim women "waging an unusual war within their faith" and being "optimistic that this will bring about a radical change in the mindset of orthodox Muslims who look at the activities of these women with suspicion today." See: www.frontline.in/cover-story/taking-on-patriarchy/-article5037878.ece (last access 15. 03. 2018); generally see Tschalaer (n. 15), pp. 63, 69.

[55] Tanja Herklotz: Feminist Dilemmas: The Challenges in Accommodating Women's Rights within Religion-Based Family Law in India, in: *Normative Pluralism and Human Rights: Social Normativities in Conflict*, ed. by Kyriaki Topidi, Routledge 2018.

[56] Deniz Kandiyoti: Bargaining with Patriarchy, in: *Gender and Society* 2.3 (1988), pp. 274–290.

[57] Tschalaer (n. 15), p. 86.

[58] Muslim women's groups thus agree with those sections of the Indian women's movement that argue for small step by step community-led reforms within the ambit of personal laws. The opposing view, which is also prevalent among Indian women's rights activists

They pursue this attempt mostly through two routes: firstly, they lobby the legislator as well as their own community to introduce new and better laws and secondly, they pursue strategic litigation in order to have certain discriminatory provisions declared unconstitutional.

IV. The State's "Hands-Off Approach": The Situation prior to *Shayara Bano*

The situation prior to the *Shayara Bano* case can be described as one where the Indian State largely refrained from interference in Muslim personal law and thereby granted the Muslim clergy authority of interpretation. Gopika Solanki speaks about a "sheared adjudication" model in this regard, according to which the Indian State willingly gave some of its adjudicative authority to religious and societal actors and organisations.[59]

1. Restraint in Interfering with Muslim Personal Law

A brief glance at modern Indian legal history shows that both the legislator as well as the higher judiciary have largely refrained from interfering with Muslim personal law. In terms of legislative change, Muslim personal law has undergone remarkably little change, especially when compared to the personal laws of the Hindu and Christian communities. Hindu personal law was codified and reformed in the 1950s through four legislations that are collectively referred to as the Hindu Code Bills.[60] This reform process, which significantly improved the situation for Hindu women,[61] was at least partly a reaction to the feminist demands that had called for reforms in this realm.[62] Hindu personal law has since then undergone other reforms, most recently

and feminist scholars, argues in favour of the introduction of a UCC in order to provide for gender just laws. On small scale reforms within the personal laws see Flavia Agnes: Minority Identity and Gender Concerns, in: *Economic and Political Weekly* 36.42 (2001), pp. 3973–3976. On suggestions to introduce a UCC see Vasudha Dhagamwar: *Towards the Uniform Civil Code*, Bombay 1989; Parashar: Just Family Law (n. 7); Catharine A. MacKinnon: Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws", in: *International Journal of Constitutional Law* 4.2 (2006), pp. 181–202; Farrah Ahmed: Remedying Personal Law Systems, in: *International Journal of Law, Policy and the Family* 30(3) (2016). For an overview on the different feminist standpoints and the shifts throughout time see Tanja Herklotz: Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court, in: *Verfassung und Recht in Übersee* 49.2 (2016), pp. 148–174.

[59] Solanki (n. 38).

[60] The Hindu Marriage Act (1955), the Hindu Succession Act (1956), the Hindu Minority and Guardianship Act (1956) and the Hindu Adoption and Maintenance Act (1956).

[61] Through the new legislation, Hindu marriages became dissoluble contracts and monogamy was imposed on Hindu men, the inheritance rights for daughters and widows were enlarged, mothers got more rights with regard to the guardianship of their children, girls could be taken in adoption (while previously only boys could be adopted) and wives and widows were granted maintenance rights. For a detailed description of the reforms see Agnes (n. 7), p. 19. Despite these significant changes, feminist scholars have bemoaned, that the laws that were passed were watered down versions of earlier drafts and that after the reforms Hindu personal law was still far from providing equal rights to men and women. Nivedita Menon: *Seeing Like a Feminist*, Zubaan 2012, pp. 24 ff.; Agnes (n. 7), p.p. 23 ff.

[62] Aparna Basu / Bharati Ray: Women's Struggle: *A History of the All India Women's Conference 1927–1990*, New Delhi 1990, p. 46.

through an amendment of the *Hindu Succession Act* in 2005. Christian law, on the other hand, had undergone some codification process under British rule and was to some extent reformed in the 1980s.[63] Muslim personal law, on the contrary, did not see such major reform processes. The only larger reform in this area was the introduction of the *Muslim Women (Protection of Rights on Divorce) Act* (MWA) in 1986, which, however, was rather an attempt by the Indian government and parliament to undo a Supreme Court judgment and maintain the status quo of Muslim personal law, as will be elaborated below.

A similar reluctance to interfere with Muslim personal law can be seen as regards the Indian higher judiciary. Compared to other areas of law, where the Indian Supreme Court has taken significant decisions in order to foster gender equality, the Court was astonishingly silent with regard to women's rights under personal laws,[64] particularly with regard to Muslim personal law. This "hands-off approach"[65] in the area of personal laws is remarkable, particularly against the backdrop of the Court's power of judicial review and its reputation as an independent and activist court, which was described above. As Indira Jaising[66] argues, the Indian courts have tended to circumvent the question of discrimination in family laws, either by holding that the personal laws are not "laws" in the purview of Article 13,[67] by drawing on the argument of a separation of powers and passing the ball back to the legislator,[68] or by arguing that a specific discrimination was not based *only* on the grounds of sex as demanded by Article 15(1).[69]

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[63] Most prominently, Section 10 of the Indian Divorce Act of 1869, which had made divorce for Christian men much easier than for Christian women, was revised. The law reform was a reaction to decade long campaigns in which Indian Christian women together with the Churches had demanded legal change and some individuals and activist lawyers had approached the courts against the problematic provisions. See Narendra Subramanian: *Nation and Family. Personal Law, Cultural Pluralism, and Gendered Citizenship*, Stanford 2014, p. 69.

[64] MacKinnon: *Sex Equality* (n. 58).

[65] Indira Jaising: Gender Justice and the Supreme Court, in: *Supreme but not Infallible: Essays in Honour of the Supreme Court of India*, ed. by B. N. Kirpal et al., New Delhi 2000, p. 290.

[66] Indira Jaising: From "Colonial" to "Constitutional", Gender justice and Governance, in: *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia*, ed. by Indira Jaising, New Delhi 2005; Indira Jaising: Gender Justice: A Constitutional Perspective, in: *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia*, ed. by Indira Jaising, New Delhi 2005.

[67] *Narasu Appa Mali* (n. 8).

[68] In *Maharshi Avadhesh v. Union of India* (1994) Suppl. (1) SCC 713 the petitioners' writ petition to declare the Muslim Women Act (MWA) unconstitutional was dismissed with the argument that "[t]hese are all matters for legislature. The Court cannot legislate in these matters". In *Madhu Kishwar & Ors v State of Bihar & Ors* AIR 1996 SC 1864, the Supreme Court stated: "However, laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject". See also *Ahmedabad Women Action Group v. Union of India* (1997) 3 SCC 573.

[69] In a number of rather problematic decisions, the judiciary has held that discrimination based on sex as well as other factors would not amount to discrimination as such discrimination was not based "only" on grounds of sex. See for instance, *Sucha Singh Bajwa v. The State of Punjab* AIR 1974 P&H 162; *Nalini Ranjan Singh v. State of Bihar* AIR 1977 Pat 171.

Even in cases where the women claimants "won", the judiciary refused to test the specific personal law provisions against the doctrine of equality. For instance, in *Mary Roy*,[70] the problematic provision in the Trivancore Christian Succession Act was struck down on a technicality. In *Madhu Kishwar v. State of Bihar*[71] and in *Githa Hariharan*[72] the Court "read down" the discriminatory provisions, rather than declaring them unconstitutional.

An early exception where the Supreme Court decided in the area of Muslim personal law, was the *Shah Bano* case of 1985,[73] where the Court granted post-divorce maintenance to a Muslim woman by applying Section 125 of the *Code of Criminal Procedure* (CrPC). The norm provides for maintenance of wives, children, and parents if they do not have enough means to maintain themselves. Notably, the Court did not declare a provision of Muslim personal law unconstitutional, but simply applied a secular provision to a Muslim woman as it would have done in any case concerning a woman of another religious community. The judgment nevertheless led to severe agitation among the Muslim population, stirred further by the *All India Muslim Personal Law Board,* which regarded the judgment as an interference by the Court in Muslim personal law.[74] This was because Muslim personal law does not recognise regular maintenance payments after the *iddat* period (roughly three months) and after the former husband has returned the *mahr* (a form of dower) to his ex-wife. But the dissatisfaction with the judgment was not only related to its outcome – in fact, two earlier judgments had decided in a similar manner and created no such outcry.[75] But it was also due to the fact that in this judgment, five Hindu judges commented on Muslim personal law, thereby largely drawing on anti-Muslim stereotypes.[76] The judgment painted a picture in which the helpless Muslim woman needs protection from the claws of its own religious community. Drawing on Spivak's famous dictum, one could say about *Shah Bano* that Hindu men sought to save Muslim women from Muslim men. Shortly after the judgment, the Rajiv Gandhi government pushed for a new law that basically undid the judgment by taking Muslims out of the purview of Section 125 CrPC: the above mentioned *Muslim Women (Protection of Rights on Divorce) Act* (MWA). Ever since, the attempts of women's

[70] *Mrs Mary Roy & Ors v State of Kerala & Ors* AIR 1986 SC 1011. The case regarded the validity of two pre-Independence statutes: the *Travancore Christian Succession Act* (1910) and the *Cochin Christian Succession Act* (1922), which were perceived as discriminatory against women and a violation of Articles 14 and 15. For a critical evaluation of this case see Agnes (n. 7), pp. 146 f.

[71] *Madhu Kishwar* (n. 68).

[72] *Ms Githa Hariharan & Anr v Reserve Bank of India & Anr* AIR 1999 SC 1149.

[73] *Shah Bano* (n. 37).

[74] On the aftermath of the *Shah Bano* case, see, for instance, Rochana Bajpai: *Debating Difference: Group Rights and Liberal Democracy in India*, New Delhi 2011, p. 180.

[75] *Bai Tahira A vs Ali Hussain Fissalli Chothia* AIR 1979 SC 362 and *Fuzlunbi vs K. Khader Vali And Anr* AIR 1980 SC 1730.

[76] The judgment, for instance, unnecessarily stated that a Uniform Civil Code would "help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies" – a reference to the Muslim community, which, the Court indicated with this comment, had delayed the process of legal unification. It further depicted Muslim women as helpless objects who would suffer from a personal law system that is "ruthless in its inequality." For a more detailed critique see Madhu Kishwar: ProWomen or Anti Muslim? The Shah Bano Controversy, in: *Manushi* 32 (1986), pp. 4–13; Agnes (n. 7), p. 157.

rights groups to have problematic provisions of Muslim personal law declared unconstitutional remained largely unsuccessful.[77]

That is not to say that no progressive judgments have been produced at all. Rather, the Indian higher judiciary has through case law diminished hardships for Muslim women to a certain degree. For instance, the Supreme Court and various high courts have not only held that Article 3 of the MWA must be interpreted in a way that the ex-husband must pay a lump-sum payment which economically secures the ex-wife's future,[78] but also that despite the existence of the MWA, the divorced Muslim woman is entitled to claim maintenance from her ex-husband under Section 125 of the CrPC even after the expiry of the *iddat* period, as long as she does not remarry.[79] In addition, the higher judiciary has also formulated rather concrete preconditions for a divorce by *ṭalāq* to be effective, thereby limiting the freedom of Muslim husbands to pronounce *ṭalāq* "at his whim".[80] However, on a large scale, the problematic provisions that exist in Muslim personal law have not been declared unconstitutional and a major confrontation with the Muslim clergy has been avoided.

2. Arguments and Reasons for the State's Reluctance

In justifying their reluctance to intrude into the realm of personal laws, the government, the parliament and the courts draw on different strands of argumentation. One argument that seems to still prevail among the parliament and the courts is that of two separate spheres, a public and a private one. While the state is supposed to regulate the former, it should refrain from interfering into the latter. Religion-based family law is considered to be part of the private sphere. This argument is brought forward very prominently in a Delhi High Court Decision, where the court held that the

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[77] See for instance *Maharshi Avadhesh v. Union of India* 1994 SCC, Suppl. (1) 713 and *Ahmedabad Women Action Group* (n. 68).

[78] *Danial Latifi & Anr v Union of India* AIR 2001 SC 3958.

[79] *Shabana Bano vs Imran Khan*, Supreme Court in 4 December, 2009. In its argumentation, the Court relied on the *Iqbal Bano* ruling, which held that "Proceedings under Section 125 Cr. P. C. are civil in nature" (*Iqbal Bano Vs. State of U. P. & Anr* (2007) 6 SCC 785, para. 10). See also Flavia Agnes: Shah Bano to Shabana Bano: The Many Small Victories for Muslim Women's Rights, in: *The Indian Express* (15 December 2009), see: indianexpress.com/article/opinion/columns/shah-bano-to-shabana-bano (last access 15. 03. 2018).

[80] The Gauhati High Court in *Jiauddin Ahmed v. Anwara Begum* (1981) 1 Gau. L. R. 358 and *Must. Rukia Khatun v. Abdul Khalique Laskar* (1981) 1 Gau. L. R. 375 held that *ṭalāq* was only valid if there was a reasonable cause for the divorce and if it was preceded by unsuccessful attempts at reconciliation between the husband and wife, involving two arbiters – one from the wife's family and the other from the husbands. Other judges have regarded triple *ṭalāq* as one revocable *ṭalāq*, meaning that after its pronouncement the husband has time to rethink his decision and an opportunity to revoke the same during the three months *iddat* period (*Masoor Ahmed v. State* (NCT of Delhi), 2008 (103) DRJ 137, para. 27). The Supreme Court, in *Shamim Ara vs State of U. P. & Anr.* (2002) 7 SCC 518, followed the Gauhati High Court, in that triple *ṭalāq* without a reasonable cause or without a previous attempt of reconciliation was considered invalid.

> [i]ntroduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life, neither Article 21 nor Article 14 have anyplace.[81]

A second argumentation – largely pursued by the government – draws on the doctrine of non-interference. The idea here is that the state should only interfere with personal laws, if and when the demand for such reform came from the respective religious community itself.[82] And thirdly, as depicted above, especially the Indian Supreme Court largely draws on the argument of separation of powers.[83]

All three arguments can be disguised as a farce quite easily. They rather seem to be used as an excuse for not acting, but there are certainly no strict principles that the state generally abides by. With regard to the distinction between a public and private domain, one might stress that not only is the Indian State bound by the Constitution to uphold the fundamental rights (Articles 12 and 13), but also the Indian constitution expressly prohibits discrimination between private actors.[84] The argument is also unmasked as the Indian State has in other areas indeed interfered with the so-called 'private' sphere, most prominently with the enactment of the *Protection of Women from Domestic Violence Act* (PWDVA) in 2005.

The rhetoric of non-interference is disguised by Rina Verma Williams. Her overview of the history of personal laws demonstrates that the State deployed this rhetoric, but never consequently followed it – neither during colonial nor post-colonial times.[85] Rather, the "rhetoric of non-interference was used more as a tool to justify government policies, based on changing political interests, than as an actual guide to formulating policy".[86]

But also the argument of separation of powers that the Indian Supreme Court frequently deploys, is untenable. It is precisely the Court's duty to declare unconstitutional law invalid. Why this should not be the case in the area of personal laws is not comprehensible. But, against the backdrop of the Court's activist role and the far-reaching and indeed political decisions that it took in other areas of law, the argument of a separation of powers seems to be just another avoidance strategy.[87]

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[81] *Harvinder Kaur vs Harmander Singh Choudhry* AIR 1984 Delhi 66, para. 34.

[82] On this argument Williams (n. 6).

[83] See, for instance, *Maharshi Avadhesh* and *Ahmedabad Women Action Group*, (both n. 68). For a more elaborate overview on the case law in this regard see Herklotz (n. 58).

[84] See for instance Article 15 (2) (a). On the issue of horizontal discrimination see Gautam Bhatia: Horizontal Discrimination and Article 15 (2) of the Indian Constitution: A Transformative Approach, in: *Asian Journal of Comparative Law* 11.1 (2016), pp. 87–109.

[85] Williams (n. 6).

[86] Ibid., p. 88.

[87] Ibid., p. 163; Herklotz (n. 89).

The calls for a UCC, that the Supreme Court every once in a while utters,[88] remained mere rhetoric and were not accompanied by any more concrete action to bring about change in the domain of personal laws.[89]

The actual reasons behind the lack of interference lie somewhere else. The personal laws are a highly sensitive issue. Especially with regard to Muslim personal law, any interference bears the risk of a backlash, as seen in the aftermath of the *Shah Bano* case. It is not only the fact that Muslims are a minority community (so are Christians and Parsis and there is less controversy around the respective personal laws of these communities). But, as stated above, the Muslim personal law is particularly politicised and it is much more linked to community identity than other personal laws. Any state action *vis-à-vis* Muslim personal law can easily produce reactions from different sides. Both the parliament as well as the courts have thus refrained from interfering in this area, as it was deemed too risky.[90] This lack of interference, as Narain, pointedly stresses, goes at the expense of Muslim women:

> By allowing Muslim leaders to continue to exercise authority over women of the community by refusing to reform the personal law, together with the state's policy of reinforcing the public / private split by claiming that no change is possible in the personal law unless the call for change comes from the community itself, the state has abandoned Muslim women to patriarchal interpretations of personal law and has legitimized their continued subordination.[91]

V. *Shayara Bano* – Deviating from the Norm

The Supreme Court broke away from precedent, with its decision in *Shayara Bano* in August 2017 when it declared Muslim divorce through triple *ṭalāq* invalid. With this judgment, the Court not only positioned itself on the topic and opposed the view of the Muslim clergy, but the State also took up some of the authority that it had earlier left to the Muslim community and thereby produced a shift in the balance of power.

Interestingly, triple *ṭalāq* is not explicitly regulated in any codified law. The key provision that the judgment engaged with was, therefore, the only provision that mentions *ṭalāq* at all: Section 2 of the *Muslim Personal Law (Shariat) Application Act* of 1937. It states:

> Notwithstanding any custom or usage to the contrary, in all questions [...] regarding [...]

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[88] For instance, in *Shah Bano* (n. 37), the Court bemoaned that article 44 "has remained a dead letter". In *Ms Jordan Diengdeh v. S. S. Chopra* (1985 AIR 935) the Court held that "[s]urely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste". In *Sarla Mudgal v. Union of India* ((1995) 3 SCC 635) the Court bemoaned that the "[r]ulers of the day" were apparently "not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949". In *John Vallamattom And Anr v. Union Of India* (JT 2003 (6) SC 37) the Court called the parliament to "step in for framing a common civil code in the country". And in *Abc v. State* (Supreme Court on 6 July 2015), the Court reminded that the Directive Principles envision a Uniform Civil Code and that "India is a secular nation and it is a cardinal necessity that religion be distanced from law".

[89] Herklotz (n. 58).

[90] On the argument that the court seeks to avoid riots, see also Werner Menski: The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda, in: *German Law Journal* 9.3 (2008), pp. 211–250 (219 f.).

[91] Vrinda Narain: *Reclaiming the Nation: Muslim Women and the Law in India*, Toronto 2008, p. 90.

> dissolution of marriage, including talaq [...] the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

The Court had to decide whether the Act in so far as it refers to triple *ṭalāq* (if it does at all), is unconstitutional.

The petition against triple *ṭalāq* was prominently supported by different Muslim women's groups and opposed by the *All India Muslim Personal Law Board*.

1. Arguments by the Muslim Women's Groups and the Muslim Clergy

The petitioners and the intervening women's groups based their contention mainly on the argument that triple *ṭalāq* was arbitrary and discriminatory and thus violated the equality provisions in Articles 14 and 15 of the Indian Constitution. It was further stressed, that it was the judges' duty to intervene in cases of violation of an individual's fundamental right, and to render justice. This, it was argued, was even more so in cases where the legislator (presumably due to political considerations) was reluctant in acting. It was further held that the Constitution's provisions on religious freedom did not in any manner impair the jurisdiction of the Court, since Article 25 itself postulated that religious freedom was subject to other fundamental rights provisions but Articles 14 and 15, on the other hand, were not subject to any restrictions. In fact, it was opined that triple *ṭalāq* was not even protected by Article 25 because it would not form an "essential practice" of religion.[92] Additionally, the argumentation also relied on international treaties and covenants to which India is a party, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the CEDAW and the respective references to gender equality, non-discrimination and human dignity therein. Beyond that, it was argued that triple *ṭalāq* was not in tune with the prevailing social conditions, as Muslim women were vociferously protesting against the practice. It was held that triple *ṭalāq* should be abolished in the same manner as the State had done away with practices once prevalent in the Hindu community, such as *sati* (the burning of widows on the funeral pyre of their deceased husbands) or polygamy. The fact that a number of countries with Muslim majorities had prohibited triple *ṭalāq* not only showed that state institutions were indeed capable of interfering with personal law, but also led to the paradox that Muslim women in secular India had lesser rights than Muslim women in Islamic states.

The rebuttal of the petitioners' contentions, prominently formulated by the AIMPLB, also drew on case law[93] in order to argue that the constitutionality of personal laws could not be tested by the courts. Instead, it was held with reference to Article 13 and Article 372, legal reform could only be brought about by the parliament. Other countries, too, had banned triple *ṭalāq* through legislative acts. It was further opined that triple *ṭalāq* – a mode of divorce that had been practised for 1400 years – was part and parcel of the personal law and thus part of the faith of at least some Indian Muslims (Sunni Muslims belonging to the Hanafi school). The practice was therefore protected under Article 25. Furthermore, it was argued that individual Muslim

[92] According to Indian jurisprudence, only "essential religious practice" is protected under Article 25; see for instance *The Commissioner Of Police & Ors vs Acharya Jagdishwarananda*, Supreme Court of India on March 11, 2004.

[93] *Narasu Appa Mali* (n. 8); *Ahmedabad Women Action Group* (n. 68).

couples were free to declare triple *ṭalāq* invalid in their marriage contract (*nikahnama*) or opt to be governed under the secular *Special Marriage Act* and could thus decide for themselves whether or not triple *ṭalāq* would be a valid form of divorce in their case. Deploying the rhetoric of non-interference, it was held that social reforms with reference to personal laws should generally emerge from the concerned community itself without the courts' interference.

2. The Court's Decision

The Court in its decision was split three to two.[94] The three judges in the majority regarded triple *ṭalāq* invalid, but used different reasoning to arrive at their conclusion: Justices Rohington Nariman and Uday U. Lalit held that the 1937 *Muslim Personal Law (Shariat) Application Act,* in so far as it refers to triple *ṭalāq,* violated Article 14 – the right to equality. They stated:

> [T]his form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression 'laws in force' in Article 13 (1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq.[95]

They further argued that triple *ṭalāq* – which was perceived as sinful in theology – did not constitute an "essential religious practice" and was therefore not protected under Article 25(1).[96]

Justice Kurian Joseph, who was also part of the majority opinion, agreed with the conclusion but based this on a different argument. He held that triple *ṭalāq* was not a valid practice in Islam and was therefore illegal. Notably, he stated: "Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible"[97] and concluded: "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well".[98]

The minority view, held by the then Chief Justice of India, Jagdish Singh Khehar and Justice Abdul Nazeer, was that though triple *ṭalāq* was undesired, the courts could not strike it down, and only the parliament could regulate on the matter. In their opinion, the personal laws of any religious community were "protected from invasion and breach, except as provided by and under Article 25". *The justices did not see a reason to engage with the relationship between Articles 25* vis-à-vis *Articles 14, 15 and 21*. They concluded that the Court

> cannot nullify and declare as unacceptable in law, what the constitution decrees us, not only to protect, but also to enforce. [...] Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault

[94] For a detailed analysis of the arguments made by the individual judges see Tanja Herklotz: Shayara Bano versus Union of India and Others: The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice, in: *Verfassung und Recht in Übersee* 50.3 (2017), pp. 200–311.

[95] *Shayara Bano*, judgment by Rohington Nariman and Uday U. Lalit, para. 57.

[96] Ibid., para. 25.

[97] *Shayara Bano*, judgment by Kurian Joseph, para. 24.

[98] Ibid., para. 26.

> therewith. Interference in matters of 'personal law' is clearly beyond judicial examination.[99]

These two judges in the minority instead "direct, the Union of India to consider appropriate legislation, particularly with reference to 'talaq-e-biddat' ".[100]

To be sure, the judgment did not come totally out of the blue, but some courts had previously ruled on the issue of triple *ṭalāq*, most notably the Supreme Court in *Shamim Ara*.[101] The judgment was nevertheless a bold step in a new direction, in that it banned triple *ṭalāq*, rather than merely reading more prerequisites into the existing norms, as done in the earlier cases. *Shayara Bano* was a serious confrontation with Muslim personal law (and the Muslim clergy), even more so because the case had gained such a huge media response. Also, judges Nariman and Lalit had proven the courage to break with former Supreme Court judgments when they stressed that there was no need that "the ball must be bounced back to the legislature",[102] but that it was the Court's task to decide on the matter and when they held that the earlier judgment by the Supreme Court in *Ahmedabad Women Action Group*[103] had "no ratio" and was contradictory in itself.[104] The judgment was thus rightfully called a "landmark decision."[105]

When seeking an explanation why the Court in this case, was willing to depart from its earlier route, one can only speculate. It certainly played a role that the case received a huge national and international media response from the very beginning and when it was still unclear how the Court would decide.[106] Shayara Bano herself had given several interviews to explain her motivation for pursuing this case. Women's rights organisations and feminist collectives had regularly updated on the case in their newsletters and on their websites. This certainly put the Court under pressure: it could no longer pursue its avoidance strategy but had to act. Clearly, the Court knew that this was a key judgment even before the hearings began. The deliberative decision to put five judges of five different religious communities – namely a Sikh, a Christian, a Parsi, a Hindu and a Muslim (all male) – on the bench to decide the case was clearly an attempt to avoid a repeat of the mistakes made in *Shah Bano*. It was possibly also a signal to the Muslim community that their concerns were being taken seriously and that the case would be looked at in the most objective manner so as to avoid a backlash. Not only that, but the Court had also decided to convene a special summer session to hear the case, in May, when it is normally in recess in order to guarantee a fast decision.

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[99] *Shayara Bano*, judgment by Jagdish Singh Khehar and Justice Abdul Nazeer, para. 195.

[100] Ibid., para. 199.

[101] See n. 80.

[102] *Shayara Bano*, judgment by Rohington Nariman and Uday U. Lalit, para. 25.

[103] See n. 68.

[104] *Shayara Bano*, judgment by Rohington Nariman and Uday U. Lalit, para. 30.

[105] Triple Talaq: India Court Bans Islamic Instant Divorce, in: *BBC* (22 August 2017), see: www.bbc.co.uk-/news/world-asia-india-41008802 (last access 15. 03. 2018); Huizhong Wu: Triple Talaq: India's Top Court Bans Islamic Practice of Instant Divorce, in: *CNN* (23 August 2017), see: edition.cnn.com/2017/05/-18/asia/triple-talaq-supreme-court (last access 15. 03. 2018).

[106] See for instance, Jan Roß: Das kannst du nicht mit mir machen, in: *Die Zeit* 14 (30 March 2017), p. 9, see: www.zeit.de/2017/14/indien-frau-scheidung-scharia-recht (last access 15. 03. 2018).

3. The *Ṭalāq* Bill

Shortly after the Supreme Court's judgment in *Shayara Bano*, the government introduced a Bill to regulate *ṭalāq*: The Muslim Women (Protection of Rights on Marriage) Bill, 2017.[107] The Bill was passed by the *Lok Sabha* on 28 December 2017 but has not yet been passed by the *Rajya Sabha*. The Bill intends "to protect the rights of married Muslim women and to prohibit divorce by pronouncing talaq by their husbands and to provide for matters connected therewith or incidental thereto." It declares that "[a]ny pronouncement of talaq by a person upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal." More than that, it criminalises the pronouncement of *ṭalāq* with imprisonment for up to three years and a fine. It furthermore grants the woman upon whom *ṭalāq* is pronounced a subsistence allowance for her and her dependent children.

The Bill's "statement of objects and reasons" refers to the Supreme Court's judgment in *Shayara Bano* – however, with contradictory statements. On the one hand, the judgment is seen as having given "a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation".[108] At the same time, it is argued that "setting aside talaq-e-biddat by the Supreme Court has not worked as any deterrent in bringing down the number of divorces by this practice among certain Muslims" and therefore it was necessary that the state via a legislation would "give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce."[109]

VI. Chances and Risks

With the Supreme Court's judgment in *Shayara Bano,* a shift in the power dynamics around Muslim personal law occurred. With the Court's rather clear stance on the issue, the state granted itself an autonomy in interpreting and navigating Muslim personal law that it had earlier left to stakeholders within the Muslim community. This move weakens the autonomy of the Islamic clergy to some extent. At the same time, it fosters women's groups for whom this judgment came as a proof that they can actively initiate legal reform processes. However, the reverberations of the judgment also brought some worrying developments with them, as indicated by the debate around the *Ṭalāq* Bill.

1. Chances for Women's Rights

Indian women's groups, activists and feminist scholars have largely perceived the Supreme Court's judgment in *Shayara Bano* as a boon. They have termed it a "milestone intervention",[110] "one of the most significant judicial decisions made in independent India"[111] and

[107] Available at: www.prsindia.org/uploads/media/-Muslim%20Women%20(Protection%20of%20Rights-%20on%20Marriage)/Muslim%20Women%20(Protection%20of%20Rights%20on%20Marriage).pdf (last access 15. 03. 2018).

[108] The Muslim Women (Protection of Rights on Marriage) Bill, 2017 (n. 107).

[109] Ibid.

[110] Hasina Khan: Ending Instant Divorce is a Victory. But Indian Women have a Fight Ahead, in: *The Guardian* (25 August 2017), see: www.theguardian.com/-commentisfree/2017/aug/25/islamic-instant-divorce-victory-india-talaq-women-harmful-practices (last access 15. 03. 2018).

[111] Betwa Sharma: Interview: Triple Talaq Ruling Fails To Address The Real Suffering of Muslim Women, Says Indira Jaising, in: *Huffington Post* (25 August

"a signpost moment of the women's movement in India."[112]

To be sure, this does not mean that the judgment was, by all means, perfect from a feminist angle – far from it. As Ratna Kapur[113] points out, even the much hailed opinion of Justices Nariman and Lalit was ultimately not concerned with women's rights, but rather with the preservation of marriage, when it found fault with triple *ṭalāq* on the basis that "the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it". Despite long elaborations on whether or not triple *ṭalāq* was 'protected' by Article 25, the Court did not position itself clearly on the relationship between gender equality and religious freedom, nor did the judgment engage with the intersection of gender and religious identity. It also refrained from expressively overruling *Narasu Appa Mali*.[114]

The judgment was also limited in scope in that it only concerned triple *ṭalāq*, and not the other forms of *ṭalāq*, which are also problematic from a gendered point of view.[115] And while the multi-faith composition of the bench, which aimed at providing a 'neutral' and differentiated view on the matter, was a laudable approach, the bench comprised no woman.

Nevertheless, the judgment was indeed a step in the right direction and has generally been understood as such among the feminist community.[116] This was not only for its stance on triple *ṭalāq*, but also the judgment has kick-started new debates on personal laws and women's rights as well as on legal reforms in other areas of law that discriminate against women or draw on patriarchal and paternalistic understandings. After the judgment, Indian media and the blogosphere produced a large number of articles that critically debated other legal areas, such as other personal laws[117]

2017), see: www.huffingtonpost.in/2017/08/25/-why-the-triple-talaq-ruling-fails-to-address-the-real-suffering-of-muslim-women_a_23179091 (last access 15. 03. 2018).

[112] Jhuma Sen: The Gender Question, in: *Frontline* (15 September 2017), see: www.frontline.in/the-nation/the-gender-question/article9834658.ece (last access 15. 03. 2018).

[113] Ratna Kapur: Triple Talaq Verdict: Wherein Lies the Much Hailed Victory?, in: *The Wire* (28 August 2017) thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory (last access 15. 03. 2018).

[114] See n. 8.

[115] The other forms of divorce at the initiative of the husband – *ṭalāq-e-aḥsan* and *ṭalāq-e-ḥasan* – remain in place even after the judgment. Thus, Muslim men retain their right to divorce their wives by pronouncing *ṭalāq* over a period of a few months.

[116] Indira Jaising, for instance, stated: "I'm delighted that we have taken one baby step in the right direction. I think that it is up to the future generation of feminist lawyers to carry this battle forward. But [it was] definitely a step in the right direction", cited in: Betwa Sharma (n. 111).

[117] Subhashini Ali: The Triple Talaq Ruling Is a Step Forward, but There Is a Long Way to Go for Gender Justice Laws, in: *The Wire* (24 August 2017), see: thewire.in/170364/triple-talaq-uniform-civil-code-gender-justice (last access 15. 03. 2018); Shalaka Patil: After Triple Talaq, a Look At the Other Discriminatory Personal Laws That Need to Go, in: *The Wire* (28 August 2017), see: thewire.in/171451/personal-law-reform-gender (last access 15. 03. 2018); Narendra Subramanian: Beyond Triple Talaq, India Needs a Debate on How to Reform Muslim, Hindu Law, in: *The Wire* (27 June 2017), see: thewire.in/151585/democratising-family-nation-triple-talaq-pluralistic-equality (last access 15. 03. 2018); Asha Bajpai: How Hindu Personal Law can be Reformed, in: *The Times of India* (18 September 2017), see: timesofindia.indiatimes.com-/india/how-hindu-personal-law-can-be-reformed/articleshow/60726036.cms (last access 15. 03. 2018).

or the Indian rape law.[118] Different journals have published special issues on triple *ṭalāq* and personal laws.[119] The heads of various (Muslim) women's rights organisations have featured prominently in Indian media and gained a large degree of visibility for their organisations and projects.

The judgment has demonstrated that continuous activism for gender equality and the use of strategic litigation pays out eventually. It has functioned as a landmark case that might also motivate other groups and social movements, such as the LGBTIQ-movement[120] or other civil rights movements.

2. Risks

However, it was not only Muslim women's groups and feminist activists, who perceived the judgment as a step in the right direction. But the judgment was also appreciated by Hindu nationalists and members of the Bharatiya Janata Party (BJP). After the Court's decision, Prime Minister Narendra Modi tweeted on his official account that the judgment was "historic" and "a powerful measure for women empowerment".[121] And it was the BJP government who introduced the so-called *Ṭalāq* Bill into parliament.

This recurrence on the rhetoric of women's rights from the side of Hindu nationalists is not unproblematic. It must be seen in a context of a growing "Hinduisation" that is currently happening in India, particularly since the election of the BJP into power in 2014. In the last years, several states have by law banned the slaughter, sale, consumption and possession of beef.[122] Hindu right-wing groups have policed those whom they consider "anti-national" or unpatriotic, often resulting in criminal legal action because many of the laws that have been in place since colonial times enable prosecutions for offences like sedition and criminal defamation on minimal grounds.[123] Indian civil society has met with a phenomenon of "shrinking spaces", in which many NGOs and other groups lost their licences to receive international funding because they were deemed to pursue "anti-national" activities or because they failed to meet the legal requirements under the Foreign Contribution Regulation Act.[124]

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[118] Maya Mirchandani: Triple Talaq and Marital Rape: Politics and Patriarchy Trump Gender Justice, in: *The Wire* (31 August 2017), see: thewire.in/-172469/triple-talaq-marital-rape-patriarchy-politics-gender-justice (last access 15. 03. 2018).

[119] See, for instance, *Frontline* (15 September 2017); The Invisible Lawyer, see: www.lawyerscollective.org/the-invisible-law-categories/special-issue/triple-talaq (last access 15. 03. 2018).

[120] LGBTIQ stands for lesbian, gay, bisexual, trans, intersex and queer.

[121] Huizhong Wu (n. 105).

[122] Such legislation is based on Article 48 of the Indian Constitution, which urges the state to focus on animal husbandry and to prevent cow slaughter. This provision was originally inserted to appease Constituent Assembly members of a Hindu nationalist persuasion who had a specific commitment to cow protection; see Thiruvengadam (n. 20), pp. 108, 238. A law that would have banned the sale of cattle for slaughter nationwide has been suspended by the Supreme Court in July 2017.

[123] Thiruvengadam (n. 20), p. 238.

[124] Rohini Mohan: Narendra Modi's Crackdown on Civil Society in India, in: *The New York Times* (9 January 2017), see: www.nytimes.com/2017/01/09/opinion/narendra-modis-crackdown-on-civil-society-in-india.html?_r=0 (last access 15. 03. 2018). In a joint statement Amnesty International and Human Rights Watch said that the government was using the Foreign Contribution Regulation Act to harass NGOs, see: www.amnesty.org.in/show/news/india-foreign-funding-law-used-to-harass-25-groups (last access 15. 03. 2018).

Anti-Muslim propaganda and criminal offences against Muslims are on the rise.[125] This includes ideologies according to which Hindu women must be "protected" from Muslim men. The so-called 'love jihad' – a claimed conspiracy by Muslims to lure Hindu women into marriages with Muslim men and to convert them to Islam is one example here. Such perceptions even found their way into court decisions, when in the *Hadiya* case in 2017, the Kerala High Court annulled the marriage of the 24-year old Hadiya and her husband Shafin Jahan.[126] The woman had converted from Hinduism to Islam and had changed her name from Akhila Ashokan to Hadiya. The High Court held that the young woman, under the influence of her Muslim husband, was not in a state to give free consent to the marriage and was in need of protection. Among other things the judgment stated:

> We further take note of the fact that Sri. Shafin Jahan's mother is already in the Gulf. He was working in the Gulf and is desirous of going back. Therefore, left to him, he would have transported Ms. Akhila out of the country. In the present confusion regarding her name, it would have become impossible to even trace her out had she been taken out of India.[127]

It further held that

> the detenue went away from her parents stating that she wanted to become a Muslim alleging that she was attracted to the teachings of the said religion. The said story cannot be believed [...]. In the present state of affairs, it is absolutely unsafe to let Ms. Akhila free to do as she likes.[128]

The Court held that it was "concerned with the welfare of a girl of her age" – notably the woman was 24 – and stated that the "duty cast on the court to ensure the safety of at least the girls who are brought before it can be discharged only by ensuring that Akhila is in safe hands".[129] The judges thus granted the *habeas corpus* petition that had been filed by Hadiya's father and ordered Hadiya's custody to her parents. The High Court order was set aside by the Supreme Court on 8 March 2018 with the argument that the Court could not intervene in a marriage between two consenting adults.[130] Nevertheless, it is problematic enough that an Indian High Court delivered such a decision in the first place and that this decision is then used by some commentators as proof that "the courts and the investigation agencies agreed that the concept of 'Love Jihad' exists".[131]

In this context, not only people among the Muslim community but also feminist scholars and women's rights activists have been concerned about the developments in the aftermath of the *Shayara Bano* case. They argue that women's rights are used as a fig leaf to pursue anti-Minority politics. Particularly the Muslim Women (Protection of Rights on Marriage) Bill, 2017, has been opposed by women's groups. *Bebaak Collective* and other groups, for instance, have criticised not only the fact that the Bill had been drafted without involving the opinion of minority rights groups or consulting with wider civil society stakeholders,

[125] Flavia Agnes (*Majlis Newsletter* on Nov 25 2017), for instance, mentions instances where Muslims have been lynched on the mere suspicion of slaughtering cows or selling beef.

[126] Kerala High Court, WPCRL No. 297/2016, 24 May 2017.

[127] Ibid. para. 46.

[128] Ibid., para. 47.

[129] Ibid., para. 50.

[130] Supreme Court of India, Petition(s) for Special Leave to Appeal (Crl.) No. 5777/2017.

[131] Bhushan Agarwal: Kerala High Court Destroyed Love Jihad in an Iconic Judgement, Supreme Court Takes it to Another Level, in: *Rightlog* (18 August 2017), see: rightlog.in/2017/08/love-jihad-kerala-01 (last access 15. 03. 2018).

but they also questioned the government's argument that the Bill would safeguard women's rights and instead described the Bill as a tool to "criminalise Muslim men."[132] In a similar fashion, Flavia Agnes, head of the Mumbai-based women's group *Majlis*, stated that

> criminalising triple talaq may not be the answer. It will just be another gimmick to fuel anti-Muslim sentiments in society. [...] Granting the police an additional handle to incarcerate Muslim men may fit in perfectly well with the anti-Muslim agenda of a right wing government.[133]

The *Ṭalāq* Bill's "statement of objects and reasons" speaks of the "hapless married Muslim women" in need of "relief".[134] It further holds: "The legislation would help in ensuring the larger Constitutional goals of gender justice and gender equality of married Muslim women."[135]

What we see here, is neither new nor unique to the Indian context. That seemingly feminist arguments of "women's safety" and "gender justice" can be (mis)used by conservative forces to deploy racist, xenophobic or anti-Muslim stereotypes has been shown in India in the wake of the *Shah Bano* case. But it is also a phenomenon that we witness in Europe, for instance, in Germany in the wake of the infamous New Year's Eve 2017 in Cologne, where feminism was appropriated in the service of racism and stereotypes against Muslim male refugees.[136] There is thus something like a "toxic connection" between racism and anti-sexist critique,[137] that some scholars have termed "femo-nationalism."[138] This connection is fostered by xenophobic, nationalist political parties who use ideas about gender equality for their anti-Muslim politics; but it is also advanced by some feminists who in their argumentation for women's rights fall into the xenophobic trap of essentialising and othering.[139]

This accidental or intended collusion between nationalist and feminists ideas confronts feminist scholars and women's rights activists with the questions of how to react when 'their' goals are hijacked by nationalist forces. Should they, as Nicola Pratt writes with reference to feminists' positioning *vis-à-vis* the war on terror, that largely drew on arguments of gender equality, "be strategically silent about 'women's rights per se' " in order to "avoid becoming complicit in racializing

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[132] Shreya Valiraman: Women's Rights Groups Speak Out Against Centre's Decision to "Criminalise Muslim Men" With Triple Talaq Bill, in: *The Wire* (22 December 2017), see: thewire.in/207493/triple-talaq-criminalised-bill-womens-rights (last access 15. 03. 2018).

[133] Flavia Agnes: *Majlis Newsletter* (Nov 25 2017).

[134] The Muslim Women (Protection of Rights on Marriage) Bill, 2017 (n. 107).

[135] Ibid.

[136] Sabine Hark / Paula-Irene Villa: *Unterscheiden und herrschen: ein Essay zu den ambivalenten Verflechtungen von Rassismus, Sexismus und Feminismus in der Gegenwart*, Bielefeld 2017.

[137] Ibid, p. 40.

[138] Sara R. Farris: *In the Name of Women's Rights: The Rise of Femonationalism*, Durham 2017. Harris' term, "refers to both the exploitation of feminist themes by nationalists and neoliberals in anti-Islam and anti-immigration campaigns as well as to the participation of certain feminists and femocrats in the stigmatization of Muslim men under the banner of gender equality (p. 4)", Farris (n. 138), p. 4.

[139] Hark / Villa (n. 137); Farris (n. 138).

discourses and co-opted"?,[140] This is what Indian feminists did in the wake of the *Shah Bano* case with regard to the Uniform Civil Code when the BJP made the UCC its own project: they largely backed out and gave up their call for the code in order to not support the wrong side. Or should they, as suggested by Sabine Hark and Paula-Irene Villa,[141] deploy an even more intersectional feminism along the line of Judith Butler's suggestion that "[f]eminism, once again, needs to care not simply about the status of women, but about opposing forms of national and racial purity and superiority" and that "[t]here can be no feminism within the contemporary global situation that does not actively contest [...] nationalist violence".[142]

VII. Conclusion: Expectations of the Three Actors

While it has been demonstrated in this paper that *Shayara Bano* was a landmark decision, it is harder to state whether it was also a turning point in the history of the Indian State's positioning *vis-à-vis* personal laws. A turning point requires heading into a different direction than the one followed earlier. Certainly, the Supreme Court departed from the road pursued before, namely that of avoidance to interfere with Muslim personal law. But where the Court or the State more generally, will head thereafter is still unclear. This paper has shown, that the *Shayara Bano* case brought about benefits as well as risks. The concluding section argues that if the potential chance is to be realised, the risks must be taken in mind by all these three actors: the Indian State, the Muslim clergy and women's rights groups. If each of them does their share, there is a chance that *Shayara Bano* was indeed a turn into the right direction and not only a brief interruption that is being followed by more of the same. What then should these three actors do?

The Indian state organs must attempt to ensure women's rights without falling into the trap of drawing on anti-Muslim stereotypes. It is paramount that a check and balance is in place and that the different branches of the state control each other. It is hoped that the *Rajya Sabha* will act as a check with regard to the Muslim Women (Protection of Rights on Marriage) Bill, 2017 and that this law in its present form will not enter into force. Parliament should concern itself with the problematic provisions not only in Muslim personal law but in other personal laws too and strive for reforms here as well as in other areas of law that still contain discriminatory or paternalistic notions. The making of new laws might benefit from hearing the representatives of women's groups in parliamentary debates and the drafting process. The Indian Supreme Court has generally moved in the right direction when it took a bold decision in *Shayara Bano*. It has also set right wrong High Court judgments, for instance in the *Hadiya* case.[143] But it needs to be seen how the Supreme Court positions itself in times of populism. With regard to the personal laws, the Supreme Court should ideally develop a clear doctrine on how to test their constitutionality against the right to equality which can then be applied in all cases that arise in the future.

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[140] Nicola Pratt: Weaponising Feminism for the "War on Terror" Versus Employing Strategic Silence, in: *Critical Studies on Terrorism* 6.2 (2013), pp. 327–331 (330).

[141] Hark / Villa (n. 137), p. 94.

[142] Judith Butler: Feminism Should Not Resign in the Fact of Such Instrumentalization, Interview by Renate Solbach, in: *Iablis, Jahrbuch für europäische Prozesse* (2006), see: www.iablis.de/iablis_t/2006/butler06.html. 2018).

[143] See n. 126.

The Muslim clergy should be open towards the interests and concerns of half of its community's population: the Muslim women. It should rethink, whether the activism of Muslim women's groups must really be perceived as a threat to its authority. In fact, the clergy could actually benefit from being open towards an interaction with the many Muslim women's groups in India. This is not only because it is high time to bring about gender equality into the domain of religion. But the Muslim clergy would actually gain from shaking off the negative image that perceives it as regressive, stubborn and resistant to social change. If it would take gender concerns seriously value the Constitution's fundamental rights and be willing to enter into a critical and open-ended dialogue about the personal laws, it would take the wind out of the sails of the Hindu nationalists as their arguments would be refuted.

Women's rights groups must find a clear position on the issue of personal laws in which they keep pursuing their agenda and at the same time avoid (accidentally) colluding with Hindu nationalists. The road that the Indian women's movement pursued in the 1980s in the aftermath of the *Shah Bano* case, when it dropped its demands for a Uniform Civil Code for fear of being in support of the BJP's agenda, would be a wrong strategy in this case. Rather, feminists and (Muslim) women's groups should continue to do what they have done in the past: stay committed to their goals, disguise the BJP's arguments of gender equality as a farce and condemn the BJP's appropriation of the victory in the *Shayara Bano* case. The statement of the Mumbai-based group *Bebaak Collective*, issued in the fall of 2017 is a positive example of how this can be done. The group said:

> BJP leaders have time and again celebrated the victory of the recent judgement that invalidates the instantaneous practice of triple talaq and the leadership have often claimed the victory to itself [...]. We strongly condemn the appropriation of the struggle of women's groups and want to reiterate that triple talaq could be declared unconstitutional owing to the sustained work of women's groups in the community and also, because of the legal intervention made by grassroots women's groups in the apex court supporting Shayara Bano's petition.[144]

All three actors, the State, the Muslim clergy and the women's groups should engage in a discourse on how to balance gender equality with a respect for religious belief and the concerns of minorities. If such a discussion is led well and if it grants a voice to all the parties involved, it has the potential to reform the system, to solve the conflicts between Articles 14 and 25 and to reconcile the different parties.

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[144] Bebaak Collective, Statement Condemning BJP Appropriation Of Muslim Women's Voices, in: *Kafila* (31 October 2017), see: kafila.online/2017/10/31/-statement-condemning-bjp-appropriation-of-muslim-womens-voices-bebaak-collective (last access 15. 03. 2018).