



## Reflections on the Shayara Bano Petition, a Symbol of the Indian Judiciary's own Evolution on the Issue of Triple talak and the Place of Muslim Personal Law within the Indian Constitutional Frame?<sup>1</sup>

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### **A judicial storm? Shayara Bano and the issue of triple talak**

Shayara Bano is now one of the most famous Muslim women in India. In the span of just a couple of weeks, her life has been the subject of numerous articles, blog posts, and other opinion pieces flooding the different Indian media outlets.<sup>2</sup> Her story is indeed a compelling one. Coming from a relatively poor background in Uttarakhand, she married Rizwan Ahmad in 2002 according to Muslim Personal Law (MPL), her family providing a significant dowry to seal the union. However, the marriage was not a happy one and upon her account she soon faced acts of cruelty on the part of her husband and his family, including persistent demands for an extra dowry and being subjected to physical abuse, notably forced abortions. After sending her back to her relatives, Rizwan Ahmad finally divorced her by way of triple talak in October 2015.

This type of divorce, unilateral and irrevocable, initiated by the husband (talak al-ba'in), through the 'improper' or 'sinful' mode (talak al-bid'a) consisting of three consecutive pronouncements, otherwise known as 'triple talak', has been a contentious issue within the administration of MPL in India. Although it has been criticised by the judiciary in the past<sup>3</sup>, it has nonetheless never been abolished, and has become over the last decade a symbol of intra-communal oppression directed at Muslim women against their individual human rights, albeit in the name of religious freedom. It has also been used as an argu-



ment for the establishment of a Uniform Civil Code (UCC), which the Constitution of India enjoins the State to promulgate<sup>4</sup>, and which would effectively repeal all personal laws.

As renowned Muslim women activist and scholar Flavia Agnes points out however, MPL may not be the sole responsible for Shayara Bano's tragic position, and as a victim of domestic violence, a number of secular legislations are available to Muslim women faced with cruel treatment within their marriage, first amongst which the *Protection of Women from Domestic Violence Act, 2005*.<sup>5</sup> Notwithstanding, in her petition in front of the Supreme Court of India<sup>6</sup>, Shayara Bano asks the Court to remedy her situation solely in regards to MPL, by issuing writs in the nature of mandamus<sup>7</sup> declaring her divorce void ab initio, and more largely the practices of triple talak, halala<sup>8</sup> and polygamy unconstitutional as violative of one's fundamental rights.<sup>9</sup>

Interestingly, the constitutional nature of the petition—even though recourse of statutory legislation was available in the lower courts—as well as the absence of reference to the UCC render this case somewhat singular. Indeed, Shayara Bano's petition follows a previous decision from the Supreme Court in 2015, which had already taken *suo motu* jurisdiction over this very issue as a matter of Public Interest Litigation (PIL), whilst settling a string of cases relating to Hindu succession law.<sup>10</sup> In writing the judgment and submitting the PIL for registration, Goel J. similarly does not mention the UCC, but insists on the recourse to art. 14, 15 and 21 of the Constitution of India in relation to Muslim Personal Law, notably citing the Danial Latifi case which had previously settled the issue of post-divorce maintenance amongst Muslims.<sup>11</sup> Hence, whilst the Supreme Court admittedly had already decided to take up the constitutional validity of triple talak amongst other issues, Shayara Bano's petition brings about a narrative likely to give popular support to any change in the administration of MPL in India.

The timing is strangely fitting, and as Flavia Agnes implicitly suggests might more suit an overarching judicial agenda rather than Shayara Bano's own problems (Agnes 2016), putting her at risk of perhaps unwillingly becoming the symbol of MPL's demise, much like Shah Bano Begum some 30 years ago.<sup>12</sup> Indeed, this case comes at a specific point in time within the Indian judiciary's own evolution on the question of MPL in general and triple talak in particular.

As aforementioned, it is a common misperception to consider the application of Islamic law in India to be one of taklid (to follow precedent, precluding new interpretation), leaving but little room for reform,



innovation or mitigation through overarching secular provisions. Unlike other Muslim populated states, and most notably neighbouring Pakistan, India has never enacted some sort of codified interpretation of Islamic family law.<sup>13</sup> On the contrary, it followed the legacy of the Raj in up-holding an un-codified system of Muslim Personal Law applicable to family matters through the *Muslim Personal Law (Shariat Application) Act, 1937*. This can be explained mainly through the peculiarity of the Muslim community's demographic position in India, which albeit strong of approximately 172 million souls<sup>14</sup> remains a minority. It had been Nehru's position (consistently up-held until today) "of not giving the impression that a Hindu majority was enforcing anything on the Muslim minority" (Zachariah 2004: 263-4), which therefore led to the view of a "fossilisation of that category of 'personal law'" (ibid.: 264).

As such, if Hindu law has been the object of multiple legislation following independence, notably in regard to marriage, divorce (*Hindu Marriage Act, 1955*) and inheritance (*Hindu Succession Act, 1956*, amended in 2005 towards complete equality between sons and daughters)—often referred to as the 'Hindu Code Bill'—subsequent attempts to reform MPL, especially through the judiciary, have been met with uproar<sup>15</sup>, and particular legislative enactments have been careful to keep in line with the traditional Islamic legal frame.<sup>16</sup> This apparent 'fossilisation' of Islamic law in India has led commentators to push towards either its abrogation altogether<sup>17</sup>, its submission to fundamental rights as provided by the Constitution of India<sup>18</sup>, or its adaptation to local practices ('adat) through a praxiological approach rather than a state—Hindu majority—led initiative.

Within this context, the practice of triple talak has been at the centre of intense scrutiny and criticism over the last decades. It is evident that such a disposition has engendered quite a lot of controversy in regards to its compatibility with the fundamental right to equality or to life, as well as creating distortions with other communities on the same ground.<sup>19</sup> At the same time, how can the Indian state reform MPL without infringing on another fundamental right (namely the one relating to freedom of religion and for a community to manage its religious affairs according to its own law), whilst risking being perceived as politically led by a Hindu agenda?

This conundrum has been tackled by the Indian judiciary on several occasions, but also left it divided as to both its solution and the legal argumentation that would support it. It appeared however to have



been definitely decided in 2002 through the Shamim Ara case<sup>20</sup>, whereby triple talak was deemed to contravene to the tenets of Islamic law, which on the other hand required both a valid reason and an arbitration between the spouses to take place before any divorce could be legally effective. Considered as a landmark judgment, Narendra Subramanian (2008) was however keen to point out the vagueness of these conditions. With hindsight it indeed seems Shamim Ara has brought more questions than answers on this particular issue, symbolising even more the un-ease of the state judiciary in dealing with Muslim personal legal matters.

Notwithstanding, a solution to this quagmire has perhaps recently surfaced within the appropriation of such issues at the brink of India's legal landscape, in the State of Jammu and Kashmir. The latter has indeed a peculiar position within the Indian Union, which is one of associated sovereignty rather than of direct incorporation.<sup>21</sup> Moreover, it is the most important state to be populated by a majority of Muslims. As Tahir Mahmood noted, Jammu and Kashmir (J&K) has a particular legitimacy in influencing the interpretation of Muslim law, due to its unique institutional and demographic positions:

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We venture to suggest that all the organs of the state of Jammu and Kashmir, especially the legislature and the judiciary, must discharge their sacred obligations in removing the grotesque distortions of the principles of Muslim personal law from which at present the application, administration and general understanding of that law vehemently suffers in the state and elsewhere in the country. (Mahmood 1981: 281)

Indeed, since the enactment of the *J&K Muslim Personal Law (Shariat Application) Act, 2007*<sup>22</sup>, J&K has started to directly tackle Islamic legal issues, and on the contention regarding triple talak, a recent judgment by its High Court<sup>23</sup> hints at sustained and possible development in the broader field of Muslim Personal Law. Could this development now be extended to the entire Indian Union?

Without predicting the outcome of the pending Shayara Bano case, this article seeks to present the aforementioned evolution from a legal historical perspective. It focuses particularly on the development of the legal argumentation revolving around the administration of MPL and its place within the Indian constitutional order. It highlights the conundrum the Indian judiciary faced in administering a minority law within a sometimes explosive political context, and how it managed to do so by gradually putting forward a harmonious interpretation between Isla-



mic law and constitutional fundamental rights provisions, whilst moving away from the British colonial legal legacy. It finally stresses the importance of Jammu and Kashmir's High Court in giving the necessary impetus and legitimacy to this change in legal reasoning. Hence, the fact that T.S. Thakur—current Chief Justice of India—has made most of his career in J&K might not be totally coincidental with the timing of Shayara Bano's petition.

### **The 'Hands Off' approach and the British colonial legal legacy**

An 'Hands Off' approach does not necessarily imply that the British did not change substantively the content of Islamic law in India, quite the contrary in fact (Anderson 1995; Giunchi 2010). However, in regards to triple talak, one can stress that in doing so, they did not venture into re-interpreting or even directly applying Islamic primary sources (be it the kur'an or hadith) but rather heavily—if not exclusively—relied on what they deemed to be authoritative Indian sources in the field, namely Al-Hidaya and Al-Fatawa al-'Alamgiriyya.<sup>24</sup> Hence British judges for the most part only applied a text-book version of Islamic law, seasoned with a clear utilitarian/positivist oriented differentiation between law and morality. As such, even though they had but little respect for the existence of triple talak, they nevertheless upheld its validity, provided it followed the correct pronouncement.<sup>25</sup>

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The position was apparently definitely settled in 1905 by Batchelor J. in Bombay for who triple talak was "good law, though bad in theology."<sup>26</sup> Justices Munro and Abdur Rahim would later follow the same reasoning in Madras:

No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband.<sup>27</sup>

For a very long time this will be the set position, sustained well after India's independence, enshrining the husband's extraordinary divorce powers:

The only condition necessary for the valid exercise of the right of divorce by the husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is neces-



sary for effecting divorce under Hanafi law (...) the husband can effect it conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge.<sup>28</sup>

High Courts have even dismissed harshly any attempt to interpret Islamic primary sources, strongly emphasising the difference between the role of a judge (as a mukallid—follower) with one of a mudjtahid (interpreter): "However learned the Tehlsidar Magistrate [whose decision is appealed] may be in theology, he should have known that he was acting as a Judicial Officer, and it was not for him as such Officer to give his own interpretations of the verses of the holy Quran."<sup>29</sup>

The judiciary thus seemed to have imprisoned itself within a fixed set of Islamic legal sources, which had been merged with Indian Muslim Personal Law—then known as Anglo-Muhammadan Law—textbooks around the beginning of the twentieth century (Mulla 1990; Ali 1985; Fyzee 2008), the latter only accentuating the 'fossilisation' effect as being both Islamically authoritative and having the force of stare decisis.

The Constitution of India brought about significant changes to the Indian legal frame, especially in its emphasis on fundamental rights (Part III) such as the one to equality (art. 14) and to life (art. 21), whilst preserving freedom of religion (art. 25) and the right for a religious denomination to manage its religious affairs in accordance with its law (art. 26). Moreover, although not directly enforceable, it disposes of a number of Directive Principles of State Policy (Part IV), not least of which the one to "secure for the citizens a uniform civil code throughout the territory of India" (art. 44). Therefore, the first question the judiciary had to face was to assess if personal laws were subjected to these fundamental rights, or would they be an integral part of the latter.

Indeed, it seems evident that triple talak contravenes to a certain number of constitutional provisions. However, from a very early stage the judiciary decided on the non-applicability of Part III of the Constitution to personal laws, specifically under art. 13 (1) which, even if it disposes that all laws in force and inconsistent with the Constitution would be void, is followed by art. 13 (3) (b) which goes on to define



"laws in force" as statutory provisions, which at the time was not the case of most personal laws, as they remained uncodified.<sup>30</sup>

Moreover, the "endeavour to secure" a uniform civil code, soon to be qualified as more of a legal process than an actual legal object<sup>31</sup>, has also bumped on the right to freedom of religion and the specific divine character of Muslim personal law in that regard:

Article 44 seeks to divest religion from social relations and personal law. Marriage, succession and like matters of a secular character cannot be brought within the guarantees enshrined under article 25, 26 and 27. The personal law of the Hindus, such as relating to marriage succession and the like have all a sacramental origin, in the same manner as in the case of the Muslims or the Christians. The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, some other communities would not, though the Constitution enjoins establishment of a "common civil code" for the whole of India.<sup>32</sup>

Subsequently, the higher judiciary consistently refused to entertain challenges to Muslim personal law based on Part III of the Constitution<sup>33</sup>, although some lower courts have continued to entertain the idea, perhaps thrilled by the possibilities opened up by Public Interest Litigation in the 1970s, such as in an un-reported case where Judge Rajender Kumar writes in an obiter dictum:

Right to sustain i.e. life [art. 21 of the Constitution] is a fundamental right of a person. It is such right, which cannot be taken away through an agreement. To be more explicit, a person cannot agree to be killed by entering into a contract. To have sex and procreate children, which are described by Mullah as "objects of Mahomaden Marriage", are essence of life as fundamental as life itself. (...) Moreover, a marriage gives birth to certain rights and liabilities, which are seldom described in the contract of marriage i.e. Nikahnama. If Nikah was an ordinary Civil Contract, a spouse could not have claimed maintenance or right in property of other spouse, having not been mentioned in Nikahnama. In this way, it will not be proper to describe a Mohamaden Marriage, a civil contract.<sup>34</sup>

Hence, having bound itself to Muslim personal law textbooks, the only option left to influence the legal outcome of a Muslim marriage seemed to extract it from the realm of religion. If simply a civil contract, then it becomes secular and the state can regulate it (art. 25 (2) (a) of the Constitution)<sup>35</sup>, or else (as Judge Rajender Kumar seems to advocate) it can also be considered as a purely social institution. In the latter



case, a Muslim marriage would fall back in the category of custom—unless otherwise codified—which would make it liable to the constitutional provisions of Part III.<sup>36</sup>

As the law stood however, the religious aspect of marriage was enshrined in the 1937 Act, which moreover defines the scope and nature of Muslim personal law. As such, any evolution of the latter necessarily needed to spring from within the Islamic legal frame itself. The struggle was now for the judiciary to break the walls it had entombed itself in. A task rendered even more perilous due to the fact that triple talak is hardly the object of a case put before a Court, but usually a superfluous argument within maintenance litigation. As such, judges can only tackle the issue within obiter dictums whose binding force remain contentious.

### **Circumventing the 'fossilisation' of Muslim law**

Paradoxically however the use of obiter dictums, precisely due to their nature as 'opinions', has allowed the judiciary more leeway in interpreting Muslim personal law. As aforementioned, most cases involving triple talak are maintenance cases. The classic defence of the husband, whose wife claimed maintenance, revolved around the argument that he had already divorced her and subsequently she could not be granted any alimony beyond the 'idda period (corresponding to three lunar months, except if the woman is pregnant, in which case the period extends until birth); *Rationes decidendi* in such instances centred on technicalities, especially the lack of communication to the wife, therefore prolonging her right to maintenance while at the same time not directly contravening to a precedent.<sup>37</sup> Judges will often touch upon the validity of triple talak as a secondary issue, but will be careful not to base their decision on it. Notwithstanding, the Gordian knot remained around the role of the judge as a mukallid, as one who could not interpret freely Islamic primary sources; thus different techniques were put in place to circumvent the problem.

#### *Blame the British*

The first step was to blame the British through their selective sources of Islamic textbooks, which would not represent the plurality of the Indian Muslim community, whilst giving biased and un-authentic versions of the kur'an and teachings of the Prophet. Justice Iyer will be at the forefront of such re-evaluation:





Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture—law is largely the formalized and enforceable expression of a community's cultural norms—cannot be fully understood by alien minds. The view that the Muslim husband enjoys arbitrary, unilateral power to inflict divorce does not accord with Islamic injunctions.<sup>38</sup>

However, the judge will not go as far as to re-interpret Islamic law by himself, but will rely on other Muslim authorities in order to qualify a Muslim marriage as a civil contract.<sup>39</sup> Iyer J. will not directly invalidate triple talak, but will balance it by recognising to the wife a similar right to divorce through khul<sup>40</sup>, therefore respecting the classical notion of equal bargaining powers in the formation of a contract.<sup>41</sup>

The view I have accepted has one of the great advantage in that the Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when roughly equal rights are enjoyed by both spouses, when the talaq technique of instant divorce is matched somewhat by the Khulaa device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realised.<sup>42</sup>

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The problem of such a definition of marriage is that it faces the risk, under civil contractual rules, to invalidate the marriage contract altogether as Nikah nama tend to usually be extremely vague.<sup>43</sup>

#### *Blurring the lines between law and morality*

Following judgments will henceforth moderate the strict civil qualification given to a Muslim marriage contract, adding to it a religious dimension.

Though marriage under the Muslim Law is only a civil contract, yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution.<sup>44</sup>



Justice Baharul Islam will directly use Islamic principles to temper the right of triple talak, whilst not completely abolishing it. "Talaq shall be for a good cause and must not be at the mere desire, sweet will, whim and caprice of husband and shall not be secret."<sup>45</sup>

In both cases, the divorce will not be recognised based on technical grounds—mainly due to the lack of evidence or the fact that the deed of divorce did not explicitly mention the nature of talak in its triple form, therefore falling under the conditions of the revocable one (*radj'i*).

Most interestingly however, Justice Baharul Islam will start to directly tackle and interpret the *kur'an* (K 4: 128-9; 4: 229-32 and most notably 4: 35 on the prerequisite of arbitration), albeit through the prism of well-established authorities. In contradiction to the previous rulings distinguishing between law and moral, he ventures into applying Islamic injunctions in accordance with broader Islamic principles in order to advance a first pre-requisite to the validity of triple talak: a reasonable cause.

The use of Islamic principles to justify the non-recognition of triple talak will continue to be used, adding more and more conditions along the way.<sup>46</sup> Nevertheless, this evolution of Muslim Law remained greatly divisive and High Courts were far from having reached a consensus on the issue.<sup>47</sup> The *Shamim Ara* decision<sup>48</sup> in 2002 seemed at first to have quelled such tensions. Again, through an *obiter dictum*<sup>49</sup> the Supreme Court gave its opinion as to the correct procedure relating to a Muslim divorce, which would require a reasonable cause and an attempt at arbitration with relevant family members of each spouse in order for it to be valid. Drawing from previous judgments, it departed from the misleading British interpretation, wrongly used as precedents by text-books (including Mulla 1990) and re-iterated the argument that Muslim personal law must be interpreted in concordance with broader Islamic moral principles.

One can however notice that the legal reasoning behind such a stance underlines a complete reversal from previous decisions regarding the nature of Muslim personal law within the Indian legal frame. Indeed, following Danial Latifi's footsteps personal law is no longer applicable because it is the legal translation of a fundamental right<sup>50</sup>, but because through its inherent religious principles, Muslim law 'is' by essence in accordance with fundamental rights. Just as "when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the Directive Prin-



principles of State Policy as the 'Book of Interpretation'<sup>51</sup>, it will now be necessary for every Islamic legal injunction to be assessed in conformity with Islamic primary sources, and even more broadly Islam's moral ethos.

The reasoning underlying the shift operated in Danial Latifi in 2001 is very similar to the one grounding the 'basic structure' doctrine within Indian Constitutional Law initiated in the 1970s.<sup>52</sup> In the same manner, the kur'an has become the 'guiding star' that will allow innovation within long standing Islamic legal provisions, following another predicament by Justice Iyer: "Law is dynamic and its meaning cannot be pedantic but purposeful."<sup>53</sup>

Danial Latifi operates an alteration, albeit subtle, from the traditional syllogistic reasoning from personal law as a fundamental right, to fundamental rights being entrenched within personal laws—if not, it is because the latter have been necessarily misinterpreted.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs.<sup>54</sup>

This passage would entail the enforcement of the right to equality (art. 14), unless trumped by the competing one of freedom of religion (art. 25 and 26), hence the aforementioned legal dead-end the judiciary previously faced. However, this is no longer an issue since:

It is popularly said that a Muslim marriage is nothing but a civil contract and a large section believes that the husband has an absolute freedom to dissolve the marriage without assigning reasons and at his free will. The Holy Quran as well as other sources of Personal Law teach us that the process of reaching to the marital tie is certainly a civil contract, but once the marriage is solemnised it becomes an institution life long for both husband and the wife and they do not live together by way of a mere contract but in a holy and sacred bond of love, care and mutual respect with equal status to both partners.<sup>55</sup>

One can sense however the irony consisting on one hand to cast aside the British heritage on the grounds of a biased application of Islamic sources, while on the other to do exactly the same, this time based on



a constitutional theory, which at least is not 'alien' to India—Islamic law having in both instances but little say in the matter.

Notwithstanding, in extending the enforceability of 'principles', which by nature are more directives than precise rules, the Indian judiciary may fall into another irony pointed by Pratab Bhanu Mehta concerning PIL, as he remarks:

[E]ven as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear. To the extent that the rule of law means making available a forum for appeals, one can argue that the Court has done a decent job. To the extent that the rule of law means articulating a coherent public philosophy that produces predictable results, the Court's interventions look less impressive. (Mehta 2007: 72)

Shamim Ara is no exception to this, quite the contrary.

#### *Shamim Ara's aftermath*

Shamim Ara, although laying forward a standard procedure relating to Muslim divorce, does not explicitly abrogate triple talak, and left a number of issues un-resolved. If arbitration were to take place before any pronouncement of talak, would a subsequent triple one be valid? Is Muslim marriage a religious institution or a civil contract to begin with, is it both? But then, which rules governing each field would take precedence over the other in case of conflict? What is the test to assess a 'reasonable cause'?<sup>56</sup> Is an obiter even binding? Etc...

As such, High Courts remain divided on the issue of triple talak, whilst some considering the obiter dictum of Shamim Ara to be binding have followed its solution; they were however forced to interpret its gaps. In *Kunhimohammed v. Ayishakutty*<sup>57</sup> Justice Basant whilst praising the Supreme Court's decision as "a declaration of law [that] rhymes well with modern notions of marriage and the true Islamic concepts of marriage and divorce" which are as such consistent with "the human right to life recognized under article 21. [And] rhyme well with the concepts of equality under article 14 of the Constitution", is nevertheless forced to qualify as an implied 'reasonable cause' a failed mediation or the refusal of the wife (or her family) to participate, adding: "We do note that Shamim Ara (...) throws up several interesting questions and those will have to be tackled. If legislature does not intervene and make stipulations, we may have to wait for bridges to



cross the rivers. Judicial innovations may become necessary and unavoidable to build such bridges" (ibid.).

Judicial innovation has already begun however, as certain High Courts have felt free under 'true' Islamic principles to read Shamim Ara as transforming triple talak into a single revocable one<sup>58</sup>, whilst cherry picking different dispositions within the All India Muslim Personal Law Board's (AIMPLB)<sup>59</sup> attempted codification of Muslim law.<sup>60</sup>

Notwithstanding, other High Courts have considered Shamim Ara not to be binding to the point of not recognising the existence of a 'reasonable cause' as a necessary condition of divorce, such as the High Court of Uttarakhand: "once pronouncement of divorce is made by husband in conscious condition, its validity cannot be challenged."<sup>61</sup>

### **The influence of the J&K High Court, a way forward?**

As it comes to legal reasoning in regards to Muslim personal law, the pattern followed by the High Court of J&K cannot yet be qualified as consistent. Indeed, some decisions continue to follow the Supreme Court's lead (and indecision), in line with the rest of the country.<sup>62</sup> However, a recent decision from Justice Massodi hints at a possible evolution<sup>63</sup>, and might change the way Muslim personal law will be applied in the future. Indeed, whilst up-holding the Shamim Ara solution of reasonable cause and necessary arbitration before any Muslim divorce is effective; the legal argumentation is significantly different and answers a number of questions that had been left open for interpretation.

#### *An Islamic legal reasoning applied to an Islamic legal issue*

The first perceived change is the complete lack of external sources used to ground Justice Massodi's decision. Indeed, apart from a reference to some Supreme Court decisions on the nature of marriage—which only serve to re-iterate J&K's increasing incorporation into the Indian legal frame—the judgment does not refer to any textbooks, legal precedents or other authorities on the matter of triple talak. Hence, whilst conceding alongside the Supreme Court's indecisive stance that marriage is a social institution (contract) however based on a 'sacred ceremony'<sup>64</sup>, Massodi J. will precisely qualify it within the Muslim legal frame as a 'solemn covenant' falling under 'ibadat (rules pertaining to the relationship between believer and God) rather than mu'amalat (social relations), therefore forgoing previous attempts



to define it in purely civil terms, but falling completely within the application of Muslim personal law due to its religious/ritualistic nature.

Subsequently the decision will ground itself on the judge's own interpretation of Islamic law, using both primary sources (kur'an and hadith), as well as secondary ones (idjma', kiyas, and idjtihad):

The primary sources of Shariat Law are Quran, Sunna-practice and sayings of the Prophet. Ijma, Qiyas and Ijtihad supplement the primary sources. To find out the answer to the question, and manner in which the marriage may be dissolved or the marriage contract come to an end, we have to go to the fundamental sources of Shariat Law and to understand the concept of marriage in Islam, the rights of the parties to the marriage contract.

This is a radical change from the strict separation the same Court operated in 1955<sup>65</sup>, as it seems now the judicial officer has a duty to tackle Islamic law as a mudjtahid rather than a mukallid. In doing so, Justice Massodi will use philology in his reading of the verses relating to marriage (K 30: 21) and the gender indeterminacy of zawdj to state an equal partnership between the spouses within marriage. Based on K 2:229 under which "a divorce is pronounced twice", he will further infer that a divorce is 'only' pronounced twice, hence: "Talaaki bid'i is a later innovation and does not find approval of Shariat Law. It is a medicine that was conceived to cure the menace of multiple divorces at one time, but turned out to be more lethal than the disease it was to cure."

To determine that the husband's right to divorce is not absolute, he also grounds his opinion on a series of hadith, notably quoted by Dja'far al-sadik (d. 765), who whilst being considered as an authority by Sunnis is also the sixth Imam of the Shia; the latter not recognising triple talak, one could speculate that this choice is not hazardous, and might be leading to talfik (mixing of legal doctrines). Hence he will conclude that arbitration is in all cases compulsory for a divorce to be effective. Furthermore, he will emphasise the role of such arbitration, differentiating it from mediation:

The verdict whatever given by the two arbiters is expected to be followed by the spouses. It is pertinent to mention that Quran uses the word "Hakm" or "arbiter" and not "mediator". The arbiters therefore, have not to simply mediate but to give their verdict so as to redress the grievances, and such verdict is expected to be followed by the spouses.



He will then use analogy (kiyas) to consider as a condition of validity the presence of two witnesses, based on the procedure laid down for revocable talak in its 'pure' form (ahsan) under K 65: 1-2.

There is no scope for disagreement with the legal proposition that the Quran and Sunna refer to Talaak ahsan, restrictions placed on use of the said device, as laid down in Chapter 65 verse 1 and 2 and elsewhere in the Quran and Sunna have reference to Talaak ahsan. However, there is no reason to conclude that the said restrictions applicable to the most approved form of divorce, should not be applicable to the most despised and discouraged form of Talaak i.e. Talaak bid'i. On the other hand, restrictions warrant strict enforcement in case of Talaak bid'i.

Justice Massodi, whilst not de jure invalidating triple talak, renders it de facto ineffective by adding a list of compulsory steps in order for a Muslim divorce to be effective:

- a. Pre-divorce arbitration with representatives of both spouses' respective families.
- b. A valid reason must be put forward (and proved).
- c. Subsequent divorce must be pronounced in the presence of two witnesses ('endued with justice').
- d. The pronouncement must be made during the period of tuhr (between menstrual cycles).

The decision is not far from the solution of the *Masroor Ahmed* case<sup>66</sup>, what is significant however is the legal rationale, which springs from Islamic law's internal reasoning, and is therefore less prone to the frequent accusations of being tainted by secular legal injunctions.

#### *J&K's unique position in reforming Muslim personal law from within*

Justice Massodi's legal argumentation can however be critiqued within the Islamic legal frame itself—as to be fair any decision based on Islamic law. Notwithstanding, the significance of this judgement lies in the fact that a judicial body has fully grasped the interpretation and application of Muslim personal law, allying two distinctive authorities: that of the Muslim scholar or kadi and that of the judicial officer of the State.

Whilst the Indian judiciary has for the most part tiptoed around Islamic legal issues: relying heavily on contradicting authorities, trying to separate certain fields from the realm of Muslim personal law to incorporate them into the civil sphere, or put forward broad Islamic moral



principles to include the former into constitutional provisions, this decision seems to follow a different path. Although moving towards similar goals, its distinctiveness lies in the argumentation put forward, more likely to appeal to a Muslim minority weary of Hindu majority state interventions, whilst having the potential to combine two conflicting sovereignties: that of God and that of the secular Nation State.

J&K is in a unique position to achieve such an agenda due to several particularities it holds within the Indian Union. As aforementioned, it is the most important state with a Muslim majority—moreover diverse with a strong tradition of Sufism and a significant Shia minority, which render the use of talfik more legitimate as a representative and unifying tool. Muslim non-governmental organisation such as the AIMPLB are also absent from the state, making the social pressure to push towards a non-State defined Islamic law less prevalent. The enactment of the *J&K Muslim Personal Law (Shariat Application) Act, 2007* follows also a different objective than the central one of 1937: Whilst the latter translated the 'hand off' approach advocated by the British colonial authorities, leading to a certain level of legal insecurity (or at least, indeterminacy), the former is the result of an appeal from the judiciary for more legal security as Justice Imtiyaz Hussain made clear in 2004:

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(...) customary law prevalent in the State has resulted in chaos and often gives rise to endless litigation and causes delay in the disposal of cases. (...) The Court<sup>67</sup> suggested that the legislature of the State should take an early opportunity of clearly expressing itself by means of proper enactment, whether in matters relating to succession and other matters which came up before the court of law from day to day Personal Law of the parties should be made applicable or custom and if so what should be that custom in a particular matter. (...) [S]ince the problem is a persisting one, it is the high time the Legislature of the State take note of the suggestions of the Full Court.<sup>68</sup>

The subsequent choice by the State legislature to favour Muslim personal law over customary law has enticed the judiciary to be more precise and foreseeable in their rulings over Islamic legal issues, whilst also giving it the tools to compete with un-official Muslim adjudicative bodies such as the Darul-Qazas (non-governmental Muslim arbitration tribunals), whereas the stance taken by the Indian central state is more accommodating in considering these structures as parallel arbitration (yet non adjudicative) bodies, necessary to avoid an over-flow of cases towards the State judicial system.<sup>69</sup>





## Conclusion

Some thirty years down the line, Tahir Mahmood's call for both reform within Muslim personal law and J&K's role to be at the forefront of such venture seems to have begun to materialise (Mahmood 1981). Yet, it remains uncertain as to its sustainability in the future: whether such change in legal reasoning will or even can spread outside J&K. As this article has sought to show, the question of triple talak is at a judicial cross road, and with it the legal grounding upon which Muslim Personal Law is to be administered within India.

The recent Shayara Bano petition exemplifies both avenues upon which the Supreme Court could potentially decide on its reform and/or unconstitutionality. Indeed, whilst the bulk of the petition asks for triple talak (and more generally the issues of marriage and divorce) to be considered outside the purview of religious precepts, and thus amenable to fundamental rights provisions, it also leaves the possibility for it to be declared void on sole Islamic legal grounds.

These two avenues do not have the same legal consequences however. On the one hand, to qualify Muslim marriages and divorce as non-essentially religious would leave but little—if any—effectiveness to the *Muslim Personal Law (Shariat) Application Act, 1937* and de facto create a judicial Uniform Civil Code. On the other hand, to follow the lead of the J&K High Court—and of other Muslim majority states—in declaring triple talak un-Islamic and therefore unconstitutional would be opening the door to further interpretation of Islamic law, something the judiciary has been weary of doing ever since the Shah Bano controversy. Finally, not to choose a particular legal grounding and declaring triple talak to be both un-Islamic and unconstitutional without indicating a clear hierarchical relation between the two, as a recent judgment from the Armed Forces Tribunal has chosen to do<sup>70</sup>, would only pave the way to more legal uncertainty in the future... something a Supreme Court is normally created to avoid.

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## Endnotes

<sup>1</sup> This article derives from a paper presented at the University of Exeter under the auspices of the 'Sharia Project' (jointly organised by the University of Exeter and Leiden University) in 2013 and originally entitled 'Jammu and Kashmir's influence in reforming Muslim Personal Law in India.' I wish to thank the two organisers, Prof. Robert Gleave and Prof. Léon Buskens, as well as all the participants for their feedback on the early stages of this work.



<sup>2</sup> A simple search on the Google search engine will provide an insurmountable amount of links to articles recanting Shayara Banu's story. For an example within a prominent Indian Newspaper, cf. Nair, Nalini. 2016. Shayara Banu's fight against triple talaq. *The Indian Express*, 24 Apr., <http://indianexpress.com/article/india/india-news-india/triple-talaq-supreme-court-ban-muslim-india-shayara-banu-2767412/> [retrieved 15.06.2016].

<sup>3</sup> Contrary to what is often stated in the media (cf. *ibid*), it is not the first time triple talak is challenged in front of the Indian judiciary, cf. Rizvi, Anusha. 2016. The Indian media's focus on Shayara Banu betrays an ignorance of important precedents. *The Wire*, 11 June., <http://thewire.in/2016/06/11/the-indian-medias-focus-on-shayara-bano-betrays-an-ignorance-of-important-precedents-42276/> [retrieved 15.06.2016].

<sup>4</sup> Art. 44 of the Constitution of India.

<sup>5</sup> Agnes, Flavia. 2016. The debate on triple talaq and Muslim women's rights is missing out on some crucial facts. *Scroll.in*, 25 May., <http://scroll.in/article/808588/the-debate-on-triple-talaq-and-muslim-womens-rights-is-missing-out-on-some-crucial-facts> [retrieved 15.06.2016].

<sup>6</sup> *Shayara Banu v. Union of India and Anr.*, writ petition (civil) no. 118 of 2016 [on file with author]. This petition was filed under art. 32 of the Constitution of India, whereby the Supreme Court has original jurisdiction to enforce the fundamental rights conferred by Part III of the Constitution.

<sup>7</sup> An order from the Court compelling a public authority to do something (in this case declare the petitioner's divorce void, as well as declaring triple talak, halala, and polygamy to be illegal.

<sup>8</sup> A triple talak implies a 'major separation' whereby the husband can only re-marry his (ex)wife provided she marries another man beforehand (and the subsequent marriage be dissolved). This practice is otherwise referred to as halala.

<sup>9</sup> Art. 14 (right to equality), art. 15 (right against discrimination), art. 21 (right to life) and art. 25 (right to religious freedom), all protected under Part III of the Constitution of India, of which art. 32 allows the Supreme Court original jurisdiction over the latter's enforcement.

<sup>10</sup> *Prakash v. Phulavati* (2016) 2 SCC 36.

<sup>11</sup> *Danial Latifi v. Union of India*, AIR 2001 SC 3958.

<sup>12</sup> *Mohd. Ahmed Khan v. Shah Bano Begum and Ors.*, 1985 AIR 945.

<sup>13</sup> I am here referring to the (Pakistan) *Muslim Family Laws Ordinance*, 1961, which codified certain aspects of Islamic family such as the procedure upon divorce (s 7), polygamy (s 6) and inheritance (s 4). There remains in Pakistan tremendous problems relating to the validity and application of these provisions (cf. *Allah Rakh v. Federation of Pakistan*, PLD 2000 FSC 1 – under appeal in front of the Supreme Court), but that is a separate issue, the point here is to stress that an attempt at Islamic legal reform had been made.

<sup>14</sup> Census of India. 2011., [www.censusindia.gov.in/2011census/C-01.html](http://www.censusindia.gov.in/2011census/C-01.html) [retrieved 01.11.2015].

<sup>15</sup> I am here referring to the massive protests following the famous *Mohd. Ahmed Khan v. Shah Bano Begum and Ors.*, 1985 AIR 945, where a Hindu composed bench interpreted K 2:241 and in particular the word *mata'* to mean 'provisions' on top of the traditional maintenance due to the divorced wife during the *idda* period (three lunar months), that the latter could claim through S. 125 of the *Code of Criminal Procedure*, 1973, read along the derogatory provision of S. 127 (3) (b)—which extinguishes the right to maintenance under S. 125 if personal law requirements concerning this issue have been fulfilled. The derogatory status of Muslim personal law towards secular provisions can also be seen as it comes to the immovable gifts (cf. *Hafeeza Bibi and Ors. v. Shaikh Farid (dead) by L.RS. and Ors.*, (2011) 5 SCC 654).



<sup>16</sup> The *Muslim Women (Protection of Rights on Divorce) Act*, 1986, was enacted soon after the Shah Bano case, apparently to revert to traditional Islamic legal principles, but in fact enshrined the differentiation operated between 'maintenance' and 'provision.' The validity of the Act as well as this interpretation will later be confirmed in *Dania Latifi v. Union of India*, AIR 2001 SC 3958 (cf. Menski 2008), although both have to be paid within the 'idda period (cf. *Kunhimohammed v. Ayishakutty*, 2010 (2) KLT 71).

<sup>17</sup> Hence fulfilling the Directive Principle of State Policy of a Uniform Civil Code (art. 44 of the Constitution of India) for all Indian citizens.

<sup>18</sup> Especially art. 14 (right to equality), in application of art. 246 (empowering the state to legislate in regards to personal laws) and art. 372 (laws enacted before the Constitution being subject to alteration, repeal, amendment or alteration).

<sup>19</sup> This is true of Hindus within the *Hindu Marriage Act*, 1955, but more recently that of Christians (another minority) within the *Indian Divorce (Amendment) Act*, 2001.

<sup>20</sup> *Shamim Ara v. State of U.P and Anr.*, AIR 2002 SC 3551.

<sup>21</sup> The Constitution of India does not directly apply (except art. 1 and 370) to J&K, which has its own Constitution (*J&K Constitution Act*, 1996 (1939 CE)), its relations with the Indian Union being regulated by the *Constitution (Application to Jammu and Kashmir) Order*, 1954 (C.O. 48), which although modelled after the Constitution of India contains important modifications in regards to J&K's status and legislative autonomy.

<sup>22</sup> Due to its legal autonomy, the *Muslim Personal Law (Shariat Application) Act*, 1937, was not applicable in J&K where customary law (if proven by the litigants) could derogate to Islamic law in all family matters, cf. *Sri Pratap Consolidation of Laws Act*, 1977 (1920 CE). It is only in 2007 that J&K applied Muslim law, irrespective of any custom, notably at the demand of the judiciary who argued for it on the basis of legal security (cf. *Yaqoob Laway and Ors. v. Gulla and Anr.*, 2005 (3) JKJ 122).

<sup>23</sup> *Mohammed Naseem Bhat v. Bilquees Akhter and Anr.*, 2012 (4) JKJ 318.

<sup>24</sup> Both are compendiums of Islamic law mainly based on the hanafi doctrine. They had the advantage of being considered in high regard by the ruling Mughal elite: *Al-Fatawa al-'Alamgiriyya* having been compiled under the orders of Awrangzib (d. 1707). As such they were either quickly translated by administrators and orientalists, or incorporated in text-books destined for judges (cf. Al-Marghinani 1791; Baillie 1875).

<sup>25</sup> Such as the fact the words need to be pronounced intelligibly and directed to the spouse (although she does not have to be present), cf. *Furzund Hossein v. Janu Bibee*, (1878) ILR 4 Calcutta 588.

<sup>26</sup> *Sarabai v. Rabiabai*, (1905) ILR 30 Bombay 537.

<sup>27</sup> *Asha Bibi v. Kadir Ibrahim Rowther*, (1910) IRL Madras 22.

<sup>28</sup> *Pathayi v. Moideen*, 1968 KLT 763.

<sup>29</sup> *Amad Giri v. Mst. Begha*, AIR 1955 J&K 1.

<sup>30</sup> *State of Bombay v. Narasu Apa Mali*, AIR 1952 Bom. 52; also *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707, which clearly states "Part III of the Constitution does not touch upon personal laws."

<sup>31</sup> That is, to tend within the existing personal legal frame to the same solutions based on different religious legal grounds (Menski 2008; also Rudolph & Rudolph 2001).

<sup>32</sup> *Sarla Mudgal, President, Kalyani and others v. Union of India and others*, AIR 1995 SC 1531.

<sup>33</sup> *AWAG [Ahmedabad Women Action Group] and Ors. v. Union of India*, AIR 1997 SC 3614.



<sup>34</sup> *Raisuddin vs. Gulshan*, r.c.a no. 9/2009 and no. 2/2010, DC, Delhi, 8 November 2011.

<sup>35</sup> The state has already used this power regarding wakf properties (cf. *Wakf Act*, 1995).

<sup>36</sup> A differentiation would be made similar to the one between 'Islamicate' pertaining to Islamic cultural norms and 'Islamic' for strictly religious injunctions (cf. Hodgson 1974). Apparently despaired by the incapacity of the Indian judiciary to correctly interpret Islamic law, this seems to be Tahir Mahmood's current stance, hinted from his recent defence of the extension of the class of 'untouchables' to the Muslim population (Misra 2007: 169-70).

<sup>37</sup> Indeed, for the divorce to take effect, its communication must be made to the wife (cf. *Pathayi v. Moideen*, 1968 KLT 763). Courts will progressively define negatively such communication as being distinct from documents relating to the legal procedure at hand.

<sup>38</sup> *A. Yousof Rawther v. Sowramma*, AIR 1971 Ker 261.

<sup>39</sup> In this case: Galwash 1945.

<sup>40</sup> A khul' divorce is a type of Islamic divorce initiated by the wife. However, unlike unilateral talak, it requires the consent of the other spouse in order to be effective. As such, in order to sway the husband's consent, the wife often abandons her dower (mahr) in exchange.

<sup>41</sup> He cites in support of his argument what is deemed to be the leading Pakistani case at the time: *Kurshid Bibi v. Mohd. Amin*, PLD 1967 SC 97. This precedent has however not always been followed by Courts since then.

<sup>42</sup> *A. Yousof Rawther v. Sowramma*, AIR 1971 Ker 261.

<sup>43</sup> This has been the case in the United States, where Courts were asked in the absence of a registered marriage to enforce at least the mahr on contractual grounds. If certain Courts did qualify the Muslim marriage contract as a pre-nuptial agreement (cf. *Aziz v. Aziz*, 488 N.Y.S 2d 123 (N.Y. Sup. Cr. 1985)), they scarcely did enforce its provisions however, precisely because the terms of the contract were too vague, or Islamic law too broad in its definitions (cf. *Shaban v. Shaban* 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001)). Cf. Thompson & Yunus 2007.

<sup>44</sup> *Sri. Jiauddin Ahmed v. Mrs. Anwara Begum*, (1981) 1 GLR 358.

<sup>45</sup> *Must. Rukia Khatun v. Abdul Khaliq Laskar* (1981) 1 GLR 375.

<sup>46</sup> Such as reversing the burden of proof as it comes to the factum of the talak—hence the need for witnesses—the pre-requisite of an arbitration between the spouses etc. See *Dagdu S/o Chotu Pathan, Latur v. Rahimbi Dagdu Pathan, Ashabi Minor D/o Dagdu Pathan and Nasimatbi Minor D/o Dagdu Pathan*, 2002 (3) Bom. LR 50.

<sup>47</sup> Indeed, some of them continued to recognise triple talak unconditionally. For a complete list of dissensions between High Court judgments, cf. Subramanian 2008: 652.

<sup>48</sup> *Shamim Ara v. State of U.P and Anr.*, AIR 2002 SC 3551.

<sup>49</sup> The thrust of the case revolved around rules of evidence and the validity of a written statement.

<sup>50</sup> Irrespective of its compatibility with other Part III provisions, precisely because they stand on the same footing and cannot be hierarchically organised.

<sup>51</sup> *Ashoka Kumar Thakur v. Union of India and Ors.*, (2008) 6 SCC 1.

<sup>52</sup> The 'basic structure' doctrine consists in operating a hierarchy of norms within the Constitution itself (inspired from both German and French constitutional theories) and instituted formally by the Supreme Court's decision *Kesavananda Bharati Sripadagalvaru and Or Vs. State of Kerala and Anr.*, AIR 1973 SC 1461.

<sup>53</sup> *Bai Tahira v. Ali Hussain Fidaalli Chothia and Anr.*, AIR 1979 SC 362.



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<sup>54</sup> *Danial Latifi v. Union of India*, AIR 2001 SC 3958.

<sup>55</sup> *Ibid.*

<sup>56</sup> Recent cases tending towards the recognition of 'irretrievable breakdown' of marriage through the extension of the concept of cruelty as grounds for divorce within Hindu personal law (*Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675), comprising even the denial of sexual intercourse (*Smt. Shashi Bala v. Shri Rajiv Arora*, 2012 (129) DRJ 678), hint at the vagueness of what could be deemed 'reasonable' within Muslim personal law.

<sup>57</sup> *Kunhimohammed v. Ayishakutty*, 2002 (2) KLT 71.

<sup>58</sup> *Masroor Ahmed v. State (NCT of Delhi) and Anr.*, 2008 (103) DRJ 137.

<sup>59</sup> The AIMPLB is non-governmental association created in 1973 in order to defend the application of Muslim Personal Law in India. It is the most prominent organisation of this kind (but not the only one), represented throughout the territory (with a few exceptions, notably J&K) although principally in the North. It furthermore oversees a great number of Darul-Qazas that offer extra-judicial rulings on family matters. Although vowing to represent all the different Sects of Islam present in the Sub-Continent, it remains largely Sunni and hanafi oriented.

<sup>60</sup> AIMPLB 2001: Part II, S 5 (b) does in fact render ineffective a divorce pronounced out of anger, as pointed out in the *Masroor Ahmed* case, however the latter disregards the fact that S 12 recognises and validates the existence of triple *talak*.

<sup>61</sup> *Mohd. Usman S/o Sri Mohd. Irfan v. Smt. Gulshan Ara D/o Shri Abrar Hussain*, Civ. App., HC Uttarakhand at Nainital, 22 October 2009.

<sup>62</sup> *Mariyam Akhter and Anr. v. Wazid Mohd.*, 2010 (4) JKJ 13.

<sup>63</sup> *Mohammed Naseem Bhat v. Bilquees Akhter and Anr.*, 2012 (4) JKJ 318.

<sup>64</sup> *G.V. Rao v. L.H.V. Prasad and Ors.*, (2000) 3 SCC 693.

<sup>65</sup> *Amad Giri v. Mst. Begha*, AIR 1955 J&K 1.

<sup>66</sup> *Masroor Ahmed v. State (NCT of Delhi) and Anr.*, 2008 (103) DRJ 137.

<sup>67</sup> *Mohd. Akbar Bhat v. Mohd. Akhoon*, AIR 1972 J&K 105.

<sup>68</sup> *Yaqaob Laway and Ors. v. Gulla and Anr.*, 2005 (3) JKJ 122).

<sup>69</sup> *Vishwa Lochan Madan v. Union of India and Ors.*, (2014) 7 SCC 707.

<sup>70</sup> *Lance Naik/Tailor Mohammad Faroor v. Chief of the Army Staff and Ors.*, Original Application no 287 of 2012, Armed Forces Tribunal, Regional Bench, Lucknow, 25 May 2016 [on file with author].

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