



## The power of two

Karnataka's political future will hinge on how the BJP and Congress deal with factionalism

When elections draw near, rivalries within parties intensify. As Karnataka prepares for next year's Assembly poll, front-line leaders of the two principal contenders for power, the Congress and the Bharatiya Janata Party, have begun pressuring their national leaderships for a bigger say in ticket distribution and in the election campaign. In the BJP, the factional fight is between the State unit president and former Chief Minister, B.S. Yeddyurappa, and senior leader K.S. Eshwarappa. Mr. Yeddyurappa, who managed to extricate himself from the legal tangles that arose out of corruption cases, is the frontrunner for the chief minister's post in case the BJP wins. But when Mr. Eshwarappa criticises the "unilateral style" of Mr. Yeddyurappa, he strikes a chord with many in the second line of the party. The BJP, which had lost heavily when Mr. Yeddyurappa broke away from the party before the last Assembly election, did well on his return in the Lok Sabha election three years ago. The party is therefore in no mood to jettison the former Chief Minister; Mr. Eshwarappa cannot hope for much more than a prominent role as second fiddle. Mr. Yeddyurappa retained the upper hand during the State executive of the party in Mysuru, even if his rival made a defiant appearance. In the absence of any encouragement from the national leadership, Mr. Eshwarappa has turned more conciliatory. But the fissures run deep and cannot be easily plastered over. Mr. Eshwarappa and his Sangolli Rayanna Brigade, a supposedly apolitical platform of Dalits and Backward Classes, will continue to exercise pressure on the chief ministerial aspirant.

In the Congress too, the leadership issue is more or less settled. Denying Chief Minister Siddaramaiah another shot at power would only weaken the party further. In any case, in the latest round of by-elections he held his own against a marauding BJP. But factional pressures and caste dynamics are in full play as the process of identifying a person for the post of president of the Karnataka Pradesh Congress Committee rolls on. After replacing former Madhya Pradesh Chief Minister Digvijaya Singh with K.C. Venugopal as the national leader in charge of affairs in Karnataka, the Congress is trying to plug the weakness in the organisational structure and bring together all factions. But there is simply no way to please everybody. Even if Mr. Siddaramaiah's rivals are willing to reluctantly accept his candidature for chief ministership, they are likely to want someone who could stand up to him as the next KPCC president. The Congress leadership may see a benefit in having two power centres. Karnataka 2018 might turn out to be a fight between Mr. Yeddyurappa and Mr. Siddaramaiah, but the election will be won and lost on how those lower down the hierarchy pull their weight.

## A new day in Seoul

South Korea's new president faces many challenges, but offers a reason for hope

The election of the moderate Moon Jae-in as South Korea's President marks a decisive break from the bitter divisions and scandals that unsettled the country's administrative and political equilibrium in recent months. Mr. Moon won 41% of the vote, almost double that of his nearest rival. In the wake of the polarising tenure of his predecessor, Park Geun-hye, who was ousted through the impeachment route, he appeared conciliatory during the election campaign, emphasising the need to move on. Indications of Mr. Moon's willingness to engage with the troubling issues in the region came after he was sworn in on Wednesday, when he declared his intention to visit Pyongyang and hold discussions with Washington, Beijing and Tokyo. With this, the veteran human rights lawyer struck a positive note for the kind of multilateralism required to lower tensions in the Korean peninsula. The bold announcement should allay the apprehensions of sceptics who would have assumed that Mr. Moon may be rather soft towards the North, as well as those who feared that engaging Pyongyang could alienate the U.S. The fact remains that any realistic prospect of containing North Korea's nuclear posturing depends on two inter-related factors: marginalising the hawks in Washington and impressing upon Kim Jong-un's regime the economic and political consequences of defying multilateral norms.

Mr. Moon's other big regional challenge is the U.S.-backed installation of the Terminal High Altitude Area Defence (THAAD) anti-missile system on South Korean soil. Interception of North Korea's increasingly sophisticated missile launches is behind this, but the development has raised concerns in Beijing, which thinks the THAAD radar could undermine its own defence infrastructure. Assuaging such Chinese fears will not be easy and Beijing would like nothing less than the complete withdrawal of the defence shield. Although Mr. Moon has promised to renegotiate the THAAD installation, it is premature to speculate on Washington's response. But a more rapid restoration of cultural, tourism and trade relations between Seoul and Beijing appears possible given Mr. Moon's accommodative stance. Peaceful coexistence is imperative among neighbours, a consideration that will hopefully prevail over other factors. At home, Seoul has in recent months been rocked by the influence-peddling scandal involving Ms. Park and executives from top business houses, leading to her eventual ouster. After rallying a large number of citizens behind the unprecedented protests, the President has raised expectations of a more transparent and accountable corporate governance culture in South Korea's conventional chaebol system of family-owned businesses. In realising that unenviable task, Mr. Moon can count on a demonstrably vibrant and independent judiciary and an effective parliament. It will not be smooth sailing, but there is reason for hope.

# Triple talaq and the Constitution

The Supreme Court cannot decide this case without engaging in a series of complex and difficult choices



GAUTAM BHATIA

The Supreme Court today will begin hearing arguments in *Shayara Bano v. Union of India*, which has popularly come to be known as the "triple talaq case". This case, in which the constitutional validity of certain practices of Muslim personal law such as triple talaq, polygamy, and nikah halala has been challenged, has created political controversy across the spectrum. The All India Muslim Personal Law Board (AIMPLB) has warned secular authorities against interfering with religious law. On the other hand, Prime Minister Narendra Modi has lent his support to the Muslim women fighting against the practice of triple talaq.

One would expect the judges of the Supreme Court to adjudicate the constitutional validity of triple talaq (and, if they choose, of the other practices under question as well) detached from the political debate, and strictly in accordance with law. A closer look reveals, however, that the court cannot decide this case without engaging in a series of complex and difficult choices. In particular, the court will have to decide first whether to adjudicate the case in a narrow manner, which stops at assessing the relationship between triple talaq and Muslim personal law, of whether to undertake a broader approach, and ask whether personal law can be subject to the Constitution at all.

### The narrow view

Proponents of the first view – which include some of the interveners before the court – invite the judges to hold that triple talaq is invalid because it has no sanction in Muslim personal law. In response to the AIMPLB's claim that the state has no right to interfere in the per-



R.V. MOORTHY

sonal, religious domain, they respond that the religious domain, properly understood, does not, and has never, allowed for triple talaq. They draw a distinction between *instantaneous* talaq, or talaq-i-bidat (where divorce is complete when "talaq" is uttered three times in succession) with talaq ahasan, which requires a 90-day period of abstinence after the pronouncement, and talaq hasan, which requires a one-month-long abstinence gap between utterances. The latter two are part of Islamic personal law, but the first one is not.

Relying upon the Supreme Court's own judgments, they point out that only those features of a religion are constitutionally protected which are "integral" or "essential" parts of it. There is no evidence to show that talaq-i-bidat constitutes an integral part of the Islamic faith and, consequently, it does not deserve constitutional protection. On this view, the Supreme Court need not go into tangled and messy questions involving personal law and the Constitution; it can decide the question on its own terms. Although this would involve secular judges laying down the law on what Islam does or does not consider an essential religious practice, the Supreme Court has been engaging in such religious inquiry at least since 1966, and it is too late in the day to now say that it cannot, or should not. In fact, the Supreme Court itself, in a number of cases, has either doubted the validity of in-

stantaneous triple talaq, or gone so far as to say that it is not a part of Muslim personal law. Such an outcome would be an easy one for the court to achieve, and of a piece with decades of consistent jurisprudence. Historically, the Supreme Court has often "interpreted" or "modified" elements of religion to conform to a modernist, progressive world view, while holding that such its interpretation is the true understanding of what the religion actually commands. Such judicial intervention has primarily – but by no means exclusively – been in the domain of Hindu law. In the words of one scholar, instead of subjecting religion to external norms (such as those prescribed by the Constitution), the court has attempted to reform religion from within. Of course, there is a very basic question here about the court's competence and legitimacy to undertake such a task. However, while the narrow view would be the easy and natural path for the court to take, it would also entail missing a significant opportunity.

### The broad view

There is a broader, almost radical, path that the court might chart. It might hold that controversies such as whether triple talaq is sanctioned by the Islamic faith raise questions that a court cannot, or should not, attempt to address. Far from entering the thicket of personal law, the court should simply ask whether a challenged practice of personal law violates anyone's

fundamental rights.

This approach, however, runs into one significant problem. In order to subject triple talaq – as a claimed aspect of Muslim personal law – to constitutional norms, the court must first overrule a 1951 judgment of the Bombay High Court (subsequently affirmed by the Supreme Court in another case) called *State of Bombay v. Narasu Appa Mali*. In that case, Justices Chagla and Gajendragadkar held that uncodified personal laws may not be scrutinised for fundamental rights violations. They did so on the technical reasoning that Article 13 of the Constitution subjected only "laws" and "laws in force" to the scrutiny of fundamental rights, and that "personal laws" are neither "laws" for this purpose, nor "laws in force". Beneath this technical reasoning, however, was a deeper assumption: a distinction between law, as created by the state or its agencies through acts of legislation on the one hand, and "personal law", which had its source in the scriptures, and in non-state bodies for interpretation and enforcement, on the other.

This view, however, suffers from being historically inaccurate. There does not exist – and there probably never existed – a "pure" domain of personal law, which has its source in scriptures (the Koran for Muslims, or the *shastras* for Hindus) independent and untouched by state influence. The colonial courts of the British empire, in fact, played an active role in both constructing and shaping what came to be defined as personal law. They did this through selection of "authentic sources" (to refer to and cite in their judgments), through creating a hotchpotch amalgamation of common law principles and what they perceived to be ancient Hindu (or Muslim) personal law, and by imposing binary categories upon fluid and changing identities. In many cases, this led to a rigidification and ossification of the dynamic aspects of religion. It is now well-known, for instance, that in the famous *Aga Khan* case in 1866,

the Bombay High Court treated the Khoja community as Muslim, despite their own protestations that they identified neither with Muslims, nor with Hindus. It was perhaps for this reason that the British administrator Elphinstone famously observed that "we ought not to be guided by Hindu law, which is a new introduction of our own."

### The choice

Ultimately, the choice between the court is a stark one. Ever since the *Narasu Appa Mali* case, there has been a domain of law – i.e., uncodified personal law – that has simply been deemed to be beyond the realm of the Constitution, and beyond the scrutiny of constitutional norms such as equality, freedom of conscience, and the right to personal liberty. Not only has this created a paradoxical situation where, as long as personal laws are uncodified, they escape constitutional scrutiny, but the moment they are legislated by the state (as large parts of Hindu laws were in the 1950s), they become subject to the Constitution; but it also seems to be entirely at odds with the basic principles of a republican democracy governed by a secular Constitution.

There is no doubt that triple talaq violates women's rights to equality and freedom, including freedom within the marriage, and should be invalidated by the Supreme Court. The larger question, however, is whether the court will stick to its old, narrow, colonial-influenced jurisprudence, and strike down triple talaq while nonetheless upholding a body of law that answers not the Constitution, but to dominant and powerful voices within separate communities; or will it, in 2017, change course, and hold that no body of law (or rather, no body of prescriptions that carries all the badges and incidents of law) can claim a higher source of authority than the Constitution of India?

Gautam Bhatia is a Delhi-based lawyer

## Navigating the new silk road

China's Belt and Road Initiative reflects global trends and a new paradigm which India can support and shape



MUKUL SANWAL

Will Prime Minister Narendra Modi surprise everyone and participate in China's 'Belt and Road Forum for International Cooperation' which begins on May 14?

That would be the kind of bold initiative he took in inviting leaders of our neighbouring countries to his swearing-in in 2014, but with far greater significance.

It would also be an appropriate response to China's recent four-point initiative and test its intent. China has suggested starting negotiations on a 'China India Treaty of Good Neighbours and Friendly Cooperation', restarting negotiations on the China-India Free Trade Agreement, striving for an early harvest on the border issue and actively exploring the feasibility of aligning China's 'One Belt One Road Initiative' (OBOR) and India's 'Act East Policy'. To repeat Nehru's outright rejection in 1960 of Zhou Enlai's proposal to settle the bor-

der dispute would be a historic mistake.

### With the long term in mind

India's response should be based on its long-term interest and not short-term concerns. First, treat the Belt and Road Initiative (BRI) – which already has contracts of over \$1 trillion covering over 60 countries – as enlarging areas of cooperation; and push for India as the southern node and a 'Digital Asia'. India cannot be a \$10 trillion economy by 2032 without integrating itself with the growing Asian market and its supply, manufacturing and market networks.

Second, complementarily to China's Initiative, develop common standards with the fastest growing economies in Asia that are on the periphery of the B&R Initiative, such as Bangladesh, Vietnam and Indonesia, to facilitate trade, investment and business engagement.

Third, offer a new cooperation framework in South Asia around global challenges. For example, sharing meteorological reports, region specific climate research and the 'Aadhaar' digital experience, despite on-going security concerns.

Fourth, thought leadership



provides an avenue to increasing global influence. Hinduism and Buddhism spread to East and South-East Asia with commerce and an urbanising Asia and world, and needs a new organising principle around shared prosperity – principles that dominated India till 1800 making it the world's richest country for over two millennia.

### Economy as strength

India has the potential to be the second largest world economy and Mr. Modi's participation in the Forum will not be as just one of the 28 leaders and 110 participating countries but as a partner shaping the changing world order.

## LETTERS TO THE EDITOR

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

### Reining in Karnan

The way the Justice Karnan case has turned out reminds one regrettably of the oft-quoted Shakespearean dictum, "Something is rotten in the state of Denmark". Even if one sets aside Justice Karnan's "aberrant behaviour" and his "flinging irresponsible charges of corruption against several High Court judges", one cannot gloss over the perception created that the judiciary's Augean stables need cleaning. Some of the cases of corruption involving those who are high profile make one believe what the judge has been trying to put across. Many in the judiciary do not speak out for fear of contempt of court (Editorial – "The recalcitrant judge", May 10).

C. LOVADASON,  
Thiruvananthapuram

Justice Karnan was given a long rope by the Supreme Court to course correct

himself. But his belligerence against and disdain for the top court was persistent. To sentence him before his retirement is not a blemish on judiciary. Had the Supreme Court bench not passed such an order, it would have sowed the seeds of doubt in our minds on whether the allegations of corruption raised by Justice Karnan were true. In a democracy, the judiciary, the executive and the legislature are coexistent. When one wing is in difficulty, the other two should step in. Justice Karnan should have also come forward to show what welfare measures were taken by him for the uplift of Dalits.

R. KRISHNAMACHARY,  
Chennai

The case once again reinforces the basic fact that there is a lack of a mechanism to discipline such judges outside the impeachment process in

order to address delinquency in the higher judiciary. I recall a 2004 article by Rajeev Dhavan in *The Hindu* that laid stress on the need for a mechanism to deal with errant judges. The behaviour and attitude of Justice Karnan, even taking shelter under his caste, say a lot about his way of functioning. Gone are the days when one led by example. I cite the example of a British judge, Lord Denning, who resigned after his book, *What Next in the Law*, created an uproar after he argued that all British citizens were no longer qualified to serve on juries because "the English are no longer a homogeneous race".

SUDDAPALLI BHASKARA RAO,  
Muscat, Sultanate of Oman

A spark for science SPARK, or Sustainable Progress through Application of Research and Knowledge, is a good idea if it is directed at encouraging

research, design and development in the industrial/private sector (May 10). Very roughly, the ratio of R&D efforts as shared between the government and private sector is 4:1. This should be reversed to 1:4, which means that the private sector spend on R&D must go up by a factor of 16. Otherwise, science in India will progress as it has always – over-managed and under-performing ("Duplication isn't synergy", May 10).

GANGAN PRATHAP,  
Thiruvananthapuram

### Triple talaq

Triple talaq is not just anachronistic, but violative of the spirit of the Koranic principle of justice and equality between genders (The Wednesday interview - Salman Khurshid, May 10). Most Muslim countries have discarded it and sections within Indian Muslims do not follow it. Insistence on it owes itself to fear that one

compromise would lead to another, leading to the complete dilution of the identity of the community. Similarly, when the BJP lends support to the issue, it does not do it out of any genuine concern for justice for Muslim women. It has never spoken against customs such as mairi karar or khap panchayats. In fact I found the party's

### CORRECTIONS & CLARIFICATIONS:

A front-page story, "ICJ stays sentence in Jadhav case" (May 10, 2017), erroneously referred to the "*Geneva convention* that deals with Consular relations". Actually, it is the *Vienna convention*.

The opening paragraph of "IndiGo to spread its wings into regional aviation market soon" (Business page, May 10, 2017) erroneously said "IndiGo's fourth-quarter profit rose 25% to 440 crore". It should have said *declined*.

Late correction: It was erroneously stated in the obituary report, "The Jewish bahu of Anand Bhavan – Fori Nehru (1908-2017)" – (April 26, 2017), that Fori was the *founder* of the Cottage Industries Emporium. As pointed out by a reader, a few other people including Subhadra Joshi, Indira Gandhi, and Kamaladevi Chattopadhyay were part of it in its early days. The report referred to a conversation at *Dharamshala*. It should have been *Kasauli*.

It is the policy of The Hindu to correct significant errors as soon as possible. Please specify the edition (place of publication), date and page. The Readers' Editor's office can be contacted by Telephone: +91-44-28418297/28576300 (11 a.m. to 5 p.m., Monday to Friday); Fax: +91-44-28552963; E-mail: readerseditor@thehindu.co.in; Mail: Readers' Editor, The Hindu, Kasturji Buildings, 859 & 860 Anna Salai, Chennai 600 002, India. All communication must carry the full postal address and telephone number. No personal visits. The Terms of Reference for the Readers' Editor are on www.thehindu.com