Triple Talaq Conundrum

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So the perpetrators and perpetuators of injustice are now masquerading as protectors and messiahs of the Muslim women. People who have all along kowtowed to the clergy are now doing so under the veneer of bringing social justice for the hapless women they have always betrayed to secure the votes of a community susceptible to the vicious influence of a clergy whose mindset continues to remain steeped in the medieval ages. A party that had reversed the landmark Supreme Court by legislating a regressive act to uphold the oppression of Muslim women is now shedding copious loads of crocodile tears in their sympathy - on the likelihood of destitution and hardship to be faced by the instantly divorced Muslim women in the event of their husbands being jailed.

The Muslim Women (Protection of Rights on Marriage) Bill, 2017 that the Government has passed in the Lok Sabha and has now been stalled by the Rajya Sabha has only 7 short clauses. After the preliminary and definitions in clauses 1 and 2, clause 3 states, "Any 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." Clause 4 prescribes the punishment for this: "Whoever pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years and fine." Clause 5 confers to a married Muslim woman upon whom talaq has been pronounced the right to receive from her husband a subsistence allowance and clause 6 gives the custody of her minor children to her. Clause 7 makes pronouncement of instant talaq a cognizable and non-bailable offence. Once the punishment is taken out, nothing remains in the Bill.

The "Statement of Objects and Reasons" of the Bill draws reference to the recent Supreme Court judgment declaring the practice of triple talaq unconstitutional. It notes that the judgment which "gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce" has not worked as a deterrent in bringing down the number of instances of triple talaq. The objective of the legislation was to ensure "the larger Constitutional goals of gender justice and gender equality of married Muslim women and help subserve their fundamental rights of non-discrimination and empowerment."

The argument proffered by the opponents to this Bill runs thus: Marriage in Islam is a civil contract between the husband and wife, and hence the procedure in the event of divorce should be civil and not criminal. The bill, they contend, thus blurs the distinction between the civil and the criminal laws. In other words, Muslim women should be satisfied with the Supreme Court ruling that made the instant *talaq* unconstitutional, the underlying assumption being that since anything unconstitutional cannot be practiced, the Supreme Court judgment would be deterrent enough. We are of course living in a perfect world where only the angels tread.

Marx had remarked that history repeats itself twice, first as a tragedy and then as farce. If Shah Bano case was a tragedy, this indeed is a farce. Let us first recall the tragedy. Shah Bano got married to Mohammed Ahmad Khan, an affluent advocate of Indore in 1932 and bore him five children through 43 years of marriage. Mr Khan then took another wife and threw Shah Bano, aged 62, along with her five children, out of her nuptial home in 1975. He paid Rs 200 per month for two years and deposited Rs 3,000 as dower during the period of *Iddat*, the obligatory period of about 90 days during which the woman cannot remarry. In April 1978, the poor woman approached the local Court, filing a claim for maintenance demanding only Rs 500 a month which was just 10 percent of her husband's income, under Section 125 of the Criminal Procedure Code, which legally obligates a man to provide for his wife during marriage and even after divorce if she is unable to maintain herself. The enraged husband then used the *brahmastra* of triple *talaq*, seeking protection under Muslim Personal Law in India that limited the husband's liability to provide maintenance only to the *iddat* period. The Indore Court directed Mr Khan to pay Rs 25 per month, which was enhanced by the High Court of Madhya Pradesh next year to Rs 179.20. Khan then filed a petition before the Supreme Court.

The venerable All India Muslim Personal Law Board (AIMPLB) and Jamiat Ulema-e-Hind joined the fray to argue for the supremacy of Sharia laws in matters relating to Muslim marriage, divorce, maintenance and all other family issues. In April 1985, a five-judge bench of the Supreme Court, in a unanimous decision, dismissed the appeal and confirmed the judgment of the High Court, saying, "Neglect by a person of sufficient means to maintain them and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion." The Court also regretted that article 44 for enacting a Uniform Civil Code in India remained a dead letter. It held that a common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. As I have argued earlier in these columns, anything less than a uniform civil code would only lead to contradictions and there is no alternative to it.

The judgment was a milestone in the legal history of India, but to the Congress party votes were more important. As AIMPLB took to the streets and whipped up religious sentiments painting the judgment as on onslaught upon Islam, Rajiv Gandhi's government meekly capitulated to the perceived powers of the clergy to sway the Muslim vote-bank away from Congress, its traditional beneficiary. It promptly enacted "The Muslim Women (Protection of Rights on Divorce) Act, 1986", overturning the Supreme Court Judgment, and limiting the liability of the husband to pay maintenance only during the period of *Iddat*. Shah Bano withdrew her maintenance suit while her husband continued enjoying the pleasures of life without paying anything to his wife of 43 years. The tragedy was that the Government of the day did not think that instant *talaq* had left her destitute. The farce is that today the same party is asking the State to pay for subsistence of the divorced wife if the husband went to jail, absolving him of all financial liabilities.

Even later in 2002, in Daghu Pathan vs. Rahimbi Daghu case involving maintenance under the same section 125, a full bench of the Bombay High Court had ruled that a Muslim husband cannot dissolve a marriage at will; that for triple talaq to be valid, it should be proved in Court, under the Civil Procedure Code, 1908

and the Indian Evidence Act, 1820, that due procedure was followed preceded by stages of conciliation or arbitration as prescribed in the scripture and that the mere existence of a *Talaqnama* or deed of divorce would not suffice to make the divorce legal. The Supreme Court reiterated this in 2002 in the case of Shamim Ara, triple-*talaqed* after 19 years of marriage, upholding her plea for maintenance again under Section 125. The tragedy was that despite these judgments, the Government had turned a blind eye to the rampant use of triple *talaq*.

To grasp what happens when the State does not criminalise actions that are criminal, consider the following. A filmmaker makes a film on a 15th century mythical character, whose right to do so is guaranteed by the Constitution. Hooligans invade and ransack the sets and assault the film crew – nothing happens to them. Even when he abides by the Censor Board directives, a self-proclaimed leader threatens to "burn" India if the film is released, and the state watches helplessly. Open defiance of the law in not criminal in our definition of democracy.

On the pretext of commemorating an obscure 19th century battle fought in an entirely different historical context that has no resonance with realities of 21st century India, absurd linkages are established to divide an already decomposed society further in the name of caste. In our corrosive body-politic, it takes very little to ignite the fuse of caste and religion. A conflict is thus engineered and an irresponsible leader calls for a bandh to let loose a corpus of hooligans who go on a rampage for two days, burning, stoning, destroying, vandalising and ransacking private and public property at will, with complete impunity. Law-enforcers watch helplessly, because inciting people in the name of religion or caste is not considered a crime; some even try to rationalize such depraved actions as expressions of genuine anger of the marginalized and the dispossessed built up over centuries of exploitation. Lumpenisation of society is what happens when the criminal acts are not criminalised and dealt with an iron hand. If the State remains a mute spectator, it becomes an active partner in this farce.