Towards Liberation

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(I)

The discord over triple talaq and rights that Muslim women have been fighting for has now boiled down to a single point whether three talaqs uttered in a single sitting should be treated as a single talaq. This has been the thrust of arguments so far proffered before the Supreme Court, and it appears that settled justice will be done and will be seen to have been done by all parties. The learned judges of course know the best, but the questions concerning the equality of Muslim women in respect of marital rights and discriminatory marital practices against them appear already to have receded into a distant background. Whether that is also an issue the Hon'ble judges will consider while deciding on the core issue of the validity of triple talaq is not known. But since fundamental rights which are integral to the basic structure of the Constitution are involved here, it can be expected that the wisdom of the Court would encompass the whole set of all linked issues and not be limited merely to a part of it. The petitioning Muslim women and Muslim women's organisations are fighting for their rights of gender equality while those opposing them are contesting to deny them these rights under the pretext of protecting their so-called religious freedom.

The Constitution Bench of the Court that is adjudicating the issue has five judges from five different faiths – four from minority communities and only one from the majority community, which was probably done to ward off the possible criticism of imposition of majority view on a minority community, given the sensitiveness of the matter and also to limit the scope of whipping up religious passions by a determined clergy, aided by an unruly media, especially electronic. The Bench had initially taken a stand to delink the questions of nikah-halala and polygamy from its purview, and to limit itself only to examine whether triple talaq is fundamental to Islam. However, immediately afterwards, they had to reverse their stand and clarify that they had not closed the window to scrutinize the two linked and contentious issues of polygamy and nikah halala, and that the decision on triple talaq may or may not have a bearing on these other two issues. They made it clear that they had kept the nikah halala and polygamy outside their radar only for want of adequate time during the current 6-day-long hearing. It reinforces the belief that the Court would not allow its judgment to be constrained and would deal with the matter holistically in all its aspects for the sake of justice.

From the way the arguments have been going so far, nobody seems to have been able to demonstrate convincingly why triple talaq should be considered as fundamental to religion, especially since many Islamic countries have prohibited the practice. Nobody can doubt that the belief in the oneness of God is a fundamental tenet of Islam, but can triple talaq be considered equally fundamental? Or is there a hierarchy of fundamental elements in Islam? Where would triple talaq fit then, since it is not mentioned in Holy Quran, and especially when divorce itself has been described as 'sinful' and "abghaz-ul-mubahat

indallah" - most detestable in the sight of God - as pointed out by Tahir Mahmood, a former member of the Law Commission and a scholar?

The argument has now veered to the question whether the three talaqs uttered in three separate occasions spaced by a month each to facilitate efforts for reconciliation would serve the needs of justice, even without curtailing the husband's unilateral right to seek divorce. This argument is bogus and militates directly against to the fundamental Constitutional rights to equality and freedom, as enshrined in articles 13, 14, 15 and 21. A practice like triple talaq under the Muslim personal law, even without having a legislative origin, has acquired the force of law through custom and usage which contradicts the fundamental rights guaranteed by the Constitution; such a practice should automatically be rendered null and void under article 13 of the constitution, as affirmed by several existing court judgments. Further, the right to freedom of religion guaranteed under article 25 is not an absolute right – like all other fundamental rights, this is also subject to reasonable restrictions. By no stretch of imagination, this right to freedom of religion can be said to supersede any other fundamental rights including the rights to equality and freedom. Personal laws cannot have the same standing as fundamental rights; if the exercise of triple talaq as per "The Muslim Personal Law (Shariat) Application Act, 1937" violated fundamental rights guaranteed under the Constitution, then it is not the fundamental right that should be compromised for the sake of personal law of a religious community, but the personal law, practice or custom in question must be abolished. Also, as the Attorney General has pointed out, the right to freedom of religion operates within the precincts of religious establishments, while fundamental rights operate everywhere without any boundary.

The learned lawyer, the veteran Congress MP Mr Kapil Sibal, engaged by the defendants, the All India Muslim Personal Law Board (AIMPLB), has proffered some impossible and ludicrous arguments in trying to defend the indefensible - "Triple talaq is there since 637. Who are we to say that this is un-Islamic? Muslims are practicing it for last 1400 years. It is a matter of faith. Hence, there was no question of constitutional morality and equity." By that logic, all customs, howsoever monstrous and repugnant they might be, could be justified, including many of the abhorrent practices which have since been abolished by law, like sati, untouchability, caste discriminations etc. Indeed, the list of now-extinct social and religious practices which reigned for a long time and are universally condemned today would be endless. If we didn't dump these abhorrent practices to the dustbin of history, human society would not have progressed much beyond its primitive stages, and remained stranded in a time-warp, where clearly the AIMPLB, an enterprise of the mullahs who have vested themselves with absolute powers over the community as guardians of Muslim personal law, wants the Indian Muslims to languish so that they can exercise their powers to control it according to their whims and fancies, interpreting religious laws according to their convenience and protecting the vested interests of the mullahs who still have an overwhelming sway over the community.

The AIMPLB, a body that believes that males have superior judgment and decision making powers than females and expressly stated so in its affidavit before the Supreme Court, had earlier carried on a systematic misinformation campaign in favour of triple talaq. In response to a March 2015 survey by the Bharatiya Muslim Mahila Andolan (BMMA), one of the petitioners in the instant case, in which 97% of women respondents had said they were opposed to triple talaq, polygamy and nikah halala, the AIMPLB

conducted a countrywide signature campaign to garner support for triple talaq, taking advantage of the congregational nature of worshippers in mosques where an Imam can exhort them to act in any particular manner and claimed an overwhelming support by the majority of Muslim women. Finally, it announced 'social boycott' of those misusing the provisions of marriage annulment under Islamic law. If anyone is in need of social boycott, it is this body of clerics who are steeped in medieval times and medieval mindset. As Mr Julio Ribeiro pointed out in a recent article, these clerics had appropriated all the powers and benefits given to the minority community by successive governments, while the rest of the community had continued to wallow in poverty, illiteracy and deprivation.

Sensing the direction of the wind, it has now changed tack. In a desperate attempt to protect their monopoly, it is now advocating that the nikah-nama which is a contract for marriage between consenting adults can have clauses for invoking the triple talaq by both husband and wife. Apart from the question of how many Qajis in the country would abide by this diktat, it also brings out the tenuousness of their argument about triple talaq being fundamental to Islam.

(II)

Even the analogy of Muslim majority countries which have abolished triple talaq might not be valid and appropriate in the Indian situation, in view of the fundamental rights to equality before law (article 14), right against discrimination on grounds of religion, race, caste or sex (article 15), and right to life and personal liberty (article 21) guaranteed in our Constitution. But we may still draw some very useful lessons.

The objective of equality and gender justice are perhaps best served by the Tunisian law, the Tunisian Code of Personal Status, 1956, under which a husband cannot unilaterally divorce his wife through verbal pronouncements; he has to first consult a judge and convince him. Marriage and divorce are controlled by the State, and all divorce proceedings must occur before a judge, with a court-directed effort at reconciliation being mandatory. Each party has the right to ask for divorce, but each has to convince the judge about the reasons thereof. The judge can order a compensation to be paid by either the husband or the wife, depending on which party has been harmed by the other. Iraq was one of the first Arab countries to replace Shariah Courts with government-run Personal Status Courts in 1959. According to Iraq's Personal Status Law, three verbal or gestural repudiations pronounced at once will count as only one divorce, but both husband and wife can ask for separation which is to be decided by the court. Sri Lanka, a Buddhist nation, has also enacted a law for the minority Muslims that allows divorce through talaq by the husband only, after notifying a Muslim judge (Qadi) and after 30 days to allow for reconciliation attempts by relatives and elders.

In Pakistan, the husband must pronounce talaq in three successive menstrual cycles, not in a single sitting. Most Muslim nations, including Bangladesh, Jordan, Egypt, Indonesia, United Arab Emirates and Qatar have adopted a similar law on triple talaq, which is based on the interpretation of the 13th century Egyptian scholar Ibn Taimmiyah. In Pakistan, the husband must first give notice to a Government appointed council that will attempt reconciliation before the divorce becomes valid. The wife does not have the power to seek separation, but can remarry her ex-husband after divorce.

By allowing a similar system, the harshness of the existing practice in India can surely be reduced and some sections of the clergy can perhaps be brought around, but that will fall short of the needs for gender justice and fundamental rights. It is to be realised that Talaq is inherently discriminatory against women and denies them not only their rights but also dignity. Again, Tahir Mahmood in his book "Introduction to Islamic Law" co-authored with Saif Mahmood had quoted the Deobandi theologian Ashraf Ali Thanvi (1863-1943): "A man pronounces a revocable talaq. He reconciles and resumes cohabitation. A few years later under some provocation he pronounces a revocable talaq once again. On recovering from provocation he again resumes cohabitation. Now two talaqs are over. Thereafter whenever he pronounces a talaq it will be counted as the third talaq which will dissolve the marriage forthwith." The right is absolute for men, women will always be at the receiving end, whether they receive the three talaqs in a single or three separate sittings.

The inescapable inference is, logically only a uniform civil code, as mandated in article 44 of the Constitution under Directive Principles of State Policy, which states that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India, can resolve all the contradictions that will arise from substitution of the present system with any other system that derives its sustenance and sanctity primarily from religion. A commendable example is Turkey, which under Mustafa Kemal Ataturk had adopted the Swiss Civil Code in 1926, discarding the Islamic laws governing divorce and marriage. The code was revised in 1980, but still remains insulated from religious footprints. We have to bite the bullet and recognize unapologetically that religion here is the root of the problem. As long as we shall give primacy to religious considerations in matters of marriage, women will continue to suffer from inequality and discrimination, and the Ostrich-like mentality of the AIMPLB will continue to rule the roost. In fact, that is how it came into existence in the first place, by exploiting the persecution complex among members of the minority community.

In the early 1970s, Mrs Indira Gandhi was attempting to control the dominance of the Sharia Law of 1937 applicable to the Indian Muslims, and the then law minister Mr H R Gokhale introduced the Adoption Bill in the Parliament declaring it as "the first step towards Uniform Civil Code". This predictably sparked an outcry among the Muslim clergy who started whipping up religious passions against what it called the Government's attempt to "subvert shariah law applicable to Indian Muslims through parallel legislation". The first meeting of several Muslim organisations to 'save the Shariah' was convened at Deoband at the initiative of Hazrat Maulana Syed Shah Minnatullah Rahmani and others, followed by a convention at Mumbai in December, 1972, which unanimously decided to create the AIMPLB. It was finally set up in April 1973, and ever since, it has consistently asserted that Sharia is beyond reach and scope of India's courts of law, including the Supreme Court, as in its opinion, secular courts do not have the authority to either interpret or apply Sharia, which is based on the Quran and the Hadith, which are above any man-made law.

In its self-appointed role as the sole arbiter of Muslim destiny in secular, democratic India, AIMPLB may have taken upon itself the onerous task of saving the minority Indian Muslims from the persecution of majority Indian Hindus. The point is, once you remove the words 'Muslims' and 'Hindus', only Indians remain – with no majority or minority - but equal in every respect before law (today they are guided by different sets of laws) enjoying equal rights and privileges under the Constitution. That can happen once

the Shariah is no longer allowed to control the lives of Indian Muslims, and their freedom to worship and follow their religious practices are left to individuals, as in most religions. AIMPLB cannot allow it to happen, since it then loses its *raison-d'etre.* In no other religion and perhaps in no other country, least of all in any democracy, the clergy, or the mullahs, are allowed to wield so much power by the State.

At independence, the plight of Hindu women was no different than the plight of Muslim women today; in many respects, it was worse. They suffered from various discriminations and inequalities - in marriage, divorce, inheritance, widow remarriage, abortion, dowry, job opportunities etc. But legal reforms initiated in 1955 and 1956 had removed most of these inequalities in respect of Hindu, Sikh and Parsi women. Of course, legislation alone cannot be effective in addressing gender disparity in an agrarian society, in which women are ignorant of their rights and continue to suffer from deeply entrenched patriarchal practices and mindset. Traditional beliefs shaped by religion still limit the growth and liberty of women from all religions in rural India. But a beginning at least has been made for other communities, while for Muslim women, time has stood still.

Shah Bano's case has been bad enough; it has been an indelible blot of our secular credentials and loud and vain proclamations about equality. Let us try to redeem ourselves this one last time. Let us not shy away from demanding a uniform civil code for all. The BJP with its raw electoral power can bring it. Then there will be no need to enact a separate law for Muslim divorce, in case the Honorable Court annuls triple talaq not only as something that is not integral to the practice of Islam, but also as something that violates the Indian Constitution. And the BJP will still have an assured vote bank of most of the 84 million Muslim women living in India.