

‘Talaq’ without a Social Security

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Both Houses of Parliament have approved the “Triple Talaq” Bill. The new law seeks to criminalise those who in defiance of law still resort to this practice and drive their wife to destitution.

I had an opportunity to listen to the debate in Both the Houses. Strong arguments were presented on both sides. There are some basic principles to be kept in mind while analysing this issue.

No social security for women in India

Those who champion the case of liberalising the marriage and divorce laws must realise two basic facts. India is a developing society. Even though weaker sections are being provided certain facilities by the Government, the concept of social security does not exist in India. The second important fact is that in a divorce proceeding, no person can take advantage of his own wrong.

Christianity traditionally did not accept the idea of an easy divorce. The conservatives were opposed to the idea of divorce. However, with the economic evolution of developed countries along with the creation of a social security net, the laws in the developed world started liberalising. In most cases, negotiated settlements take place between the wife and the husband. The husband has to pay a huge amount of alimony or maintenance. In many societies, divorce is accompanied with sharing of assets. We, in India, are still in a stage where sharing of assets is extremely rare, maintenance levels are extremely low and post a divorce, unless she is working or employed, the wife is driven to either dependency or destitution. On basic principles of humanity, justice and fairplay, would it be right, irrespective of religion, to give to the husband a unilateral right to end the marriage? The fear of the husband uttering three words will always keep the wife subjugated and bear the injustice.

Divorce, in India, take place either by consent of both parties on agreed terms or one of the parties approaches the court for divorce on the ground that spouse has committed a “matrimonial misconduct” (the grounds for divorce in Indian law). Most cases end in a settlement with either a reconciliation or a divorce where a wife is provided for either monthly maintenance or a large lump-sum of money which will maintain her. The basic principle of matrimonial law is that no person can take advantage of his own wrong. The Shariat law was an exception. The husband may have wronged the wife and still despite his own matrimonial misconduct divorce her by uttering three words to dissolve the marriage. This is against all canons of humanity, justice and fairplay. If this practice is adopted by others, many women would be driven to destitution.

The Politics of this Bill

This Bill has exposed all those who consider themselves ‘liberals’. A ‘liberal’ should ordinarily be hostile to the idea of discrimination and injustice perpetuated by an oral

divorce. In this case, not one spoke in favour of the Bill which is ending the injustice. They raised weak arguments so that the fundamentalists amongst the Muslims are kept happy. Let us assume the reverse of the present situation. What if such a provision existed in Hindu law? Liberals, leftists, women organisations and perhaps even the judiciary would have been shocked with such a provision and would have attempted either for a repeal of the law or it being declared unconstitutional. These people stand exposed because what they have attempted to raise farcical objections. They wanted to continue and defend an obsolete practice which promotes injustice.

Rights vs. Rituals

The Fundamental Rights in India's Constitution and the Right to Practice and Propagate ones Religion is in the same chapter of the Constitution. How do you reconcile provisions of personal law which violates fundamental rights? What would be the harmonious construction so that these provisions can co-exist?

I have consistently held the opinion that there must be a recognised distinction between two aspects which stem out of religious interpretations. The first is the 'rituals' of a religion. Rituals cannot be decided by the law. They remain squarely within the right to practice ones religion. However, fundamental rights belongs to all. One section of the society cannot be denied these rights. What affects the right of a citizen – in this case the Muslim wife, cannot be determined by a religion. After the constitution came into force, rights emanating from birth, rights of a minor, rights in relation to marriage, divorce, succession, adoption, rituals etc., belong to every citizen. They should necessarily be compatible with fundamental rights. Granting an arbitrary right to a husband to orally and instantaneously divorce his wife and does not deal with any ritual which is in the domain of a religion. In a society governed by Constitution and the rule of law, prima facie, this practice of oral divorce violates both the right to equality and the right of a woman to live with dignity.

It is long overdue that the courts re-examine whether the rights being deprived to a citizen on the grounds of personal law violate the constitutional guarantees.

The deterrent effect

Those with short-sighted vision have repeatedly argued that since the Supreme Court has declared the practice as unlawful, then why punish a husband who is indulging in an unlawful act. The "Triple Talaq" right used by him is unlawful and does not exist, then why send him to jail? The Supreme Court, by striking down the practice of "Triple Talaq", has merely made a declaration of the law. This declaration has to be followed by a legislation which punishes the offending spouse for indulging in this cruel act despite it being declared unlawful. Many conservatives would still practice this irrespective of what the court has said. There is data available post the judgement which establishes that this is actually happening on the ground. Besides being tried for the offence in a court, obviously the husband will have to pay maintenance to his wife. Both these will have a strong deterrent effect for those who want to use the weapon of "Triple Talaq". They will think hundred times before using it due to the onerous consequences of their illegality. I have no doubt that

once an example is made out of some people, the fear of its consequences will lead to minimising this practice. If this law was not enacted, the judgement of the Supreme Court will turn into a futile academic exercise where the practice is illegal, if you still indulge in it, no penal consequence visits you.

Why make a civil contract into a criminal offence?

Demanding dowry, indulging in bigamy or polygamy, indulging in cruel behaviour (including mental cruelty) are all criminal offences. A bounced cheque or a defamation may be a civil wrong but both have penal consequences in criminal law. Merely to oppose a progressive legislation, one does not have to invent a new jurisprudence.

The Congress Party has ruled this country for a long time. During this period it has amended several personal laws to make them acceptable to the changing social mind-set. But when it comes to the Shariat, it is scared. It's stand in both the Shah Bano case and now in the legislation emanating from the Shayara Bano case, it has given a clear evidence of its intent. It does not mind Muslim women being driven to destitution. After all, the fundamentalist vote bank is at a higher priority than justice being conferred to the female gender.