

Triple Talaq verdict: is this a case of judicial overreach?

New Delhi: Talaq-e-biddat is a practice by which a Muslim man, by pronouncing the word “talaq” thrice in one instance, can unilaterally and irrevocably divorce his wife. Clearly, it is a practice derogatory to women, apart from being arbitrary and problematic, as it leaves no scope for reconciliation.

The argument that the number of reported cases of triple talaq is very low in India does not answer the question as to why such a discriminatory practice must continue. Actual cases may be few, but there is no way to count the number of cases where a woman lives under the threat of being divorced by her husband in a fit of rage or spite.

The question, however, remains whether it is the court’s domain to discard or uphold a religious practice, and if yes, how.

There are three judgments which were delivered by the Constitution bench on Tuesday. Two of the five judges held that Triple Talaq has so far been permissible as a result of Section 2 of the Shariat Act 1937, which by virtue of being codified, has been tested and found violative of Article 14, which makes it an arbitrary practice, hence unconstitutional.

Another judge of the bench concluded similarly, but through a different line of reasoning. He has opined that the practice of instantaneous triple talaq, finding no sanction in the Quran, is un-Islamic and therefore does not warrant protection of Article 25 (right to freedom of religion) under the Constitution. This striking down of the practice constitutes the majority opinion.

However, two other judges of the bench have found that the practice does actually form an essential part of the religion of Muslims and therefore observed that they cannot interfere in the present matter—the same being protected by Article 25. This, however, does not end here and the judgment further directs the union government to consider appropriate legislation with respect to instantaneous triple talaq. Till such time that the legislation is considered, Muslim husbands are prohibited from pronouncing instantaneous triple talaq. However, as the practice has been held impermissible by the majority opinion, this minority judgment is now inconsequential.

The verdict is being celebrated as a huge victory for Muslim women. But let us look at what message the verdict has sent out and what its consequences would be.

First, the court can, at any time, cherry pick a religious practice, check if it forms an essential part of the religion, and if not, hold it impermissible.

Secondly, the court can find a practice to be an integral part of a religion and still prohibit individuals from practising it while directing the government to legislate on it.

And thirdly, and most importantly, the court has once again shown an enthusiasm to introspect a Muslim practice without going into the question as to whether personal laws (which would include Hindu laws too) can be tested for violation of fundamental rights. There was no reason for the court to not do this. And by not doing so, the court has merely acted as a reformer of a religious community, rather than upholding the fundamental rights of women when found in contradiction with personal laws.

The All India Muslim Personal Law Board had filed an affidavit before the Supreme Court stating that they are, at their level, taking all steps to discourage instantaneous triple talaq. If the court was not willing to test whether all personal laws can be tested for violation of fundamental rights,

the court, in my opinion, ought to have respected the AIMPLB statement, and held the matter to be outside the judicial realm.

A change which comes from within the community would be sustainable and more welcomed, especially when the political climate of the country is charged communally.

When a court refuses to criminalize a practice as heinous as marital rape, refuses to decriminalize something as personal as homosexuality, refuses to look into the gender discriminatory provisions of the Hindu Succession Act, but proactively takes up the case of Muslim women and decides in a manner that does not allow women of the country to assert their fundamental rights in the face of their personal laws, one is bound to wonder if the current verdict really stems from a concern for women.

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