

POWER, NOT JUSTICE

Relevant for: Developmental Issues | Topic: Rights & Welfare of Women - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

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The much talked about [Triple Talaq](#) Bill (TTB) has finally been passed by both Houses of Parliament. The Union law minister justified it as an issue of gender justice and admitted that there have been just 473 cases of triple divorce in the last two years. This admission proves two things: One, the incidence of triple divorce is negligible and the issue was blown out of proportion for political reasons and two, the penal provision in the ordinance had no deterrent effect. That Muslim countries too penalise triple divorce was the third justification for the law but this is factually incorrect — there is a distinction between an act being declared “invalid” and being made an “offence”. The Supreme Court declared triple divorce as invalid and did not ask the government to make it a penal offence.

In fact, the day the Lok Sabha passed this regressive law, newspapers reported that the former Malaysian king, who recently abandoned the throne, announced that he has given triple divorce to his Russian wife. Triple divorce has not gone out of use in the Muslim world. Can we say that since Indian law punishes murders and rapes, no murder or rape is committed in India?

Muslim countries serve as poor examples for gender-just laws. Unlike Muslim men, in almost all Muslim countries, women cannot marry Christians or Jews. In some, they have a duty to “obey their husband” and need his permission to work or go outside the home. Their testimony has half the value of that of men. In some countries, a rapist can escape punishment if he marries the victim. Even on the issue of custody of children and maintenance, laws in Muslim countries are regressive as mothers can get the custody of a son only till he attains the age of 10 and a daughter till she attains the age of 12. And she loses custody on her remarriage. They punish adultery and apostasy with death.

Every punishment which does not arise from absolute necessity, according to Montesquieu, is tyrannical. In fact, criminal law should be used only as a “last resort” (*ultima ratio*) and only for the “most reprehensible wrongs”. The TTB is an instance of the unnecessary invocation of criminal sanctions.

Consider three current debates in our criminal justice system: One, we have decriminalised breaches of matrimonial faith in the form of adultery. Two, we decriminalised homosexuality though it has been punishable for centuries in all religions and legal systems. Three, we are not able to criminalise “marital rape” despite our revulsion to it. If something is a “sin”, let God punish the sinner. A civilised legal system should not enforce religious morality. The Wolfenden Committee Report (1957) in England clearly said that “unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”

The fact that triple divorce is a “sin” under Islamic law was admitted even by the [Narendra Modi](#) government in its affidavit in the Shayara Bano case. Yet, we are set to penalise this breach of religious morality through the instrumentality of criminal law. [BJP](#) MPs did argue during the

debate on the TTB that since triple talaq is sinful, it can be penalised. Are we going in the direction of religious theocracy?

From another angle, too, triple divorce is a unique case where the law is dictating to the orthodox Hanafi Muslim woman to continue in a relationship she considers sinful. If she thinks that as per her sect, her marriage has come to an end, forcing the continuance of sexual relations is nothing but tyranny unleashed by the law, which seriously undermines individual choice and autonomy. On the one hand, we have the bogey of so-called “love jihad” deployed to curtail the freedom to marry a person of one’s choice and on the other hand, Muslim women are forced to continue with same abusive husband who has given them instant triple divorce. We cannot say that the issue of women’s entry into the [Sabarimala](#) temple is a question of faith and triple divorce is an issue of gender justice. This is hypocrisy of the highest order. Moreover, instant triple divorce should not be a crime when it is pronounced at the request of the wife. We should not curtail this right of Muslim women.

Unfortunately, “crimes” originate in government policy and, therefore, criminal law reflects the idea of “power” rather than “justice”. This was evident in the recent amendments to the Unlawful Activities (Prevention) Act. The state in its discretion deems certain acts as crimes as per its own electoral or other needs. The state may decide to criminalise and decriminalise almost anything.

A crime consists of wrongdoing which directly and to a serious degree threatens the security or well being of society, and because it is not safe to redress it only by compensation to the injured party. The purpose of criminal law is to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests. Since the Supreme Court has set aside triple divorce, it can no longer dissolve marriages and thus causes no harm at all. It no longer threatens the security and well-being of the society. [Mukhtar Abbas Naqvi](#), in his speech in the Lok Sabha, said that government has now made it a bailable offence. He is wrong. A bailable offence is one where bail is a right and cannot be denied. Under the TT Bill, bail is at the discretion of the judge and thus, it is non-bailable. Moreover, we have restricted even this judicial discretion by laying down that it can be exercised by the judge only after hearing the wife on whom talaq has been pronounced.

Criminal law should not be used if it may not be effective in controlling the act in question. The triple divorce law is bound to fail, especially in cases of oral triple divorce given by husbands when no one other than the couple was present, as discharging the burden of proof will be a Himalayan task for the prosecution. We are doing a huge disservice to Muslim women as no husband on his return from jail is likely to retain the wife on whose complaint he had gone to prison. The Bill will lead to more divorces and abandonment. The remedy to tackle triple divorce is thus worse than the disease. Ideally, the marriage contract must lay down that a husband can give divorce only with the consent of the wife and if he gives three unilateral divorces in one go, the dower amount will be increased to five times. In case of non-payment, a prison term would be justifiable as under civil law, non-payment of debt does lead to imprisonment.

A punishment, to be just, should have only that degree of severity which is sufficient to deter others. Punishments invariably exceed the crime and this, in the ultimate analysis, harms the state. Three years’ imprisonment in the new Bill is excessive and is disproportionate. The Indian Penal Code provides far lesser sentences for graver crimes. The TTB obliterates the distinction between “minor” and “major” crimes.

Criminal law’s promise of safety is matched by its power to destroy. Let us hope the Bill will not be misused.

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