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AN INDEFENSIBLE ORDINANCE

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“There is no evidence to show that the incidence of instant talaq had reached alarming levels to warrant the hasty promulgation of an ordinance.” Women oppose the triple talaq Bill in Azad Maidan, Mumbai. | Photo Credit: Arunangsu Roy Chowdhury

An ordinance is a constitutionally sanctioned ad hoc mechanism by which critically urgent situations are met when Parliament or a State Assembly (as the case may be) is not in session and the government cannot afford to wait till it reassembles for fear of things becoming unmanageable if not legislatively redressed immediately.

Last week, the Union Cabinet, on the presumption that direful conditions prevail in the country due to the pervasiveness of instant triple talaq, convinced the President to promulgate the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018. In the words of Union Law Minister Ravi Shankar Prasad, the “overpowering urgency and compelling necessity” that gave birth to this ordinance was that talaq-e-biddat continued unabated despite the Supreme Court’s order last year.

The fact is, excluding isolated cases, there is no documentary evidence to show that the incidence of instant triple talaq had reached alarming levels to warrant the hasty promulgation of a presidential ordinance. And as Article 123 of the Constitution requires the President to ensure the existence of circumstances “which render it necessary for him to take immediate action”, the Centre, in the interest of a fair debate, must make public the evidence presented to the President.

Nevertheless, the triple talaq ordinance is so poorly conceived and drafted that it is bound to fail the test of judicial scrutiny on several grounds. First, it could collapse under the weight of its internal contradictions. Section 2 (b) of the ordinance defines talaq-e-biddat as any form of talaq “having the effect of instantaneous and irrevocable divorce” but lays down in Section 3 that such a pronouncement in any form whatsoever “shall be void and illegal”. No explanation is offered as to how the pronouncement can be “void” and have “the effect of instantaneous and irrevocable divorce” at the same time. Besides, Section 4 mandates a three-year imprisonment and fine for this void act, and Section 7 declares it a cognisable and non-bailable offence. This fixation with talaq-e-biddat, even when it does not dissolve the marriage, is baffling.

Second, barring constitutional amendments under Article 368, Parliament is not competent to enact any law which is inconsistent with the fundamental rights enshrined in Part III of the Constitution. Article 13 (2) states: “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” Endorsing this, Article 123 (3) warns that if an ordinance “makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.”

The ordinance, insofar as it arbitrarily curtails the personal liberty of a citizen without his having committed any offence, violates Part III of the Constitution, specifically Article 21 which states: “No person shall be deprived of his life or personal liberty except according to procedure established by law.” It also goes against Article 19 which inter alia allows all citizens “to move freely throughout the territory of India” and “practise any profession, or to carry on any occupation, trade or business.”

Third, the Supreme Court in several cases, including *Maneka Gandhi v. Union of India* (1978) and Justice *K.S. Puttaswamy v. Union of India* (2017), had made it clear that “law” means reasonable law, not any enacted piece. And a procedure established by it has to be fair, just and reasonable to avoid being struck down as unconstitutional. The ordinance fails on all these counts.

If by criminalising the mere pronouncement of the legally impotent formula talaq-talaq-talaq it violates the principle of substantive due process, the ordinance disregards procedural due process by laying down an iniquitous procedure for the “offender’s” imprisonment, bail, custody of his children and the amount he has to shell out as subsistence allowance to his wife even while serving a jail sentence. The unfairness, injustice and unreasonableness lie in the fact that the ordinance inflicts this torment on a citizen despite acknowledging the voidness of his pronouncement.

Fourth, Article 123 empowers the President to promulgate an ordinance only when urgent situations arise during the recess of Parliament. In the case of triple talaq, no such emergency came to light after the monsoon session ended. In fact, the triple talaq Bill passed in the Lok Sabha was already being debated across the country when the Centre, citing the reason of lack of consensus among parties, decided not to table the amended version of it in the Rajya Sabha during the monsoon session. This indicates that the Bill did not have the approval of the Upper House of Parliament. If despite this an ordinance resembling the untabled Bill has been promulgated, it lends credence to accusations that the legislature was undemocratically circumvented to serve the political interests of the ruling party.

The fact is, it makes no sense to bypass the parliamentary process because Article 123 (2) (a) demands that all ordinances be laid before both Houses of Parliament when Parliament reassembles. In *Krishna Kumar Singh v. State of Bihar* (2017), the Supreme Court ruled that tabling ordinances in Parliament (or a State Legislature) “is a mandatory constitutional obligation cast upon the government” because ultimately it is the legislature which determines “the need for, validity of and expediency to promulgate an ordinance.” And failure to table an ordinance before the legislature “is an abuse of the constitutional process” and a “serious dereliction of the constitutional obligation.” Therefore, one fails to understand the Union Cabinet’s wisdom in taking the ordinance route without discussing the triple talaq Bill in the Rajya Sabha. If it was due to the fear that the Bill would not have been approved, then the same fear exists for the ordinance because in all probability, the Rajya Sabha will reject it too, and the government would have achieved nothing except criminalising instant triple talaq for a short period of time till the winter session of Parliament starts.

In this context, the Supreme Court’s pronouncement on the re-promulgation of ordinances assumes significance. In *Krishna Kumar Singh*, criticising the State of Bihar for re-promulgating ordinances without placing them before the legislature, the court declared that “re-promulgation of ordinances is a fraud on the Constitution and a subversion of democratic legislative processes.” The power to promulgate ordinances is subject to legislative control, it said, and does not make the President or the Governor “a parallel source of law making or an independent legislative authority.” As is obvious, the pointlessness and the indefensibility of the triple talaq ordinance stands out from every coign of vantage. One hopes that the President will examine the legal infirmities that the ordinance suffers from and consider withdrawing it at the earliest.

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Last week Ram Kadam, a BJP MLA from Maharashtra, told the men in an audience that if they were interested in women who didn't reciprocate the feeling,

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