A thought for today

Man is defined as a human being and a woman as a female – whenever she behaves as a human being she is said to imitate the male

SIMONE DE BEAUVOIR

Forever Expunged

Sanctity bestowed on personal laws ensured triple talaq escaped legal gaze for far too long

The Supreme Court judgment declaring illegal talaq-e-biddat or triple talaq – the practice of instant, unilateral and irrevocable divorce – ends a source of injustice that put certain sections of Sunni Muslim women at a great disadvantage. By a 3:2 majority SC ruled that this form of talaq is "manifestly arbitrary", allowing marital ties to be "capriciously and whimsically" broken by a Muslim man, and violated Article 14 of the Constitution guaranteeing equal protection of the law to men and women. With no chance for reconciliation, many Muslim women have found themselves destitute, with no recourse available in civil law.

The majority verdict attempts a delicate balancing act between individual rights enshrined in Article 14 and religious freedoms guaranteed by Article 25. While Justice Joseph found that triple talaq

was against the mandate of Quran and therefore impermissible, Justices Nariman and Lalit also made the more fundamental argument that triple talaq violated Article 14 and therefore needed to be struck down. Since marriage is a civil institution, Article 14 ought to have precedence over Article 25 in case there is conflict between the two. Interestingly, the Union government wanted the court to ban all forms of talaq which none of the judges agreed to. But the government can take credit for lending its immense clout to the Muslim women who approached SC against triple talaq.

It was a colonial era law, Muslim Personal Law (Shariat) Application Act, 1937, that surrendered jurisdiction on matters of marriage, divorce, succession and maintenance including talaq to clerics who later banded under the All India Muslim Personal Law Board (AIMPLB). But Justice Nariman rightly cited the Constitution's Article 13(1) which demands that all colonial-era laws not in consonance with fundamental rights be struck down. This is an important intervention. Matters concerning fundamental rights cannot be left to personal law bodies like the arch-conservative AIMPLB.

It is tempting to see the judgment as a body blow to personal laws and politicise it. This is not only incorrect but also dangerous. Rather than an affront to any particular religion it must be viewed as a pit stop in the path towards progressive and egalitarian changes in society. Many Muslim majority countries including Indonesia, Pakistan, Afghanistan, Turkey, have rejected talaq-e-biddat. The government's emphasis must now shift to ensuring universal marriage registration and reforming personal laws in consultation with community groups to ensure equal rights for men and women in marriage, divorce and alimony.

Realist Strategy

Trump's new Afghanistan plan puts much-needed squeeze on Pakistan

In a marked departure from his campaign rhetoric, US President Donald Trump has outlined his new Afghanistan strategy that favours realism over politics. Reversing the previous Obama administration's approach that was focussed on drawing down American troops, the new plan authorises the deployment of an additional 4,000 soldiers to train and buttress Afghan forces. Trump is right in assessing that a hasty withdrawal from Afghanistan would create a vacuum for terrorists, including the Afghan branch of Islamic State (IS), to fill. This is precisely what happened with Obama's withdrawal from Iraq that led to the rise of IS.

Obama's Afpak policy didn't work for a number of reasons.

Announcing deadlines for a drawdown made it easy for the Taliban to wait out the Americans. Secondly, it is next to impossible to defeat an insurgency which has safe havens, and Pakistan provided those havens. The new Trump policy seeks to address both. It will not focus on deadlines but on actual ground conditions. Thirdly, Trump put Pakistan on notice for providing safe havens to terror groups. Part of the problem of the US policy in Afghanistan has been Washington's over-reliance on Islamabad. This has allowed the Pakistanis to shelter terror groups.

Trump has said this situation needs to change. It is in Pakistan's best interest that it stops providing safe havens and succour to terrorists. If it refuses to do so, the Trump strategy promises that the full panoply of available diplomatic, economic and military instruments will be used in concert to achieve this outcome. Sustained pressure along these lines is bound to yield results. It's good that Trump has acknowledged India's role in Afghan stability and development. To buttress the new strategy Trump should also not rock the boat with Iran, which too has a stake in Afghan stability.

Unsafe as houses

Watch out – your dream home could become a nightmare

Jug Suraiya

Most Indians dream of owning a home. And, if recent developments are anything to go by, the chances are that their dream home will remain just that: a dream.

Real estate developers – including some really big boys in the business – are collapsing like a house of cards.

Some have declared insolvency as they are unable to repay banks and others whom they've borrowed money from. Others have left their projects only partly finished and unfit for occupation.

Indeed, if all the delays in construction across the country were to be totted up they'd probably add up to an age when folks didn't live in houses, but in caves.

And perhaps the time will come – if it hasn't already – when people may have to do just that: Wanted for immediate occupation 2 BHK goofa, bijli-pani optional. Brokers welcome.

Many of those who've been left literally home-less have invested their life savings in a place to call their own which now seems more remote and out of reach than the surface of another planet.

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In fact that unearthly analogy might be only too apt. Because one of the reasons why the real estate sector is in such a mess, that it should more appropriately be redesignated the unreal estate sector, is that many developers got so greedy that they used up all the money they'd collected for Project A to buy up land on which to start Project B, leaving Project A half-finished, if that.

This Operation Landgrab was of such a scale that the recently introduced Real Estate Regulation Act (RERA) might well uncover pie-in-the-sky housing projects based on the Moon, or Mars, the Earth having run out of space.

In the meantime, many who've put their hard-earned money into owning a home are being made to learn the origin of the phrase to be 'flat broke': buy a flat, and become totally broke.

secondopinion@timesgroup.com
http://blogs.timesofindia.indiatimes.com/jugglebandhi/

Open Letter To Incoming CJI

The most pressing priorities before India's judiciary, and how to address them

Abhishek Singhvi

Respected CJI designate,

You are about to head the world's most populous functioning democracy's apex court, the planet's most dynamic judicial institution, a final court with globally the highest degree and scope of judicial review, the global inventor of basic structure theory and PIL and the Indian institution in which maximum faith is reposed by over 1.25 billion Indians. Any wish list for such a powerful and all encompassing institution is bound to be overflowing. I will, due to exigencies of space, limit mine to a few priorities.

Firstly, you and your successor Chief Justices, down to the last known one presently on the bench, should sit down together at least once every two months to create and then monitor the implementation of one, two and five year plans for the entire judiciary, including your court. It is tragic that for the last 70 years such plans have not even been formulated with a minimum perspective of five years, subsuming sub plans for shorter periods.

This is especially vital since most of you have roughly one year (or shorter) Chief Justiceships (with one exception reaching two years). On the many fundamental issues on which the brethren may and do have disagreements, you should agree to disagree and leave them aside to be decided by each incumbent CJI.

Secondly, this agreed five year perspective plan must not be changed for any reason, except fine tuning and calibration for better achievement. Synergistic results are bound to follow. The practice of each CJI anxious to stamp his own brand of policy tends to create transitory and disruptive paradigms, precluding accelerated cumulative consequences.

Thirdly, an example of Thomas Hardy's admonition "Take care of the small things and the big things will take care of themselves" arises in the case of our collective war on the biggest scourge of judicial arrears and backlog, besmirching the otherwise glorious face of the

Uday Deb

Indian judiciary. Since your colleagues have now firmly re-established the primacy of the collegium for judicial appointments at all except the district court level, why is it not possible to establish a flow chart which is uniform, unchangeable and institutional (not personal) to expedite appointments? The single biggest reason for backlog is unfulfilled vacancies, reaching a peak of 450 out of a total 1,100 high court judges about a year ago (plus a normal 25-33% vacancy amongst the lower judiciary, where appointments fall within the jurisdiction of the respective HCs).

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This flow chart must ensure throwing up names at least six months before a SC or HC vacancy. The process must be managed by a senior non-legal, non-judicial managerial officer whose only job is to see that a judicial replacement is known at least a fortnight before the incumbent's retirement. The flow chart must factor in that there are serious delays and stalemates amongst yourselves, but that can be taken care of by constantly throwing up names at least three times the number of vacancies.

Irrespective of the merits of the appointment, the rigidity of the "pre-retirement fortnight rule" will ensure that your whole team works to a deadline. It will obviate serious hit wickets and self-goals like the apex court committed while adopting a self-defeating standstill policy of non-meeting of collegium and non-appointment of anyone while the NJAC hearing and judgment process was on for almost 18 months.

Fourthly, having reiterated the exclusive jurisdiction of the apex court regarding judicial appointments, you as a judicial collectivity cannot adopt a policy of "prepared to strike afraid to wound". If there are deliberate and persistent government-related reasons for delay in clearing files, it is time you began to exercise coercive powers reaching upto and including contempt against secretary and even ministerial level functionaries to ensure timely appointments. There can be no dyarchy of appointment power in practice despite a definitive SC judgment asserting exclusivity of the collegium (this comes from a supporter of the NJAC Bill like me; final SC orders must be final in letter and spirit).

Lastly, it is time that the collegium started adopting a uniform marking system for HC and SC elevations, even if it is destroyed immediately after the event. My wish list would be an equal weightage on quality of judgments written, integrity issues and a residual category of all other factors like temperament, experience, etc. The headings, though important, are less important than the fact that they must be *uniform* and intergenerationally consistent, forcing the various collegiums to have some uniformity of focus.

Ideally, one of your Committee of CJIs or one amongst the collegium should, like the erstwhile Sultan of folklore, sit in the court of potential appointees, disguised and completely anonymous, and report back. Physical reality is often shockingly different from paper reality! Since that will never happen, a group of 10 senior advocates of each court should be informally consulted.

None of this is rocket science. It arises from the experience of each one of us who have spent a lifetime at the Bar. It presupposes a reasonably bona fide attempt to improve the speed and quality of judicial appointments. It does not presuppose an ideal world without "the politics of the judiciary" or the "politics of the political system" but seeks to accommodate those realities. It is a great opportunity for you to start. I have no doubt that you will get full collegiate support. But even if you do not, it's is always better to try and fail rather than fail to try.

The writer is Congress MP and senior advocate. Views are personal

'SC's decision will liberate Muslim women ... if Parliament wants to reform personal laws it has full rights to do so'

***Arif Mohammad Khan** famously quit in protest as minister of state in the Rajiv Gandhi government after the enactment of the Muslim Women (Protection of Rights on Divorce) Act in 1986, which overturned the Supreme Court's historic Shah Bano judgment giving maintenance to a divorced Muslim woman. He made an impassioned parliamentary defence of the Shah Bano judgment, the last such landmark case on Muslim women preceding the Supreme Court's latest 3:2 judgment which has ruled instant triple talaq as unconstitutional, before resigning. Khan spoke to **Rohit E David** and **Nalin Mehta** on how 'talaq-e-biddat' violates the fundamental rights of Muslim women, gender equality and reforms in Muslim personal laws:*

Q&A

■ How do you read the Supreme Court's judgment on triple talaq?

The abolition of triple talaq by the Supreme Court is a big victory. I welcome this verdict. I honestly feel that we are not in a position today to make a realistic assessment of the positive fallout this judgment would have on the future of Muslims.

If a divorce between a Muslim man and woman has to happen, it will take place. The real problem was that a Muslim girl grows with this consciousness that after marriage her husband can turn her out of the house by simply saying triple talaq. This was really oppressive for Muslim women. This apparent law on triple talaq had distorted the minds of the Muslim world. Now, they will see a new Muslim community growing up in India which will not have the fear of triple talaq among them.

With the abolition of this law, Muslim ladies will have the courage to report against their husbands, if they abuse or mistreat them.

■ Is the Supreme Court's ruling that triple talaq violates the fundamental rights of Muslim women a great victory for progressive Muslims?

This is a great victory for every Muslim woman. The Supreme Court has held this decision to be arbitrary. Now, when it comes under the arbitrary category, this cannot come under the fundamental rights of a Muslim. I have not read the judgment in detail but there is six months' time for the government to bring up detailed legislation.

■ The All India Muslim Personal Law Board has been opposing the abolition of triple talaq. Do you think they are on the wrong side of history?

In 1986, their decision was different but in the Supreme Court whatever Kapil Sibal has said on their behalf, particularly the affidavit which was submitted when the arguments were concluded, is different. They have also recognised that it was an unjust practice and they want to abolish this practice.

The Muslim Personal Law Board had said that Parliament has the authority. If it wants to reform the laws, it has full rights to do so. Their new stand is totally different from the position they took in 1986.

■ Isn't this decision a great step for gender equality?

Yes, absolutely. It will not only liberate Muslim women from the threat of triple divorce but it will also impart a sense of equality and empowerment.

■ Doesn't this judgment by the apex court make Indian Muslim personal law more compatible with personal laws relating to marriage and divorce in orthodox Islamic countries?

Of course. Almost all Muslim countries have already got rid of this practice. Triple talaq was undoubtedly part of their practices earlier. Now, this law finds no standing in any court. Even Pakistan and Bangladesh which had the same laws on triple talaq had reformed their laws in the 1990s. It was high time, and thankfully India has done this now.

■ The last Supreme Court verdict on a similarly sensitive issue came in the Shah Bano case. It was overturned by Parliament and you resigned in protest. Have your views been vindicated?

I don't look at this whole issue from the view point of my personal vindication. I'm very happy that oppression and suppression which was being practised in the name of religion has come to an end.

■ Do you think that a section of Muslim clerics is holding back progressive reforms?

Try to understand the Muslim religion. My message is we should not hold back progressive reforms.

dilbert

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Reason & Justice

All of us who are concerned for peace and triumph of reason and justice must be keenly aware how small an influence reason and honest good will exert upon events in the political field.

Albert Einstein

'Instant Triple Talaq Is Un-Islamic'

Maulana Wahiduddin Khan

As an Islamic scholar, i would say that the Supreme Court's judgment delivered on August 22 – striking down instant triple talaq as being unconstitutional – is totally right. Triple talaq is not a principle of Islam, but is rather a ruling of certain Muslim jurists, adopted in the later period of Islam. In this matter, Muslim jurists need to correct themselves instead of wrongly justifying triple talaq.

In Islam, talaq is seen as an undesirable practice. But in rare cases, a couple may feel that their marriage is not working, and in this situation, divorce is allowed. However, there is a prescribed method laid down by the Quran (2:229). That is, a divorce is finalised over a period of three months. In the first month, the husband tells his wife that he has given her one talaq. Both then wait for a month during which they could reconcile. After the first month, he may either take back the talaq or pronounce it a second time. Both wait for another month, at the end of which, if he pronounces a third talaq, the divorce becomes final.

This pattern was adhered to during the time of the Prophet and the first caliph Abu Bakr. There were rare cases, when a man would come to the Prophet or Abu Bakr, saying that he had divorced his wife by saying talaq three times in one go. Then the Prophet and Abu Bakr would consider this an instance of talaq being said in anger and so would not finalise the divorce. Rather, they said his uttering 'talaq' three times in one instance would be regarded as only one pronouncement of talaq.

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During the time of the second caliph Umar, the number of people who began to pronounce talaq in one sitting increased. Umar, in a few cases, ruled the saying of talaq three times in one go as final and annulled the marriage. But he would also flog such men as deterrent punishment. This helped in curbing instances of saying talaq at one go. Certainly, Umar's practice was not a Sharia law. His step was rather an example of hukm al-hakim, or an executive order. His annulment of marriage in cases where men said talaq three times in one go was an exercise of the discretionary power of a ruler. Such executive orders are applicable to particular cases and do not have the status of Sharia law.

In the British period, men again began to divorce their wives in one sitting. Now Muslim jurists belonging to the Hanafi school of law revived Umar's order and made instant triple talaq valid. The Hanafi jurists cited Umar's precedent, but this reference was unwarranted, because Umar had done so by way of an executive order while, in the later period, Hanafi jurists did so by issuing a fatwa. Moreover, Umar would also flog men as deterrent punishment, while Hanafi jurists were not in a position to flog anyone.

In such a scenario, my advice to Hanafi Muslims is to take the Supreme Court's verdict as a reminder and review their practice. They should consider triple talaq in one go as a case of a decision having been taken in anger and take it as only one talaq – as had been done during the time of the Prophet.

*Follow Maulana Wahiduddin Khan at **speakingtree.in** The Speaking Tree is also available as an 8 page newspaper every Sunday for Rs 3. Book your copy of The Speaking Tree with your newspaper vendor or SMS STREE to 58888.*