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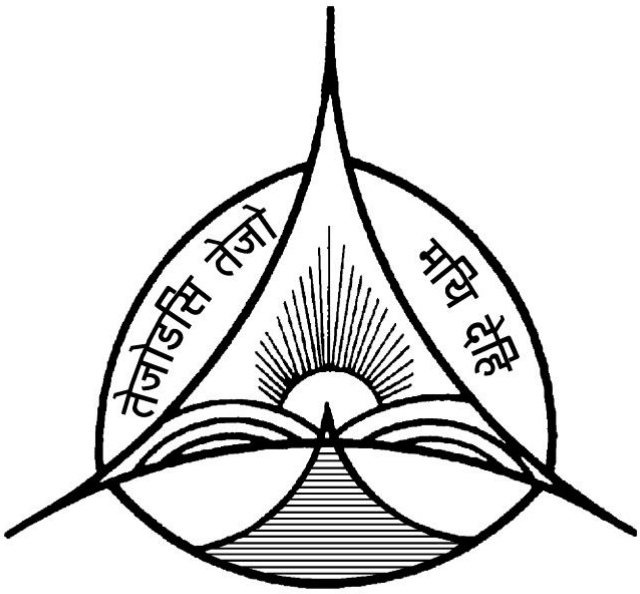

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'Taking a gun to kill the mosquito'[1]: Gender Justice, Deterrence and Protection in the Legislative Debate on Criminalising Triple *Talaq*

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I. Introduction

In December 2017, the union government introduced the Muslim Women (Protection of Rights on Marriage) Bill, 2017 (hereinafter, the Bill) in the Lok Sabha, in a bid to contain the problem of Muslim men divorcing their wives through triple *talaq*, i.e., by pronouncing *talaq* (divorce) three times at once, severing the marital tie instantly and irrevocably.[2] This mode of divorce has been widely criticized for making Muslim women vulnerable to threats of instant divorce and the resulting destitution. The practice was declared to be invalid by the Supreme Court of India in a much-publicised case, *Shayara Bano v Union of India*[3] (hereinafter, *Shayara Bano*), four months earlier. The Bill was a short one, with four elements: (a) Section 3 sought to declare any pronouncement of triple *talaq* 'by words, either spoken or written or in electronic form or in any other manner whatsoever' to be 'void and illegal'; (b) Section 4 and Section 7 sought to make the pronouncement of triple *talaq* a cognisable and non-bailable offence,[4] punishable with imprisonment for three years; (c) Section 5 provided that the aggrieved wife shall be entitled to a 'subsistence allowance' from the husband for herself and the dependent children; and (d) Section 6 provided that she would have custody of the minor children.

While the ruling Bharatiya Janata Party (hereinafter, BJP) and its allies supported the Bill, the opposition parties, including the Congress, All India Anna Dravida Munethra Kazhagam, Rashtriya Janata Dal, Samajwadi Party and the Communist Party of India (Marxist), among others, welcomed the clause invalidating triple *talaq* (Section 3), but opposed the criminal law provisions (Sections 4 and 7). My purpose in this article is to map how the Muslim woman question was framed by the law makers, by describing and interrogating the range of ideas and arguments that were articulated in the course of the legislative debate on the Bill by

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both its proponents and opponents. I focus, in particular, on three themes that animated the debate: gender justice (for Muslim women); the use of criminal law as a tool of deterrence; and competing frames of protection offered by the state and marriage.

The Lok Sabha debated the Bill between 3:30 and 8:00 PM on 28 December 2017 and passed it the same day. On 2 January 2018, the government attempted to introduce the Bill in the Rajya Sabha but failed in the face of stiff opposition by Congress members, who demanded that the Bill be referred to a Select Committee for closer scrutiny. Although the Bill was discussed only for a few hours on one single day and at the time of writing, its fate was uncertain,[5] it is nonetheless crucial to examine the terms of the legislative debate, for this was only the second time in the history of independent India that the legislature sought to codify Muslim personal law and specifically debated the rights of Muslim women. The first time was in 1986, when the Congress government enacted the Muslim Women (Protection of Rights on Divorce) Act in response to the Supreme Court's controversial judgement in *Mohd. Ahmed Khan v Shah Bano Begum*[6] (hereinafter, *Shah Bano*). The 1986 Act is significant in Indian legal history as it redefined secularism as respect for the viewpoint of a minority group, departed from equal citizenship rights for Muslim women, and advanced their differential treatment as the optimal means to protect both women's rights and minority rights. Examining the debate on the 2017 Bill therefore allows us to understand the law makers' response to a specific problem affecting Muslim women, but also affords us a good opportunity to track the shifts in the legislative discourse on Muslim women's rights between 1986 and 2017.

A word on my use of sources before proceeding further. Transcripts of the debate are uploaded on the Lok Sabha website as (a) 'Uncorrected Debate' which report the proceedings verbatim, and (b) 'Text of Debate' which contains the edited proceedings after they are approved by the members. The edited debates are uploaded within a fortnight, but as of mid-May 2018—when this article was submitted—the edited debate for 28 December 2017 was the only one not uploaded on the website. As a result, I have relied on the uncorrected debate for this article. Additionally, English translations of the speeches in Hindi are part of the printed debates kept in the Parliament Library, but not uploaded on the website. Since I have

used only what was available on the website, the excerpts quoted in this article from the Hindi speeches are my translations and not the official English translations of those speeches.

II. Situating the Bill: Immediate Context and the Politics of Memory

The government justified the Bill to be both in furtherance of the Supreme Court's verdict in *Shayara Bano*, as well as in response to its failure to curb the practice of triple *talaq*. On 22 August 2017, a five-judge bench of the Supreme Court invalidated triple *talaq* by a 3:2 majority. The three judges constituting the majority, in two differently reasoned opinions—one by Justices Rohinton Nariman and Uday Lalit, and one by Justice Kurian Joseph—found the practice to be unsupported by the sources of Muslim personal law and, therefore, illegal in the eyes of the secular state.[7] The minority opinion by Chief Justice Jagdish Khehar and Justice Abdul Nazeer, on the other hand, reasoned that although the practice was objectionable, the legislature alone could prohibit it by law in exercise of its authority to enact social reform legislations. These judges therefore urged the government to enact a law prohibiting triple *talaq* within six months of the decision. Though the government had been non-committal about enacting a law at the time, in December 2017 it introduced the above Bill, noting that since the verdict had not deterred Muslim husbands from resorting to triple *talaq* and had not succeeded in bringing down the number of such divorces, it was compelled to act in order 'to redress the grievances of victims of illegal divorce' (Government of India 2017: 3).

This immediate legal context aside, the Bill had a political significance also, signalled most obviously by its title. The title of the Bill was a mirror image of the Muslim Women (Protection of Rights on Divorce) Act, 1986, mentioned before, with the word 'divorce' replaced with 'marriage'. The 1986 Act was passed by the Congress government under Rajiv Gandhi to undo the Supreme Court's verdict in the *Shah Bano* case, where it had held that if a divorced Muslim woman fell on hard times, she could seek maintenance from her former husband under the common vagrancy prevention law—Section 125 of the Code of Criminal Procedure—even though Muslim personal law did not require the husband to maintain her beyond three months after divorce.

In popular consciousness, the 1986 Act embodies Muslim law's exceptionalism that lets off husbands lightly as compared to the law governing other Indian men; the Muslim community's backwardness that resists reform and denies its women legal rights available to other Indian women; a polity wedded to 'vote bank politics' and 'minority appeasement'; a pliant state that allows all of the above and fails in its commitment to 'true' secularism; and so forth. Notwithstanding the fact that creative judicial interpretation of the 1986 Act has ensured that Muslim husbands are not easily let off, and their divorced wives have often received better economic protection under the 1986 Act than their non-Muslim counterparts have under the common law (Subramanian 2017), the above narrative continues to dominate and frame discussions on Muslim personal law reform in India. Arguably, it was this narrative of a Congress government buckling under the pressure of conservative Muslim groups and compromising on Muslim women's rights in 1986 that the Modi government was attempting to capture through the title of the 2017 Bill. The Bill's title was so worded to contrast the illusory protection of Muslim women's rights 'on divorce' by the 1986 Act, with its own supposedly more radical protection offered to them 'on marriage'.

That the Bill was firmly located in this politics of memory around *Shah Bano* and the 1986 Act was further evidenced from the legislative debate. Thus, Meenakshi Lekhi, the only BJP member apart from the law minister who spoke at length during the debate, questioned the moral standing of the Congress to oppose the Bill by repeatedly stressing its conduct in 1986:

> Congress party brought in the 1986 law, the Protection of Women on Divorce Act [sic], meaning, they decreed that divorce just has to happen. Today they are saying what will happen to such families. There was no attempt to save marriage (back then). Triple *talaq* was accepted and maintenance only for the *iddat* months, no maintenance thereafter for the woman—that's the law they brought in. It was rectified by the Supreme Court in the year 2001. In 2001 in the case of *Danial Latifi*[8] this law was rectified. Congress party had no contribution in this.

Admittedly, the issue in 1986 was not divorce itself, but the husband's post-divorce obligation. However, given that the memory of the Shah Bano episode was invoked to show one's political opponent in a bad light, such factual details were immaterial. Lekhi continued her criticism of the Congress' role in denying Muslim women their citizenship rights:

> Congress, who is today saying all this, did appeasement politics and at a time, when it enjoyed the kind of majority in the House which no party has ever had in this country, it made a joke and played with people's rights and did appeasement politics. The nation bore the brunt of that appeasement politics for thirty years. After thirty years the nation has got this opportunity to correct it. If we lose this opportunity today, then history knows that we'll not get it again and we'll have no answers to give to the future generations.

Arvind Sawant of the Shiv Sena, a BJP ally, echoed these exact words. Similarly, M.J. Akbar, BJP Rajya Sabha Member and Minister of State for External Affairs, sought to establish that the proposition of 'Islam in danger'—typically marshalled by conservative Muslim groups opposed to reform of Muslim personal law—was a 'false argument', and attributed its origin to the 1986 episode, which he characterised as heralding the 'age of false argument'. To set itself apart from the politics of the Congress that gave priority to minority group autonomy at the cost of women's rights, the government presented the Bill as a measure centrally concerned with gender justice. The next section examines the contours of this formulation.

III. Situating Muslim Women: Putting Gender Center Stage?

Rochana Bajpai has shown how the Shah Bano debate marked a shift in the legislative discourse on secularism from that in the Constituent Assembly debates. In the Constituent Assembly, secularism was conceptualised as separation of religion from politics and equal citizenship rights of *individuals* irrespective of religion, but in the legislative debate on the 1986 Bill, the Congress party articulated secularism as equal respect for all religions, respect for a minority group's viewpoint and complete religious freedom of *groups* (Bajpai 2011). Consequently, this redefinition of secularism not only allowed greater legitimacy for legal pluralism and greater autonomy for Muslim personal law, it was also compatible with differential treatment of Muslim women. As Bajpai notes: 'The legislation (the 1986 Act) did not violate formal equality: the case of Muslim women was different, so treating them differently in law was not tantamount to discrimination' (ibid.: 195).

Indeed, the 1986 Act not only marked a separation in the civic status of Muslim women, one of its legacies has been to amplify Muslim women's 'difference' in everyday legal discourse. Accounts from family courts (Mukhopadhyay 1998; Basu 2008) bring forth the 'zone of difference' (Basu 2008: 508) in which lawyers, counsellors and judges frame and address the claims of Muslim women.

The government situated the Bill in the conception of secularism as equal citizenship rights transcending group identity. While introducing the Bill, law minister Ravi Shankar Prasad noted that the government's purpose was not to interfere with the *Shariat*, but to simply give effect to the Supreme Court's verdict that triple *talaq* was invalid, and advance Muslim women's citizenship rights under the Constitution. That the move to legislate on *talaq* did not amount to 'interference' with religion was conveyed by presenting the examples of Muslim majority countries where it was regulated by state law. Further, the universality of the 'social and moral obligation' of the husband to maintain his wife and children, and the incongruity between unilateral, arbitrary divorce and India's aspiration for progress and development were noted to emphasise that the Bill was a civic measure in furtherance of the state's secular interests, one of them being 'gender justice'. Thus, Prasad began his introductory speech noting that the issue before the House was not one of religion or faith, but of 'gender justice, gender dignity, and gender equality', and concluded by urging the members not to make the Bill about 'vote bank politics', but see it as a question of their Muslim sisters' and daughters' 'honour, dignity and justice'.

In the same vein, Lekhi deployed the classic feminist analytic of the public/private distinction to attack the personal law system for differentiating between women on the basis of religion, and at the same time seeking to immunise matters pertaining to family life (and by implication, women) from common, secular standards. Lekhi therefore posed a dual critique of the 'private'—the conception of secularism that allows groups to claim certain matters as private or as internal to the group, as well as the extra-judicial, and in that sense, private nature of the Muslim husband's right to divorce:

> When you do *nikah*, you take the entire society with you. Then how can you end it on your own? Neither there is any mention of evidence, nor does the Evidence Act apply here and what is most surprising is that in this secular country, from Rent Act to

> Company Act and Criminal Act, everything is secular. All the laws apply equally on everyone, except in those subjects that pertain to women, such as adoption, maintenance, marriage, divorce. For these everyone has separate personal laws. This is the secularism of this country. Since men have to do business, they have to do jobs, have to buy and sell homes and shops, all that is secular. They commit crimes also, so criminal law is also common. But, for women's rights you will separate everyone.

To be sure, this foregrounding of gender by the proponents of the Bill did not mean that they emphasised the commonalities in the experience of family life and family law of *all* women. Notwithstanding the move to shift the debate from religious difference to gender difference, the proponents of the Bill exceptionalised Muslim women to be distinctly, and in fact more, vulnerable than their counterparts in other religions—a move which then justified the resort to exceptional measures.

Indeed, one way to look at the continued resort to triple *talaq* by husbands and their validation by clerics despite being declared invalid by a number of appellate court judgements even before *Shayara Bano,*[9] could be as abuse of divorce law by men to cast off their wives. On this view, triple *talaq* is not exceptional, since similar practices are observed in non-Muslim husbands' use of 'their' divorce law as well. For instance, the predominant use of mental disability in Indian family law seems to be for Hindu husbands to dispose of their wives and escape the economic obligations of marriage, with the approval of lower court judges (Dhanda 2000; Pathare et al. 2015). In such cases, the only consequence of the fraudulent act of the husband is the appellate court overturning the lower courts' order, provided the wife appeals. Attaching punitive consequences to triple *talaq*, from this perspective, would then be tantamount to exceptionalising one particular form of what is evidently a wider phenomenon. As Jay Prakash Narayan Yadav (Rashtriya Janata Dal) aptly remarked, opposing the criminalisation aspect of the Bill:

> …*talaq* is both named, and unnamed. *Talaq* can be given silently also. Among Hindu brothers, they don't even say it and yet *talaq* takes place. There are, not one, but lakhs of such examples among Hindu families, where *talaq* has not been said out aloud, but it is there.

But given the way the rhetoric of 'gender justice' and 'justice for Muslim women' dominated the government's discourse, there was no room for a nuanced articulation of the problem such as Yadav's. Supporters of the Bill spoke in these broad terms without getting into the specific aspects of the Bill. Those opposing the Bill also affirmed their commitment to Muslim women's interests in these same terms, but raised the issue of inadequate participation by Muslim women's organisations, NGOs and community members, which, they maintained, could result in a better Bill. But then any specific criticism of the Bill or the process of its formulation, or alternative legislative proposals was countered by appealing to 'justice' for Muslim women. Thus, when Mallikarjun Kharge (Congress) urged that 'Everybody wants empowerment of women. Everybody wants to support this Bill', but in the interest of Muslim women, the Bill should be referred to the Standing Committee, Prasad replied:

> But Sir, there is one thing we need to understand. One is the need to go for Standing Committee procedure and the other is the cry for justice of this lady, who was turned out of her house this morning because of triple *talaq*.

Did the terms justice/gender justice have any definite meaning in these invocations or were they empty signifiers deployed to seek legitimacy for the Bill and co-opt opposition? Some members opposing the Bill maintained that the government did not really care about justice for women, much less for Muslim women. In support of their charges, these members alluded to the government's defense of the marital rape exemption in an ongoing constitutional challenge to the husband's immunity in rape law, and its inaction on the Women's Reservation Bill. But assessing the Bill without comparing it to the Modi government's stance on other questions pertaining to women, could we say that it prioritised women's interests in this particular case? Is it possible for us to identify any conception of 'justice' for arbitrarily and illegally divorced Muslim women in the government's advocacy of criminal law against their husbands? It is to this question we turn in the next section.

IV. Debating Deterrence: The Politics and Pragmatics of Criminal Law

What motivated the government to propose a criminal law to secure justice for Muslim women facing arbitrary *talaq*? As mentioned earlier, the government presented the Bill as a

response to the seeming failure of the Supreme Court's verdict in preventing Muslim men from divorcing their wives through triple *talaq*. It was not sufficient, the government maintained, to simply declare the practice to lack legal validity; the declaration had to be backed by sanction for violation. Prasad sarcastically asked those arguing that a law was not needed since the Court's verdict had already articulated the legal position on triple *talaq*:

> …so should the victims of triple *talaq* frame the Supreme Court's verdict and hang it in their homes? What should they do?

Criminal law was held to be the ideal forum for giving teeth, as it were, to the Court's verdict, and thereby protect and 'empower' Muslim wives. Lekhi asserted:

> Penal provisions are basically to act as a deterrent as in Sati …. This is basically to empower women, to dissuade people from treating women as commodities because many people think women are commodities and that needs to be stopped and, to dissuade people from announcing various interpretations [of the *Shariat*].

The proponents of the Bill thus justified its use of criminal law as a tool of deterrence against the husbands. Deterrence, or the idea that individuals desist from committing crimes because of the fear of punishment, is a key proposition underlying the criminal justice system. Originating in the rationalist thought of Enlightenment philosophers Cesare Beccaria and Jeremy Bentham, the promise of deterrence leads lawmakers to turn to criminal law to combat a range of undesirable social problems. However, there is no evidence of the deterrent effect of punishment, not least because the deterrence thesis is built on the imagination of human beings as rational actors (Paternoster 2010). Further, critics have argued that deterrence theory lacks a moral foundation, because it allows the use of the state's coercive power against an individual to deliver a message to the entire society, and in doing so, treats individuals as means rather than as ends (Kennedy 1983–1984: 10). Broad invocations of deterrence also obscure the politics of naming an offence or imposing punishment. In other words, invocations of deterrence do not clearly tell us what aspects of the problem are sought to be deterred and what are left out. Thus, analysing the Lok Sabha debate over amending the rape law in 1983 and the proposal to institute capital punishment

for rape in 1998, Pratiksha Baxi (2000) shows that although harsher punishments were proposed in the name of *all* women, the construction of the problem by the legislators revealed that their objective was to deter rape only against a small set of women—unmarried, 'chaste' women, from 'respectable' social backgrounds.

How did the opponents of criminal law engage with the idea of deterrence? While some members questioned the deterrence thesis itself, pointing out that criminalising domestic violence and dowry harassment in the 1980s had not deterred husbands and their families from committing these offences, others asked why the deterrence project was aimed at Muslim men alone. As we have seen in the previous section, the government discourse exceptionalised Muslim women as being more vulnerable than other women. The Bill thus sought to deter *only* Muslim men from illegally divorcing their wives, leaving men from the other communities without criminal liability for similar conduct. Many members noted that this singling out of Muslim husbands smacked of anti-Muslim bias. As E.T. Mohammad Basheer (Indian Union Muslim League) protested,

> You are trying to create a myth. What is that myth? You want to prove that men of a particular community are dangerous, and they are cruel towards women. That is your agenda and that is what we are protesting against.

Indeed, the move to treat Muslim women as more vulnerable than other women, and hence, requiring an exceptional level of protection, was at odds with the government's stated goal of furthering gender justice by de-emphasising religious difference in family law. As V. Varaprasad Rao (YSR Congress Party) remarked,

> By putting extra punishment in this case, literally we are driving a wedge between different communities and we are dealing the case of divorce differently with regard to Hindu, Muslim and others.

The strongest opposition to the Bill's deterrence thesis was on account of the high quantum of punishment. Pronouncing triple *talaq* upon the wife did not have to be accompanied by violence or any form of abuse to attract the punishment of three years' imprisonment. But,

the act of 'pronouncing' triple *talaq* itself was punishable. Sushmita Dev (Congress) pointed out that under the Indian Penal Code, some of the offences that carry a punishment of three years' imprisonment are, 'rioting, armed with deadly weapons' (Section 148); 'promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony' (Section 153A); 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs' (Section 295A), among others—all serious offences that pose a threat to law and order. No matter how objectionable the conduct, the pronouncement of triple *talaq* cannot be attributed the same level of harm as rioting with arms. Ironically, Beccaria, to whom the earliest formulation of the deterrence theory is attributed, also stressed proportionality between the harm done by the crime and the punishment imposed, in order for the criminal justice system to be rational and efficient, thereby meeting the ends of deterrence. The government's advocacy of deterrence on the other hand was marked by sheer disregard for proportionality.

Beside the rhetoric of deterrence, the use of criminal law was also defended as a pragmatic measure. Both Lekhi and Prasad argued that making triple *talaq* a criminal offence meant authorising the police to intervene, which in turn was an effective way to facilitate poor or rural Muslim women's access to state institutions for justice. Here, the police was presented as a neutral, objective agent of deterrence, which is belied by women's experience of the police in cases of domestic violence and sexual assault. It must be remembered that the feminist demands for state action against domestic violence that ultimately culminated in the Protection of Women from Domestic Violence Act, 2005, preferred civil remedies and civilian functionaries to facilitate women's access to the legal system, precisely because of the negative experience with the police.

To sum up, although unsuccessful on the criminalisation issue, the opposition's interventions not only punched holes in the deterrence thesis advanced by the government, but also revealed the Bill as excessive use of the state's coercive power in dealing with what everyone agreed was a pressing social problem. As Basheer fittingly remarked, the government was 'unnecessarily taking a gun to kill the mosquito'.

V. Protection of State/Protection of Marriage

Similar to deterrence in the context of criminal law, protection is a trope frequently used by the state when acting in relation to women. It is through the discourse and ideology of protection that the state constitutes the vulnerable subject and acts in its name. The ideology of protection is premised on the inherent weakness of the protected and expresses itself in their unequal treatment (Kapur and Cossman 1996: 23). Mapping the multiple discourses that framed the 'Muslim woman question' in the Shah Bano debate, Zakia Pathak and Rajeswari Sunder Rajan note how they were 'marked and unified, by the assumptions of an ideology of protection' (1989: 562). For instance, different actors in the debate claimed to be protecting Muslim women from penury or from the Muslim patriarch, protecting Islam from encroachment by the state, protecting the minority community from majoritarianism, and so forth. Pathak and Sunder Rajan explain the problem with protection thus:

> An alliance is formed between protector and protected against a common opponent from whom danger is perceived and protection offered or sought, and this alliance tends to efface the will to power exercised by the protector. Thus the term conceals the opposition between protector and protected, a hierarchical opposition that assigns higher value to the first term: strong/weak, man/woman, majority/minority, state/individual (ibid.: 566).

How did the language and ideology of protection figure in the legislative debate on the 2017 Bill? The government did not use the language of protection, but below the surface of its rhetoric of gender justice and empowerment, the government's discourse revealed its investment in the ideology of protection. The government's advocacy of criminal law centred on the image of Muslim women as helpless victims of triple *talaq*, who were exceptionally and distinctly vulnerable. Criminal law in the government's discourse was therefore as much an instrument of protection directed at Muslim women, as an instrument of deterrence directed at their husbands.

The concern with protection was more direct for the opponents of criminalisation. The very basis of their opposition was that the recourse to criminal law undercut protection to Muslim women by striking at the source of their 'real' protection, i.e., marriage. A. Anwar Raja

(AIADMK) predicted how the Bill would spell doom for Muslim women, and in turn for the entire Muslim community, while at the same time noting the superior protection offered to them by the *Shariat*:

> If you want to punish Muslim (men), then how Muslim women will be benefitted by your action. They will not even get the money that is provided through one-time settlement as per Shariat law. Muslim women may be forced to roam on roads as orphans and beggars without any support from anybody. I wish to bring to your kind notice that the current legislation will only lead the Muslim community to such a pathetic situation.

If the supporters of criminalisation such as Lekhi and Prasad justified it on the ground of pragmatism as we saw in the previous section, then the opponents sought to question the very claim to pragmatism by foregrounding its impact on marriage. Thus, Sushmita Dev (Congress) asked,

> Is it a real possibility that after I go to a magistrate in a non-bailable offence when my husband is going to be arrested (…) he will sit in a reconciliation position with me? Is it possible?

While sharing Dev's concern regarding the impracticality of a criminal legal response, Supriya Sule (Nationalist Congress Party) put the question in more normative terms: 'Are we here to break marriages or to reconcile it [sic]?' Sule made a case for alternative ways to address the problem by invoking the nature of Indian women and what they really want, and the impact of marriage breakdown on children and the extended family:

> The biggest problem is when you put a father in jail—he may be a bad husband but he could be a wonderful father—and when the father comes out, that child will be ragged everyday in school and it will be said 'your father is in jail' [sic]. What is that child's mistake?

> One divorce in a family is not isolated. We do not live such nuclear families. The whole family gets affected. So if you are going to criminalize it, the whole family is going to get harassed and troubled.
>
> Why do we not look for a better solution where he could apologize, he could be counselled and she could live in a less hostile environment? No woman wants to leave; no woman in this world however badly she is, she first wants her marriage to work because she wants to protect her children. Her children are her first choice and then she will worry about her husband.

Similarly, V. Varaprasad Rao (YSR Congress Party) rued: 'We are really going ahead with the destruction of marriages rather than rebuilding marriages', and recommended reconciliation and arbitration provisions. Dushyant Chautala (Indian National Lok Dal) cautioned that the legislature should not enact a law which has to be later amended to contain its 'repercussions', and suggested that instead of criminalisation, the Bill should provide for 'settlement' between the parties. For these members, 'justice' for Muslim women lay in bringing the errant husband around through reconciliation and preserving their marriages.

How did the opposition of these members to arbitrary divorce lead them towards preservation of marriage? After all, is arbitrary *talaq* not symptomatic of an unhappy marriage? Why then did these members want to preserve such marriages? In all the above interventions, we can identify the view that the protection offered by marriage was far more meaningful and pragmatic than that offered by the state, for marriage was the only viable, long-term avenue of protection available to most women. For Sule, Rao and Chautala, preference for reconciliation was based on what they believed Indian women *really* desired and was ideal for Indian society; but Dev drew on the Supreme Court's judgement in *Shayara Bano* itself. Indeed, Justices Nariman and Lalit had found triple *talaq* to be 'manifestly arbitrary'—and hence in violation of the right to equality under Article 14 of the Constitution—not because the right to pronounce triple *talaq* was available to the husband and not to the wife, but because it allowed no possibility of reconciliation. Justice Nariman wrote in his judgement:

> … it is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 …

This formulation remained largely unchallenged in the public discussion on the Court's judgement, except by a few feminist commentators (Kapur 2017; Sen 2017). In fact, what the members quoted above voiced in the legislative debate was indicative of the wider progressive discourse on triple *talaq* that condemned the practice without adequately distinguishing between opposition to arbitrary divorce and opposition to divorce itself. As a result, it almost entirely overlapped with the conservative position of preserving marriage as a social good.

The government's response to the charge that it was proposing to deprive Muslim women of the *real* economic protection of marriage was to point to Section 5 of the Bill that made the errant husband pay a 'subsistence allowance' to the wife. Some members faulted the Bill for not specifying the quantum of allowance, to which Prasad responded that it was left to the discretion of the magistrates. Others suggested that if the government was really concerned about Muslim women, instead of leaving it to the husband and the uncertainty of enforcement of a court order, the government should assume that responsibility and create a fund for that purpose. When asked how the husband will discharge his obligation to pay subsistence allowance if he was arrested and convicted of the offence of triple *talaq*, Prasad claimed that magistrates were already authorised to decide such issues under Section 125 of the Code of Criminal Procedure. This was both an evasive and dishonest response, as nothing in the Bill enabled a magistrate to decide the question of 'subsistence allowance' by applying another legal provision, namely Section 125 CrPC. Additionally, even under Section 125, maintenance can be sought from a person who has been neglecting the petitioner, despite 'having sufficient means'—which an arrested or convicted husband cannot be in every case.

To be sure, all the interventions discussed in this section were meant to highlight the fact that a criminal legal response did not fully serve the interests of arbitrarily divorced Muslim women. Pathak and Sunder Rajan agree that protectionist arguments are neither 'easy to

avoid' while discussing women's issues, nor 'invariably insincere' (1989: 569–70). But as they maintain, even sincere claims of protection entail the protector's will to power, which is successfully masked by the ideology of protection (ibid.: 570). In holding up the protective role of marriage, even as a practical matter, these interventions worked to efface the violence entailed in the dependency on marriage, not just for Muslim women facing arbitrary *talaq*, but for *all* women.

VI. Conclusion

In this paper I looked at the Lok Sabha debate on the 2017 Bill to understand the legislative response to a specific issue affecting Muslim women, namely, triple *talaq*, and to trace the shifts in the script of the legislative discourse on Muslim women's rights since the 1986 Act. Unlike the issue of maintenance in the case of *Shah Bano*, the debate on triple *talaq* did not involve a clash between community autonomy and secular citizenship rights. The invalidation of triple *talaq* by the Bill did not amount to imposition of 'secular' values on the Muslim community, but was presented and perceived by almost all the parties involved as a measure to reinstate the *authentic* Islamic position on divorce through the use of civic authority. To that extent, the conception the of state–religion relationship underlying the 2017 Bill was not different from, but continuous with, the one proffered by the Congress in support of the 1986 Act. 'Non-interference' in the realm of Muslim personal law has always been a myth. While pursuing a policy of non-interference, it is the state that has always determined who represents the community and what represents the community's law, and legislated and enforced the same using state institutions. The political consensus on the need to legislate in this case possibly signals that the myth of non-interference has been finally put to rest.

While both the proponents and the opponents of the 2017 Bill agreed to invalidate triple *talaq*, the two sides presented competing visions of the state's role in protecting Muslim women's interests. While the government's proposal of a criminal law sought to deploy the state's coercive power to deal with the problem, and presented the state as the neutral agent of deterrence, it disregarded the Muslim community's vulnerability to state institutions and state power. The opponents of criminalisation, on the other hand, imagined justice for Muslim women as averting divorce through reconciliation, thus reifying the pre-eminent position of marriage as the legitimate domain of protection for vulnerable women. Though

the government's rhetoric of gender justice and the use of criminal law as the main point of contention gave the impression that the debate on the Muslim woman question had moved beyond the women's rights/minority rights binary and focused attention on the appropriate *means* of securing justice for Muslim women, closer scrutiny revealed the difficulty of transcending either that binary or the ideology of protection.

Notes

[1] E.T. Mohammad Basheer, Lok Sabha Debate, 28 December 2017.
[2] Muslim law provides different modes of divorce for the husband and the wife. *Talaq* or male-initiated divorce can take place either through a single pronouncement of *talaq* followed by no sexual contact for three months (*talaq ahasan*); three pronouncements over a period of three months with no sexual contact (*talaq hasan*); or a single irrevocable pronouncement or three pronouncements at once (*talaq al-bidah*). It is the last of these forms that is popularly known as 'triple *talaq'*. Female-initiated divorce on the other hand is either with the husband's consent to being released from the marriage (*khula*); upon delegation by the husband of a conditional right to divorce (*talaq-i-tafweez*); through a decree by a *qazi* i.e. an Islamic judge (*faskh*); or by a state court under the Dissolution of Muslim Marriage Act, 1939.
[3] (2017) 9 Supreme Court Cases 1
[4] A cognisable offence is one where the police is authorised to arrest without a warrant from a court. A non-bailable offence is one where the arrested individual cannot seek bail as a matter of right.
[5] As of early May 2018, the government was reportedly contemplating bringing an Ordinance to enforce the Bill. See, Ohri (2018).
[6] (1985) 2 Supreme Court Cases 556.
[7] Justices Nariman and Lalit held that triple *talaq* was not only invalid in Muslim law, it also violated the fundamental right to equality (Article 14) under the Indian Constitution. Justice Joseph agreed with Nariman and Lalit on the point that it was disapproved of in Muslim law, but held that its constitutional validity could not be challenged since it was not state enacted law.
[8] Here, Lekhi is referring to the Supreme Court's 2001 judgment in *Danial Latifi v Union of India*, (2001) 7 SCC 740, which involved a constitutional challenge to the 1986 Act. The judges found that the Act to be discriminatory for denying Muslim women a legal recourse that was available to women from other religious groups. Despite this finding, instead of striking it down the judges upheld an alternative interpretation of the Act that was capable of protecting the economic interests of divorced Muslim women. See, Subramanian 2017.
[9] A number of High Courts have, since the 1980s, refused to recognize triple *talaq*, on the view that a *talaq* is deemed valid in Muslim law only when it is for a reasonable cause, and preceded by attempts at reconciliation between the spouses aided by mediators from both sides. This view was affirmed by the Supreme Court in the 2002 judgement, *Shamim Ara v State of Uttar Pradesh [All India Reporter 2002 SC 3551]*, which was relied on by a number of High Courts to invalidate triple *talaq*.

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