

TRIPLE TALAQ – GENDER CONCERNS AND MINORITY SAFEGUARDS WITHIN A COMMUNALISED POLITY: CAN CONDITIONAL NIKAHNAMA OFFER A SOLUTION?

*Flavia Agnes**

This article is written at a critical juncture, as we await the Supreme Court verdict on the triple talaq issue. The aim here is to trace the trajectory of this entire debate and analyse the various strands of the arguments presented before the Supreme Court. While it is anyone's guess which way the verdict will go, this article focuses attention on the Supreme Court's directive issued at the end of the hearing regarding the use of a conditional nikahnama to restrain husbands from pronouncing arbitrary and instant triple talaq. By placing legal developments against the political backdrop, the article attempts to comprehensively address the interplay between gender, community and law in the present with triple talaq as the context.

I. INTRODUCTION

Within a polarised environment, where 'neutral, secular, liberal and progressive' voices demanding justice for Muslim women are placed in opposition to the 'bearded, misogynist and patriarchal' Muslim clerics, it closes the space for Muslim women to express a nuanced view regarding the present controversy over triple *talaq* and enforces upon them an artificial identity question. B.S. Sherin, a research scholar of comparative literature in Hyderabad, articulates her concern:

“It is truly unfortunate that Muslim women's identity is highlighted only in terms of personal laws, especially after the Shah Bano case. This overarching focus on personal law presents any improvement of Muslim women's lives as contingent only on the reform of personal laws. By raising the question of personal laws and of community-binding, the larger implications of culture, class and region on the lives of Indian Muslim women are deferred. Muslim women themselves have come out in large numbers against the present

* Flavia Agnes is a feminist legal scholar and director of Majlis based in Mumbai which provides litigation support to victims of domestic and sexual violence. She is a proponent of legal pluralism.

campaign on Triple *Talaq* to say what is much more urgently needed is empowerment and education. But their voices do not receive larger audience. The recent appearance of articulate, practicing Muslim women challenging ‘progressive voices’ has been written off as ‘motivated by patriarchal forces’ or ‘indoctrinated’.”¹

When and how did the issue of lack of rights of Muslim women under their personal laws come to the fore? Why did the media not publicise the gains secured by Muslim women through the process of litigation during the last three decades? Why is there an overemphasis on triple *talaq* today to the exclusion of all other gender concerns? Is gender a neutral terrain, which is disjunct from the contemporary political reality? Within a sharply polarised environment where gender is pitted against community rights, and there are no easy solutions, what would be the most viable strategy to ensure dignity and offer protection to Muslim women and secure their economic rights? These are some critical issues which will be untangled in the course of this paper as I explore the contentious issue of triple *talaq*.

In this paper, I attempt to analyse the recent developments against the populist grain by clearing some of the misconceptions surrounding the rights of Muslim women under the Muslim personal law regime. Part I provides the backdrop for the litigation. Part II provides the gist of the arguments and brings into context the question raised by the Chief Justice of India towards the end of the hearing, regarding conditional *nikahnama* to restrain triple *talaq* and its implications. Part III discusses the complex terrain of personal laws in India. Part IV, examines the rising wave of Hindu fundamentalism in the country against the backdrop of the triple *talaq* controversy. In Part V, the non-reporting of a historic judgment, *Danial Latifi v. Union of India* (‘Danial Latifi’),² and the problems it created are highlighted. In Part VI, the making of *Shayara Bano v. Union of India*³ and the legal precedent in *Shamim Ara v. State of U.P.* (‘Shamim Ara’)⁴ are analyzed. Part VII summarises the various arguments advanced before the Supreme Court. Finally, in the last part, I come back to explore whether a conditional *nikahnama* with adequate protective clauses written into it can be a way forward from the current stalemate. I conclude by raising a contentious question – whether the campaign against triple *talaq* by women’s groups provided the much-needed handle for a right-wing government, with its stated anti-Muslim agenda, to bring in a statute which will

¹ Outlook, *Shortcomings in the Triple Talaq Debate*, November 6, 2016, available at <http://www.outlookindia.com/website/story/shortcomings-in-the-triple-talaq-debate/297366> (Last visited on July 2, 2017).

² *Danial Latifi v. Union of India*, (2001) 7 SCC 740.

³ *Shayara Bano v. Union of India*, 2017 SCC OnLine SC 963.

⁴ *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 : AIR 2002 SC 3551.

change the essential character of the Muslim Personal Law which the community considers an integral marker of its identity.

II. THE TIGHTROPE WALK

The *suo motu* (on its own) reference to constitute a special bench to examine discriminatory practices of Muslim law such as polygamy and triple *talaq*, was made by a two-judge bench comprising of Justices Anil Dave⁵ and Arun Kumar Goel, in *Prakash v. Phulavati* ('Prakash')⁶ on October 16, 2015 while deciding an appeal concerning the rights of a Hindu woman to ancestral property. In an unprecedented manner, responding to stray comments by an advocate present in court and relying upon some articles in the press, the judges made a reference to the Chief Justice to constitute a special bench to examine discriminatory practices which violate the fundamental rights of Muslim women. This came to be titled as *Muslim Women's Quest for Equality, In re.*⁷

The Constitutional Bench headed by Chief Justice J.S. Khehar heard the arguments in this matter along with four other judges – Justices Kurien Joseph, R.F. Nariman, U.U. Lalit and Abdul Nazeer, on the days of May 11-18, 2017 during the summer vacation. Appreciating the strategy of placing four minority-community judges on a five-judge bench, Prof. Tahir Mahmood, an expert on Islamic law, has commented that such a move was needed since the unruly media debates had given the issue the colour of a majority-minority tussle.⁸ In the same spirit, the bench also declined to examine polygamy and confined the arguments strictly to the question – whether instant triple *talaq* constitutes a core belief among *Sunni Hanafi* followers of Islam in India.⁹

⁵ Justice Dave was a judge of the Gujarat High Court when Prime Minister Modi was the Chief Minister of the state. He retired in November, 2016. In August 2014, while he was a sitting judge, while speaking at a conference at Gujarat University made the following comment, "Had I been the dictator of India, I would have introduced Gita and Mahabharata in Class I.", which was immediately picked up by the media. See *The Indian Express, If I Were Dictator, Would Have Made Gita Compulsory in Class I: SC Judge*, August 3, 2014, available at <http://indianexpress.com/article/india/india-others/if-i-were-dictator-would-have-made-gita-compulsory-in-class-i-sc-judge> (Last visited on July 2, 2017).

⁶ *Prakash v. Phulavati*, (2016) 2 SCC 36.

⁷ *Muslim Women's Quest for Equality, In re*, SMW(C) No. 2 of 2015, decided on 22-8-2017 (SC).

⁸ *The Indian Express, Ball in the Supreme Court*, May 15, 2017, available at <http://indianexpress.com/article/opinion/columns/ball-in-the-supreme-court-triple-talaq-4655854/> (Last visited on July 2, 2017).

⁹ *Times of India, Supreme Court Begins Triple Talaq Hearing, Says Won't Touch Polygamy Issue*, May 12, 2017, available at <http://timesofindia.indiatimes.com/india/supreme-court-begins-triple-talaq-hearing-says-wont-touch-polygamy-issue/articleshow/58635232.cms> (Last visited on July 2, 2017) (It needs to be clarified that several Shia sects such as Khojas, Bohra, Ismailis, Itna Asharis etc. do not recognize instant triple *talaq* and have elaborate dispute resolution structures for arbitration in family matters. Even among Sunnis there are sects such as Ahl-e-Hadeez who do not instant recognize triple. However, majority of north Indian Muslim are Hanafis who recognize instant triple *talaq*. Also, instant triple *talaq* is not the only form available to a Muslim couple to dissolve the marriage. It is only one of the several forms of

Tagged along with original reference were several subsequent writ petitions/intervener applications by individual Muslim women, Muslim women's organisations including the RSS affiliated Rashtrawadi Muslim Mahila Sangh, the All India Muslim Personal Law Board ('AIMPLB')¹⁰ and other associate organisations such as the Jamiat Ulama-i-Hind, the All India Muslim Women's Personal Law Board, etc.

The hearing aroused a great deal of public interest, as the packed court room even while the court was on summer vacation and the extensive reporting of the case each day indicate. This is not surprising considering that the issue had received wide media publicity since the time it first hit the news headlines around two years ago when at a press conference, the Bharatiya Muslim Mahila Andholan published a study of 4710 women and came out with the press statement that triple *talaq* and polygamy are the primary concerns of Muslim women, not just of those who took part in the survey, but Muslim women in India, overriding concerns regarding poverty, illiteracy and marginalization.¹¹

According to Abusaleh Shariff and Syed Khalid, the publicity that the issue received is next only to demonetization which affected majority of Indians while the issue of triple *talaq* affected a miniscule minority of Muslims.¹² A recent survey conducted by the New Delhi-based Centre for Research and Debates in Development Policy (CRDDP) and relied upon by these authors, states that out of 331 divorces from among women and men, about a quarter occurred through the intervention of religious institutions such as the *qazi* and *darulqaza* and only one respondent or 0.3 per cent of the total group studied reported oral, instant 'triple *talaq* in one go.'¹³

Commenting upon the manner in which this issue was used by the Prime Minister during the election campaign in Uttar Pradesh, the authors, relying upon the 2011 Census data brought out the fact that the number of deserted Hindu women who live in deplorable conditions, far exceeds the number of Muslim divorcees and deserted women. The numbers are staggering – out of

dissolving a Muslim marriage. The Muslim law recognizes other forms including the woman's right to dissolve the marriage – khula, and divorce by mutual consent – mubarra).

¹⁰ It is a representative body of Muslims of various denominations, however, it is dominated by clerics of Hanafi sect. Though a non-statutory body, it has great influence over matters of faith among followers of Islam in India.

¹¹ TwoCircles.net, *Saying Islam gave rights to women 1400 years ago, won't solve our problems*, August 20, 2015 available at <http://twocircles.net/2015aug20/1440089863.html> (Last visited on July 4, 2017). See also Islamic Voice, *89% Muslim Women Call for Govt. Intervention to Codify Muslim Personal Law*, September 15, 2015, available at <http://islamicvoice.com/89-muslim-women-call-for-govt-intervention-to-codify-muslim-personal-law/> (Last visited on July 2, 2017).

¹² The Indian Express, *Unimportance of Triple Talaq*, May 29, 2017, available at <http://indian-express.com/article/opinion/columns/unimportance-of-triple-talaq-supreme-court-muslim-law-4678304/> (Last visited on July 2, 2017).

¹³ *Id.*

2.3 million separated and abandoned women, around two million are Hindus, as against 2.8 lakhs Muslims.¹⁴ And yet no attention is paid to them, even while the Prime Minister was lamenting over the plight of Muslim divorcees. They also pointed out that despite the hype, divorce among Muslims is much lower than in the majority community. However, they conceded that divorcees and deserted women face destitution, loss of rights and social stigma. However, it is not a unique problem of the Muslim community but a more pervasive social problem located within patriarchy.

It needs to be emphasised here, as those who have campaigned for abolition of arbitrary triple *talaq* have repeatedly urged, numbers are insignificant. Even if a few women are divorced in an arbitrary manner, it still constitutes violation of their fundamental rights. What is being opposed here is the right of a Muslim husband to use his power of divorce in an arbitrary manner against a defenseless woman and the lack of a corresponding right for the woman which amounts to gender discrimination.¹⁵

However, giving the issue communal flavour, the then newly appointed Chief Minister of Uttar Pradesh, Yogi Adityanath compared triple *talaq* to the disrobing of Draupadi.¹⁶ Another one of his cabinet colleagues, Swami Prasad Maurya, commented that Muslims resort to *talaq* to keep “changing wives” to “satisfy their lust” and leave their wives to beg on the street which aroused the wrath of members of the Muslim Women’s Personal Law Board who demanded his resignation.¹⁷

The fact that this group has also been campaigning for abolition of triple *talaq* and has intervened in the Supreme Court reflects the tightrope walk Muslim women who are demanding a change in their personal laws are faced with, when a right-wing anti-Muslim government is in power. In this situation, the ideal solution would be, by adopting the policy of ‘reform from within’, for the Muslim Personal Law Board to come out with a clear statement that arbitrary and instant triple *talaq* is *unquranic* and hence invalid and that all divorces must only be through *talaq-e-ahsan* mode.¹⁸ This would send a clear message to the entire Muslim community. The Board’s refusal to come out with such a statement has led to the current stalemate where the Supreme Court must

¹⁴ The Wire, *Abandoned Women Vastly Outnumber Victims of Triple Talaq and It’s Time Modi Spoke Up for Them*, December 12, 2016, available at <https://thewire.in/86335/abandoned-women-triple-talaq/> (Last visited on July 2, 2017).

¹⁵ The Wire, *Why Triple Talaq Needs to Be Abolished*, June 17, 2016, available at <http://thewire.in/43481/why-triple-talaq-needs-to-be-abolished/> (Last visited on July 2, 2017).

¹⁶ NDTV, *What’s at Risk if Triple Talaq is Declared Unconstitutional*, June 14, 2017, available at <http://www.ndtv.com/opinion/triple-talaq-vs-divorce-among-other-religions-1710918> (Last visited on July 2, 2017).

¹⁷ News 18, *U.P. Minister Says Muslims Use Triple Talaq to Change Wives, Satisfy ‘Lust’*, April 29, 2017 available at <http://www.news18.com/news/politics/up-minister-says-muslims-use-triple-talaq-to-change-wives-satisfy-lust-1387283.html> (Last visited on July 2, 2017).

¹⁸ Over a three month period.

now intervene and declare the law. The task is not easy, and as some lawyers commented during the hearing, it is like walking on a razor's edge.

III. CAN INSTANT TRIPLE TALAQ BE RESTRAINED THROUGH A CLAUSE IN THE NIKAHNAMA, QUERIES THE CHIEF JUSTICE

During the six day marathon hearing, everyone – from the presiding judges on the bench, to lawyers who thronged the packed court hall, to reporters jostling to get an exclusive byte – learnt a great deal about the pristine Muslim law – *sahi* Hadith to unauthentic Hadith and the grammar for determining it, which English translation of the Quran was authentic and the exact *Quranic* verses which dealt with the procedure for *talaq*. It was as though everyone was in a time-warp, in seventh century Arabia. The core concerns of modern Muslim women of faith who are an integral part of their community, the marginalized and the middle class, slipped through the crevices.

As against the polarities between *Sunni-Hanafi Ulama* of the AIMPLB, and the progressive Islamic scholars who battled it out to convince the bench of the accurate Islamic law, was the modernist approach of the attorney general, Mukul Rohatgi. He argued that the only way gender justice can be secured was to enact a law and bring all *talaq* (not just triple *talaq*) under judicial scrutiny.¹⁹ He did not pause to reflect on the situation of Hindu women under a codified Hindu law, since that was not an issue before the court.

A surprise was in store. At the end of the marathon discourse, the Chief Justice enquired with Kapil Sibal representing the conservative AIMPLB, whether it was possible to include within the marriage contract (*nikahnama*) a clause stipulating that the husband shall not pronounce arbitrary triple *talaq*, and directed the Board to file an affidavit to this effect.²⁰

This has helped to bring the debate to the contemporary and to highlight the progressive nature of a Muslim marriage which is conceived as a contract from its very inception. Hence conditions can be incorporated into the marriage deed to secure the rights of the woman, an unequal partner within the normative patriarchal marriage. This right is not available to a Hindu woman, as despite codification, Hindu marriages continue to be viewed as sacrament

¹⁹ The Asian Age, *Let's talk about women's rights*, May 23, 2017, available at <http://www.asianage.com/opinion/oped/230517/lets-talk-about-womens-rights.html> (Last visited on July 2, 2017).

²⁰ NDTV, *Supreme Court Concludes Triple Talaq Hearings, Reserves Verdict*, May 19, 2017, available at <http://www.ndtv.com/india-news/supreme-court-concludes-triple-talaq-hearings-reserves-verdict-1695503> (Last visited on July 2, 2017).

with Brahminical rituals like *vivaha homa*,²¹ *saptapadi*²² and *kanyadhan*²³ forming its core essentials.²⁴ This was a welcome move for Majlis²⁵ since our written submissions filed in court included the format of a standard nikahnama which, we felt, can go a long way in securing the rights of Muslim women.²⁶

IV. THE COMPLEX TERRAIN OF PERSONAL LAWS IN INDIA

Before proceeding further, perhaps there is a need to explain the complex terrain of family laws in India. Within the framework of legal plurality prevailing in India, an optional civil law of marriage coexists harmoniously with religion-based family laws and customary practices. The aspiration to bring in a secular and uniform family law is articulated in Article 44 of the Constitution – “The State shall endeavour to enact a uniform civil code” which is merely a directive principle of state policy.²⁷ As against this, there are two contesting claims which are enforceable and justiciable fundamental rights – gender equality and non-discrimination (Articles 14-15) and right to religious freedom and cultural identity (Articles 25-30).²⁸ The complex terrain of religion based personal laws (which govern marriage, divorce, maintenance, guardianship, adoption, succession, etc.) situated within the rubric of multiculturalism and legal pluralism, is often in conflict with notions of secularism and gender equality.²⁹

The watershed for this type of polarisation between gender equality and religious freedom is the controversial ruling in *Mohd. Ahmed Khan v. Shah Bano Begum* (‘Shah Bano’)³⁰ in 1985. The unwarranted comments against Islam and the Prophet and the call for enacting a Uniform Civil Code (‘UCC’), while deciding the rights of a Muslim woman under a secular statute, led to a backlash within the conservative Muslim religious leadership. Relenting to

²¹ The sacred fire at the wedding ceremony.

²² Seven steps round the sacred fire.

²³ Offering of the bride to the groom; literal meaning: kanya=virgin, dhan=offering.

²⁴ For a detailed discussion on the flaws within the Hindu Law, see Flavia Agnes, *Has the Codified Hindu Law Changed Gender Relationships?*, 46 SOCIAL CHANGE 4, 611 (2016) available at <http://journals.sagepub.com/doi/abs/10.1177/0049085716666635> (Last visited on July 2, 2017).

²⁵ Majlis based in Mumbai, provides litigation support to victims of domestic and sexual violence and has conducted extensive research and archiving projects on women’s issues in India.

²⁶ Live Law, *Triple Talaq: Women’s Rights Activist Flavia Agnes Submits Model Nikahnama Before SC*, June 3, 2017, available at <http://www.livelaw.in/triple-talaq-womens-rights-activist-flavia-agnes-submits-model-nikahnama-sc/> (Last visited on July 2, 2017).

²⁷ The Constitution of India, Art. 44.

²⁸ *Id.*, Arts. 14, 15, 25-30.

²⁹ See Flavia Agnes, *The Supreme Court, the Media and the Uniform Civil Code Debate in India* IN THE CRISIS OF SECULARISM IN INDIA 294 (Anuradha Dingwaney et al, 2007), for a detailed discussion on this subject.

³⁰ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 : AIR 1985 SC 945.

the pressure mounted by the orthodoxy, the government enacted the Muslim Women's Act ('MWA')³¹ to exclude divorced Muslim women from the purview of the secular law of maintenance for destitute wives (§125 of the Criminal Procedure Code ('Cr.PC')). This move by the ruling Congress Party came to be viewed as a blatant violation of secular principles and gender justice in favour of sectarian 'vote-bank politics'.

The move to enact this law met with severe opposition, not only from Hindu right-wing parties, but also from secular and women's rights groups. As the debate progressed, the media projected two insular, mutually exclusive and polarised positions: those who opposed the new Act and supported the demand for a UCC were viewed as modern, secular and rational, and those who opposed the UCC as fundamentalist, orthodox, male chauvinist, communal and obscurantist. This left no space for articulating shades of grey. Muslims, in turn, were mobilised to view this as yet another threat to their tenuous identity.³² The rigid approach of the conservative Muslim religious leadership provided further fuel to Hindu nationalists in their anti-Muslim propaganda and resulted in strengthening the Muslim appeasement theory within the Indian polity.

However, certain political events which occurred during the decades following the Shah Bano ruling led many rights based secular groups to change their earlier demand for a UCC as a means of ensuring gender justice. The demolition of the 400 year old mosque, the *Babri Masjid*, in 1992 despite an assurance to the Supreme Court to the contrary, and the riots across India which resulted in loss of life and property of Muslims, the gruesome sexual violence inflicted upon Muslim women during the Gujarat carnage of 2002 where around 3000 Muslims were killed, attacks on Christian churches in tribal areas of Dang (Gujarat-2005) and Khandamal (Orissa-2008), the riots in Muzaffarnagar (U.P.-2013), the continued escalation of violence in Kashmir since 2010 where thousands of civilian lives have been lost, and the manner in which the right wing political party, the Bharatiya Janata Party ('BJP') used the demand for a UCC as a stick to beat the Muslim minority with – are major contributing factors that necessitated a re-examination of the earlier call for a UCC. Rather than an all-encompassing uniform code, concepts such as 'reform

³¹ The Muslim Women (Protection of Rights upon Divorce) Act, 1986.

³² The partition of the country at independence had left a violent blood bath along the Hindu Muslim communal divide. In the decades following independence, the communal gulf had widened with riots erupting in several places where Muslims had suffered greater loss to life and property. In addition, mobilization of Hindu public opinion for the demand for a Ram Mandir at the site of the 400-year-old mosque, Babri Masjid, had been a constant point of friction. These developments contributed to making the Muslim religious leadership extremely rigid about any interference in their personal laws by a secular court.

from within' and a gradual 'step-by-step approach' gained currency as a viable strategy to secure gender justice.³³

V. THE RISING WAVE OF HINDU FUNDAMENTALISM

Since the NDA coalition government led by BJP came to power dislodging the earlier UPA coalition led by the Indian National Congress (perceived by minorities as a more secular and inclusive party) in 2014, Hindu fundamentalism has escalated to a new height. The extreme right-wing outfit, Rashtriya Swayamsevak Sangh ('RSS') provides the present regime its ideological mooring of building a Hindu *Rashtra* (nation). Within this political framing, the projection of Muslim as anti-national, terrorist and enemy of the Hindu nation, has gained credence and the secular fabric of the country has been fractured. The forces of communalism have spread far and wide and have taken roots even among the middle and lower classes. The recent Uttar Pradesh elections (2017) have given a boost to the party as it gained power with a thumping majority dislodging the Samajwadi Party which gave Muslims a voice. The choice of Yogi Adityanath, a member of the RSS and an avowed Muslim hater, as Chief Minister, has served to highlight the extent to which the majority vote could be mobilised around an anti-Muslim agenda. It is interesting to note that the BJP did not field a single Muslim candidate and the number of Muslims in the state legislature reduced from seventy-four in 2012 to a mere twenty-four in 2017.³⁴

It appears that under the present regime, Muslims as a political identity have ceased to matter. The huge Muslim population of about 200 million is passing through a most difficult phase. A deluge of anti-Muslim tirades, in the form of love *jihād*,³⁵ *ghar wapasi*³⁶ and cow vigilantism, have been unleashed upon the largely poor, uneducated and deeply religious community.

³³ This view is also endorsed by some former High Court judges and legal scholars. See The Hindu, *Uniform Civil Code – Now is Not the Moment*, July 13, 2016, available at <http://www.thehindu.com/opinion/lead/k-kannan-on-uniform-civil-code-now-is-not-the-moment/article8840401.ece> (Last visited on July 2, 2017); The Hindu, *This Reform Must Begin Within*, April 27, 2016, available at <http://www.thehindu.com/opinion/lead/lead-article-by-syed-a-hameed-on-public-interest-litigations-this-reform-must-begin-within/article8524648.ece> (Last visited on July 2, 2017).

³⁴ Faisal Fareed, *Hundred Days of Yogi Adityanath and Muslims: Challenging Times Ahead*, June 21, 2017 available at http://twocircles.net/2017jun21/411723.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Twocirclesnet-IndianMuslim+%28TwoCircles.net+-+Indian+Muslim+News%29 (Last visited on July 2, 2017).

³⁵ The RSS has carried out a systematic propaganda campaign alleging the existence of a Muslim plot to seduce and convert Hindu girls. This term is used to foster a sense of insecurity amongst Hindus and to make ordinary Hindus suspicious against Muslims.

³⁶ This term is used by RSS and Vishwa Hindu Parishad (VHP) for religious conversions of non-Hindu to Hinduism.

The beef ban and the more recent ban against cattle slaughter has led to the loss of trade and livelihood of large sections of Muslims. The ascendance of the holy cow into the political arena has given rise to cow vigilantism with gaurakshak squads roaming the countryside posing a grave risk to the lives of ordinary Muslims. The lynching of fifty-year old Mohammed Akhlaq at Dadri in Uttar Pradesh, by a mob of a 100 gau rakshaks just a few kilometers away from the capital city in September, 2015 and the Prime Minister's refusal to make a public statement condemning the action of such unruly mobs came in for sharp criticism from secular sections of society.³⁷ Since then there have been several other such mob killings in different North Indian states.³⁸ The latest is the stabbing of a young fifteen-year old boy in the Delhi Mathura local train on June 22, 2017 during the holy month of Ramzan.³⁹

These brutal killings of Muslims by violent mobs have failed to interrupt the routine business of our legislatures. They have not stirred the collective social and political conscience of a society meant to be governed by the rule of law. According to Apoorv Anand, a human rights activist and scholar, the harsh truth is that India's legislators and parliamentarians seem to have deserted the country's Muslims.⁴⁰ However, after the latest spate of killings, spontaneous protests were organized by secular and human rights groups in most major cities of India under the slogan, *not in my name*.

It is against this political backdrop of Muslims being pushed to the status of second class citizens that we must examine the exaggerated interest in the issue of triple *talaq* by the media and the government's eagerness to reform the Muslim Personal Law. While the lynching of Muslims did not arouse public conscience, triple *talaq* which hit the news headlines around the same time, witnessed unprecedented media publicity. This makes one wonder whether non-reporting of lynchings and heightened publicity given to triple *talaq* form two sides of the same coin, of treating Muslims as the 'other' which then feeds into the global phenomenon of Islamophobia.⁴¹

³⁷ BBC News, *Why Indian Man Was Lynched Over Beef Rumours*, October 1, 2015, available at <http://www.bbc.com/news/world-asia-india-34409354> (Last visited on July 2, 2017).

³⁸ The Wire, *Muslims Must Refuse to Be Killed*, April 9, 2017, available at <https://thewire.in/122420/muslims-must-refuse-killed-cow-beef/> (Last visited on July 2, 2017); See The Indian Express, *Our Own Animal Farm*, May 10, 2017, available at <http://indianexpress.com/article/opinion/columns/our-own-animal-farm-cow-protection-narendra-modi-yogi-aditya-anath-pehlu-khan-4648544/> (Last visited on July 2, 2017).

³⁹ The Indian Express, *15-yr-Old Boy Killed, Brother Says Were Called Beef Eaters*, June 24, 2017, available at <http://indianexpress.com/article/india/18-year-old-stabbed-to-death-they-flung-our-skull-cap-pulled-beard-ballabgarh-mathura-bound-train-4719096/> (Last visited on July 2, 2017).

⁴⁰ The Wire, *supra* note 38.

⁴¹ A term used for prejudice or negative feelings and attitudes towards Islam and Muslims. The term gained wide acceptability in the Western world after the 9/11 attack on the twin towers of the World Trade Centre in New York in 2001.

VI. NON-REPORTING OF HISTORIC JUDGMENT – DANIAL LATIFI

At this point, I must come back to the controversial Muslim Women’s Act (‘MWA’) enacted as a response to the Shah Bano⁴² ruling. Despite its negative projection, the Act was of immense historical significance as it was the first attempt in independent India to codify a part of Muslim Personal Law. But the positions across the divide were so rigid that there was no space to reflect upon this milestone. Since it was enacted amidst protests from women’s rights groups and progressive social organisations, it was viewed with suspicion and foreboding. Hence, the first response of the protesting groups was to challenge its constitutionality, rather than examine its viability.

However, while writ petitions filed by these groups were pending in the Supreme Court, the controversial Act gradually began to unfold in the lower courts. When a Muslim woman approached the court to claim maintenance under §125 Cr.PC, the usual ploy adopted by the husband’s lawyer, was to enclose a *talaqnama* (deed of divorce) along with the reply to the petition, under the mistaken notion that the new Act has absolved the husband of his liability of paying maintenance to his divorced wife beyond the *iddat* period.⁴³ But in a curious role reversal, the courts started awarding the divorced wife a lump sum settlement as per the provisions of the new Act.

The first significant order was by a woman magistrate, Rekha Dixit of Lucknow in January, 1988 when she granted Fahmida Sardar INR 85,000 (inclusive of maintenance for the *iddat* period, her *mehr* amount and a sum of INR 30,000 as “reasonable and fair provision” under the new Act).⁴⁴ This was a quantum leap from the meagre amount of INR 179 which was awarded to Shah Bano as monthly maintenance under §125 Cr.PC.

From 1988 onwards, high courts one after another upheld significant amounts of lump sum settlements awarded to wives by trial courts. Aggrieved by these orders, the husbands started filing appeals in the Supreme Court to reverse these orders. Curiously these appeals started accumulating in the Supreme Court alongside the writ petitions filed by secular groups to strike down the statute as unconstitutional.

The final moment of reckoning came when the Constitutional Bench (five judges) ruling in 2001, Danial Latifi⁴⁵ resolved the controversy and declared that the Act is constitutionally valid and simultaneously upheld the

⁴² Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : AIR 1985 SC 945.

⁴³ A period of three months after the first divorce is pronounced.

⁴⁴ Minu Jain, *Curious Role Reversal*, THE SUNDAY OBSERVER January 24, 1988.

⁴⁵ Danial Latifi v. Union of India, (2001) 7 SCC 740.

right of divorced Muslim women to lump sum amounts as ‘fair and reasonable settlements’ from their former husbands.

In the ultimate analysis, both sides – the secular groups pleading for the Act to be struck down as unconstitutional and husbands who sought reversal of orders passed by High Courts – lost. Divorced Muslim women who had waged a relentless battle to defend their precious economic rights from the magistrate’s court to the final authority of adjudication, the Supreme Court, emerged victorious. The Muslim woman secured for herself the right to determine her economic rights at the time of the divorce and get a lump sum settlement, a right, which is lacking in matrimonial laws of other communities.

However, within the communally vitiated atmosphere prevailing in the country, the advances made by divorced Muslim women under MWA did not attract the media attention. Ignoring the historical judgment, the media continued to project the view that after the enactment of MWA, Muslim women have no rights to post-divorce maintenance/settlements. Due to this, even scholars, lawyers, feminists and activists are ignorant of the significant gains secured by individual Muslim women. This has done the greatest harm to the cause of Muslim women’s rights as lawyers kept advising their male clients that all they need to do is to draw up a *talaqnama* and send it by post when a deserted wife files for maintenance in a court. Most often, not just the wife’s lawyer but even the presiding judge is ignorant of the historical judgment which results in loss of rights to the aggrieved woman.

VII. THE MAKING OF SHAYARA BANO AND THE LEGAL PRECEDENT IN SHAMIM ARA

As we return to the present, it is important to analyse one of the first petitions filed by a Muslim woman, Shayara Bano who is hailed as the champion of Muslim women.

Soon after the reference to the Chief Justice was made, a BJP activist Ashwini Upadhyay filed a petition pleading for the enactment of a UCC. When the petition came up before the bench presided over by the then Chief Justice T.S. Thakur, it was dismissed on the ground that this prayer falls squarely within the domain of the legislature.⁴⁶ The Chief Justice also questioned the petitioner’s motive in filing the petition. However, the bench assured

⁴⁶ The Times of India, *Supreme Court Leaves Uniform Civil Code to Parliament, Door Ajar on Triple Talaq*, December 8, 2015, available at <http://timesofindia.indiatimes.com/india/Supreme-Court-leaves-uniform-civil-code-to-Parliament-door-ajar-on-triple-talaq/articleshow/50083462.cms> (Last visited on July 2, 2017) (India is governed by a constitutional scheme of separation of powers between the three arms of the State – the legislature, the executive and the judiciary. The power of the judiciary is confined to examining the constitutional validity of an act or a rule but it does not have the law making power).

that if a victim of triple *talaq* approaches the court, it would examine whether instant and arbitrary triple *talaq* violated the fundamental rights of the wife.

So, by the time Shayara Bano approached Balaji Srinivasan, the ground for filing the writ petition was laid and the mantle of being a crusader for the cause of Muslim women's rights fell upon her shoulders. It is interesting to examine the background of this case. Initially, Bano's brother had contacted a local lawyer for filing a transfer petition in the Supreme Court to transfer the case filed by her husband in the family court at Allahabad, for restitution of conjugal rights (in effect, to ask her to return to the matrimonial home - a far cry from 'instant triple *talaq*'), to her native place in Kashipur, who, in turn, referred them to Srinivasan to file a transfer petition in the Supreme Court.⁴⁷

Since Bano did not want to return to her husband and instead, wanted to contest the case, to bring to an end the contentious litigation, the husband's lawyer resorted to the frequently used device, drew up a *talaqnama* and sent it to Bano by post. When this was brought to the notice of Srinivasan, he advised them to file a PIL on the ground that the *talaqnama* violated her dignity, though Shayara Bano has consistently maintained that she does not wish to return to her abusive husband. In an interview, Srinivasan stated that while he knew it would be a big case, the publicity it received far surpassed his own expectations. However, Bano's core concerns – protection from domestic violence, access to her children, regular monthly maintenance, and a fair and reasonable settlement for the future – issues which had to be litigated in the local court, under relevant statutes – the Domestic Violence Act and the MWA – appear to have remained unaddressed.

Subsequently, several more aggrieved women as well as various Muslim women's organisations approached the Supreme Court. It was rather strange that during this entire period, the media continued to project that Muslim women are devoid of rights rather than dwell upon the entire judicial discourse which had held instant and arbitrary triple *talaq* invalid.

In 2002, in a landmark ruling *Shamim Ara v. State of U.P.*,⁴⁸ the Supreme Court invalidated arbitrary triple *talaq* and held that a mere plea of *talaq* in reply to the proceedings filed by the wife for maintenance cannot be treated as a pronouncement of *talaq* and the liability of the husband to pay maintenance to his wife does not come to an end through such communication. In order for a divorce to be valid, *talaq* has to be pronounced as per the *Quranic* injunction. In the same year, a full bench in the Bombay High Court in *Dagdu*

⁴⁷ The Indian Express, *Shayara Bano's Fight Against Triple Talaq*, April 24, 2016, available at <http://indianexpress.com/article/india/india-news-india/triple-talaq-supreme-court-ban-muslim-india-shayara-bano-2767412/> (Last visited on July 2, 2017) (There is not much information available about the case filed by her husband in the Allahabad family court).

⁴⁸ *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 : AIR 2002 SC 3551.

*v. Rahimbi Dagdu Pathan*⁴⁹ had held that a Muslim husband cannot repudiate the marriage at will. The court relied upon the *Quranic* stipulation: “To divorce the wife without reason, only to harm her or to avenge her for resisting the husband’s unlawful demands and to divorce her in violation of the procedure prescribed by the *Shariat* is *haram*”. All stages – conveying the reasons for divorce, appointment of arbitrators, and conciliation proceedings between the parties – are required to be proved when the wife disputes the fact of *talaq* before a competent court. A mere statement in writing or oral deposition before the court about a *talaq* given in the past is not sufficient to prove the fact of a valid *talaq*.

These judgments in turn relied upon two earlier judgments of Justice Baharul Islam pronounced in 1981 while presiding over the Gauhati High Court – *Jiauddin Ahmed v. Anwara Begum* and *Rukia Khatun v. Abdul Khalique Laskar* which had declared:

“The correct law of *talaq* as ordained by Holy *Quran* is: (i) *talaq* must be for a reasonable cause; and (ii) it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, *talaq* may be effected.”⁵⁰

Following Shamim Ara, there were a plethora of verdicts which declared instant triple *talaq* invalid and safeguarded the rights of women approaching the courts for maintenance.⁵¹ So this had become the settled position of law. However, the media continued to project the view that once the husband pronounces *talaq*, the wife is stripped of all her rights. It is due to the selective amnesia regarding the earlier struggles of Muslim women, the petition filed by Srinivasan came to be hailed as the first instance where a Muslim woman had challenged the validity of instant triple *talaq*.

⁴⁹ *Dagdu v. Rahimbi Dagdu Pathan*, 2002 SCC OnLine Bom 440 : (2003) 1 Bom CR 740.

⁵⁰ *Jiauddin Ahmed v. Anwara Begum*, (1981) 1 GLR 358; *Rukia Khatun v. Abdul Khalique Laskar*, (1981) 1 GLR 375.

⁵¹ *A.S. Parveen Aklhar v. Union of India*, 2002 SCC OnLine Mad 836 : (2003) 1 LW (Cri) 115; *Najmunbee v. Sikandar*, 2003 SCC OnLine Bom 136 : (2004) 1 DMC 211; *Mustari Begum v. Mirza Mustaque Baig*, 2005 SCC OnLine Ori 268 : (2005) 2 DMC 94; *Shahzad v. Anisa Bee*, 2006 SCC OnLine MP 16 : (2006) 2 DMC 229; *Farida Bano v. Kamruddin*, 2005 SCC OnLine MP 519 : (2006) 2 DMC 698; *Dilshad Begaum Ahmadkhan Pathan v. Ahmadkhan Hanifkhan Pathan*, 2007 SCC OnLine Bom 48 : (2007) 2 DMC 738; *Riaz Fatima v. Mohd. Sharif*, 2006 SCC OnLine Del 1420 : (2007) 1 DMC 26; *Masroor Ahmed v. State (NCT of Delhi)*, 2007 SCC OnLine Del 1357 : (2008) 103 DRJ 137; *Shakil Ahmad Jalaluddin Shaikh v. Vahida Shail Shaikh*, Writ Petition No. 2201 of 2007, decided on 20-1-2016 (Bom).

VIII. A GIST OF THE VARIOUS ARGUMENTS ADVANCED BEFORE THE SUPREME COURT

Against the backdrop of judicial pronouncements leading up to the present hearing, I now examine the various strands of arguments advanced before the Constitutional Bench.

The first, as already pointed out, is the argument advanced by Mukul Rohatgi on behalf of the government seeking a total ban on all *talaqs*. When asked how Muslim husbands will divorce their wives, the Attorney General's prompt response: "You ban it today, and we will bring in a new law tomorrow."⁵² He argued that it was not a majority-minority issue but an intra-community gender equality issue. The government's eagerness to abolish the prevailing Muslim law, which the community considers as a marker of its identity, and bring in a statute enacted through Parliament was clearly on display.

The Bebaak Collective (a recent collective of secular women's rights / feminists organisations) represented by senior counsel Indira Jaising, pleaded that all personal laws must be tested against the touchstone of fundamental rights. However, she made an attempt to distinguish her position from that of the AG representing the right wing political regime by stating that in certain aspects Muslim law is better than the Hindu law and that it is not a Muslim issue but the concern of fifty per cent of the Indian population. She argued that marriage is a status and a right *in rem* (against the whole world, not just a personal right against the husband) and for a woman divorce is equivalent to civil death.⁵³ She too pleaded that all divorces must take place under "judicial oversight" and the prevailing practices of *talaq* and *khula* in informal adjudicational fora such as *darul qazas* must be stopped.

Advocate Farah Faiz, President of the RSS affiliated Rashtrawadi Muslim Mahila Sangh, who appeared in person pleaded that Shariat is interpreted as per the "whims and fancies of the local ulema".⁵⁴ Women are dependent on half-baked *maulanas*, *muftis* and *qazis* who sort out problems in their

⁵² See India Today, *If Triple Talaq Declared Illegal, Will Bring in Law to Regulate Muslim Marriage, Divorce: AG Mukul Rohatgi to Supreme Court*, May 15, 2017, available at <http://indiatoday.intoday.in/story/triple-talaq-polygamy-nikah-halala-supreme-court-centre-mukul-rohatgi/1/954030.html> (Last visited on July 2, 2017).

⁵³ Huffington Post, *Triple Talaq: A Ringside Look At The Proceedings In A Major Women's Rights Case*, May 12, 2017, available at http://www.huffingtonpost.in/2017/05/12/triple-talaq-a-ringside-view-to-one-of-the-significant-womens_a_22082977/ (Last visited on July 2, 2017).

⁵⁴ Bhadra Sinha, *Muslim woman advocate moves SC against triple talaq, polygamy*, HINDUSTAN TIMES June 2, 2016 available at <http://www.hindustantimes.com/india-news/muslim-woman-advocate-moves-sc-against-talaq-polygamy/story-smV6eYolof4RvFzZ7TB6GJ.html> (Last visited on July 2, 2017).

own way.⁵⁵ She demanded setting up of a high-level committee comprising of scholars and academicians, but not clergymen, to deliberate upon a new statute for addressing issues of marriage and divorce among Muslims.

Despite their different ideological locations, the moot point argued by this group was for the enactment of a new statute to regulate Muslim marriages and divorces.

The second position advanced by various Muslim women's groups was to declare triple *talaq* as one pronouncement, as held by the Delhi high court in 2008 in the *Masroor Ahmed v. State (NCT of Delhi)*.⁵⁶ They pleaded the point, which had been advanced by me earlier since Shayara Bano had filed her petition, that the Supreme Court ruling of 2002 in *Shamim Ara* had already laid down the procedure for pronouncement of *talaq* and the same must be affirmed.⁵⁷

Mr. Arif Mohammed Khan and Mr. Salman Khurshid, experts on the pristine Muslim law argued that 'what is bad in theology can never be good in law and cannot be considered as an integral part of Islam' and sought judicial intervention to invalidate instant triple *talaq*.⁵⁸ The lawyers representing Bharatiya Muslim Mahila Andolan ('BMMA'), adopting a cautious approach of minimalist intervention argued that since the law has already been declared, the test of constitutionality is unwarranted. This was a great comedown for BMMA which had written a letter to the Prime Minister in November, 2015 asking the government to codify the Muslim Personal Law.⁵⁹ Mr. M. Venkaiah Naidu,⁶⁰ a cabinet colleague of the Prime Minister, in July, 2016 had relied on

⁵⁵ Hindustan Times, *Muslim Woman Advocate Moves SC Against Triple Talaq, Polygamy*, June 2, 2016, available at <http://www.hindustantimes.com/india-news/muslim-woman-advocate-moves-sc-against-talaq-polygamy/story-smV6eYolof4RvFzZ7TB6GJ.html> (Last visited on July 2, 2017).

⁵⁶ *Masroor Ahmed v. State (NCT of Delhi)*, 2007 SCC OnLine Del 1357 : (2008) 103 DRJ 137.

⁵⁷ Flavia Agnes, *Muslim Women's Rights and Media Coverage*, 51 EPW 20 (2016), available at <http://www.epw.in/journal/2016/20/web-exclusives/muslim-womens-rights-and-media-coverage.html#sthash.DFL3pSfa.dpuf> (Last visited on July 2, 2017).

⁵⁸ Mandhani Apoorva, *Treat Triple Talaq as one Revocable Talaq: Salman Khurshid to SC*, [Read Written Submissions] May 15, 2017 available at <http://www.livelaw.in/treat-triple-talaq-one-revocable-talaq-salman-khurshid-sc-read-written-submissions/> (Last visited on July 2, 2017); Arif Mohammed Khan's position in Kaushika Pragma, *Triple talaq be treated as court's contempt: Arif Mohammad Khan*, THE INDIAN EXPRESS May 10, 2017 available at <http://indianexpress.com/article/india/triple-talaq-be-treated-as-courts-contempt-4648666/> (Last visited on July 2, 2017).

⁵⁹ DNA, *Muslim Women Write to PM Modi to Make Triple Talaq, Polygamy Illegal*, November 28, 2015, available at <http://www.dnaindia.com/mumbai/report-muslim-women-write-to-pm-modi-to-make-triple-talaq-polygamy-illegal-2149650> (Last visited on July 2, 2017).

⁶⁰ Minister for Urban Development and Minister for Information and Broadcasting, Government of India.

this letter to argue in favour of UCC.⁶¹ However, in court, they diluted their earlier position and did not plead in favour of enacting a new statute.

The third was the argument advanced by Mr. Kapil Sibal for the AIMPLB, who pleaded that matters of faith and belief cannot be tested against Articles 14 and 15 (equality and non-discrimination) of the Constitution as they are protected under Articles 25 and 26, which are also fundamental rights. Mr. Sibal queried that when instances of arbitrary triple *talaq* are rare, what was the need for a *suo motu* reference, and pointed out that the AIMPLB had already come out with an elaborate eight-point procedure for *talaq* and issued an advisory to all *Qazis* to this effect. He concluded his arguments with the analogy of the golden eagle which flies in the Alaskan skies, preying on the little birds below. The birds protect themselves by building their little nests. He compared the minority community to these little birds which have come with great faith to the Supreme Court to protect their little nests – their tradition and culture – from the golden eagle preying upon them and permit them to bring reform from within, which is the constitutional guarantee given to them. “Our faith in this court for last 67 years is fundamental and with that faith we have come here,” he concluded.⁶²

The three positions can be summed up as:

- 1) Statutory intervention – declare triple *talaq* unconstitutional and pave the way for the government to enact a new law.
- 2) Judicial intervention – Uphold the Quranic procedure declared by Shamim Ara that all divorces must be through *talaq-e-ahasan* mode over a three month period after making attempts at reconciliation.
- 3) Reform from within – Internal reforms through the intervention of the AIMPLB.

The Supreme Court, in its wisdom, may arrive at solutions, which may have different permutations and combinations of the above or prescribe a totally different solution beyond the three positions mentioned above. The decision of the Constitutional Bench, is binding on all parties. However, within a communally vitiated political climate, the task of weeding out discriminatory

⁶¹ The Hindu, *Why Not A Common Civil Code for All?*, July 16, 2016, available at <http://www.thehindu.com/opinion/lead/Why-not-a-Common-Civil-Code-for-all/article14491018.ece> (Last visited on July 2, 2017).

⁶² PTI News India, *Kapil Sibal Tells SC Muslims Are Like Small Birds On Which ‘Golden Eagles’ Prey*, May 18, 2017, available at <https://www.scoopwhoop.com/defending-triple-talaq-kapil-sibal-says-muslims-are-like-small-birds-which-need-scs-protection/#.ilwseata8> (Last visited on July 2, 2017).

practices of Muslim law tends to be extremely challenging and there are no easy solutions.⁶³

The demand for a new statute is problematic under the current political regime with its stated anti-Muslim agenda. In a recent article Mr. Mani Shankar Aiyar, a former Congress Member of Parliament asked a pertinent question, whether this government with the lowest Muslim representation, just 4.2%, has the moral authority to legislate on matters governing family relationships, which the community considers are important markers of its identity.⁶⁴ Even if the government enacts the law, the rights would have to be secured through a lengthy process of litigation in a family court which may well be beyond the reach of most Muslim women who are poor, illiterate and marginalised.⁶⁵

It is also not clear whether by the word ‘ban’ or ‘abolish’ the campaigning groups are expecting an amendment to the criminal statute rendering uttering of triple *talaq* a criminal offence. Even here, the complainant would have to go through the rigour of a criminal prosecution to punish her errant husband and few Muslim women would have the enduring power to pursue such litigation.⁶⁶ By then the marriage would have been irretrievably broken down anyway. And if deserting the wife is not a criminal offence, discarding her through triple *talaq* be construed as one, when the impact of both upon victims is similar?

Even if the Supreme Court declares the law regarding the proper procedure for divorce, if the family and community believes that such a divorce is valid, it will be difficult for the woman to enforce her rights as a married woman, because she too may believe that it is *haram* (sinful) to continue conjugal relationships after the pronouncement of triple *talaq*.⁶⁷

Moreover, this right already exists after the Shamim Ara ruling since 2002, and every arbitrary pronouncement of triple *talaq* can be challenged

⁶³ It needs to be pointed out here that despite codification of Hindu laws sixty years ago, and stringent anti-dowry laws enacted nearly four decades ago, discriminatory practices and dowry related violence still persists.

⁶⁴ NDTV, *supra* note 16.

⁶⁵ The Wire, *supra* note 15.

⁶⁶ Audrey D’Mello, *What Is Wrong with the Demand for a Ban on Triple Talaq*, HINDUSTAN TIMES October 25, 2016 available at <http://www.hindustantimes.com/analysis/what-s-wrong-with-the-demand-for-a-ban-on-triple-talaq/story-E3b8Y1KsTnh3BrspAPwy5J.html> (Last visited on July 2, 2017).

⁶⁷ Faizan Mustafa, *Law, Morality, Triple Talaq*, THE INDIAN EXPRESS July 10, 2017 available at <http://indianexpress.com/article/opinion/columns/law-morality-triple-talaq-muslim-islam-4743272/> (Last visited on July 2, 2017); See also M. Reyaz, *How does government plan to implement the triple talaq ban?*, DAILYO, December 9, 2016 <http://www.dailyo.in/politics/triple-talaq-uniform-civil-code-shariah-aimplb-bmma-patriarchy-allahabad-high-court/story/1/14477.html> (Last visited on July 2, 2017).

in court, but as activists of BMMA have pointed out it is not easy for a poor Muslim woman to approach the court for enforcement of her right.

Regarding the third position, I have already pointed out that the Board's refusal to come out with a clear statement invalidating triple *talaq* has led to the current stalemate. The advisory issued to the *Qazi* may not bring the required change.

IX. THE WAY FORWARD – A STANDARD NIKAHNAMA WITH PROTECTIVE CLAUSES

There are many who think that it will be a simple task for the Supreme Court to strike down triple *talaq* or declare it unconstitutional and change will automatically follow. However, even if the government brings in a new statute and “bans” or criminalises triple *talaq*, it may not be adequate to bring in reforms on the ground and reach it to the lowest social denominator. If the religious leaders reject the changes, or boycott the reforms, it will be difficult for individual women to enforce the law and the changes will remain at a cosmetic level, rendering the entire exercise futile.

In order for changes envisaged at the highest level to be effective at the lowest level it is necessary to bring the religious leaders on board and make them stake holders in the process so that the impact of the changes can be more effective. It is in this context the question that the Chief Justice posed to the religious leaders to bring in change through their own internal mechanisms becomes relevant.

The contractual character of a Muslim marriage permits conditions to be included in the *nikahnama* for protecting the rights of women specially safeguarding their economic rights, prohibiting the husband from pronouncing instant triple *talaq* and from entering into a bigamous marriage. According to Ameer Ali, a renowned Islamic jurist, the following agreements in a marriage contract are held to be enforceable in a court of law:

- 1) The husband will not contract a second marriage during the subsistence of the first;
- 2) The husband will not remove the wife from the conjugal domicile (matrimonial home) without her consent;
- 3) The husband will not absent himself from the conjugal domicile beyond a certain period;
- 4) The husband and wife will live in a specified place;

- 5) A certain amount of dower will be payable immediately after marriage or within a stipulated period;
- 6) The husband will pay the wife a fix sum of maintenance
- 7) The husband will maintain the children of the wife from her former husband;
- 8) The husband will not prevent the wife from receiving visits from her relations whenever she likes.⁶⁸

There have been several instances of such *nikahnamas* being used during the British period by Muslim families of repute. Even though in some cases, it was argued on behalf of the husband that such agreements are against public policy, the courts validated them and held them to be enforceable since the Muslim marriages were contractual in nature and conditions could be stipulated at the time of entering into the contract.

This suggestion receives support from Faizan Mustafa, where he argues that:

“The marriage contract or *nikahnama* (prenuptial contracts) is the easy solution to the problems at hand — polygamy, triple divorce and halala. The historian Shireen Moosvi has collected several marriage contracts of the Mughal period which demonstrate a uniform pattern of the conditions of *nikahnama*.”⁶⁹

Since the custom of stipulating such conditions have not been in much use after independence, efforts were made by various NGOs to introduce model *nikahnamas*. But due to their limited reach, these private efforts have not been effective. But now, since the Board has been asked to file an affidavit to this effect, they cannot shirk away from their responsibilities and they would have to send a message to all local *qazis* who perform marriages that the *nikahnama* that will be used must essentially have the condition as stipulated by the Supreme Court or else it will amount to contempt of court.

The effectiveness of this transformative solution will also depend upon the extent to which NGOs working on the ground are able to act as

⁶⁸ AMEER ALI, *MUSLIM LAW* Vol.2 321 as cited by PARAS DIWAN & PIYUSHI DIWAN, *LAW OF MARRIAGE AND DIVORCE* 67 (3rd ed., 1997).

⁶⁹ Faizan Mustafa, *Remake the Marriage Contract*, *THE INDIAN EXPRESS* May 11, 2017 available at <http://indianexpress.com/article/opinion/columns/remake-the-marriage-contract-4650220/> (Last visited on July 2, 2017); See also Mustafa, *supra* note 67.

watchdogs and ensure that the local *qazi* abides by the advisory issued by the AIMPLB. If they don't, it will amount to contempt of court.

This is only the beginning. Once the concept of a conditional *nikahnama* catches up, women will be in a position to add more conditions as per their specific requirements. This will prove to be an effective mechanism to protect women against instantaneous and arbitrary triple *talaq*, the practice of polygamy and also protect them against domestic violence. Such a *nikahnama* will not violate the essential character of a Muslim marriage being a contract between two consenting parties. Adding conditions for protection of the wife during her matrimonial life does not in any way violate provision of equality under Article 14 as it is protected under Article 15(3). Such conditions were deemed to be necessary because of the overarching power a husband has, in all patriarchal cultures.

Even this by itself, may not sufficiently secure the rights of a Muslim wife. For more lasting impact, along with the 'standard *nikahnama*', it is important to create sufficient legal awareness about the rights of Muslim women and their ability to negotiate for these rights in judicial or non-judicial fora. The failure to create awareness about their rights renders Muslim women vulnerable to domestic violence and results in loss of crucial rights. Though there are several statutes which protect the rights of Muslim women, including divorced Muslim women, due to lack of awareness, the Muslim women from poor and marginalised sections are unable to avail of the remedies which they are entitled to.

There is an urgent need to focus upon awareness of rights to ensure that important information about legal rights filters down to all women, particularly to the poor and marginalized who suffer blatant violation of their human rights and become victims of brutal domestic and sexual violence. Due to their poverty, illiteracy and low socio-economic status they become easy victims of exploitation by vested interests. Only when women become aware of their rights will they be able to protect them. Hence spreading legal awareness is critical— particularly about a standard *nikahnama* that women can use at the time of their marriage to protect them against instant and arbitrary triple *talaq*.

X. CONCLUSION

As already stated, a letter written by Zakia Soman and Noorjehan Niaz, the founders of BMMA to the Prime Minister in November, 2015, was relied upon extensively by Mr. Naidu, to support the demand for enacting a UCC, (which he referred to as 'common civil code', a term used by the RSS) though the letter was confined to asking the Prime Minister to codify the Muslim Personal Law as per the Quranic provisions. Below is an excerpt:

“From Shah Bano to Shayara Bano, who recently filed a PIL in the Supreme Court, the focus has been on gender-friendly reforms of Personal Laws. With changing times, the need has arisen for having a Common Civil Code for all citizens, irrespective of religion, ensuring that their fundamental and constitutional rights are protected. [...] While emphasising that the foundations of secularism would only get further strengthened by introducing a Common Civil Code, I would like to recall the words of Mahatma Gandhi: “I do not expect India of my dreams to develop one religion, i.e., to be wholly Hindu or wholly Christian or wholly *Mussalman*, but I want it to be wholly tolerant, with its religions working side-by-side with one another. With the government seeking the opinion of the Law Commission to examine all aspects pertaining to Uniform Civil Code, the time has come for an enlightened debate in the country to arrive at a consensus at the earliest.”⁷⁰

This message of a tolerant India sounds hollow in the context of the current political reality of lynching of Muslims that occurs every other day. Neither Mr. Naidu nor any of his cabinet colleagues have come out with a clear statement condemning such acts or preventing such venom from spreading and rupturing the secular fabric of the nation.

As mentioned in the article, soon thereafter, to test the waters, the Law Commission of India came out with a questionnaire to seek public responses to the enactment of a UCC, which was criticised not only by Muslims but also other minorities, tribals and secular groups. So the government retracted from perusing this further.⁷¹

Thereafter, a realisation seemed to have dawned that there was no need to broach the contentious topic of UCC since gender discrepancies within Hindu laws would have to be examined, since the letter to the Prime Minister had given a handle to the government to tinker with the religious law of Muslims through statutory reform. Earlier it was perceived that this could only be done by invoking the Constitutional provision of Article 44 – “The State shall endeavour to enact a uniform civil code” and without this mandate, it would be difficult to circumvent the protection given to minorities under Articles 25-26. Since in any case, the underlying motive of UCC was to use it as a stick to beat the Muslim with, the purpose would be better served by

⁷⁰ The Hindu, *supra* note 61.

⁷¹ The Indian Express, *Looking at Reform of Family Laws Across Religions, Not Uniform Civil Code, Says Justice B.S. Chauhan*, November 16, 2016, available at <http://indianexpress.com/article/india/india-news-india/family-laws-across-religions-uniform-civil-code-says-justice-b-s-chauhan-4377676/> (Last visited on July 2, 2017).

reforming Muslim Personal Law. Since then, no BJP leader has raised the issue of UCC.

The comments of the Prime Minister, the UP Chief Minister and other ministers clearly show how effectively BJP used the issue of triple *talaq* as a political agenda, and they could do it with a clear conscience. They were not doing it *suo motu* – the demand had come from Muslim women themselves, from within the community.

Though BMMA diluted its position in Court and did not press for statutory reforms, this shift ceased to matter politically, since two other organisations – the RSS affiliated Rashtrawadi Muslim Mahila Sangh and the secular-feminist Bebaak Collective, though speaking from two different locations, stepped in to take its place. In fact, the Bebaak position is not just for reform of Muslim personal law but for a gender just UCC along the lines of what Mr. Naidu had stated in his article in July, 2016.

The reference made by judges in Prakash and the PIL filed by Shayara Bano only served to further boost the BJP's agenda and keep the issue on the boil. It is indeed interesting to read the comments by Mr. Naidu on the very next date of the conclusion of the hearing that if the Supreme Court does not strike down triple *talaq* the government will bring in the law.⁷² The Minister justified this by stating that the government was not trying to “interfere” with personal matters but trying to ensure justice to women and equality before the law.

So, each one became a pawn in the hands of the anti-Muslim government, in its master plan of legislating for Muslims in the name of gender justice.

I am reminded of Zakia Pathak and Rajeshwari Sunder Rajan's famous essay, “Shahbano” – to justify the bizarre and sinister formulation, “Hindu men are saving Muslim women from Muslim men”,⁷³ the Muslim woman must invariably be projected as devoid of rights and lacking agency, and the Muslim male, pre-modern, lustful, polygamous and barbaric. This formulation alone provides the moral high ground for an anti-Muslim government to adorn the mantle of saving “Muslim sisters.”⁷⁴ It is this scary formulation which compelled Shah Bano to relinquish her claim to maintenance in 1985 and assert her Muslim identity as opposed to her claims of gender justice. Faced with

⁷² The Indian Express, *Govt. May Step in and Enact a Law to Ensure Triple Talaq is Banned: Venkaiah Naidu*, May 20, 2017, available at <http://indianexpress.com/article/india/govt-may-step-in-to-ensure-triple-talaq-is-banned-venkaiah-naidu-4665404/> (Last visited on July 2, 2017).

⁷³ Pathak Zakia & Rajeshwari Sunder Rajan, *Shahbano*, 14 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 3 558-582 (1989).

⁷⁴ *Id.*

a similar dilemma, it is anyone's guess how the ordinary *burqa* clad Muslim woman of faith will respond to this intervention which is being hoisted in her name. Sherin (cited above) sums up the current dilemma:

“A viable feminist approach cannot de-historicize Muslim woman as a transcendental subject of gender negating her immediate religious and political realities. Gender is always contingent; located historically, materially and socially. Under the current realities of Muslim existence in India, clamour for gender justice for Muslim women cannot exclude Muslim men as part of their community identity and as equal participants in their political destiny. The faith Muslims attempt to protect is not a historical spirituality, but the spirituality whose symbolic markers are constantly wiped out and demolished from the face of the modern nation state.”⁷⁵

And when the government bring in this law, as one more feather in its cap, in addition to cow vigilantism, *ghar wapasi*, love *jihad*, and lynching of Muslims, depriving the community of its last vestige of pride – its personal laws – as a feminist lawyer known for defending the rights of women, all I will be left with, is to categorically state, ‘Not in my Name’.

⁷⁵ Outlook, *supra* note 1.