

From *Shahbano* to *Kausar Bano* – Contextualizing the ‘Muslim Woman’ within a communalised polity

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i. Intersection of gender and identity

This essay explores the intersection of gender and identity and weaves together two significant, yet seemingly isolated incidents in Indian history – the Supreme Court verdict in the *Shahbano* case in 1985 and the controversy that followed, and the more recent communal carnage and the sexual violence that was unleashed upon Muslim women in Gujarat. Though apparently isolated, both these incidents bring to the center stage the subaltern Muslim woman, situated within a communally vitiated political arena. While marking the period of the rising wave of Hindu fundamentalism in the country, *Shahbano* stands at one end of the spectrum and Kausar Bano at the other.

Within the confines of an identity that is both rigid as well as fluid, how does a Muslim woman negotiate the state structures and community dictates? What are the contradictory pulls of culture, religion, law and politics that play upon her life and how does she position herself within these contradictory pulls? Why does she always enter the political arena donned with the mantle of victimhood? Are there no moments of defiance and resistance and why do these moments get overshadowed? Who are her allies and adversaries in her struggle for survival? What have been her gains and losses? How do the proponents of a Uniform Civil Code view her?

More importantly, how does she relate to the vocal, visible and highly articulate women’s movement which brought gender concerns within the political arena, with the slogan, ‘*Personal is Political*’. The movement focused on the overarching hold of patriarchy upon the lives of women and invoked state interventions through sustained campaigns to release women from its clutches. But how has this articulation addressed concerns of women who are at the margins of social boundaries, whose reality is marked not only by patriarchal dominations but also by racial, religious and caste prejudices? These are important questions that have haunted some of us within the Indian feminist movement.

Within a hierarchy of social relationships, gender concerns are articulated from the context of the mainstream. A slogan coined by women of colour in the U.S. succinctly captures this reality: *All women are White, All Blacks are men ... but some of us are brave*’. Even when gender concerns of the marginalized women hit the headlines, they do so primarily to strengthen the prevailing stereotypical biases against the community

at large. Rather than the overt pro-women concern, what gets foregrounded is the anti-community undertone.

ii. *Shahabano* Judgement and the Controversial Muslim Women's Act

No other example can better serve to explain this, than the *Shahbano* controversy following a Supreme Court ruling in 1985¹ which upheld the right of a divorced Muslim woman for maintenance under the Criminal Procedure Code (Cr.PC) which is popularly referred to as S.125 Cr.PC. The adverse comments in the ruling against the Prophet and Islam and the call for a Uniform Civil Code (UCC) resulted in a Muslim backlash and a demand for a separate statute based on Islamic jurisprudence. Relenting to the pressure exerted by the Muslim orthodoxy, the government introduced a Bill in the Parliament, which would exclude divorced Muslim women from the purview of S.125 Cr.PC.

This move by the ruling Congress led by Rajiv Gandhi came to be projected as the most glaring instance of the defeat of the principle of gender justice for the Indian women as well as the defeat of secular principles within the Indian polity. The Act would deprive divorced Muslim women of the rights granted under a secular provision, S.125 Cr.PC on the basis of religion alone and violate the Constitutional mandate of equality. The Act would also be a clear departure from the directive principle enshrined in Article 44 of the Indian Constitution - "the state shall endeavour to enact a Uniform Civil Code".

The period between the pronouncement of the judgement by a Constitutional Bench in April, 1985 to the time the Act was passed under a party whip in May, 1986, was a turbulent one for the Muslim woman. She was placed at the core of the controversy with both sides laying their claims upon her to justify their respective positions. The Muslim woman was situated within these sharply drawn binaries and was called upon to choose between her religious beliefs and community affiliations at one end and her gender claims at the other, which was indeed a difficult choice for her.

As the debate progressed, the media projected two insular and mutually exclusive positions i.e. those who opposed the Bill and supported the demand for a UCC as modern, secular and rational, and those opposing the UCC as fundamentalist, orthodox, male chauvinist, communal and obscurantist. To be progressive, modern and secular was also to be nationalist and conversely the opposing faction could be labeled as anti-national. As the controversy escalated, the Muslim was defined as the other, both of the nation and of the Hindus. Muslims, in turn could be mobilized to view this as yet another threat to their tenuous security. Huge mobs of Muslims, including women, walked the street to denounce the judgement and to demand the enactment of the new statute.

¹ *Mohd Ahmed Khan v Shahbano Begam* AIR 1985 SC 945

Ironically, the fury which was whipped up, seemed to be divorced from the core component of the controversy, a paltry sum of Rs.179.20 per month, far too inadequate to save the middle-aged, middle class, ex-wife of a Kanpur-based lawyer, from vagrancy and destitution.² The raging controversy finally led Shah Bano herself to make a public declaration renouncing her claim. If this entitlement was against her religion, she declared, she would rather be a devout Muslim than claim maintenance. A sad comment indeed, warranting reflection from campaigners on both sides of the divide.

The hurriedly drafted and hastily enacted statute was full of loopholes. But despite its limitations, the Act was of immense historical significance, as the first attempt of independent India,³ to codify a segment of the Muslim Personal Law and bring it within the purview of the Constitutional framework of justiceable fundamental rights. But the positions across the divide were so rigid by then that they left no space to contemplate upon this milestone.

iii. Unfolding of the Act

The contentious litigation terrain of this enactment can be divided into two core components. First was the challenge to the constitutionality of the Act by social organizations, women's groups and statutory bodies⁴ by way of Writ Petitions in the Supreme Court. While these lay dormant over the next 15 years, the Act gradually unfolded itself in the lower courts. Here, at the basic grass root level were the numerous applications filed by Muslim women to get reliefs under the provisions of this controversial enactment.

The binary formulation within the UCC debate ignored the ground reality that beneath this highly visible and volatile terrain of statutes, lies a mundane yet dynamic sub-terrain where rights are constantly negotiated, interpreted and evolved – the contested terrain of litigation. A silent, yet significant, revolution takes place when the aggrieved Muslim woman, a victim of patriarchal prejudices, initiates the process of litigation. This is the sub-terrain, where the agency of the ordinary Muslim woman is most vibrantly felt.

This is the domain where she negotiates the realm of law at her own instance, just the way Shahbano had done before her claim became entangled within the political controversy, which compelled her to let her identity supersede her claims of gender justice, at least publicly. But most often, these significant struggles and victories of individual women do not even emerge as case laws. These are known only to the concerned woman, the lawyers and the judge. Very few of them reach the High Courts

² The purpose of S.125 Cr.PC is to make husbands liable to pay a maintenance dole to their wives and children to prevent their destitution and vagrancy. Hence the maximum amount which could be awarded under this provision was Rs.500 per month. Through a legislative amendment in 2002, the ceiling has been removed.

³ There had been a similar move during the pre-independence period, which resulted in the enactment of the Dissolution of Muslim Marriages Act, 1939 which gave Muslim women a statutory right of divorce.

⁴ For instance, the National Commission for Women.

or the Supreme Court and even fewer get reported in law journals. So what we finally get to read in law journals is a mere tip of the iceberg. Nonetheless, they are important markers of the prevailing social reality and emerging legal trends. In this section, I have summarised some of these judgements.

Despite the enactment which barred from claiming maintenance, deserted Muslim women continued to approach the magistrate's courts for reliefs. In most cases, the husbands pronounced talaq as a retaliatory measure to defeat the women's claim.⁵ Thereafter, the maintenance rights of Muslim women had to be decided as per the provisions of the Muslim Women's Act (MWA)⁶. When lump sum maintenance was awarded to them, the husbands started filing appeals against the decisions of the lower courts in various High Courts in the country and from there to the Supreme Court. These appeals gradually started accumulating, along with the original writ petitions challenging the Constitutionality of this Act.

What was intriguing was that if indeed the Act was depriving women of their rights and was enabling husbands to wriggle out of their economic liability, why were the husbands finding themselves *aggrieved* by the orders passed under a blatantly anti-women statute? Lurking beneath was a faint suspicion that perhaps the manner in which the Act was unfolding itself in the lower courts, was indicative of a different reality, defying the premonitions. This fascinating phenomenon provided the first indication that perhaps the ill-famed Act could be invoked to secure the rights of divorced Muslim women.

A seemingly innocuous clause, which had missed the attention of protesters and defenders alike, had been invoked by a section of the lower judiciary, to pronounce judgements, which provided greater scope for protection against destitution. Section 3 (1) (a) of the Act stipulated that a divorced Muslim woman is entitled to - *a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband*. This clause, along with the preamble - *An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands*", had been invoked by the judiciary in defense of Muslim women's rights.

Though initially just a trickle, the judgements were a pointer towards a possibility. The High Courts of Gujarat and Kerala were among the first to herald in the new tidings. They affirmed that the new Act was to *protect* the rights of divorced Muslim women and not to *deprive* them of their rights. They further stressed that any ambiguity within its clauses, must be interpreted in such a manner as to reconcile with the proclamation contained in the title of the Act. Banishing divorced women to a life of destitution would not amount to protecting their rights as stipulated by the statute, they declared.

The first significant judgment on this issue was pronounced by the Gujarat High Court, on 18th February, 1988, within a year and a half of the enactment. But even before this, the dice was cast in women's favour, by a woman judicial magistrate in Lucknow on

⁵ Manipulations by lawyers plays an important role here and most often these lawyers who manipulate the Muslim law are not Muslims but Hindus.

⁶ *The Muslim Women (Protection of Rights on Divorce) Act, 1986*

6th January, 1988. The woman concerned, Fathima Sardar, was awarded Rs.85,000/- as fair and reasonable provision and maintenance during the iddat period. Justice M. B. Shah, while presiding over the Gujarat High Court explained: "The determination of fair and reasonable provision and maintenance would depend upon the needs of the divorced woman, standard of life enjoyed by her during her marriage and the means of her former Husband. The amount must include provision for her future residence, clothes, food and other articles for her livelihood."⁷

In the same year, the Kerala High Court reaffirmed this position in *Ali v Sufaira*⁸ and *Aliyar v Pathu*⁹ in the months of July and August respectively and reaffirmed this position again in *Ahmed v Aysha*¹⁰ in 1990. In 1995, a division bench of the Kerala High Court explained "The clause, 'reasonable and fair provision and maintenance to be made and paid to her within the iddat period' is as follows: Provision is to be made and maintenance is to be paid. The provision has to be made to secure livelihood of the wife. This need not be in monetary terms, it could be by grant of immovable property or other valuable assets or other income yielding property. Provision must be made within the iddat period and it has to be fair and reasonable. ... The revolt against the Shahbano judgement by a section of Muslims was only in respect of a continued liability. There was no dispute regarding the liability of the husband to pay. The Act was passed to contain the revolt and protect the rights of divorced Muslim women. It is difficult to think that Parliament has, by enacting the Act, completely taken away the right of divorced Muslim women under S.125 Cr.PC without making any provision as a compensatory measure."¹¹

Later there were judgements of the Madras and the Bombay High courts. The Madras High Court held: The very purpose of the Act was to protect the rights of Muslim women, who have been divorced and to make provisions for their future livelihood.¹² In 2000, a Full Bench of the Bombay High Court further explained that the words 'maintenance' and 'reasonable and fair provision' carry distinct meaning. The word 'provision' has a future content. It is an amount kept aside to meet a future liability. The husband must make a reasonable and fair provision for her, which should take care of her future needs. It cannot be substituted by word 'for'. The amount of 'maintenance' and 'reasonable and fair provision' cannot be confused with mehr. Mehr is a liability which does not get absolved by any other payment or consequences.¹³

The full bench ruling of the High Court of Punjab & Haryana in 1998 in *Kaka v Hassan Bano*¹⁴ and the division bench ruling of the Bombay High Court in 1999 in *Jaitunbi Shaikh v Mubarak Shaikh*¹⁵ also upheld this view.

⁷ *Arab Ahemadhia Abdulla v Arab Bail Mohmuna Saiyadbhai* AIR 1988 Guj 141

⁸ 1988(2) KLT 94

⁹ 1988 (2) KLT 172

¹⁰ II (1990) DMC 110

¹¹ *K Kunhammed Haji v K. Amina* 1995 Cri.LJ 3371

¹² *K. Zunaiddeen v Ameena Begum* II (1998) DMC 468

¹³ *Karim Abdul Shaikh v Shehnaz Karim Shaikh* 2000 Cri.LJ 3560

¹⁴ II (1998) DMC 85

¹⁵ 1999 Cri.LJ 3846

iv. *Law is What Law Does*

A legal provision has to be assessed not merely by its wordings but in its application to real life situations. The wordings of a statute or dictate come to life when they are contested in courtrooms and are interpreted through judicial pronouncements. As formulated in the legal maxim – law is what law does.

The lump sum provisions for future security, which the courts so carefully crafted out of the controversial legislation, in fact, seemed to provide a better safeguard against destitution, than the meager doles which they were entitled to under the earlier anti vagrancy provision under S.125 Cr.PC. In a significant number of cases a concerned and sensitive judiciary, carved out a space for the protection of women's rights from what appeared to be an erroneously conceived, badly formulated and blatantly discriminatory statute, without invoking a political backlash. Endorsing the spirit of Islam and the Shariat and drawing upon the Islamic concept of *mataaon bil ma'arofe* (fair and reasonable provision), the courts opened a new portal for the protection of divorced Muslim women by reading into the statute notions of justice and equity. Doing precisely what the Act in its title proclaimed, i.e. protection of rights of divorced Muslim women, the judiciary turned what had initially appeared to be a misnomer and a mockery into a factual reality and ushered in a silent revolution in the realm of Muslim woman's rights.

A reading of the judgements indicates that the Act had rid itself of the agenda of alleviating vagrancy and destitution among divorced women (the defining feature of S.125 Cr.PC) and had extended itself to the claims of women from higher social strata. The statute enacted in haste, at the insistence of the conservative leadership, seemed to have boomeranged. The ruling of the five-judge Constitutional Bench of the Supreme Court in *Daniel Latifi*¹⁶, pronounced on 28th September 2001 finally put its seal of approval on these positive interpretations.

For the women, the crucial right of survival hinged upon interpretations and explanations of simple words like 'within / for' 'and / or' 'maintenance / provision'. Through this labourious process, the criteria for the civil right of divorce settlement has been taken out of the earlier legal premises of 'inability to maintain', 'prevention of vagrancy' 'a dole to hold together body and soul'. The courts delivered women from the liability of recurring monthly dues, which hinged upon post-divorce chastity under the provisions of S.125 Cr.PC.

The essence of legal citations is culled out by lawyers in support of a legal point advanced during court proceedings. Even in legal textbooks, only the legal maxim, which was upheld, is mentioned as a one liner. If the same point has been upheld in more than one case, mere citations are mentioned to augment the argument. But in matrimonial

¹⁶*Daniel Latifi v Union of India* 2001 (7) SCC 740; 2001 Cri.LJ 4660

litigation, hidden beneath each citation lies the story of the struggle of an individual woman.

Viewed in this context, the struggles of individual Muslim women who defied the dictates of patriarchy in defense of their right have to be acknowledged as acts of assertion. This was a great victory for individual Muslim women, who had to fight every inch of the way due to the ambiguities caused by callous drafting. The Act provided ample scope to husbands to exploit the situation, which led to protracted litigation beneficial to husbands and a nightmare to women. But women withstood the ordeal with courage and determination, with patience and perseverance. After a decade and a half, the end results of this persistent struggle are clearly visible. 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.

v. Communalised Media Campaign

Ironically, within the communally vitiated atmosphere, the advances made by divorced Muslim women under the MWA did not seem to invoke the media attention. These individual triumphs have been invisibilised and glossed over. As we learnt the hard way, gains made by Muslim women had no news value. Unless some radical and polarised opinion is expressed or a reaction to a judgment is evoked from within the community (as was the case in the *Shahbano* judgement), this silent revolution does not warrant media attention. In order to fit the media formula, the Muslim woman has to be portrayed as a victim of sexist and obscurantist biases within the community.

So even after the path breaking *Daniel Latifi* ruling, the media continued to splash the stories of Imrana, Gudiya and Najma Bibi, victims of patriarchal biases and community prejudices. The extensive publicity awarded to these cases, over the print as well as the visual media, transformed these unknown women into household names.

Imrana, a Muslim woman from Muzaffar Nagar in Uttar Pradesh was raped by her father-in-law in July, 2005. After a complaint was filed, a journalist approached a Maulana of the Deoband school with the facts of this case and asked for a fatwa. The facts were projected as hypothetical. The Maulana issued a fatwa that after the rape, her husband cannot live with her and he should divorce her and then her father-in-law may marry her. Suddenly a case of violence against women turned out to be an issue of Muslims and others. Imrana was placed in the center of the controversy despite Supreme Court guidelines that the identity of a rape victim should not be revealed in press reports. But for the media Imrana was not just a woman, overnight she had been transformed into a symbol of Islamic orthodoxy.

Najma Bibi's case is yet another example of this trend. The incident occurred in 2004 in a small village in Badrak, Orissa. After a domestic quarrel, the husband pronounced talaq in an inebriated state and later repented. He obtained a fatwa from a local Maulavi declaring that it was not a valid talaq and the couple could live together. Later another

fatwa was obtained by some community leaders gave a contrary view. The hostility between two local NGOs was an important factor in fuelling the conflict. Finally the matter was settled through intervention of the Supreme Court which held that if two people wish to live together the community cannot interfere.¹⁷

Gudiya's case is the most tragic of them all. Her husband Arif, who was serving in the Indian army in Kashmir, became a prisoner of war and was unheard of for five years. Subsequently she married Taufiq and when she was pregnant from this second marriage, the first husband returned and expressed his desire to reunite with his wife. When this news item was reported in the press, television channels jumped into the fray and publicly paraded the anguish of a young girl, to increase their TRP rating. One channel went to the extent of holding a live '*panchayat*'¹⁸ which projected the eight months pregnant girl burning with fever. The panchayat gave its verdict in full public view that Gudiya should now return to her first husband and it is his prerogative either to accept her first child or discard it. All the channels had a field day projecting this story and interviews with various relatives of the three persons concerned and Muslim Maulavis. Finally, it seemed that Arif had agreed to accept the child and Gudiya was happy to keep the child. Though in her earlier interviews she had made a caustic comment: "*Yeh koi khel thody hai, aaj iske saath kal uske saath* (This is no game. Living with someone today, another tomorrow)". But after the verdict when she returned to her husband's home she was calm, composed and relaxed and commented that this is her destiny and further endorsed this statement with a comment that it is her wish.¹⁹ A few months later a brief news item appeared in the press that Gudiya had passed away. There was no public debate on who killed Gudiya.

In a communalized climax, Muslim women have become the fodder for the insatiable greed of the media to increase their TRP ratings. Defaming the entire community was its by product. Isolated instances based on non-Islamic practices are projected as the norm of the community. In the ensuing controversy two contesting segments are pitted against each other are - the local Qazis or Maulanas who may or may not have the authority to give an informed verdict (fatwas) on the Islamic jurisprudential principles is at one end and secular / women's rights activists, at the other. In order to make a sensational story, the media projects the most polarised opinions of these two segments. Within this formulation, there is no space for shades of grey to emerge. In the predetermined binaries formulated to create the controversy, there is no space for moderate opinions within Muslim leadership as they do not make a 'good story'.

Since our perceptions regarding social concerns and women's rights are gathered from the media, non-reportage renders this revolution invisible and thereby insignificant. Hence even lawyers and women's rights activists continue to harbour the misconception that the rights of a divorced Muslim woman are extinguished at the expiry of Iddat period.

¹⁷ *Times of India*, April 14, 2006

¹⁸ Non-formal and community based justice delivery mechanism

¹⁹ *Indian Express*, September 28, 2004

This attempt to ignore the assertive Muslim woman and popularise the image of an authentic 'victim subject' while contextualizing the Muslim family law by projecting isolated incidents onto the public domain is extremely harmful. The regressive views of a particular Maulana tend to get engraved in the public mind as the norm of the community or even more dangerous - as Quranic dictates. There seems to be an acceptance, both within the community as well as among social activists and scholars of the positions that are projected as 'Islamic principles'. These polarised views then become the base for the discourse on community-based interventions for reform.

It is in this context that one needs to examine the invisibilising of the Muslim woman's struggle within the cultural construct of these hegemonic claims. The logic could be sustained only by denying the fact that the MWA provided for an alternate remedy, far superior to the one that had been denied to Muslim women under S.125 Cr.PC; by negating the fact that since 1988, the Act was being positively interpreted by various High Courts in the country by awarding substantial amounts as 'settlements'; by glossing over an important development in the realm of family law, that of determination of economic entitlements upon divorce, rather than the prevailing right of recurring maintenance.

vi. Interrogating the demand for UCC

One needs to examine the demand for a UCC within the communalized polity. The myriad opinions expressed in support of the UCC are governed by three distinct undertones i.e. gender equality, national integration and concepts of modernity imbedded within notions of middle class morality.

The gender concerns project the demand for an all encompassing and uniform code as a magic wand which will ameliorate the woes and sufferings of Indian women in general and Muslim women in particular. This concern places gender as a neutral terrain, distanced from contemporary political processes. From this point of view, the agency for change within communities becomes highly suspect. Minority women are projected as lacking a voice and an agency either in their own communities or through the process of litigation to claim their rights within existing structures. It projects the state intervention in the form of an enactment of a uniform code as the only option to bestow gender justice upon minority women.

At another level, for the liberal, modern, English educated, middle classes, the demand for UCC is laden with a moral undertone of abolishing polygamy and other 'barbaric' customs of the minorities and extending to them the egalitarian code of the 'enlightened majority'. This position relies upon the western model of nation state and liberal democracy and scorns simultaneous sexual relationships in the nature of polygamous marriages in the name of modernity but at the same time, endorses sequential plurality of sexual relationships (through frequent divorces), and also the more recent trends of informal cohabitations, which have gained legitimacy in the west.

Within a communally vitiated political climate, the demand also voices concerns of 'national integration' and 'communal harmony' and projects Muslims as the 'other' both of Hindus and the nation. At times the distinction between these two terms collapses and they become interchangeable.

The root of the communal propaganda is centered on the growth in Muslim population. As per this premise, non-implementation of Article 44 of the Constitution has resulted in a growth in the Muslim population and this constitutes a danger to the majority community. The image of a polygamous Muslim has been constructed to serve this propaganda.²⁰ It is in this context that monogamy imposed by a compulsory code becomes the need of the hour. The gains to the gender concerns by the imposition of monogamy seems to be only incidental. Muslim scholars have countered this with statistical data and focused upon the sociological factors such as poor socio-economic conditions and low level of education among the Muslims, which are the root causes of a slight increase in Muslim population and pointed out that a UCC will not resolve this problem.²¹ But the doctrine of monogamy (which is a basic tenet of Christianity) also draws the unquestioning support of liberals moulded in the Western ethos. Here bigamy is reflective of pre-modern barbarism and monogamy symbolises civilisation, enlightenment, modernity and progress.²²

It is indeed a matter of grave concern that these positions, advocated by the Hindu right wing, received a boost through judgements pronounced by the Supreme Court of a secular and pluralistic state, and more often than not by the presiding Chief Justices. It is interesting to note that no matter what the core issue litigated before the apex court, the comments regarding the enactment of a UCC are always made in reference to 'national integration' and either a veiled or direct insinuation against Muslim law, thus creating a fiction that Hindus are governed by secular, egalitarian and gender just family code and it was high time that this code was extended to Muslims to usher in modernity and gender equality among them.

This communal posture of the apex court becomes evident when we examine the constitutional challenges to archaic and sexist provisions of Hindu law. For instance, when in 1984, the Delhi High Court upheld the archaic provision of restitution of conjugal rights under the Hindu Marriage Act which was challenged on the basis that it violates freedom and equality, not only was there no mention of a UCC and 'national integration' but the court went further and ruled: "Introduction of constitutional law in the home is most inappropriate. It is like pushing a bull into a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the

²⁰ 'Since Muslims are allowed to marry four wives, the Muslim population is growing at a faster rate', is the communal propaganda.

²¹ Badshah, H. 'Uniform Civil Code - Chasing a Mirage' The Hindu 24.12.95

²² While not holding a brief for male bigamy, one is only questioning whether sexuality can be controlled through state regulations when the economic restraints for such measures, which were rooted in European feudalism, (bastardisation of children and denying them the right of property inheritance) have broken down. The modern tendency is towards laxity in marriage contracts, conferring rights to spouses in informal relationships and dissolving the differences between legitimate and illegitimate children

privacy of the home and married life, neither Article 21 nor Article 14 have any place.”²³ The Supreme Court later affirmed this decision.²⁴

While the blame for igniting the UCC controversy must lie primarily with the Supreme Court, the blame for repeatedly fanning it and keeping it alive in popular parlance lies with the media. Every time the Supreme Court makes a comment, what one sees in the media are images of purdah clad Muslim women and opinions of Muslim religious leaders opposing the demand. Many times, the core issues litigated before the Supreme Court are blotted out and the call for a UCC is projected as a pronouncement against the Muslim minority.

For instance, the judgement pronounced by Chief Justice V. N. Khare in the *John Vallamattom's*²⁵ case in August 2003 concerned a Christian priest's personal freedom to make a bequest of religious-charitable nature. But a stray and uncalled for comment regarding the UCC helped the media to convert a judgement in defense of personal freedoms and cultural plurality into one in defense of UCC and hence, anti-minority and anti-plurality. Ironically, the next day and through the weeks that followed, the news papers were flooded with reports and editorials on UCC with quotes from Muslim religious leadership and Muslim intelligentsia on one end and women's rights activists at the other, while the judgement itself was of relevant neither to the Muslim identity nor women's rights.

Similarly in the *Sarla Mudgal*²⁶ of 1995, the core issue before the court was conversion and bigamy by Hindu men. Here again, neither Muslim law nor rights of Muslim women were issues before the court. The court was examining the rights of two Hindu wives and the validity of two marriages by a bigamous Hindu husband – the prior one under the Hindu law and the subsequent one contracted after a fraudulent conversion to Islam. Despite this, the parties to the litigation were all Hindus and continued to be so. But unfortunately, the judgement and the media publicity that followed focused primarily on UCC in the context of nation, national integration and minority identity. Of the three judgements, the *Shahbano* alone had an aggrieved Muslim woman at its core.

While the *Shahbano* judgement provided the first impetus for highlighting the polarized opinions into mutually exclusive segments - the progressive-modernist in support of a UCC and fundamentalist-obscurantist in opposition, it has continued to frame the issue within these binaries even when the lines between these two sections have become blurred.

In the two decades since the *Shahbano* ruling the ground realities have changed substantially. The demolition of the Babri Masjid, the rise of the Hindu right-wing, the

²³ *Harvinder Kaur v Harvinder Singh* AIR 1984 Del 66

²⁴ *Saroj Rani v Sudarshan* AIR 1984 SC 1562

²⁵ AIR 2003 SC 2902

²⁶ *Sarla Mudgal v Union of India* (1995) 3 SCC 635

attacks on Christians, the gruesome sexual violence upon Muslim women during the recent Gujarat carnage, - have all been factors that have necessitated a re-examination of the earlier call for a UCC, ostensibly to secure the rights of minority women. In the Gujarat riots, even while homes of poor Muslim women were looted, gutted and razed to the ground in various communal riots, while teenage sons of Muslim women were killed at point blank ranges in police firings, while Muslim women were raped under flood lights in post Babri Masjid riots, the mainstream continued to lament over *Muslim appeasement* and denial of maintenance to '*poor Muslim women / the Shahbanos*'.

One could overlook even this. Perhaps there was a justification. Denial of maintenance by husbands was as loathsome as rape of women in communal riots. In the ultimate analysis, it was the Muslim woman who suffered. So far so good. But how can one logically explain the recurring motif of 'Muslim appeasement' even after the Supreme Court decision in *Danial Latifi*²⁷ case, when the controversy was finally laid to rest by upholding the Constitutional validity of the Act and simultaneously securing the rights of Muslim women?

The rhetoric conveniently overlooks the fact that abandonment and destitution of wives is as rampant among Hindus; that the matrimonial faults of adultery and bigamy are evenly distributed across communities and that Hindus, Christians and Parsees, with equal zeal, guard the patriarchal prerogatives within their respective personal laws. Further, that around 80% of all women burnt in their matrimonial homes are urban middle class Hindus!

vii. Reframing the Covenants of Equality and Equal Protection

The symbolism becomes even more stark, when one is confronted with the gruesome sexual violations of women during the recent massacres. While exploring possible legal portals to place these blood curdling barbarities, one hits a dead end at each turn. As one hears the narratives of young women, running helter-skelter, slipping, falling and becoming preys to the marauding mobs, their violated and mutilated bodies being thrown into open fires, the question keeps haunting: where and how does one pin the culpability?

A social activist, Harsh Mander commented in a newspaper column as follows: "*I have never known a riot which has used the sexual subjugation of women so widely as an instrument of violence as in the recent mass barbarity in Gujarat. There are reports every where of gang-rape, of young girls and women, ... followed by their murder by burning alive, or by bludgeoning with a hammer and in one case with a screw driver.*"

To gauge the extent of horror one must see an affidavit filed by Firoz bhai Khajamonuddin Sheikh, from Naroda Patia in Ahmedabad regarding the murder of his wife Kausar Bano, before the Commission of Enquiry (*Shah & Nanavati Commission*) in

²⁷ II (2001) DMC 714 (SC)

Ahmedabad:

On 28th February, 2002, at about 10.30 A.M., a mob of about 3000 men surrounded our Chali. They were shouting slogans ... "Jai Shri Ram". They were carrying swords, lathis, chains, pipes and some were carrying cans of what looked like petrol. They were wearing shorts and had "pattis" on their head. They had come running from the direction of Noorani Masjid. People started running for their lives. My wife was pregnant. She could not run so I carried her in my arms and was running through a lane going towards the Teesra Kuwa. Behind me the mob was setting the houses on fire, killing people, setting them ablaze. Near the Teesra Kuwa, I put my wife down and we were both running when about 20 to 25 persons caught up with us. They pulled my wife out of my arms. ... Then they slit her stomach with a sword, pulled out our child from her stomach and paraded the baby on the tip of a sword. I think I heard my child cry. Then they poured petrol on both of them and lit them. I hid behind a five feet wall, which is the boundary wall of a maidan (open ground) and witnessed what happened to my wife and child. Then I ran for fear of my life.²⁸

Kauser Bano later became the symbol of the extent of debasement and sexual violence unleashed upon Muslim women during the communal carnage in Gujarat. In most of the debates she became the central motif. This led one of the woman ministers of the Bharatiya Janata Party (BJP), Uma Bharati, to ask in feigned disbelief, *Who is she whose stomach was slit and foetus taken out? No one has heard of this woman. She is a fiction created by the media.*²⁹

When violence of this scale supersedes the confines of criminal jurisprudence which is bound by conventions of proof and evidence, medical examinations and forensic reports, when criminal prosecution itself is a closed-end process in the hands of the state machinery, what legal measures can be invoked to bring justice to the dead and the surviving? But the danger at the other end, if these violations do not form part of 'official records' they can be conveniently negated as baseless allegations or normalised as routine occurrences as the Defence Minister in the right-wing led National Democratic Alliance (NDA) government, George Fernandes did, on the floor of the House, during the marathon debate on Gujarat.

The genocide in Gujarat, as well as the earlier communal riots, have taught a painful lesson to Muslim women, that when threatened with a life and death situation, in the

²⁸ See Flavia Agnes, *Lofty Claims and Muffled Voices*, Majlis (Informal Publication) Mumbai (2002)

²⁹ It may be recalled that Uma Bharati was one of the BJP women activists who had cheered and goaded the crowd while Babri Masjid was being demolished. She was a Minister in the NDA government and later she was also the Chief Minister of Madhya Pradesh. Currently she is expelled from the party.

face of bloodthirsty and sexually debased mobs, mosques, dargahs and madrasas are transformed into an oasis of security and solace. Women in relief camps narrated incidents of camp organisers helping out, not only with arrangements of food and first aid, but also with cleansing bleeding wounds and extracting wooden splinters buried into the deepest crevices. While women gave birth in the open in those traumatic days, the men had no choice but to help in the birthing process. Before the meagre aid declared by the government could be accessed, the hungry children were fed only through hurriedly put together community resources. Women partook in the festivity of marriage celebrations of young orphaned girls, arranged by camp leaders, which brought a semblance of normalcy to their shattered lives. They cried out, when the men were picked up in combing operations and bore the brunt of police brutalities. The bonding between people under siege, is cemented through the adhesive of shared grief and suffering. In the struggle for day to day survival, gender concerns and patriarchal oppressions seem remote. It is here that community and patriarchal identities get forged. The secular and women's rights voices are too distant from their harrowing realities.

The motif of the vigorously self-multiplying Muslim had been effectively used to whip up Hindu sentiments in support of the Uniform Civil Code, in the post Shahbano phase, by the right-wing saffron brigade. It was invoked again during the Gujarat violence. The woman's body was a site of almost inexhaustible violence, with infinitely plural and innovative forms of torture, their sexual and reproductive organs were attacked with a special savagery, their children born and unborn, shared the attacks and were killed before their eyes. How should concerned groups within civil society respond to this social and political reality? What are the myriad ways in which the seemingly innocuous laws get unfolded within the complex terrain of social hierarchies? When the moral basis for the rights itself shifts, where can one start the process of renegotiating and reframing the covenants of equality and equal protection. It is then that these covenants mock you in the face.

And the rhetoric continues. And is used yet again, in defence of the Gujarat carnage. *'They had it coming ... they have been 'appeased' beyond tolerance. Why should they demand a separate law in a secular country? Why should they be allowed to marry four times? Why are Hindus alone bound by an obligation of maintenance?'* What is startling is that the grievances are mouthed not only by Hindu extremists but also by centrists, the liberals, the people who inhabit my social space, the urban, cosmopolitan, middle class. Within the cultural ethos of the mainstream, an injustice to a Muslim wife gets magically transformed into a Hindu injury, which could be invoked to justify communal carnage. Without this tacit approval by the middle class, the violence in Gujarat could never have spread so wide nor so deep.

As the gruesome sexual crimes continue to haunt us, I turn back to the questions that I started with. How do we, concerned citizens, human rights activists and women's organisations view these violations? Will these narratives be a 'raceless tale of gender

subordination'³⁰ for feminists and a gender-less narrative of minority victimisation for the Muslim community? Just as the stories of black women, caught up in the whirlwind of lynchings and the gendered genealogy of racist violence has been hidden from history, will also the women, caught in the whirlwind of communal violence and paid the price with their blood and that of their children, born and unborn, get erased? To avoid this eventuality, feminism would have to be recast within the complex intersectionality of gender and identity. Only then, would a Shahbano not be compelled to retract.

Covenants of equality and equal protection may unfold diagonally opposite trajectories for the mainstream and the marginalized. Several African American feminist legal scholars, have challenged the theories advocated by a predominantly white women's movement and have attempted to rewrite these covenants, within the alchemy of race and rights.³¹ A similar challenge confronts the contemporary Indian women's movement - to recast feminism into a complex rubric of rights within a communalized polity.

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³⁰ Here I am using a phrase coined by some African American scholars like Kimberle Crenshaw, Toni Morrison and others.

³¹ I am grateful to several African American scholars - Angela Davis [*Women Race & Class*], Patricia J. Williams, [*The Alchemy of Race and Rights*]Toni Morrison [*Race-ing Justice, En-gendering Power*] among others, whose work has influenced my writings.