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Triple talaq: The Muslim Law Board's affidavit in the Supreme Court has a few positives for women

But these are buried beneath the Board's unashamed defence of instant triple talaq on the ground that it prevents women from being murdered by their husbands.

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The detailed affidavit filed by the All India Muslim Personal Law Board before the Supreme Court on the matter of instant triple talaq has received a [backlash](#) from various quarters – the media, women's groups, and secular Muslims.

A press statement endorsed by 100-odd feminists has been released demanding a “gender just” family law for all, away from religious precepts. Demonstrations have been held to

publicly denounce the affidavit, and various newspapers have carried op-eds condemning the archaic stand adopted by the Board in its affidavit.

Against this overwhelming backlash, it is extremely challenging to dwell upon the positive elements of the affidavit, lest one is termed reactionary and anti-women. However, I feel that most people who have endorsed the affidavit or commented upon it have reacted to the initial press reports, and have not read the 70-page document in its entirety.

However challenging it may be, one needs to take on this task as certain paragraphs of the affidavit indicate a departure from the earlier positions held by the Board, and this serves to strengthen the rights of Muslim women. However, these positives are buried beneath the Board's unashamed patriarchal posturing and its defence of instant triple talaq on the ground that it [prevents women from being murdered](#) by their husbands.

Three important take-aways

The three important points that the affidavit dwells upon are made in the opening paragraphs as preliminary points which are as follows:

1. The Supreme Court in the [2002 Shamim Ara](#) ruling has already dealt with the issue of instant, arbitrary triple talaq and has laid down the test of "reasonable cause" and "prior reconciliation". The affidavit goes further to state that the principle laid down by Justices RC Lahoti and Venkatarama Reddi in this *case* is the law of the land. In view of this, the Board's later statement that instant triple talaq is valid is contradictory.
2. A Muslim woman victim of domestic violence has the right to claim relief under the Protection of Women from Domestic Violence Act, 2005. This is a secular statute that protects the rights of all women (Muslim and non-Muslim; single, married, divorcee or widow). The affirmation by the Board that Muslim women are entitled to seek protection under this statute helps to break the prevailing myth that Muslim women are not entitled to relief under it. The clear direction to Muslim women subjected to domestic violence that they should avail of the remedies given under this progressive statute – protection from domestic violence, right of residence, injunction against their husband from dispossessing them, right to maintenance, child custody and compensation – will help in giving women the confidence to approach the courts.
3. In the event that [Shayara Bano](#) wished to end her violent marriage by accepting the talaqnama, the affidavit states that she also had the option of exercising her rights under the Muslim Women (Protection of Rights upon Divorce) Act, 1986. This is significant as in the [Danial Latifi case](#), the Board had opposed the wider interpretation of this statute that a Muslim woman is entitled to a fair and reasonable provision for her entire life, and wanted to constrain the provision only for three months. Now the

Board seems to have accepted the wider interpretation in Danial Latifi, which had upheld the constitutional validity of this Act, and had held that the Muslim Women (Protection of Rights upon Divorce) Act secures the rights of Muslim women better than the maintenance provision under Section 125 of the Criminal Procedure Code.

The agency of the Muslim woman and her multiple choices, which are seldom highlighted, are captured in a nutshell in this affidavit. This is generally not highlighted in the media. This approach of negating the positive aspects of Muslim Law is a great disservice to Muslim women.

The affidavit goes further, and admonishes Shayara Bano for rushing to the Supreme Court without first availing of the remedies under various statutes in a local court. The affidavit further affirms that these remedies would have benefited her as the appropriate judicial authorities could give effective orders. On these grounds, the affidavit claims that the Public Interest Litigation that Bano filed with two other petitioners must be dismissed. These statements help to clear the misconceptions that a divorced Muslim woman has no rights under the existing laws.

Contradictions in affidavit

It would have been appropriate if the affidavit had ended here instead of attempting to validate instant triple talaq. The claim that the Board is the final authority to declare the law applicable to Muslims is rather absurd since the Board has been party to various proceedings before the Supreme Court, including the Daniel Latifi case, and has accepted the authority of the court to interpret this law as per the Quranic provisions.

Another contradiction is that after stating that it would have been more apt for Shayara Bano to take recourse to existing legal provisions in a court of law, it states that Muslim women should not go to court and clog the courts and instead settle the matter within Islamic courts.

It needs to be pointed out here that the argument regarding clogging the courts is a position not unique to the Board. Several women's groups and NGOs offering counselling services also hold this view. The Bombay High Court, in a recent ruling, [Jaya Sagade vs State of Maharashtra](#) (2015), also endorsed this view and stated that it is better for women victims of domestic violence to settle matters in police stations and counselling centres, rather than approaching the courts and clogging them.

Within this context, urging Shayara Bano to approach the court for her rights, is a more progressive step, rather than urging petitioners to settle disputes in Darul Qazas [parallel courts] or even in the so-called women's shariah court started by a Muslim women's group, both of which have no legal binding. (For instance, in *Vishwa Lochan Madan vs Union of India* (2014), the Supreme Court held that the sharia court is "bereft of any legal pedigree and has no sanction in laws of the land".)

The point about bringing in a comparative perspective between Hindu and Muslim polygamy is also valid though it must be conceded that it is made in a very clumsy manner.

It is common knowledge that the Hindu Marriage Act has not curbed bigamy.

In *Rameshchandra Daga vs Rameshwari Daga* (2005), the Supreme Court, while trying to grapple with this problem, awarded maintenance to a woman whose husband had challenged the validity of their marriage on the ground of a previous subsisting marriage. The court commented that despite codification and introduction of monogamy, the ground reality had not changed much and that Hindu marriages, like Muslim marriages, continue to be bigamous. Further, though such marriages are illegal they are not "immoral" and hence a financially dependent woman cannot be denied maintenance on this ground.

Rights of women

To deal with grave hardship caused to a large number of Hindu women, the Protection of Women from Domestic Violence Act introduced the concept "live-in relationships". However, a Supreme Court ruling by Justice Markandey Katju in *D Velusamy vs D Patchaiammal* (2010), commented, while setting aside the orders of maintenance of two lower courts:

"If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant, it would not, in our opinion, be a relationship in the nature of marriage...No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law."

Under Muslim law there is no concept of a so-called keep and subsequent wives are deemed to be married and enjoy the same status as the first wife. There is a presumption in favour of a valid marriage rather than concubinage.

A more recent judgement, *Badshah vs Urmila Badshah Godse* (2014), on this issue has emphasised that while dealing with the application of a destitute wife, the court is dealing with marginalised sections of society. The purpose is to achieve “social justice,” the constitutional vision enshrined in the Preamble of the Constitution of India. It is the bounden duty of the courts to advance the cause of social justice. As an example, the judgment cited the journey from *Shah Bano* (1985) to *Shabana Bano [Shabana Bano vs Imran Khan (2009)]*, which secured the rights of divorced Muslim women.

It is important to keep in mind this harsh ground reality while demanding a ban on Muslim polygamy. The plea for “gender justice” should not result in making more women destitute. Article 14 of the Constitution also incorporates within its realm Article 14(3) special protection to women and children, which would include vulnerable women in valid second marriages.

In this context, an [article](#) by Pratap Banu Mehta in *The Indian Express*, in which he emphasises that individual rights need to be protected rather than group identities seems a more valid option even while endorsing “politically correct” postures.