COVER STORY

Triple Talaq Verdict: Some Justice, Finally

The impact of the Supreme Court's Triple Talaq verdict on Indian politics and Muslim society

PR Ramesh + Ullekh NP + Siddharth Singh | 24 Aug, 2017

In the afternoon of August 23rd, Shayara Bano, 36, is back at her father's quarters in Remount Training School & Depot, a defence training centre in Hempur Daya, Uttarakhand, resting after an overnight trip from Delhi. Within a few days she will resume travelling daily to Moradabad's Teerthanker Mahaveer University, almost tw hours one-way by bus, to pursue her MBA. She is exhausted after an eventful day, yet jubilant about the August 22nc Supreme Court verdict that struck down *talaq-e–biddat*, the Muslim practice of instant divorce, as null and void. "Yesterday was a historic day for all the Muslim women of India and I am glad that we are finally getting justice," say this primary petitioner in the case who had received a '*talaq*' by her husband by Speed Post in 2015. She is emphatic that no "personal law" of any religion can be justified if it puts the lives of women in jeopardy. She repeats this when asked about the minority judgment of Chief Justice Jagdish Singh Khehar and Justice Abdul Nazeer that termed instant Triple Talaq as sinful in theology but insisted that courts must not interfere in a religious community's personal laws. "[The ruling of Chief Justice Khehar and Justice Nazeer) is disappointing and horrendous," says Zeena Shaukat Ali, an Islamic scholar who taught Islamic history at St Xavier's College, Mumbai, rueing that "the laws of Islam are being misinterpreted by clerics to treat women like dirt". It was the minority judgment that was first reported by some of the electronic media on August 22nd before the final decision was announced. "I was surprised to listen to the minority judgment. 'How is this possible?' I wondered. Instant Talaq had to be uprooted because it is

flawed," says the Mumbai-based author who has spent decades studying marriage and divorce in Islam, which is also the subject of her doctoral thesis. In their ruling, the two judges also mentioned the role played by the Government Narendra Modi as having adopted an aggressive posture, 'seeking the invalidation of the practice by canvassing that [instant Talaq] violates the fundamental rights enshrined in Part III of the Constitution, and by further asserting that it even violates constitutional morality', according to the text posted on Supreme Court of India's website.

The reference to the NDA Government's aggression in the Khehar-Nazeer dissent note set the tone for several responses to the larger verdict that struck down instant Talaq. Signs of it were spotted in Modi's Red Fort speech on August 15th, in which he threw his weight behind Muslim women fighting for their rights. "I pay my respects to thos women who had to lead miserable lives due to Triple Talaq and then started a movement which created an environment in the whole nation against the practice...," he said, "I want to tell them that they will succeed as the whole country supports them in this significant step towards women's empowerment."

By pointing fingers at the Modi Government, besides media and women's groups for leading a campaign over this case, the two judges seem to have touched upon the broader motives of the ruling BJP, which has adopted a long-term strategy to pull in the votes of Muslim women and render inconsequential the influence of the male-dominate and recalcitrant clergy by calling it out for its disregard of its own community's interests and their avarice in clinging to power without any basis. By weakening their vice- like grip over Indian Muslims, the BJP hopes to destroy the 'veto' exercised by Islamic clerics over political issues through parties it accuses of 'minority appeasement'. "Neutralising the strength of Muslim hardline organisations and the clergy has been a strategy as old as Akbar. In modern times, this strategy will still click," says a senior BJP leader aware of the plan. The 16th century Mughal ruler had introduced a new syncretic religion, Din-i Ilahi, not only to warm up to the Subcontinent's majority but also to keep Islamic clerics away from state affairs while the administration focused on governance and development. Toda the ruling party is on a mission to consolidate its electoral support by aligning with new parties and enfeebling the opposition, especially the Congress.

Some three decades ago, it was over the issue of Muslim women's rights and of the then all-powerful Congress yielding to male- chauvinist *mullahs* on the *Shah Bano* case that the BJP marshalled its troops and cobbled together a anti-Congress alliance. Rajiv Gandhi, who had succeeded his slain mother as Prime Minister in the 1984 General Election which his party won by a landslide, looked invincible—with 414 lawmakers on his side in the then 533-member Lok Sabha—until he fell victim to an ill-advised surrender to Muslim religious leaders on that case. In 1985 Shah Bano, a 69-year-old woman from Indore with three children, had won a battle in the Supreme Court for a monthly maintenance of less than Rs 200 from her advocate husband Mohammed Ahmed Khan who had divorced her in 1978 after marrying her younger cousin. Rajiv Gandhi was initially in favour of the apex court's verdict, which invoked Section 125 of Code of Criminal Procedure, to pronounce its judgment. But he soon came under pressure from the All India Muslim Personal Law Board (AIMPLB), Congress leaders such as Syed Shahabuddin, and various academics to enact a law in Parliament to overturn the court verdict on the argument that it flouted centuries-old Islamic laws on marital dissolution. Rajiv Gandhi tried at first to resist the demand and got his Civil Aviation Ministe Arif Mohammed Khan, then just 35, to resign as a measure to make traditionalists relent. However, the ruse didn't work and the Prime Minister's own trusted and politically-naive Doon School buddies reportedly advised him to backturn and let Sharia have its way. Khan stuck firmly to his position favouring modern law, and the Congress fielded ZR Ansari, then a minister of state for environment, to undermine reformists within and without the party. While Khan made an impassioned speech on the issue in Parliament, the BJP launched a nationwide campaign accusing Rajiv Gandhi of appeasing the Islamic clergy.

The BJP, which had just two members in the Lok Sabha in the mid-1980s, used that opportunity to flay Rajiv Gandh so convincingly among vast numbers of the majority, that his advisors saw him in need of a balancing act. To placate Hindu sentiment, the Prime Minister would soon open the long-locked Babri Masjid in Ayodhya for ritual worship. The BJP, led by LK Advani, sprung into action, throwing its lot behind the Vishwa Hindu Parishad's campaign to bui a Ram Temple in place of the disputed triple- dome structure. The Bofors Scam surfaced some months later, but by then the BJP had forged itself into a potent ideological force as a champion of Hindutva. In hindsight, it all started with the *Shah Bano* verdict and the Congress response.

Ironically, from Shah Bano to Shayara Bano, the Congress appears to have learnt little. Its endorsement of the Augu 22nd verdict doesn't indicate any paradigm shift in its approach towards the Muslim clergy. After all, the conduct of Congress leader Kapil Sibal, who argued the case of the AIMPLB in court, was confirmation of the party's contrived outreach for minorities. During a hearing, Sibal had offered platitudes, including an assertion that a ban on instant Talaq—which is outlawed in 22 Muslim majority countries— could result in a backlash among followers of the faith in India. His logic was that the court "must not get into validity of customs". Sibal also warned the court that "if a secular court like the Supreme Court entertains the scrutiny of Triple Talaq and the Centre pitches for its ban, the Muslim community may take a rigid stand". The lawyer also claimed during the hearing, "Triple Talaq has been practised since 637... Who are we to say that this is unIslamic? Muslims are practising it for the last 1,400 years. It is a matter of faith. Hence, there's no question of constitutional morality and equity."

Scholars such as Zeenat Shaukat Ali refute these claims, saying instant Triple Talaq has no place in the Qur'an. Salman Khurshid, another Congress leader, had also been making complex contentions of faith and freedom *vis-à-v* Triple Talaq. Though both Sibal and Khurshid have welcomed the verdict after it was announced, such statements b politicians come across as supportive of the Muslim orthodoxy in India and insensitive to the hapless Muslim wome divorced over the phone and by other means like email and WhatsApp.

> "It was a historic day for all the Muslim women in India and I am glad that we are finally getting justice" – Shayara Bano, petitioner

IRRESPECTIVE OF THE clerical hold over the Muslim community, young urban women are now highly vocal abou their rights while it is mostly the disadvantaged among them who bear the brunt of orthodox rulings and arbitrary *fatwas*. Some of them, explains Noida-based Nazia Erum, author and TEDx speaker, insist on inserting suitable clauses in their *nikaah nama*, the Muslim marriage document. Though it isn't customary for brides to ask for provisions in this contract other than what a *qazi* has prepared—a standard format with the names of the couple, witnesses, and details of the *mehr* (dower)—the times are fast changing, with young women demanding their own specifications. Erum shares with *Open* a piece she has written on Hyderabad-based Asiya Shervani, a successful corporate professional, who had a special '*haqq-e-talaq*' clause included in her *nikaah nama* that would grant her equa rights as the husband in any divorce proceedings. Shervani, who didn't want her career to suffer on account of the marriage, also asked for a clause on equal respect for each other's career ambitions. Muslim women have also insiste on clauses on the custody of children after a divorce (enabled only over three sittings, each a month apart), monogamy as a condition, and so on. Says Erum, "A high court judge's wife recently told me that when she got married, her husband-to-be told her that he was okay with monogamy being inserted as a clause in the *nikaah nama* [as Prophet Muhammad is said to have done for his daughter Fatima Zahra's wedding]. But his father refused to entertain the idea, asking if the bride was unsure of her decision to marry. So such subtle apprehensions and pressures, part of our customs and deeply patriarchal societies, ensure brides don't get to wield the power that a *nikaah nama* offers her."

Clearly, change is in the air. The Congress party, however, has a record of assuring hardliners its patronage in return for their sway over Muslims as a vote bank. "I hate such appeasement, which essentially is kneeling before the male *mullahs*," says Zeenat Shaukat Ali. From banning Salman Rushdie's novel *Satanic Verses* in the late 1980s—even before it kicked up a controversy and the author attracted a death *fatwa* from Iran's Ayatollah Khomeini—to making arguments that go in favour of the AIMPLB's stance, the Grand Old Party hasn't changed much. Congress leader and author Mani Shankar Aiyar, who welcomes the August 22nd verdict, wrote an online column in June in which he regretted that a key question barely mentioned in court hearings and in the media was the extent of Triple Talaq's prevalence in the Muslim community. He cited a survey stating that only 0.3 per cent of divorces among Muslims were done instantly. Yasmin Kidwai, filmmaker and Congress corporator in Delhi, tells *Open* that she scoured the

city's Nizamuddin basti a day after the verdict and couldn't find a single woman divorced through instant Talaq. She adds, "That doesn't mean this unIslamic act should continue, but it shouldn't be used for political purposes," she says without elaboration.

In response to Aiyar's column on the *NDTV* website, Zakia Soman and Noorjehan Niaz, co-founders of the Bharatiy Muslim Mahila Andolan (BMMA), one of the petitioners in the Triple Talaq case, wrote a rebuttal stating that 'Mr Aiyar and the progressives must find other fronts for opposing the central government and not place hurdles in the Muslim women's struggle for gender justice and equality.' They also blamed Aiyar, one of Rajiv Gandhi's speech writers and close aides, for being on the wrong side of history. They wrote, 'If only Mani Shankar Aiyar had written piece to support the Muslim women's struggle for gender justice rather than the article carried here, it would have helped the discourse against patriarchal norms in marriage and family.'

Zeenat Shaukat Ali and Nazia Erum agree that only a small segment of Muslim women divorced in India are victims of instant Talaq, where, unlike in the other two options, the divorce comes into effect immediately. In other forms o the practice, a divorce takes effect only three months after the first (or only) '*talaq*' is uttered. Erum says, "We have to recognise that there is a constant fear of Triple Talaq in the lives of many Muslim women. Why should an arbitrary, unconstitutional, unQuranic law be allowed even if it affects only a handful of women? The social engineering arour it leads to it giving unprecedented powers to the groom's side. I am glad that this archaic custom has been done awa with. It has actually got nothing to do with religion but our societal set-up. Ideally, yes, the community should have reformed this internally, but then certain men in power have long fought progressive changes. If left to them, they will continue making arbitrary laws that help them circumvent logic and reasoning and Quranic principles of justice and fairness and gender equality. Therefore, the apex court was needed to intervene, and they have delivered a gender-just ruling."

> Rajiv Gandhi was initially in favour of the 1985 Shah Bano verdict. But he came under pressure to enact a law in Parliament overturning it on the argument that it flouted centuries-old Islamic law

Charges of judicial timidity tend to arise every time the Judiciary dithers over an issue, especially when it has got to do with religious laws and customs. The question of whether Indian courts or the Government should have anything to do with the regulation of customs and such laws has often come to the fore in different phases of Indian history.

On closer examination, the reasoning that led to the verdict of August 22nd was varied. The dissenting judges, Chief Justice Khehar and Justice Nazeer, say that courts have no role in outlawing this variant of *talaq*. A third judge, Justice Kurian Joseph, has declared it invalid on the ground that what is bad in theology is also bad in law. Two other judges Justices Rohinton Nariman and UU Lalit—have formed the majority, along with Justice Joseph, in striking down the law.

Differing opinions are not new for the apex court. But what will cause much unease now is the reasoning followed b a part of the Supreme Court bench in the case of instant Talaq. The basis for the claims and counterclaims on which the case was found to rest is the nature of The Muslim Personal Law (Shariat) Application Law, 1937. This pre-Independence law partially codified what is now called Muslim Personal Law—the set of practices, norms and traditions on family law among Muslims in India. Justices Khehar and Nazeer have held that this law could not be subjected to the test of constitutionality. In their ruling, 'Religion is a matter of faith, and not of logic. It is not open t a court to accept egalitarian approach over a practice which constitutes and integral part of religion.' (Paragraph 193) The two judges reject the claim that the 1937 Act has ceased to be a 'personal law' and been transformed into an ordinary law, subject to the same standards as any other passed by an Indian legislative body. Their conclusion is tha Triple Talaq does not violate any parameters of Article 25 of the Constitution that guarantees religious freedom in India. Further, this form of divorce has been an integral feature of Muslim Personal Law and the latter is fully

protected by Article 25. As a result, the Judiciary cannot 'touch' it, much less strike it down.

This is an incongruous position. For one, it pits religious belief against the constitutional order in India and even elevates it above the latter. This comes close to an ancient argument that divine laws cannot be undone by man-mad ones—an anachronistic stance in the 21st century. In their ruling, the two judges hold that the Government should consider appropriate legislation to end Triple Talaq in India. This contradicts the bulk of their judgment: that personal laws are not subject to constitutional tests. It is odd to say that what cannot be undone constitutionally can be fixed by a parliament created by and governed by the Constitution.

In general, the immunity from constitutional scrutiny of religious laws that the minority judgment claims is worrying. A careful reading of all judgment documents put out with the verdict reveals that this reasoning has wider backing. Justice Kurian Joseph—who sided with the majority in outlawing *talaq-e- biddat*—also based his judgment o a close consideration of the theological aspects of *talaq* and whether it was in consonance with the Qur'an. Reliance on religious ideas for what is legal and what is not sits uncomfortably with the constitutional order that India's founders sought to create.

However, in contrast to holding the 1937 Act as beyond the pale of the Constitution, Justices Nariman and Lalit have tested if this law violates it. Through a careful interpretation of existing constitutional provisions and the exact place of laws like the 1937 one, they conclude that instant Talaq is unconstitutional. These judges, too, took into account th theological aspects of the practice placed on a scale ranging from 'good' to 'prohibited' in Islam; but instead of ruling out the applicability of the Constitution, they tested the law against it, and they have found it wanting.

This was a test case in many ways. It was about the power of religious communities against the rights of individuals who are subject to unjust 'rules' said to be ordained by their faith; it was also about the rights of women in a system dominated by men. But fundamentally, in the 70th year of Indian independence, it was one case where the Constitution could have been put on the higher pedestal, above every other law or religious sentiment that exists in India. On earlier occasions, too, like in the case of *Shah Bano* in 1985 and *Shamim Ara versus State of UP* in 2002, the apex court had frowned upon instant Talaq and ruled against its legitimacy. The outcome then was ambiguous and revived a debate that acquired political overtones.

Dr Faisal Devji, a renowned Oxford University academic and historian who has authored several books on Islam and India, offers an analysis of public responses to the verdict "The response to the court's judgment has been interesting if largely predictable," he says, "Leaving aside those who are celebrating the decision, whether for feminist, communal or other reasons, its critics have adopted one of two strategies. Either they focus on the court's caution in refusing to make a general statement on the subordination of all personal laws to the Constitution. Or, like the dissenting judges, they blame it for interfering in personal law understood as representing freedom of conscience. Those outside the court also accuse it of making much out of a marginal issue while remaining silent about far more egregious violations of constitutional rights in cases of riots or lynching."

> Modi in his Red Fort speech on August 15th this year threw his weight behind Muslim women fighting against the practice of instant talaq

The BJP has come under attack from a section of critics—and the opposition—for polarising the country along religious lines for poll gains by allegedly trying to whip up Islamophobia. Earlier, as self-styled custodians of the Hindu faith went about wreaking havoc over the issue of beef consumption, the Government was reproached by many for not doing enough to rein in wrongdoers and gag the incendiary statements of some party functionaries.

Devji argues that most criticism of the Triple Talaq verdict is based on alleged ulterior motives, and so it is entirely

speculative in nature. "But even if, for the sake of argument, we acknowledge the evil of such motives, would this make retaining Triple Talaq a good thing?" he asks. "It is not the judgment that is a distraction from real issues, as its critics allege, but rather their argument about its motives. Personal law, as the judgment made clear, has always been creation of the state and does not represent the freedom of conscience in civil society." He agrees that civil society within the Muslim 'community' is not just unwilling but unable to 'reform' personal laws without the imprimatur of the state.

According to Devji, the verdict sets a precedent on the constitutional status of personal law. But, he avers, "The question it raises goes well beyond one of equity—whether the court will treat all personal laws in the same manner and guarantee the rights of women from all communities. For this kind of concern often becomes little more than a tit-for-tat argument about communal competition instead of justice. The real question has to do with how willing th state—rather than the court—is to regulate religious authority and even practices, as Ambedkar had so forcefully recommended. By being taken in hand in such a way, religious issues will be de-politicised, just as the Government's administration of Hajj already is [as distinct from the controversy over its funding]." He offers tips on how to handle such issues. While the Indian state has never been good at creating autonomous bodies relatively immune from political interference (the police being a good example of this), he says, certain forms of administration like that of Hajj do appear to work well. "Furthermore, state regulation of religious institutions and authority is an important pa of many constitutional systems, of which the long-standing example of the Turkish Diyanet provides a good model. In India, it has been the chaotic appearance of religious freedom on the Anglo-Saxon model of the marketplace that has given rise to so much violence and injustice in the past. For no religious institution or movement has really enjoyed any freedom from political influence or coercion."

The Oxford scholar believes it is time to abandon this colonial mode of dealing with religious communities, which has given neither their leaders nor followers any freedom, but has only pressed them into political machinations of various kinds. Notes Devji: "The marketplace is not a good model for religious authority, as the example of the self-selected AIMPLB demonstrates, a body that has always been reactive and defensive rather than proactive in defending the rights of Muslims as individuals, as opposed to laying claim to properties. Elected and appointed Muslims working within the state and consulting with bodies in civil society need to take up the task of ensuring the regulation of religious institutions and practices in constitutional terms."

AMID SUCH STIMULATING yet controversial debates, the likes of Zeenat Shaukat Ali and Anisa Draboo, a Kashmi born senior executive with a multinational NGO, speak of how reforms that ensure women's rights are zealously scuttled by Islamic clerics, especially in India. Both contend that in its early stages, Islam sought to offer dignity and greater freedom to women. Says Draboo, a Cornell University alumnus, of the verdict: "The practice of instant Tripl Talaq was unconstitutional and the verdict has withheld freedom of choice as the supreme right. About 1,400 years ago, when Islam introduced divorce, that itself was a progressive step and was way ahead of its time. The current practice of talaq wasn't followed in the same spirit and over time instant Talaq became the norm. Whether or not Muslim men exercised it, Triple Talaq became a tool that they could exercise at whim." She adds, "And for Muslim women, Triple Talaq left a constant fear in their minds. The fact that this tool ceases to exist is a huge relief. More logic and reasoning can now be applied to the process, where women can participate as equal partners. What will remain a challenge to address is ensuring that the verdict reaches all men and women in the country soon, especially the poorest of the poor." *Talaq-e-biddat* has already been banned in many Islamic countries, including the UAE and Pakistan. Egypt was the first to enact such a law back in 1929. Other countries that have abolished the practice includ Algeria, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, Yemen, Indonesia, Malaysia, Bangladesh and Sri Lanka.

In an interview with *Open*, Arif Mohammed Khan draws attention to the evolution of Muslim personal laws: "The Muslim Personal Law Board is a body of clerics mostly associated with leading *madrassas*. If you look at the curriculum of these [seminaries], you would find that their focus is mostly on religious laws as laid down during the period when the Muslim empire extended from Baghdad to Sindh and Spain in Europe. An empire, or for that matter any government including a democratic government, needs force to compel obedience. On the other hand, [Islam] is essentially a moralising phenomenon and it appeals to the better angels of human nature and abhors the

use of force and compulsion. This explains why the Board does not talk of Islamic values like compassion and mercy and focuses on laws that need to be enforced... and the clerics view themselves as the enforcement agency. In fact, all through Muslim history, clerics were the accomplices of Muslim kings and despots as interpreters of the law. Maulan Azad has powerfully described this state of affairs in one sentence: 'Islamic history is replete with the misdeeds of Ulema (clerics) who have brought humiliation and disgrace to Islam in every period'." Khan adds, "According to a Prophetic narration, 'a Muslim is her own priest', and then there is another narration that asserts that in Islam there is no priesthood. But strangely today we have more Muslim clerics than any other religious community in the world."

Khan is opposed to the exclusive male privileges that clerics have implemented in general and instant Talaq in particular. "This practice was outlawed by Egypt in 1929, Sudan in 1935, Jordan in 1951, Syria and Iraq in 1953, Morocco in 1958 and the then Pakistan in 1961," he says, "[Members of the AIMPLB] admit this practice is *biddat* (innovation) which finds no sanction in either the Qur'an or Sunna (sayings of the Prophet), yet insist on its retention. If they ignore the Qur'an and Sunna, what other message will they heed?"

To Khan's relief, India has now joined that league in outlawing the pernicious practice, thanks to a clutch of petitions asking exactly for this. Besides Shayara Bano and members of the BMMA, the petitioners included 31-year-old Ishra Jahan of Howrah in West Bengal, who was divorced by her husband over the phone two years ago; Rampur-based Gulshan Parween, 31, who received an instant Talaq notice on a Rs 10 stamp paper; Jaipur-based Aafreen Rahman, 2 whose divorce was delivered by Speed Post; and Atiya Sabri of Sahranpur, who was divorced by her husband after h family couldn't cough up a hefty dowry; Sabri, 33, was issued an instant divorce on a piece of paper.

Many leaders within the Congress party admit that more measures are required to reform Muslim personal laws. Th same might well be true of various Hindu rituals that fall back on 'tradition' to prop up ancient customs that put women at a disadvantage. The framers of India's Constitution, especially Ambedkar who had worked tirelessly to reform and codify Hindu Law, had called for a common civil code to relieve Indian society of outdated and unjust religious practices. However, India's first Prime Minister Jawaharlal Nehru, who had often publicly stated his own preference of a Uniform Civil Code, eventually decided to toe the line of the country's colonial rulers who refused t amend Islamic personal laws. Ambedkar had argued vehemently for such a code, but opted later to leave the Nehru Cabinet over differences with him. Even socialist leader JB Kripalani had favoured marriage laws that would ensure monogamy among Muslims. "Pandit*ji* [Nehru] was worried about what Muslim leaders thought about the issue. Besides, the opposition from other parties could be ignored thanks to the vast majority he had in Parliament. He als had sympathy for Muslims who stayed back in India after Partition," says a Congress leader who has studied Nehru and his years in power.

According to Zeenat Shaukat Ali, Prophet Muhammad had brought in measures of gender justice in an age when women were treated badly and forced to lead promiscuous lives. "His aim was to give back women their respect and he did it through a series of measures... that legacy is not continued by clerics now, regrettably," she says, adding that several anti-women practices are anti- Quranic as well. For his part, Khan says that the Qur'an prescribes monogamy as a norm (24.32) and allows polygamy only under highly exceptional circumstances (4.2-3). "But the patriarchal mindset ignored the norm and adopted the conditional permission as regular law. If we no longer demand the right to have 'slave girls', then we can also reconsider polygamy, particularly in the light of the fact that the marriage contracts of the daughters of the Prophet had a provision to obligate their husbands not to take another woman during the lifetime of the wife," he says.

There may be multiple claims about the respect that Islam accords women, but any interpretation of the faith that perpetuates anti-women practices must be fought valiantly. That is exactly what petitioners such as Shayara Bano have done. There are rays of hope.

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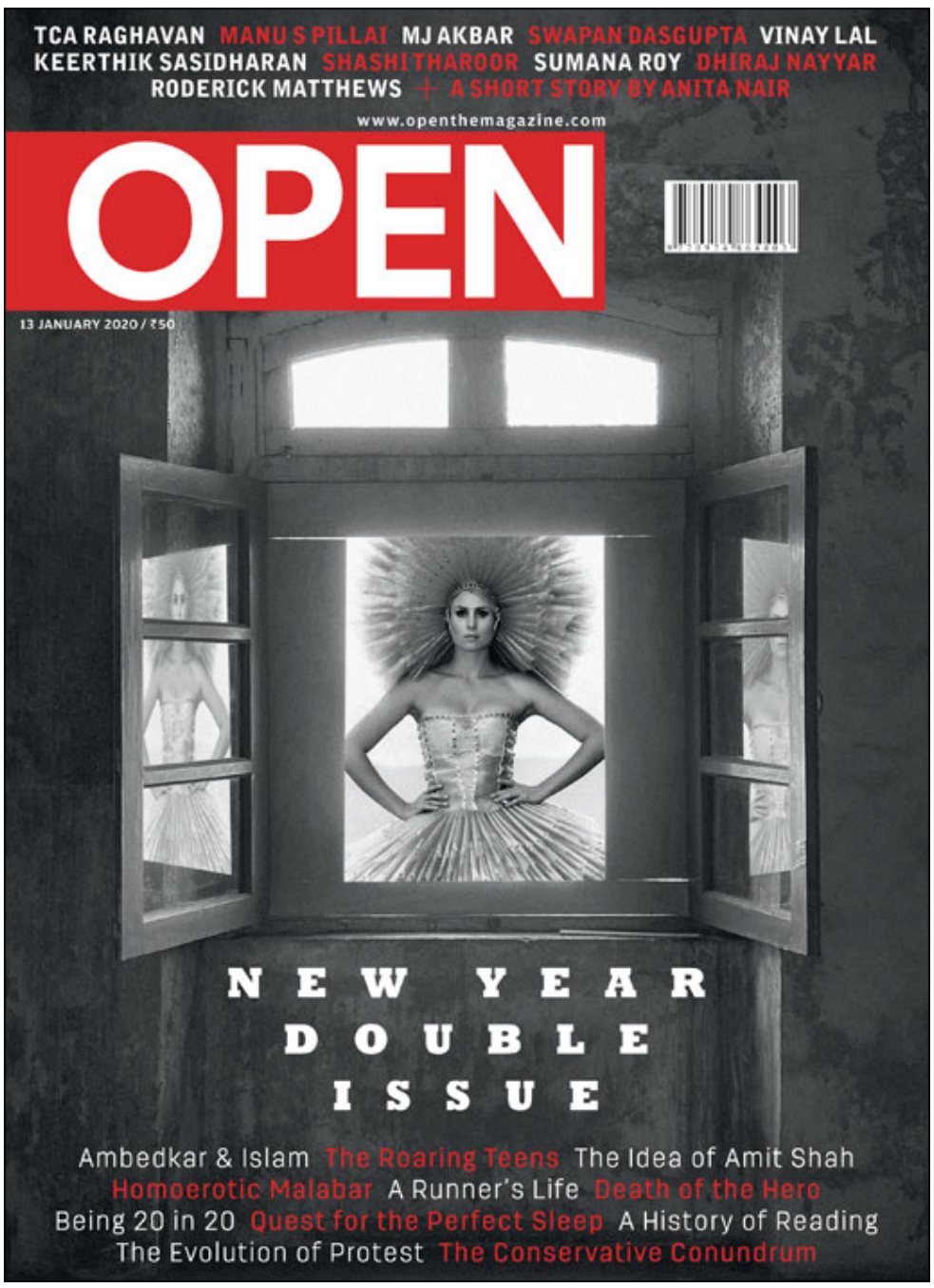

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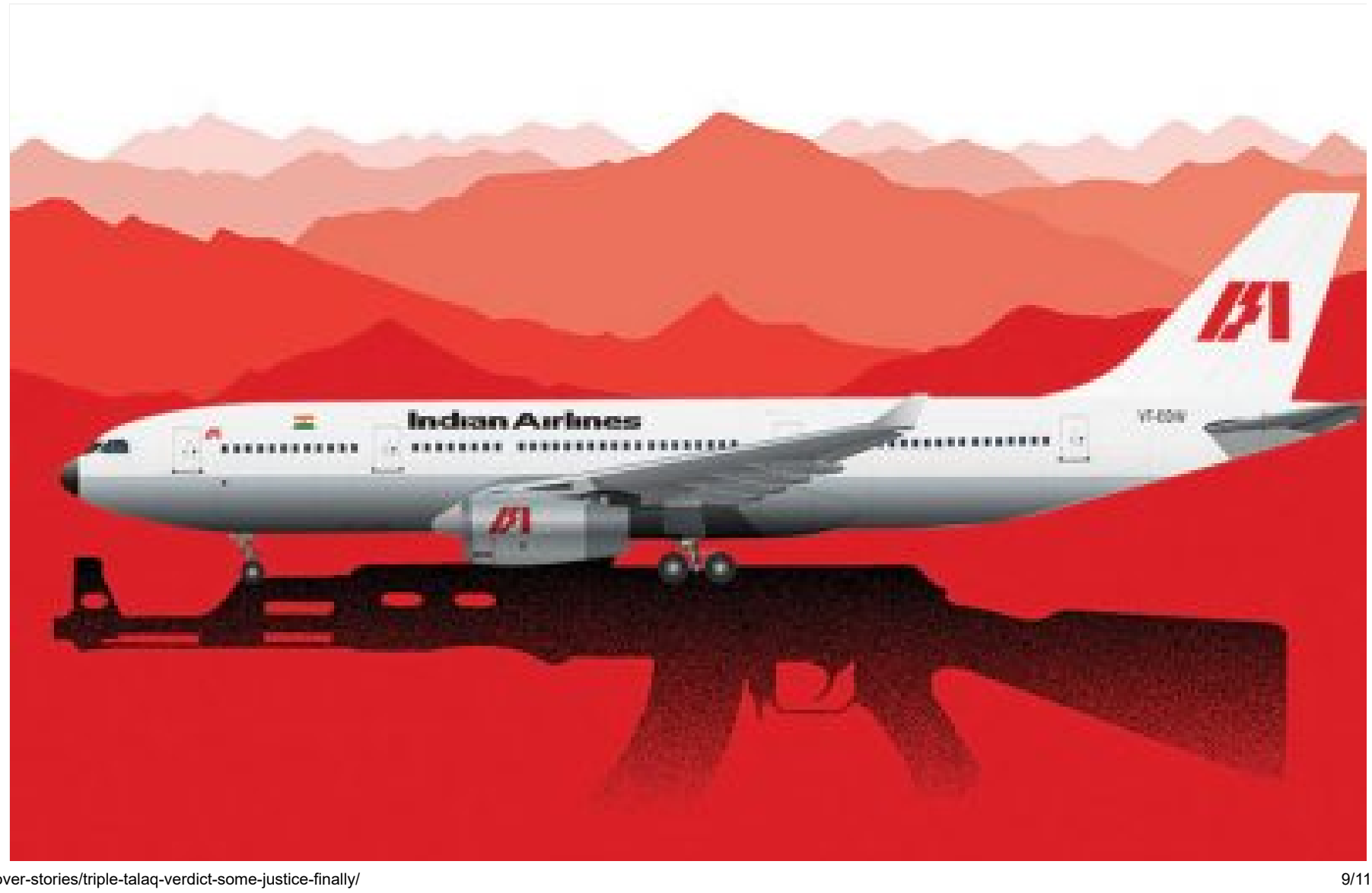

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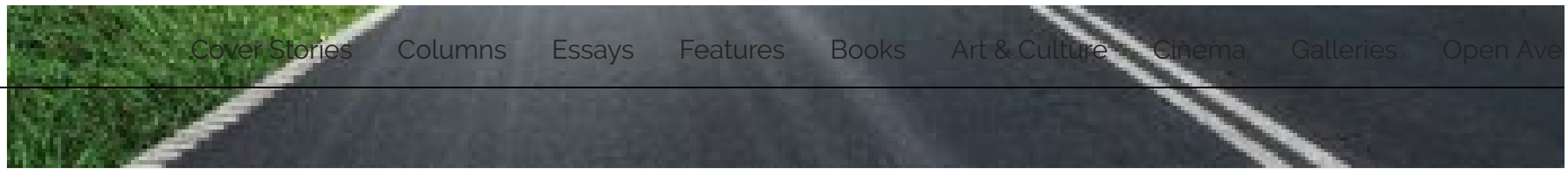

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