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CASE COMMENT ON SHAYARA BANO AND OTHERS V. UNION OF INDIA

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INTRODUCTION

The Triple Talaq Bill is not about politics but empowerment and justice for women. This bill is not about any specific religion and community. The bill is about humanity and justice [1]
— Union Law Minister Ravi Shankar Prasad

The struggle for women for their rights in a country like India is a huge challenge. As seen in the case of triple talaq or 'talaq-e-biddat' whereby a husband can divorce his wife only by pronouncing the word 'talaq' (Arabic word for 'divorce') three times at once either in oral, written or more recently, in electronic form. [2] The divorce in such form is irrevocable and instant. The issue elementarily emerged when the *Bharatiya Muslim Mahila Andolan (BMMA)* launched a campaign for the ban of triple talaq system; following which the case of Shayara Bano and several other petitions as PIL before Supreme court were considered regarding certain aspects of the *Muslim personal law* to be gender biased and hence voilative of the fundamental rights of women and hence the apex court set aside this practice of talaq-e-biddat. The following case comment gives a brief comment on the case of *'Shayara Bano and others v. Union of India'* and is being followed by using the FILAC method.

BACKGROUND

Shayara Bano, wife of Rizwan Ahmad was married for 15 years. Her husband pronounced 'talaq' three times in the presence of two witnesses and delivered 'talaq- nama' on 10/10/2015 to her. The wife challenged the same in front of the Supreme Court arguing that these three practices – triple talaq, polygamy and *nikah halala* were unconstitutional; due to which the constitutional validity of such practice was called before a constitutional bench of the apex court consisting of 5 judges from different grounds[3]. She claimed that these practices were voilative of several provided under the Constitution of India including; *Article 14* (right to equality), *Article 15(1)* (prohibition of discrimination on the basis of gender), *Article 21* (right ot life and personal liberty) as well as *Article 25* (freedom of religion). The main issues concerning this case were-

a) Is talaq-e-biddat Islamic in nature?
b) Whether the Muslim Personal Law (Shariat) Act, 1937 grants statutory status to the subjects regulated by it or is it still covered under "Personal Law" which is not "law" under Article 13 of the Constitution as per previous the Supreme Court judgments?

[1] Quotes on triple talaq and women;s rights, available at; https://www.msn.com/en-in/news/ last seen on 01/03/2019

[2] Talaq-e-biddat, available at; https://www.thehindu.com/opinion/op-ed/ last seen on 01/03/2019

[3] Facts of the case, available at; http://www.feministlawprofessors.com/2017/ last seen on 01/03/2019

c) Is it protected by Article 25 of the Constitution?[4]

The laws concerning this case are the fundamental rights of **Article 14** which gives (right to equality), **Article 15(1)** which talks about (prohibition from discrimination on the basis of gender), **Article 21** that speaks of (right to life and personal liberty), **Article 25** which guarantees freedom of religion,

Section 2 of the Muslim Personal (Shariat) Application Act, 1937[5] which says- Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat); **Section 25 of the Code of Civil Procedure 1908**[6] which talks about (an application of transfer of suit) with **Order XXXVI-B of the Supreme Court Rules, 1966.**

ANALYSIS

The Triple Talaq judgment is widely appreciated throughout the jurisdictions as a protection shield against the social evil such as this practice promoted. The majority bench on the face of it criticized the government for not making relevant laws to prohibit such a regressive practice. This act allowed the husband to end the marital tie on his whims and fancies, thereby making the life of the women hell. The Muslim women have since many years demanding the protection from such a regressive and bad practice and finally it was the apex court which gave them the appropriate remedy.

On August 22, 2017 the Supreme Court of India decided the practice of triple talaq to be unconstitutional in the case of *Shayara Bano and others, v. Union of India* with a majority decision of 3:2 (being a constitutional bench) which analyzed the Quran and the customs practiced and the related constitutional provisions. The three judges in the majority decided the practice to be invalid by using separate reasoning to arrive at such a conclusion. Whereas the dissenting opinion by Chief Justice Jagdish Singh Kehar and Justice Abdul Nazeer by saying that triple talaq can be regarded as invalid but it is the duty of the Parliament to regulate on this matter and should not be struck down by the courts. While the majority view resolved that the 1937 Muslim Personal (Shariat) Application Act which defines triple talaq can be found as voilative of Article 14 of the Indian Constitution.

It can be considered that according to Article 25 of the Indian Constitution, the right to freely practice and propagate one's

[4] Issues in Shayara Bano case, available at; http://glcmag.com/2017/09/13/ last seen on 1/03/2019

[5] Muslim personal Shariat Application Act 1937, available at https://indiacode.nic.in/bitstream/123456789/2303 last seen on 02/03/2019

[6] Code of Civil Procedure, 1908

own religion of choice is provided to the people to in turn facilitate the purposes of secularism. The state cannot take away the essential religious practices of a person. If a practice is not prohibited, it does not necessarily mean that such a practice is essential. When a particular religion has certain practices that discriminates people on the grounds of gender, we usually don't see much legal protection being given to such practices which has to be considered as a greater concern today. It can be even observed that such discrimination is reflected in this practice as the power to make an irrevocable divorce has been only given to husbands and not wives. Even considering the sources of such practices that is, the Holy Quran, does not even speak of this practice rather it frowns to such beliefs. Thus it can be well said that since the main holy source of Islam does not brace the practice of triple talaq; it can be easily considered un-Islamic. It becomes the duty of courts to in turn provide justice as this issue being voilative of the fundamental rights of Islamic women. It is not necessary that the talaq being given was true in its form (in the sense that, the husband may have been in some other metal condition or stress which could have been taken out in form of aggression and therefore resulting in some kind of an argument between the two and ended up in giving talaq). Here the woman is clearly shown to be unable to exercise her authority or her reasonable fundamental rights which is a clear discrimination of gender. The practice of triple talaq not being Islamic makes it more non-essential to be practiced. Like many other post-colonial states, India also maintains a personal law system, according to which certain family and property matters as in (marriage, divorce, adoption, maintenance, guardianship, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as Jews.

The majority in this judgment agreed to the phrase "*what is bad in theology cannot be good in law*". One does not need to go down into the details and should understand that if *Triple Talaq* had been a essential religious practice of Islam then in that case it would not have been banned in almost all Islamic nations. Further, the said practice is only practiced in Hanafi School who itself considers it sinful. Therefore, the majority bench correctly held such practice as unconstitutional.

The minority bench ignored the atrocities that are committed by the said practice. It is the duty of the courts to dispense justice and the courts should not be deterred by mere technicalities in dispense justice. The minority judgment is *per incuriam* as the judges said that however bad the practice be, if it is an essential practice it cannot be struck down. As even in ***Sardar Syedna Taher Saifuddin Saheb case***[7]**,** which was taken as one of the precedents in this judgment; was debated on the constitutional validity of *Section 3 of the Bombay Prevention and excommunication act, 1949* which infringed the fundamental rights of the dawoodi bohra community as it violated Article 25 and 26 of the Indian Constitution and hence it was declared void. [8] Even considering another precedent taken into the

[7] Sardar Syedna Taher Saifuddin Saheb case 1962 AIR 853

[8] Case brief, available at; https://www.legalcrystal.com/case/ last seen on 4/03/2019

judgment, that is of; ***Shamim Ara v. State of U.P.***[9] This concerned with the appellant being filed an application in 1979 under *Section 125 CrPC* complaining of cruelty to her and her children as well as desertion. The husband claimed that he had divorced her on 11-7-1987, and therefore her disentitlement for maintenance. There was no statement of circumstances or justification by reasons or any proof of efforts at reconciliation and no evidence of witnesses in support of the talaq. The Family Court had accepted an affidavit produced by the husband as proof of the talaq and accordingly dismissed the wife's suit for maintenance. On an appeal to the High Court by his wife, the High Court of Allahabad held that the alleged divorce had not been communicated to the appellant, the divorce stood completed in 1990 when the husband filed written statement to her appeal.

Hence the reasoning of the minority bench in the judgment of Shyara Bano is unfair, irrational, and unjust. If the two judges have also ruled in the favor of majority the impact would be altogether different. Hence, the justified reasoning provided by the majority bench in India finally did away with the backward practice of *Triple Talaq* or *Talaq-e-biddat.*

CONCLUSION

After various attempts, the petitions of Shayara Bano, Aafreen Rehman, Ishrat Jahan, Gulshan Parveen the Supreme Court gave a successful judgment in bringing justice to many unheard voices in India. The decision is particularly relevant because it addressed a practice within the ambit of personal law through the lens of structural equality and within the framework of fundamental rights. Now, it will be feasible to test and challenge other discriminatory personal laws against fundamental rights.[10] No husband can now abandon his wife by ending marital tie on his whims and fancies. The court ensured that the ideas of equality especially gender equality is not a mere theoretical ideology. However, the opinion of minority bench worries the nation. If the Chief Justice of India is giving primacy to practices such as *Triple Talaq* ignoring the widespread atrocities, then there is some serious rethink required by the Judges of the apex court.

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[9] Shamim Ara v. State of U.P. (2002) 7 S.C.C. 518.

[10] Muslim personal law relations, available at; https://www.researchgate.net/publication/ last seen on 05/03/2019