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IN *RE MUSLIM WOMEN'S QUEST FOR EQUALITY*: ANALYSIS OF THE JUDGEMENT OF SUPREME COURT ON ISSUES OF FUNDAMENTAL RIGHTS AND PERSONAL LAWS

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Introduction

Personal law governs a person's rights and liabilities in such as succession, marriage, etc family and marital space by virtue of person's belonging to a particular religion.[1] It applies to people believing in their respective religions however, it does not apply equally. Men have been favoured over women in the scheme of personal laws.

Article 13 of the Constitution of India (hereinafter Constitution) provides, *inter-alia*, that any law or laws in force inconsistent with provisions of fundamental rights shall to the extent of inconsistency be void. However, Supreme Court has consistently held that personal laws do not fall within the category of either law or laws in force as described in Article 13.[2] The distinction Court has created in application of fundamental rights over personal laws preserves and protects the 'public-private dichotomy'[3] and legitimizes discrimination based on gender within the private sphere of family. The recent pronouncement in *Shayara Bano* (infra) has been hailed in public perception as a progressive pronouncement for Muslim women's rights in their marriages.[4] However,

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1 P. Ramanatha Iyer (ed.), The Law Lexicon: Encyclopaedic Law Dictionary With Legal Maxims, Latin Terms And Words & Phrases 1454 (4th ed. Nagpur).

2 *See* Section B of this paper below.

3 *See* for basic discussion on public-private divide *The Public/Private Divide,* in Pushpa Kumari, UNDERSTANDING POLITICAL THEORY: FEMINISM. *Available at*: http://vle.du.ac.in/mod/book/view.php?id=10492&chapterid=18241 (last visited 10 Nov., 2017). Feminists' scholars have argued that injustices and violence committed within personal spheres such as marriages, families, etc. have not been recognized due to an artificial barrier which keeps private spheres outside of intervention of State and that State has colluded with patriarchy to break this barrier. *See generally* Susan Moller Okin, JUSTICE GENDER AND THE FAMILY (1989) and Carol Pateman, THE SEXUAL CONTRACT (1988)

4 *See* Yojna Gusai and Ashhar Khan, *SC Decision on Triple Talaq: Victory of Women, for Women*, DECCAN CHRONICLE (23 Aug., 2017). *Available at*: https://www.deccanchronicle.com/nation/current-affairs/230817/sc-decision-on-triple-talaq-victory-of-women-for-women.html?fromNewsdog=1&utm_source=NewsDog&utm_medium=referral (last visited 10 Nov., 2017). *See also Victory For Women: AIMWPLB on Triple Talaq Verdict*, BUSINESS STANDARD (22 Aug., 2017). *Available at*: http://www.business-standard.com/article/current-affairs/victory-for-women-aimwplb-on-triple-talaq-verdict-117082200406_1.html (last visited 10 Nov., 2017). *See also* Hasina Khan, *Ending Instant Divorce is a Victory. But Indian Women Have a Fight Ahead*, THE GUARDIAN (25 Aug., 2017). *Available at*: https://www.theguardian.com/

has also been criticized for ignoring to read fundamental rights protections in personal laws once again.[5] Therefore, the author of this paper (hereinafter author) concentrates on this judgment while highlighting with the issue of conflict between personal laws and fundamental rights in this paper.

In the first section the author has analyzed the opinions of the Supreme Court in various raised in various cases on personal laws on grounds of violation of fundamental rights prior to the *Shayara Bano* (infra) judgment. The analysis shall be used to identify the approaches that Court uses to preserve to deny constitutional guarantee of equality in the sphere of family and marriage and protect the public-private distinction.

In the next section the author evaluates all the three opinions delivered in *Shayara Bano* (infra) to argue that Court did not disturb the public-private distinction it has created through precedents so far although, it has set aside the practice of *talaq-e-biddat* (commonly referred to as triple talaq). In the last section the author concludes with his view on the approach of Supreme Court in matters of personal laws and fundamental rights.

Analysis of Supreme Court's Opinion in Cases Prior to *Shayara Bano*

The fundamental issue in the Petitioners' writ petitions in *Shayara Bano* (infra) was that the customary practice of *talaq-e-biddat* was a discrimination based only on grounds of sex, by custom only men could pronounce triple talaq and that too unilaterally. Therefore, the practice was in violation of Article 14, Article 15 (1), and Article 21; it was not protected within the religious freedoms guaranteed under Article 25 (1), Article 26 (b), and Article 29 of the Constitution. Therefore, the practice should be declared unconstitutional. As we have seen above that any challenge on grounds of fundamental rights has to first establish that the violation is emanating from either any law or laws in force. It is submitted that the scheme of Article 13 is wide enough to include personal laws. The sources of personal laws are customs, usages, and statute. Eminent scholar and authority on Indian Constitution, H.M. Seervai has contended in his work that personal laws are such an intricate mixture of statute, customs, and usages that it is nearly impossible to dissect and locate personal law outside them.[6] If we represent this scheme diagrammatically the picture that emerges shows that Article 13 is wide enough to include personal laws within its meaning. Article 13(3) (a) includes statutes as well as customs and usages having force of law. Personal law consists of statutes and customs

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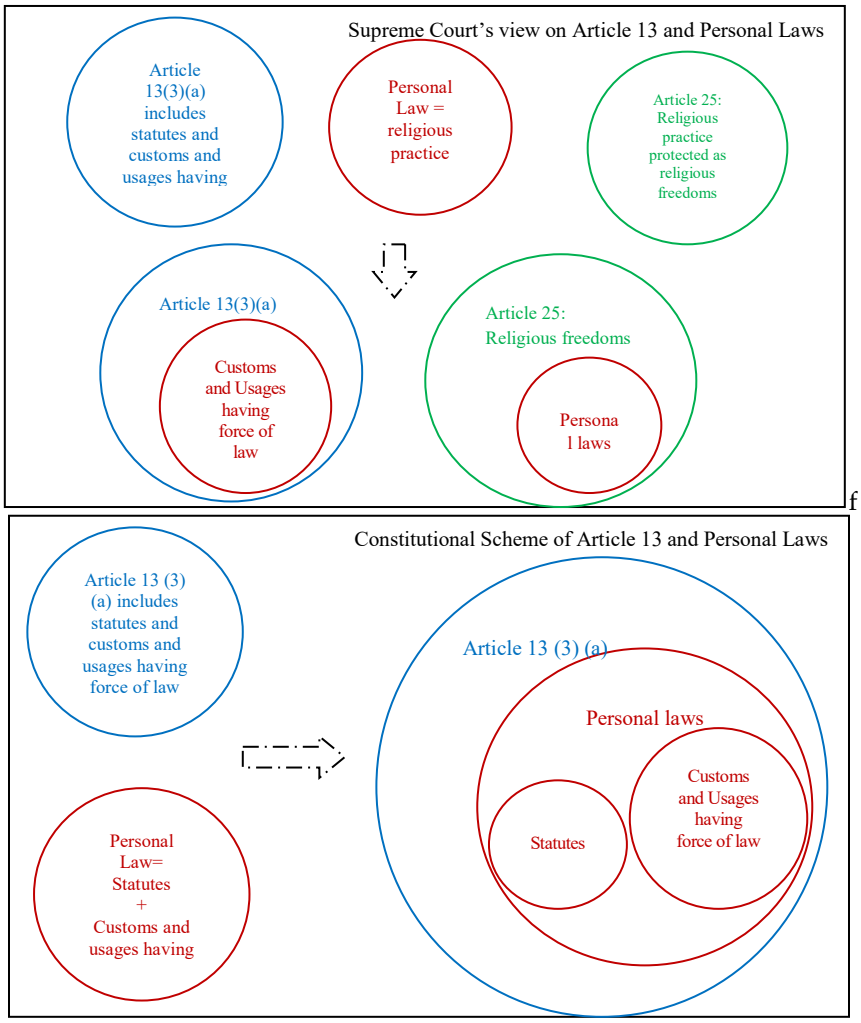
commentisfree/2017/aug/25/islamic-instant-divorce-victory-india-talaq-women-harmful-practices (last visited 10 Nov., 2017).

[5] *See* Ratna Kapur, *Triple Talaq Verdict: Wherein Lies That Much Hailed Victory* THE WIRE (28 Aug., 2017). *Available at*: https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/ (last visited 10 Nov. 2017).
See also Jhuma Sen, *Editorial,* THE INVISIBLE LAWYER (01 Sep., 2017). *Available at*: http://www.lawyerscollective.org/the-invisible-lawyer/editorial (last visited 10 Nov. 2017).

[6] H. M. Seervai, CONSTITUTIONAL LAW OF INDIA - VOLUME 1 677 (4th edn., 1993).

and usages having force of law. Therefore, there can be no question of personal law being outside the meaning of Article 13.



However, in view of Supreme Court the following picture of personal laws vis-à-vis exists. It has consistently held that the personal laws are fall under Article 25 as part of religious practice and not law within Article 13. Thus, the distinction court has carved out is not supported by the Constitution.

The question of application of fundamental rights in the sphere of personal law arose for the first time in *Narasu Appa Malli* case.[7] In that case the Constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged before the division bench of Bombay High Court on grounds of discrimination only on the basis of religion.[8] M.C. Chagla C.J. delivered the leading opinion to which P.B.

[7] Narasu Appa Malli v. State of Bombay A.I.R. 1952 Bom 84.

[8] The Bombay Prevention of Hindu Bigamous Marriages, (Bombay Act 25 of 1946).

Gajendragadkar J. concurred. Chagla C.J. observed that the State is under no obligation to extend protection to religious practices under Article 25 and if religious practices run counter to the public order, health, morality, and policy of social welfare and fundamental rights enumerated in the Part III of the Concentration then the latter shall prevail over religious practices.[9] However, in the later part of his opinion he observed that personal laws are laws not within the meaning of the Article 13(3) (a). He distinguished between the terms 'personal law' and 'customs and usages having force of law' on the grounds that since the framers of the Constitution did not use the term personal law in Article 13 and that this omission was deliberate. Therefore, only such customs and usages which have force of law and are in violation of fundamental rights can be declared as void under Article 13.[10] Supreme Court in 1981 expressed similar view in *Shri Krishna Singh*.[11] Although, the Supreme Court did not discuss the correctness of the view of the Bombay High Court view in *Narasu* case (supra).

It deserves mention here that the issue of discrimination based on gender was not integral to either of these cases; the challenge was limited to discrimination only on grounds of religion in *Narasu* (supra) and the dispute related to succession of *math* property of upon a *shudra sanyasi* who were disqualified by religious customs to become a *sanyasi* in *Shri Krishna Singh* (supra). The ratio of both cases was that the personal laws were immune from the test of fundamental rights. Thus, the Supreme Court confused religious practices with personal laws and carved out an exception for personal laws from Article 13(3)(a). This exceptionalisation provides for the basis for creation of public-private distinction in enforcing fundamental rights in family and marriage space. Consequently discrimination against women based on personal laws was legitimized within private sphere of family and marriage.

Therefore, when constitutionality of the provision enforcing restitution of conjugal rights in a Hindu Marriage Act, 1956 [12] was challenged in the Delhi High Court, A.B. Rohatgi J. observed that:

> *"One general observation must be made. Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14- have any place. In a sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond."*(sic)[13] (Emphasis supplied)

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[9] *Supra* note 7, para 3.

[10] *Supra* note 7, para 21.

[11] *Shri Krishna Singh* v. *Mathura Ahir* {(1981) 3 S.C.C. 689 at para 17.

[12] *See* Section 9 of the Hindu Marriage, (Act 25 of 1955).

[13] *Harvinder Kaur* v. *Harmander Singh Chaudhary*, A.I.R. 1983 Del 66.

The single judge of Delhi High Court dissented from the opinion of P.A. Chaudhry J. of Andhra Pradesh High Court in *Sareetha* case.[14] *Sareetha* was pronounced in the same year as *Harvinder Kaur* (supra) and it was also cited during the arguments of *Harvinder Kaur.* The single judge in *Sareetha* (supra) observed that the remedy of restitution of conjugal rights breaches personal liberty, privacy, dignity, and decency of a woman and is therefore, in violation of Article 14, 19, and 21 of the Constitution.[15] Whereas Rohatgi J. concentrated on protection of family and marriage over enforcing fundamental rights Chaudhry J. concentrated on protecting individual liberties.

Subsequently, the Supreme Court approved the view of *Harvinder Kaur* (supra) in *Saroja Rani* case and overruled the view of *Sareetha* (supra). Sabyasachi Mukherji J. of the Supreme Court observed that the remedy of restitution of conjugal rights.[16]

> "[I]s not a creature of statute but a *right inherent in the institution of marriage in itself and it serves social purpose of preventing break-up of marriages*".[17] (Emphasis supplied)

Thus, it is clear that judiciary used the exception carved out for personal laws to protect institutions of marriage and family more than enforcing the Constitutional rights and guarantees accorded to women. The Court thus adopted the patriarchal and paternalistic values of the society.

Another way to preserve discrimination in religious personal laws is to obfuscate the question of gender based discrimination. *Shah Bano* case is an example of this approach is the adopted by the Constitution Bench of the Supreme Court in 1985.[18] The matter was referred to the Constitution Bench by the full bench hearing *Shah Bano* (supra) of the Court in view of two earlier decisions of the Supreme Court of co-equal strength extending the application of Section 125 of the Criminal Procedure Code (Cr.P.C.) to Muslims.[19] Section 125 of the Cr.P.C. provides remedy of seeking maintenance order from criminal courts to; wife divorced or not, minor children, and father or mother unable to maintain themselves. The full bench was of the view that the ratio of the impugned decisions viz., *Bai Tahira* and *Fuzlunbi* were wrong, in so far as, it extended the application of Section 125 to Muslims; and was in contravention of the customs of *Shariat*. The Constitution Bench held restricting maintenance only to the period of *iddat* as per customary Muslim law was unfortunate. It further observed that personal laws

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[14] *T. Sareetha* v. *T. Venkata Subhaiah*, A.I.R. 1983 AP 356.

[15] *Id*., paras 29-32.

[16] *Saroja Rani* v. *Sudarshan Kumar,* A.I.R. 1984 S.C. 1562 at paras 13-16.

[17] Ironically, the latest judgment in right to privacy case did not express any opinion on gender equality within the private space of family and marriage. Justice Chandrachud did cite Sareetha case but did not express any opinion on its correctness. *See Justice K.S. Puttuswamy* v. *Union of India* (2017) S.C.C. 996

[18] *Mohd. Ahmad Khan* v. *Shah Bano Begum* (1985) 2 S.C.C. 556

[19] *See Bai Tahira* v. *Ali Hussaini Fidaali Chotia* (1979) 2 S.C.C. 316. *See also Fuzlunbi* v. *K. Khadar Vali* (1980) 4 S.C.C. 125. Both decisions approved application of Section 125 of the Criminal Procedure Code to Muslim women

have no bearing in so far as application of section 125 is concerned. However, the Court did not disturb the hitherto established position of personal laws vis-à-vis fundamental rights.[20] These findings of the Court were based on its own interpretations of religious text, i.e., *Quran* and not interpretation of law.[21] The Court cited profusely from *Quran* and gave its own interpretations of the verses of *Quran* than discussing questions of law involved in the dispute. Thus, the Court completely ignored the question of gender inequality in marital institution and did not resolve the question of fundamental rights in personal laws. It is submitted that the conflict in *Shah Bano* (supra) could have been decided if the Court had simply applied the test of Article 14. The Court could have answered the reference firstly, on the ground that Article 25 expressly provides that the religious freedoms are subject to the other provisions of Part III and therefore, any religious practices cannot prevail over fundamental rights. Secondly, excluding the benefit to Muslim women would have neither met the reasonable classification test nor will meet the rational nexus and legitimate purpose test developed by the Supreme Court.[22] Thus, the Court obfuscated the question of gender inequality within marital space and preserved the status quo on this question. Thereafter, in *Danial Latifi* case validity of the Muslim Women's Protection of Rights Act, 1986 was challenged on the grounds that it is violative of the various provisions of fundamental rights.[23] The Supreme Court adopted the same approach as in *Shah Bano* (supra). S. Rajendra Babu J. speaking for the bench held that the Parliament could not have intended to defeat the rights of Muslim women and push them into destitution and therefore, he interpreted the word 'within' *iddat* period as not placing any limitation on the period for which maintenance is to given. However, the Court once again negated the challenge on grounds of fundamental rights and held that the provisions of the impugned Act do not offend fundamental rights *per se*.[24]

The third approach of the Supreme Court in protecting the patriarchy in the personal laws is by exhibiting inflexibility and brazen refusal to the engage with the question of inequality altogether. There can be no better example of this than the *Ahmedabad Womens' Action Group* (*AWAG)* case.[25] In this case the Petitioners' raised a challenge to the customary practices of polygamy, divorce, and inheritance in *Shia* and *Sunni* sects of Islam. AWAG took the grounds that the customary practices of Islamic personal law of either sect are in violation of fundamental rights of women and is discrimination only

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[20] *Supra* note 18, para 7.

[21] *Supra* note 18, at paras 13-24. In a 35 paragraph judgment 10 paragraphs were devoted to interpretations of Islamic law rather any opinion or citation on right of a woman in property, earnings, and assets during marital life.

[22] See *Chiranjit Lal Chowdhuri* v. *The Union of India* (1950) S.C.R. 869. See also *The State of Bombay* v. *F.N. Balsara* 1951 A.I.R. 318. See also *State of West Bengal* v. *Anwar Ali Sarkar* 1952 A.I.R. 75, for discussion on the reasonable classification, legitimate purpose, and nexus test of Article 14 of the Constitution.

[23] *Danial Latifi* v. *Union of India* (2001) 7 SCC 740.

[24] *Supra* note 23 paras 28-36.

[25] *Ahmedabad Women's Action Group* v. *Union of India* {(1997) 3 SCC 573}.

on grounds of sex.[26] However, K. Venkatasami, J. speaking for the full bench refused to hear the case on merits. He stated:

> "4. At the outset, we would like to state that *these writs do not deserve disposal on merits inasmuch as the arguments advanced by the learned Senior Advocate before us wholly involves issues of State policies with which the Court will not ordinarily have any concern*. Further, we find that when similar attempts were made, of course by others, on earlier occasions this Court held that the remedy lies somewhere else and not by knocking at the doors of the Court."[27] (Emphasis supplied).

Despite that the Judge cited several other Supreme Court cases wherein similar challenges to personal laws were made and rejected.[28] This case exposes the judicial arrogance wherein the Court can simply refuse to hear a matter on merits and yet pronounce a binding judgment.

Therefore, we see the various ways in which the Supreme Court has failed to enforce the Constitutional guarantees in the domain of personal laws. The approach of the Court is patriarchal, paternal, obfuscatory, or dismissive in its interpretations whenever personal laws are attacked on the grounds of fundamental rights.

Shayara Bano is one unique case wherein the three different opinions that were delivered depicts the approaches elucidated above.

Analysis of Supreme Court's Opinion *in Shayara Bano*

The Constitution Bench of the Supreme Court delivered three reportable judgments in *Shayara Bano* case; Kehar C.J. delivered one opinion for himself and S. Abdul Nazeer J., Kurian Joseph J. delivered a separate opinion of his own, and Rohinton F. Nariman. J. delivered one opinion for himself and U.U. Lalit J.[29] While the opinions of Kehar C.J. and Nariman J. are based on completely different analysis of facts and law and are different from one another the opinion of Joseph, J. is based on his own reasons and does not concur completely with either of other two opinions.

Brief History of the Matter

During September 2015, *Phulavati* was being argued before the division bench of A.R. Dave and A.K. Goel JJ. of the Supreme Court.[30] The brother of Phulavati had come up

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[26] *Id.,* paras 1-2.

[27] *Id.,* para 4.

[28] *Id.,* paras 5-16. It is interesting to note that AWAG decision does not have a ratio as there is no pronouncement on merits merely recitals of other Supreme Court decisions.

[29] *See* Order of Supreme Court in W.P. (C) No. 118/2016, SUPREME COURT OF INDIA (22 Aug., 2017). *Available at*: http://sci.nic.in/supremecourt/2016/6716/6716_2016_Order_22-Aug-2017.pdf (last visited 13 Nov., 2017)

[30] *Prakash* v. *Phulavati* (2016) 2 S.C.C. 36. (Author was a practicing advocate at that time and was present in the Court during arguments of *Phulavati*. The reporters and press have not been able to report the arguments which were advanced in that case in full). (Hindu Succession Act, 1956

in appeal to the Supreme Court challenging the decision of the Karnataka High Court of giving retrospective effect to the Amendment made to the devolution of coparcenary property under Hindu Succession Act.[31] During the course of arguments the advocates for Respondent-Plaintiff pointed out that the provisions of the Hindu Succession Act, 1956 in so far as they denied the equal inheritance rights to daughters and preferred males over females were discriminatory only on grounds of sex and therefore, do not serve the purpose of the amendment. The advocate for the Appellant-Defendant raised a counter point that such discriminatory laws and customs are prevalent even in the Muslim community such as practice of polygamy, *talaq-e-biddat, nikah-halala,* etc. and that the State or the Court does not interfere in them since personal laws are protected under Article 25.[**] The bench took suo motu cognizance based on the Appellant-Defendant's arguments and ordered a Public Interest Litigation (hereafter referred as PIL) to be registered and listed before the Chief Justice for appropriate orders.[32] The PIL came to be known as *In Re: Muslim Women's Quest for Equality*.[33] Subsequently, Shayara Bano filed her writ petition in 2016 and her matter was tagged to the earlier PIL.[34] Thereafter, Aafreen Rehman, Gulshan Parveen, and Ishrat Jahan filed their writ petitions in 2016 and all these were also tagged with Shayara's writ petition[35] and Atiya Sabri filed her writ petition in 2017 which was tagged to the *suo motu* cognizance of the Court.[36] Therefore, all the writ petitions were filed later in 20016-17 whereas the Supreme Court had on its own motion decided to examine the Constitutional validity of the customary practices of Muslim personal law. It was improper and unwarranted to take *suo motu* cognizance of the Muslim personal laws in this manner. Firstly, the discriminatory provisions of other religious personal laws did not become part of this reference highlighting the selective nature of the reference. Secondly, the manner and the terms of the reference expose judicial arrogance. All earlier challenges of similar nature involving same questions had either been ignored or dismissed. However, here

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was amended in 2005 through Amendment Act no. 39 of 2005, and daughters were accorded coparcenary rights equal to that of men).

31 *Id.* para 1.

32 *Supra* note 30, paras 28-33.

33 *See Suo Motu* Writ Petition (Civil) No. 2/2015.

34 *See* Order of Supreme Court in W.P. (C) No. 118/2016, SUPREME COURT wherein the Court ordered the writ to be tagged with Suo Motu W.P. (C) No. 2/2015. *Available at*: http://sci.nic.in/jonew/bosir/orderpdfold/2469004.pdf (last visited 15 Nov., 2017).

35 *See* Order of Supreme Court in W.P. (C) No. 288/2016, SUPREME COURT (11 May, 2017). *Available at*: http://sci.nic.in/jonew/courtnic/rop/2016/15758/rop_671912.pdf (last visited 15 Nov., 2017)
See also Order of Supreme Court in W.P. (C) NO. 327/2016, SUPREME COURT (29 Sep., 2016). *Available at*: http://sci.nic.in/jonew/bosir/orderpdf/2683452.pdf (last visited 15 Nov., 2017)
See also Order of Supreme Court in W.P. (C) NO. 665/2016, SUPREME COURT (26 Aug., 2016) wherein the Court ordered the matter to be tagged along with W.P. (C) No. 118/2016 *Available at* http://sci.nic.in/jonew/courtnic/rop/2016/27066/rop_815235.pdf (last visited 15 Nov., 2017)

36 *See* Order of Supreme Court in W.P. (C) NO. 43/2017, SUPREME COURT (23 Jan., 2017) wherein the Court ordered that the matter be tagged with W.P. (C) No. 2/2015 available at http://sci.nic.in/jonew/courtnic/rop/2016/42949/rop_883275.pdf (last visited 17 Nov. 2017)

the Court took suo motu cognizance of the same questions in a case involving a dispute of succession under Hindu Succession laws. Therefore, it is not the merits of the case that determines judicial attention but the whims and wills of the judges

Opinion of Jagdish Singh Kehar, C.J.

The opinion of Kehar C. J. can be summarized as confusing and erroneous. Kehar J. first observed that the practice of *talaq-e-biddat* is a valid practice in Muslim law,[37] then, he observed that the Supreme Court is not a proper forum to adjudicate if *talaq-e-biddat* conforms to the *hadiths* accepted in Islamic jurisprudence.[38] Finally, he declared that the practice of *talaq-e-biddat* is integral to the religious denomination of *Sunni* followers of the *hanafi* school of Muslim law in India. It has sanctions and approval from the religious denomination where it is practiced and therefore, it is part of their personal laws.[39] Kehar C.J. adopted the same line of argument as in *Narasu* (supra) and declared that the personal laws are protected under the Article 25 (1) of the Constitution. While Kehar C.J. noted that Article 25 circumscribes the limits of the right through its own text however, he somehow failed to read the restriction with respect to 'other provisions of Part III' as mentioned in the Article 25.

The discussions and observations he has made do not support the ratio of his opinion his deductions are illogical and incoherent. He followed the obfuscation approach as followed in *Shah Bano* (supra) and *Danial Latifi* (supra). He concentrated on the interpretation of religious practices than the question of equality within the private sphere of marriage.

A better way to test the validity of talaq-*e-biddat* was through harmonious reading of Article 14[40] and Article 25(1) of the Constitution as explained in the above section.[41] The Supreme Court while reading Article 25 focuses on religion than other fundamental rights and consistently has failed to read that Article 25 is subject to other fundamental rights, especially in context of gender equality in family and marital institution.[42]

The error in his judgment is in the operative part. He had already declared *talaq-e-biddat* to be integral part of the religious practices of the religious denomination of the followers of *Sunni* sect. He had also declared it to be a part of religious practice and protected in the manner of fundamental right under Article 25 therefore, he could not have suspended the practice of *talaq-e-biddat*. He granted injunction from using *talaq-e-*

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[37] *See Shayara Bano* v. *Union of India* W.P. (C) No. 116/2018 para 127.

[38] *Id.* paras 128-139.

[39] *Id.,* paras 145.

[40] Article 14 of the Constitution reads as under:
[t]he state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

[41] *See* analysis of *Shah Bano case* in Section A of this paper

[42] *See Maneka Gandhi* v. *Union of India* (1978) 2 S.C.R. 621, for a detailed discussion on reading different fundamental rights together rejecting the view of reading in them silos as in *A.K. Gopalan* v. *State of Madras* (1950) S.C.R. 88.

biddat as a mode of pronouncement of divorce for a period of six months from the date judgment and implored Union of India to consider bringing a law to this effect.[43] He further stated that in the event of no law being passed within six months the injunction on *talaq-e-biddat* would continue.[44] This meant that he declared the practice to remain in suspension despite finding it Constitutional and part of the fundamental rights. Essentially, a fundamental right was declared to remain suspended. Kurian Joseph J. caught this anomaly and suggested that the fundamental rights cannot be suspended even through exercise of extraordinary power under Article 142.[45] The Supreme Court can only enforce a fundamental right and it does not have power to suspend the operation of a fundamental right even under its extraordinary powers under Article 142.

Opinion of Kurian Joseph J.

Joseph J. posed the question as in terms of interpretation of *Shariat* completely ignoring that the challenge was made on the grounds of fundamental rights and not incorrect interpretation of *Shariat*. He framed the question as: that the only question to be decided is whether after recognition of *Shariat* as personal law *talaq-e-biddat* can be held as a valid practice in law since it is wrong in *Quran.*[46] He promptly answered the question: that after *Shamim Ara*[47] the question is no more *res integra* since it has already held that *talaq-e-biddat* lacked legal sanctity and that under Article 141 of the Constitution that is the settled position of law in India.[48] This determination is incorrect for two reasons. Firstly, if *Shamim Ara* (supra) had already settled the question of validity of *talaq-e-biddat* then there was no need for the Supreme Court to re-examine the same question. There was no *lis* before the Court and Court was also not reviewing the decision of *Shamim Ara* (supra) rather it had taken *suo motu* cognizance of the matter to examine the validity of *talaq-e-biddat*. Subsequent writ petitions challenging the same does not validate the error of taking a *suo motu* cognizance despite having already settled the matter. Secondly, the observations in *Shamim Ara* (supra) regarding *talaq-e-biddat* could not be said to be ratio since in *Shamim Ara* (supra) the issue of *talaq-e-biddat* was neither raised nor debated and was neither integral to the dispute. Kehar J., had observed this, and rightly so, in his opinion. Therefore, any view on *triple talaq* in *Shamim Ara* (supra) was non-binding *obiter* and not *ratio*.

Joseph's J. approach was both paternal and obfuscatory. In the beginning of his opinion he declared that the question of validity of *talaq-e-biddat* was no more *res integra* after *Shamim Ara* (supra). Despite that he proceeded to reproduce verses from the *Holy Quran* and gave his own interpretation of those verses. He observed that the *Quran* does not sanction *talaq-e-biddat* because *Islam* considers *talaq* to be sinful, avoidable, and to be

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[43] *Supra* note 37, para 200.

[44] *Id*.

[45] *Supra* note 37, para 24 of the Joseph's J. opinion

[46] *Id.,* para 1.

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

[48] *Supra* note 37, paras 1-4 of the Joseph's J. opinion.

exercised only after the attempt of reconciliation and since, possibility of reconciliation is foreclosed in *talaq-e-biddat* and therefore, it is un-*Islamic* and not an approved mode of divorce in *Sharia.*[49] This view is paternalistic. It focuses on protecting the institution of marriage and not on recognition of the rights of women in marriage. The Petitioners had claimed recognition of equal rights within the domain of family and marital institution and were not seeking declaration of appropriate and *Quranic* ways of dissolution of a Muslim marriage.

Opinion of Rohinton F. Nariman J.

The opinion of Nariman J. is for himself and Lalit J. and it forms the operative part of the judgment in this case. His view resonates the third approach i.e., inflexibility and brazen refusal to engage with the question of gender justice altogether. He refused to go into the question of discrimination stated:

> "…[S]ince we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, *we do not find the need to go into the ground of discrimination in these cases,* as was argued by the learned Attorney General and those supporting him." (Emphasis supplied).

He carried the legacy of the Supreme Court of maintaining the public-private dichotomy in implementation of fundamental rights.[50]

The basis of setting aside practice of *talaq-e-biddat* for Nariman J. is, in fact, not supported by the concurring opinion of Joseph J. Nariman J. declared that the Section 2 of the *Shariat* Act (supra) is *ultra vires* to the Constitution since it approves *talaq-e-biddat* as a mode of divorce in Islam. On the other hand Joseph J. had declared that the provision of the Act did not permit *talaq-e-biddat* as an approved mode of divorce.[51] Therefore, we have a majority view, consisting of two views, which declare *talaq-e-biddat* as unconstitutional but the *ratio* of constituting views are in conflict of each other. Therefore, can it be said that there is any ratio at all in this judgment?

Analysis reveals that Nariman's J. view is hardly progressive. Much like his brother Joseph J. he observed that the practice of *talaq-e-biddat* is bad because it does not leave any room for reconciliation and an immediate severance of marital status is occurred.[52]

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[49] *Supra* note 37, para 10 of the Joseph's J. opinion.

[50] *See* Section A of this paper for detailed analysis of Supreme Court's refusal to enter into sphere of family.

[51] *Supra* note 37, para 26 of the Joseph's J. opinion. See Ravish Kumar, Supreme Court Verdict on Triple Talaq, KHABAR. NDTV (22 Aug., 2017). *Available at:* https://khabar.ndtv.com/video /show/prime-time/all-parties-welcome-the-verdict-on-triple-talaq-465938?yt, wherein Professor Faizan Mustafa, Vice Chancellor, NALSAR and eminent scholar on Islamic and Constitutional Law has also pointed out this anomaly of the majority view in this judgment in his interview.

[52] *Supra* note 47, paras 391-393.

Thus, his focus is also on protection of marital institution and his view is as paternalistic as of other judges on the bench.

The remarkable aspect of Nariman J. view is his near obsessive focus on doctrine of arbitrariness. He devoted almost one third of paper and ink on discussing arbitrariness in reference to *McDowell* (supra) case.[53] It might be sheer coincidence that he had argued that case for McDowell as a Senior Advocate and McDowell had lost and in *Shayara Bano* (supra) – a case in which neither liquor trade nor freedom of trade was an issue – he declared that decision of the Supreme Court in *McDowell* (supra) was wrong. However, the fact that he did not consider the question of gender based discrimination relevant to the issue of personal laws is certainly not a coincidence and rather is a reflection on the judicial attitude on gender discrimination.

Conclusions

No judge on the Bench looked into the correctness of the ratio of: *Narasu* (supra), *Shri Krishna Singh* (supra), *Harvinder Kaur* (supra) *Saroja Rani* (supra), *Shah Bano* (supra), *Danial Latifi* (supra), and *AWAG* (supra). Ratio of all these decisions was important to the issues integral in *Shayara Bano* (supra). Not a single word was spared for discussion on gender discrimination in religious personal laws. No one was interested in referring to gender just family laws. However, the judges were interested in determination of 'true meaning' of the *Quranic* verses and impact of arbitrariness in reference to liquor trade. Every single member of the bench avoided the question of equality, discrimination, public-private dichotomy, and gender justice. As a result, despite being incorrect opinions all these stand valid with an addition and approval of Constitution Bench in *Shayara Bano* (supra). Moreover, in case where religious personal laws was challenged for violation of fundamental rights, Kehar and Joseph J.J.. declared that religious personal laws are fundamental rights unto themselves. Such is the irony when a question of personal law becomes more important than the question of justice.

- Ritesh Dhar Bubey[*]

[53] *State of Andhra Pradesh* v. *McDowell & Co.* (1996) 3 S.C.C. 709.

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