# SHAYARA BANO v. UNION OF INDIA, 2017

## CASE COMMENTARY: AN INTRICATE ANALYSIS OF THE LANDMARK JUDGEMENT[1]

### Facts

The petitioner Shayara Bano filed a petition before the Supreme Court with the contention that her husband, respondent Rizwan Ahmed had divorced her unilaterally by saying the word *'Talaq'* as per the process of Talaq – Biddat and conveyed a 'Talaqnama' which was signed amidst two eyewitnesses on 10th of October 2015. Her contention was that the process was unconstitutional as it does not take into account the choice of a woman which is her fundamental right and thereby challenged its constitutional validity. A plethora of petitions which were filed by other women challenging this custom was merged and a counter affidavit was filed by Rizwan Ahmed and the All India Muslim Personal Board with the contention that shariat laws are intervowen with their religion and the Supreme Court must not interfere with such matters and they must be left to the interpretation of the community itself.

### Background

The practice of divorce under Muslim Personal laws are of three kinds – *Talaq - e -biddat, Talaq - e - hasan and Talaq - e - asan.* These forms of divorces are legal as per Section 2 of Muslim Personal Law (Shariat) Application Act, 1937[2]. Out of the three, the first form is challenged by the petitioner on the grounds that it violates a woman's fundamental rights which are Article 14 which ensure equality before law, Article 15(1) which ensures there is no discrimination between religion, race, caste, sex and place of birth, Article 21 which ensures life and personal liberty, Article 142 by virtue of which the Supreme Court has to do complete justice in all cases and Article 25 which ensures freedom of practice of religion[3]. The Court also looked into the personal laws of 19 nations to find whether triple talaq is allowed only to find that none of the Arab nations, south- east nations and sub – continent nations allow triple talaq. The Court then looked at cases where triple talaq was challenged of which first one was

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[2] Muslim Personal Law (Shariat) Application Act, 1937, No. 13, Acts of Parliament, 1937
[3] Indian Const

*Rashid Ahmad v. Anisa Khatun*, 1932 where triple talaq was upheld by the Privy Council[4]. The next case is *Jiauddin Ahmed* v. *Anwara Begum*, 1978 where the High Court stated that Triple Talaq would not lead to a valid divorce[5].The next case is a must. *Rukia Khatun* v. *Abdul Khalique Laskar*, 1979 where the Gauhati High Court laid down various requirements for a valid divorce and Triple Talaq did not qualify the requirements[6]. The last case is *Nazeer* v. *Shemeema*, 2016 where the Court disapproved the practice and should codify the law in a form to ensure justice[7].

**Analysis**

The Five judge Constitution consisting of Chief Justice Khehar, Justice Kurian Joseph, Justice Rohinton Fali Nariman, Justice U.U Lalit, Justice S. Abdul Nazeer took the right decision in criminalising the process of triple talaq as the this form of divorce would not be stopped unless there was some form of institution present to prevent it. Chief Justice Khehar and Justice Nazeer gave the minority opinion while Justice Nariman and Justice Lalit gave the majority opinion to which Justice Joseph gave his concurring opinion. There were two main issues in the case –

1. Whether talaq – e- biddat is Islamic in nature and an essential religious practice?
2. Whether talaq – e – biddat comes under the term 'Law' as per Article 13 of the constitution and can be struck down or it comes under 'personal laws' which cannot be struck down as per Article 13 of the Constitution?

The institution to strike down any law which violates Fundamental Rights is Article 13 of the constitution which abrogates any law being in contrary to Part III of the constitution[8]. This was the test which the judges widely used to strike down various arbitrary laws. The petitioners at first argued that the law impacted a large number of women in a disastrous manner as the women would be left alone to fend for herself while the Husband can marry whomsoever he pleases. The petitioners then placed reliance upon the Jiauddin Ahmed, and the Rukia Khatun cases. Based on the above judgments, it was submitted, that Courts of India had not agreed with the practice of triple talaq as in both the cases, the Court held that the practice was unreasonable and pronouncement of Talaq thrice would not amount to a valid divorce. Also,

[4] Rashid Ahmed v. Anisa Khatun, 1932, AIR 1932 PC 25.
[5] Jiauddin Ahmed v. Anwara Begum, 1978, ( 1981 ) 1 GLR 358
[6] Must. Rukia Khatun v. Abdul Khalique Laskar, 1979, ( 1981 ) 1 GLR 375
[7] Nazeer v. Shemeema, 2016, 2017 ( 1 ) KLJ 1
[8] Supra Note 4 at Art 13

various legislations of other countries were also relied upon through which the petitioners were able to drive the point home that various legislations of Islamic countries had done away the practice of 'Triple Talaq'. Another case which was heavily relied upon was the case of Shamim Ara v. State of Up and Anr, 2002[9]. In this case, the Court held that facts leading to talaq was required to be proven and a mere document stating the date or events of talaq would not be considered as valid. The respondents made the argument that that the practice of Talaq – e – Biddat was prevalent for a long period of time and was valid and was an essential "religious practice". Also, the respondents stated the fact that Personal laws are excluded from the ambit of Article 13 of the constitution which lays down that any law which goes against Part III of the constitution is unconstitutional. It was a personal law because it was not mentioned in the Muslim Personal Law (Shariat) Act, 1937[10]. So, any personal law cannot be declared to be against Part III of the constitution. This decision was affirmed in the case of *State of Bombay* v. *Narasu Appa Malli*, 1951[11].

Chief Justice Khehar and Justice Nazeer, in their dissenting judgement, stated that Triple Talaq forms an essential part of a Sunni Muslims life even though the practice of Triple Talaq is not mentioned in any form in the Quran and it is there in the Hadi'ths only which is an invalid reasoning as the essential requirement of any tradition is that it must be there in Quran. The Holy Quran on the practice of Talaq is strict but it is stricter on irrevocable and fickle form of dissolution of marriage in which a man is not bound to quote a reason of pronouncing Talaq and which also featured with the lack of reconciliation mode. Triple Talaq is a form of irrevocable divorce which the Quran prohibits. Justices Khehar and Nazeer regarded triple talaq as a part of uncodified Muslim personal law (for Sunni Muslims belonging to the Hanafi school) and stated that the uncodified personal law would not come under Article 13 of the constitution and the the act cannot be held unconstitutional in any way. This was because, in their opinion, the personal laws of any religious community were protected from invasion and breach as per the Narasu Appa Malli case. This interpretation in particular has been criticized. The justices did not see a reason to engage with the relationship between Articles 25 vis-à-vis Articles 14, 15 and 21 as other provisions of this part, which the freedom of religion is subject to Article 25 (1), as they held that these rights were only applicable to State action against

[9] Shamim Ara v. State of Up and Anr, 2002, AIR 2002 SC 3551
[10] Muslim Personal Law (Shariat) Act,1937
[11] State of Bombay v. Narasu Appa Malli, 1951 AIR 1952 Bom 84

individuals[12]. They concluded that the Court "cannot nullify and declare as unacceptable in law, what the constitution decrees us, not only to protect, but also to enforce. Article 25 obliges all Courts to protect 'personal laws' and not to find fault therewith. Interference in matters of 'personal law' is clearly beyond judicial examination[13].

However, Justice Joseph, in his concurring judgment, after engagement with the Islamic literary texts stated Triple talaq was not a part of Muslim personal law as the Quran only, permits talaq when there has been a previous attempt at reconciliation. However, since in the case of triple talaq, reconciliation is not possible, the practice must be held to be "against the basic tenets of the Holy Quran and consequently, it violates Shariat or Muslim personal laws and it does not come under it. So, the Act is not an essential religious practice and could be struck down by the court. Justice Nariman and Justice Lalit, in their majority judgement, then stated that the 1937 Act did indeed codify triple talaq under statutory law. They held that "all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq" (para 18). As a pre-constitutional law, the 1937 Act would fall within the expression "laws in force" and would be hit by Article 13(1) if found to be inconsistent with the provisions in Part III of the Constitution. The judges over here used the non – obstante clause interpretation which was laid down in *Aswini Kumar Ghosh* v. *Arabinda Ghosh,* 1952 where this clause was used to obtain more meaning to the Act[14]. The Justices held that as per the non - obstante clause “all forms of practices” which is there in the Shariat Act, 1937[15] triple talaq would constitute one such valid practicewhich would come under Section 2 of Muslim Personal Law (*Shariat*) Application Act, 1937[16]. So, the practice would come under “laws in force” as per Article 13 and it would fall to the test laid down by Article 13 and escapes the dangerous precedent laid down in the *Narasu Appa Malli,* 1951 case[17]. On these grounds combined with the conclusion that the practice violates the fundamental right of the constitution; the Court declared the law to be unconstitutional and

[12] Avantika Tiwari, “TRIPLE TALAQ- COUNTER PERSPECTIVE WITH SPECIFIC REFERANCE TO SHAYARA BANO”, 1, ILI law review, 89, 2017.
[13] Herklotz, Tanja. “Shayara Bano versus Union of India and Others. The Indian Supreme Court's Ban of Triple Talaq and the Debate around Muslim Personal Law and Gender Justice”, ResearchGate, 309, (2017), https://www.researchgate.net/publication/322335780 last visited – 16.6.2019
[14] Aswini Kumar Ghosh v. Arabinda Ghosh, 1952, AIR 1953 SC 75
[15] Muslim Personal Law (Shariat) Act, 1937
[16] Mohsin Raza , Hadiya Khan, “Legislative attempt to criminalize Triple Talaq: A critical analysis of Shayra Bano’s Judgement”, 4, issue 2 , International Journal of Law, 261, 2018.
[17] Id at 263

directed the legislature to make a legal framework to prevent further use of this practice or custom.

**Conclusion**

Religion is a basic and most sacrosanct aspect of any individual's life. The religion governed by personal laws must ensure that the laws are kept in check and are not arbitrary. Personal laws are very essential in nature as they are interwoven with the religion itself and cannot be separated from the religion. So, for the continuance of religion in the modern era, it must learn to adapt to ideals of the present society. Any custom or practice which is governed by the religion does not fit into the ideals or the principles, then the Supreme Court must take a hard stance and remove the section despite the fact that the constitution also promotes right to religion. Triple Talaq was one such practice which was taken away as it violates gender justice and gender equality which are the ideals of the modern society.