SHAYARA BANO: AN ANALYSIS OF DISSENTING JUDGMENT

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ABSTRACT

In this paper author discusses intricate details of judgment passed by the Constitution Bench (5-Judge) of the Hon'ble Supreme Court of India in case of **Shayara Bano v. Union of India**[i], with objective to understand the concept of Talaq-ul-Biddat and its religious and legal sanctity and permissibility. This paper aims to provide the insight of less discussed (2-Judge) dissenting judgment passed by Hon'ble Supreme Court in **Shayara Bano (supra)** with particular emphasis on providing details about the issues framed and considered by Hon'ble Supreme Court and reasoning provided therefor, while considering the rival submissions of the parties and relevant provisions of law and judicial precedents.

INTRODUCTION[ii]

a. Origin of Islam

In the religious sense Islam means *'submission to the will of God'* and in secular sense Islam means the '*establishment of peace'*. The Prophet said, "Purity of speech and hospitality. And what is faith? He said, patience and beneficence.[iii] A man said, "O Prophet of God, What is (the mark of) faith? The Prophet said, when the good work gives thee pleasure, and they evil work grieves thee, thou art a man of faith. The man said, "What is sin? The Prophet said, when anything smirtes thee within thyself forsake it."

Islam as a new religion had appeared on the globe in the early years of 7 century AD in the historic Arab city of *Makkah* now situate in *Saudi Arabia*. It was proclaimed by Prophet *Muhammad*[iv] posthumous child of *Abdullah bin Abdul Muttalib*, hailing from the noblest Arab family of the time which claimed descent from patriarch *Abraham* through his younger son *Ismail*. The Prophet was brought up by his mother. On his mother's death, while yet a child, the Prophet passed into the care of his grandfather, Abdul Muttalib. Two years later the grandfather also died and the boy was then brought up by his uncle Abu Talib, after the age of twenty-five years he spent much of his time in solitude making a lonely cave his abode, where he is said to have been occupied in prayer and meditation. He became a Prophet at the fortieth year of his age, when he received his first *wali* or message from God. From that time he devoted himself in replanting the only true and ancient religion, professed by Adam, Noah, Abraham, Moses, Jesus and all the Prophets of the past. In his endeavours to this end, he met with the most bitter persecution from the idolaters whose faith he attacked. He was abused, spat upon, covered with dust and dragged from the temple of Mecca by the hair of his head but still he assiduously preserved in his undertaking and ultimately succeeded in spreading his religion over a great portion of the Roman Empire, in converting the people of Perma, in advancing his dominion to the banks of Indus and the Oxus and in founding a sect of people that afterwards became the conquerors of India and are at the present time one of the most numerous, if not the most powerful races of men on the earth.

On facing severe persecution in the city of his birth for thirteen long years on account of his revolutionary ideas, in his 53rd year he had migrated to the friendly city of *Madinah*, over two hundred miles away. As a result of the Prophet's condemnation of the paganism, then prevalent

in Arabia, he was compelled to leave Mecca and took refuge among his followers at Medina. The flight of Prophet known as *'hijrat'*, marks the beginning of Muslim era. The years of humiliation, of persecution, of failures came to an end and the years of success, the fullest that has ever crowned one man's endeavour, had begun. The Hijrat makes a clear division in the story of Prophet's Mission, which is evident in the Koran. Till then he had been a preacher only. Henceforth he was the ruler of a State-at first a very small one, but which grew in ten years to be the empire of Arabta. This absolute supremacy continued till his death in 632 A.D. The Prophet's body is buried in a mausoleum, called the *Green Dome*, in a corner of the palatial *Madinah Mosque* which was initially built by him.

The Prophet was indeed a great social reformer much ahead of his time in his thoughts and, in a span of about twenty-three years, had introduced radical reforms in all aspects of private and public life.

b. Fundamental Beliefs in Islam

The two foremost and fundamental Muslim beliefs are those contained in what is called *Kalema-e-Tayeba* which reads as *La ilaha illallah Muhammad-ur-Rasulullah* - There is none to be worshipped but God and Muhammad is God's Prophet. These are described as *wahdaniat* (belief in one supreme and invisible God to the exclusion of all other gods) and *risalat* (belief that Muhammad was God's *Rasul* (messenger, prophet)).

There are also two Declarations of Faith - *iman-e-mujmal* (faith in brief) and *iman-e-mufassal (*faith in detail). The former says "I believe in God with all His names and attributes and accept all His directives" - and the latter reads as "I believe in God and His angels, His books and His prophets, in the Day of Judgment, in all good and bad things being destined by Him, and in the life hereafter."

From the very beginning Islam prescribed a religious law code with prescriptions for all walks of life. As Islam grew with the pace of time, so did its law, eventually culminating into a magnificent system of jurisprudence encompassing all branches of law, both public and private, and covering all legal subjects including *huquq-ul-ibad* (human rights), *siyasa shariya* (governance), *gaza* (administration of justice), *muamlat* (transactions), *jinayat* (criminal law) and *alwal-us-shakhsiya* (personal status). The origin of this comprehensive and all-embracing

legal system is professedly divine but its development and systemization is certainly attributable to human beings, the early jurists and interpreters of Islam.

The legal acumen and massive contribution of the developers of Islamic law earned accolades from a 20th century western scholar *Count Leon Ostrorog*,[v] in these powerful words:

> *"Those eastern thinkers of the ninth century laid down on the basis of their ideology the principle of Rights of Man, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property, described the supreme power in Islam as based on a contract implying conditions of capacity and performance and subject to cancellation if the conditions under the contract were not fulfilled; elaborated a law of war, of which the humane chivalrous prescriptions would have put to the blush certain belligerents in the Great War, expounded a doctrine of toleration of non-Muslim creeds - so liberal that our West had to wait a thousand years before seeing equivalent principles adopted."*

ISLAMIC LAW A GLOBAL PERSPECTIVE[vi]

The constitutions in twenty-four Muslim countries of Asia and Africa recognize Islam as the state religion; and some of them mention the *Shariah* (Islamic law) as the source for law-making. The judiciary in some of these countries, including ***Pakistan***, has ruled that *Shariah* means the law as laid down in the *Qur'an* and *Hadith*, and not as interpreted by any particular jurist of the past.

In some countries particular schools of Muslim law are legally given precedence. The *Hanafi* and *Shafei* schools of Muslim law, followed by the majority, are regarded as the state law under the constitutions of ***Afghanistan*** and ***Brunei Dar-us-Salam*** respectively (both enforced in 2004). On the other hand, in *Ithna Ashari*-dominated *Iran* the *Jafari school* has the same position under the Constitution of 1979. All these constitutions however recognize the right of other Muslims to follow their own schools of law.

During 1951-62 the Ottoman Law of Family Rights referred to above was replaced with new national laws in ***Jordan***, ***Syria*** and ***Lebanon***. In 1975-76 the Syrian Law of Personal Status 1953 was subjected to major amendments, and the Jordanian Law of Family Rights 1951 was

replaced it with a more comprehensive law called the Law of Personal Status 1976. In ***Lebanon,*** the Law of Family Rights 1962 was significantly amended in later years.

In ***Iraq***, a modern Law of Personal Status was enacted in 1959 and was amended four years later to abandon the new inheritance regime it had introduced which had created a political turmoil. In 1987 and 2000 the 1959 Code was drastically revised and later supplemented with a number of Decrees to introduce some major reforms.

While ***South Yemen*** adopted a new Family Law in 1974, ***North Yemen*** enacted new Family and Inheritance Laws during 1976-78. After the reunification of the country all these laws were replaced with a common Republican Decree on Personal Status 1992 [amended in 1998-99].

In the Gulf region, ***Kuwait*** amended the law of inheritance in 1971 and thirteen years later enacted a comprehensive law titled Code of Personal Status 1984 [amended in 2004]. The ***Sultanate of Oman*** codified the Muslim family law by an *Amiri* Decree issued in 1997. The ***United Arab Emirates*** did the same in 2005; and ***Qatar*** and ***Bahrain*** followed suit in 2006 and 2009 respectively.

In ***Iran***, the only non-Arab country in the region and seat of the Shia Ithna Ashari school, two Family Protection Laws had been enacted in 1967 and 1975 introducing some major reforms in family law. Both were rendered ineffective after the Islamic Revolution and were eventually repealed in 2008.

The most populous Muslim country of the world, ***Indonesia***, enacted a new Marriage Law in 1974 imposing State control on bigamy and divorce. Statutory regulations were issued with it for its effective implementation. In ***Malaysia*** the Federal Legislature had enacted an Islamic Family Law Act in 1984 which was later locally re-enacted in all the thirteen States. Similar laws were enacted in ***Brunei Dar-us-Salam*** and ***Singapore***.

The ***Philippines*** enacted a comprehensive Code of Muslim Law in 1977 on the basis of a draft prepared by a Muslim Jurists Commission. In ***Singapore*** the Administration of Muslim Law Act, originally enacted in 1966 and last revised in 2009, is drawn on the pattern of similar laws in force in Malaysia.

ISLAM UNDER BRITISH EMPIRE[vii]

The British imperialists had, on the analogy of their community's name, (Christian derived from Christ), coined for the followers of Islam the word *"Mohammadan"* (derived from Muhammad and written with varying spellings). The religion-based law of the Muslims was therefore referred to by them as the *"Mohammadan law."* The names of the community and its law so coined were wholly contrary to the Muslim religious beliefs. These obnoxious expressions gradually fell into disuse everywhere in the world and in all languages. The community is now known everywhere as the Muslims and its law as the Muslim law.

During the Muslim rule, in India the rulers were Hanafis and so Hanafi Law became the law of the land. This continued till the establishment of the British Empire.

To the close of the 16th century, the British traders came India for trading purposes during the reign of Mughal dynasty. In 1600 A.D., the East India Company was established. The foundations of the British Empire were laid by treaties with Mughal rulers representing the authority of the Delhi Sultanate. The North West provinces were governed by the East India Company down to 1857 in the name of titular sovereign, who had been a British pensioner.

In 1765 A.D. the Company was vested with the power of collecting land revenue, but the criminal jurisdiction remained in the hands of Muslim law officers, so the criminal law was Muslim. In civil matters, the Islamic Law was applied to Muslims and the Hindi law to Hindus. Hence the influence of Islamic Law was felt everywhere during the earlier days of British Empire.

It was only in 1772 A.D. when the Muslim Law got recognition in British India. Warren Hastings, the first Governor General of British India for the first time framed the famous Regulation II of 1772 which was reconnected as the Regulation of 1780. According to Section 27 of this Regulation:

> *"In all suits regarding inheritance, succession, marrage, casis and other religions usages or institutionis, the laws of the Quran with respect to Mohammadans and those of the Shustrus with respect to the Gentoas (Hindus) shall be invariably adhered to."*

Further by regulation VII of 1832, it was provided that, whenever in any civil suit, the parties shall be of different persuasions, when one party shall be of the Hindu and the other of the

Mohammadan persuasion, or where one or more of the parties to such suit shall not be either of the Mohammadan or of the Hindu persuasion, the laws of those religions shall not be permitted to operative to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases, the decision shall be governed by the principles of Justice. equity, and good conscience, it be in clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles.

Where in the personal laws, there were differences between the parties, the law of the defendant was applicable. Similarly, the Regulating Act of 1773, the East India Company Act. 1780, the charter of 1781, the East India Act, 1797 and the Burma Laws Act, 1806 were passed by the Brush Government which shows, that Islamic Law founded recognition in British Courts in India. The original rules of Islamic Law on wakf were also retained with the passing of the Musalman Wald Validating Act. 1913. Lastly, the clear proof of recognition of Islamic Law in India, was given when the Muslim Personal Law (Shariat) Application Act, 1937 was passed by the Brush Government in 1937. This Act abrogated the custom and restored to Muslims their own personal law in almost all matters.

In *criminal matters* also, the Islamic Law governed the Indian population irrespective of religion of the offender. It was decided that Islamic criminal law would remain in force until the Company's Government thought fit to order otherwise for a longer time till the year 1860, when the Indian Penal Code and the Code of Criminal Procedure were passed.

As far as the *laws of evidence* was concerned, Islamic Law of evidence was in vogue till the passing of the Evidence Act, 1872.

ISLAMIC LAW IN INDIA: PRESENT POSITION[viii]

a. Under Indian Constitution

The personal law of any community is not directly or indirectly protected by the Constitution of India. The right to religious freedom under *Article 25*[ix] includes both belief in and practice of religion, but it is qualified right to be ensured by the State *"subject to public order, morality*

and health." It also does not prevent the State from making laws for *"regulating or restricting any economic, financial, political or other secular activity associated with religious practice; or providing for social welfare and reform."* The courts have ruled in many cases that only those practices, of whichever religion, as are its essential parts are to be protected under Article 25.

All personal laws are applied as parts of the country's civil law and not as part of any religion. All of these are within the legislative competence of the State for the purpose of amendment and reform, and within the courts powers of ascertainment, interpretation and application of laws. Under *Article 372*[x] of the Constitution all laws in force before the commencement of the Constitution are to remain in force *"until altered or repealed or amended by a competent legislature or other competent authority"* - and no personal law is excluded from the ambit of this provision.

The Concurrent List of subjects for legislation in *Schedule VII* of the Constitution places within the jurisdiction of both the Union and the States *"marriage and divorce; infants and minors; adoption; wills, intestacy and succession, joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law*."[xi] The provision fully applies to the Muslims.

Article 44[xii] in *Part IV* of the Constitution containing Directive Principles of State Policy (Non-justiciable as per Article 37)[xiii] says that the *"State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."* The direction, notably, is not to "enact" such a code straight away but to make efforts to "secure" possible uniformity in civil laws. In a number of cases various Benches of the Supreme Court have reminded the government of this policy directive under the Constitution but have respected its non-justiciable nature and refrained from issuing any instruction to the government in this regard.

b. Under Personal Law

In India there is a three-tier system of family law and succession which may be classified as follows:

- community-specific laws applicable to followers of different religions of the country and generally known as personal laws,

- civil laws available to all of them as an alternative to their personal laws on these subjects; and
- general laws having a bearing on family relations and succession compulsorily applicable to all persons irrespective of their religion and personal law.

The personal law of Muslims is based on Islam. Islam had its origin in Arabia and from whence it was transplanted into India. In Arabia, the Prophet Hajrat Mohammed, himself an Arab, Promulgated Islam and laid down the foundation of Islamic Law The main ground work of Islamic legal system was nourished and developed by Arab-jurists and the real fountain head of Islamic jurisprudence is to be found in pre-Islamic Arabian Customs and usages of 7th century of the Christian era. The impress of social history of Arabia on Islamic Law can be clearly found. The Islamic jurisprudence in fact, includes many rules and usages of pre-Islamic customary law of Arabia, so before going to analyse the origin and development of Islamic Jurisprudence, it is very important to study pre-Islamic Arabian Society and its customs and usages.

In ***Moonshee Buzloor Ruheem v. Shumsoonissa Begum***[xiv], the Judicial Committee of the Privy Council dealing with certain remarks of the Judges of the Sudder Court of Calcutta, refusing to follow the Mahommedan Law in that case, made the following observations-

> *"There Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment*[xv] *already referred to, which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mohammedan Laws with respect to Mohammedans, and the Hindu Laws with regard to Hindus are to be considered as the general rules by which Judges are to form their decisions, and they can conceive nothing more likely to give just alarm to the Mohammedan community than to learn by a Judicial decision that their law, the application of which has been justly secured to them, is to be overridden upon a question which so materially concerns their domestic relations."*

In India, the law is, in the main, personal. This not only adds to the difficulty of legislation, but considerably enhances the risk of failure in the administration of justice. In the case of the Mohammedan Law especially, clothed as it is for the most part in the garb of an unfamiliar language, it is often extremely difficult to ascertain and apply its principles. And it is apparently

on this account that often certain reluctance is evinced to give effect to the rules of the Mussalman Law, and English Law and sometimes even Hindu Law are invoked either to cut down or to explain away the meaning of the Mohammedan Law.

What independent India inherited from its colonial past in the name of "Mohammedan law" or "Anglo-Mohammedan law" was generally a distorted version of the original Muslim law. This legacy of our colonial past has been retained in independent India for too long, despite its conflict with the Constitution of India and the international human rights law.

India does need its own code of Muslim law, and in preparing such a code legislative reforms of this law in Muslim countries can be kept in mind. In the light of the experience since the advent of independence, enactment and enforcement of a comprehensive code of Muslim law for India however seems to be a cry for the moon. In this situation the role of the judiciary in properly interpreting and restoring the original, unadulterated Muslim law is extremely important.

A former Chief Justice of India, describing the legislature, executive and judiciary as "pillars of democracy serving the society" had once observed:

> *"An obligation is cast on one pillar to be ready to additionally bear the weight and burden if another pillar becomes weak or for some reason or the other is unable to bear the weight or is in the danger of crumbling*."[xvi]

CONCEPT OF MARRIAGE AND DIVORCE UNDER HOLY QUR'AN[xvii]

a. Marriage

The law on marriage is found in the *Qur'an* mainly in Chapter II and in a few verses of some other Chapters. One of these *[IV: 21]* describes marriage as *misaq-e-ghaliz* (solemn covenant); another calls it a *hisn* (fort)- to the security of which the parties get into and therefore become *muhsan* (protected).

It is a great folly to see marriage in Islam as merely a contract. Those who do so confuse substantial aspects of the institution with the form of marriage under Muslim law, which involves no essential rites, and the contractual freedom it offers to the parties to an intended

marriage beyond the legally prescribed essentials. The form of marriage in Islam is like that in a civil marriage, though it is now universally supplemented with religious rites; and the contractual freedom is aimed at protecting women from exploitation by the male partners. Neither of these detracts an iota from the sanctity of marriage asserted by the Holy Qur'an. Even if a Muslim marriage is a contract, it is not an ordinary but a sacred contract.[xviii]

b. Divorce

Divorce was most certainly not introduced by Islam; it was rampant in the Arab society of the time and Islam tried to gradually reform it in a very humane way. The *Qur'an [IV:19]* discouraged divorce by telling men that a wife who they do not like may be carrying some divine good for then The Prophet declared divorce to be *abghad-ul-mubahat indallah* (worst of all permitted things in the eyes of God) and warned the people: *"Enter into marriage and do not dissolve it. God curses those who change their life partners for the sake of pleasure."*

The Qur'anic law on divorce found in Chapters II, IV and LXV was indeed much ahead of its time. It laid essential conditions and procedure for divorce and issued warnings against their violation. Judiciously read together, they confirm the truth of the late *Justice Krishna Iyer's* observation that *"a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce."*[xix]

Muslim law in fact stands for what is now known as the breakdown theory of divorce. Certainly it does not treat marriage as an indissoluble union and does lay down rules to ensure that marriages are saved and divorce is avoided. If a marriage irreparably breaks, Muslim law permits an out-of-court divorce at the instance of either party or by their mutual consent, and prescribes procedures for all these courses of action.

No other aspect of Muslim law has been so gravely misunderstood and so blatantly misused in the society as its rules relating to divorce. In popular textbooks on Muslims law one finds statements like these, drawn from old judicial decisions or made by way of comments on them:

- "any Mohammedan may divorce his wife at his mere whim or caprice"
- "there is no occasion for any particular cause for divorce, mere whim is sufficient.
- "impropriety of the husband's conduct would in no way affect the legal validity of a divorce effected by the husband."

Such statements may be reflecting the unfortunate reality of a terrible misuse of Muslim law of divorce in the society but it can by no means be treated as legal propositions indicating the Muslim law on subject. [xx]

TALAQ-UL-BIDDAT: AN OVERVIEW[xxi]

Traditional interpreters of Sunni law give effect to a *talaq* even if pronounced by a man in violation of the Quranic law and procedure for divorce explained above. It is called *talaq-ul-bidat* (innovative divorce), opposite of *talaq-us-sunnat* (divorce as per the prescribed law and procedure). According to them a *talaq-ul-bidat* is *"sinful but effective*"- a strange proposition rendered into English as "bad in theology but good in law". Some instances of the so-called *talaq-ul-bidat* are as follows:-

(a) The law says that a *talaq* pronounced for the first or the second time ever in married life will be essentially revocable within the prescribed time limit. Yet, people dissolve their marriage forthwith by adding to their pronouncement of *talaq* the word baen (irrevocable).

(b) If a man adds the word "three" or its equivalent to his *talaq* pronouncement, or repeats the word *talaq* thrice, this will have the effect of a third-time *talaq* instantly dissolving the marriage with no room either for revocation of divorce during *iddat* or for renewal of marriage ever after that. This is called *"triple talaq."*

These forms of *talaq-ul-bidat* are not recognized by the *Ahl-e-Hadith* section of the Sunni Muslims and also under all schools of Shia law.

There is no verse in the Quran that can be interpreted or stretched to mean approval of the so-called triple *talaq*. As regards the Hadith, the Prophet was infuriated when somebody pronounced triple *talaq* and had condemned it as "*playing with the book of God while I am still alive*." Years after the Prophet's demise his *second Caliph, Umar,* gave effect to triple *talaq* in some cases at the insistence of the wives, but after inflicting on the husband the traditional punishment of flogging. It is shocking that his action should have been treated as a binding precedent for giving effect to such an unlawful and repulsive action in every case, even against the wishes of a repentant husband and the aggrieved wife.[xxii]

Whatever be the origin of triple *talaq*, it seems absolutely unintelligible why a *talaq* pronounced in violation of the prescribed law and procedure, which by a consensus in religious circles is a sinful act, should be given effect by law.

Very unfortunately Muslim men in India are blissfully unaware of the true Islamic procedure for *talaq* explained above and believe the so-called triple *talaq* to be the only way of divorcing their wives. The theologians always declare it to be effective, even if unintended, in disregard of the ruling of an eminent Islamic scholar:

> *"If the word 'three' was used with talaq only to put emphasis that it will be counted and have the effect of a single talaq only."*[xxiii]

This is indeed a devastating state of affairs playing havoc with Muslim women. An eminent Muslim theologian of the subcontinent has lamented:

> "*Due to ignorance Muslims generally believe that divorce can be given only through triple-divorce formula, although it is an innovation and a sin leading to terrible consequences. If people knew that triple divorce is unnecessary and even a single talaq would dissolve the marriage leaving room for remarriage innumerable families could have been saved from destruction".*[xxiv]

The distortion of the Muslim law of divorce has now unfortunately reached such ridiculous heights that triple *talaq* is professedly pronounced in some cases by phone, SMS or e-mail. This is an absurdity that militates against the spirit and rationale of the true Islamic law on the subject.[xxv]

SHAYARA BANO JUDGMENT[xxvi]

a. Facts of the Case in Brief[xxvii]

Ms. Shayara Bano and her husband, Mr. Rizwan Ahmed, got married in April 2002 in Uttar Pradesh. Ms. Bano claimed that her husband 'compelled' her family to give dowry for the marriage. She stated that her husband and his family drugged, abused, and eventually abandoned her while she was sick when her family could not provide additional dowry. In October 2015 Mr. Ahmed divorced Ms. Bano through the practice of talaq-e-biddat, also known as instantaneous triple talaq. Talaq-e-biddat is a religious practice that allows a man to divorce his wife instantly by saying the word 'talaq' thrice. The practice does not require the wife's consent.

Ms. Bano filed a writ petition at the Supreme Court in February 2016 challenging the constitutionality of talaq-e-biddat, polygamy, and nikah-halala. Polygamy as an Islamic religious practice allows men to marry more than one woman at a time. If a Muslim woman wants to remarry their first husband following a divorce, nikah-halala requires them to first marry and subsequently divorce her second husband.

Ms. Bano claimed that these practices violate the Right to Equality, the Right against Discrimination, and the Right to Livelihood. She further argued that these practices were not protected by the Right to Freedom of Religion—religious freedom is subject to other fundamental rights, public order, morality, and health.

On February 16th, 2017, the Hon'ble Supreme Court directed the ***All India Muslim Personal Law Board (AIMPLB),*** the ***Union Government***, and women's rights groups such as the ***Bebaak Collective*** and the ***Bhartiya Muslim Mahila Andolan***, to give written submissions addressing the matter. All of these groups, besides the AIMPLB, filed submissions in support of Ms. Bano.

While the AIMPLB conceded that Shariat strongly condemns the practice of talaq-e-biddat, they argued that the Court could not review uncodified Muslim personal law. They further argued that these practices were essential to Islam and protected by the Right to Freedom of Religion.

b. Issues raised before Court[xxviii]

In the case of Shayara Bano (supra) the issue that were before the Hon'ble Supreme Court are as follows:-

- Whether Triple *Talaq* has any legal sanctity; and
- Whether the Muslim Personal Law (Shariat) Application Act, 1937[xxix] (hereinafter referred to as "the 1937 Act") can be said to recognise and enforce Triple *Talaq* as a rule of law to be followed by the courts in India.

c. Gist of Arguments Advance on Behalf of Petitioner[xxx]

- The petitioners, supported by the Union of India, contended that Triple *Talaq* is an anachronism in today's day and age and, constitutionally speaking, is anathema. Gender discrimination was put at the forefront of the argument, and it was stated that even

though Triple *Talaq* may be sanctioned by the Shariat law as applicable to Sunni Muslims in India, it is violative of Muslim women's fundamental rights to be found, more particularly, in Articles 14, 15(1) and 21 of the Constitution of India.[xxxi]

- They also contended that Triple *Talaq* is specifically sanctioned by statutory law the 1937 Act vide Section 2 of the 1937 Act[xxxii] and what is sought for is a declaration that Section 2 of the 1937 Act is constitutionally invalid to the aforesaid extent.

d. *Gist of Argument advance by All India Muslim Personal Law Board* [xxxiii]

- The AIMPLB contended the proposition that Personal Laws are beyond the pale of the fundamental rights chapter of the Constitution and hence, cannot be struck down by this Court. According to them, in this view of the matter, the Court should fold its hands and send Muslim women and other women's organisations back to the legislature, if Triple *Talaq* is to be removed as a measure of social welfare and reform under Article 25(2), the legislature alone should do so.
- The Muslim Personal Board has further contended that Section 2 of the 1937 Act, is not in order to apply the Muslim Law of Triple *Talaq*, but is primarily intended to do away with custom or usage to the contrary, as the non obstante clause in Section 2 indicates. Therefore, the Muslim Personal Law of Triple *Talaq* operates of its own force and cannot be included in Article 13(1) as "laws in force".

e. *Majority Decision of the Court*[xxxiv]

The Hon'ble Supreme Court in Shayara Bano (Supra) by majority of 3:2 has held the practice of pronouncing triple *talaq* as unconstitutional on the grounds:

- That *talaq*-ul-biddat is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it; &
- That the 1937 Act, insofar as it seeks to recognise and enforce Triple *Talaq*, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognises and enforces Triple *Talaq*.
- The judgment of Hon'ble Supreme Court in Shamim Ara,[xxxv] which has held the practice of Triple *Talaq* as violative of the procedure as mentioned in holy Qura'n was

upheld, and expressly endorsed. The Supreme Court further held that-What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.[xxxvi]

f. The Dissenting Judgment

It is pertinent to note that in the practice of triple *talaq* was declared unconstitutional by a thin majority of *3:2*, and a dissenting opinion was expressed by two Hon'ble Judge namely: *Hon' ble Mr. J.S. Khehar, CJI., and Hon'ble Mr. Abdul Nazeer, J.* The dissenting judgment dealt with the series of issues and reached to conclusion that the practice of triple *talaq* is a matter of Personal law and the legislature is appropriate and competent to legislate in this behalf, and judicial intervention in the matter of Personal Law is beyond power of the court, as mandated by the Constitution of India.

The issues framed in dissenting opinion and the decisions thereon[xxxvii] as given by the Hon'ble Court are as follows:-

(i) Does the judgment of the Privy Council in Rashid Ahmad case, [xxxviii] upholding "*Talaq*-e-Biddat", require a relook?

- The Hon'ble Supreme Court held that despite the decision of Rashid Ahmad case on the subject of "*Talaq*-e-Biddat", by the Privy Council, the issue needs a fresh examination, in view of the subsequent developments in the matter.

(ii) Has "*Talaq*-e-Biddat", which is concededly sinful, sanction of law?

- The Hon'ble Supreme Court held that despite the practice of "*Talaq*-e-Biddat" being considered sinful, it was accepted amongst Sunni Muslims belonging to the Hanafi School, as valid in law, and has been in practice amongst them.

(iii) Is the practice of "*Talaq*-e-Biddat", approved/disapproved by "hadiths"?

- The Hon'ble Supreme Court held that it would not be appropriate for it to record a finding whether the practice of "*Talaq*-e-Biddat" is, or is not, affirmed by "hadiths", in view of the enormous contradictions in the "hadiths", relied upon by the rival parties.

(iv) Is the practice of "*Talaq*-e-Biddat", a matter of faith for Muslims? If yes, whether it is a constituent of their "Personal Law"?

- The Supreme Court held that "*Talaq*-e-Biddat" is integral to the religious denomination of Sunnis belonging to the Hanafi School. The same is a part of their faith, having been followed for more than 1400 years, and as such, has to be accepted as being constituent of their "Personal Law".

(v) Did the Muslim Personal Law (Shariat) Application Act, 1937 confer statutory status to the subjects regulated by the said legislation?

- The Hon'ble Supreme Court held that the contention of the petitioners that the questions/subjects covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be "Personal Law", and got transformed into "statutory law", cannot be accepted, and was accordingly rejected.

(vi) Does "*Talaq*-e-Biddat", violate the parameters expressed in Article 25[xxxix] of the Constitution?

- The Hon'ble Supreme Court held that "*Talaq*-e-Biddat" does not violate the parameters expressed in Article 25 of the Constitution. The practice is not contrary to public order, morality and health. The practice also does not violate Articles 14, 15 and 21 of the Constitution[xl], which are limited to State actions alone.

(vii) Does Constitutional morality effect "*Talaq*-e-Biddat"?

- The Hon'ble Supreme Court held that the practice of "*Talaq*-e-Biddat" being a constituent of "Personal Law" has a stature equal to other fundamental rights conferred in Part III of the Constitution. The practice cannot therefore be set aside on the ground of being violative of the concept of the constitutional morality, through judicial intervention.

(viii) Is there any need to reforms "Personal Law" in India and extent of intervention by Constitutional Courts?

- The Hon'ble Supreme Court held that reforms to "Personal Law" in India, with reference to socially unacceptable practices in different religions, have come about only by way of legislative intervention. Such legislative intervention is permissible under Articles 25(2) and

44, read with Entry 5 of the Concurrent List, contained in the Seventh Schedule to the Constitution. The said procedure alone needs to be followed with reference to the practice of "*Talaq*-e-Biddat", if the same is to be set aside.

(ix) Impact of international conventions and declarations on "*Talaq*-e-Biddat"

- The Hon'ble Supreme Court held that international conventions and declarations are of no avail in the present controversy, because the practice of "*Talaq*-e-Biddat", is a component of "Personal Law", and has the protection of Article 25 of the Constitution.

CONCLUSION

The Hon'ble Supreme Court in decision of ***Shayara Bano (supra)*** has expressly and unequivocally declared the practice of pronouncing *talaq*-ul-biddat, popularly known as triple-*talaq*, as unconstitutional being violative of Article 14 of Constitution of India emphasizing upon the irrevocability, lack of procedure to attempt mandatory reconciliation as mandated by Qur'an itself, and deprecated its use as a tool to oppress women.

But, the dissenting opinion emphasized on the nature of Personal Law affecting Public Morality and law in force in India affecting Constitutional Morality, for which judicial intervention is necessitated. It laid emphasis on role of Legislature on enacting appropriate legislation in order to deal with the practice of triple-*talaq* and Court's inability to interfere with personal laws of any particular religion, which gain protection and impetus *vide* Article 25 of the Constitution of India.

Indian Parliament in the year 2019 enacted the legislation, namely, the *Muslim Women (Protection of Rights on Marriage) Act, 2019*,[xli] to declare the instant divorce granted by pronouncement of *talaq* three times as *void and illegal*. It provides for imprisonment for a term up to 3 years and fine to the husband who practiced instant *Talaq-ul-Biddat*.

Prima facie, the statutory rights and protection as provide by the Act, 2019 seem to be providing efficacious remedy to any aggrieved Muslim women. But question that remains unanswered is, as to how many Muslim women will be able move the appropriate Court, and among them how many will substantially get the benefit and protection of the same. This question and position can only be analyzed in years to come, with support of requisite data. At

this stage, it will not be appropriate to comment upon efficacy of available remedy without sufficient data to substantiate the same.

ENDNOTES

[i] *Shayara Bano v. Union of India*, (2017) 9 SCC 1
[ii] Refer: (i) Tahir Mahmood , *Muslim Law in India and Abroad* (Universal Law Publishing, 2nd edn., 2016, ISBN: 978-93-5035-697-5); (ii) I. Mulla, *Mulla on Mohammedan Law* (Dwivedi Law Agency, Allahabad , 2nd Reprint, 2008, ISBN: 81-89619-04-7); (iii) Abdullah Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary* (Kitab Bhavan, New Delhi, 1994, ISBN: 81-7151-196-1)
[iii] Aby Umarah-Sayings 217
[iv] 570-632 AD
[v] *The Angora Reform-Lectures* delivered at the centenary celebrations of the University College, London-1927, pp 30-31
[vi] *Supra* note 2
[vii] *Supra* note 2
[viii] *Supra* note 2
[ix] 25. Freedom of conscience and free profession, practice and propagation of religion:-
(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
[x] 372. Continuance in force of existing laws and their adaptation:-
(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority
(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law
(3) Nothing in clause (2) shall be deemed
(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or
(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause Explanation I The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas Explanation II Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect Explanation III Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force Explanation IV An Ordinance

promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

[xi] List III, Entry 5

[xii] 44. Uniform civil code for the citizens:- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

[xiii] 37. Application of the principles contained in this Part- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

[xiv] *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*, (1867) 11 M.I.A 551

[xv] Regulation IV of 1793, § 15

[xvi] RC Lahoti, *Lecture on Judicial Activism*, Delhi, 8 November 2004

[xvii] *Supra* note 2

[xviii] *Noor Mohammad v Mohammad Ziauddin*, AIR 1992 MP 244

[xix] *A. Yousuf Rawther v Sowrummo*, AIR 1971 Ker 261.

[xx] Tahir Mahmood , *Muslim Law in India and Abroad* (Universal Law Publishing, 2nd edn., 2016, ISBN: 978-93-5035-697-5)

[xxi] *Supra* note 2

[xxii] *Parveen Akhtar v Union of India*, 2003 (1) LW (CH) 115: 2003 (1) LW 370)

[xxiii] Ashraf Ali Thanavi, *Behishti Zewar*, Vol. IV, 29:13

[xxiv] Abul Ala Maududi, *Huqooq-al-Zanjain*, 9th ed 1964, p 10

[xxv] *Supra* note 16

[xxvi] *Supra* note 1

[xxvii] https://www.scobserver.in/cases/shayara-bano-union-india-triple-talaq-case-background/

[xxviii] *Supra* note 1, ¶ 1 & 32

[xxix] Act No. 26 of 1937

[xxx] *Supra* note 1, ¶ 20

[xxxi] 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth;

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public

(3) Nothing in this article shall prevent the State from making any special provision for women and children

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes;

21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

[xxxii] § 2. Application of Personal Law to Muslims:- 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 properly 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).

[xxxiii] *Supra* note 1, ¶ 31

[xxxiv] *Supra* note 1, ¶ 104

[xxxv] *Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 : 2002 SCC (Cri) 1814

[xxxvi] *Supra* note 1, ¶ 27

[xxxvii] *Supra* note 1, ¶ 383

[xxxviii] *Rashid Ahmad v. Anisa Khatun*, 1931 SCC OnLine PC 78 : (1931-32) 59 IA 21 : AIR 1932 PC 25
[xxxix] *Supra* note 9
[xl] *Supra* note 31
[xli] Act 20 of 2019 (w.r.e.f. 19-09-2018)