# ARBITRARY ARBITRARINESS: A CRITIQUE OF THE SUPREME COURT'S JUDGEMENT IN SHAYARA BANO V UNION OF INDIA

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**ABSTRACT**

*Arbitrariness has long been a ground used by courts to strike down administrative action in India. Its applicability to legislation has been a matter of contention until the issue was put to rest by the Supreme Court of India in Shayara Bano v Union of India, where it was used by Justices Nariman, Joseph and Lalit to strike down triple talaq as unconstitutional. However, this line of reasoning is philosophically and jurisprudentially unsound, and may need re-consideration though the larger outcome of the triple talaq case is correct. The central idea with which I write this paper is that while subjecting executive action to the doctrine of arbitrariness may have been constitutionally envisaged, subjecting Parliamentary action to such standards is absolutely not so.*

## I. Introduction

A Constitution Bench of the Supreme Court of India "set aside" *talaq-e-biddat* (or "triple talaq") in *Shayara Bano v Union of India.*[1] While the judgement was initially considered to be a 3-2 judgement against the legal validity of triple talaq, a closer scrutiny leaves us with an altogether absurd 2-1-2 result![2] Justice Kurien

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1 *Shayara Bano v Union of India*, (2017) 9 SCC 1, ¶ 395.

2 See Girish Shahane, *Secular civil code: with triple talaq struck down its time to reform other unjust faith based laws*, Scroll.in, available at

Joseph agrees with Justice Nariman's judgement on behalf of himself and UU Lalit to the extent that Section 4 of the Shariat Act is "arbitrary", but disagrees with Nariman's conclusion that triple talaq is a part of Islamic jurisprudence.[3] While a majority of judges accept the proposition that the triple talaq has no legal sanctity, the manner in which they arrive at it is quite contradictory and hard to reconcile.[4]

Assuming for a moment that the ratio of this case is that a majority of judges agreed upon the finding that Section 4 of the Shariat Act is unconstitutional, the manner in which this conclusion has been arrived is debatable. While the impact of the judgement on Muslim personal law and Muslim women's rights remains to be seen, it is noteworthy for one other thing: Nariman's judgement has tried to put to rest a controversy that arose since the judgement of the Supreme Court in *Mardia Chemicals v Union of India*,[5] namely the question of whether a law made by Parliament could be held unconstitutional on the ground of arbitrariness alone. Doubt was cast upon the correctness of *Mardia Chemicals* in *Subramanian Swamy v CBI*[6] and it was referred to a Constitution Bench in the context of the validity of Section 6-A of the Delhi Special Police Establishment, 1946. However, the eventual judgement of the Constitution Bench made no reference to arbitrariness, preferring to strike down Section 6-A only on the basis that it created a classification which had no reference to the purposes of the law.[7]

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https://scroll.in/article/848142/secular-civil-code-with-triple-talaq-struck-down-its-time-to-reform-other-unjust-faith-based-laws last seen on 05/12/17.

3 *Shayara Banov* ¶ 5.

4 I have consciously avoided using the term "majority judgement" in this comment precisely because it is hard to call any of the three judgements a "majority judgement" and it is best to identify them by the name of their authors.

5 (2004) 4 SCC 311.

6 (2005) 2 SCC 317.

7 *Subramanian Swamy v Union of India*, (2014) 8 SCC 682.

*Prima facie*, it seems Nariman's judgement has finally settled the matter. The Supreme Court also seems to think so since three judges in *Navtej Johar v Union of India*[8] cite *Shayara Bano* as an authority for the proposition that a law made by Parliament can be declared as unconstitutional on grounds of being "arbitrary".[9] A majority of the opinions in *Navtej Johar*, hold that Section 377 of the Indian Penal Code if "arbitrary" for criminalizing homosexual acts.

While the eventual outcomes in both *Shayara Bano* and *Navtej Johar* are correct, it is my argument in this article that relying on the doctrine of arbitrariness to declare the enforcement of triple talaq or Section 377 unconstitutional simply does not hold up to scrutiny. I argue that failure in legal and logical reasoning apart, it vastly expands the power of judicial review into the territory of questioning legislative wisdom itself, and not just testing whether a law is constitutionally valid or not.

In laying out my argument for the above proposition, I will first trace the link between arbitrariness and inequality as articulated by courts in India. The next part of this comment will analyse Nariman's judgement in detail, breaking down his argument for holding triple talaq as being unconstitutional. The concluding part of this article will summarise the argument against arbitrariness as a ground to strike down legislation and why there is no constitutional basis *at all* for saying that arbitrariness is a ground to strike down Parliamentary legislation.[10]

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8 2018 SCC Online SC 1350.

9 *Navtej Johar*, ¶ 238, 336, 523 in the judgements of CJI Misra, and Nariman and Chandrachud JJ respectively.

10 For the purposes of this paper, Parliamentary legislation includes laws made by Legislative Assemblies in the State.

## II. Conceptions of arbitrariness in Indian law: EP Royappa to Mardia Chemicals and Malpe Vishwanath

Arbitrariness, simply put, is a lack of reason.[11] Justice Bhagwati's concurring judgement in *EP Royappa v State of Tamil Nadu*[12] is ostensibly the first to link arbitrariness, as a ground to strike down executive action, with the Article 14 guarantee of equality.[13] Though it was later emphasized in *Maneka Gandhi v Union of India*,[14] the first time the Supreme Court used the doctrine arbitrariness as expounded in *Royappa* to strike down executive action seems to be in *Air India v Nargesh Meerza*[15]where it was held that the service regulations governing female air crew of Air India were "unreasonable and arbitrary" in so far as they mandated compulsory retirement upon getting pregnant.[16]

Bhagwati's attempt to link arbitrariness with Article 14 came in for severe criticism from HM Seervai.[17] Seervani makes four separate arguments as to why the "new doctrine", as he calls it, is untenable.[18] He finds Bhagwati's statement of the "new doctrine" logically fallacious and unhinged from the distinction between the action of a person which may be arbitrary and laws made by a body.[19] An arbitrary law, according to Seervai, may better describe a

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11 TAO Endicott, *Arbitrariness* Canadian Journal of Law and Jurisprudence Volume 27, Issue 1 page no 49-71, (2014);.

12 1974 SCR (2) 348.

13 That does not mean that the test of reasonable classification under Article 14 did not involve some element of "non-arbitrariness" even prior to *Royappa*. See Shankar Narayanan, "*Rethinking Non-arbitrariness*", National Law School Journal 134 2017.

14 (1978) 1 SCC 248.

15 (1981) 4 SCC 675.

16 *NargeshMeerza*., ¶ 82.

17 HM Seervai, *Constitutional Law of India*, Vol I 436-441 (4th Edition, 2015).

18 HM Seervai, *Constitutional Law of India*, Vol I 438 (4th Edition, 2015).

19 HM Seervai, *Constitutional Law of India*, Vol I 441 (4th Edition, 2015).

dictatorial or a monarchical form of government where all law making power is vested in one person, and consequently has no relevance in a constitutional system where a body set up by the constitution is given law making power.

While arbitrariness as a facet of inequality was the basis for striking down delegated legislation from as far back as *Nargesh Meerza*, it had never been used to strike down laws themselves until *Mardia Chemicals v Union of India.*[20] *Mardia Chemicals* used an "extra-constitutional test" namely that of arbitrariness,[21] to strike down Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) as being arbitrary and therefore violative of Article 14 (implicitly following *Royappa*).

*Mardia Chemicals* however, makes no mention of *State of AP v McDowell's Ltd.*[22]where the court had rejected the notion of a parliamentary law being struck down for being "arbitrary". *McDowell's* makes a constitutional argument *against* giving courts the power to strike down laws on grounds of arbitrariness – that legislatures, which are elected by the people, are likely to know what is best and therefore should not be second guessed by the courts. In doing so, *McDowell* walks a fine line between questioning the very basis for judicial review and allowing the courts to question the wisdom of the legislature in every matter.

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20 Supra 6.

21 Abhinav Chandrachud, "*How Legitimate is Non-Arbitrariness? Constitutional Invalidation in Light of Mardia Chemicals v Union of India*",2(Indian Journal of Constitutional Law 179 (2008).

22 *State of AP v Mcdowell & Co. And Ors.*,(1996) 3 SCC 709. In tracing the genealogy of arbitrariness, it would not be amiss to mention *State of Tamil Nadu & Ors v Ananthi Ammal& Ors.*,(1995) 1 SCC 519, ¶ 17, where part of a Tamil Nadu law was struck down as being ultra vires Article 14 because it was "wholly unreasonable" (). However, in *McDowell* this was explained away as actually referring to discriminatory treatment and not arbitrariness.

Does Nariman's judgement in *Shayara Bano* complete the trajectory of arbitrariness while adequately addressing the concerns mentioned above?

Respectfully, it does not.

## III. Arbitrariness as a ground to strike legislation: An analysis of Justice Nariman's opinion in Shayara Bano

Nariman begins by tracing the history of Article 14 and arbitrariness not only to *Royappa* but also to earlier judgements such as *SG Jaisinghani v Union of India*[23]and *Indira Gandhi v Raj Narain.*[24]Interestingly, he offers a new basis for linking Article 14 and arbitrariness – the rule of law. While no doubt arbitrary *decisions* of government authorities are destructive of the rule of law, it is highly doubtful if one can erase the category distinction between a law and an executive action in one stroke - to say that arbitrary *laws* are also against the rule of law. While the attributes of the rule of law are well known and have been discussed by several legal philosophers,[25] laws being *necessarily* informed by reason is not one of them. The necessary implication of Nariman's attempt to link arbitrariness with rule of law and Article 14 is that the judicial review of laws becomes a vastly wider exercise – rather than seeing whether a law conforms to the Constitution, it now becomes the judge's task to see whether the law is sufficiently *justified.* This is not per se problematic. The Constitution requires courts to go into the justification for and/or reasonableness of laws in the context of the fundamental freedoms protected under Article 19, religious freedom under Article 25 and

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23 *SG Jaisinghani v Union of India & Ors.*,(1967) 2 SCR 703.

24 *Indira Gandhi v Raj Narain*,1975 Supp SCC 1.

25 See for instance, Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (edition,1979).

26, and in the context of reservations under Articles 15(3) and 16(3). However, in each of these instances, there are specific grounds on which the court is required to test laws for their reasonableness – something lacking entirely in relation to Article 14, which makes reading arbitrariness into it problematic. This effectively means that the court can question the Parliament as to *why* it is making certain laws, and not the how (as it is meant to). While courts are constitutionally permitted to ask *why* in the context of certain restrictions being imposed Parliament, it would be wholly defeating of parliamentary democracy if every law has to be justified to the courts on grounds beyond those provided in the Constitution.

Indeed, this concern is raised by Jeevan Reddy in *McDowell*, which Nariman addresses at two levels. First, it is implied that *McDowell's* ignores two previous binding judgements, namely *Ajay Hasia v Khalid Mujib Sehravardi*[26]and *Dr. KR Lakshmanan v State of TN*.[27]Second, it is pointed out that substantive due process, which is undoubtedly a part of Indian law, also requires that laws be struck down on grounds of being "arbitrary".

Both these claims need to be addressed.

The reference to *Ajay Hasia* as a binding judgement is somewhat bewildering as the case did not involve a challenge to any statutory law at all. The passage cited can, at best, be considered a passing observation and it's a stretch to hold that it's an authority for the proposition that laws can *necessarily* be tested for arbitrariness. As far as the *Lakshmanan* case is concerned, it is so contradictory (using "discriminatory" and "arbitrary" interchangeably) that it is hard to

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26 (1981) 1 SCC 722.
27 (1996) 2 SCC 226.

even point out what the ratio of the case is.[28] It has not been followed in any subsequent case by the Supreme Court but has been distinguished in *Union of India v Elphinstone Spinning and Weaving Co Ltd.*[29]

The second claim, while partially true - substantive due process is indeed protected under the Constitution – it is not quite clear how Nariman traced this to Article 14 instead of Article 21. He cites his own judgement in *Mohd Arif v Supreme Court of India*,[30]but does not point out that the case was decided on the test of Article 21 and not Article 14. Merely because a law taking away life and liberty under Article 21 should not be arbitrary and unreasonable, it does not automatically follow that a law can be struck down as a violation of Article 14 for being "arbitrary". Nariman seems to use "substantive due process" as a wand to brush side constitutional concerns without actually explaining what it has to do with the present case.

As with cases starting from *Royappa*, Nariman never clarifies what it means for a Parliamentary law to be "arbitrary" in the course of his judgement. The definition of "arbitrarily" offered in the judgement[31] and repeated in *Navtej Johar* applies to the decision of an individual and makes no sense when applied to the norms set out by a body. Even on the facts of the case, it has been difficult to parse whether the practice of triple talaq is itself considered arbitrary or if Section 4 of the Shariat Act is for enforcing triple talaq or both. These three things mean very different things in the context of what "arbitrariness" is, but no clarity is obvious from Nariman's

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28 See *A Varadharajan v State of Tamil Nadu*, (2004) 1 LW 436, ¶ 20.

29 (2001) 4 SCC 139.

30 (2014) 9 SCC 737.

31 *Shayara Bano, ¶ 100 where the definition in Sharma Transport v State of AP* (2002) 2 SCC 188 *is adopted.*

judgement. It is also possible, that as with *Dr KR Lakshmanan*, *Nargesh Meerza* and *Ananthi Ammal*, Nariman means discriminatory when he says "arbitrary". The key difference between "arbitrary" and "discriminatory" is that the former does not need a comparator whereas the latter does.[32] In each of these cases, including *Shayara Bano*, there is no proper articulation of what a test for arbitrariness, in the context of laws, looks like. It suggests that Jeevan Reddy, when he caustically referred to the term arbitrary as "[a]n expression used widely and rather indiscriminately – an expression of inherently imprecise import", was not too far off the mark.[33]

In any event, Nariman's judgement holding that arbitrariness is a ground to strike down Parliamentary law directly conflicts with the Supreme Court's advisory opinion in *In Re Natural Resources Allocation*[34]where it has noted, with approval Jeevan Reddy's caution in *McDowell*.[35] This automatically makes the judgement a prime candidate for re-consideration by a larger bench (even if it does not imply overturning the result of the case). Even in *Navtej Johar*, no attempt has been made to harmonize the contradictory approaches in *Shayara Bano* and *In re Natural Resources Allocation*.

## IV. Conclusion: What to make of Nariman's reasoning

Seervai's critique of *Royappa* holds true – it is logically and legally incorrect to say that all arbitrary acts are *necessarily* violations of Article 14 as well. It is correct that some arbitrary acts may amount to violations of Article 14, but it is not necessarily so. Legally, it is not possible to impute unconstitutionality as a necessary feature of all

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32 Tarunabh Khaitan, *Equality*, first page, cited pag ein *The Oxford Handbook of the Indian Constitution*, (Madhav Khosla, edition, year).

33 *State of AP v. Mcdowell& Co. And Ors.*,¶ 43.

34 *In Re Natural Resources Allocation*,(2012) 10 SCC 1.

35 *In Re Natural Resources Allocation*,(2012) 10 SCC 1, ¶ 105-6.

arbitrary acts, whether they are laws or executive actions. *Royappa's* fallacious reasoning has been wholeheartedly embraced but applied in a terribly incoherent fashion by Nariman in *Shayara Bano* and compounded in *Navtej Johar* when applied uncritically.

Holding that legislation can be struck down for being arbitrary also features a fundamental category error – it erases all distinction between administration action under a legislation and the legislation itself. Executive action can be struck down on grounds of arbitrariness because the executive is required to act in accordance with the dictates of Parliament and cannot be based on the whims of the decision maker. Further confusion has arisen from striking down delegated legislation also as arbitrary. The law as it stands on the issue of arbitrariness and Article 14 has completely confused the legislative, judicial/quasi-judicial and executive functions of the executive, when it comes to judicial review.

On the other hand, Parliament traces its powers to the Constitution itself, as does the judiciary, and in holding that parliamentary law can be arbitrary, the judiciary is holding the Parliament to a standard that does not exist in the constitution. It is, instead, holding the Parliament to a standard developed by the judiciary itself. While Parliament is supposed to be accountable to the electorate at large, the doctrine of arbitrariness expects it to be accountable to the dictates of judges as well!

This absurd conclusion is wholly the result of the incorrect line of reasoning adopted by the Supreme Court in *Royappa*, and which should not have been extended by Nariman in *Shayara Bano*. It leads to directly what Jeremy Bentham warned us about: arbitrary rule by judges which is wholly destructive of the rule of law.[36]

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[36] Supra 11.