RATIO DECIDENDI OF PLURALITY OPINIONS

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Introduction

Ratio decidendi (hereinafter "*ratio*") of a case, is broadly put, the 'reason for the decision.'[1] It encompasses the principles formulated to arrive at the decision.[2] This paper adopts the Cross and Harris test for the determination of the *ratio*.[3] According to this test:

> The ratio decidendi is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.[4]

The exercise of determining the *ratio* holds significance because it is the *ratio* which forms a precedent and not everything that a judge says.[5] The *ratio* of a case, in which there are several judges with separate opinions, is that *ratio*, which is common to a majority of the judges. For example, in *Navtej Singh Johar v Union of India*,[6] though the judges struck down Sec. 377 of the Indian Penal Code on several grounds, one of the common grounds was that it was manifestly arbitrary.

However, this exercise of the determination of the *ratio* gets particularly complicated when a majority of judges reach the same decision using different reasoning. *Shayaro Bano v. Union of India*, in which there was 3:2 split, is perhaps one of the best examples of such a case.[7] In this case, J. Nariman and J. Lalit held that triple talaq is regulated by the Shariat Act and since it is manifestly arbitrary per Art. 14 of the Constitution, it is invalid, On the other hand

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[1] *Halsbury's Laws of England*, vol 26 (4th edn, Butterworths 1979).

[2] Decision in this paper does not refer to the final order (for e.g. whether an appeal has been accepted or dismissed), but refers to the pronouncement of the court on a distinct, identifiable legal issue. One single case can involve multiple legal issues and the *ratio* for each of them is to be determined separately.

[3] The other two tests are the Wambaugh and Goodhart test. According to the Wambaugh test, a proposition of law, if negated, should change the outcome of the case. If it does, only then is it the *ratio*. However, this test fails when there is more than one *ratio*. According to the Goodhart test, the *ratio* is not found in the reasons but in the material facts and decision of the case. This test is rejected because it neglects the role that reasons play in the determination of the ratio of a case. See, Sir Rupert Cross and JW Harris, *Precedent in English Law* (Fourth Edition, Oxford University Press 1991) ch 2.

[4] ibid 72.

[5] Sir Rupert Cross and JW Harris, *Precedent in English Law* (Fourth Edition, Oxford University Press 1991) 41: Those statements made by the way and off the cuff are called *obiter dictum* and do not operate as precedent.

[6] *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

[7] J. Nariman, J. Lalit and J. Joseph held the practice of triple talaq to be legally invalid, whereas CJ. Kehar and J. Nazeer dissented.

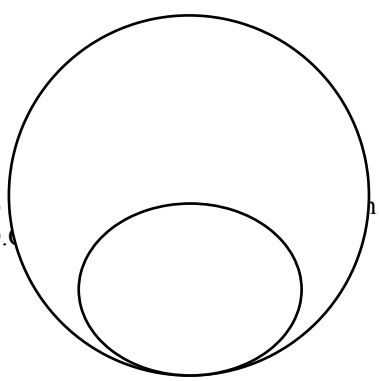
J. Joseph held that triple talaq is not regulated by the Shariat Act, but since it is un-Islamic, it is invalid. Thus, the majority use completely different paths to reach the same conclusion.

This paper considers the test to determine the *ratio* of such cases. The scope of this paper is limited to an analysis of the descriptive *ratio* (determination of the *ratio* solely based on the judgement of the case) and not the prescriptive *ratio* (determination of the *ratio* based on interpretation of the case by future judges).[8] This paper *argues* that such cases do not have a discernible *ratio*. However, they can also operate as binding precedent. Various proposals that have been put forth to determine the *ratio* of such cases have been evaluated. It has been argued that each of these approaches are incorrect. Finally, the precedential value of such cases has been considered.

Narrowest Ground Test

This test was formulated by the United States Supreme Court in *Marks v. United States*. As per this test, the *ratio* of a case is the position of the judge who concurred on the narrowest ground. The narrowest ground is that '*which the plurality must necessarily agree as a logical consequence of its own, broader position*.'[9]

Let us consider, for example, the case of *Rajasthan State Electricity Board v. Mohan Lal*. The Supreme Court had to determine whether the State Electricity Board (SEB), is "State" under Art. 12 of the Constitution. J. Bhargava held that "other authorities" in Art. 12, includes all statutory and constitutional authorities upon which powers have been conferred by law. Since the SEB had powers to issue binding directions, it satisfied the test under Art. 12. On the other hand, J. Shah in a separate opinion, disagreed with J. Bhargava's broad test, though he agreed that the SEB is "State." He held that so long as the power conferred was of a sovereign nature, the authority would be "State." His decision was a logical subset of J. Bhargava's decision. While there may be two different tests, J. Bhargava, would at least agree that bodies which have been conferred sovereign power would qualify as "State" under Art. 12.



[8] Julius Stone, 'The Ratio Of The Ratio [illegible] Law Review 597, 600.
[9] King v. Palmer, 950 F.2d 771, 781 (D.C

This test is appropriate in such a case, where one reasoning is a logical subset of another. However, this test is of no guidance when the reasoning of the judges is completely independent, as in *Shayara Bano*.

Majority of the Majority Approach

Cross suggests that when there is no consistent reasoning across the majority judges, the *ratio* should be determined by the reasoning used by a majority of the majority judges.[10] This would mean that in *Shayara Bano*, of the majority of J. Nariman, J. Lalit and J. Joseph, only the first two's judgement would determine the *ratio*, since they constitute the majority of the majority.[11] Thus, in effect, two judges in a five-judge bench would determine the proposition that is binding on lower courts.

This approach is contrary to Art. 145(5) of the Constitution according to which a judgement of the Supreme Court must have the concurrence of a majority of the judges. Moreover, such an approach would imply that we are giving greater weight to the judgement of two judges over the three other judges, who disagreed with the two. The only reason put forth in defence of this approach is that we can disregard the judgement of the minority.[12] This, however, is not a valid reason because a dissent does not mean that a five-judge bench becomes a three-judge bench. Thus, this approach must be rejected.[13]

Separation of Reasoning and Conclusion

[10] Sir Rupert Cross, 'Ratio Decidendi from Plurality of Speeches' (1977) 93 Law Quarterly Review 378, 381; See also AM Honore, 'Ratio Decidendi: Judgee and Court' 71 Law Quarterly Review 196, 198.
[11] Interestingly, the Delhi High Court, implicitly adopted such a stance in *Shahid Azad v. Union of India*, when it observed that as per *Shayara Bano*, triple talaq is unconstitutional.
[12] *Fellner v. Minister of the Interior* 1954 (4) S.A. 523 (A.D.) per J. Schreiner.
[13] *Harper v. National Coal Board*, per Lord Stephenson.

As per this approach, the reasoning and the conclusion are separated. The principle which has been followed by a majority is considered as the *ratio* of the case. Such an approach was used by a lower court in *Harper v. National Coal Board* (*Harper*), in which the Court had to determine the *ratio* of *Central Asbestos v. Dodd* (*Dodd*). In *Dodd*, the House of Lords had to determine whether the limitation period for a claim had expired. Lords Reid and Morris held that the limitation period began when the plaintiff became aware that he had a cause of action and thus held in favour of the plaintiff. Lords Salmon and Simon dissented and held that the limitation period began when the plaintiff came to know the material facts constituting the cause of action. Lord Pearson agreed with Lords Salmon and Simon, but held that knowledge was attributable to the plaintiff at a later time and thus ruled in his favour. In *Harper*, the court at first instance applied the line of reasoning followed by the dissenting Lords and Lord Pearson. However, this was later overruled by the Court of Appeal. In *Shayaro Bano*, such an approach would mean a separation of the interpretation of the Shariat Act, 1937 (since CJ. Kehar, J. Nazeer and J. Joseph followed the same interpretation), and the final outcome of the case.

The separation of the decision from the reasoning goes against the very definition of a *ratio*. Moreover, a *ratio* has authority not because it is the opinion of individual judges but because it is the reason for the order of the court as a whole. The minority judge's opinions cannot be considered for the *ratio* because the decision of the court is not based on their reasoning.[14] Moreover, if were to accept the minority's reasoning as the correct reasoning, this would imply that the two judges in the majority did not have the right reasoning. If their reasoning is not right, then their conclusion, which is based on that cannot stand. Thus, this approach must be rejected as well.

Synthesis Approach

According to Dr Goodhart, where there are differences amongst the judges, the *ratio* of the case would be the combined *ratio* of all the judges in the majority.[15] This approach as well is not appropriate. The reasons and principles that judges use to reach a conclusion would lose their value if combined all together. For example, in *Shayara Bano*, the *ratio* as per this approach would include both that triple talaq is regulated and not regulated by the Shariat

[14] Honore (n 13) 198; *Garcia v. National Australia Bank*, [1998] HCA 48.
[15] Arthur L Goodhart, *Essays in Jurisprudence and the Common Law,* (The University Press 1931) 11.

Act, 1937. Applying this approach to *Dodd*, would mean that the limitation period begins both when the plaintiff knows he has a cause of action and when he knows the material facts constituting the cause of action. Thus, this approach leads to absurd results and cannot be used to determine the *ratio*.

All four approaches that have been suggested to determine the *ratio* in are incorrect. Instead, it is argued that in such cases, the *ratio* is not discernible. The *ratio*, is the abstract principle derived from a case based on the reasons for the decision. In the absence of agreement on the path of reasoning that led to the conclusion, there can be no ratio, because no single principle has been accepted by the Court. This is also the conclusion that the Court of Appeals reached in *Harper,* where they held that *Dodd* had no discernible ratio. This limitation of the concept of *ratio decidendi* was recognized by Cross and Harris, who said that it is "*peculiarly appropriate to a single judgement*."[16] An attempt to derive the *ratio* of a case with several judgements with independent reasoning would lead to arbitrary results.[17]

Precedential Value

If such cases do not have a *ratio*, the question that follows is whether these cases can operate as binding precedent, and if so, what is binding on future courts. It is argued that the decision of the court in such cases is binding on other courts. This position can be supported on three grounds: *first,* an interpretation of Art. 141 of the Constitution; *second*, on Salmon's ultimate principles and Hart's rules of recognition and; *third*, on Raz's doctrine of pre-emption.

As per Art. 141 of the Constitution, law declared by the Supreme Court is binding. J. Subba Rao interpreted 'declared' as:

> The expression 'declared' is wider than the words 'found or made'. To declare is to announce opinion. Indeed the latter involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law.[18]

[16] Cross and Harris (n 3) 85.
[17] ibid.
[18] Golaknath v. State of Punjab

Thus, what operates as binding precedent is the decision arrived at on a legal issue, and this does not necessarily include the rationale of the decision.[19] This is also known as 'result *stare decisis*.'[20]

Some authors suggest that in the absence of a common thread of reasoning, a decision of a court should not form binding precedent. This in their opinion would allow for greater experimentation by lower courts.[21] From a realist perspective, this suggestion is problematic because it would lead to inconsistency, unpredictability and greater litigation on matters that have already been settled by a higher court. More importantly, such a suggestion assumes that the authority of a precedent is derived from the *ratio*. To the contrary, as Dworkin said, the rules of precedent confer authority on the *ratio*.[22] That rules of precedent are authoritative is underived. It is as Salmon would argue, part of certain ultimate principles that exist in law or as Hart would argue, part of the rules of recognition of a legal system.

Precedents can also be looked at as pre-emptory or second-order reasons for decisions. According to Raz, authorities 'pre-empt individual judgement on the merits of a case.' Precedents can be characterized as exclusionary reasons.[23] These are second-order reasons to act and negate the necessity of weighing up first-order reasons on the same legal issue each time. Thus, if the question of the legal validity of triple talaq were to come up again, *Shayara Bano* would act as an exclusionary reason for the court to declare it invalid. On the other hand, when a case has a *ratio* or a principle that can be abstracted from it, the principle becomes a first-order reason that can be applied in future disputes. The usage of this principle would be preferred over other principles, because it is reinforced or protected by an exclusionary reason. For example, the test of 'just, fair and reasonable' under Art. 21 would be applied in a dispute over other tests (such as the one laid down in *AK Gopalan v. State of Madras)*, because it is protected by *Maneka Gandhi v. Union of India*.

Thus, it is concluded, that cases in which the majority reaches the same conclusion, using different reasoning do not have a discernible *ratio*. However, they still operate as binding precedent.

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[19] *Waman Rao v. Union of India*, (1981) 2 SCC 362.
[20] James Hardisty, 'Reflections On Stare Decisis' 55 INDIANA LAW JOURNAL 31, 52: As per result *stare decisis* only the decision is binding on other courts. On the other hand, as per rule *stare decisis*, there is a principle of law laid down by the court which is binding.
[21] Ken Kimura, 'A Legitimacy Model for the Interpretation of Plurality Decisions' (1992) 77 Cornell Law Review 1593, 1625.
[22] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 24.
[23] Joseph Raz, *Practical Reasons and Norms* (2nd edn, Oxford University Press 1999) 144.