

RIGHTS IN
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I. INTRODUCTION

RIGHTS IN REVIEW

is an annual review of Indian Supreme Court decisions on constitutional fundamental rights cases in the year past. We began writing and publishing Rights in Review in 2014 and this is the fourth volume in the series. In 2017 we surveyed all reported decisions of the Supreme Court adjudicating fundamental rights challenges from Dec 15, 2016 to Dec 15, 2017. Once again we select cases which extend or modify existing legal doctrine, apply the law to new factual circumstances or otherwise have a significant impact on public policy or public affairs. We have identified 11 cases this year based on these criteria and the discussion below is organized into 3 substantive sections: the right to equality, life and religious freedom.

In 2017 we notice a new and significant trend for fundamental rights protection in India. The Supreme Court constitutes 5 judge constitution benches more readily to decide significant fundamental rights cases. This year we review a 9 judge bench decision recognizing the right to privacy as a fundamental right and a 5 judge bench decision declaring instantaneous triple *talaq* unconstitutional. In May 2017 there were 39 pending constitution bench cases. Constitutional law scholars have previously argued that larger benches may write more considered opinions that settle conflicting lines of precedent and lead to a more stable and principled rights adjudication in India. As the Court delivers more constitutional bench decisions in 2018 and in subsequent years, we can assess if this decisively reshapes fundamental rights adjudication in India.

Besides the big privacy judgement in *Puttaswamy*, 2017 was an important year for the protection of women's rights. *Shayara Bano* declared instantaneous triple *talaq* under Muslim personal law unconstitutional, *Independent Thought* read down the exception to the rape offence to declare child marital rape a criminal offence and *Meera Santosh Pal*

expanded reproductive rights by permitting the termination of pregnancy beyond the 20th week if there is harm to the foetus and danger to the physical and mental health of the mother. In the year of the *#metoo* movement that has reshaped popular discourse on gender relations across the world and in India, the Indian Supreme Court has contributed in good measure.

Finally, the Centre for Law and Policy Research extended its coverage of the Supreme Court beyond our annual publication of the Rights in Review. We launched the Supreme Court Observer [www.scobserver.clpr.org.in] to record and catalogue the work of the Supreme Court of India in 19 landmark cases in 2017. The Observer aims to make intelligible and accessible the Supreme Court's daily labour of putting the Constitution to work in the 21st century. It pulls together all written submissions to the Court and summarises oral arguments in an attractive yet bipartisan and measured manner. We hope that the Observer will become a veritable news source and a reliable archive of the Supreme Court for legal experts and citizens at large.

II. The Right to Equality

1. *Nikesh Tarachand Shah v. Union of India*, 2017 SCC OnLine SC 1355

Nikesh Shah challenged the constitutional validity of Section 45 of the Prevention of Money Laundering Act, 2002 ("PMLA"). Section 45 imposed two conditions on the grant of bail for offences under Part A of the Schedule to the Act¹. First, it mandated that the Public Prosecutor must be given an opportunity to oppose the bail application. Secondly, where bail was opposed, the court must have reasonable grounds to believe that the accused was not guilty of the offence and was unlikely to commit any offence while on bail. This challenge was before a 2 judge bench comprising Justices Rohinton Nariman and S. K. Kaul.

First, Nikesh Shah pointed out that when the Prevention of Money Laundering Bill, 1999 was tabled before the Parliament, the proposed Section had provided that the twin conditions for grant of bail would apply only to PMLA offences. However, when the Act was finally introduced in 2002, this was amended to include PMLA offences and offences under other legislations where the term of imprisonment is more than three years. This difference between the scope of offences covered under Section 45(1) in the Bill and the Act was at the heart of the challenge in this case.

Shah argued that Section 45 violates Article 14 as stricter bail conditions may be reasonably linked to the amount of laundered money as set out in the draft Bill but not to the entire schedule of offences included in the final amendment. Moreover, Section 45 compels the accused to disclose their defence soon after arrest when they are unaware of the case against

them. Further, he pointed out that the bail conditions were excessive and violate the cruel and unusual punishment standard in the Eighth Amendment to the US Constitution which has been read into Article 21². Shah pointed out that while a person charged of money laundering and a scheduled offence could continue on anticipatory bail throughout the trial without satisfying the twin conditions, anyone who applied for regular bail, who would have to satisfy the twin conditions under Section 45, which in practice may mean the denial of bail.

The Union responded that the classification of offences under Section 45 and the Schedule was to ensure greater punishment for money laundering offences. It defended the twin conditions in Section 45 as the expression 'reasonable grounds for believing that he is not guilty of such offence' invites a prima facie assessment of reasonable guilt by the Court and these conditions are already part of the laws governing bail, in a different form³. The Union urged that if the language of the Act is plain and straightforward the Court should be wary of reviewing the object of the Act. As Section 45 seeks to unearth black money, courts *"should be very slow to set at liberty persons who are alleged offenders of the cancer of money laundering."*⁴

Justice Nariman began by examining if Section 45 violated the Article 14 arbitrariness standard. To strike down a legislation under the 'manifest arbitrariness' standard there *'must be something done by the legislature capriciously, irrationally and/or without*

adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."⁵ The PMLA (as originally enacted) included the most heinous offences under the Indian Penal Code in Part B of the Schedule. Offences were classified into Parts A and B in the Schedule as Section 45 conditions would apply to Part B offences only if the money involved exceeded Rs. 30 lakhs. The PMLA was amended several times to alter the offences in the Schedule and increase the threshold for Section 45 application to 1 crore.⁶ The Amendment Act of 2012 transplanted all the offences under Part B into Part A of the Schedule thereby erasing the monetary threshold for the application of Section 45.

Justice Nariman pointed out that a court granting bail to a person being prosecuted simultaneously for a Schedule A offence punishable with imprisonment for over 3 years and the offence of money laundering, would have to satisfy the twin conditions imposed by Section 45 even where there was no connection between the two offences. Further, there may be persons prosecuted for the Schedule A offence, together with the person prosecuted for the money laundering offence under the PMLA, who now have to satisfy the twin conditions despite having nothing to do with the money laundering offence.⁷ Finally, someone charged with PMLA offences may secure pre-arrest anticipatory bail without the twin conditions under Section 45, but be denied post-arrest bail due to the application of these conditions.⁸

The Court held that these examples show that the manifestly arbitrary, discriminatory and unjust results that arise on the

application or non-application of Section 45, violates Articles 14 and 21. Relying on *In Re: Special Courts Bill, 1978*,⁹ the Court held that distinctions between offences based on sentence length have no rational relation to the objectives of the 2002 PMLA or to the conditions for the grant of bail.

The Court then considered whether the presumption of innocence, which is attached to any person being prosecuted of an offence, is inverted by the conditions specified in Section 45. The onerous conditions on bail imposed by Section 45 effectively detain the accused and reverse the burden of proof. In the absence of a compelling state interest, the indiscriminate application of the provisions of Section 45 violates Article 21.

The Court also accepted that excessive bail amounts or excessive fines would violate the Article 21 guarantee of the right to life.¹⁰ It affirmed the principle that "*grant of bail is the rule and refusal is the exception*".¹¹ The Court clarified that the phrase "*procedure established by law*" is the only limit to the "*personal liberty of an accused or convict ... The last four words of Article 21 are the life of that human right.*"¹²

The Supreme Court concluded that Section 45(1) of the Prevention of Money Laundering Act, 2002 was unconstitutional, as it violates Articles 14 and 21 of the Constitution. It directed that all the matters in which bail have been denied, to be heard on merits without application of the conditions contained in Section 45 in the respective courts.

2. *Binoy Viswam v. Union of India*, 2017 (7) SCC 59

Binoy Viswam, a member of the Communist Party of India, along with Ramon Magsaysay Award winner Bezwada Wilson and ex Army Officer Mr S. G. Vombatkere, filed petitions before the Supreme Court under Article 32 challenging the constitutional validity of Section 139AA of the Income Tax Act, 1961 ('ITA'). Section 139AA was inserted into the ITA by the Finance Act, 2017. It mandated the possession of an Aadhaar number before applying for a new Permanent Account Number (PAN) card or filing an income tax return. Further, sub-section (2) provided that if current PAN card holders failed to provide an Aadhaar number before 1st July 1 2017, their PAN would be deemed invalid *ab initio* (from the very beginning), resulting in the penalties set out in the ITA. These petitions were heard by a Bench comprising of Justices A.K. Sikri and Ashok Bhushan.

The constitutionality of Section 139AA was challenged on three grounds: being beyond the legislative competence of the Union, violating the right to equality under Article 14, and violating the right to trade and commerce under Article 19(1)(g). First, Binoy Viswam and the other petitioners argued that the Parliament could not amend the ITA and make the Aadhaar compulsory for filing IT returns unless it amends the core legislation, which is the Aadhaar (Targeted Delivery of Financial and Other. Subsidies, Benefits and Services) Act, 2016 ('Aadhaar Act'). Further, as enrolment for an Aadhaar number is voluntary under the Aadhaar Act, it cannot be made mandatory under the ITA disregarding the interim orders of the Supreme Court on the Aadhaar Scheme.¹³

The interim orders of the Supreme Court constitute an implied limitation on legislative powers under Article 141.

The Court found no conflict between the amendments to the ITA and the Aadhaar Act, as the Parliament has the power to make Aadhaar mandatory to curb tax evasion while it remained voluntary under the Aadhaar Act. Moreover, as the interim orders of the Court were issued when the Aadhaar scheme was an executive order and the Aadhaar Act now provides statutory cover, the earlier interim orders no longer constitute an implied limit on Parliament's legislative power.¹⁴ The Court recognized that the constitutional validity of the Aadhaar Act was before a 5 judge Constitution Bench whose decision would finally settle the issues before the Court.

Next, the petitioners argued that Section 139AA violated the Article 14 equality guarantee by mandating individuals to furnish an Aadhaar number and exempting companies from the requirement. It was argued that the requirement also discriminated between a class of citizens who voluntarily enrolled from those who did not want to enroll for an Aadhaar number.

The Court reiterated its Article 14 doctrine that a law could make reasonable classifications based on intelligible differentia that have rational or reasonable nexus to a permissible object. The Court accepted the Union's claim that 10.52 lakh out of the 11.35 lakh cases of duplicate or fraudulent PAN cards belonged to individuals, and concluded that the distinction between natural and artificial

persons was a reasonable one to prevent tax evasion.¹⁵ It rejected the argument that there could be a valid classification between those who voluntarily secured an Aadhaar number and those who chose not to, as recognizing those who oppose a particular law as a distinct class would open up every law to a challenge on this ground.¹⁶

The Court then considered the third argument of the petitioners that the penal consequences of non-compliance with Section 139AA were disproportionate and violate the right to freedom of trade under Article 19 (1)(g). They contended that only natural persons could be issued an Aadhaar number and were affected by the penalties, these penalties were an unreasonable restriction of the rights of professionals and small business owners to carry on their trade and profession. Justice Sikri recognized that the withdrawal of a PAN card would restrict the right to do business but reasoned that these restrictions are reasonable on a 'balancing' or 'proportionality' test.¹⁷ It concluded that as the Aadhaar 'unique identity' could enhance delivery of welfare services, curb corruption and black money, combat terrorism and widen the tax base, it was a reasonable restriction of the Article 19(1)(g) right.¹⁸ The Court concluded that Section 139AA of the ITA does not offend Article 19(1)(g).

Nevertheless, the Court read down the proviso to Section 139AA(2) to only have prospective effect. The failure to intimate the Aadhaar number would not render existing PAN cards of persons not enrolled for Aadhaar as invalid or invalid *ab initio*, as the rights which have already accrued to a person in law cannot be taken away. However, the court did not expressly read

down the Section 139AA(1) requirement of Aadhaar number or application details for filing of income tax returns. The Union of India has interpreted this ambiguity to mandate Aadhaar for all tax filings, thereby effectively linking Aadhaar and PAN, and overcoming the restraints imposed on Section 139AA(2).

Though the Court upheld the amendment to the ITA, it clarified that this decision was subject to the ongoing constitutional challenge to the Aadhaar Act for violations of Article 21 of the Constitution being heard in 2018.¹⁹

3. *Secretary, Mahatma Gandhi Mission v. Bharatiya Kamgar Sena*, (2017) 4 SCC 449


The Mahatma Gandhi Mission is a public charitable trust that administers two engineering colleges in Maharashtra. The Bharatiya Kamgar Sena is an unregistered body of persons comprising the teaching staff, non-teaching staff, and other employees in the two engineering colleges. The Kamgar Sena had filed a writ petition in the Bombay High Court seeking a revision of their pay scales on the basis of Fifth Pay Commission. This petition was allowed by the Bombay High Court in 2002.²⁰ Thereafter, the Mission and the Kamgar Sena reached a settlement where the non-teaching staff agreed to waive their right to claim arrears of pay under the Fifth Pay Commission and the management undertook to implement future salary revisions by the Pay Commission.²¹

After this settlement, the 6th Pay Commission was set up and announced revised pay scales. The Maharashtra Government passed orders to adopt the revised pay scale only for the teaching staff of educational institutions and not for the non-teaching staff. The Kamgar Sena filed 4 separate writ petitions²² asking the Court to direct the Mission to implement the 4th, 5th and 6th Pay Commission Reports for its non-teaching staff. The Bombay High Court allowed these petitions. The Mission thereafter appealed to the Supreme Court. This was heard by a Division Bench comprising Justices J. Chelameswar and A. M. Sapre.

The Mission argued that as it was a private unaided institution, the rights and obligations arising out of the relationship of employment between the Mission and

their employees, whether teaching or non-teaching, was purely contractual. It argued that Section 8(3) of the Maharashtra Universities Act, 1994 and the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard Code Rules, 2009 (2009 Rules) deal with non-teaching employees of aided colleges only. Further, the Maharashtra Government Resolution (GR) on 12th August 2009 applied the Pay Commission recommendations to teaching and non-teaching staff of government and government-aided colleges only. Hence, it claimed that there is no law which obliges unaided private colleges to pay 6th Pay Commission salaries and allowances to its employees whether teaching staff or non-teaching staff.²³

The Kamgar Sena contended that the State Government was not justified in directing the revision of the pay scales of only the employees of those institutions which are either directly under the control of the State Government or its instrumentalities and aided institutions. It argued that the failure to extend the same benefits to the employees of private unaided educational institutions which otherwise functioned under the control and supervision of the State Government violates Article 14.²⁴ It pointed out that artificial classifications between the teaching and non-teaching staff of all educational institutions and between the employees of aided and unaided educational institutions had no relationship with the purposes sought to be achieved by the pay revision. Though the Pay Commission recommendations were not binding on the States, the Union incentivised State adoption of the same by



undertaking a substantial portion of the financial burden. As this incentive sought to advance the provision of a living wage to workers in line with the Article 43 of the Directive Principles of State Policy, it must include the non-teaching staff of even unaided private colleges.

The Court agreed with the Kamgar Sena that though classification between aided and unaided institutions and teaching and non-teaching staff are intelligible classifications, they are not reasonable classifications with respect to the objective of these regulations.²⁵ Periodic revisions of pay scale seeks to meet Article 43 obligations of the State to endeavour to secure a living wage and conditions of work which ensures a decent standard of life for its citizens. If the State Government implemented the pay scale for the teaching and non-teaching staff of State and aided educational institutions, there was no justification in excluding the non-teaching employees of the unaided educational institutions.²⁶

The Court then examined whether the benefits could be extended to non-teaching staff of unaided institutions rather than striking down the 2009 Rules and the GR. It relied on the Constitution Bench decision in *D.S. Nakara v UOI*²⁷ where the State was directed to extend benefits uniformly to all similar situated people to affirm the Court's power to tackle inequalities through positive action. It went beyond passive neutrality to fashion an appropriate injunctive relief that eliminates discrimination in this case.²⁸ The Court also relied on the United States Supreme Court decision in *Plyler v. Doe*²⁹ which compelled the State to comply with the constitutional mandate by extending the benefit provided under a legislation to a

certain class of people who were expressly excluded from receiving that benefit.³⁰

The Court rejected the appeal and extended the benefit of the 6th Pay Commission as set out in the GR to all teaching and non-teaching staff of aided and unaided private institutions rather than declaring it unconstitutional. It rejected the Mission's argument that it was unable to pay the increased salaries and held that it was for the Mission to work out how to meet the financial liability arising out of these obligations. By applying the Pay Commission recommendations to private unaided colleges and imposing positive obligations on the State and private actors to realize Article 43, the Court has extended the scope and horizontal application of the equality guarantee to private actors.

¹ Part A of the Schedule enlists certain offences which draws imprisonment for more than 3 years under other statutes, which include the Indian Penal Code (IPC), Narcotic Drugs and Psychotropic Substances Act (NDPS), Explosive Substances Act (ESA), Unlawful Activities (Prevention) Act (UAPA), Arms Act, Wild Life (Protection) Act, Immoral Traffic (Prevention) Act (ITPA), and the Prevention of Corruption Act (POCA), amongst others.

² *Rajesh Kumar v. State through Government of NCT of Delhi* (2011) 13 SCC 706, 725

³ See *State of U.P. through C.B.I. v. Amarmani Tripathi*, (2005) 8 SCC 21, 31

⁴ *Nikesh Tarachand Shah v. Union of India*, 2017 SCC OnLine SC 1355, Paragraph 6

⁵ *Shayara Bano v. Union of India and others*, (2017) 9 SCC 1, 99

⁶ Prevention of Money Laundering (Amendment) Act, 2005 (20 of 2005); Prevention of Money Laundering (Amendment) Act, 2009 (21 of 2009); Prevention of Money Laundering (Amendment) Act, 2012

⁷ *Nikesh Tarachand Shah v. Union of India*, 2017 SCC OnLine SC 1355, Paragraph 32

⁸ *Nikesh Tarachand Shah v. Union of India*, 2017 SCC OnLine SC 1355, Paragraph 41

⁹ *In Re: Special Courts Bill, 1978*, (1979) 1 SCC 380

¹⁰ The principle has been drawn from the Eighth Amendment to the US Constitution. See *Rajesh Kumar v. State through Government of NCT of Delhi* (2011) 13 SCC 706, 725

¹¹ *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565, 588

¹² *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240, 243

¹³ Justice K. S. Puttaswamy v UOI, WP(C) 494/2012; Order dated 23.9.2013 (<http://supremecourtof-india.nic.in/jonew/bosir/orderpdfold/1811046.pdf>) and Order dated 11.8.2015 (<http://supremecourtfindia.nic.in/jonew/ropor/rop/all/334597.pdf>). Also see Constitutionality of Aadhaar Act, Supreme Court Observer. Available at <http://scobserver.herokuapp.com/court-case/constitutionality-of-aadhaar-act>

¹⁴ *Binoy Viswam v. Union of India*, 2017 (7) SCC 59, 129-132

¹⁵ *Binoy Viswam v. Union of India*, 2017 (7) SCC 59, 134

¹⁶ *Binoy Viswam v. Union of India*, 2017 (7) SCC 59, 135

¹⁷ *Binoy Viswam v. Union of India*, 2017 (7) SCC 59, 140

¹⁸ *Binoy Viswam v. Union of India*, 2017 (7) SCC 59, 145-147

¹⁹ Justice K. S. Puttaswamy v Union of India and Others, W. P. (C) 494 of 2012. See Constitutionality of Aadhaar Act, Supreme Court Observer. Available at <http://scobserver.herokuapp.com/court-case/constitutionality-of-aadhaar-act>

²⁰ *Bhartiya Kamgar Sena v. State of Maharashtra*, (2012) 3 Mah LJ 872

²¹ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 460

²² See *Bhartiya Kamgar Sena v. State of Maharashtra*, (2012) 3 Mah LJ 872

²³ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 477

²⁴ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 477

²⁵ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 482-483

²⁶ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 482

²⁷ *D.S. Nakara v Union of India*, (1983) 1 SCC 305, 315, 345

²⁸ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 486

²⁹ *Plyler v. Doe*, 457 U.S. 202 (1982), 227

³⁰ *Secretary, Mahatma Gandhi Mission and Anr. v. Bharatiya Kamgar Sena and Others*, (2017) 4 SCC 449, 487

III. The Right to Life and Personal Liberty

4. Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1

Retired Justice K. S. Puttaswamy had challenged the constitutional validity of the Aadhaar scheme in 2012. While hearing this matter, on 18th July 2017, a five judge constitution bench of the Supreme Court was confronted by the Union's argument¹ that there were conflicting judicial decisions on whether the Constitution provided for a fundamental right to privacy. The matter needed to be referred to a nine judge bench to settle this question. A bench comprising Chief Justice J.S. Khehar, Justices D.Y. Chandrachud, J. Chelameswar, S.A. Bobde, R.K. Agarwal, Abdul Nazeer, Rohinton Nariman, S.K. Kaul, A.M. Sapre began hearing this case on 19th July 2017.

Several petitioners and impleaders argued for the recognition of the right to privacy as a fundamental right. They argued that several Supreme Court judgements have recognised privacy to be a fundamental right² and that though privacy is not explicitly mentioned it may be inferred from other fundamental rights in the Constitution. They also argued that the right to life included privacy and dignity as natural rights and not merely State-granted rights.

The Union of India argued that privacy is too amorphous a concept to be elevated to a fundamental right. Further, it argued that the judicial precedents in *Kharak Singh*³ and *MP Sharma*⁴ have denied that privacy is a fundamental right. Finally, it argued that it is parliament's prerogative to amend the Constitution and not the role of the Court.

The 9 judge bench unanimously declared

that the right to privacy is a fundamental right through 6 concurring opinions. Justice Chandrachud authored the lead opinion speaking for himself, Justices Khehar, R.K. Agarwal and Abdul Nazeer. Five separate opinions were authored by Justices Chelameswar, Sharad Bobde, Rohinton Nariman, Abhay Sapre and S. K. Kaul, respectively.

Justice Chandrachud held privacy to be an inalienable natural right intrinsic to life, liberty, and dignity.⁵ He overruled *ADM Jabalpur v. S. S. Shukla*⁶ to the extent that it restrictively read the right to life and liberty.⁷ He endorsed the dissenting opinion of Justice H. R. Khanna where he held that Article 21 is not the sole repository of right to life as this right is a natural right.⁸ He located privacy in Articles 14, 19 and 21 and clarified that like other fundamental rights, privacy is not an absolute right and any restriction must be tested against Articles 14, 19 and 21 simultaneously. He concluded by doubting *Suresh Koushal v. Naz Foundation*⁹, which upheld Section 377 of the Indian Penal Code as "... the right to privacy and protection of sexual orientation lie at the core of fundamental rights guaranteed by Articles 14, 19 and 21 of the Fundamental rights ... [LGBT] rights are not so-called but are real rights founded on sound constitutional doctrine."¹⁰

Justice Chelameswar held that even if privacy is not expressly found in the Constitution, it may be implied from the phrase 'personal liberty' in Article 21. Moreover, various dimensions of privacy may flow from Article 14 and Article 19 rights.

He suggested different standards for violations of privacy rights – a reasonable classification test for Article 14; a just, fair and reasonable restriction test for Article 19; and a just, fair, reasonable and ‘compelling state interest’ to satisfy the ‘procedure established by law’ standard in Article 21.¹¹ Justice Chelameswar held that liberty enables the individual to make choices on all aspects of life including what to eat, how to dress, or what faith to follow.¹² He clarified that privacy has a negative dimension that restrains the State from intrusion, and a positive obligation on the State to take all necessary measures to protect the privacy of the individual.¹³

Justice Nariman began by celebrating the ‘three great dissents’ of Justice Fazl Ali in *A. K. Gopalan v. State of Madras*, Justice Subba Rao in *Kharak Singh* and Justice Khanna in *ADM, Jabalpur* that has now been accepted as the law.¹⁴ Justice Fazl Ali had held that fundamental rights overlap with each other and have to be interpreted in an integrated manner. Justice Subba Rao in *Kharak Singh* confirmed that protection from surveillance has to be derived not only from freedom of movement under Article 19(1)(d) but from personal liberty under Art 21. Justice H.R. Khanna’s dissent in *ADM Jabalpur* held that the right to life and its manifestations are not rights conferred by the state but form part of natural rights.

Justice Nariman then clarified the scope of the privacy right and specifically located facets of privacy right under various constitutional articles. Namely, privacy relating to the physical body, such as interference with a person’s right to move freely, surveillance of a person’s movements under Articles 19(1)(d), 19(1)(e)

and 21; informational privacy relating a person’s private information under Article 21; and the autonomy to make intimate and personal choices under Article 19(1) (a) to (c) and Articles 20(3), 21 and 25.¹⁵

Justice Kaul recognised that privacy protects the individual from interference by state and non-state actors.¹⁶ He called for regulation of how information is stored, processed and used by non-state actors.¹⁷ Justice Bobde clarified that the right to privacy is not confined only to intimate spaces such as the bedroom or the washroom but extends to the public sphere.¹⁸ Hence, solitude is not always essential to privacy but is rooted in broader conception of “cognitive freedom”.¹⁹

The broad endorsement of a constitutional right to privacy by the Supreme Court is likely to have a significant impact on other cases before the Court. In the last year, *Puttaswamy* has been relied on in the challenge to the criminal law exemption to child marital rape,²⁰ and the constitutionality of discriminatory family laws.²¹ It is directly relevant to the ongoing Aadhaar Case²² before the 5 judge bench. It is likely to be central in the pending challenge to the decision in *Suresh Kaushal*.²³


5. *Independent Thought v. Union of India*, (2017) 10 SCC 800

The Protection of Children from Sexual Offences Act, 2012 punishes sexual assault and sexual harassment of children.²⁴ The Act defines a child as any person below eighteen years of age.²⁵ The Prohibition of Child Marriage Act (PCMA), 2006 makes the marriage with a girl below the age of 18 voidable, which can be nullified on attaining majority.²⁶ The Protection of Women from Domestic Violence Act, 2005 (PWDVA), Juvenile Justice (Care and Protection of Children) Act, 2012 (JJA), Protection of Children from Sexual Offences Act, 2012 (POCSO), and Prohibition of Child Marriage Act, 2006, (PCMA) - all define a child as anyone under the age of 18.²⁷ In 2013, Section 375 of the Indian Penal Code (IPC), which defines rape, was amended to raise the age of consent from 16 to 18.²⁸ Therefore, there is statutory consensus on the legal age of consent being 18 years.

However, Exception 2 to Section 375, which creates an exception to the offence of rape in cases of forced sexual intercourse by a man with his own wife if she is of 15 years of age or above, has not been amended. This resulted in an anomalous situation where sexual intercourse by a husband with a minor wife between the ages of 15 and 18 is permitted. Independent Thought, a Non Governmental Organisation, filed a writ petition before the Supreme Court under Article 32 to declare the exception unconstitutional. Child Rights Trust, a non-governmental organisation working on prevention of child marriage, joined as an Intervenor, and was also heard extensively.

Independent Thought challenged the anomaly on two grounds: first, that it creates an inconsistency in the law and secondly, that it violates Articles 14, 15 and 21 of the Constitution. It argued that the exception in Section 375 IPC is inconsistent with the legislative consensus on the age of consent in the PCMA, PWDVA, JJA, and POCSO. Further, exempting sexual violence on minor wives by their husbands from Section 375 IPC defeats the purpose of the enactment of the PCMA, which was passed to curb the practice of child marriage. Hence, legitimising violence against minor married girls within marriage violates their right to life and dignity under Article 21 and fails to protect the rights of the Child under Article 15. Further, the classification between girls below 18 on the basis of marital status is arbitrary and violates Article 14.

Child Rights Trust, the intervenor, argued that exempting sexual abuse and violence on a minor wife deprives them the autonomy over their body and intimate decisions and thereby violates the right to privacy recognised under the Article 21 guarantee of the right to life. It pointed at the adverse effects on the physical, mental and sexual health of the girl child due to early marriage, including teenage pregnancies and abortions. As child marriages are voidable at the option of the wife upto a period of 2 years of attaining majority, the husband of a minor wife cannot claim immunity for forced sexual conduct in such a marriage. They pointed out that some states like Karnataka have amended the PCMA in April 2017 to declare child marriages void *ab initio*.²⁹



Finally, they urged the Court to read down the exception as this would merely extend an existing offence to a class of people who earlier had immunity and would not create a new offence.

The Union of India first argued that it was for Parliament to rectify the anomaly created by the exception in Section 375. Secondly, the anomaly had been considered repeatedly by Parliament and it has made a conscious decision to retain the classification, in response to prevailing social attitudes³⁰ and the state's reluctance to interfere in marital life.

A two judge bench comprising Justices Madan B. Lokur and Deepak Gupta, in two concurring decisions, read down Exception 2 to Section 375 IPC, and raised the age of consent to 18 for the purpose of the Exception. It also called for legal reforms to prevent and address violations of girls' rights due to child marriage.

The Court noted the contradictions between the IPC, PCMA and POCSO Act. Justice Lokur held that the conflict must be resolved and the statutes must be harmonised "*to present an articulate whole*".³¹ He held that the exception violates Article 14 by unreasonably discriminating between a married girl child and an unmarried girl child³² and diverging from the age of consent that all legislations in our country universally accept.³³ Justice Gupta held that the exception violates Article 14 as it discriminates against a non-consenting child bride who is married off without her consent and the marriage is consummated against her consent and even then this girl cannot file a criminal case against her husband.³⁴ Both judges rejected the State's justification the exception exists to preserve the institution

of marriage.³⁵

Justice Lokur held that the exception violates the affirmative action sought by Article 15(3), as the human rights of a girl child must be recognised whether she is married or not.³⁶ As the IPC exception effectively sanctifies a traditional practice such as rape within child marriages which violates the bodily integrity of girls, causes health risks and destroys her freedom of reproductive choice, it violates Article 21 of the Constitution.

Additionally, the Court observed that while the PCMA prohibited and criminalised child marriages, they were not declared void, except in Karnataka where an amendment was made to declare all child marriages void *ab initio*.³⁷ The Court advised all other State Legislatures to adopt the same solution as Karnataka to void all child marriages and thus ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and IPC.³⁸ The Court also called for stronger implementation of the PCMA.³⁹ Justice Madan Lokur categorically rejected the argument that recognizing marital rape would destroy the institution of marriage.⁴⁰ The Court rejected the State's argument that child marriage is part of culture and tradition and affirmed that constitutional morality required that girls are not endangered by these statutes.⁴¹

Independent Thought is the first Supreme Court judgement recognizing that child marriage violates India's constitutional and human rights obligations. The reasoning in this case applicable more widely to the marital rape exception⁴² currently being challenged in the Delhi High Court in *RIT Foundation v. The Union of India*.⁴³

6. Meera Santosh Pal v. Union of India, (2017) 3 SCC 462

Meera Santosh Pal, a 22 year-old woman, who was 24 weeks pregnant, had filed a writ petition before the Supreme Court under Article 32 seeking directions to the Union of India to permit her to undergo medical termination of her pregnancy under Section 3 of the Medical Termination of Pregnancy Act, 1971 ("MTPA"). Her foetus was diagnosed with anencephaly, a defect that leaves the foetal skull unformed. As this is untreatable, it was certain to cause the infant's death during or shortly after birth and endanger the mother's life.

Section 3(2)(b)(ii) allows the termination of pregnancy within 20 weeks, if it poses grave injury to the physical or mental health of the woman. On 11th January 2017, the Supreme Court had directed that Ms. Pal be examined by a 7-member Medical Board. The Board report submitted to the Court on 13th January 2017 stated that the foetus would not survive as its skull was not formed, and that the continuation of the pregnancy could gravely endanger Ms. Pal's physical and mental health. Based on this report, the Supreme Court allowed Ms. Pal to medically terminate her pregnancy despite it being in the 24th week, well over the 20-week limit stipulated under the MTPA.

The Court affirmed *Suchita Srivastava and Anr. v. Chandigarh Administration* a three-judge bench had held that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution and had also held that: *"It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."*⁴⁴

The overriding consideration for the Court's decision was Ms. Pal's *"right to take all such steps as necessary to preserve her own life against the avoidable danger to it"*⁴⁵ and her *"right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy."*⁴⁶ While the Court did not create a categorical exception to the 20 week limit in the MTPA it continues to concede a wider discretion to medical experts on a case to case basis.

7. *Arjun Gopal v. Union of India*, 2017 SCC ONLINE SC 1071

Three minor children Arjun Gopal (aged 6 years), Aarav Bhandari (aged 6 months), and Zoya Rao Bhasin (aged 14 months), filed a petition through their guardians against the widespread pollution caused by firecrackers and fireworks. In an earlier order in the case, responding to pollution levels being 29 times the WHO limits, the Supreme Court had directed the Union Government to suspend all licenses that permit the sale of fireworks, wholesale and retail within the territory of the National Capital Region (NCR).⁴⁷

The manufacturers and suppliers of fireworks, primarily based in Sivakasi, Tamil Nadu, applied to modify this order on two grounds. First, they contended that the National Green Tribunal (NGT) did not list fireworks as a major contributor of air pollution in the NCR and that a study by IIT Kanpur sponsored by Government of National Capital Territory of Delhi (NCT) and Delhi Pollution Control Committee (DPCC), Delhi corroborates this view.⁴⁸ Instead, air pollution in the NCR was caused mostly by the burning of crops stubble in Punjab despite an NGT order against this.⁴⁹ Secondly, they pointed out that the order threatened the livelihood of about 5 lakh people employed in the fireworks industries.

The Court affirmed its earlier precedents on right to health and the derivative right to live in a clean, hygienic, and safe environment.⁵⁰ These cases draw on the

right to life under Article 21 and the Directive Principles of State Policy, particularly Articles 39, 41 and 42. The Court confirmed that citizens are entitled to breathe unpolluted air and to protect their health from the pollution caused by firecrackers. Though the Court was unconvinced the Delhi Government and the Delhi Pollution Control Board's efforts to generate awareness and investigate the causes of pollution comprehensively, it admitted that a graded and balanced approach to reduce and gradually eliminate air pollution in Delhi would be preferred to a blanket suspension of licenses.⁵¹

While affirming that the right to health and quality air takes precedence over commercial interests,⁵² the Court modified its previous interim order by lifting the suspension on permanent licenses already granted. It directed that the licensees in 2018 could sell only 50% of the quantity permitted in 2017.⁵³ The police were directed to reduce the grant of temporary fireworks licenses by 50% and the number was capped at 500.

The Court emphasised that the result of these regulations must be an improvement of ambient air quality. It directed the Central Pollution Control Board (CPCB) and Fireworks Development Research Centre (FDRC) to jointly conduct a study and identify appropriate standards for ambient air quality in relation to fireworks.

8. *Hussain v. Union of India*, (2017) 5 SCC 702

Mr Hussain and Mr Hafijuddin Khan were detained on 4th August 2013, and their trial was underway. Mr Aasu was detained on 11th January 2009 after his conviction. His appeal was pending from 2013. All of them were denied bail. They appealed to the Supreme Court against the denial of their bail. The appeal was heard by a bench comprising Justices Adarsh Kumar Goel and U. U. Lalit.

Mr Hussain and Mr Aasu argued, first, that they are entitled to bail as their right to speedy trial under Article 21 has been violated by the unnecessarily long period in custody. Secondly, they contended that Section 436A Code of Criminal Procedure (Cr. P. C), which provides for the grant of bail of a person who has undergone detention upto one half of the maximum prescribed imprisonment, operates in this case. Finally, they referred to precedents which have held that bail should normally be granted if the appeal is not heard for 5 years, excluding the delay for which the accused himself is responsible.⁵⁴

The Union submitted that Section 436A applies only during trial. As Mr Hussain has not undergone the requisite detention period, he is not covered by Section 436A. Secondly, Mr Aasu is not covered by the precedents which have held that bail should normally be granted if the appeal is not heard for 5 years, as his appeal has been pending since 2013. The Court directed that the Mr Hussain and Mr Khan's trial and Mr Aasu's appeal be disposed of within six months.

The Court then addressed the larger question on the circumstances in which bail can be granted on the ground of

delayed proceedings when a person is in custody. The Supreme Court took note of the frequently arising issue of long-pending trials and affirmed that the right to speedy trial at all stages was part of the right to life guaranteed under Article 21 of the Constitution.⁵⁵ This right cannot be denied even on the plea of non-availability of financial resources by the courts.⁵⁶ The Court affirmed *Hussainara Khatoon v. State of Bihar*⁵⁷ with respect to the role of High Courts to ensure that guidelines on bail and early release⁵⁸ are followed, and subordinate courts are monitored. The Court suggested that bail applications in subordinate courts be disposed within one week and in High Courts within two-three weeks.⁵⁹

The C noted that 43,19,693 cases pending in subordinate courts were more than 5 years old⁶⁰ and directed that magisterial trials where accused is in custody should be concluded within 6 months and sessions trials within 2 years.⁶¹ The Court also directed regular monitoring and performance appraisals of judges.⁶² It suggested that the High Courts could direct subordinate courts to supplement section 436A of the Cr.P.C. by facilitating the release on personal bond, of those undertrials in custody in excess of the sentence likely to be awarded.⁶³

In *Hussain v. Union of India*, the Court continues its recent emphasis on the early release of undertrial prisoners through institutional and procedural modifications through recent cases like *Bhim Singh v. Union of India*,⁶⁴ *In Re: Inhuman Conditions on 1382 Prisons*,⁶⁵ and *Imtiyaz Ahmad v. State of U. P.*⁶⁶

9. State of Uttar Pradesh v. Anand Kumar Yadav, 2017 SCC OnLine SC 792


An amendment to the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 ("UP RTE Rules") introduced Rule 16-A and amended Rule 14, authorising the State Government to relax the minimum educational qualifications for appointment of Assistant Teachers in Junior Basic Schools. Thereafter, through executive orders, 1.78 lakh *Shiksha Mitras* who were contractual teachers, were regularised as Assistant teachers even though they did not meet the minimum statutory criteria of passing the Teachers Eligibility Test (TET) - a requirement under the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act).

In 2015, the Allahabad High Court set aside Rules 16 A and 14 as being arbitrary, unconstitutional, and in conflict with provision of Right to Education Act.⁶⁷ Against this decision, the *Shiksha Mitras* appealed to the Supreme Court and a Division Bench comprising Justices Adarsh Goel and U U Lalit decided the matter. The question before the Court was whether Rule 16 A and the amended Rule 14 of the UP RTE Rules which provided for the appointment of *Shiksha Mitras* as Assistant Teachers without requisite qualifications violates Section 23 of the RTE Act read with the Notification dated 23rd August, 2010⁶⁸ which prescribes the Teachers Eligibility Test as a minimum criteria.

The *Shiksha Mitras* advanced three main arguments. First, large scale appointment of these *Shiksha Mitras* has led to lower pupil teacher ratio, and advanced the

constitutional cause of elementary education for all. Elementary education bring provided to children between the ages of 6 and 14 does not require highly qualified teachers, and the *Shiksha Mitra* scheme selects and train teachers at district training institutes to achieve the object of education for all at lesser cost. Second, the scheme of *Shiksha Mitras* was consistent with Article 243G and enabled decentralization of powers. Finally, the Court may exercise its power under Article 142 to render complete justice in this case by overriding the statutory provisions and associated notifications.⁶⁹

Anand Kumar Yadav countered the first argument by stating that the constitutional mandate of free and compulsory education for children between ages 6 and 14 cannot be hollowed out by compromising on the quality of education. The training imparted to *Shiksha Mitras* did not render them eligible in terms of Section 23(1) of the Right to Education Act. Section 23(1) of the Right to Education Act allows an academic authority, authorized by the Central Government, to lay down minimum qualifications for appointment as a teacher and TET (Teachers Eligibility Test) has been prescribed as a minimum criteria. Secondly, Article 243G and decentralization of powers to the Panchayats do not permit the violation of a valid legislation. Lastly, the power of the Supreme Court under Article 142 should be exercised to advance justice and not defeat the Parliamentary mandate for the advancement of quality education.



Additionally, he contended that the regularization of *Shiksha Mitras* as teachers is contrary to the principle in *Secretary of State of Karnataka v Umadevi*,⁷⁰ which limited the power of the States to regularise public employment on the principle of Equality, by holding that such appointments must be in terms of the relevant rules and after a competition among qualified persons.

The Supreme Court clarified that the right to free and compulsory education for children between ages 6 and 14, a Fundamental Right under Article 21A is a right to *quality* education.⁷¹ The appointment of *Shiksha Mitras* who do not fulfil the minimum qualifications and have not passed the TET, would not ensure quality education. It held that the appointments of 1.78 lakh *Shiksha Mitras* cannot be at the cost of the fundamental right of children to quality education by duly qualified teachers.⁷² Hence, the appointment of *Shiksha Mitras* who have not fulfilled the statutory minimum criteria of passing the TET was held to be impermissible.

The Court agreed with the view of the Allahabad High Court that the State of Uttar Pradesh, by exempting the *Shiksha Mitras* from the mandatory qualification of TET, had violated the mandate of Section 23(1) of the RTE Act, which vests the power to relax the minimum qualifications exclusively in the Central Government. It affirmed the limitation on the power of States in regularising public employment on the principle of Equality, by holding that such appointments must be in terms of the relevant rules and after a competition among qualified persons.⁷³

The Court also rejected the argument of the *Shiksha Mitras* that this case calls for the invocation of its powers under Article 142. The powers under Article 142 cannot be used to undo the legislative mandate requiring minimum qualifications for the appointment of teachers. Although the court reaffirmed quality education as a non-negotiable component, it took a balanced position by not terminating the employment of 1.74 lakh *Shiksha Mitras*, but giving them two attempts to clear the Teachers Eligibility Test.

- ¹ The Union relied on *Kharak Singh v. State of U. P.*, AIR 1963 SC 1295 and *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300, to make this claim.
- ² See *Govind v. State of M.P.*, 1975 SCR(3) 946, *Rajagopal v. State of Tamil Nadu*, 1994 SCC (6) 632, and *PUCL v. Union of India* (1997) 1 SCC 301
- ³ *Kharak Singh v. State of U. P.*, AIR 1963 SC 1295
- ⁴ *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300
- ⁵ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 419
- ⁶ *ADM Jabalpur v. S. S. Shukla*, (1976) 2 SCC 521
- ⁷ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 419
- ⁸ *ADM Jabalpur v. S. S. Shukla*, (1976) 2 SCC 521, 747
- ⁹ *Suresh Kumar Koushal v NAZ foundation*, (2014) 1 SCC 1
- ¹⁰ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 422-423
- ¹¹ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 533
- ¹² *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 532
- ¹³ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 510
- ¹⁴ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 556
- ¹⁵ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 599
- ¹⁶ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 619
- ¹⁷ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 621
- ¹⁸ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 540
- ¹⁹ *Justice K.S. Puttaswamy and Anr. v. Union of India and Others*, (2017) 10 SCC 1, 541
- ²⁰ *Independent Thought v. UOI*, (2017) 10 SCC 800
- ²¹ *Goolrokh Gupta v. Burjor Pardiwala*, SLP (C) 18889/2012
- ²² *Justice K. S. Puttaswamy v UOI*, WP(C) 494/2012; See Constitutionality of Aadhaar Act, Supreme Court Observer. Available at <<http://scobserver.herokuapp.com/court-case/constitutionality-of-aadhaar-act>>
- ²³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, Curative Petition Number (C) No. 88-102 of 2014
- ²⁴ Objects and Reasons, Protection of Children from Sexual Offences Act, 2012
- ²⁵ Section 2(1)(d), Protection of Children from Sexual Offences Act, 2012
- ²⁶ Section 3, Prohibition of Child Marriage Act, 2006
- ²⁷ See Section 2(b), Protection of Women from Domestic Violence Act, 2005; Section 2(k), Juvenile Justice (Care and Protection of Children) Act, 2012; Section 2(1)(d), Protection of Children from Sexual Offences Act, 2012
- ²⁸ The Criminal Law (Amendment) Act, 2013, Act No. 13 of 2013.
- ²⁹ The Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, Karnataka Act No. 26 of 2017
- ³⁰ The Union stated that as a large number of women were married before 18, criminalising the consummation of marriage with an offence such as rape would not be appropriate and practical.
- ³¹ *Independent Thought v. UOI*, (2017) 10 SCC 800, 843, 853- 854
- ³² *Independent Thought v. UOI*, (2017) 10 SCC 800, 844
- ³³ *Independent Thought v. UOI*, (2017) 10 SCC 800, 846
- ³⁴ *Independent Thought v. UOI*, (2017) 10 SCC 800, 882
- ³⁵ *Independent Thought v. UOI*, (2017) 10 SCC 800, 849, 872, 879
- ³⁶ *Independent Thought v. UOI*, (2017) 10 SCC 800, 836-838, 840
- ³⁷ *Independent Thought v. UOI*, (2017) 10 SCC 800, 844
- ³⁸ *Independent Thought v. UOI*, (2017) 10 SCC 800, 844, 871
- ³⁹ *Independent Thought v. UOI*, (2017) 10 SCC 800, 855
- ⁴⁰ *Independent Thought v. UOI*, (2017) 10 SCC 800, 849
- ⁴¹ *Independent Thought v. UOI*, (2017) 10 SCC 800, 880
- ⁴² Exception to Section 375 of the Indian Penal Code
- ⁴³ *RIT Foundation v. The Union of India*, Writ Petition (Civil) 284 of 2015

ENDNOTES

- ⁴⁴ *Suchita Srivastava and Anr. v. Chandigarh Administration*, (2009) 9 SCC 1, 15
- ⁴⁵ *Meera Santosh Pal and Ors v. Union of India and Others*, (2017) 3 SCC 462, 465
- ⁴⁶ *Meera Santosh Pal and Ors v. Union of India and Others*, (2017) 3 SCC 462, 465
- ⁴⁷ *Arjun Gopal and Ors. v. Union of India* (2017) 1 SCC 412
- ⁴⁸ Comprehensive Study on Air Pollution and Greenhouse Gases in Delhi, Mukesh Sharma and Onkar Dikshit, January 2016. Available at http://delhi.gov.in/DoIT/Environment/PDFs/Final_Report.pdf
- ⁴⁹ Order of the National Green Tribunal in *Vikrant Kumar Tongad v. Environment Pollution (Prevention & Control) Authority and Others*, (Application No. 118 Of 2013) passed on 10th December, 2015.
- ⁵⁰ *Consumer Education & Research Centre v. Union of India*, (1995) 3 SCC 42; *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647; *Occupational Health & Safety Assn. v. Union of India*, (2014) 3 SCC 547;
- ⁵¹ *Arjun Gopal and Ors. v. Union of India* (2017 SCC ONLINE SC 1071), Paragraph 73
- ⁵² *Arjun Gopal and Ors. v. Union of India* (2017 SCC ONLINE SC 1071), Paragraph 73
- ⁵³ *Arjun Gopal and Ors. v. Union of India* (2017 SCC ONLINE SC 1071), Paragraph 76
- ⁵⁴ *Akhtari Bi v. State of Madhya Pradesh*, (2001) 4 SCC 355; *Surinder Singh v. State of Punjab*, (2005) 7 SCC 387
- ⁵⁵ *A. R. Antulay v. R. S. Nayak*, (1992) 1 SCC 225, Paragraph 86; *Hussain and Others v. Union of India*, (2017) 5 SCC 702, 709
- ⁵⁶ *Hussain and Others v. Union of India*, (2017) 5 SCC 702, 709
- ⁵⁷ *Hussainara Khatoon (VII) v. State of Bihar*, (1995) 5 SCC 326
- ⁵⁸ See *Akhtari Bi v. State of Madhya Pradesh*, (2001) 4 SCC 355; *Thana Singh v. Central Bureau of Narcotics*, (2013) 5 SCC 590; *Bhim Singh v. Union of India*, (2015) 13 SCC 603; *In Re Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700
- ⁵⁹ *Hussain and Others v. Union of India*, (2017) 5 SCC 702, 715
- ⁶⁰ *Hussain and Others v. Union of India*, (2017) 5 SCC 702, 714
- ⁶¹ Circular issued by the Punjab and Haryana High Court dated 2nd April 2011
- ⁶² *Hussain and Others v. Union of India*, (2017) 5 SCC 702, 715
- ⁶³ *Hussain and Others v. Union of India*, (2017) 5 SCC 716, 715
- ⁶⁴ *Bhim Singh v. Union of India*, (2015) 13 SCC 605
- ⁶⁵ *In Re: Inhuman Conditions on 1382 Prisons*, (2016) 3 SCC 700
- ⁶⁶ *Imtiyaz Ahmad v. State of U. P.*, (2017) 3 SCC 658
- ⁶⁷ *Anand Kumar Yadav v. Union of India*, (2015) ILR All 1108
- ⁶⁸ Notification by the National Council for Teachers' Education, 23rd August 2010, F. No. 61-03/20/2010/NCTE/(N & S). Available at <http://ncte-india.org/ncte_new/wp-content/uploads/2015/06/Minimum-Qualification-2010.pdf>
- ⁶⁹ *Union Carbide Corporation v. Union of India*, (1991) 4 SCC 584
- ⁷⁰ *Secretary of State of Karnataka v. Umadevi* [(2006) 4 SCC 1]
- ⁷¹ *State of Uttar Pradesh v. Anand Kumar Yadav*, 2017 SCC OnLine SC 792, Paragraph 16.
- ⁷² *State of Uttar Pradesh v. Anand Kumar Yadav*, 2017 SCC OnLine SC 792, Paragraph 18
- ⁷³ *Secretary of State of Karnataka v. Umadevi*, (2006) 4 SCC 1

IV. The Right to Freedom of Religion

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

One suo motu public interest litigation¹ initiated by the Court and five writ petitions² challenging the constitutional validity of Triple Talaq or *Talaq-e-Biddat*, were clubbed and heard by a five judge Constitution Bench of the Supreme Court. In Muslim law, '*Talaq*' or divorce at the instance of the husband is of three kinds – '*talaq-e-ahsan*', '*talaq-e-hasan*' and '*talaq-e-biddat*'. *Talaq-e-ahsan* is a single pronouncement of '*talaq*' followed by abstinence during *iddat*.³ In *talaq-e-hasan* there are three pronouncements of the word '*talaq*', and abstinence is practiced between each utterance. While *talaq-e-ahsan*, and *talaq-e-hasan* are both approved by the Quran, it was contended that *talaq-e-biddat*, where divorce is effective with the three simultaneous utterances of the word *talaq* and is irrevocable at the very moment, is not part of the Quran. As it discriminates against Muslim women who could be divorced unilaterally, it was argued that triple *talaq* or *talaq-e-biddat* was also unconstitutional.

While there were multiple arguments for the petitioners, the core arguments were that Triple *Talaq* is codified by the Muslim Personal Law (Shariat) Application Act, 1937 (Shariat Act) and is 'law' under Article 13 and will be struck down for violating fundamental rights; secondly, that it is not an 'essential practice' protected under Art 25 freedom of religion and also violates right to equality under Article 14. The *Amicus Curiae* Salman Khurshid urged the court to not go into constitutionality of Triple *Talaq* as it is an unrecognised form of divorce under Sharia that should be invalidated on that ground. The All India

Muslim Personal Law Board (AIMPLB), a non governmental organisation concerned with applicability of Muslim personal law and an intervenor argued that Triple *Talaq* is a practice recognised in Sharia and one that is constitutionally protected under Article 25. The AIMPLB argued that Triple *Talaq* is part of uncodified Muslim personal law and is not subject to Article 13; and that Triple *Talaq* forms part of essential practice under Hanafi School and is protected by Freedom of religion under Article 25. In this case, the Union joined some petitioners to argue against the constitutionality of Triple *Talaq* practice.

On 22th August 2017, the 5 Judge Bench of the Supreme Court pronounced its decision declaring *talaq-e-biddat* unconstitutional by a 3:2 majority. Justices Rohinton Nariman, U.U.Lalit and Kurian Joseph invalidated Triple *Talaq* practice while Chief Justice J.S. Khehar and Justice Abdul Nazeer were in dissent. Although the practice of Triple *Talaq* was invalidated by a ratio of 3:2, there were divergences on the reasons for decision. First, Justices Nariman and Lalit held it to be unconstitutional; Chief Justice Khehar and Justice Nazeer held it to be constitutional; and Justice Joseph invalidated it and did not go into its constitutionality.

On the question of whether it was codified Islamic law or not, Chief Justice Khehar and Justices Nazeer and Joseph held that the Shariat Act does not codify Muslim personal law, and so the practice of Triple *Talaq* could not be tested on the anvil of fundamental rights; Justice Nariman and Justice Lalit held that the Shariat Act codifies Muslim personal law and has

legislative force under Article 13. The dissenting judges held Triple *Talaq* to be an 'essential practice' of Islam owing to the long standing tradition of 1400 years. Justices Rohinton Nariman and U. U. Lalit held that it is a non-essential practice of Islam which is not protected under the Article 25 freedom of religion. Justice Kurian Joseph jointed them in concluding that it was an un-Islamic practice and hence was not an 'essential practice' under Article 25.

The bench also diverged on its opinion on the judgement of *Narasu Appa Mali*⁴ which held that uncodified personal law is not subject to fundamental rights. While Justice Nariman held that it is not necessary to revisit this case as Shariat Act is a codified law, Chief Justice Khehar and Justice Nazeer held that *Narasu Appa Mali* is the binding precedent.

The three opinions show a plurality of reasoning in determining the validity of the triple *talaq* practice. The lead opinion by Justices Nariman and U. U. Lalit held that *Talaq-e-Biddat* is regulated by the Shariat Act which governs Muslim personal law. They held that the Act includes Triple *Talaq* in Muslim personal law that was applicable to Sunnis in India, and rejected the argument of the Muslim Personal Board that Section 2 of the Shariat Act does not recognize or enforce Triple *Talaq*. Further, they added that it would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution.

The approach taken by Justices Nariman and Lalit was to test whether Triple *Talaq* would be an essential part of the Islamic faith and whether it would be protected by the Article 25 guarantee of freedom of religion.⁵ They held that Triple *Talaq* is not

only impermissible in law but also sinful by the very Hanafi school under which it has been prevalent. According to the precedents that laid down the key ingredients of the 'essential practice' test,⁶ they held that the fundamental nature of the Islamic religion seen through the eyes of an Indian Sunni Muslim will not change without this practice.⁷ Therefore, they held, Triple *Talaq* is not protected by Article 25.⁸

They then tested whether Triple *Talaq* violates the fundamental right to equality.⁹ They held that the requirements of reasonableness runs through Part III of the Constitution. Importantly, this opinion overruled *McDowell's* ratio that legislation cannot be struck down on the grounds of arbitrariness.¹⁰ The judges cited other decisions post-*McDowell* where law became arbitrary and was struck down for violating Article 14.¹¹ They held that the practice was unconstitutional due to its manifestly arbitrary nature which permits a Muslim man to instantly, irrevocably, and unilaterally terminate a marriage, with no scope for reconciliation.¹² They held that the Shariat Act is within the meaning of the expression 'laws in force' in Article 13(1), and must be struck down to the extent that it seeks to recognize and enforce Triple *Talaq*. Notably, this opinion did not examine the ground of discrimination against women at all.

Justice Kurian Joseph, in his concurring but separate opinion, recorded that the reason the practice lacks legal sanction is because it is against the tenets of the Quran and "*What is held to be bad in the Holy Quran cannot be good in Shariat and, what is bad in theology is bad in law as well.*"¹³ He did not go into the constitutionality of Triple *Talaq* and

invalidated it on ground of it being un-Islamic.

The dissenting opinion of Chief Justice Khehar and Justice Abdul Nazeer traced the elevation of personal law to the status of fundamental rights in the Constituent Assembly Debates on Articles 25 and 44. They held that the practice of Triple *Talaq* is not regulated by the Shariat Act but is an intrinsic part of uncodified personal law. The stature of 'personal law' is that of a fundamental right. Thus Triple *Talaq* enjoys constitutional protection under Article 25.¹⁴ They rejected the argument that by the enactment of the Shariat Act, the questions and subjects covered by the Act ceased to be 'personal law', and became 'statutory law' which would have to satisfy the requirements of Part III of the Constitution.¹⁵ The judges held that the Act was enacted only to preserve Muslim personal law and did not lay down or codify Muslim personal law.¹⁶

They held that personal law is a matter of religious faith and not state action. Thus, it raises no question of violating Articles 14, 15 and 21. Judicial interference with personal law can be rendered only in the manner provided for in Article 25. If personal law is in conflict with international conventions and declarations, personal law will prevail.¹⁷ They held that *Talaq-e-biddat* does not violate the parameters expressed in Article 25, is not contrary to public order, morality and health, and does not violate Articles 14, 15 and 21. Further, religion is a matter of faith and *"it is not open to a court to accept an egalitarian approach to a practice which constitutes an integral part of religion"*.¹⁸ The Constitution assures, under Article 25, that the way of life of believers of all faiths

will not be subjected to any challenge, *"even though they may seem to others (-and even rationalists, practicing the same faith) unacceptable, in today's world and age"*.¹⁹ The dissenting opinion of Justice Khehar and Nazeer protected all personal law practices under the Article 25 freedom of religion and emphasized that such practices cannot be further scrutinised for violating other fundamental rights.

However, in view of the position taken by all the parties, including the All India Muslim Personal Law Board, that Triple *Talaq* was objectionable, the minority judges directed the Union of India to consider appropriate legislation, particularly with reference to *talaq-e-biddat*. Till the legislation is being considered, Muslim husbands were enjoined from pronouncing *talaq-e-biddat* to sever their matrimonial relationship.²⁰ The government has proposed a bill²¹ which has been passed in Lok Sabha and is pending approval in Rajya Sabha. This bill aims at making Triple *Talaq* a criminal offence in response to reports of low levels of compliance with the Supreme Court decision.²²

The Triple *Talaq* decision rested on a reading of Article 25 and Article 14 but failed to comprehensively address the constitutional status of discriminatory religious practices against women and their equal rights within marriage.

11. *State of Gujarat v I.R.C.G., (2017) SCC OnLine SC 1011*

In 2012, the Islamic Relief Committee of Gujarat (IRCG) filed a public interest litigation before the Gujarat High Court, to direct the State Government to compensate the costs of repair for damaged mosques, *dargahs*, *Khankahs* and other places of religious importance, which were destroyed in the communal riots of 2002. The IRCG claimed that 567 religious places, including 545 Muslim structures, were damaged during the riots.

The Gujarat High Court passed an order directing the State Government to compensate for the restoration of all the religious places and also appointed Principal District Judges as Special Officers, to decide the claims for compensation. The State of Gujarat filed a civil appeal against this in the Supreme Court which was heard by the two judge bench of Chief Justice Dipak Misra and Justice P. C. Pant.

The State of Gujarat made two key arguments. First, as Article 27 of Constitution prohibits compelling any person to pay any tax, which would be spent for the promotion or maintenance of any particular religion, compensation by the State for religious shrines violates the principle of secularism. Secondly, it contended that the public law remedy of awarding compensation was restricted to only Article 21 Right to Life violations and is inapplicable in this case.

The IRCG argued that State compensation for restoring shrines destroyed during Gujarat communal riots does not amount to promotion of any religion under Article 27, but is consistent with the Article 25

requirement of equal protection of all religions. Further, it argued that destruction of places of worship of a weaker group by a dominant group amounts to inflicting humiliation on them and should be broadly construed as violation of the Article 21 Right to Life.

The judgement relied on precedents which restricted the public law remedy for grant of compensation to situations where right to life is violated and not otherwise, but did not give a finding on whether the right to life was violated in this case.²³

On the question of Article 27, which prohibits tax diversion towards a particular religion, the bench relied on *Prafull Garodia*²⁴ to create a distinction between substantial and non-substantial diversion of tax proceeds and said that a substantial diversion violates secularism.²⁵ The bench observed that there should be a limit on tax proceeds used for any religion.

Lastly, the court reviewed the scheme framed by the State of Gujarat for providing 'ex-gratia assistance' of Rs. 50,000 for damage to the religious structures. The Court found the scheme of the State Government reasonable and affirmed precedents which held that limiting compensation provided with a ceiling was constitutionally legitimate.²⁶

ENDNOTES

- ¹ *In Re: Muslim Women's Quest for Equality v Jamiat Ulma-I-Hind*, Suo Moto WP (C) 2/2015
- ² *Shayara Bano v UOI*, WP (C)118/2016; *Aafreen Rehman v UOI*, WP (C) 288/2016; *Gulshan Parveen v UOI*, WP (C)327/2016; *Israt Jahan v UOI*, WP (C)665/2016; *Atiya Sabri v UOI*, WP(C)43/2017
- ³ *Iddat* is a period of ninety days or three menstrual cycles or three lunar months.
- ⁴ *State of Bombay v. Narasu Appa Mali*, 1951 SCC OnLine Bom 72
- ⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 67
- ⁶ See *Javed v. State of Haryana*, [2003 (8) SCC 369]; *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*, [2004 (12) SCC 770]; *Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [1954 SCR 1005]; *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* [1962 Supp (2) SCR 496]; *Seshammal v. State of T.N.* [(1972) 2 SCC 11]
- ⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 69
- ⁸ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 69
- ⁹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 71-92
- ¹⁰ *State of A.P. v. McDowell & Co.*, (1996) 3 SCC 709
- ¹¹ *State of Bihar v. Bihar Distillery Ltd.* , (1997) 2 SCC 453; *State of M.P. v. Rakesh Kohli*, (2012) 6 SCC 312; *Rajbala v. State of Haryana & Ors.*, (2016) 2 SCC 445; *Binoy Viswam v. Union of India*, (2017) 7 SCC 59.
- ¹² *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 99-100
- ¹³ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 53
- ¹⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 295
- ¹⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 266
- ¹⁶ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 254
- ¹⁷ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 288
- ¹⁸ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 295
- ¹⁹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 295
- ²⁰ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, 299
- ²¹ The Muslim Women (Protection of Rights on Marriage) Bill, 2017 ([http://www.prindia.org/uploads/media/Muslim%20Women%20\(Protection%20of%20Rights%20on%20Marriage\)/Muslim%20Women%20\(Protection%20of%20Rights%20on%20Marriage\)%20Bill,%202017.pdf](http://www.prindia.org/uploads/media/Muslim%20Women%20(Protection%20of%20Rights%20on%20Marriage)/Muslim%20Women%20(Protection%20of%20Rights%20on%20Marriage)%20Bill,%202017.pdf)) (Last accessed on 27/2/2018)
- ²² *Rajya Sabha standoff over Triple Talaq Bill*, Indian Express, 5th January 2018. See <http://indianexpress.com/article/india/congress-told-govt-will-support-triple-talaq-bill-if-you-agree-to-pay-subsistence-allowance-5012216/> (Last accessed on 27/2/2018)
- ²³ *State of Gujarat v I.R.C.G.*, (2017) SCC OnLine SC 1011, Paragraph 30. See *Hindustan Paper Corpn Ltd. v. Ananta Bhattacharjee and Others*, (2004) 6 SCC 213
- ²⁴ *Prafull Goradia v. Union of India*, (2011) 2 SCC 568, 572
- ²⁵ *State of Gujarat v I.R.C.G.*, (2017) SCC OnLine SC 1011, Paragraph 37
- ²⁶ *State of Gujarat v I.R.C.G.*, (2017) SCC OnLine SC 1011, Paragraph 44. Also see *Archbishop Raphael Cheenath S.V.D. v. State of Orissa*, (2009) 17 SCC 87, 90

