

DNR COLLEGE OF LAW-MOOT PROBLEM-1 FOR PRELIMINARY ROUNDS

Moot Problem-1:

Almost three decades after the Supreme Court judgment in the Shah Bano case raised questions on the sanctity of personal laws, comes in the Shayara Bano case that has once again stirred the religious orthodoxy versus gender justice debate. In February last year, Shayara, a resident of Kashipur in Uttarakhand who was given instantaneous triple talaq by her husband, approached the Supreme Court. Her petition challenged the long-standing practices of talaq-ul-biddat (instantaneous triple talaq), nikah halala (prohibition on remarriage with the divorced husband without consummating marriage with another man) and polygyny. Now, the Union government has filed an affidavit that in-principle supports the petitioner's demand for doing away with such practices.

The Muslim Personal Law (Shariat) Application Act, 1937, allows Indian Muslims to be governed by the Shariat (Islamic law), based on the Quran and Hadith (utterances of the Prophet), in matters of personal law. In the absence of any codification even within the Quranic framework, however, the Shariat has been subject to interpretations by the Muslim clergy, who have held these practices as sacrosanct.

But stating that Muslim women, merely by virtue of their gender and religion, are being denied their right to equal protection under law and protection against discrimination, Shayara's petition argues that talaq-ul-biddat has no foundation in the Quran and that polygyny is not an integral part of Islam.

Shayara's is the first such petition to challenge it citing the fundamental rights guaranteed by the Indian Constitution. The petition invokes Articles 14, 15, 21 and 25 that deal with the right to equality before the law, protection against discrimination on grounds of sex or religion, protection of life and personal liberty and freedom of religion respectively.

While the petition was originally filed by the lawyers of Shayara Bano, over the last several months, it has been clubbed with several other petitions, including those filed by a few other affected women. Muslim scholars such as Irfan Ali Engineer through his Centre for Study of Society and Secularism and several Muslim women's groups such as the Bharatiya Muslim Mahila Andolan (which has over 1 lakh members across 15 states) and Bebaak Collective (coalition of seven Muslim women groups across India) have also filed intervening petitions supporting Shayara's demand. Also expected to join the fray is the All India Muslim Women Personal Law

Board, which has in the past drafted its own Sharia Nikahnama that gives equal rights to men and women and repeatedly spoken against triple talaq.

The All India Muslim Personal Law Board (AIMPLB) has, however, decried all the groups that have spoken out in favour of reforming the Muslim personal law. The AIMPLB's affidavit opposes any attempts at interference by the Supreme Court in matters of religious and cultural rights.

In March last year, The Supreme Court had asked the Centre to make public a report by the high-level Pam Rajput committee on the status of women in India and the committee has sought a ban on gender discriminatory practices propagated by personal laws. It was only this month, however, that the Ministry of Law finally filed its affidavit where it took a stand that personal laws, regardless of the fact that they are meant to preserve the plurality and diversity of the country, "must be examined in the light of the overarching goal of gender justice and dignity of women. To drive in the point that such practices are not integral to Islam", the Union ministry gives detailed examples of personal law reforms, mainly Muslim majority, in 10 Countries. The union government's affidavit states, "Secularism being a hallmark of Indian democracy, no part of its citizenry ought to be denied access to fundamental rights, much less can any section of a secular society be worse off than its counterparts in theocratic countries, many of which have undergone reforms."

Prepare memorials/arguments for both Petitioner and Respondent to present them before the Moot Court.

Shayara Bano ..(Petitioner) v. Union of India (Respondents): W.P.No. 118 of 2016 judgment dated 22nd August, 2017.

Moot Problem No. 2:

Right to Privacy: SC's verdict on Justice K.S. Puttaswamy(Retd.) and Anr. v. Union of India and Ors. W.P.(C) No.494 of 2012, case decided on 24th August, 2017 :is landmark, but raises five interesting law and policy issues

Facts of the Case: The Government of India initiated Aadhaar Project, with an objective to build a database of personal identity and biometric information covering every Indian. More than a billion Indians have so far been registered in the Aadhaar programme, which sees citizens issued with a 12-digit number that aligns to specific biometric data such as eye scans and fingerprints. Registration has now been made mandatory for filing tax returns, opening bank accounts, securing loans, buying and selling property etc.

In 2012, former judge Justice K.S. Puttaswamy filed a writ petition in the Supreme Court challenging the constitutionality of Aadhaar Project on the grounds that it violates the right to privacy. The Government argued that there was no such constitutional right of privacy in view of the decision given by eight judges in *M.P. Sharma v. Satish Chandra* [1954] SCR 1077 and a decision by a four judges in *Kharak Singh v. State of Uttar Pradesh* [1964] 1 SCR 332.

The case came before a three judge Bench of the Court which, on 11 August 2015, referred the matter to a larger Bench of the Supreme Court. On 18 July 2017, a five judge Constitution Bench ordered the matter to be heard by a nine judge Bench. In the meantime however the bench hearing the constitutional validity to Aadhaar passed an interim order restricting compulsory linking of Aadhaar for benefits delivery.

ISSUES BEFORE THE COURT:

The apex court decided the case upon following issues:

Whether the judgment pronounced by the constitutional bench, in the case of *M.P Sharma* and *Kharak Singh* that there is no right of privacy in the constitution, is correct.

During the hearing of the present case, the court also dealt on various aspect of privacy-

- (i) Whether there is a constitutionally protected right to privacy;
- (ii) If there is a constitutionally protected right, whether this has the character of an independent fundamental right or whether it arises from the existing guarantees of protected rights such as life and personal liberty;
- (iii) The doctrinal foundations of the claim to privacy;
- (iv) The content of privacy;
- (v) The nature of the regulatory power of the state

JUDGMENT:

The court in this case unanimously held that privacy is a constitutionally protected right which emerges, primarily, from Article 21 of the Constitution. However, this is not an absolute right but interference must meet the three fold requirement of (i) Legality; (ii) the need for a legitimate aim and (iii) proportionality. The court also noted that, as informational privacy is a facet of the right to privacy, the Government will need to put in place a robust regime for data protection.

The judgment can be summarized as follows:

Decision in *MP Sharma* has been overruled.

Decision in *Kharak Singh*, to the extent it says Right to Privacy is not part of Right to Life, is also over ruled.

Right to Privacy is an intrinsic part of life and personal liberty under Article 21.

Decisions subsequent to *Kharak Singh* which held privacy as part of right to life are correct.

Moot Problem No: 3

Naz Foundation v. Govt. of NCT of Delhi judgment in the light of fundamental right to privacy in putta swamy Vs union of india on 24th august 2017

Homosexuality is mostly a taboo subject in Indian civil society and for the government. Section 377 of the Indian Penal Code makes sex with persons of the same gender punishable by law. On 2 July 2009, in Naz Foundation v. Govt. of NCT of Delhi, the Delhi High Court held that provision to be unconstitutional with respect to sex between consenting adults, but the Supreme Court of India overturned that ruling on 11 December 2013, stating that the court was instead deferring to Indian legislators to provide the sought-after clarity.[1] On 2 February 2016, however, the Supreme Court agreed to reconsider its judgment, stating it would refer petitions to abolish Section 377 to a five-member constitutional bench, which would conduct a comprehensive hearing of the issue.[2]

There are no official demographics for the LGBT population in India, but the government of India submitted figures to the Supreme Court in 2012, according to which, there were about 2.5 million gay people recorded in India. These figures are only based on those individuals who have self declared to the Ministry of Health. There may be much higher statistics for individuals who have concealed their identity, since a number of homosexual Indians are living in the closet due to fear of discrimination.[3]

Homophobia is prevalent in India.[4][5] Public discussion of homosexuality in India has been inhibited by the fact that sexuality in any form is rarely discussed openly. In recent years, however, attitudes towards homosexuality have shifted slightly. In particular, there have been more depictions and discussions of homosexuality in the Indian news media[5][6] and in Bollywood.[7] Several organisations have expressed support for decriminalising homosexuality in India, and pushed for tolerance and social equality for lesbian, gay, bisexual, and transgender people. India is among countries with a social element of a third gender. But mental, physical, emotional and economic violence against LGBT community in India prevails.[8] Lacking support from family, society or police, many gay rape victims don't report the crimes.[9]

Religion has played a role in shaping Indian customs and traditions. While injunctions on homosexuality's morality are not explicitly mentioned in the religious texts central to Hinduism, the largest religion in India, Hinduism has taken various positions, ranging from homosexual characters and themes in its texts to being neutral or antagonistic towards it. Rigveda, one of the four canonical sacred texts of Hinduism says Vikriti Evam Prakriti (Sanskrit: , meaning what seems unnatural is also natural),[10] which some scholars believe recognises homosexual/transsexual dimensions of human life, like all forms of universal diversities.[11] The ancient Indian text Kamasutra written by Vātsyāyana dedicates a complete chapter on erotic homosexual behaviour. Historical literary evidence indicates that homosexuality has been prevalent across the Indian subcontinent throughout history, and that homosexuals were not necessarily considered inferior in any way until about 18th century.[12]

On 11 December 2013, the Supreme Court of India set aside the 2009 judgement given by the Delhi High Court stating that judicial intervention was not required in this issue. This in effect recriminalized sexual intercourse "against the order of nature". In its judgment the Supreme court bench of justices G. S. Singhvi and S. J. Mukhopadhyaya stated —

"In view of the above discussion, we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable." [1]

The full decision can be found [here](#).

The bench of justices G. S. Singhvi and S. J. Mukhopadhaya however noted that the Parliaments should debate and decide on the matter. A bench of justices upheld the constitutional validity of Section 377 of Indian Penal Code that makes anal sex a punishable offense.[2] The central government has filed a review petition on 21 December 2013. In its review petition the Centre said: "The judgment suffers from errors apparent on the face of the record, and is contrary to well-established principles of law laid down by the apex Court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution." The IPC, when enacted in 1860, was justified; but with the passage of time it had become arbitrary and unreasonable, the petition added.[3] Naz Foundation has also filed a review petition against the Supreme Court order on Section 377.[4] On January 28, 2014 Supreme Court dismissed the review Petition filed by Central Government, NGO Naz Foundation and several others, against its December 11 verdict on Section 377 of IPC.[5][6]

Responses

Days later and influenced by the Devyani Khobragade incident, former Finance Minister Yashwant Sinha called for the arrest of same-sex companions of US diplomats, citing the Supreme Court of India's recent upholding of Section 377 of the Indian Penal Code.[7][8] The recriminalization of gay sex comes under fire from World leaders. The United Nations human rights chief Navi Pillay[9] voiced her disappointment at the re-criminalization of consensual same-sex relationships in India, calling it "a significant step backwards" for the country. In the wake of Indian Supreme Court's ruling that gay sex is illegal, UN chief Ban Ki-moon[10] stressed on the need for equality and opposed any discrimination against lesbians, gays and bisexuals.[11]

Soon after the judgement, Sonia Gandhi, President of the then ruling Congress party, asked Parliament to do away with section 377. Her son and Congress Party vice-President, Rahul Gandhi also wanted section-377 to go and supported gay rights.[12] In July 2014, Minister of State for Home Kiren Rijiju in the BJP led Central government told the Lok Sabha in a written reply that a decision regarding Section 377 of IPC can be taken only after pronouncement of judgement by the Supreme Court.[13] However, on 13 January 2015, BJP spokesperson Shaina NC, appearing on NDTV, stated, "We [BJP] are for decriminalizing homosexuality. That is the progressive way forward." [14]

Protest on social media

Actor Imran Khan took action in order to disabuse homophobic people from their mistaken notions of homosexuality in a satire video.[15] Many Mumbai film industry personalities such as Amitabh Bachchan, Aamir Khan, Celina Jaitley, Twinkle Khanna, John Abraham, Karan Johar, Farhan Akhtar, Riteish Deshmukh,[16] Shruti Haasan, Sonam Kapoor, Anushka Sharma,[17] commented against the ruling. Many other well known persons, including Nobel Laureate Amartya Sen, and writer Vikram Seth, protested against the supreme court ruling.[18]

In 2013, Delhi-based author Akhil Katyal published a poem "Girl, when you" satirizing Section 377 and how it implicates heterosexual acts as well.[19]

" Girl, when you blow your boy, or boy, when you go down on her, or when both of you use a toy, and all the world's a blur, I know it feels like heaven, you too violate 377.[20]"

The Wrong Burrow, a short story satirizing the judgment of the Supreme Court, was published in the January 2015 edition of an Indian e-zine, Spark.[21]

In September 2015, first time author Manish Jani launched a fiction book titled 377 that revolves around four youngsters finding themselves in a unique situation where they are compelled to raise their voices against Section 377 of Indian Penal Code.[22]

PROBLEM 4 : FOR SEMI FINAL/FINALS

The Sabarimala temple, located in the Periyar Tiger Reserve in the Western Ghat mountain ranges of Pathanamthitta District of Kerala, is renowned for lakhs of pilgrims thronging it all through the year. Pilgrims trek the Neelimala to reach the shrine, which has 18 sacred steps, to worship Lord Ayyapa after undergoing strict religious vows for 48 days.

The temple is also prominent for another reason — the selective ban on women entering it. Women aged between 10 and 50, that is those who are in menstruating age, are barred from entering the temple. While there is no restriction on women to worship Lord Ayyapa in any other temple, their entry is prohibited only in this temple alone.

The Indian Young Lawyers Association and five women lawyers approached the Supreme Court seeking a direction to allow entry of women into the temple without age restrictions. Another group of women, part of the "Happy to Bleed" campaign, has also sought the court's direction on whether society should continue to bear with "menstrual discrimination."

Their petition contended that discrimination in matters of entry into temples was neither a ritual nor a ceremony associated with Hindu religion. Such discrimination was totally anti-Hindu. The religious denomination could only restrict entry into the sanctum sanctorum and could not ban entry into the temple, making discrimination on the basis of sex.

The Travancore Devasom Board, which maintains the temple, had replied that the ban was in accordance with centuries-old tradition. Lord Ayyapa, being a Naishtika Brahmachari (one who has vowed to remain celibate). Another argument put forth by the temple authorities is that it is not possible for women to put up with the physical hardship, austerity and days of celibacy like men.

The on-going trial in the Supreme Court has also put the spotlight on a 1991 Kerala High Court judgment, which held that the restriction was in accordance with a usage from time immemorial and not discriminatory under the Constitution. Upholding the restrictions, the High Court, in its judgment, said: "According to 'The Sabarimala Thanthri', these customs and usages had to be followed for the welfare of the temple. He said only persons who had observed penance and followed the customs are eligible to enter the temple and it is not proper for young women to do so."

Twenty-five years after this judgment, the Supreme Court has questioned the "logic" behind the restriction, even wondering whether there was any proof that women did not enter the sanctum sanctorum 1,500 years ago.

Earlier instances

The Sabarimala Temple tantris would perform a "purification ceremony" at the 18-sacred steps that lead to the sanctum sanctorum, whenever the rules are violated. The last ceremony took place in December 2011, after a 35-year-old woman managed to climb the "pathinettam padi".

In 2006, astrologer P. Unnikrishna Panicker conducted a "devaprasnam" at the temple and 'found' that there were signs of a woman having entered the sanctum sanctorum. Soon after this, yesteryear Kannada actor Jayamala said she had entered the temple and even touched the idol in 1987, when she was shooting for a movie.

Amidst outrage, the Kerala police filed a report, state the entire episode was "orchestrated to gain publicity." The case is pending in the Kerala High Court.

Though, courts have generally not interfered in the traditions and practices followed in religious place, it has never failed to uphold equality whenever discrimination was reported. In this conflict of worshipping rights versus customs, all eyes are now on the Supreme Court.

Prepare memorials/arguments for both Petitioner and Respondent to present them before the Moot Court.

S U P R E M E C O U R T O F I N D I A: Writ Petition(s)(Civil) No(s).373/2006

INDIAN YOUNG LAWYERS ASSOCIATION & ORS. Petitioner(s) V. THE STATE OF KERALA & ORS. Respondent(s)