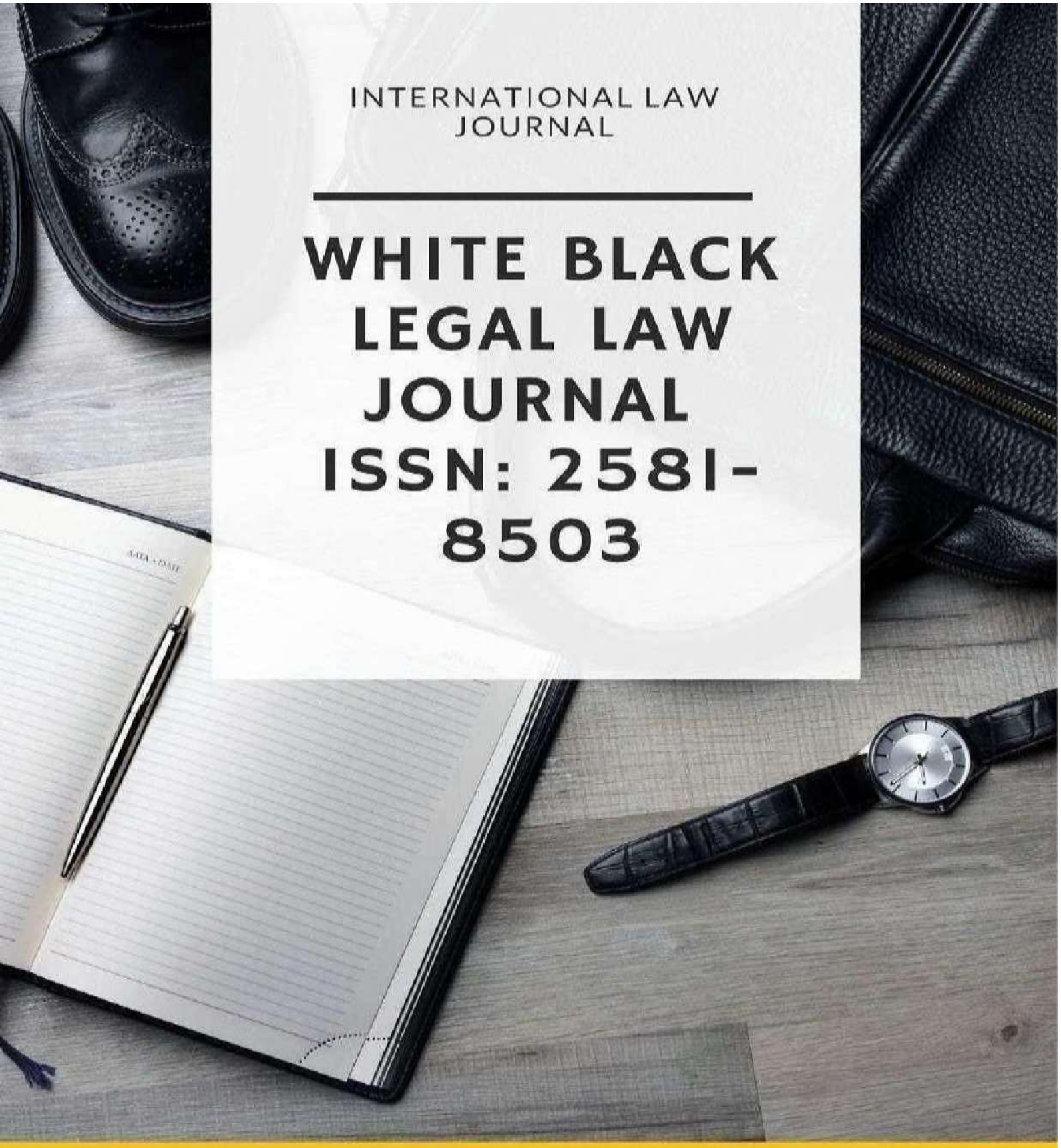

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer

Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.

Senior Editor

Dr. Neha Mishra

Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.

Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in ‘Intercountry adoption laws from Uttranchal University, Dehradun’ and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM
Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.
More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

www.whiteblacklegal.co.in
Volume 3 Issue 1 | May 2025 ISSN: 2581-8503

DON'T DISCARD THE DISSENT

AUTHORED BY - PAAVNI GUPTA & SHRUTI UDAYAN

ABSTRACT

The article explores the *role of judicial dissent in shaping the law of the land* and its impact on the future of Indian judiciary arguing that "DON'T DISCARD THE DISSENT". The article examines key cases including *KS Puttaswamy v. Union of India*, the *Elgar Parishad arrests*, the *Sabrimala temple entry case* and the case of *Shayara Bano v. Union of India* to illustrate how dissenting opinions have influenced the legal interpretations and societal norms. The article focuses on the importance of dissent in upholding the fundamental rights of citizens, promotion of public discourse and ensuring that the judiciary is accountable. It highlights *how dissenting voices even though being in minority becomes the catalysts for the evolution of legal system* and its reform which ultimately contributes to a more inclusive form of democracy.

What is a healthy democracy? If you ask us, a democracy that often dissents is in the pink of its health. Dissent is hope. Dissents play a transformative role and opens doors to alternative opinions and inclusive law making.

India respects dissent. For almost a hundred years, the Britishers viewed dissent as a threat to their position in India. A strong constitution is one with a strong right to dissent. Article 19(1)[1] of the Indian Constitution protects the right to dissent in India as a fundamental right and an essential part of democracy. The collegium system of appointment of judges in India provides for an insulation from direct political influence thus, allowing for broader range of judicial dissents, unlike the United States.

THE SIGNIFICANT MINORITY

In the recent same sex marriage case,[2] while the apex court refused to recognize the right of same sex to form civil unions, in delivering a minority opinion, Justice DY Chandrachud and Justice SK Kaul, stood by their opinion that same sex couples are entitled to recognize their

[1] Additional District Magistrate v. Shivkant Shukla, 1976 AIR 1207.
[2] Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

relationships as civil unions and claim consequential benefits. Not enough time has lapsed to see whether this minority opinion will become tomorrow's majority view.

Judicial Dissent finds its roots in post-independence India, starting from *A.K Gopalan v. State of Madras*,[3] 1950, Justice Fazl Ali's dissenting view on personal liberty shaped the later interpretations of Article 21[4] to become as we now know it. In the 1951 case[5] on the limits to which Indian legislature can delegate its legislative power, dissenting from his seven competent colleagues, then Chief justice, Harilal J Kania, placed his emphasis on conditional legislation. Justice HR Khanna in his admirable verdict in *ADM Jabalpur v. Shivkant Shukla*,[6] opined that, "*A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed*." Justice Khanna's dissent relating to *habeas corpus* was later acknowledged as a fundamental rule of law governing our nation.

DISSENT AND LAW

This article intends to explore what role does judicial dissent play in producing decisions by a court of law. The article will base its analysis on major judgments which serve as examples to dissent affecting law.

First, in the case of *Justice K.S.Puttaswamy(Retd) vs Union Of India*,[7] which created a legal battle centered on the constitutional validity of the Aadhaar Act culminating in the 2018 Supreme Court judgment which highlighted the power of judicial dissent. The core issue revolved around the validity of the act with the majority upholding its use for filing of taxes and welfare schemes. However, Justice D.Y. Chandrachud penned a powerful dissent, raising profound concerns about mass surveillance and the erosion of fundamental rights, particularly the right to privacy.

In 2011, the Government of India initiated a new identity document known as the Aadhar Card and established a new agency for the same known as Unique Identification Authority of

[3] M. K. Guru Prasath, K. Jerlin Subiksha,"Role of Dissenting opinion in Judiciary" (2023) 1 (1) IJLLR <https://www.ijllr.com/post/role-of-dissenting-opinion-in-indian-judiciary > Last accessed on 12 March 2025.
[4] Bhargavi P, An analysis on the dissenting opinion In India, White Black Legal Law Journal, Jan 2024 .
[5] Justice K.S. Puttaswamy(Retd) v. Union of India, AIR SC 2018 1841.
[6] Supreme Court Observer, "The Constitutionality of the Aadhaar Act"
Last Accessed on 12 March 2025.
[7] Supra Note 5.

India(UIDAI). The intention of government was to make a primary identity number for all residents living legally in India, it provided people with an unique 12 digit number which was made available to every legal resident free of cost. The UIDAI is responsible for storing the data in a centralised database. Progressively, the government made Aadhaar card mandatory for a number of welfare schemes. The Aadhar scheme was challenged before the Supreme Court by Justice K.S. Puttaswamy. The claim was made by him that the Aadhar infringes upon the fundamental and baisc rights of the people, specifically he was concerned about the privacy as there are no checks on the power of the government to use the biometric data collected.

The judgement[8] came in a 3:1 ratio. Justice Chandrachud stated that *"The entire Aadhaar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act does not save the Aadhaar project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act are unconstitutional."*

While the judgement of the majority prevailed, Justice Chandrachud's dissent resonated deeply which serves as a critical reminder of the importance of protecting privacy of individuals in the increasingly digital world. His arguments fuelled a broader public discourse on data protection and underscored the need for stringent safeguards. His legal reasoning from the dissent has been cited in various cases and debates which revolves around concerns of data privacy. Critically, his dissent has been brought to the forefront the principle of proportionality, emphasizing the state's obligation to demonstrate and prove that any measure infringing upon fundamental rights is both necessary and proportionate.

His dissent has fuelled ongoing legal challenges and also solidified the importance of judicial dissents in creating an influence on future legal interpretations and ensuring the preservation of individual liberties in the increasing digital era. Thereby indelibly impacting the law of the land by reinforcing the value of privacy within the framework of fundamental rights.

Second, the Maharashtra Police on 28th August 2018 [9] carried out various and continious raids across different parts of India, resulting in the arrest of five public activists namely, Varavara Rao, Sudha Bhardwaj, Gautam Navalakha, Vernon Gonzalves and Arun Ferreira. They were

[8] THE HINDU, Activists arrested in nationwide raids: the story so far, New Delhi, 4th December 2021.
[9] The Unlawful Activities prevention Act, 1967.

alleged as responsible for the Elgar Parishad, an event which was held to celebrate 200 years of the battle of Koregaon Bhima in January 2018. According to the police and locals, it triggered the Bhima Koregaon violence.[10]

The police further alleged them to be the member of Communist Party of India (Maoist) which is a banned organization. Following the same, five citizens filed a joint petition[11] to the Supreme Court challenging the arrests of the arrestees. The petitioner contended that the police violated the activists fundamental rights [Article 14, Article 19, Article 21]. They emphasised that the arrestees have been booked under the provisions of Unlawful Activities (Prevention) Act,1967 (UAPA).[12]

A second similar petition was tagged with the case where the Maharashtra Police arrested [13] five activists. The petitioners requested the court to form a Special Investigation Team. The court delivered its judgment with a 2:1 majority which allowed the police to continue the investigation. Justice D.Y. Chandrachud authored the dissenting opinion and suggested the appointment of an SIT. Hon'ble Justice Dhananjaya Y Chandrachud was the lone dissenter and supported that the SIT should be appointed for further investigation. He stated that "*Circumstances have been drawn to our notice to cast a cloud on whether the Maharashtra police has in the present case acted as fair and impartial investigating agency*", Justice Chandrachud in his dissenting opinion,[14] has raised concerns on the investigation that were conducted by the Pune Police. He questioned the conduct of theirs in approaching the media while the investigation was still underway. According to him, the selective disclosure of details by the police to the media created public bias against the accused and cast doubts on the impartiality of the investigation therefore, necessitating the need for an SIT. His dissent served as a powerful catalyst for increased public and legal scrutiny and emphasised on the potential for bias and the overall conduct of the investigation raising serious questions about fairness of the process and underscored the fundamental importance of due process and an impartial investigation.

[10] The National News,Bhima Koregoan violence: Activist Rona Wilson and Lawyer Surendra Gadling among five arrested,<https://scroll.in/latest/881576/bhima-koregaon-violence-activist-rona-wilson-and-lawyer-surendra-gadling-among-five-arrested > 6 June 2018, Last accessed on 12 March 2025.
[11] Romila Thapar v. Union of India, AIR 2018 SC 4683.
[12] Supra Note *9*.

While the majority judgment prevailed, Justice Chandrachud's dissenting opinion laid the groundwork for future legal challenges and interpretations.

Third, a legal battle was initiated by a petition filed by the Indian Young Lawyers Association. The petition challenged the exclusion of women from entry into the Sabarimala Temple dedicated to Lord Ayyappa on grounds of right to equality and religious freedom. This case is an example of how dissent is just as powerful as the consensus. In the 2018, the five judge bench, Justice Indu Malhotra was the only women and the lone dissenter. The bench contained of Chief Justice Misra, Justice Nariman, Justice Chandrachud, Justice Khanwilkar and Justice Malhotra. The court delivered four separate opinions with an odd one out written by Justice Indu Malhotra. By a 4:1 majority, the exclusionary practise was held to be unconstitutional. The majority opinion held that the practise was against the right to freely practise and profess one's religion under Article 25(1) of the Indian Constitution. Additionally, that the devotees of Lord Ayyappa's did not pass the constitutional test to fall under the definition of a separate religious identity and that, they were Hindus. Article 25(2)(b) provides the state with the power to make laws to reform Hindu denominations. Justice Nariman concurred with Justice Misra and Justice Khanwilkar however, Justice Chandrachud in separate and concurring opinion said that the exclusion of women between ten to fifty years of age was contrary to constitutional morality and that the physiological characteristic of menstruation did not have any significant entitlements or bearing under the constitution. He further added that the exclusion was a form of untouchability under Article 17 of the Indian Constitution.

In a starkly dissenting opinion, Justice Indu offered contrary reasonings and viewed the exclusion as constitutional. She held that the right to equality under Article 14 cannot override the religious rights under Article 25. The Sabarimala Temple passes the test to be a separate religious denomination and is, subsequently, not covered under the social reform mandate of Article 25(2)(b). Justice Malhotra further dismissed the contention of violation of Article 17 and held that untouchability does not extend to gender.

The case, by the majority opinion, held the exclusion of women from entry to the Sabarimala temple as unconstitutional.

However, more than fifty review petitions were subsequently filed and in November, 2019, the five judge bench delivered a judgement on the review petitions, keeping them pending and

referring certain overarching constitutional questions to a larger bench. Further, in 2020, the nine judge bench upheld the validity of the referral order issued in the 2019 judgement however, made no observations referring to the stay on the 2018 verdict. Implicit in these observations is the assumption that these benches may disagree with the Sabarimala judgment of 2018.

Therefore, it was the lone dissenting voice of Justice Indu Malhotra, her infamous view, that poured into the floodgates of review and revision. Plurality decisions form strong precedents, not because of the majority view but because someone disagreed and dissented. Justice Indu's opinion of dissent demonstrated the democratic and diverse nature of the Indian Judicial process- there can exist no democracy without dissent.

Fourth, in 2017, the minority dissenting opinion was the longest of the three decisions propounded by the five judges in the case of *Shayara Bano v. Union of India*.[15] *Talaq-e-Biddat*, popularly known as Triple Talaq, allowed a muslim men to instantaneously divorce their wives by pronouncing the word '*talaq'* three times successively. The petitioner, Shayara Bano, approached the Supreme Court challenging this practice. It violated muslim women's right to equality and other constitutional freedoms promised to them under the Indian Constitution.

The case was heard by a five-judge bench comprising of Hon'ble CJI J.S Khehar, Justice U.U Lalit, Justice Abdul Nazeer, Justice Rohinton Nariman and Justice Kurian Joseph.

Justices U.U. Lalit and Justice Nariman held the majority opinion and elaborated that *the practise* is regulated by the *Muslim Personal Law (Shariat) Application Act, 1937*, and is expressly unconstitutional as it is manifestly arbitrary in nature. Additionally, the practise was recognised to be against the Quran and therefore, lacking a legitimate legal sanction, Justice Kurian Joseph noted this while penning his concurring opinion.

He held, "*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*".
It was Chief Justice Khehar, along with Justice Abdul Nazeer, who dissented on this bench and took the view that the practice of triple talaq was "*bad in theology but good in law*". They

[15] Shayara Bano v. Union of India, AIR 2017 SC 4609.

advocated the view that the practise in question is not regulated by the Shariat Act, however, is an intrinsic part of Islamic personal law and by reason of the same, is protected by Article 25. The solution to this gender discriminatory practice is legislative action. A challenge to its constitutionality is not the recourse to take.

The minority opinion suggested that the law be inoperative for a duration of six months from the pronouncement of this judgement and in the meantime, the legislature must frame a law to counter this discriminatory practise and rectify the violation of rights that plague muslim women. They directed the central government to enact a law to govern it.

However, the majority advocated for a opposing view, equally well reasoned, and the practice was made inoperative, indefinitely.

This served as an example of when dissent may shape law. How an opinion of the minority dissenters may help support and strengthen the verdict of a case.

FUTURE OF DISSENT

The right to dissent is not merely a fundamental right incorporated in the part III of the Constitution but also plays a significant and important role in shaping the laws for the country. The judgment of *ADM Jabalpur v. Shivkant Shukla*[16] is a solid example supporting the same, Justice H.R. Khanna's powerful dissent stood as a beacon of judicial courage asserting that the right to life and liberty could not be suspended even during an emergency. It was disregarded that time but is widely celebrated in today's India and holds a great importance in judicial independence and the protection of fundamental rights. Dissents have always contributed to significant changes in legal doctrine over time. Yet again, Justice H.R. Khanna's dissent in *Kesavananda Bharati v. State of Kerala*[17] eventually became the majority opinion in subsequent cases, establishing the doctrine of the basic structure of the Constitution. It might be that dissents do not have immediate legal force but always influences the future judicial thinking. Dissents acts as a tool to keep check and balance on the judiciary.

[16] ADM Jabalpur v. Shivkant Shukla, 1976 AIR 1207.
[17] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

While interpreting the case the dissenting opinion plays an important role, it raises questions on the unanswered concepts of law. In India, dissenting opinions are essential for determining the direction the legal theory takes and helps in maintaining a lively, active and transparency. When individuals and groups are given the right to freely express their dissent it can very easily hold government or powerful authorities accountable and could raise questions if something seems unreaasonable or unjustified. Dissents fosters and increases the culture of debates and proper discussions in decision making which is very important for a democratic country and is important for the growth of the country too. The development of legal concepts depends largely on dissenting views. The dissenting judges add to the ongoing process of legal growth by questioning accepted standards. In most of the landmark cases the opposing views have sparked legislative changes and societal transformations by serving as the cornerstone for ensuring the reforms in legal system. Dissents often highlight the complexity of legal issues, offering alternative perspectives that can enrich legal discourse and lead to more nuanced understandings of the law.

Dissenting views stimulate public discussions and debates about important legal and constitutional changes and issues which enriches the democracy. While frequent dissents raises questions about judicial unity they also play an important role in demonstrating how judiciary values the diverse perspective which enriches the trust of the public on the legal system of the country. It is necessary for us to accept dissents as a necessary element of the legal system which helps in maintaining judicial independence, stimulating intellectual variety and advancing justice in the current society.

Dissenting views will surely continue to be a pillar of India's rich and intricate jurisprudential legacy as the judicial system develops.

To summarize, in the long run dissent can lead to progress by prompting individuals to critically examine long-standing norms, challenge existing power dynamics and ultimately strive for fairer and more equitable systems. It can also offer marginalized voices an opportunity to be heard.

CONCLUSION

Dissent is tool, a powerful tool that helps shape evolution and progress. It is a vital mechanism that if strengthened, fuels the foundation of democracy. The aforementioned cases serve as unique examples of how a dissenting opinion helps inspire a law built rested upon majority consensus and acts as a catalyst for social change and increased inclusivity.

The transformative power of dissent is much out in the open, becoming solid foundations for the "*brooding spirit of the law*", applying and preaching law, truly in the aspired spirit of our constitution makers rather than in letter alone. Dissent plays role in furtherance of diverse ideas, challenging traditional views, and ensuring the judiciary stays accountable. It sparks public discussion and supports the creation of a more fair and equal society. Frequent disagreements in court concern us about unity, however, they are proof of our judiciary's commitment to embracing different viewpoints and maintaining public trust.

To summarise, judicial dissent is not ambiguity or confusion or weakness, it is key to a well-functioning, healthy and living legal system, that evolves with growing time and accommodates when needed. Dissent protects basic rights, encourage legal changes, and keep the law in tune with society's needs. As India's judiciary faces complex legal and social issues, dissenting opinions will continue to play a vital role in its journey toward justice and equality.