MAGLAW

Magazine for Lawyers and Academicians

2017

DEPARTMENT OF LAWS

PANJAB UNIVERSITY, CHANDIGARH

तमसो मा ज्योतिर्गमय

"Lead us unto the Light from Darkness"

MAGLAW

2017

DEPARTMENT OF LAWS

PANJAB UNIVERSITY

CHANDIGARH

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Message from Chairperson

Dear Readers,

It is a matter of pride to pen down the message for "MAGLAW" the Panjab University's Law Department Magazine. I am happy to know that our department is moving forward confidently and once again have managed to bring out departmental magazine. There is nothing…absolutely nothing that stops Law Department juggernaut from rolling forward, going on from one project to other thereby leaving spectators spellbound.

All this have been made possible by extraordinary vision and immaculate planning of our editorial board, student coordinators and very special student authors. The magazine provides law students a platform to explore their potentials express their opinions on the current delicate issues unhesitatingly.

The essential purpose of the magazine is to inform, engage, inspire and entertain a diverse readership including alumni, faculty members, researchers and other peers of the same profession.

With this I compliment the faculty members, research fellows and the student authors of this vibrant department success in their future endeavours.

With Best Wishes,

Prof. Shalini Marwaha

Chairperson

Message from Editorial Board- Teachers

Dear Readers,

It is always an immense pleasure to be a part of the team which strives to bring out the talents of students and staff. We are happy to see the extent of enthusiasm of eminent members of this department to contribute towards the magazine. Not to be surpassed, our very special students who devoted their time and plunged into creating powerful opinions in form of writing articles on the current debatable legal issues. We stand awed by the sheer number of articles that have come for the magazine, thus showing the high optimistic energy of the students of this esteemed department.

The magazine is intended to bring out the hidden literary talents in students and to inculcate the art of expression with fine writing skills among them. Reading this magazine would provide a glimpse of approach our buddying lawyers are having most controversial debatable legal issues of the society. We cordially invite you to read and appreciate the brilliant minds of this temple of learning.

We hope everyone would continue to put their efforts to keep the momentum and enhance the standards of magazine. The credit for bringing out MAGLAW- 2017 goes to the glory of the Department. We sincerely appreciate the Chairperson, editorial team and especially the students without whose support this edition would not have been possible.

Regards
Editorial Team.

Message from Editorial Board- Research Scholars

Dear Readers,

We are fortunate enough to get an opportunity to be associated with the Panjab University's Law Department magazine "MAGLAW" that provides a platform to students for giving free expression of their ideas and opinions on the current legal issues. Our goal is to provide a stage to students who believe in exchange of information on all aspects of legal issues. MAGLAW captures the essence of the Law Department which lies in intellectual maturity of students. We have made every attempt to keep the publication scheduling in order and making sure that we deliver high quality content to our readers in timely fashion.

Our sincerest thanks to the most respected Chairperson, Dr. Shalini Marwaha who encouraged not only the students but also the entire team of editors and made us handle the heavy workload in a smooth manner. The smooth transition would have not been possible without the tireless help from teacher's editorial board who were extremely quick in reviewing, editing and taking decisions. Most importantly, we are thankful to the authors who provided ample content to make our magazine best possible.

Finally, from the entire team of MAGLAW, we wish all the readers a Happy Reading!

THE ORDINARINESS OF ORDINANCES

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Abstract

Ordinances are legislative measures adopted by governments both at the Centre and States between two sessions of Parliament or State Assemblies and due to some urgency. They are issued by the President under Article 123 of the Constitution and by the Governor under Article 213. The crux of the matter lies in the fact that power to issue ordinance is a power enshrined in 1the Constitution of India to handle situation of urgency with ease and it becomes totally unethical when such power is used a weapon of interference by the executive into the legislative prerogatives. Constitution of India has clearly given parameters when and how this power is to be used. But a deeper analysis reveals a casual disregard for norms of democratic politics typified by parliamentary supremacy. Author makes an attempts to carefully analyse pattern of promulgating ordinance whereby a brief references have been given in the form of judicial pronouncements along with the examination of 'emergent' reasons whereby different governments resort to this method to bring legislations. Further author shall give historical account of various issues related to ordinances and recent developments that throw light on scope of judicial review has evolved to restore separation of powers and prevent abuse of power

Introduction

India is the biggest parliamentary democracy in the world with the written constitution which is quite exhaustive in nature. According to this Constitution, laws are to be legislated by the Parliament. But from the vast and varied experiences of colonisation, invasions makers of our constitution envisaged the power to legislate in the executive head of the state. Power of the head of executives of Centre and State to legislate is only between two sessions of Parliament or State Assemblies in the circumstances of emergency and where immediate action is needed. Such power is exercised in the form of passing an Ordinance issued under Article 123 and Article 213 of the Constitution of India by the President and Governor respectively. These can also be termed as temporary laws made by the President or Governor on the advice of council of ministers. Though the power conferred on Executive is ex necessitate these days ordinances have

been used as weapon to bypass legislative debates and voting. Their maximum lifespan can be seven and a half months[1] (6 months plus 6 weeks) but repeated re-promulgation gives them an apparently a permanent character. The Supreme Court's Constitution bench, while expanding scope of judicial review of ordinances, has ruled that re-promulgation of ordinances defeats the Constitutional scheme and is a fraud on the Constitution.

In what follows, hereunder given is the brief overview of ordinances, key issues related to them and the evolution of debates on those issues with special focus on Krishna Kumar Singh judgement delivered on January 2, 2017.

Ordinance making power of the President

Article 123 of the Indian Constitution grants the President of India certain law making powers i.e. to promulgate Ordinances when either of the two Houses of the Parliament is not in session which makes impossible for a single House to pass and enact a law. Ordinances may relate to any subject that the parliament has the power to make law, and would be having same limitations. Thus, the following limitations exist[2]:-

- The President can only promulgate when either of the House of Parliament is not in session.
- The President though has the power of promulgating the ordinances but same cannot be done unless he is satisfied that there are circumstances that require him to take immediate action.
- After the ordinance has been passed it is required to be approved by the parliament within six weeks of reassembling. The same will cease to operate if disapproved by either House.

The President may withdraw an ordinance at any time. However he exercises his power with the consent of the Council of Ministers headed by the President. The Ordinances may have retrospective effect and may modify or repeal any act of parliament or other ordinances. It may be used to amend a tax law but it can never amend the Constitution.

Ordinance making powers of the Governor.

Just as the President of India is constitutionally empowered to issue Ordinances under Article 123, the Governor of a State can issue he same under Article 213, when the state legislative assembly (or either of the two Houses in states with bicameral legislatures) is not in session. The powers of the President and the Governor are broadly comparable with respect to Ordinance

[1] Article 85 of the Constitution of India.
[2] Article 123 of the Constitution of India

making. However, the Governor cannot issue an Ordinance without instructions from the President if[3]:

- A Bill containing the same provisions would under this Constitution have required the previous sanction of President for the introduction thereof into the Legislature
- He would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President,
- An act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President; it had received the assent of the President.

Key debates relating to the Ordinance making powers of the Executive

There has been significant debate surrounding the Ordinance making power of the President (and Governor). Constitutionally, important issues that have been raised include judicial review of the Ordinance making powers of the executive; the necessity for 'immediate action' while promulgating an Ordinance; and the granting of Ordinance making powers to the executive, given the principle of separation of powers.

Table 1 provides a brief historical overview of the manner in which the debate on the Ordinance making powers of the executive has evolved in India post-independence.

Year	Legislative development	Key arguments
1970	RC Cooper *vs.* Union of India[4]	Supreme Court, while examining the constitutionality of the Banking Companies (Acquisition of Undertakings) Ordinance, 1969 which sought to nationalise 14 of India's largest commercial banks, held that the President's decision could be challenged on the grounds that 'immediate action' was not required; and the Ordinance had been passed primarily to by-pass debate and discussion in the legislature.

[3]Article 213 of the Constitution of India.
[4]AIR 1970 SC 564

1975	38th Constitutional Amendment Act[5]	Inserted a new clause (4) in Article 123 stating that the President's satisfaction while promulgating an Ordinance was final and could not be questioned in any court on any ground. Amendment also declared that "satisfaction" of the President and the State Governor to issue ordinances would be final and conclusive and shall not be questioned in any court on any ground.
1978	44th Constitutional Amendment Act	Deleted clause (4) inserted by the 38th CAA and therefore reopened the possibility for the judicial review of the President's decision to promulgate an Ordinance.
1980	AK Roy *vs.* Union of India[6]	While examining the constitutionality of the National Security Ordinance, 1980, which sought to provide for preventive detention in certain cases, the Court argued that the President's Ordinance making power is not beyond the scope of judicial review. However, it did not explore the issue further as there was insufficient evidence before it and the Ordinance was replaced by an Act. It also pointed out the need to exercise judicial review over the President's decision only when there were substantial grounds to challenge the decision, and not at "every casual and passing challenge".
1985	T.Venkata Reddy *vs.* State of Andhra Pradesh[7]	Supreme Court while deliberating on the promulgation of the Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984 which abolished certain village level posts, reiterated that the Ordinance making power of the President and the Governor was a legislative power, comparable to the legislative power of the Parliament and state legislatures respectively. This implies that the motives behind the exercise of this power cannot

[5] M.P Jain Indian Constitutional Law, Sixth edition.
[6] AIR 1982 SC 710.
[7] AIR 1985 SC

		be questioned, just as is the case with legislation by the Parliament and state legislatures.
1987	DC Wadhwa*vs.* State of Bihar[8]	It was argued that the legislative power of the executive to promulgate Ordinances is to be used in exceptional circumstances and not as a substitute for the law making power of the legislature. Here, the court was examining a case where a state government (under the authority of the Governor) continued to re-promulgate ordinances, that is, it repeatedly issued new Ordinances to replace the old ones, instead of laying them before the state legislature. A total of 259 Ordinances were re-promulgated, some of them for as long as 14 years. The Supreme Court argued that if Ordinance making was made a usual practice, creating an 'Ordinance raj' the courts could strike down re-promulgated Ordinances.

Most recently a matter a with regard to promulgation of ordinances came in the name of Krishan Kumar Singh and Another v. State of Bihar and Ors[9]in which ordinances were passed by the government of Bihar through which the State sought to take over some 429 Sanskrit schools, transferring in the process the services of all the teachers and other employees of the schools to the State government. The first ordinance, which was issued in 1989, was followed by a succession of five ordinances, none of which was placed before the State legislature. Ultimately, the government failed to enact a statute confirming the terms of the ordinances, and the last of them was allowed to lapse on April 30, 1992. The employees of the schools, who stood discharged from service, as a result of the termination of the ordinances, took the State government to court. When the case ultimately reached the seven judge bench of Supreme Court for arguments there were two fundamental questions to be answered.

First, whether the ordinances issued by the Bihar government were constitutionally valid. Second, whether the petitioners had derived any legal right that survived the termination of the ordinances?

[8]AIR 1987 SC 579

[9]Civil Appeal No. 5875 of 1994, DD- 02.01.2017.available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=44452.

On the first, Justice Chandrachud went beyond existing precedent to hold that not only re-promulgated ordinances, but even ordinances issued at the first instance, are subject to judicial review. Reliance was placed on the celebrated **S.R. Bommai v. Union of India**[10] (1994), where a nine-judge bench of the court had ruled that the judiciary could strike down a proclamation of emergency when the power had been exercised by the executive to secure an oblique purpose. Supreme Court ruled that a similar standard of view could be applied to ordinances too. The court, in these cases will not enquire into the adequacy or sufficiency of the material before the President or the Governor, but it can investigate to see if there has been either a fraud or an abuse of power committed by the executive.

On the second question, the court overruled two of its earlier judgments, and scrapped what it described as a theory of enduring rights. It ruled that an ordinance is distinct from a temporary legislation, and it therefore doesn't automatically create rights and liabilities that go beyond its term of operation. "While enacting a law, the legislature is entitled to define the period during which the law is intended to operate," wrote Justice Chandrachud. "…Hence, it lies perfectly within the realm and competence of the legislature which enacts a temporary law to provide that the rights or the liabilities which are created during the tenure of the law will subsist beyond the expiry of its term." But an ordinance, unlike a temporary statute, is not a creature of the legislature. Therefore, the court held, these orders have the same force and effect of a legislation only so long as they are operational. In other words, once the conditions imposed by Article 123 or Article 213, as the case may be, are infracted, the question of what effects will survive from the ordinance will have to be independently assessed. In such circumstances the court must examine whether the undoing of acts performed under an ordinance would run counter to public interest.

Therefore it can be concluded that the presidential satisfaction with regard to circumstances rendering it necessary for him to promulgate an ordinance immediately was subject to judicial review adopting the standard laid down in ***S.R. Bommai***[11]. Secondly, majority held that an ordinance should be placed before the legislature. Thirdly, acts done under a lapsed or disapproved ordinance would not survive unless they were irreversible or reversing them would be against the public interest. The Majority judgment is rigorous, well-reasoned, and legally

[10] AIR 1994 SC 1918
[11] *Ibid.*

unimpeachable. Parliamentary supremacy and the power of judicial review are the cornerstone of our democratic republic. The Constitution Bench judgment of the Supreme Court is a vindication of the supremacy of Parliament and a reminder to the executive about the threat posed to the sovereignty of the Parliament by re-promulgation of ordinances.

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Rajya Sabha Needs Relook

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Abstract

Parliament of India comprises of three vital bodies i.e. President, Lok Sabha and Rajya Sabha. All the three are equally important for the proper functioning of Legislature whose prime work is to legislate laws for the Union of India. Rajya Sabha has been integral to India's parliamentary democracy. Unfortunately from past few years, existence and relevance of the upper house of Parliament i.e. Rajya Sabha has become a matter of debate since it is emerging as a blockade in the process of legislation.. An attempt has been made to analyze that how the august institution of Rajya Sabha has turned into "federation of anarchists" as quoted by the Chairman of the house and to find an answer to the question that is the abolition of the house the only option we are left with or there be some other alternative as well instead of taking a harsh step of abolishing it?

Sometimes back, frustrated over a logjam on the Goods and Service tax (GST) Bill, Finance Minister Arun Jaitley had questioned the relevance and powers of the indirectly elected Rajya Sabha to block the bill passed in the directly elected Lok Sabha. Finance Minister had raised the issue earlier also, though he himself is the product of RajyaSabha having failed to get directly elected from Amritsar in 2014 Parliamentary elections. Disturbed over the unseemly conduct of members, Chairman Hamid Ansari had dubbed the Rajya Sabha a "federation of anarchists"[12]Under this situation BJP's Kurukshetra MP, Mr Raj Kumar Saini's call for abolishing Rajya Sabha[13] can't be dismissed as bizarre. He has definitely raised a very thought provoking issue which merits good debate on the usefulness of Rajya Sabha in the current political culture in the country. Undisputedly, sixty five years after the august institution of Parliament began functioning, it would be too much to ask for removing one of its vital organs, Rajya Sabha. The character of key democratic institutions cannot be changed to suit the whims of politicians in power. As a matter of fact doctors also amputate the part of the body when it starts disturbing the working of other organs. The events of the last one decade projects the unhealthy condition of Rajya Sabha and it is emerging as a blockade in process of legislation, the most accepted way to form laws in any democracy. The matter needs to be examined from the various angles within the constitutional framework.

[12] Text available at: http://archive.indianexpress.com/news/ansari-says-rajya-sabha-becoming-a-federation-of-anarchists-faces-bjps-ire/1154810/.
[13] Text available at: http://www.dnaindia.com/india/report-rajya-sabha-should-be-abolished-bjp-mp-raj-kumar-saini-2256516.

The first point that comes to mind is - can we really wind up Rajya Sabha? Well, the wise men who designed the Constitution of India did not want it to be rigid like that of USA, otherwise they would not have made the proviso of article 368 which empowers Parliament to amend the constitution without changing the basic structure, as enshrined in our Preamble. The fact that country has seen 101 constitutional amendments in the last 67 years[14] against 27 amendments in the constitution of USA in the past 225 years[15] itself corroborates the view point that nothing in our constitutional is static except its basic structure.

Secondly, how one can think of winding up the Rajya Sabha when any constitutional amendment is not possible without its being processed and approved by Rajya Sabha itself. The solution is to form a committee of constitutional experts who can examine the working of legislative process in the democracy without the existence of upper house as was done at the time when Constitution of India was drafted.

Thirdly, it is very important to analyze the impact of abolishing the constitutional organ on the Federal structure. Undoubtedly, existence of the Rajya Sabha contributes to federal structure since its members are elected by the state legislatures. Further, if Rajya Sabha passes a resolution with not less than 2/3 majority, authorizing Parliament to make laws on any state subject, Parliament gets the power to legislate on the state subject.[16]Similar is the position under Article 252

Unfortunately what needs to be investigated is whether members of Rajya Sabha truly represent the states or it has become the junk yard for the failed politicians or stooges of the political bosses in the country whichever political party they belong to. Member of Parliament Mr Raj Kumar Saini, of BJP from Kurukshetra was right on dot when he quoted that people were reaching the upper house after paying money and pleasing their political masters.[17]This statement from a man who himself falls under the same junk yard cannot be overlooked. Mr. Mallaya, who has absconded after having made default of Rs 9000crores to the financial institutions also happened to be a member of Rajya Sabha. It is not difficult to guess how he was inducted in to this august house. At the same time Lok Sabhahas members from all the states who get directly elected. Why it should be presumed that Lok Sabha members are not in position to safeguard the interest of the states they represent, as directly elected members and only indirectly elected members can protect the interest of states.. It happened many a times when Karnataka, Tamil Nadu

[14] Text available at: https://en.wikipedia.org/wiki/List_of_amendments_of_the_Constitution_of_India.
[15] Text available at: https://en.wikipedia.org/wiki/List_of_amendments_to_the_United_States_Constitution.
[16]Article 249 of the Constitution of India.
[17] Text available at: http://www.pressreader.com/india/hindustan-times-jalandhar/20160122/281719793596118.

members joined hands, cutting across party affiliations to strongly present the case of their respective states.

Fourthly, has the situation reached threshold that winding up of Rajya Sabha can be justified? Answer is: the party politics has changed in the country over the decades. Regional parties have grown in strength and they are seen to represent the aspiration of people. There is very rare possibility when the party who has the majority in Lok Sabha will have the majority in Rajya sabha too, as was the trend in good old days. It means an environment of confrontation between the ruling outfit in LokSabh aand its opposition through its members in Rajya Sabha. What can't be done directly, Rajya Sabha provides platform to do the same indirectly and the situation becomes worse when there is no continuity of the same party government at the centre. Recently, when the reporter asked the Congress spokesperson why it was not allowing the parliament to function, the argument given by him was that BJP also tried similar obstructionist tactics in the past, which seems totally baseless and in one manner it suppresses the will of the people of the nation. Tomorrow when other party comes at the centre, and the Rajya Sabha is flooded with BJP members, same argument will be advanced by BJP. There is no end to it. Egos and personal grudges of the leaders overtake national interest. Under such scenario, why almost 1200 crores of taxpayer's money should be annually spent on the institution which is hardly giving any any positive outcome. India cannot afford to maintain this second chamber as a matter of luxury like that of United Kingdom and United States of America especially when it is emerging as a hindrance in the legislative process rather than playing a powerful positive role.

One of the options can be to increase the number of Lok Sabha members from present 550 to 800 after winding up Rajya Sabha. It needs to be appreciated that this number of 550 was fixed when the country's population was 35 crores which has now swelled to 120 crores which merits increase in number of member of Parliament to have better representation of masses in the law making chamber. Britain has 650 members in the Parliament[18] for a population of 64 million. The average population falling in constituency is around 70000,[19]which allow law makers to intimately get involved with its constituents in the constituency.

Fifthly, if we do not abolish this august institution what can be the alternative. We can always think of some modifications with regard to the powers of Rajya Sabha. For example, at present Money bill can be introduced only in Lok Sabha and Rajya Sabha can give recommendations which Lok Sabha may or may not accept.[20] Likewise National budget and grants for various Ministries can be discussed but not voted in

[18] Text available at: https://en.wikipedia.org/wiki/House_of_Commons_of_the_United_Kingdom.
[19] Text available at:researchbriefings.files.parliament.uk/documents/SN05677/SN05677.pdf.
[20]Articles 109 and 110 of the Constitution of India.

Rajya Sabha. Council of Ministers which runs the country is responsible only to Lok Sabha. On the same lines, few other bills and constitutional amendments/ordinances can be added to its list. Let there be the system of checks and balances but not veto power to obstruct the duly elected government from implementing its plans. Similarly, any member who is rejected in Lok Sabha elections should not be allowed to become Minister on the strength of his Rajya Sabha membership. It amounts to ignoring people's verdict against an aspirant for the sake of political convenience. Those who have the fears that in the absence of Rajya Sabha, there will be no checks on the majority government in the centre, simply forget that in most of the countries with democratic governments, there is only a single Chamber/house. Then any government which is at the centre is the elected government which comes to power on the strength of absolute majority. If we do not have faith in the directly elected government then it is an insult to the institution of democracy.

At last, we forget that that we have an independent and powerful judiciary which has the powers even to set aside the decision taken even in the both houses of parliament if it violates the spirit of Constitution. Setting aside of the emergency proclaimed by Late Indira Gandhi in 1975 who commanded absolute majority in both the houses of the parliament and then the recent National Judicial Appointments Bill 2015 which had been passed in both the houses of parliament are the shining examples of the role of judiciary in the Indian democracy.

Undoubtedly, second chamber was created to add value to the decision/law making but in the changed circumstances it has acquired more of a nuisance value. It was not meant to dump political leftovers or once useful power brokers. It was supposed to lift the level of parliamentary debate by bringing in rational, reasonable and intellectual voices from different walks of life. But, over the years it has now become a place where "*every single rule in the book, every single etiquette is violated."*[21]Therefore, we need to have the committee of Constitutional experts to examine that what can be done to Rajya Sabha in the changed circumstances so that it lives up to the cherished objectives of our fathers of the Constitution.

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[21]Text available at: http://www.business-standard.com/article/news-ani/ansari-clarifies-on-federation-of-anarchists-remark-113081400526_1.html.

UNIFORM CIVIL CODE- NEED OF THE HOUR

Prabhjot Kaur Virdi*

Abstract

India has separate sets of personal laws for different religions, which governs various institutions like marriage, succession, adoption etc. To cover all personal laws into one unified set of secular law, and thus to attain the highest degree of secularism in India, the provision of Uniform Civil Code under Article 44 of Indian Constitution was inculcated. To enhance the national integrity by quashing the contradictions based on religious ideologies, the issue has heated up many times in our nation. On various occasions judiciary has tried to step in shoes of legislature and sought to create some kind of harmony in laws and gave decisions in favour of Uniform Civil Code whether it was through Shah Bano's case or Sarla Mudgal's case. Apart from Judiciary, various writ petitions were also filed calling for direction to introduce Uniform Civil Code but same was dismissed on ground that matter falls in legislature lap. The important point to be taken up here is that personal laws of almost all the religions are gender- biased which is a fact and can't be denied. So many a times, these personal laws have been challenged by women on the grounds that their personal laws violate the right to equality given by our constitution. Thus, it can be concluded that personal laws somewhere and somehow hinders the growth of one particular section of society. This paper is an attempt to study constitutional provisions relating to UCC, Judicial decisions in this regards and views in favour of and against it.

Introduction

Ignition of Uniform Civil Code is not something new in Indian history. Recently Government's move to seek a report from Law Commission on Uniform Civil Code has triggered a debate on political as well as on academic level[22].
India has separate set of personal laws for every religion which governs various institutions like marriage, divorce, succession, maintenance, adoption etc[23]. It was with the object to cover all personal laws into one unified set of a secular law, which would be applicable to each and every citizen of India irrespective of religion they belong, that the provision for Uniform Civil Code

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[22]Available at: http://www.hindustantimes.com/india-news/govt-imposing-single-ideology-in-uniform-civil-code-issue-muslim-law-board/story-yixTGpmXIEbTPeQvP6m6FN.html

[23]Available at: http://www.archive.india.gov.in/citizen/lawnorder.php?id=16

was inculcated in Indian Constitution under Article 44[24]. The object behind this provision was to enhance the national integrity by quashing the contradictions based on religious ideologies. By this all the communities would stand on common platform. But since, it is a part of Directive Principles of State Policy, it is not enforceable in any court of law but still, according to Article 37[25] of Indian Constitution State is duty bound to apply these directives while making law and policies.

Judicial Pronouncements

History evidences various instances where judiciary tried to step into the shoes of legislature and tried to create some kind of harmony in laws, without taking into account the personal law of the parties. Also, time and again judiciary has expressed itself in favour of Uniform Civil Code by taking a critical view of government's and legislature's inability to bring it into being. It was in the infamous case of ***Mohd. Ahmed Khan v. Shah Bano Begum***[26] where the Hon'ble Supreme Court for the first time in 1985 not only decreed maintenance in favour of divorced Muslim women after the iddat period but also reminded the Parliament to frame Uniform Civil Code and observed:

> "It is a matter of regret that Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies. It is the State which in-charged with the duty of securing a uniform civil code for the citizens of the Country and, unquestionably, it has the legislative competence to do so. A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because; it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot

[24]Article 44: Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.
[25] Article 37: Application of the principles contained in this Part The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws
[26] AIR 1985 SC 945

take the place of a common civil code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case".

But after the above-stated decision, the situation turned sour and to take situation under the control, Rajiv Gandhi government passed The Muslim Women's Act 1986 with immediate effect, which nullified the decision of Supreme Court[27].

Subsequently, after the gap of ten years the Apex Court again gave a ruling in favour of enactment of uniform civil code in the case of ***Sarla Mudgal v. Union of India***[28].In the case the court decided that a Hindu man, who is having a living wife, cannot remarry by converting into Islam and if he does so, would be tried for bigamy under Indian Penal Code. The court also requested to the then government to take a fresh look Article 44 and held:

> "The State shall endeavour to secure for the citizens a uniform civil code through-out the territory of India" is an unequivocal mandate under Article 44 of the Constitution of India which seeks to introduce a uniform personal law - a decisive step towards national consolidation. Pandit JawaharLal Nehru, while defending the introduction of the Hindu Code Bill instead of a uniform civil code, in the Parliament in 1954, said "I do not think that at the present moment the time is ripe in India for me to try to push it through". It appears that even 41 years thereafter, the Rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments - which have come and gone - have so far failed to make any effort towards "unified personal law for all Indians". When more than 80% of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of "uniform civil code" for all citizens in the territory of India".

But since the above-said judgements are only an opinion of the court, i.e. it is an obiter dicta, it is not binding for the government. Moreover, after these cases, various other writ petitions were also filed claiming for direction to introduce uniform civil code, but same were

[27]Available at: http://indiatoday.intoday.in/story/shah-bano-judgement-was-a-landmark-in-our-social-and-political-history/1/192383.html
[28] AIR 1995 SC153

dismissed by Courts on the ground that this was a matter to be looked into by legislature and not by the judiciary[29].

Conclusions

There are two views regarding UCC. One view is in favour of enacting UCC and other is against it.

Views in Favour of UCC-

It is submitted that no one denies the fact that personal laws of almost all the religions are gender-biased. And many a times these personal laws have been challenged on the ground that they violate their right to equality, as given under the Constitution. Thus, it can be concluded that to some extent these personal laws hinder the growth of one particular section of society, which is against our basic Constitutional idea of: Equality[30].

It is also submitted that in case uniform civil code is enacted then it will not only eliminate all personal laws but will also do away with gender-biasness, whether it is a matter of polygamy, triple talaq or any other personal law practice.

State of Goa is the only example in India which has successfully enacted the Uniform Civil Code, which applies to all communities in Goa. There is no discrimination among Hindus, Muslims, and Christians with respect to their personal laws in the State[31]. To illustrate, those Muslims whose marriage has been registered in Goa can neither practice bigamy nor can give divorce by pronouncement of Triple Talaq.

Views Against UCC

An argument given against the enactment of uniform civil code is that it interferes with ones right to practice their religion. The argument was dissuaded by the Apex Court holding that there is no necessary connection between religion & personal laws in a civilised society. As the matters regarding marriage, adoption etc. are of secular nature and can be regulated by same law applicable to all persons in a country[32].

This issue has always been mooted and communal overtones over-shadowed the merits of this provision, due to which enactment of uniform civil code remained in limbo. But ideally,

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[29]Available at: http://www.livelaw.in/pil-seeking-uniform-civil-code-dismissed-delhi-high-court/

[30]ParulChaudhary, "Gender Inequality in Hindu and Muslim Personal Laws in India" 1(1) *IJHS* 2015 34-37, available at: http://www.homesciencejournal.com/vol1issue1/Part%20A/pdf/15.1.pdf

[31]Available at: http://www.hindustantimes.com/india-news/all-in-the-family-is-the-goa-civil-code-a-model-for-the-rest-of-the-country/story-4ImvwP0OrAST2hUnsZxtiL.html

[32]See Mohd. Ahmed Khan v. Shah Bano Begum (AIR 1985 SC 945) ,John Vallamattom v. Union of India (AIR 2003 SC 2902)

while discussing this, legislature should focus on rights, leaving behind the rituals, customs, traditions which are protected by our Constitution itself under Article 25[33].

Suggestion -

To conclude it is submitted that in a step ahead, the mid-way can be taken by making it an option. If it is made optional, it can provide free choice and facilitate harmonisation of social relationships across the Nation.

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[33]25. Freedom of conscience and free profession, practice and propagation of religion: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

HUMAN RIGHTS OF PATIENT – A LEGAL STUDY

Navjot Kaur*

Abstract

Hospital reserves unavailable environment in every human being life. Hospitals are currently working socio-economic and technical changes that raise concern for the quality of health care. Every Patient in the hospital must be protected their rights which encompass legal and ethical issues in the provider-patient relationship, including right to privacy, medical care quality, right information about treatment options and the right to refuse treatment. In the present article attempt is made to conduct survey in the Chandigarh hospitals and it has been seen that people are least aware about their human rights.

Introduction

In today's scenario the need of hospitals are very important as people are suffering from so many diseases. Every patient has certain rights which include right to privacy, medical care quality, right to information about treatment options and the right to refuse treatment and these must be protected. Every patient is very concerned about the quality of treatment and the facilities they get at hospital[34]. While quality and care is one aspect, the hospital's organization must protect patients and their family rights as well .So in today's scenario it has become very important to increase the awareness regarding the human rights of patients. At the time of the admission of patient, both the family members of patient must be informed of their rights and responsibilities[35]. Lets' briefly analyse the rights of patients -

Right to Health and Medical Care: Fundamental Right Under Indian Constitution

Various provisions in the constitution directly or indirectly provides that Right to medical care is a fundamental right, for example Under *Article 21* it says that no person shall be deprived of his life or personal liberty except according to procedure established by law.

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[34]Available at: http://www.thehealthsite.com/diseases-conditions/patients-rights-in-india-what-you-should-know-and-ask-for/

[35]Available at: http://indianexpress.com/article/opinion/columns/first-give-the-patient-right-to-know/

Article 38 it states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Article 39(e) provides that the State is obligated to make policy for health and strength of workers, men and women and children.

Article 41 imposed duty on State to provide for public assistance basically for those who are sick and disable.

Article 42 makes provision to protect the health of infant and mother by providing for policy initiatives of maternity benefit.

*Article 47*casts the duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall Endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Judicial Decisions

From the above provision, it is clear that Right to medical care is a Fundamental Right and it is the duty of the state to provide their rights. Significantly, Judiciary has also supported it in a number of cases**.**

In ***PaschimBangakhet Mazdoor Samiti v/s State of West Bengal***[36]the Supreme Court observed as under:

> "It is no doubt true that financial resources are needed for providing medical facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the state to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this court has held that the state cannot avoid its constitutional obligation in that regard on account of financial

[36] AIR 1996 SC 2426

constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation the state has to be kept in view."

The Judicial observations from ***Vincent Panikulanagara* to *Paschim Banga***[37] give a clear picture that access to medical treatment has become a part of Article 21 of constitution. The approach in Paschim Bangal is more remarkable because the state and central government are directed to provide basic medical facilities along with the sophisticated medical treatment. In the present scenario, since, the life of the person can be effectively preserved from physical retardation with the aid of medical technology developments, along with the private medical institutions the government has to come forward to equip the state-run medical institutions with sophisticated medical instruments to render medical assistance. The Government may face financial constraints in implementing all these laudable directions but that should not be an excuse for the state to go away from the basic responsibility. In the welfare state, it is the prime duty of the state to provide cheap medicine and drugs, better equipped hospitals with modernized medical technologies facilities and these things have to be done by the state in accordance with the international declarations, mandate of the constitution and the judicial observation

Medical rights of patients[38] :

It is important to note that there are following medical rights of the patients

- Right to considerate and respectful care.
- Right to information on diagnosis, treatment and medicines.
- Right to obtain all the relevant information about the professionals involved in the patient care.
- Right to expect that all the communications and records pertaining to his/her case be treated as confidential
- Right to every consideration of his/her privacy concerning his/her medical care programs me.
- Right to expect prompt treatment in an emergency
- Right to refuse to participate in human experimentation, research, project affecting his/her care or treatment.
- Right to get copies of medical records

[37] AIR JOURNAL SECTION 103at p. 106
[38] Available at: http://nabh.co/Images/pdf/Patient_Charter-DMAI_NABH.pdf

- Right to know what hospital rules and regulations apply to him/her as a patient and the facilities obtainable to the patient.
- Right to get details of the bill.
- Right to seek second opinion about his/her disease, treatment.

When a patient enters the hospital, he must know his rights. With the help of survey it was observed that the following problems were faced by the people in both government and private hospitals.

Government Hospitals

- The treatment provided by the doctors was acceptable by patients but major problem was faced by the poor people because of the behaviour of doctors who did not treat them well and also frightened them.
- It was seen that in PGI the poor patients were discriminated with rich people by the doctors and staff
- In the emergency ward patients are not given the treatment on the spot as doctors are careless and they are moreover busy with their works and phones
- The people faced much of difficulties of extra bedding both in general and private wards. There were no chairs facilities in waiting room. Even when the patient is being operated they were send out and they have to spend nights and days in winters under open sky.
- Medicines are not given properly. Seva Bharti and Red Cross do not provide free medicines to the poor people but they are ought to provide the free medications.
- Nursing facilities are low. Washrooms are not clean and drinking water is not good as well. So the hygiene level needs to be improved.

Private Hospitals

1) In the private ward people faced the infrastructure problems like compliances (fridge, exhaust) were not there.
2) Highly expensive.
3) Doctors are negligent and sometimes they do wrong Diagnosis.
4) Some of the private hospitals are only concerned about their new patients and they do not treat well to other regular patients.

Conclusion

Right to medical care is a fundamental Right under Article 21 of the Constitution of India and it includes endless rights such as -

- Right to considerate and respectful care.
- Right to information on diagnosis, treatment and medicines.
- Right to obtain all the relevant information about the professionals involved in the patient care etc.

It is the duty of the state to provide medical facilities and to protect their rights. However when the state fails, private hospitals perform such functions-
From the survey the problems faced by patients were realised. The problems were-

1. Lack of awareness.
2. Not much information is provided to the patient at the time of admission.
3. Private hospitals are very costly.
4. Government hospitals hygiene is a big issue.

Suggestions –

1. Awareness of Patient's medical rights should be spread by the government.

2. Proper laws must be framed regarding patient's rights.

3. As the private hospitals are very expensive than Government hospitals so it should be checked that whether the services are provided as per the cost is being charged.

4. In the government hospitals more improvement should be made in hygiene level. Where it's provided to give free medical aids it should be given as most of the poor people are being exploited on this part only and lastly the discrimination should be stopped in the government hospitals.

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Compulsory Licensing of Patents in India

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Abstract

Patents are an important legal measure to incentivise innovation and to ensure that the innovation is made commercially viable. The TRIPS agreement and the Doha declaration have impacted India's patent policy which policy is aimed at balancing the seemingly conflicting aims of development and public welfare and protecting Intellectual Property Rights. The Indian Patents Act has provided the mechanism of Compulsory Licensing to secure the protection of public health. India has granted its sole compulsory license in 2012. The price differential between the patented drug and of the drug so licensed seems to be an important consideration for the Controller of Patents. Other applications for granting Compulsory Patents have been rejected. The patent office has exercised restraint in granting compulsory licenses and has taken it to be a last resort for providing access to life saving drugs in India.

Introduction:

The Indian Patent Act, 1970 states that patents are granted to encourage innovation and to secure that they are worked on a commercial scale to the fullest, reasonable practicable extent.[39]After the TRIPS agreement and the Doha declaration a significant change was made in India's intellectual property regime to make it TRIPS compliant seek a balance between India's technological and development goals and giving protection to intellectual property rights.[40]

The Act provides the mechanism of Compulsory Licensing for manufacturing of patented pharmaceutical products so as to ensure that patenting of drugs does not impede the protection of public health due to the monopoly created by the patents.

Grant of Compulsory Licenses and Intellectual Property Act, 1970

Section 84 of the Intellectual Property Act 1970 deals with grant of compulsory licenses -

The compulsory license may be granted on the basis of -

[39] Section 83(a), The Patents Act, 1970

[40] Discussion Paper on Compulsory Licensing, Department of Industrial Policy and Planning, http://dipp.nic.in/English/Discuss_paper/CL_DraftDiscussion_02September2011.doc

1. application by any person

2. suo moto action taken by the controller.

3. public health crises

4. for the export of patent product

1. On the basis of application by any person

Section 84 deals with grant of compulsory license. Significantly it provides that any time after the expiration of three years from the date of the grant of a patent, any person interested may make an application to the Controller for grant of compulsory license on patent on any of the following grounds:

(a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied, or

(b) that the patented invention is not available to the public at a reasonably affordable price, or

(c) that the patented invention is not worked in the territory of India.[41]

Accordingly, interested person may make an application to the controller for granting compulsory license on different grounds i.e. public interest, non availability of products at affordable prices and non availability within the territory of India. A compulsory license granted under Section 84 may be revoked on an application made by the patentee that the grounds on the basis of which the compulsory license was granted have ceased to exist and that such circumstances are unlikely to occur. The holder of the Compulsory License has a right to object to such an application.[42]

2. **On basis of Suo moto action** - Apart from application for compulsory license, the controller may make suo moto action for granting license. Section 92 states certain special provisions for granting compulsory licenses. IT states that the controller may grant a compulsory license on notification of national emergency or circumstances of extreme urgency by the Central Government in the official gazette. The Controller has to satisfy himself that the granting of compulsory license is necessary in:-

(i) a circumstance of national emergency; or
(ii) a circumstance of extreme urgency; or

[41] Section 84, The Patents Act, 1970
[42] Section 94, The Indian Patents Act, 1970

(iii) a case of public non-commercial use,[43]

3. **Action by the controller in public health crises - Exception where procedure not to be followed**

It is important to note that in case of public health crises, relating to Acquired Immuno Deficiency Syndrome, human immunodeficiency virus, tuberculosis, malaria or other epidemics, the Controller is not bound to apply any procedure specified in section 87 for dealing with the grant of Compulsory license.[44]

4. Compulsory license for the export of pharmaceutical products –

Section 92A provides for granting of compulsory license for export of patented pharmaceutical products in exceptional circumstances. Compulsory license shall be available for manufacture and export of patented pharmaceutical product to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India.

Cases Relating to Grant of Compulsory License in India

India's first and only Compulsory License was granted to NATCO Pharmain 2012, for manufacturing the patented drug Nexavar which is used for the treatment of liver and kidney cancer. The patentee Bayer had priced the drug at Rs. 2.8 Lakh for one month's treatment. In its application, NATCO agreed to price it's generic formulation at Rs. 8800, which is 3% of the price of the patented formulation. Natco applied for grant of Compulsory License under all three grounds given in Section 84. The controller of patents granted the compulsory license while directing Natco to pay a royalty of 6% of the net sales to Bayer.[45]

Bayer's appeal against this order seeking a stay was rejected by the Intellectual Property Appellate Board (IPAB). The Supreme Court dismissed a Special Leave Petition challenging the Bombay High Court's decision upholding the grant of the Compulsory License.[46]

The above decision was taken to be an indication that greater number of compulsory licenses would be granted.[47]In March 2013,BDR pharmaceuticals filed an application for the grant of compulsory license for

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[43] Section 92(3)
[44] id.
[45] Compulsory License of Patents in India http://www.ssrana.in/Intellectual%20Property/Patents/Patents-Compulsory-Licensing-in-India.aspx
[46] Supreme Court dismisses Bayer's special leave petition against Natcohttp://www.livemint.com/Companies/L0sMOCyuJL21M9vNGLhFkM/Supreme-Court-dismisses-Bayers-special-leave-petition-again.html

Dasatinib, a drug used for treating Chronic Myeloid Leukemia. The patent for the drug is held by Bristol-Myers Squibb (BMS). In it's application requesting a compulsory license, BDR Pharma stated that it had applied for a voluntary license from BMS and as such had fulfilled the requirements for 'effort' to obtain license under the Patents Act.[48]BMS had replied with certain queries. BDR did not reply to the questions and took the reply as a rejection of their application for the voluntary license. The Controller rejected BDR's application stating that BDR did not make a 'sincere attempt to procure a voluntary license' and did not follow the scheme of law and the procedure mandated by law.[49]In 2014, an attempt by the Health Ministry to compulsorily license Dasatinib under Article 92 was turned down the Department of Industrial Policy and Planning since there was no emergency situation prevailing in the country.[50]

Other applications for grant of compulsory license, such as by Lee Pharma Ltd, for an anti-diabetic drug have been rejected by the Controller.

The patent office has invoked the provisions relating to compulsory licensing as a last resort[51]. It has in its decisions sought to achieve a balance between two disparate objectives[52] of protecting the pharmaceutical companies interests and increasing access to essential medicines.

Conclusion

The above discussion shows that after the TRIPS agreement, amendments were made in Indian Patents Act 1970 to make TRIPS compliant. In India, compulsory license is an important provision under the Indian Patent Act 1970. In India compulsory license has been applied mainly in drugs but the patent office invokes the provisions relating to compulsory license as a last resort.[53]The patent office while granting compulsory license always tries to achieve a balance

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[47]VanitaKhanna, Intellectual Property Rights, 2016

[48]Section 84(6)(iv)In considering the application filed under this section, the Controller shall take into account,—

(iv) as to whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit: Provided that this clause shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee, but shall not be required to take into account matters subsequent to the making of the application. 1[Explanation : For the purposes of clause (iv), "reasonable period" shall be construed as a period not ordinarily exceeding a period of six months.

[49] BDR Pharmaceuticals Pvt. Ltd. Vs. Bristol Myers Squibb C.L.A. no. 1 of 2013

[50] Compulsory Licensing of Drugs and Pharmaceuticals: Issues and Dilemma, http://nopr.niscair.res.in/bitstream/123456789/33191/1/JIPR%2020(5)%20279-287.pdf

[51] BDR Pharmaceuticals Pvt. Ltd. Vs. Bristol Myers Squibb C.L.A. no. 1 of 2013 as stated on http://www.ssrana.in/

[52] Compulsory License of Patents in India, Supra at 2

[53] BDR Pharmaceuticals Pvt. Ltd. Vs. Bristol Myers Squibb C.L.A. no. 1 of 2013 as stated on http://www.ssrana.in/

between two objectives[54] of protecting the pharmaceutical companies interests and increasing access to essential medicines. This cautious approach should be adopted in the future also as Compulsory Licenses may act as a deterrent for companies to invest in research and development of new drugs. Other means of increasing access to medicines such as tax rebates and direct purchase of drugs and distribution of drugs by the government may be utilized along with the mechanism of compulsory licensing.

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[54] Compulsory License of Patents in India, Supra at 2

Mandatory Playing of the National Anthem at Cinema Halls across the Country and its Legality

Kavya Gupta*

Abstract

Every nation has a National Anthem which is a hymn or song expressing patriotic sentiment. Citizens must honour it but the question is that honour for nations and respect for national symbols or national anthem cannot be extracted or imposed on the perils of punishment. The paper examines the aggressive attitude of Indian Judiciary which gets reflected in the recent judgements given by the Apex Court with regard to the conduct to be followed while playing of National Anthem which has emerged as a subject of debate in recent times.

Recently, the Supreme Court in a landmark judgement ***Shayam Narayan Chouksey v. Union of India***[55] made it compulsory to play the national anthem in all cinema halls across the nation and made it obligatory for the audience to stand up while it plays. The Hon'ble bench of Justice Dipak Misra and Justice Amitava Roy held that certain norms and protocol be followed before any feature film in the cinemas. The order is not limited just to the cinemas but to functions where constitutional dignitaries are present as well.

One of the many guidelines given include that the National Flag be displayed on the screen while the complete and not an abridged version of the anthem is being played. This order was passed after the petitioner SN Chouksey filed a writ petition under Article 32 of the Constitution of India to specify as to what constitutes disrespect and abuse to the National Anthem. A few references have been made to show circumstances in which the anthem was played during an interview to test a behavioural pattern of the candidate and at other times when it was played at occasions, with a dramatic effect.

Under Part IV-A of the Constitution of Article 51-A provides that it shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and situations, the National Flag and the National anthem.

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[55] Writ Petition(s) (Civil) No. 855/2016.

In this light the order of the Apex Court was appreciated while appreciated by many stating that it would instill a sense of patriotism in a way by uniting people. The opposing view, however is that patriotism cannot be forced on the citizens. After all it is purely faith and belief. Some critics also say that the order is unfair. To expect the disabled and however took this into consideration and issued guidelines for the same.

In the history of Indian cases, in regard to the anthem, in ***Bijoe Emmanuel & ors v. State of Kerela& ors***[56]case has been the most impactful one so far, in which students belonging to a school in Kerala refused to sing the national anthem. The Apex Court held that the right to be silent is an implied right of Freedom of Speech and the students had a right not to sing the anthem. Not singing it would not amount to disrespect to the nation.

In yet another case, ***Shyam Narayan Chouksey v. Union of India & Ors***[57]where the Madhya Pradesh High Court ordered that the scene from the movie *Kabhi Khushi Kabhie Gham* in which the national anthem was sung by a young school boy be deleted as the audience in the film did not stand up during that scene and it was considered disrespectful. Interestingly, the petitioner in that case was Mr Chouksey as well and the judgement was passed by Justice Mishra.

The order of the Madhya Pradesh High Court was later, however set aside by the Supreme Court saying that it is not mandatory to stand for the national anthem and the scene was added back in the film.

Soon after, the Allahabad High Court in ***Suresh Gupta v. State of Uttar Pradesh***[58]dismissed a PIL for the daily recital of the anthem in District Courts, High Courts and Tribunals. The bench stated that to show respect to the anthem is one aspect but to sing it daily in courts may in itself not be a reflection of Constitutional aspect. It also distinguished between a prayer and the anthem stating that a prayer is self imposed for moral and spiritual gains. The question of morality does not arise in respect to the anthem.

Therefore, while the order of the Hon'ble Apex Court was passed in good spirit, patriotism is not an emotion that can be forced upon the citizens. A broader sense of what patriotism actually

[56] 1986 SCR(3) 518
[57]AIR 2003 MP 233
[58] P.I.L Civil number 1928 of 2017

is should be taken into account. Further there appears to be no justifiable reason that that why only the cinema halls have been included under the ambit of this judgement.

The question that arises here is that is this misplaced sense of patriotism? If any institution on its own wishes to play the anthem, with the true intent of paying respect to it, that would be patriotism in the true sense.

The national anthem is merely 52 seconds and taking out that time from movies worth hours to respect our nation and its freedom fighters is not so irrational. The sense of belonging that it gives is unmatchable.

The anthem must be respected and this admiration should come from within,it cannot be forced upon.

Here it becomes relevant to cite case ***Smith vs Goguen***[59]of the Supreme Court of the United States of America, wherein it was held that neither the United States nor any state may require any individual to salute or express favourable attitude towards the flag, thus implying that nationalism cannot be aggressive.

It should however be left to the discretion of the cinema halls. It can be made compulsory to play it on certain days like Independence and Republic Day. But making it obligatory to play it every day and to stand while it plays is against the principles of our Constitution.

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[59] 415 U.S 566 (1974)

Sedition

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The law of sedition in India has always remains in controversy. Today, it has assumed a controversial importance largely on account of change in the body politic and also because of the constitutional provision of freedom of speech guaranteed as a fundamental right in India.[60]

The recent arrest of Kanhaiya Kumar, a student leader of the Jawaharlal Nehru University sparked controversy on the law of sedition. Interestingly, freedom fighters like Bal Gangadhar Tilak, Annie Basent, Mahatma Gandhi were convicted under the law of sedition as well.[61]

Sedition is an offence defined under sec 124 A of IPC which provides that whoever, by words, either spoken or written, by signs, or by visible representation, or otherwise, brings or attempts to brings into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.[62]

The expression disaffection includes disloyalty and all feelings of enmity. The comments expressing disapprobation of administrative or other actions of the Government with a view to obtain their alteration by lawful means without exciting hatred, contempt or disaffection do not constitute an offence hereunder.

This section is based on the principle that continued existence of the Government established by law is an essential condition for the stability of the state. The very existence of the state will be in jeopardy, if the Government established by law is subverted. The Criticism of

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[60] Law of sedition in India, available at - http://indiatoday.intoday.in/education/story/indian-sedition-law/1/597316.html.

[61] A short summary of Law of sedition in India, available at - https://thewire.in/21472/a-short-summary-of-the-law-of-sedition-in-india.

[62] The Indian Penal Code- Sec 124 A- Sedition.

administrative and other actions of Government without exciting or attempt to excite hatred, contempt or disaffection towards the Government established by law would not be seditious.

Historical Backdrop –

Section 124-A, I.P.C. was originally under section 133 of Macaulay's Draft Penal Code of 1837-39. Indian law of sedition was a statutory enunciation of Common law of sedition.

During the colonial period sedition was considered a black Law and was used extensively against the leaders of the freedom movement. This section was used to suppress the Indian Freedom Struggle. The freedom fighters continuously condemned it as undemocratic and called it prince among the laws designed to suppress the liberty of the citizens.[63] Mahatama Gandhi, Bal Gangadhar Tilak and many other leaders were put behind bars for many years under this law. In 1897 Tilak's article 'Shivaji's utterances' in The Kesari was held seditious in nature. In 1908 his article 'Advocating the use of bombs for the attainment of Swarajya' was held seditious. In 1916, Tilak's three speeches in Marathi were alleged to be seditious wherein he advocated to increase the share of Indians in civil services. Mahatma Gandhi was also tried under sec.124-A in 1922 for his three articles 'Tempering With Loyalty', 'The Puzzle and Its Solution' and 'Shaking the Manes' published in the Young India.[64]

Due to its draconian nature, constitution framers expressly abstained from including the word sedition in reasonable restrictions and used more comprehensive words to include acts amounting to sedition. After independence, this law was used to suppress political dissent. Famous writers, politicians, lawyers, human rights activists, social workers, student leaders etc. were charged with sedition. State always favoured the use of this law in the interest of security of state and the public order.[65]

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[63] Law of Sedition in India, available at - 14.139.60.114:8080/jspui/bitstream/.../Law%20of%20Sedition%20in%20India.pdf.

[64] Sedition in India – A Quick history, available at - http://blogs.wsj.com/indiarealtime/2012/09/14/trivedi-case-sets-off-sedition-debate/

[65] Sedition and the Government, available at - http://www.thehindu.com/opinion/lead/Sedition-and-the-government/article14082471.ece.

The ***moot question*** is –

Do our free speech laws not allow us to be critical of the country or the Govt.? At what point can we say the line has been crossed from an exercise of free speech to sedition?

According to the English Law, Sedition embraces all the practices whether by word or writing which are calculated to disturb the tranquility of the state and lead an ignorant person to subvert the Government. Basic criticism of Government is not seen as sedition unless the Government believes that it was calculated to undermine the respect for the government in such a way so as to make people cease to obey it.[66]

KEDAR NATH v STATE OF BIHAR[67]

In this landmark judgment, the constitutionality of section 124-A was again challenged through appeal. The Supreme Court upheld the conviction and dismissed the appeal. Hence, the section 124-A was held constitutionally valid.

The SC court observed:-

Since sedition was not included in Article 19(2) of the Constitution of India, it implied that a more liberal understanding was needed in the context of democracy. They made a clear distinction between strong criticism of the government and those words which excite with the inclination to cause public disorder and violence. The section aims at rendering penal, only such activities as would be intended, or have a tendency, to create disorder or disturbance, of public peace, by resorting to violence. The explanations appended to main body of the section made it clear that the criticism of public measures or comment on government action, however strongly worded would be within reasonable limits and would be consistent with the fundamental right of the freedom of speech and expression. It is only when the words, written spoken, etc. which have pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. The section strikes the balance between fundamental rights and the interest of the public order.

A cumulative reading on public order and sedition suggests that –

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66 Ibid.

67 1962 Supp 2 SCR 769.

Our commitment to freedom of speech and expression demands that it cannot be suppressed unless the situations created allowing the freedom are pressuring and the community interest is endangered. The anticipated danger should not be remote or farfetched but should have direct and proximate nexus with the expressions.[68]

WRAPPING UP

The valuable and cherished right of freedom of speech and expression should be nurtured and inculcated as it helps to create an environment where mutual respect would be the basis of dialogue and deliberation. These are the true ideals of democracy which needs to be protected and promoted across the socio-political spectrum in order to promote the healthy idea of nationalism and people where people are the core of the nation. It may at times have to be subjected to reasonable subordination of social interests, needs and necessities to preserve the very core of democratic life, preservation of public order and rule of law.

Notwithstanding the law of sedition has its origin in the colonial rule the, Indian judiciary and legislature evolve its interpretation and application to strikes a balance between fundamental rights and the interest of the public order.

Present interpretation of this law is in consonance with **Mahatma Gandhi's** quote[69]-

"Affection cannot be manufactured or regulated by the law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence. "

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[68] Interview: Sedition and the Right to Freedom of Expression - The Wire, available at - https://thewire.in/42412/interview-sedition-and-the-right-to-freedom-of-expression

[69] The Great Trial, available at - http://www.mkgandhi.org/law_lawyers/25great_trial.htm.

Animal Welfare in India

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Abstract

India wakes up with the horrific stories of cruelty on animals. The poor mute creatures are often been seen harassed, tortured and brutally killed by humans. But Indians appear not ready to take responsibility for cruelty instances becoming part of life. The paper makes an attempt to examine the actual treatment meted out to the animals in India and the judicial attitude towards cruelty to animals in the light of existing legislative framework."

INTRODUCTION

"The greatness of a nation and its moral progress can be judged by the way its animals are treated." - Mahatma Gandhi.

India is at a developing stage, growing at the speed of light in terms of literacy, skills, effectiveness of the government and even population. With so much growth comes the growth of mental capabilities and consciousness of man. But the consciousness of some men has led them to believe to be more superior than even the greatest conscious. Considering man, as the most important living being on the earth has led to the destruction of environment and causing death and hurt to other living beings.

India is one with several religious traditions advocating non - violence and compassion towards animals. The *Vedas* teach about *ahimsa* and Hinduism regards killing of animals as against *ahimsa* and amounting to bad *karma*.

In our country the animals are in a sorry state. We see numerous examples everyday where people are seen being hateful to animals, beating them blue and black to death, making them starve, taking their eyes out, making their lives miserable in some way. In Hyderabad, a case was registered against a man under Sections 429, 374 of IPC, and Section 11 of PCA for killing and raping a female dog.[70] But the punishment was meagre pertaining to the fact that the victim was an animal. In 2016, Tamil Nadu, two medical students were let off by a fine of Rs. 2 Lakh each for throwing a dog off the roof.[71] Nobody would dare to do this to humans. The lack of proper

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[70] PTI, Hyderabad: Man arrested for 'sexually abusing' dead dog, *The Indian Express,* October 24, 2016.

[71] Two India students arrested for throwing dog off roof, *available at*: http://www.bbc.com/news/world-asia-

implementation and poor amount of punishment has led to increase in the cruelty to animals in the past year itself.

LEGALITY AND JUDICIAL INTERPRETATIONS

We can choose not to be indifferent towards such inhuman behaviour by humans to other souls living with us. To kill or maim any animal, including stray animals, is a punishable offence under Sections 428 and 429 of the Indian Penal Code. India's first national animal welfare law, the Prevention of Cruelty to Animals Act, 1960, criminalises cruelty to animals, though exceptions are made for the treatment of animals used for food and scientific experiments. The 1960 law also created the Animal Welfare Board of India to ensure that the anti-cruelty provisions were enforced and to promote the cause of animal welfare.[72]There is also a Committee for the Purpose of Control and Supervision of Experiments on Animals (CPCSEA) to check animal testing. Since these laws are lesser known to people and hence these mute beings, are rather represented by muted humans. However if one is aware of the laws, and chooses to report, their condition may improve. There was a recommendation made to include acts on animal rights and books written by Smt. Maneka Gandhi (founder of People for Animals, 1992) in the curriculum of law colleges but has not implemented.

It is a normal sight to see stray animals in a barbaric condition on streets dying of hunger or of some disease. Constitution of India is considered the epitome and is the law of the land. Article 51 A(g) of our Constitution imposes upon every Indian citizen a fundamental duty to have compassion for all living creatures. But this duty is not fulfilled by most of us.

Also there are a number of domestic animal welfare organisations, as well as chapters of international animal nonprofits including People for the Ethical Treatment of Animals, Humane Society International, and In Defense of Animals.

But the laws of the country are not enough to protect animals from the cruelty they face. Although cattle slaughter is illegal in all but two Indian states, poor enforcement of cattle protection laws has allowed a thriving leather industry. A 2016 report on the Indian leather industry states that India is the second largest producer of footwear and exporter of leather

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india-36721344 (last visited on February 19,2017).

[72] ANIMAL PROTECTION LAWS FOR THE GUIDANCE OF POLICE, HAWOs, NGOs AND AWOs, *availableat*: https://awbi.org/awbi-pdf/APL.pdf (Last visited on February 18, 2017).

garments, with significant room for growth.[73] The Indian government supports the industry by allowing 100% foreign direct investment and duty-free imports, funding manufacturing units, and implementing industrial development programs.

There are various judgments of the Hon'ble Supreme Court and High Courts in favour of animal protection in India. The Hon'ble Supreme Court in case of ***State of U.P v. Mustakeem and Ors***[74]made it amply clear that once an animal was removed from a person's care on grounds of cruelty to his/her charge, the animal would not be returned until the case was resolved.

In 2014, the Hon'ble Supreme Court banned the illegal transport of cattle to Nepal for The *Gadhimai* festival, which played an important role in bringing down the number of animals sacrificed that year.

In **Animal Welfare Board of India v. A Nagaraja and Others**[75]the Supreme Court banned the practice of *Jallikattu* in 2014, it alluded to various sections of the PCA Act, 1960,which addresses unnecessary suffering of animals. Alluding to Section 3 and Section 11, the Hon'ble Court declared that all animal fights incited by humans are illegal, even those carried out under the guise of tradition and culture. Surpassing the said judgment, the state government of Tamil Nadu passed an ordinance allowing *Jallikattu and* later passed a bill toreplace the ordinance following which the state's governor sent the bill to President for approval which is still pending.

The aforesaid judgments and many more assure us about the legal position of protection of animals in the country. Yet the humans attacking animals do not have to face a heavy punishment. Since cruelty to animals is not considered to be a grave offence by the law, such practices continue. Still there are many incidences which show the brutality that animals face at the hands of "humans", as we call us. But nothing about us is truly "human" until we do something about the things we care about. Animals who don't have a voice depend upon us to give them a voice to be saved from us. And we must be human enough to provide them that and

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[73] Leather Sector Achievement Report, *available at*: http://dipp.nic.in/English/Investor/Make_in_India/sector_achievement/Make_in_India_Leather_Sector_Achievement_Report_22122016.pdf (Last visited on February 18, 2017)

[74] SC 2002

[75]CIVIL APPEAL NO. 5387 OF 2014

end their misery. Gandhi truly said we must be the change we want to see in this world. To stop their suffering we need to stop making them suffer. And be the change we all need.

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Muslim Woman subject to Gender Injustice

JatinderArora*

Abstract

Religion has important place in everyone's life but it is submitted that sometimes this very religion plays a discriminatory role against women. In India Muslims is the largest minority religion, which forms 25 million in total population. According to contemporary social scenario personal law of Muslims seems to practice many discriminatory acts against women. These practices in-fact begins from home, from wearing burqa to bias between sons and daughters and even follows thereafter. At the time of the marriage where on one hand a Muslim male has the liberty to marry four women, with liberty to marry a Muslim woman or even a woman of other kitabia religion, but on the other hand women do not even have the prerogative to marry a non-muslim. Moreover, unlike female counter-part Muslim male is also empowered to give divorce to their wives at any time by pronouncing triple talaq and further divorced women does not even have a right to claim maintenance after iddat period. In Muslim personal law where daughters are given half the share in property in comparison to full share of their male counter-parts; she is even subjected to restricted right of movement, i.e. she is even prohibited entry in Islamic sacred places.

A wave of bringing equality among men and woman is running across the global. At world stage it is under Universal Declaration of Human Rights 1948[76]that women are given same status as men. Similarly, under Indian Constitution also framers give much importance to promoting equality between both the genders[77]. The Indian Constitution not prohibits any kinds

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[76]Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration,*without distinction of any kind, such as race, colour, sex, language, religion,political or other opinion, national or social origin, property, birth or other status.*

Article 16 (1): Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

[77]Article14:The State shall not deny to any person equalitybefore the law or the equal protection of the laws withinthe territory of India.

Article 38 (1): The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

of discriminatory action against woman but has also empowered the State to make special provisions for woman under Article 15 Clause 3[78].

But now the question that arises is that whether after 65 years of independence, do women have actually attained same rights, as the Constitution intended to give them? Whether State has succeeded in giving equal status to women?

Religion has important place in everyone's life but it is submitted that sometimes this very religion plays discriminatory role for women. In India Muslims is the largest minority religion, which forms 25 million in total population. It is submitted that Muslim woman have always been subject to discrimination from beginning. Religious impositions upon women are sometimes to such an extent that they are allowed to move out only when they attire in an accepted dress code, i.e. wearing of a burqa. And various attempts to ban these restrictions have always brought forth criticism from Muslim society and rather treated as a restriction on practice of their religion. One such glaring example of this criticism was the recent instance of Germany. When German Chancellor Angela Merkel banned wearing burqa she had to face severe criticism from many orthodox Islamic groups, though the decision was welcomed by Muslim woman[79].Although in Quran it is no-where written that Muslim woman are required to wear burqabut still it is imposed on them, one reason possibly being patriarchal paradigm.

Furthermore, at the time of the marriage where a Muslim male has the liberty to marry four women, with liberty to marry a Muslim woman or even a woman of other kitabia religion, but women do not even have this prerogative[80].Moreover, unlike female counter-part Muslim male is also empowered to give divorce to their wives at any time by pronouncing triple talaq and further divorced women does not even have a right to claim maintenance after iddat period[81]. In Muslim personal law where daughters are given half the share in property in comparison to

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Article 51A (*e*): to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; *to renounce practices derogatory to the dignity of women*.

[78]Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children.

[79] Available at: https://www.thesun.co.uk/news/2339873/german-leader-angela-merkel-says-full-veil-is-not-appropriate-here-in-astonishing-u-turn/

[80]Available at: http://www.advocatekhoj.com/library/lawareas/marmuslim/relative.php?Title=Marriage%20Muslims&STitle=Relative%20Incapacity%20or%20Prohibition

[81]Available at: http://www.livelaw.in/uniform-civil-code/

full share of their male counter-parts[82]; she is even subjected to restricted right of movement, i.e. she is even prohibited entry in Islamic sacred places. It was only recently that the Hon'ble Bombay High Court lifted the ban on woman entry in Hajji Ali Dargah and observed that there is not even single word in Al Quran which prohibits the entry of woman in dargah. Therefore court held the restriction to be unconstitutional and violative of principal of equality as given under Article 14[83]. Although the decision when appealed to Hon'ble Supreme Court was stayed, butwas opined as a welcome step by civil society[84].

Now the question that arises before us is what is personal law? Personal law is a law which is based on religion and is derived from religion[85]. That means that Muslim personal law is derived from their holy book Quran. And it is submitted that Al Quran is so liberal that it places both men and woman on equal status and prohibits any form of discrimination between the two. The Holy book not only recognizes the divorced women's right of maintenance but it also opines its disapproval to casual pronouncement of divorce by triple talaq. It is only in the situation where marriages have broken down irretrievably that triple talaq finds place and approval in Quran. The submission also finds place in judicial opinion as given by Justice Krishna Iyer in the case of *YousufRawther v Sowramma*[86], holding as follows:

> ".. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quranlay down and the same misconception vitiates the law dealing with the wife's right to divorce."

Now another question that arises is that when Quran is so liberal then why Muslim women feel oppressed? The possible answer is its misinterpretation and confusion between right to practice religion and practices of personal law. This means that Muslim law by itself is not discriminatory but it is because of these challenges and thought patterns that women have to face restrictions and discriminations.

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[82]Available at: http://vikaspedia.in/social-welfare/women-and-child-development/meera-didi-se-poocho/property-richts-of-women-in-india-and-maintenance

[83]NoorjehanSafiaNiazv. State of Maharashtra and other, Bombay High Court, PIL No. 106 of 2014, judgement dated 26th August 2016

[84]Available at: http://indianexpress.com/article/india/india-news-india/sc-stays-womens-entry-in-haji-ali-dargah-as-management-awaits-progressive-stand-3070775/

[85]Available at: http://www.epw.in/journal/2016/50/web-exclusives/do-personal-laws-get-their-authority-religion-or-state%E2%80%94revisiting

[86]AIR 19 71 Ker 261

Hon'ble Supreme Court has also time and again expressed its concern over the discrimination meted out in our societal set-up, despite India being a democratic state[87].The Hon'ble Supreme Court, while considering the plight of Muslim women under certain circumstances, in *Kunhimohammed v Ayishakutty*[88]observed:

"The stipulation in Muslim Law tolerating polygamy and the further stipulation enabling arbitrary unilateral pronouncement of talaq, which stipulations have been grossly misused by some unprincipled who have no commitment to the dynamism, liberalism and humanism, underlying these stipulations in Muslim Law. It is perhaps more unfortunate that the Courts have not so far tackled the bull by the horns and had not tested the constitutional validity of these stipulations which get the mandate for enforcement under the provisions in the Muslim Personal Law (Shariat) Application Act, 1937. Whether the stipulations of Muslim Personal Law tolerating polygamy and permitting arbitrary and unilateral termination of marriage by pronouncement of talaq by the husband offend the constitutional fundamental rights to equality and life under Articles 14 and 21 of the female half of Muslim population will certainly have to be considered by the constitutional Courts".

Concern for plight of Muslim women was also highlighted by Justice Khalid in the case of ***Mohammed Haneefa v Pathummal Beevi***[89], wherein the learned Judge after referring to the unbridled power of a Muslim husband to divorce his wife, asked: -

> "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity."

Presently, to remedy the situation the Government of India is contemplating to enforce and implement uniform civil code as envisioned under Article 44[90]. But it is submitted that if uniform civil code is implemented then it will not only mean that there will be one family law governing all the religions but it might also mean imposing of law of majority to minority, which will be

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[87]Available at: http://www.hindustantimes.com/india/sc-to-examine-muslim-personal-law-for-polygamy-triple-talaq/story-qpLYAycFxuLkHyvv8zCRTL.html
[88]2010 (2) KHC 63
[89] 1972 Ker LT 512
[90] Article 44: Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

seen as being against the principle of secularity of Indian state. Therefore, it is suggested that rather than enforcing uniform civil code it should encourage some changes in Muslim personal law or possibly codify it on lines similar to that of Hindu law. But before initiating any step towards non-discriminatory society it will be required that any envisioned step be widely discussed and debated and society be made a part of that change.

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MARITAL RAPE

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ABSTRACT

"They are all innocent until proven guilty. But not me. I am a liar until I am proven honest." Women used as synonym to a 'subordinate group' have been deprived of the basic fundamental principles enshrined in the Constitution. They still have difficult time protecting their bodily integrity, whether against domestic violence or against rape outside or inside the home. India is predominantly a patriarchal society. Institution of marriage is considered a sacrament and an integral part of our social institution. With this notion, Legislature and Judiciary have successfully fled from their responsibilities of protecting the married women from their spouses. Regressive culture of our society is evident from cases where marital rape is considered as an individual case, a personal cause and not a public cause. This article thereby deals with the concept of marital rape, its effect and need for its criminalization.

In ***Shyam Narain v. State (NCT of Delhi)***[91] it was held, 'Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable.'

The word 'rape' means 'to seize'. The Supreme Court has in ***Bodhisatwa* vs. *Ms. Subdhra Chakroborty***[92] stated rape as a crime against basic human rights and in violation of right to life which includes right to **live with human dignity** as contained in ***Article 21***. The severity of crime and the effect of this cruelty acquire an increased intensity in the case of a woman who is raped by her spouse. Where rape committed against a woman 'outside her home' has been made punishable by parliament under ***section 376* of Indian Penal Code**, rape committed to a woman 'inside her home' i.e. marital rape has not been recognised by policy enforcers. ***Section 375, IPC***

[91] (2013) 7 SCC 77
[92] (1996) 1 SCC 490

defines rape as an act of violence against a woman without her consent. However, ***Exception 2*** provided in the said section states that only sexual intercourse or sexual act committed by a man with his lawfully wedded wife who is below 15years of age without her consent shall come within the purview of rape. Thus it clearly eliminates sexual violence in a 'Husband-Wife' relationship where wife is above 15 years of age though without her consent. This is in sharp contrast to the age of consent provided explicitly under *Section 375* i.e. 18 years. Though there have been a number of reportable cases of rape, but the percentage is very less when it comes to marital rape; reason being due to family loyalty or fear of husband, financial dependence on husband, safeguarding the future of their children or marital rape not being criminalised in India.

According to ***The Hindu Marriage Act, 1955*** when a woman gets married she is duty bound to serve her husband according to his wishes and is considered as his property. This ideology is also reflected under ***Section 497 IPC*** where woman is treated as a chattel. The philosophy has influenced our Indian legislatures in ignoring the offence of spouse rape citing social and cultural reasons by giving it shield of matrimonial right of the husband. Hence, they are silently accepting that wife is merely an object of sexual gratification of her husband with no will of her own over her sexuality. Its criminalization though rejected, was even recommended by the **Verma committee** which was appointed to suggest amendments to India's sexual assault laws.

Thus in cases of marital rape, women are forced to have non-consensual sex with their husband when they are asleep, through use of coercion, verbal threats or physical violence. Due to prevalent social dogma and financial dependency, married women are strained in such relationships. Meaning thereby, a married woman who is consenting to have sexual intercourse because of threat of injury to child or herself, depriving the woman of her right to stay in the house or receive maintenance cannot be considered as a valid consent.

Section 122 **of the** ***Indian Evidence Act*** prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for an offence against the other. Since, marital rape is not an offence; the evidence is inadmissible, although relevant. In ***2005, under Domestic Violence Act***, it has been considered as prosecutable only under ***Section 498A IPC*** as a ground for cruelty.

Further, **intrusion in the sexual privacy** of a person has been considered in the case of *State Of* ***Maharashtra And Another*** **v.** ***Madhukar Narayan Mardikar***[93] whereby the Supreme Court has held that every woman is entitled to her sexual privacy and it is not open to any and every person to violate her person as and when he wishes. She is entitled to protection of law. However this Hon'ble court seems to have taken a different view in case of a married couple. In ***Sree Kumar And Anr.*** **v.** ***Pearly Karun***[94], the Kerala High Court observed that the offence under *Section 376A, IPC* will not be attracted as the wife is not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent. In this case, the wife was subjected to sexual intercourse without her will by her husband when she went to live together with her husband for 2 days as an outcome of settlement of divorce proceedings which was going on between the two parties. Hence the husband was held not guilty of raping his wife though he had done so. Under the *Criminal Amendment Act 2013*, abovementioned *Section 376A* has now been provided under *Section 376B.*

Thus it can be **concluded**; marital rape is equivalent to depriving a woman of self determination of her body; meaning thereby taking away the right in making decisions in matters closely connected with her body or well being. Sexual relationship is one of the most personal choices that a woman reserves for herself. Studies claim that approximately 10% to 14% of married women have been subjected to rape by their husband.[95] ***United Nations*** recognize women's rights to be free from male violence as a fundamental human right. ***Article*** **2 of the** ***Declaration of the Elimination of Violence against Women*** includes marital rape explicitly in the definition of violence against women. The offence has been made punishable under criminal laws of around 100 countries but India is not one amongst them. Even after protests by Human Rights activists, government has turned deaf ear towards this vital issue. There is a dire need for amendment to the existing age old definition of rape. Non intervention in marital rape cannot be ignored as a family sphere.

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[93] AIR 1991 SC 207
[94] 1999 (2) ALT Cri 77
[95] Box, S., Power, Crime and Mystification, (London Tavistock Publications, 1983), p.122

Globalization in Reverse Gear

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When it first became part of English vocabulary, the word globalization was supposed to be the wave of change. The process by which relatively autonomous economies started to function together was termed as inevitable and irresistible.

During globalisation's heyday, we were told that state policies no longer mattered and that corporations would soon dwarf states. In fact, states still do matter. The European Union, the United States government, and the Chinese state are stronger economic actors today than they were a decade ago. In China, for instance, transnational corporations (TNCs) march to the tune of the state rather than the other way around.

Moreover, state policies that interfere with the market in order to build up industrial structures or protect employment still make a difference. Indeed, over the last 10 years, interventionist government policies have spelled the difference between development and underdevelopment, prosperity and poverty. Malaysia's imposition of capital controls during the Asian financial crisis in 1997-98 prevented it from unravelling like Thailand or Indonesia. Strict capital controls also insulated China from the economic collapse engulfing its neighbours.[96]

But it got a jolt, the world was amazed by UK's referendum to exit European union. And just when people ran out of their skin, Donald Trump's election victory dashed the hopes of those who wanted to see the world as one global economy. World commerce is sagging and globalization is in gull retreat.[97] It is all set to reverse the course which likes of Woodrow Wilson, Franklin Roosevelt both former president of USA, Winston Churchill, the former Prime Minister of England and Joseph Stalin, former premier of Russia had chalked out while forming of league of Nations and UNO to bring all nations together to promote international brotherhood and global tolerance for preserving international peace.

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[96] Frontline magazine 2007, vol 24 issue 1.

[97] Reverse gears for Globalization, available at -http://www.seattletimes.com/business/economy/reverse-gears-for-globalization-jon-talton/.

Brexit the First political earthquake signals seismic shift that will reverberate globally for next decade. It is a manifestation of mounting backlash against ever deeper entanglement with European union and not just European union but with the world. It reflects the sense that with all dismantling of nation economic controls and ceding of power over trade and the like global bodies such as WTO, the nation state has fundamentally lost control of its destiny surrendering to global forces.

Economists could not understand the under-current leading to the decision of exit of Britain from European Union. Rather after the decision, they started saying that Britain will be at loss, post Brexit. And when Pound and British stocks started declining, they are patting their backs for what they have been saying. It is being said that Britain would lose a big chunk of its international trade, as 56 percent of Britain's trade has been with EU. However, this fear was not one sided, even EU is also in danger, once such an important partner exits from EU. Though, it may take more than 2 years for Britain to actually leave EU, officials of EU, baffled by the decision, have started asking Britain to leave EU at an early date.

What is true for Britain is true for Germany, Sweden where ultra right front national, anti euro, anti-immigrants Democrats are capitalising on same populist nationalist and anti global sentiment.[98] But more than anything else Brexit exposed limitations of British constitution. The very fact that present British leadership allowed referendum to be used for such an important issue will make difficult for coming generations to believe that this is on country rally Empire which ruled entire world at one time and whose national flag was flying all 24 hrs in one country or other.

Resistance to globalization was arguably the foremost policy theme in Trump's election campaign. He railed against US's existing trade agreements, threatened to slap taxes on US companies investing overseas and pledged to keep out the migrants whom he accused of being rapists. His plan for First hundred days in office shows centrality of his theme to renegotiate from NAFTA, abandon Trans pacific partnership, expel more than 2 million migrants and build a wall with Mexico.[99] We see its effects on globalization playing out at three levels.

The first is the direct effect of the U.S. turning inward. The U.S. is the world's largest economy, measured in market dollars, and it's the third most populated. A partial withdrawal from the global

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[98] Brexit: All you need to know about the UK leaving the EU, available at- http://www.bbc.com/news/uk-politics-32810887

[99] Donald Trump and the future of Globalization, available at - https://www.brookings.edu/blog/up.../donald-trump-and-the-future-of-globalization/

economy by the U.S. is therefore likely to register in measures of globalized stocks and flows, simply by virtue of the country's size. Indeed, America holds the largest share of global trade, foreign capital stocks, and migrants. Yet, relative to its size, America is not as globally integrated as many other countries. It is those areas where the U.S. is most globally intertwined, that the direct impact of a Trump presidency on globalization could theoretically be greatest.[100]

Globalization is reversible. Higher energy prices are impacting transport costs at an unprecedented rate. So much so, that the cost of moving goods, not the cost of tariffs, is the largest barrier to global trade today. In fact, soaring global transport costs have already offset all the trade liberalisation efforts of the past three decades.[101]

If major cuts in tariffs and non-tariff barriers led to explosion of world trade, including the rapid industrialisation of India and China, during the past three decades, it says now "triple-digit oil prices, soaring transport costs, not tariff barriers, pose the greatest challenge to trade".

There's a backlash against globalization underway in many Western countries. Although Americans still say positive things about international trade and immigration, political candidates like Donald Trump and Bernie Sanders have gotten a lot of support for opposing both to a degree that would have been unthinkable a decade ago. Meanwhile, trade deals like the relatively innocuous Trans-Pacific Partnership are suddenly in danger. Britain's divorce from the European Union is also commonly interpreted as a rejection of globalization. But there's likelihood that today's anti-globalization warriors are fighting yesterday's war. By many measures, globalization has been in full retreat since the crisis of 2008.[102]

Donald Trump's election presents an opportunity for American institutions business, universities, governments, non-profits to re examine their own policies towards globalization and determine whether these need to be "rebooted." The effects of Donald Trump's election and his blunt inauguration speech are profound. The phrase "make America great again" is not just a reflection of chauvinism. It's an acknowledgement that the era of American policies to create a global order is ending.[103]

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[100] Report - Brina Seidel and Lawrence chandy, November 2016.

[101] Ibid.

[102] Globalization goes into reverse, available at - http://m.dailyhunt.in/news/india/english/bloomberg+quint-epaper-bloomqui/globalization+goes+into+reverse-newsid-59531432

[103] The Trump Doctrine and Globalization, available at - http://www.huffingtonpost.com/ed-krapels/the-trump-doctrine-and-gl_1_b_14753754.html

Conclusion –

Globalization is already receding. World leaders are on the road to beggar thy neighbour protectionism. Based on assessment of movement of goods, money and people we find the future of globalization has indeed changed. Pursuing protectionism is like locking up oneself in a closed room. While wind and rain may be kept outside so as light and air. No one will emerge as a trade winner.

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Surrogacy Laws in India - A Contemporary Debate

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Abstract

The article presents a critique of the Surrogacy (Regulation) Bill, 2016, which was passed by Union Cabinet in August 2016. With the aggravating circumstances in the domain of surrogacy the regulation of surrogacy laws had become indispensable. Along with underlining the issue of victimization of the surrogate, the article elucidates some of the major provisions laid down in the bill which mainly aims at providing safeguards to the surrogate mother and the child in question.

However, it is also noteworthy that while interdicting commercialization of surrogacy, the bill goes on to adopt a rather rigid approach. Various issues pertaining to the provisions laid down in the bill including the prioritization of the ideas of heterosexuality and marriage have also been discussed in the article. The article, all in all, promotes a penetrating outlook in interpreting the present day scenario.

Introduction:

Surrogacy is an arrangement whereby a woman agrees to carry pregnancy for another person by undergoing the process of insemination. A commercial surrogacy incorporates consideration in return and relinquishment of the child by the surrogate mother. Generally entered into owing to medical complexities, the arrangement of surrogacy has been widely adopted of late. In India, the practice of commercial surrogacy has procured its place as an industry in the past decade. India has been a hub of commercial surrogacy for diverse nations.

The onset of discourse:

Due to the contractual nature of the contemporary practice, surrogacy in India until now was being governed by the Indian Contract Act, 1872. However, with the escalation of the commercial surrogacy, the issues of exploitation of the surrogate mother came forth. A

recommendation by the Law Commission in its 228th report had also been made, *vis-à-vis* interdiction of commercial surrogacy and bringing altruistic surrogacy into practice.

The major string of debate surged after the case of [104]***Baby Manji Yamada v. Union of India and Another (2008) 13 SCC 518*****,** where a Japanese couple stepped into a surrogacy contract with an Indian woman in State of Gujarat. However, the couple went through a matrimonial discord thereafter and the question of custody came into being.

The Apex Court held the father to be the genetic parent of the child and was given custodial rights. The Government was directed to issue the passport to Manji Yamada and she returned with her grandmother. Most importantly, the Supreme Court upheld the validity of surrogacy agreement in India. What is discernible in the Baby Manji Yamada case is that the Court had adopted apro- contractual approach.

Facets of the Surrogacy (Regulation) Bill, 2016:

The Surrogacy (Regulation) Bill, 2016[105]was passed by the Union Cabinet in August, 2016 in order to foster altruistic and ethical surrogacy. The cardinal feature of The Bill, 2016 is that it wholly outlaws commercial surrogacy and only a close relative, not necessarily related by blood, is eligible to be a surrogate mother. It has also been directed that a couple in order to go for surrogacy must be married for at least five years and must not have a surviving child, except in the cases where the surviving child is physically or mentally disabled or is suffering from a terminal disease. To safeguard the interest of the child it has been laid down in the bill that a child born out of surrogacy is entitled to all the rights which are availed by a natural born.

A National Surrogacy Board, at both Central and State level will be established for effective regulation of surrogacy laws in India. Under the new bill, the registration of assisted reproductive clinics has been made mandatory. The clinics will need to maintain the record of surrogacy for 25 years.

The unmarried, the live- in couples, homosexuals, foreigners and even overseas citizens are ostracized from the practice of surrogacy. So, The Bill, 2016 extends only to the married couples medically proven to have fertility complications. Commercial surrogacy, abandoning the

[104] https://indiankanoon.org/doc/854968/
[105] The Surrogacy (Regulation) Bill, 2016 available at www.prsindia.org

surrogate child, exploitation of surrogate mother, selling/import of human embryo have been made punishable with imprisonment for a term of at least 10 years and a fine of up to Rs. 10 lakh.

Exigency of a law:

With the proliferating incidents of harassment of the surrogate mother and the child, there had been a dire need for regulation of surrogacy laws in India. Legions of cases have been reported where the child being unrelated to the parents biologically was abandoned. The health, both mental and physical of the surrogate mother has also been of paramount concern. The relinquishment of the child can leave an indelible impact on her mental state. Where the surrogate mother is from the marginalized section of the society, the scope of oppression widens further.

However, the state of affairs is not always ideal for the intended parents either. With the rise in industry, there has been a tremendous growth of a new section of intermediaries, which further foreshortens the scope of transparency in the process of surrogacy.

As mentioned earlier, commercial surrogacy in India hitherto worked as per the Indian Contract Act, 1872. Although utmost significance has been given to free consent in a contractual set up, The Contract Act, 1872 has been inadequate to deal with myriad issues which may emerge during a process as intricate as surrogacy, which often ends up in infringement of the rights of surrogate mother, child and the intended parents.

A critical stance:

One of the primary matter of concern with the advent of Surrogacy (Regulation) Bill, 2016 is the build out of an underground market of surrogacy, thereby making it more exploitative in nature. Transplantation of Human Organs and Tissues Act, 2011 has been a popular instance of mushrooming of such covert black market.

By licensing only married couples to go for surrogacy, the State denies to the citizens the rights which are provided under Article 14 of the Indian Constitution. The Supreme Court in its earlier

ruling in the year 2015 put the live in relationship at par with the married one[106]. A child born out of live in relationships had also been accorded the status of a legitimate child. The new bill therefore stands in negation to the ruling.

Moreover, the bill tends to ostracize the queer community in explicit terms. Though homosexuality has not attained a legalized status in India as yet, the bill's heteronormative aspect further makes it regressive in nature.

Conclusion:

The Bill, 2016 has been passed by the Union cabinet as yet, which still leaves the scope for revision of the set out draconian provisions. In the contemporary scenario a legal framework that limits the exploitation of the surrogates and the children is imperative. In lieu of adopting a stringent stance, a diagnostic and problem-solving approach is far more fitting to resolve the root issues like unsettled identity of the child, child abandonment, objectification of the surrogate mother and infringement of the interest of intended parents to name a few.

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[106] http://timesofindia.indiatimes.com/india/Couple-living-together-will-be-presumed-married-Supreme-Court-rules/articleshow/46901198.cms