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MESSAGE FROM THE PATRON

It gives me a sense of great pride and privilege in bringing to you the maiden issue of the **Contemporary Law and Policy Review (CLPR)**, a student-edited, blind peer-reviewed, bi-annual Journal of Maharashtra National Law University, Nagpur. The Journal strives to promote quality and scholarly research on a wide range of contemporary issues that blend legal and social dimensions. The Journal endeavours to provide a platform to the students and scholars to delve into research on topics which warrant policymaking and academic deliberations.

This first volume of CLPR in the hands of its readers is the outcome of sheer hard work and dedication of a competent and committed team of students, who have brought this Journal within a short span of time. The research articles/ papers published in the Journal bear testimony to the commitment of the University to disseminate qualitative research inputs from faculty, research scholars and law students across the country.

The idea behind promoting this Journal is to acquaint future generations with quality editing and research based learning. Contributions in this Journal have been selected, edited, and compiled by a team of students under the guidance of faculty members. The Journal has undergone blind peer review by these students and the subject experts. I am happy to see professional skills and a sense of commitment among these students for taking up the herculean task of bringing out an academic Journal from a young law school.

I wish to thank all the contributors to the Journal and wish that they continue their support in future as well. I also thank all the Hon'ble Members of the Advisory Board of the Journal. Bringing out this Journal would not have been possible without their constant support and advice. The faculty members of the University who guided the students on a regular basis also deserve my appreciation as they are the real mentors behind the success of the Journal. All the members of the Student Editorial team deserve appreciation for their tireless hard work put into the Journal. I wish them great success in their future endeavours and I am sure this Journal would be a significant source of information for the readers and would be a value addition to their library.

(Vijender Kumar)

Vice-Chancellor

EDITORIAL NOTE

This maiden issue of NLUN CLPR contains articles and notes on various contemporary issues, ranging across national and international scenarios. It is an eclectic mixture of opinions offering the readers an insight into both social and legal issues. This is an integrative issue containing articles concerning international law, constitutional law, family law, corporate and insolvency law, and legal theory. We hope that these pieces benefit the readers by providing a fresh perspective on issues and a starting point for further research.

In 'Extinguishing Hindu Joint Family and Mitakshara Coparcenary: A Critique', Prof. (Dr.) Vijender Kumar and Vidhi Singh examine the concepts of the Mitakshara Coparcenary system and the Hindu Joint Family in the light of rules and law relating to testamentary and intestate succession, analysing *Uttam v. Saubhag Singh (2016)*, and highlighting the various fallacies in the judgment.

In 'Imminence of a Cyber Attack vis-à-vis Anticipatory Self-Defence', Chitresh Baheti analyses the technological aspects of theories in international law in determining the 'imminence' of cyber-attacks with respect to the cyber weapons used, and their utility in helping states in ascertaining the difference between peace, lawful warfare or illegitimate warfare.

In 'Legal Truth of Rape in India and the Questions it raises', Nikita Samarnath delves into the idea of a 'legal truth', and how it helps in raising questions on the rape policy in India. The author examines different categorisations of sexual offences created by legal definitions and the issues involved in rape policy, concluding the paper by highlighting the necessity of a synergy between the law and other social sciences, while dealing with rape policy in India.

In 'Reinforcing India's Commitment to International Humanitarian Law- A Case for Ratification of Additional Protocols to Geneva Conventions', Palada Dharma Teja and Rohitesh Tak explore the reasons for India's non-accession to the Additional Protocols of 1977 to the Geneva Conventions of 1949, and advocate for India's ratification to the Additional Protocols for better compliance with its humanitarian obligations. They conclude by enunciating several important reservations relating to the sovereignty of State Parties and political legitimacy of non-State actors.

In 'Puttaswamy: Privacy and Decisional Autonomy', Sholab Arora explores the impact of *Justice K.S. Puttaswamy (Retd.) v. Union of India* on

various legislation governing decisional autonomy in India after it was declared an intrinsic part of the fundamental right to privacy under Article 21 of the Constitution of India by the Supreme Court.

In 'Creditors at Last! An Analysis of the Legal Position of Homebuyers', Arpit Jain and Anisha Agarwal analyse the changed position of homebuyers as creditors under the amendment to the Insolvency and Bankruptcy Code. They chronicle the legal position of the homebuyers prior to the amendment and further analyse the post-amendment position. The authors also highlight the various alternate legal remedies available to the homebuyers in cases of delayed possession by the developers.

In 'An Analysis of Maternity Benefit (Amendment) Act, 2017 and the Exploration of Paternity Leave', Vaibhav Latiyan analyses the Maternity Benefit (Amendment) Act, 2017, by highlighting the various lacunae in the same. The author also discusses the concept of paternity leave and its necessity in India.

In 'Cinema in India: A Critical Analysis of Grant or Refusal of Certificate', Aman Shrivastava analyses the role of the Central Board of Film Certification, and the validity of the ban on movies in Indian cinema in the light of the right to freedom of speech and expression and the right to freedom of trade.

The Student Editorial Committee hopes that the assortment of articles in this maiden issue, encompassing various contemporary issues are beneficial and perceptible for its readers. We look forward to comments and criticism on the articles published in this issue, hoping that the suggestions would help us further encourage scholarly dialogue in our forthcoming issues.

(Student Editorial Committee)

EXTINGUISHING HINDU JOINT FAMILY AND MITAKSHARA COPARCENARY: A CRITIQUE

Vijender Kumar [*] *and Vidhi Singh* [♠]

Abstract

In matters of a Hindu joint family, its joint property and partition, intestate and testamentary succession, Hindus are governed by either of the two major schools of Hindu law, Mitakshara and Dayabhaga. The former school is the most widely followed amongst Hindus, who form the largest part of the population of India. Areas other than intestate and testamentary succession are still uncodified, and hence, they fundamentally rely on Vedic and various Hindu customary practices. Therefore, any judicial pronouncement concerning Mitakshara law from the apex court of the country, if not in the right spirit or inconsonant with Hindu scriptures or customary law, can affect a very large number of Hindus and their rights with respect to their property.Uttam v. Saubhag Singh's (2016) case is such a pronouncement which has disturbed the intrinsic sanctity of the Mitakshara joint family property. The apex court has declared that "on the death of one of the coparceners, the Mitakshara joint family comes to an end for all practical purposes." An earlier judgment of a three-judge bench of the Supreme Court of India, namely Gurupad v. Hirabai (1978), has been overlooked by the two-judge bench in Uttam v. Saubhag Singh's case. Therefore, in the light of the above judgment, this paper attempts to compare and contrast circumstances in which a Hindu joint family and the Mitakshara coparcenary gets extinguished. Further, while discussing in detail the impact of the above judgment, the paper highlights the contours of extinguishing Hindu joint family and its implication on the contemporary family system.

Key Words: Hindu Joint Family, Coparcenary, Self-Acquired Property, Notional Partition, Intestate Succession

Introduction

In tracing society backwards to its cradle it appears that one of the earliest units is the patriarchal family, which may be defined as, "a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, and great-grandfather".[1]

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1 JOHN D. MAYNE, TREATISE ON HINDU LAW AND USAGE 820 (Vijender Kumar rev., Bharat Law House Pvt. Ltd. 17th ed. 2014) (1892).

A Hindu joint family consists of a common ancestor and all his lineal male descendants up to any generations together with the wife or wives (or widows) and unmarried daughters of the common ancestor, and of the lineal male descendants. Further, in the Smritis and commentaries, we come across the words *'kutumba'*[2] or '*avibhakta-kutumba*',[3] which also highlights the meaning of 'joint family'.[4] It has to be clearly understood that the existence of the common ancestor is necessary for bringing a joint family into existence, but not for its continuance. The death of the common ancestor does not mean that the joint family comes to an end. Upper links are removed and lower ones are added and in this manner, so long as the line does not become extinct, the joint family continues and can continue indefinitely, almost for perpetuity.

Hindu law confers a status and several rights to the members of a Hindu joint family; the concepts of coparcenary, joint family property etc. revolve around the concept of a Hindu joint family, therefore, the existence of a Hindu joint family is quite important for the execution and development of rights involving these concepts in a joint family. In *Uttam v. Saubhag Singh*,[5] Mr. Jagannath Singh, a Hindu whose demise occurred in 1973, as an undivided member of his coparcenary, left behind his widow, son and three brothers. In such circumstances, the status of plaintiff/appellant, grandson of Mr. Jagannath Singh, needed to be determined by the Hon'ble judges to ascertain his claim in the said case based on the law applicable to him and the respondents. Therefore, it is necessary for the authors to discuss in brief the concepts of Hindu law surrounding a joint Hindu family, Mitakshara coparcenary, partition, notional partition, intestate and testamentary successions to make appropriate comments on the decision of the apex court while analysing the same.

Presumption of Jointness

A Hindu joint family is presumed to be joint unless the contrary is proved. An undivided Hindu family is ordinarily joint not only in the estate but also in food and worship.[6] The presumption is stronger among the nearer relations, the remoter we go, the weaker is the presumption. The burden of proof that a partition has taken place is on the person who asserts partition.[7]

In a Hindu joint family, there is no limit to the remoteness of their descent from the common ancestor, and also to the distance of their relationship from its members. It is not a corporation and thus, has no legal entity distinct and separate from its members. When we speak of a Hindu joint family we include only those persons who, by virtue of their relationships, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and are at pleasure to enforce its partition.[8] Therefore,

2 *Nar., Dattapradanika* 6, *Yaj*., II. 175.
3 *Yaj*., II. 45.
4 PARAS DIWAN AND PEEYUSHI DIWAN, MODERN HINDU LAW, 259 (15th ed. 2003).
5 AIR 2016 SC 1169.
6 *Raghunadha v. Brozo Kishoro* (1876) 3 IA 154; MAYNE, *supra* note 1, at 820.
7 *Jaai Kishore v. Govind Singh* AIR 1920 Pat 128.
8 *N.V. Narendranath v. Commissioner of Wealth Tax, AP* (1969) 1 SCC 748.

no co-owner has a definite right, title, and interest in a joint Hindu family property, in any particular item or portion thereof; on the other hand, he has right, title and interest in every part and parcel of joint property or coparcenary property under Hindu law. The order passed by the court against one co-owner in respect of joint property would bind the other co-owners as well.[9]

Coparcenary under Original Mitakshara School

A daughter on marriage ceases to be a member of her father's family and becomes a member of her husband's family. Under the Mitakshara School of Hindu law, a Hindu coparcenary is a much narrower concept than the joint family. It comprises only of those males who take, by birth, an interest in the joint or the coparcenary property, that is, a person himself and his sons, his son's sons and the son's son's sons from the time of their birth.[10] These persons can enforce a partition whenever they like. Therefore, the essence of a coparcenary under the Mitakshara School of Hindu law is a community of interest, and unity of possession.

A coparcenary is a pure creation of law.[11] In order to be able to claim a partition, he must not be removed by more than four degrees from the last male owner, who has himself taken an interest by birth.[12] The reason as to why the coparcenary is so limited is to be found in the tenet of Hindu religion, wherein only male descendants up to three degrees can offer spiritual ministration to an ancestor. In a traditional Mitakshara coparcenary, only males can be coparceners.[13] A female, not being a coparcener, cannot enforce partition. However, all the other members of the family have a right to be maintained out of the joint family property.

In a traditional Mitakshara coparcenary, the joint family property devolves by survivorship, that is, on the death of a coparcener his interest lapses and goes to the other coparceners, provided that if the deceased has left a son, grandson, or a great-grandson, the latter represents and occupies the place of the deceased coparcener when a partition takes place. The affairs of the family are managed by the father and if he is very old or dead, by the senior brother or member or by any other member with the consent of the senior member.[14] He possesses powers such as the imposition of partition on his sons[15], alienation of property in cases of legal necessity, etc., making gifts of movable ancestral property, and

9 *Shankara Co-operative Housing Society Ltd. v. M. Prabhakar* AIR 2011 SC 2161.

10 *N.V. Narendranath v. Commissioner of Wealth Tax, AP* AIR 1937 PC 36.

11 *P.N. Venkatasubramania Iyer v. P.S. Easwara Iyer* AIR 1966 Mad 266; *Sudarsanam Maistri v. Narasimhalu* (1902) ILR 25 Mad 149; *Bhagwan Dayal v. Reoti Devi* AIR 1962 SC 287.

12 *Moro v. Ganesh* 10 Bom HCR 444 (In this case, Nanabhai Haridas J. very lucidly explains by several diagrams the limits of coparcenary and what persons are entitled to demand a partition and from whom).

13 *Sunil Kumar v. Ram Prakash* AIR 1988 SC 576.

14 *Nar., Dayabhaga* 5 and *Sankha*. The manager is called the *Karta* in modern times, by the *Smritis* and digest works such as *kutumbin*. (*Yaj.* II. 45), *grhin, grahapati, prabhu* (Kat., 543) and not *Karta*.

15 *Yaj.*, II. 114.

even immovable property within reasonable limits for pious purposes, without the consent of other coparceners.[16]

This is in contrast to the rights of other coparceners in the Mitakshara coparcenary, who cannot dispose of their undivided interest in the property in any way, without the consent of the other coparceners.[17] The courts have, however, in certain cases, allowed the undivided interest of a coparcener in the joint family property to be attached at the instance of the creditor for the individual debts of a coparcener.[18]

In *State Bank of India v. Ghamandi Ram*[19] the Supreme Court has held that the Mitakshara coparcenary entails certain incidents, such as (i) the property in which the male issue of a coparcener acquires an interest by birth; and (ii) the joint property devolves by survivorship, and not by succession. The most remarkable feature of acquiring an interest by birth is, as mentioned before in the paper, that the interest which a coparcener acquires by birth is not a specified or a fixed interest. The interest fluctuates with the births and the deaths in the family. Deaths may enlarge the beneficial interest of the survivors just as births may diminish their interests by increasing the number of claimants. Each coparcener has a right to claim a partition. But until he elects to do so, the joint family property continues to devolve upon the members of the family for the time being by survivorship and not by succession.[20]

Property under Hindu Law

The Mitakshara School classifies property mainly under two heads: first, *Apratibandha Daya* or unobstructed heritage; and secondly, *Sapratibandha Daya* or obstructed heritage. All properties inherited by a male Hindu from a direct male ancestor, not exceeding three degrees higher to him are called *Apratibandha Daya*. In this property his son, son's son, son's son's son acquires an interest by birth. Therefore, it is called as unobstructed heritage. On the other hand, when a person inherits property from any other relation, such as maternal or paternal uncle or brother, nephew, etc., then it is known as *Sapratibandha Daya* and his son, son's son and son's son's son, or for that matter, any other person does not acquire an interest by birth. The Mitakshara property is divided into two heads, *viz*., joint family property and self-acquired property.

16 *Ramalinga v. Sivachidambara* AIR 1942 Mad 440; *Gangi Reddy v. Tammi Reddy* 54 IA 136, 140; *Sri Thakurji v. Nanda* AIR 1943 All 560, (for the validity of gifts of small immovable property by the *Karta* for religious purposes.). But in *Jinnappa v. Chimmava* AIR 1959 Bom 459; a gift of a small portion of joint family immovable property by the father to his daughter on the ground that she looked after him in his old age was set aside at the suit of his grandsons.

17 Brihaspati, *in* 33 SACRED BOOKS OF THE EAST: THE MINOR LAW BOOKS (CHAPTER XXV), 93 (Julius Jolly trans., Motilal Banarasidass Publishers Pvt. Ltd. 7th rep. 2014) (1889) (Whether kinsmen are united or separated, they are all alike as regards immovable property, as no one of them has power in any case to give, mortgage, or sell it).

18 *Vasudev v. Venkatesh* (1873) 10 Bom HCR 139; which were approved by the full bench in *Fakirapa v. Chanapa* (1873) 10 Bom HCR 162 and *Vitla Butten v. Yamenamma* 8 Mad HCR 6.

19 AIR 1969 SC 1330.

20 *Mst. Kashmira v. Dy. Director* (1975) All 458, 460.

In joint family property, the property flows from different sources and from which all members of the joint family draw out to fulfill their multifarious needs. One of its sources is ancestral property, i.e., any property inherited from an ancestor or ancestress may be called ancestral property. It includes a share allotted on the partition, and the property begotten on severance of status. In the former, the share, which a coparcener obtains on the partition of ancestral property, is known as ancestral property with respect to his male issue. The coparcener takes an interest in it by birth, whether he is in existence at the time of the partition or is born subsequently;[21] as regards the latter, whenever a coparcener expresses his intention to partition, a severance of status takes place. In *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe*[22] Justice A.N. Sen had observed that "the character of any joint family property does not change with severance of status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned among the co-shares."

Partition under Mitakshara School

The property which can be considered as subject matter of partition is coparcenary property. It is essential that the property should have been earlier held as joint property in the coparcenary, so that it may be brought within the ambit of partition. Separate property or self-acquired property cannot be considered as a subject matter of partition amongst the members of coparcenary. But if the property is of such a nature that it has been allotted at a previous partition to a member, it would, of course, be indivisible between himself and the separated members but will be divisible between himself and his own descendants.[23] An important question in this regard is that when does severance of status among the members of the coparcenary take place? The Supreme Court has held that such severance takes place from the date of institution of a suit.[24]

Where the property is indivisible due to its very nature, it is considered that such property must either be enjoyed by the heirs jointly, or sold, and the value distributed; or it may be valued and retained by one coparcener exclusively and the appropriate amount credited to his share. Members may hold family idols in turns, or as the Bombay High Court has ordered, family idols may be taken in possession by the senior most male member with liberty to other members to have access to them for the purpose of worship.[25]

Persons entitled to claim Partition

Any adult coparcener may sue for partition and every coparcener is entitled to share upon partition. The earlier law in this regard was that a son could not

21 *Adurmoni v. Chaudhary* (1878) 3 Cal 18.
22 AIR 1986 SC 79.
23 *Periasami v. Periaswami* (1878) 5 IA 61; MAYNE, *supra* note 1, at 1017; *Gannmani Anasuya v. Parvatini Amarendra Chowdhary* AIR 2007 SC 2380.
24 *Kakumanu Pedasubhayya v. Kakumanu Akkamma* AIR 1958 SC 1042.
25 *Damodar Das v. Uttam Ram* (1893) 17 Bom 271.

ask for partition without the assent of his father when the father was joined with his own father, brother or another coparcener. However, after the decision of *Abu Hamir v. Aher Duda*[26] it was held that the assent of the father is not a pre-requisite to a suit, against the grandfather and his collaterals for partition by metes and bounds (which means actual partition) where there had already been a severance of status. This is the status under the Mitakshara law. Under the Dayabhaga School, which prevails in Bengal and Assam, a son has no right to claim a partition of the property held by his father during the latter's lifetime, as the son has no vested interest in it. According to the current law, the members who are entitled to claim partition are sons born after the partition, sons begotten at the time of the partition, minor coparceners, and adopted sons.

Persons entitled to a Share on Partition

Apart from the claimants mentioned above, there are some female members who have an entitlement in the property, even though they themselves cannot claim it. Any property that they may take on the partition is their absolute property, by virtue of Section 14 of the Hindu Succession Act, 1956. Moreover, their right to maintenance does not adversely affect their claim on their share at the time of partition. The above mentioned female members are the wife of a coparcener, the mother and a widow of a coparcener, the grandmother, and the daughters. The wife cannot herself claim partition[27] but when partition takes place between her husband and her sons, she is entitled to a share equal to that of a son, which she can enjoy separately from her husband,[28] except in South India, where the practice has been obsolete since long. A widowed mother has the right to an equal share as that of her son's, but only when partition by *metes and bounds* takes place.[29] In Dayabhaga School, a widow becomes the heir of her deceased husband, if he leaves no male issue, regardless of whether he was undivided or not. A paternal grandmother is entitled to a share, if partition takes place between her grandsons, or between her son and son of a predeceased son. When two or more widows succeed to their husband's property, both of them have a right to partition.[30] In case of a custom prevailing at a point of time, a daughter is entitled to claim a share.[31] After the commencement of Hindu Succession (Amendment) Act 2005, in a Hindu joint family governed by Mitakshara law, a daughter of a coparcener has become a coparcener and has the same rights as that of a male coparcener. Hence, she can claim partition and has a share equal to that of a son.

Coparcenary Property and the Hindu Succession Act, 1956

The Hindu Succession Act, 1956 has brought about radical changes in the law of succession without abolishing the joint family and the joint family

26 AIR 1978 Guj 10.
27 *Punna Bibee v. Radha Kissen* (1904) 31 Cal 476.
28 *Shiromani v. Hem Kumar* AIR 1968 SC 1299.
29 *Pratapmull v. Dhanbatti* (1973) PC 21; DIWAN AND DIWAN, *supra* note 4, at 333.
30 *Jupudi Venkata Vijaya Bhaskar v. Jupudi Kesava Rao* AIR 2003 SC 3314.
31 *Pachi Krishnamma v. Kumaram* AIR 1982 Ker 137.

property. It does not interfere with the special rights of those who are members of a Mitakshara coparcenary. It is, however, essential to note that Section 6 of the above mentioned Act recognizes the rights upon the death of the coparcener and his heirs to claim an interest in the property that would have been allotted to him if there had been a partition immediately before his death. Section 6 of the Hindu Succession Act, 1956 states that:

> *when a male Hindu dies after the commencement of the Act, having at the time of his death, an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. Provided that, if the deceased had left surviving a female relative specified in Class-I of the Schedule, or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or in intestate succession, as the case may be, under this Act and not by survivorship.*

This Section indicates that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. Further, nothing contained in the proviso to this Section is to be construed as enabling a person who has separated himself from the coparcenary, before the death of the deceased, or any of his heirs, to claim on intestacy a share in the interest referred to therein. This provision of the Act deals with the question of a coparcener in a Mitakshara coparcenary dying, after the coming into operation of the Act, without making any testamentary disposition of his undivided share in the joint family property. Under the old Hindu law, a device by the coparcener in Mitakshara family of his undivided interest was wholly invalid. Section 8 states that:

> *the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter- (a) firstly, upon the heirs being the relatives specified in Class-I of the Schedule; (b) secondly, if there is no heir of Class-I then upon the heirs, being the relatives specified in Class-II of the Schedule; (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and (d) lastly, if there is no agnate then upon the cognates of the deceased.*

This Section propounds a new and definite scheme of succession and lays down certain rules of succession to the property of a male Hindu who dies intestate after the commencement of the Act. The rules are pivotal and have to be read along with the Schedule adjoining the Act.

Section 30 in Chapter-III of the Hindu Succession Act, 1956 deals with 'testamentary succession' for Hindus which states that:

> *Any Hindu may dispose of by will or other testamentary disposition any property which is capable of being so disposed of by him or by her*[32] *in accordance with the provisions of the Indian Succession Act 1925, or any other law for the time-being in force and applicable to Hindus.*[33]
>
> *Explanation- The interest of a male Hindu in a Mitakshara coparcenary property and as a member of a 'tarwad', 'kutumba' in the property, notwithstanding anything in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this Section.*

The Concept of Notional Partition under old Hindu Law

What must be noted in the definition of a joint Hindu family as well as the coparcenary is the fact that it is completely patriarchal and women have been treated as subservient, and completely dependent on male support. Prior to the Hindu Succession Act, 1956, *Shastric* and customary laws that varied with every region, sometimes even varied within regions due to caste-based diversity, governed Hindus and resulted in diversity in the law. Consequently, even in the matter of succession, there were different Schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan, and Gujarat, and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The multiplicity of succession laws in India, the diversity in their nature, owing to their varied origin made the property laws even more complex. Earlier, women had a right to sustenance, but the control and ownership of property did not vest in them. In a patrilineal system, like the Mitakshara School of Hindu law, a woman was not given a birthright in the family property like a son.

The concept of notional partition is laid down in Explanation-I of Section 6 of the Hindu Succession Act, 1956. This concept may be explained with the aid of two tools; the wording of the Explanation-I itself and the Supreme Court decision in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum.*[34] The language of the said Explanation must be kept in mind while giving effect to the proviso of this Section. The following underlined phrases are of significance in the language itself:

> *for the purpose of this Section the interest of a Hindu Mitakshara coparcener <u>shall be deemed</u> to be the share in the property that*

32 Hindu Succession (Amendment) Act, 2005 (Act no. 39 of 2005).

33 A part of this Section has been omitted by the Hindu Succession (Repealing and Amending Act), 1960 (Act no. 58 of 1960) and sub-section (2) has been omitted by the Hindu Succession (Amendment) Act, 1956 (Act no. 78 of 1956).

34 AIR 1978 SC 1239.

> *would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not.*[35]

The language clarifies that the fiction of a notional partition is to be applied to a very limited extent of separating the share of the deceased coparcener, in order to ascertain his interest in the coparcenary property. It is stated in the said Explanation that the same has to be applied irrespective of whether he was entitled to claim partition or not. Outwardly, it would appear strange if one says that a coparcener was not entitled to a partition of the family property, especially in a Mitakshara joint family as specified by the said Explanation. This may, however, happen in some specific exceptions; a full bench of the Bombay High Court had held that a son is not entitled to ask for partition in the lifetime of his father without his consent when the father is not separated from his own father, brothers, and nephews.[36] As a matter of custom in Punjab, a son cannot enforce partition against his father during his father's lifetime. The wording in the said Explanation gave rise to a series of conflicting judgments from various High Courts especially when the female relative happened to be the wife or the mother living at the time of the death of the coparcener.[37] While the proviso to the Section 6 gives the formula for fixing the share of the claimant, Explanation-I gives the clue for arriving at the share of the deceased coparcener. The conflicting judgments basically took three separate views.

The First View

The first view was given in *Shirambai v. Kalagonda,*[38] wherein the Bombay High Court took the view that under the notional partition, shares need to be allotted only to male coparceners. The Court stated that the interest of a Hindu Mitakshara coparcener available for division under this Section is that share in the property as would be allotted to him if a partition of the property had taken place immediately before his death amongst the coparceners. According to Hindu law, providing a share to the mother for maintenance and marriage expenses must be treated as abrogated in the view of Section 4, which gives the Act an overriding effect.[39] Therefore, according to the court, Section 4 establishes that the female members are not supposed to be included as claimants in the coparcenary property of the deceased coparcener. The same view has been endorsed in *Kanahaya Lal v. Jamma.*[40]

The Second View

The basic assumptions of the second view are: (a) notional partition is envisaged only for the purpose of ascertainment of the successional shares; (b) notional partition envisages the taking into account of the share of female heirs,

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35 Explanation I, Section 6, Hindu Succession Act, 1956 (Act no. 30 of 1956).
36 *Apaji v. Ramachandra* (1892) 16 Bom 29.
37 *Shiramabau v. Kolgonda* AIR 1964 Bom 263, 264.
38 *Ibid.*
39 *Id.*
40 ILR (1972) 2 Del 64.

marriage expenses of unmarried daughters, funeral expenses, etc.; and (c) nothing contained in the Hindu Succession Act, 1956 is to be deemed to affect the uncodified Hindu law of partition. This view is indifferent to the anomaly that may arise, that while we reduce the successional share of the widow on the assumption that she would be entitled to a share on actual partition, she might not be receiving such a share at all. For instance, if a coparcener died leaving behind a widow and a son, then according to the concept of notional partition, the share of the deceased would be 1/3. The successional share of the widow would be 1/6. The hardship which it causes to the widow is that, while her share is reduced on the assumption that she would be entitled to a share on partition, such partition is unlikely as there is one coparcener who has been ignored.

The Third View

The third view is reflected in *Rangubai Lalji v. Laxman Lalji*[41] wherein the Court has overruled the decision in *Shiramabai's* case. In *Rangubai*'s case, in the illustration taken earlier, the widow would be entitled to her share under the notional partition as well as her share under the succession, together making her share 1/2=(1/3+1/6). In other words, it converts the notional partition into an actual partition, an effect not envisaged by the legislature. It now removes the anomaly in a forthright way.

A full bench of the Bombay High Court in *Sushilabai Ramachandra v. Narayanrao Gopalrao*[42] reconsidered this aspect as to whether the scope of the fiction is as large as was held in *Rangubai's* case. The full bench adhered to the view of *Rangubai's* case on the narrow ground that where there are only two coparceners and one of them has died, then if any person other than the coparcener is entitled to a share as a result of severance of the deceased coparcener, the share of such other person becomes fixed. Thus, the court did not answer the question as to what would happen if there were more than two coparceners in the notional partition. Therefore, this judgment, though rational, has only a limited scope of application, as it does not deal with more complex situations that may routinely arise.

A three-judge bench comprised of Justice Y.V. Chandrachud, Justice P.N. Singhal and Justice V.D. Tulzapurkar of the Supreme Court confirmed and upheld the view of the Bombay High Court in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*,[43] which is a landmark judgment dealing with the concept of notional partition. The Supreme Court also stated that the fiction created by Explanation-1 of Section 6 of the Hindu Succession Act, 1956 has to be given its due and full effect as the fiction created by Section 18-A(9)(b) of the Indian Income-Tax Act, 1922, which was referred by the Supreme Court in *Commissioner of Income-tax, Delhi v. S. Teja Singh*[44] wherein the court held that failure to send an estimate of tax on income under Section18A(3) is to be

41 AIR 1966 Bom 169.
42 AIR 1975 Bom 257.
43 AIR 1978 SC 1239.
44 AIR 1959 SC 352.

deemed to be a failure to send a return and necessarily involves the fiction that a notice had been issued to the assessee under Section 22 of the Act and that he had failed to comply with it. In an important aspect, this case is stronger in the matter of working out the fiction because in *Teja Singh's* case, a missing step had to be supplied which was not provided for by Section 18A(9)(b), namely, the issuance of a notice under Section 22 and the failure to comply with that notice. Section 18A(9)(b) stopped at creating the fiction that when a person fails to send an estimate of tax on his income under Section 18A(3) he shall be deemed to have failed to furnish a return of his income. Further, the Section did not provide that in the circumstances therein stated, a notice under Section 22 shall be deemed to have been issued and the notice shall be deemed not to have been complied with. These assumptions in regard to the issuance of the notice under Section 22 and its non-compliance had to be made for the purpose of giving due and full effect to the fiction created by Section 18A(9)(b). In *Gurupad's* case, it was held that it is not necessary, for the purposes of working out the fiction, to assume and supply a missing link and the same was enunciated by Lord Asquith in his famous passage in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*[45] which reads as:

> If you are bidden to treat an imaginary state of affairs as real, you, must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it; and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs.[46]

The view of the Court in *Gurupad*'s case was reiterated by the Bombay High Court in *Rangubai Lalji v. Laxman Lalji.*[47] Subsequently, a full bench of the Bombay High Court in *Sushilabai Ramchandra Kulkarni v. Narayanrao Gopalrao Deshpande,*[48] the Gujarat High Court in *Vidyabenv Jagdischandra N. Bhatt*[49] and the High Court of Orissa in *Ananda v. Haribandhu*[50] has also taken the same view. Further, the Bombay High Court has applied the same concept and interpretation in *Subhash Eknathrao Khandekar v. Prayagabai Manohar Biradar*[51] and a two-judge bench comprised of Justice B.N. Agarwal and Justice P.P. Naolekar of the Supreme Court has upheld the same in *Anar Devi v. Parmeshwari Devi*.[52] In all these cases the ratio of *Gurupad's* case has been upheld while taking into account the changes brought about by the Hindu Succession (Amendment) Act, 2005.

45 [1952] AC 109 (132).
46 *Ibid.*
47 AIR 1966 Bom 169.
48 AIR 1975 Bom 257.
49 AIR 1974 Guj 23.
50 AIR 1967 Ori 194.
51 AIR 2008 Bom 46.
52 AIR 2006 SC 3332.

Hence, on the lines of *Gurupad's* case, the decision of the Supreme Court as well as the subsequent concurring decisions from various High Courts, we find that the legal fiction of a notional partition must be taken into account when there is a partition subsequent to the death of a Mitakshara coparcener. The claimants in this partition, according to the *Gurupad*'s case, receive their shares from the notional partition as well as their successional interests in the deceased's property.

The Hindu Succession (Amendment) Act, 2005 and Notional Partition

On September 9, 2005, the Hindu Succession (Amendment) Act came into force. It aimed at eradicating gender discrimination and providing equal rights to daughters in succession. It has amended Section 6 of the principal Act of 1956 to include the proprietary rights of a daughter of a coparcener governed by Mitakshara law, to be a coparcener by birth and abolished the doctrine of survivorship. The Act of 2005 is accompanied by implications such as (i) the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son; (ii) the daughter has the same rights in the coparcenary property as she would have had if she had been a son; (iii) the daughter shall be subject to the same liability in the said coparcenary property as a son would be; and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener; (iv) the daughter is allotted the same share as is allotted to a son; (v) the share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and (vi) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter.[53]

It can be clearly inferred from the aforementioned implications that the Act of 2005 affects the concept of notional partition as envisaged by Explanation-I of Section 6 of the Act. Prior to the amendment, according to the concept of notional partition, the wife, son 1 and son 2 would each receive 1/4+1/20=6/20 of the property, while the daughters would receive 1/20 each of the property if there was a partition after the death of the father. Total property=6/20+6/20+6/20+1/20+1/20=1.[54] After the amendment of 2005, the daughters would get the same coparcenary rights as the sons, and that would apply to a notional partition as well. Therefore, they would each get 1/6+(1/6+ 1/5)=1/6+1/30=6/30. Hence, we find that the new amendment entitles the daughter to an extra share in the coparcenary property and brings her at par with the son by way of a legal fiction.

In *Subhash Eknathrao Khandekar v. Prayagabai Manohar Biradar*[55] and *Anar Devi v. Parmeshwari Devi*[56] the *Gurupad's* ratio had been enforced with

53 Section 6, Hindu Succession (Amendment) Act, 2005 (Act no. 39 of 2005).

54 The equation was followed in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum* AIR 1978 SC 1239; *Raj Rani v. Chief Settlement Commissioner, Delhi* AIR 1984 SC 1234.

55 AIR 2008 Bom 46.

due allowance for the Act of 2005. The result of this interpretation is the same as mentioned in the above example. It must be noted that there had been no specific legislation with regard to notional partition, and therefore, the Act of 2005 leaves certain questions about notional partition unanswered, but at the same time, the Act of 2005 clears up certain doubts that have been raised with regard to notional partition in prior cases. The Act has cleared the position of only a daughter with reference to partition. The confusion that had arisen in cases prior to *Gurupad's* case and which had been resolved to a great extent by *Gurupad's* case has been restored to a certain extent by the Act of 2005.

The Act of 2005, by removing the proviso and leaving the Explanation to Section 6 unchanged has merely left the Courts with a tool to determine the share of the deceased coparcener, and has taken away the tool that was used to divide this share. Further, by restricting itself only to the daughter of a coparcener and excluding from its ambit other female members of the family, the amended Section undid its objective of gender equality to a great extent. The main consequence of the Act of 2005 is to bring about gender equality with respect to property rights in a Hindu joint family. This is disadvantageous to the widow as well as other female members of the joint family. Therefore, in the absence of a clear legislation, the ratio laid down in *Gurupad's* case must continue to be followed while dealing with female members of a joint family on the death of a male Hindu coparcener. The concept of notional partition is relevant even after the Amendment Act of 2005. Section 6 of the Act affects Explanation-1 of Section 6 of the principal Act but it does not make it irrelevant. Hence, the concept of notional partition is still socially as well as economically relevant for Hindu joint family property and will continue to decide the manner in which a partition would take place in a Mitakshara Hindu joint family after the death of a coparcener.

Devolution of Interest in the Coparcenary Property

Section 6 of the Hindu Succession Act, 1956 has brought about drastic and fundamental changes in the law of succession. The same had been required in Mitakshara law of coparcenary because in cases where one coparcener has died intestate, it is necessary that not only in case of his separate property but also in respect of his undivided interest in the coparcenary property, there should be an equal distribution of that share between his male and female heirs, especially between his sons and daughters. In order to bring about these favourable changes, the whole concept of the Mitakshara coparcenary could have been done away with, but there was a strong sentiment in favour of its retention even if it was in an attenuated form, and the rules laid down under Section 6 evince the consequent compromise.

Section 6 of the Act provides that the coparcenary interest would devolve upon the coparceners as per the rule of survivorship provided that the deceased has left no female relative specified in Class-I of the Schedule or a male relative

56 AIR 2006 SC 3332.

specified in that class who claims through such a female relative. If the deceased has such an heir left then the property devolves by testamentary or intestate succession as the case may be but not according to the rule of survivorship.[57]

The interest of the deceased in the coparcenary property is determined by assuming that a partition had taken place just before the death of the deceased, and the interest of the deceased is the share in the property that he would have gotten, had the actual partition taken place during his lifetime. An important question, however, arises is whether this notional partition will have the same effects as that of regular or actual partition among the rest of the members of the family. This issue was addressed in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum.*[58] In this case the deceased was a member of the Mitakshara coparcenary. He died leaving behind his widow, two sons and three daughters. His widow subsequently asked for partition and claimed her share to be 7/24. The 7/24 was the sum total of the 1/4th that she would get at the time of the notional partition that would take place between the deceased and the others, and the 1/24th that she would get out of the interest of her deceased husband. The Supreme Court held that though she was not capable of asking for partition, if a partition took place her share would be 7/24. The decision of the Supreme Court does not intend that the fiction and notional partition must bring about the total disruption of the joint family or that the coparcenary ceases to exist even if the deceased is survived by coparceners.

Therefore, notional partition is not a real partition. On the death of the coparcener there is no automatic partition under Hindu law but, it seems, in reference to notional partition, severance of status is deemed to have taken place from the date of death of the coparcener who has left an heir.[59] However, there is no direct severance of status and it is merely a fiction. Notional partition has two facets. First, all rules relating to partition as laid down in the Hindu law apply to notional partition. If it were not so, the provision would not work. Secondly, notional partition not being a real partition, no severance of status takes place among the surviving members of the Hindu undivided family, and therefore, no one else's interest except that of the deceased coparcener is severed. It may be emphasized that the exercise of notional partition is undertaken to separate the share of the deceased coparcener as only by doing so, the proviso can be made to work.[60]

General Rules of Succession in case of Male Hindus

Section 8 of the Hindu Succession Act, 1956 deals with the general rules of succession in case of male Hindus. According to this Section, the property of a male Hindu dying intestate shall devolve accordingly: First, upon the Class-I

57 Section 6 must be read with Section 8 or Section 30 of the Hindu Succession Act, 1956 (Act no. 30 of 1956).
58 AIR 1978 SC 1239.
59 *Shive Hondav v. Director* AIR 1992 Bom 72; PARAS DIWAN, FAMILY LAW 417 (6th ed. 2001).
60 DIWAN AND DIWAN, *supra* note 4, at 252.

heirs,[61] if there is no Class-I heir then on relatives specified in Class-II,[62] and if there is no heir of any of the two classes, then upon the agnates of the deceased. Lastly, if there is no agnate[63] then upon the cognates[64] of the deceased.

In *Savitri v. Devaki*[65] the Court held that where a partition of a joint family property takes place and a separate share is given to the mother, then in the case of death of one of the sons, the mother would be entitled to have a share in the separate property of her son. The fact that earlier when the partition took place she was given a share would not place any bar. In *Yudhistir v. Ashok Kumar*[66] it was held that the property that devolves on a Hindu male governed by Mitakshara law under Section 8 of the Act, will be his separate property. Such a property would never amount to joint family property in his hands as against his son. It must be noted at this point that a son, as mentioned in the Schedule, or a son's son, or a son's son's son, has to be a legitimate son. This principle was laid down in *Daddo v. Raghunath*[67] by the Bombay High Court, where it was held that an illegitimate son would not be entitled to claim any share in the property of his father. A son of a voidable marriage is, however, a full-fledged legitimate son and will inherit the property of his father, but the son of an annulled voidable marriage will inherit the property of the father alone and of no other relation.[68] However, before the Act of 1956 was passed, in *Kamalammal v. Vishwanathaswami*[69] and *Gur Narain Das v. Gur Tahal Das*[70] it was held by the Supreme Court that an illegitimate son takes half of what he would have taken had he been a legitimate son. It is the submission of the author that the view taken in these two cases is correct because an illegitimate son should not be made to suffer for no fault of his own.

In as much as the share of the daughters and more specifically, the illegitimate daughters, goes, the law was finally settled in 1994 with the Supreme Court judgment in *Vithalbhai Krishnaji Patil v. Bhanubai*,[71] where it was specifically held that an illegitimate daughter may not inherit. The people

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61 *Class-I heirs would include, Son, Daughter, Widow, Mother, Son of a predeceased son, daughter of a predeceased son, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son*.

62 *I. Father; II (1) Son's daughter's son, (2) Son's daughter's daughter, (3) Brother, (4) Sister; III (1) Daughter's son's son (2) Daughter's son's daughter, (3) Daughter's daughter's son, (4) Daughter'sdaughter's daughter; IV. (1) Brother's son, (2) Sister's son, (3) Brother's daughter, (4) Sister's daughter; V. Father's father; Father's mother; VI. Father's widow; Brother's widow; VII. Father's brother; Father's sister; VIII. Mother's father; Mother's mother; and IX. Mother's brother, Mother's sister*.

63 *Section 3 (a), Hindu Succession Act, 1956 (Act no. 30 of 1956) reads as "One person is said to be an 'agnate' of another if they are related by blood or adoption wholly through males*".

64 *Section 3 (c), Hindu Succession Act, 1956 (Act no. 30 of 1956) reads "One person is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males*".

65 AIR 1982 Kar 67.

66 AIR 1987 SC 558.

67 AIR 1979 Bom 176.

68 DIWAN AND DIWAN, *supra* note 4, at 420.

69 46 Mad 167 (PC).

70 AIR 1952 SC 225 (Ali J. and Bose J.).

71 AIR 1994 SC 481 (Venkatachaliah J. and Sahai J.).

whose names are mentioned in Class-II of the Schedule are second in turn to be entitled to a share. The Class-II heirs are divided into nine categories. The rule, as laid down in *Satya Charan Dutta v. Urmila Sundari Dassi*[72] is that an heir in an earlier category excludes heirs in later categories. All heirs in one category take simultaneously between themselves. Just because numerals have been used in some categories, such as in categories II, III, and IV, it does not indicate any preference of heirs in an earlier numeral over the heirs in a later numeral. Thus, in category II, where son's daughter's son bears numeral 'I', it does not mean that son's daughter in numeral II will be excluded. Agnates and Cognates will inherit the property if there is no Class-I or Class-II heir to be found. In so far as the agnates and the cognates go, the agnates will be preferred as a general rule to the cognates, howsoever remote an agnate may be. Thus, from the cases that have been studied above, Section 8 may be summarized as follows:

When a male Hindu having an interest in the Mitakshara coparcenary property dies, his property would first devolve by succession upon any of the relatives mentioned in Class-I of the Schedule. If there is no Class-I heir, then the property would devolve upon the relatives mentioned in Class-II, in the specified order. In the rare case that there is no Class-I and Class-II heir, the property will go to the agnates and if there are no agnates, then the same would pass to the cognates. If there are still no heirs, then the government is entitled to escheat the property.

UTTAM V. SAUBHAG SINGH[73]

Facts of the case

Appellant had filed a suit for partition against his father and three uncles (brothers of father), claiming $1/8^{th}$ share in the suit property on the foothold that the suit property was ancestral property, and he being a coparcener has a right by birth as per the Mitakshara law. The trial Court decided in favour of the appellant. However, first appellate court disentitled the appellant on the ground that during the life time of the Class-I heir, i.e., his father, respondent no.3, had no right to sue for partition and dismissed the suit. The second appellate court upheld the order of the first appellate court. Hence he preferred an appeal to the Supreme Court.

Issues involved in the case

1. Whether in the event of death of *karta*, the joint family property which was ancestral property in his hands and other coparceners, devolved by succession under Section 8, ceased to be joint family property on the date of death and the other coparceners and his widow held the property as tenants in common and not as joint tenants.

72 AIR 1970 SC 1714 (Shah J., Ramaswami J. and Grover J.).
73 AIR 2016 SC 1169 (Joseph J. and Nariman J.).

2. Whether for the purpose of claiming succession rights in a joint Hindu family, the provisions of Act exclude the son's son, but include the son of a predeceased son.

3. Whether property which devolved on a Hindu under Section 8 would be Hindu undivided family property in his hand with regard to his own son, or would it amount to creation of two classes among the Class-I heirs: the male heirs in whose hands it will be joint Hindu family property in relation to sons, and female heirs with respect to whom no such concept could be applied.

Arguments advanced by the Appellant

The foremost point that the appellant contended was that as Jagannath Singh's widow was alive in 1973 at the time of his death, the case would be governed by the proviso to Section 6 of the Hindu Succession Act, 1956, and therefore the interest of the deceased in the Mitakshara coparcenary property would devolve by intestate succession under Section 8 of the said Act.[74] The appellant contended that "it is only the interest of the deceased in such coparcenary property that would devolve by intestate succession, leaving the joint family property otherwise intact."[75] Consequently, the appellant had every right to sue for partition while his father was still alive, inasmuch as, being a coparcener and having a right of partition in the joint family property.[76] The appellant also contended that Section 8 of the Act would not bar such a suit as it would apply only at the time of the death of Jagannath Singh, i.e., the grandfather of the plaintiff in 1973 and not thereafter to non-suit the plaintiff.[77] Accordingly, "Section 6 and Section 8 have to be read harmoniously, as a result of which the status of joint family property which is recognized under Section 6 cannot be said to be taken away upon the application of Section 8 on the death of the plaintiff's grandfather in 1973."[78]

Arguments advanced by the Respondent

The respondent contended that once Section 8 is applied by reason of the application of the proviso to Section 6, the joint family property ceases to be so and thereafter can only be succeeded to by the application of either Section 30 or Section 8; Section 30 applying in case a will had been made and Section 8 applying in case a member of the joint family died intestate.[79] The respondent to prove this, heavily relied on a two-judge bench decision of Justice R.S. Pathak and Justice Sabyasachi Mukherji of the Supreme Court of India in *Commissioner of Wealth Tax, Kanpur v. Chander Sen*,[80] and another case of

74 *Uttam v. Saubhag Singh* AIR 2016 SC 1169, ¶ 6.
75 *Ibid*.
76 *Id*.
77 *Id*.
78 *Id*.
79 *Id*.,¶ 7.
80 AIR 1986 SC 1753.

Bhanwar Singh v. Puran.[81] He thus contended that the appellant had no right to a partition of a property which is no longer joint family property continuing to subsist in any member of the coparcenary.

Statutory References

The present case profusely involves the application of the Hindu Succession Act, 1956, as its long title states that "*an Act to amend and codify the law relating to intestate succession among Hindus.*" The provisions involved, of the said Act, are indicated as follows: Section 4 contains a non obstante provision in terms whereof "*any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act, ceased to have effect with respect to any matter for which provision is made therein save as otherwise expressly provided*"; Section 6 of the Act, provided for devolution of interest in the coparcenary property,

> *When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. Provided that, if the deceased had left him surviving a female relative specified in Class-I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship*.

Section 8 lays down the general rules of succession that the property of a male dying intestate devolves according to the provisions of the Chapter as specified in Clause (1) of the Schedule. Section 19 prescribes the mode of succession for two or more heirs "*If two or more heirs succeed together to the property of an intestate, they shall take the property, (a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and (b) as tenants-in-common and not as joint tenants.*" Lastly, Section 30 provides for testamentary succession,

> *Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her, in accordance with the provisions of the Indian Succession Act 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.*

These were the relevant provisions of the said Act, being pertinent to the judgment.

81 AIR 2008 SC 1490.

Judicial Referencing

The Apex Court referred to certain judicial pronouncements, to sustain its ruling in the instant case. In *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*,[82] a Hindu widow claimed partition and separate possession of a 7/24th share in joint family property which consisted of her husband, herself and their two sons. If a partition were to take place during her husband's lifetime between himself and his two sons, the widow would have got a 1/4th share in such joint family property. The deceased husband's 1/4th share would then devolve, upon his death, on six sharers, the plaintiff, and her five children, each having a 1/24th share therein. Adding 1/4th and 1/24th, the plaintiff claimed a 7/24th share in the joint family property. In this regard, the Court held that:

> The Hindu Succession Act came into force on June 17, 1956. Khandappa having died after the commencement of that Act, to wit in 1960, and since he had at the time of his death an interest in Mitakshara coparcenary property, the pre-conditions of Section 6 are satisfied and that Section is squarely attracted. By the application of the normal rule prescribed by that Section, Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. But, since the widow and daughter are amongst the female relatives specified in Class-I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to Section 6 comes into play and the normal rule is excluded. Khandappa's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship... There is thus no dispute that the normal rule provided for by Section 6 does not apply, that the proviso to that Section is attracted and that the decision of the appeal must turn on the meaning to be given to Explanation-1 of Section 6. The interpretation of that Explanation is the subject-matter of acute controversy between the parties.

The Court further emphasised that:

> the allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion…The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

82 AIR 1984 SC 1234.

Further, in *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh*,[83] the question that was raised before the Court was, whether a female Hindu, who inherits a share of the joint family property on the death of her husband, ceases to be a member of the family thereafter. The Supreme Court held that as there was a partition by operation of law on the application of Explanation-1 of Section 6, and as such partition was not a voluntary act by the female Hindu, the female Hindu does not cease to be a member of the joint family upon such partition being effected. In *Shyama Devi v. Manju Shukla*,[84] the Court went on to state that Explanation 1 contains a formula for determining the share of the deceased on the date of his death by the law effecting a partition immediately before a male Hindu's death took place.

On application of the principles contained in the aforesaid decisions, it is explicit that, on the death of Jagannath Singh in 1973, the proviso to Section 6 would apply inasmuch as Jagannath Singh had left behind his widow and "that the plaintiff would be entitled to a share on this partition taking place in 1973. We were informed, however, that the plaintiff was born only in 1977, and that, for this reason, (his birth being after his grandfather's death) obviously no such share could be allotted to him."[85]

Furthermore, addressing the other issue, the court referred to *Commissioner of Wealth Tax, Kanpur v. Chander Sen*,[86] in which the father died in 1965, leaving behind his son and two grandsons, and a credit balance in the account of the firm. The question before the court was whether the credit balance left in the account of the firm could be said to be joint family property after the father's share had been distributed among his Class-I heirs in accordance with Section 8 of the Act. The court stated that:

> [I]t would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in Class-I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated.

The Court found the Andhra Pradesh High Court finding to be correct, along with other rulings of the High Court of Allahabad, Madras and Madhya Pradesh. In addition to it, in *Yudhishter v. Ashok Kumar*,[87] the Court followed the law laid down in *Chander Sen's* case.[88] Also, in *Bhanwar Singh v. Puran*,[89] the Court followed *Chander Sen's* case, where Bhima left behind Sant Ram and three daughters. In terms of Section 8 of the Act each of them had 1/4th share in

83 AIR 1985 SC 716.
84 (1994) 6 SCC 342.
85 AIR 2016 SC 1169, ¶ 15.
86 AIR 1986 SC 1753.
87 AIR 1987 SC 558.
88 *Commissioner of Wealth Tax, Kanpur v. Chander Sen* AIR 1986 SC 1753.
89 AIR 2008 SC 1490 (Sinha J. and Sirpurkar J.).

the property. A partition had taken place amongst the heirs of Bhima. Further:

> it had rightly been held that even in such a case, having regard to Section 8 as also Section 19 of the Act, the properties ceased to be joint family property and all the heirs and legal representatives of Bhima would succeed to his interest as tenants-in-common and not as joint tenants. In a case of this nature, the joint coparcenary did not continue.[90]

Some other judgments[91] were also cited before the Court stating that joint family property continues even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact that there is a sole surviving coparcener. But, the Court declared that none of these judgments would take the appellant any further in view of the fact that in none of them there is any consideration of the effect of Section 4, Section 8 and Section 19 of the Hindu Succession Act, 1956.

Finding of the Apex Court

The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:

i. When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

ii. To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is a property that can be disposed of by him or by her by will or other testamentary disposition.

iii. The second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class-I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

iv. In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by

90 *Bhanwar Singh v. Puran* AIR 2008 SC 1490, 1492, ¶ 13.

91 *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe* AIR 1988 SC 845; *Sheela Devi v. Lal Chand* (2006) 8 SCC 581; *Rohit Chauhan v. Surinder Singh* (2013) 9 SCC 419.

operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

v. On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

vi. On a conjoint reading of Section 4, Section 8 and Section 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.[92]

Judgment in Uttam v. Saubhag Singh

In the instant case, a two-judge bench of Justice Kurian Joseph and Justice R.F. Nariman of the Supreme Court of India held that on death of one of the coparceners, the Mitakshara joint family comes to an end for all its practical purposes. The Apex Court further held that on the death of Jagannath Singh in 1973, the joint family property devolved by succession under Section 8 of the Act and thus the ancestral property ceased to be joint family property on his death and other coparceners and his widow held the property as tenants in common and not as joint tenants. As such, appeal was held to be not maintainable.

The first appellate court stated that once Section 8 of the Hindu Succession Act, 1956 steps in, the joint family property has to be divided in accordance with rules of intestacy and not by the doctrine of survivorship. This being so, no joint family property remained to be divided when the suit for partition was filed by the plaintiff, and that since the plaintiff had no right while his father was alive, the father alone being a Class-I heir (and consequently the plaintiff not being a Class-I heir), the plaintiff had no right to sue for partition, and therefore, the suit was dismissed and consequently the first appeal was allowed.[93]

Evaluation

After understanding the fundamentals of a Hindu joint family, the coparcenary and succession laws of Hindus, one can form a crystal clear opinion of the fact that Section 6 of the Hindu Succession Act, 1956 deals with devolution of interest in coparcenary property through identification of an interest of a deceased coparcener from his/her original undivided coparcenary property while using a legal fiction, and that Section 8 of the Hindu Succession

92 AIR 2016 SC 1169, ¶ 20.
93 *Ibid*, ¶ 3.

Act, 1956 deals with general rules of intestate succession in the case of a male Hindu. Further, it is Section 6 of the Act which provides a formula on which undivided interest of a deceased coparcener can be identified on or after his/her death without disclosing or disturbing the jointness of status of other coparceners and claimants; and once a definite moiety to which the deceased was entitled just before his/her death irrespective of whether the partition had taken place or not has been determined, the share so identified becomes the property for devolution on the legal heirs of the deceased according to the rules of either intestate succession or testamentary succession as the case may be. However, Section 8 of the Act deals with both types of properties, i.e., self-acquired property and an interest from the coparcenary property; for its devolution on the legal heirs of the deceased. Therefore, it is difficult to understand the application of these two Sections, and thus each one of them needs to be applied carefully according to the facts of each case. Therefore, it is wrong to conclude that on the death of *Karta*, the joint family property which was ancestral property in his hands and other coparceners, devolved by succession under Section 8, ceased to be joint family property on the date of his death and further the other coparceners and his widow held the property as tenants in common and not as joint tenants. Further, it is true to say that for the purpose of claiming succession rights in a joint Hindu family, the provisions of Hindu Succession Act, 1956 exclude son's son but include son of a predeceased son, as when the succession opens, it opens with the application of *per strips,* i.e., among the heads of each branch of the Hindu joint family and thereafter, it opens through applying the doctrine of *per capita*, i.e., each member of the branch so claimed. Hence, the son of a predeceased son gets an equal share on succession.

While determining a share of one of the coparceners on the death of a father governed by Mitakshara law or the widow of the said deceased, the joint / ancestral coparcenary property cannot be considered as belonging to the deceased Hindu only, as the same property belongs to all the members of the coparcenary, unless the contrary is not proved. Evidently, this is the main crux of the matter where opening of succession by metes and bounds needs specialization to understand the nature of property in dispute and apply the correct law in the given circumstances, while protecting special property rights of female members and providing them an equal share along with the male members of the family.

The authors are of the definite opinion that the Hon'ble Court while applying general rules of Hindu joint family, Mitakshara coparcenary, normal partition and the notional partition has erred fundamentally and reached the wrong conclusion that "on death of one of the coparceners, the Mitakshara joint family comes to an end for its all practical purposes", as neither the Hindu joint family nor the Mitakshara coparcenary comes to an end on the death of one of its members. The law of notional partition has been settled and is clear, as referred to earlier in the paper, and as the authors understand, the court has misapplied the concept of notional partition, confusing it with normal partition

while determining the matter of intestate succession. The Hon'ble Court did not realize that this ruling may affect Mitakshara joint family property in a large way. Further, the earlier judgment of a three judge-bench in *Gurupad v. Hirabai* (1978) has been overlooked by the two-judge bench in *Uttam v. Saubhag Singh's* case. Therefore, this pronouncement of the Apex Court is *per incuriam*, but unfortunately, shall still be considered as a binding judicial precedent. The Hon'ble Court has left no remedial provisions to correct this erroneous ruling to save Mitakshara joint family property. However, the authors very humbly appeal to the Hon'ble Supreme Court to reconsider the facts and the principles laid down in this case and to allay the misgivings and hence save the Mitakshara joint family, the coparcenary system and the joint property from extinction.

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IMMINENCE OF A CYBER ATTACK VIS-À-VIS ANTICIPATORY SELF-DEFENCE

Chitresh Baheti *

Abstract

The power of a nation to use 'force' as anticipatory self-defence in expectation of a 'cyber armed attack', depends majorly on the 'intensity' as well as 'imminence' of the armed attack under Article 51 of the UN Charter. While it is largely accepted that some cyber-attacks do qualify as 'armed attacks' under Article 51 of UN Charter, the issue regarding the evaluation as to whether such armed attacks are 'imminent', solely relying on the technology used to design such cyber weapons, has received rather less attention. This note focuses on evaluating the technological aspects of existing theories to determine the 'imminence' of cyber-attacks depending upon the cyber weapon used, subject to whether the 'last possible window' has been closed or is open for anticipatory self-defence. This can eventually help the decision makers to establish the difference between peace, legal war and illegal war in determining the 'last possible window'. With the help of this analysis, the author contends that despite the common assumption, prospective cyber-attacks can be detected in advance before the attacker actually executes the coding involved in the same. The gravity of the concerned cyber-attack plays an imperative role in such determination. The more likely it is that a cyber-attack reaches the level of an 'armed attack'; the more chances there are of the offence being detected in advance. This may help the decision maker, who is authorised to use force in self-defence in anticipation of a cyber-attack, to determine the 'last possible window' and act in accordance with it to classify their actions between peace, lawful warfare or illegitimate warfare.

Key Words: Cyber weapons, Cyber-attack, Anticipatory self-defence, Armed attack, Caroline Doctrine

Introduction

Advancement in data innovation and correspondence has exceptionally influenced our ways of living.[1] It has equally increased the risks for dangers such as cyber-attacks, and hence it has become important to discuss safeguards which States can develop against them. The term cyber-attack is utilized to depict an assortment of unsafe exercises occurring on the internet.[2] Much has

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1 Aleksoski et al., *Use of Force in Self-defence against Cyber-Attacks and Shockwaves in the Legal Community: One more reason for Holistic Legal Approach to Cyberspace*, 4 MEDITERRANEAN. J. SOC. SCI. 115, 116 (2013).

2 Nicholas Tsagourias, *Cyber-attacks, Self-defence and the Problem of Attribution*, 17 J. CONFLICT AND SECURITY L. 229, 232 (2012).

been written by researchers and professionals about how the privilege of self-protection and law of self-defence can be utilized to battle distinctive dangers in the cyberspace.[3] Cyber-attacks in Estonia (2007) and Georgia (2008), where coordinated bot-nets overwhelmed servers and shut down the internet; Iran (2010), where the Iran Nuclear Facility was disrupted by the Stuxnet worm; Burma (2010), USA (2011) and finally the Middle East (2012), confirms what many scholars' view has been, that cyber protection ranges:

> [F]rom the utility (or futility) of network monitoring, to the possibility (or impossibility) of universal trustworthy cyber authentication, to the potential from emerging defensive, offensive, and pre-emptive cyber operations, to proposed clean-slate designs of future internet architectures, to the role of the military and intelligence agencies in securing public and private networks, to the role and rules of international law concerning cyber warfare, and finally to the role of cyber security education, among others.[4]

Since the 9/11 attack, there has been a growing concern about submarine cables as targets of cyber-attacks by State and/or non-State actors.[5] Submarine cables can be used as tools in cyber-espionage and intelligence gathering.[6]

As of late, political and national security administration has portrayed cyber espionage activities against the Democratic National Committee amidst the 2016 Presidential electoral cycle in the US as a "serious business…(that) may destroy democracy" and the most "aggressive or direct campaign to (ever) interfere in our election process."[7] Under Article 51 of UN Charter, if any State classifies a cyber-operation against it as an 'armed attack', then it has an inherent right of anticipatory self-defence[8] which is deeply enrooted in the Caroline doctrine of 'imminence'.[9] According to the Caroline doctrine, any cyber-attack not resulting 'in death or physical destruction of a sufficient scale', is not *per se* sufficient to be classified as an 'armed attack', unless it is imminent in nature.[10]

The paper aims at scrutinising the problem of imminence, which still suffers from a lack of literature and academic interpretation.[11] First, the paper analyses

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3 Christian Schaller, *Beyond Self-defence and Countermeasures* 95 TEX. L. REV. 1619, 1622 (2017).
4 Aleksoski et al., *supra* note 1, at 115.
5 Robert Beckman, *Protecting Submarine Cables from Intentional Damage- The Security Gap, in* SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY 281, 283 (Douglas R. Burnett et al. eds., 2014).
6 Tara Davenport, *Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis*, 24 CATH. U. J. L. AND TECH. 59, 62 (2016).
7 Ryan J. Hayward, *Evaluating the "Imminence" of Cyber Attack for Purpose of Anticipatory Self-defence* 117 COLUM. L. REV. 399, 400 (2017).
8 Daniel Bethlehem, *Self-defence against an Imminent or Actual Armed attack by Non-State Actors* 106 AM. J. INT'L. L. 770, 771 (2012).
9 Graham H. Todd, *Armed Attack in Cyberspace: Deterring asymmetric Warfare with an Asymmetric Definition*, 64 A. F. L. REV. 66, 99 (2009).
10 *Ibid*, 8.
11 Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article* 2(4), 36 YALE J. INT'L. L. 421, 437 (2011).

whether a State can foresee an armed attack, and the role the character of such an attack plays in such an analysis. Secondly, the paper tries to identify the factors which help a State in determining the imminence of such an attack.

Further, the paper tries to determine the 'last possible window' theory propounded in the *Caroline*[12] case, which aims at deciding the appropriate time to prevent prospective cyber-attacks, which in all probabilities will take place. The paper also tries to resolve the situation in which the cyber operation amounts to a cyber-armed attack and the lawful necessities for response in self-defence.

The paper has been divided into two parts. In Part I, the paper discusses the legitimacy of anticipatory self-defence under the UN Charter and the situations in which cyber operations would amount to armed attacks. In Part II, the paper analyses the theories propounded by various practitioners regarding the cyber-attack to be 'imminent' for purpose of anticipatory self-defence and discusses the effectiveness of the methodologies, and the technological considerations adopted in course of time for evaluating the imminence of an armed attack.

Anticipatory Self-Defence against Certain Cyber-Attacks

This part focuses on scholars' acceptance of considering certain cyber operations under Article 51 of UN Charter as armed-attacks. The analysis focusses on the legitimacy of anticipatory self-defence under Article 51 of the UN Charter in case of certain cyber-attacks, and has been done in two parts: the criteria according to which a cyber-operation can be regarded as an armed attack, and whether the criteria laid down under various statutes and later jurisprudence have been fulfilled by contemporary cyber operations in being regarded as armed attacks.

Before analysing the requirement of 'imminence' for self-defence in a cyber-attack, the intricacies of the criteria for an armed attack, and the legitimacy of such self-defence need to be analysed.

The Caroline Doctrine of Anticipatory Self-Defence

The Caroline was an American ship attacked by British troops in a famous 1837 military incident. The British, were suspicious that the Caroline was secretly supporting a Canadian rebellion, claimed that they had acted in self-defence. In the ensuing diplomatic correspondence, the Secretary of State, Daniel Webster, first articulated the doctrine of anticipatory self-defence calling for its use only in the face of necessity that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[13]

The concept of 'anticipatory self-defence' is consistent not only with customary international law but also incorporated under Article 51 of the UN Charter. The concept of 'anticipatory self-defence' has also been incorporated

12 *The Caroline v. United States* 11 US 496 [1813].

13 Anthony Clark Arend, *International Law and the Pre-emptive Use of Military Force*, 26 WASH. Q. 89, 90-91 (2003).

in Rule 15 of the Tallinn Manual.[14] It is evident by merely a cursory glance at Article 51 of the UN Charter that it requires that an armed attack should necessarily take place, but as per Article 32 of the Vienna Convention on Law of Treaties, the interpretation made according to Article 31 should not be "*manifestly absurd or unreasonable*."[15] The reason behind anticipatory self-defence is to enable the victim to avoid the armed attack if, and only if, the attack is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[16] Even the ICJ has not been able to take any position in respect of such a problem of self-defence, in response to an imminent threat of armed attack.[17]

Anticipatory self-defence against a cyber-attack that precludes an imminent kinetic armed attack, as in the case of Israel's Operation Orchard against a Syrian nuclear facility,[18] or anticipatory self-defence by cyber means against an imminent kinetic armed attack, would not create problems significantly different from those already existing in the traditional scenario.[19]

The term 'armed attack' arises in the *jus ad bellum*, the law overseeing the fall back on drive, that is, the point at which a State may utilise force within the limits of the UN Charter structure and traditional lawful standards.[20] The UN Charter does not specify the meaning of an 'armed attack', and it is also not a part of treaty law.[21] It can be defined as standard military attack on another State's territory or utilization of aberrant power on another state.[22] Article 2(4) of the UN Charter prohibits the utilization of power by one State against another: "*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of United Nations*." It provides for three exceptions to the prohibition of use of force: first, a State may use force with the consent of the State from where the attack took place; second, a State can utilize force as a component of a multinational activity approved by the Security Council under Chapter VII, as given in Article 42 of the UN Charter; and third, as per an intrinsic right of self-defence under Article 51 of the UN Charter against an armed attack.

According to Schmitt, anticipatory self-defence is permitted under three specific and cumulative circumstances. First, the operation should be a part of the overall act culminating into an armed attack. Secondly, the operation should

14 MICHAEL N. SCHMITT, TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 63 (2013) [Hereinafter 'Tallinn Manual'].
15 Vienna Convention on the Law of Treaties article 32, May 23, 1969, 1155 UNTS 331.
16 LORI DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 59 (2009).
17 *Military and Paramilitary Activities in and Against Nicaragua* [Nicar. v. US] 1986 I.C.J. 14 (June 27).
18 Kim Zetter, *Mossad Hacked Syrian Official's Computer Before Bombing Mysterious Facility*, WIRED, (March, 2009) https://www.wired.com/2009/11/mossad-hack/ (visited February 22, 2018).
19 MARCO ROSCINI, CYBER OPERATIONS AND USE OF FORCE IN INTERNATIONAL LAW 79 (2016).
20 OHIN ET AL., CYBERWAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 89 (2015).
21 *Ibid*, 17.
22 ANTONIO CASSESE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 111 (1986).

be an irreversible step. Third, any act in self-defence must be during the 'last possible window' of opportunity in order to counter the cyber operation.[23]

The only fundamental question of anticipatory self-defence is "when can it be said that it is the last opportunity to take action to thwart or blunt the attacks?"[24] This will be addressed in a later part of this paper, before which the requirement of an 'armed attack' which is deeply entrenched in international law vis-à-vis cyber operations, needs to be dealt with.

Cyber-Attack can be regarded as 'Armed Attack'

Article 51 of the UN Charter reads: "*Nothing in present charter shall impair the inherent rights of individual or collective self-defence if an armed conflict occurs against a member of United Nations until the Security Council has taken measures necessary to maintain international peace and security*." This article allows self-defence in response to an 'armed attack' and the ICJ has confirmed the same in landmark judgments such as *Nicaragua*[25] and *Oil Platforms*[26], observing that nothing short of an armed attack will trigger the right of self-defence under international law. It has been accepted that an 'armed attack' is the use of force corroborated with scale and effects,[27] irrespective of the instruments used.[28] Consequently, a cyber-attack can be classified as armed attack if it results in substantial human and/or material destruction.[29] Operation, attacks, or acts causing significant death, injury, damage, or destruction by a State or non-State group[30] will generally be considered to be armed attacks.

According to the Tallinn Manual, "certain cyber-attacks have to be sufficiently severe to license them as armed attacks" under Article 51[31] such as an attack on the air traffic system or a nuclear reactor, causing substantial material or human destruction. Accordingly, there are three approaches accepted under international law as to when a cyber-attack can be regarded as an armed attack[32]: instrument based, target based and effect based. The 'effect based approach' has been much more widely accepted and is consistent with that of the ICJ, in considering the effects of an act as relevant in deciding the nature of the act, rather than the means or target of acts.[33] Rule 30 defines an armed attack as an act which can be reasonably expected to cause "injury or

23 Michael Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a normative Framework*, 37 CAMBRIDGE. J. TECH. AND L. 885, 932 (1999).
24 Michael Schmitt, *Cyber Operations and Jus as bellum Revisited*, 56 VA. L. REV. 569, 591 (2011).
25 *Military and Paramilitary Activities in and Against Nicaragua* [Nicar. v. US] 1986 I.C.J. 14, 181 (June 27).
26 *Case Concerning Oil Platforms* [Iran v. US] 2003 I.C.J. 161, ¶ 51 (November 3).
27 TOM RUYS, ARMED ATTACK AND ARTICLE 51 OF UN CHARTER 139 (2010); TALLINN MANUAL, *supra* note 14.
28 *Ibid*.
29 Yoram Dinstein, *Computer Network Attack and Self-Defence*, 76 US NAVAL. WAR C. 99, 105 (2002).
30 *Armed Activities on the Territory of Congo* [Dem. Rep. Congo v. Uganda] 2005 I.C.J. 168 (December 19); Dinstein, *ibid*, 54.
31 TALLINN MANUAL, *supra* note 14.
32 ROSCINI, *supra* note 19, at 46.
33 O.A. Hathaway, *The Law of Cyber-attack*, 100 COLUM. L. REV. 817, 847 (2012).

death to person, or damage or destruction to objects."[34] The language of the rule is consistent with that of a non-cyber armed attack.[35] Comment 9 to Rule 13 states that "the case of actions that do not result in injury, death, damage, or destruction, but which otherwise have extensive negative effects, is unsettled."[36] Comment 10 to Rule 13 states that "all the reasonably foreseeable consequences of a cyber-operation" are to be considered in verifying whether the concerned act has crossed the required threshold for cyber armed conflict. This suggests the adoption of a broader view rather than direct causality.[37] Therefore, if a cyber-operation is likely to result in death, injury, physical damage, or destruction, it is an armed attack.[38] Yoram Dinstein is of the view that "even if no member of armed forces is injured or military property damaged, there is no reason to come to a different conclusion with regard to a cyber-attack against a civilian system."[39] Some experts, however, seem divided on the issue of intentionality[40] as well as the applicability of a lower threshold for classifying an act as an armed attack.[41] Nonetheless, all of them agree that at least certain operations can be classified as 'armed attacks.'[42]

There has been a continuous wrangle regarding fixing the threshold of 'armed force' and 'armed attack'. Despite the debate, followed by judgments of *Nicaragua* and *Oil Platforms*, it is well established that there exists a narrow distinction between a cyber-armed attack and cyber armed force. However, such a distinction in the threshold of each concept, corroborated with the responses which both concepts allow, is yet to be established. According to the Tallinn Manual, "the international community would be less likely to recognize an armed attack arising out of mere destruction, damage, or alteration of data; it would additionally have to result in physical consequences."[43] In contrast, the expansive view propounded in the Tallinn Manual non-unanimously, is that the "destruction of data having compounding scale and real-world effects are severe enough to constitute an armed attack."[44] Additionally, Schmitt argues that "the net result is a limitation on both sides to resort to computer network attack techniques which might threaten global stability, and on individual responses which themselves might prove destabilising."[45]

To analyse the concept of a 'cyber-attack' with reference to an 'armed attack', it would be necessary to analyse the situation when a cyber-attack is likely to constitute an armed attack. Under the unanimously accepted threshold

34 TALLINN MANUAL, *supra* note 14.
35 *Ibid*.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 Dev, *Use of Force and Armed Attack in Cyber Conflict*, 50 TEX. INT'L L. J. 380, 381 (2015).
41 *Ibid*, 5.
42 TALLINN MANUAL, *supra* note 14.
43 MICHAEL SCHMITT, CYBER OPERATIONS IN INTERNATIONAL LAW: THE USE OF FORCE, COLLECTIVE SECURITY, SELF-DEFENCE AND ARMED CONFLICT 589 (2010).
44 Herbert Lin, *Offensive Cyber Operation and the Use of Force*, 4 J. NAT'L, SECURITY. L. AND POL'Y. 63, 64 (2010).
45 HEATHER DINNISS, CYBER WARFARE AND THE LAWS OF WAR 80 (2012).

by the Tallinn Manual, the international community would be much less likely to characterise any cyber-attack as an armed attack just because it resulted in "mere destruction, damage, or alteration of data." The cyber-attack should result in 'physical consequences' like explosion of a generator, fire etc. Whereas, under the other, compounding effects and scale are severe enough to constitute 'armed attack'.[46] This group does not follow the physical outcome as an indispensable element for cyber-attack to be characterised as an 'armed attack'. Eventually, under both the interpretations, the victim-state can respond with force to cyber operations which are accompanied by military action, and otherwise can be regarded as 'armed attacks' irrespective of the effect of cyber-operations.

The author considers that the threshold for armed attacks conducted via computer networks should be set in consonance with present International Law. Notably, no cyber incidents have been unanimously and globally characterised as cyber armed attacks, including the attacks on Estonia in 2007, Georgia in 2008 (which was followed by Russia's intervention), and the Stuxnet operation in 2010. The significant effects and physical damage up to a considerable extent, corroborated with the means and the target of the attack should be considered as the criteria to elevate the incidents beyond the equivalent of a frontier incident. It is also submitted that brief and intermittent disruptions of non-essential cyber-services do not classify as armed attacks.[47] Therefore, despite the political pressure and possible harm, Russia's alleged cyber espionage programme to disrupt the US Presidential electoral process in 2016 was not regarded as an armed attack.

The issue regarding self-defence in a cyber-armed attack is deeply rooted in determination of 'imminence' of such an attack, which shall now be dealt with.

'Imminence' of a Cyber-Attack

According to both conventional[48] as well as customary law,[49] a State enjoys an inherent right to resort to force in self-defence against an illegitimate armed attack- in exception to the proscription of menace or use of force set out by Article 2(4) of the UN Charter. The main conditions for exercising such a right are, the gravity of the armed attack suffered, and the necessity, proportionality and immediacy of the response.[50] A coercive self-defence ought to be resorted to if all the means fail and a resolution is unreachable.[51] A utilitarian point of view requires that the utilization of force in self-defence should be corresponding to the target of repulsing the outfitted assault.[52] The requirement

46 Schmitt, *supra* note 24, at 571.

47 Ryan Fairchild, *When Can a Hacker Start a War: The Sony hacks raised an interesting question: At what point does a cyber-attack become an act of war?* PACIFIC STANDARD, (February 6, 2015), https://psmag.com/environment/when-cyber-attack-constitutes-act-of-war (visited March 10, 2018).

48 U.N. Charter article 51.

49 *Military and Paramilitary Activities in and Against Nicaragua* [Nicar. v. US] 1986 I.C.J. 14, 181 ¶ 176 (June 27).

50 OHLIN ET AL., CYBERWAR: LAW AND ETHICS FOR VIRTUAL CONFLICT 121 (2015).

51 YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 232 (2011).

52 GEORG KERSCHISCHNIG, CYBER THREATS AND INTERNATIONAL LAW 117 (2012).

of immediacy implies that a State has a responsibility to defend itself within a reasonable timeframe.[53] As observed by Gill and Ducheine, "a State does not forfeit its right of self-defence because it is incapable of instantly responding or is uncertain of who is responsible for the attack or from where the attack originated."[54] But, there is a lack of discussion regarding the practical applicability of such 'imminence' in the contemporary situation, considering the evolving nature of cyber weapons being developed and launched.[55]

This part tries to analyse such technical considerations applied to contemporary situations and also tries to determine how such considerations can be beneficial in determining the imminence of the particulars of cyber attacks. The author here assumes that some cyber operations can be considered as armed attacks, and that anticipatory self-defence in case of 'imminent' armed attacks is legal, as discussed above. The author analyses the situations in which the applicability of 'imminence' is carried out in the cyber arena. Also, it is argued that improving the detection mechanisms of cyber operations will lead to a prior notice of armed attacks, which will eventually help the political decision-makers to determine the imminence of such attacks.

Determination of 'Imminence' of armed attack

In the jurisprudence of cyber armed attacks, there is no single definition provided or accepted in international law literature which determines the armed attack in question to be 'imminent'.[56] Considering the most restrictive approach, the commentators have asserted that for an armed attack in which anticipatory self-defence is justified, the force used should take place when the attack is about to be launched.[57] The requirement of immediacy does not imply that "self-defence must take place the instant an armed attack occurs."[58] In cyber context, this means that a State can react in anticipatory self-defence at the moment when the adversary is about to launch the pre-written codes.

Daniel Bethlehem has proposed a theory to determine the imminence of a cyber-attack. He has proposed certain factors which need to be considered before adjudicating the imminence of a cyber-operation. These factors are: The nature and immediacy of the threat, the probability of an attack, whether the anticipated attack is part of a concerted pattern of continuing armed activity, the likely scale of the attack and the injury, loss or damage likely to result there from, in the absence of mitigating action and the likelihood that there will be

53 *Ibid*, 54.
54 Terry D. Gill and Paul A.L. Ducheine, *Anticipatory Self-defence in the Cyber context*, 89 INT'L. L. STUD. 438, 447 (2013).
55 Waxman, *supra* note 11, at 436.
56 *Ibid*, 7.
57 *Id.*, 20.
58 *Id.*,54.

other opportunities to undertake effective action in self-defence, that may be expected to cause less serious collateral injury, loss or damage.[59]

Yoram Dinstein argues that "the beginning of an armed attack is not linked to the first shot but rather to the moment of irrevocable commitment to attack. Once the die has been cast, the armed attack can be said to have commenced and the victim-State need not wait impotently for the inescapable blow."[60] This is a major issue in context, as the time duration for a fully pre-written code to reach its targeted destination after its execution is negligible.[61] Considering the narrow reading of proximity in cyber-attacks, the query of anticipatory self-defence never arises, and therefore the majority of experts in the Tallinn Manual reject the contention of a narrow reading of 'imminence' for anticipatory self-defence.[62]

According to the broad view which is propounded by Schmitt and later adopted by the Tallinn Manual, the proper test to determine the imminent position for anticipatory self-defence is "whether or not the last possible window of opportunity to stop an armed attack has been presented."[63] This window "may present itself immediately before the attack in question or, in some cases, long before it occurs."[64] For determination of such situations in which the 'window' is about to close, considering the lack of information available regarding the nature and type of cyber-attacks, the following likelihoods are propounded by Schmitt:

i. Likelihood of happening of an actual armed attack by the opponent.
ii. Likelihood that such an attack will reach the requisite level for classifying such attack as an armed attack.
iii. Likelihood that the moment of closing of the 'window' is the last opportunity for the victim-State to effectively counter the prospective attack.[65]

Caroline Foster has contended that the threat should be treated as imminent "at the point when it appears reasonable for the State to conclude, based on all the available scientific knowledge, that preventive action must be taken."[66] The rider attached with the 'last window' approach is that the nation will have to substantiate that the prompt action taken is the only way to guard the imperilled interest.[67]

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59 Marko Milanovic, *What Is an Imminent Armed Attack? A Hopefully Helpful Hypo*, EJIL: TALK (January 12, 2017), https://www.ejiltalk.org/what-is-an-imminent-armed-attack-a-hopefully-helpful-hypo/ (visited March 6, 2018).
60 DINNISS, *supra* note 45, at 84.
61 TALLINN MANUAL, *supra* note 14.
62 *Ibid*.
63 Michael Schmitt, *Computer Network Attack and Use of Force in International Law*, 37 CAMBRIDGE J. TECH. AND L. 930, 931 (1999).
64 TALLINN MANUAL, *supra* note 14.
65 *Ibid.*
66 C.E. Foster, *Necessity and Precaution in International Law*, 23 N.Z.U. L. REV. 277, 281 (2008).
67 Akande et al., *Clarifying Necessity, Imminence and Proportionality in the law of Self-defence* 107 AM. J. INT'L. L. 563, 564 (2013).

Recently, a third view for determining the 'imminence' has emerged, known as 'elongated imminence.'[68] The theory propounded by Harold Koh allows a consistent pattern of prior activities.[69] He explains the theory with an elaborate example. According to him, a terrorist need not board the plane before the operation can be executed; the designing of the suicidal vest is enough to determine the imminence of such attack.[70] According to him, the designing of the suicidal vest is a strong indicator of the possibility that the terrorist is carrying out an attack and its result in the most probable situation would reach the intensity to classify such act as an armed attack. He argues that waiting until the terrorist boards a plane is unacceptable since then the probability of the occurrence being effectively countered would be too low.[71] The author contends that the 'elongated theory' of imminence is nothing but a more ornate presentation of the 'last possible window' approach. This is because a State in such a situation would not wait for the adversary to implement the final step in furtherance of the plan. This situation can be analysed considering some hypothetical situations:

i. Any State, for instance, India, has discovered that an adversary has penetrated significantly into its nuclear plant grid and developed the code needed for the same. The adversary has immense resources to shut down the grid, but it is impossible to determine that it intends to do so in the near future. In such a situation, considering the attack under 'about to be launched' (A.B.L.) approach, India cannot act in anticipatory self-defence since there is cause to believe that adversary plans to act in the immediate future. Whereas in the 'last possible window' (L.P.W.) approach[72], India has an unbridled right to take any action since the codes, if launched, would not be preventable in any situation.
ii. An adversary has declared its intention to carry out a cyber-attack, but the victim-state believes that no activity has begun, and the adversary has not penetrated into the system. In this situation, considering the A.B.L. approach, the victim-state cannot act, since no action in furtherance of the plan has taken place. Similarly, it may not react in the L.P.W. approach as well.
iii. An adversary possesses the established code to launch an attack, but it needs an agent to penetrate some device in the central computer system. In such a situation, the victim-state cannot act in furtherance of that under the A.B.L. approach, since the adversary does not have the resources to penetrate into the system. Whereas, under the L.P.W. approach, the act of the victim-state but can be carried out as the chances of stopping the

68 DANIEL KALIDMAN, KILL OR CAPTURE 117 (2012).
69 *Ibid*, 219.
70 *Id.*, 220.
71 *Id.*
72 *The Caroline v. United States* 11 US 496 [1813].

> attack are too minimal if the agent is not stopped before the penetration of the device in the central computer system.

From the above explanation, it is evident that only the L.P.W. approach permits the actions essential to prevent potentially caustic attacks. According to Schmitt, "this standard combines the requirement for a very high reasonable expectation of a future attack, with an exhaustion of the remedies component."[73]

Circumstances Determining the 'Imminence' of a Cyber-Attack

The standard of proof for the above is, "the quantum of evidence necessary to substantiate the factual claims made by the parties."[74] In cyber law, the country exercising right of self-defence has to show that:[75]

> The cyber-attack actually has occurred and its scale and extent have reached to the level of an armed attack and;
>
> That it is attributable to some State or non-State actors. Clear and convincing evidence seems the appropriate standard, not only for claims of self-defence against traditional armed attacks, but for those against cyber operations; a *prime facie* or a preponderant standard of proof might lead to specious claim and false attribution, while a 'beyond reasonable doubt' standard would be unrealistic, the degree of burden of proof…adduced ought not to be so stringent as to render the proof unduly exacting.

The attack, if imminent, gives the victim-State the right to legally justify anticipatory self-defence at the first instance, but the same might not be true for other attacks. This part deals with some technical aspects of cyber weapons which might make the attacks less anticipatory. These attributes decrease the likelihood of imminence of an attack when the victim-State learns about the intention of the adversary.

Resource intensive and Custom made

A cyber-attack which necessitates an anticipatory armed attack is basically target-specific. It needs a flaw in the computer system so that an outsider may access it to do something harmful, and make it vulnerable.[76] The success of an attack on a specified target requires time and resources. For example, the virus used in the Stuxnet attack on the Natanz Enrichment plant was precisely this. It attacked on vulnerable software named Siemens Step 7, which is connected to the control system which operates a nuclear apparatus.[77] The vulnerable software would then attack the other devices connected in a specified manner.

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73 Michael Schmitt, *Pre-emptive Strategies in International Law*, 24 MICH. J. INT'L. L. 515, 535 (2003).

74 Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 INT'L. AND COMP. L. Q. 165, 167 (2009).

75 ROSCINI, *supra* note 19, at 102.

76 Lin, *supra* note 44, at 63.

77 Kushner, *The Real Story of Stuxnet*, IEEE SPECTRUM (February 26, 2013), https://spectrum.ieee.org/telecom/security/the-real-story-of-stuxnet (visited March 25, 2018).

The code was commissioned in the sense that it was "designed to specifically target a system with 984 machines connected to each other."[78] The code developed for such an intensive attack requires 50 times more typical a coding than a normal computer virus, as well as extraordinary expertise to determine the exact amount of torque required to damage aluminium rotors in a nuclear plant.

The major issue is that unlike a regular bomb whose manufacturing process remains constant throughout, cyber-attacks require a lot of honing and skill, which are frequently required to impact just one outfitted cyber-attack at one particular target. This means that not only will such an attack be rare, but also that the time gap between the decision maker's knowledge of the attacker's intent and the actual attack by the latter might be longer than what has *prima facie* been anticipated. Therefore, just an arrangement for an assault with a cyber-weapon that could possibly ascend to the level of an armed attack will seldom speak of an impending risk, but a learning of the plans, validated with use of conventional weapons, may constitute an imminent threat.

Single-use weapons

Cyber weapons used for the purpose of an armed attack have a very short shelf life, and hence they become ineffective after being used once.[79] This is a significant point to be kept in mind by the decision makers while determining the imminence of an armed attack, because the likelihood of the opponent succeeding in the attack is a key factor in determining the imminence of attacks.[80] For example, the Stuxnet was identified despite it having characteristics to safeguard itself from detection, after which a flaw could easily be detected in code of the Iran Nuclear Plant.[81] Since then, experts and potential targets have continuously been trying to impede such attacks by employing reverse-engineering and by patching up the vulnerabilities existing in systems. Therefore, when a victim-state believes that an attack might take place against it, it usually determines the imminence of the attack, the inordinate cost of developing such weapon, as well as the inability to use the same weapon again. This again decreases the likelihood of an attack being imminent as compared to conventional weapons.

Local or Remote access

Another valuable consideration in judging the imminence of an armed attack is the likelihood of the attackers having access to the intended target system. The requirement of proximal or remote access to the target invariably

78 Schloss, *The limits of the Caroline Doctrine in the Nuclear Context: Anticipatory Self-defence and Nuclear Counter-proliferation*, 43 GEO. J. INT'L. L. 555, 576 (2012).

79 Steve Ranger, *Inside the Secret Digital Arms Race: Facing the Threat of a Global Cyber war*, TECH REPUBLIC (January 26, 2017), http://www.techrepublic.com/article/inside-the-secret digital-arms-race/ (visited February 26, 2018).

80 Schmitt, *supra* note 20, at 931.

81 Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History* WIRED (July 11 2011), http://www.wired.com/2011/07/how-digital detectives-deciphered-stuxnet/ (visited on February 22, 2018).

determines the imminence of the armed attack.[82] Gaining remote access is easier than accessing the target through local access, as it requires less efforts and is easier to accomplish.[83] An attack utilizing remote access will in all probability be more successful than a proximal access attack, and therefore will be more 'imminent', as a proximal access attack requires more stringent planning and development of multiple software or trustworthy agents. The relative probability of a cyber-attack to succeed depends upon the trouble in acquiring local access of the system.[84] For example, in the Stuxnet attack, the assailants succeeded in attacking the central system through an infected USB drive introduced into the local area network.[85]

The probability of an attack succeeding is a pre-requisite to the analytics of an approach: an attack that plans to utilize a proximal access attack has a tendency to be less unavoidable.[86] On the contrary, targets like websites can be easily accessed from remote areas, and therefore the inherent risk attached as in the case of proximal access attacks is negligible in these. Thus, while evaluating whether an attack is imminent or not, the victim nation should analyse whether the attacking nation can access the central computer system locally or remotely. All in all, a proximal access attack is less imminent as it involves the involvement of an internal resource in the form of a human agent, which is less likely to take place, as only a few people have access to the main computer system.

Chances of errors

With the emergence of complex computer software, new cyber weapons require extensive testing as well as less likelihood of removing the errors which decrease the inherent unreliability.[87] This is governed by two factors: (1) the concept of testing the cyber weapon before the final attack will eventually delay the launch of the cyber weapon as expected by the victim state before hand; and (2) the acceptability of the fact that even a tested weapon may fail, which increases the delay, as succeeding is a factor to determine the 'imminence' of attack.[88]

The requirement to test software is one of the few reasons why cyber espionage tasks against privately owned businesses regularly include the aggressor investing huge measures of energy and having penetrated the target

82 Lin, *supra* note 44, at 66-67.
83 *Ibid.*
84 *Id.*
85 David E. Sanger, *Obama Order Sped up Wave of Cyber Attacks against Iran*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyber attacks-against-iran.html) (visited March 20, 2018).
86 *Ibid.*
87 N.D. SINGPURWALLA, SOFTWARE RELIABILITY MODELLING 289, 304 (1994).
88 James G. Stavridis, *Incoming: What Is a Cyber Attack*, SIGNAL MAG. (January 1, 2015), http:// www.afcea.org/ content/? q=incoming-what-cyber (visited February 19, 2018).

system without making a physical move.[89] This situation can be analysed with help of the cyber espionage conducted against Sony Networks.

The next factor is the chance of failure of tested software. Hence, "even if a State believes that the opponent has extensively tested the weapon software, the State should also generally discount the *imminence* of a cyber-attack because all new weapons - even when extensively tested - will have high error rates."[90]

Hence the fact that the software does have some errors that developers test for before the actual attack, and some errors persist even after prolonged testing, eventually increases the gap period, making the attack less imminent and the likelihood of increasing the success rate minimum. These considerations help the victim-state with less information to believe the lessened imminence of cyber-attacks.

Conclusion

The States with advanced networking systems and software will normally be capable of discovering well in advance the cyber-attacks that would reach the level of armed attacks for the matters of anticipatory self-defence under Article 51 of the UN Charter and the Caroline Doctrine. Since non-State actors with a stockpile of resources and large troops also conduct attacks through cyber weapons, the State is under an obligation to determine if the attack is imminent, in order to attack promptly. In determining the imminence, several technical aspects[91] as well as weapons which are relatively lesser in number need to be taken in consideration for purpose of anticipatory self-defence. This software, as discussed above, requires years of customized development by expert engineers. The single-use attribute of such weapons needs to be taken into account. Ergo, the testing of such software, corroborated with chances of failure of such codes holds major ground in determining the imminence of cyber-attacks. The customized missile operations, which can be launched with relatively less efforts and can be equated with the level of armed attacks, justify anticipatory self-defence on the part of the victim-state in the first place. Therefore, a cyber-attack which can be classified as an 'armed attack' will eventually be detected and hence will give adequate opportunity to decision makers to determine the 'right time' to initiate actions in self-defence.

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89 David E. Sanger and Martin Fackler, *N.S.A. Breached North Korean Networks Before Sony Attack, Officials Say*, N.Y. TIMES (January 18, 2015), http:// www.nytimes.eom/2015/01/19/world/asia/nsa-tapped-into-north-korean-networks-before sony-attack-officials-say.html (visited March 17, 2018).

90 Neil C. Rowe, *The Ethics of Cyber weapons in Warfare* (July 22, 2013), http://calhoun.nps.edu/bitstream/handle/10945/36453/Rowe_Ethics_of_Cyberweapons.pdf?sequence=1 (visited March 29, 2018).

91 Oona A. Hathaway, *The Law of Cyber-attack*, 100 COLUM. L. REV. 817, 849 (2012).

LEGAL TRUTH OF RAPE IN INDIA AND THE QUESTIONS IT RAISES

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Abstract

What is law? Is it just a set of rules that regulates who or what it ought to, or does it travel far beyond? This article delves into the idea of 'legal truth' and how it helps us raise questions on the rape policy in India. It attempts to explain how only a few aspects of individual autonomy involved in rape get highlighted through and by law because of the power law yields as being one part of the discipline of social science. What does this then hold for the rape policy that we follow in India? It ends up formulating non-inclusive and incomplete solutions for the problem of rape in the society. Is there a better solution which seems to be more inclusive and coherent?

Keywords: Legal Truth, Law, Rape, Rape Policy, Marriage

Legal Truth and the Power it Yields

Section 375 : A man is said to commit "rape" if he - …… Explanation 1 - …Explanation 2 - …Exception 1 - …Exception 2 - …'[1]

It has been, and continues to be, a matter of great debate about what the definition of law is and what functions it performs or ought to perform.[2] However, one of the functions that law definitely performs is to make things true as a matter of law.[3] This is clearly advocated by a jurisprudential approach that concentrates on treating law as what emanates from an authority. Things become true as a matter of law since it involves explaining of a particular phenomenon. However, in the process of explaining the phenomenon, the law as is laid down by an authority seeks shelter under certain assumptions that lead to the very creation of such a phenomenon. This further leads to the creation of a 'legal truth', as is propounded by Jack Balkin.[4]

The most obvious consequence of this legal truth is that it lays down rules that ought to be followed. Law has the opportunity to do this because of its

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1 Section 375, INDIAN PENAL CODE (1860).

2 Jurisprudentially, there are various approaches to law (that are not exhaustive and they continue to expand further), ranging from positivist to natural to sociological to realism to critical legal studies. Various political thinkers/philosophers have had in the past and continue to add to the nuances of law and the realm within which law should/could operate. *See* generally, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (2000); H.L.A. HART, THE CONCEPT OF LAW (2012); JOSEPH RAZ, THE AUTHORITY OF LAW (2009); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2011); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT, VERSO (2015), etc.

3 Jack M. Balkin, *The Proliferation of Legal Truth*, 26 HARV. J. L. AND PUB. POL'Y 101,102 (2003).

4 *Ibid*.

status as law, because it is intertwined with, supports and is supported by the power and authority of the State. In India, legislations that are accepted and followed as law are formulated by one of the organs of the State - the legislature. The legislature, at least on paper, comprises of members that are elected by the citizens and who are seen as their representatives in the State. Therefore, because the law is law, it matters what things look like to law and how law characterizes them.[5] These rules include and exclude certain aspects which may or may not be in sync with the individual experiences of the people that the law has an application to. Law exercises power and it determines the extent to which it resists and disqualifies alternative accounts of social reality.[6]

Law makes things real[7] because law either regulates or is followed. Any deviance from law leads to punishment of various categories. It is this ability of law to impose its definition of events, things or phenomenon in everyday life that is interesting.[8] Just because the law says it is, it 'becomes' and anything beyond or before it is either left to the discretion of the judiciary or is never considered as the truth.

The consequences of this dissemination of legal truth are the following, as discussed by Jack Balkin in his article:

i. It shapes, directs and constraints how people live their lives;

ii. It shapes people's beliefs and understandings;

iii. It proliferates ideas, concepts, institutions and forms of social imagination which can attach themselves to, reorganize, and even displace existing forms of social understanding, social practice and social reality.[9]

Carol Smart very aptly writes "…Hence law constitutes a plurality of principles, knowledge's, and events, yet it claims a unity through the common usage of the term 'law'."[10] Despite these pitfalls, no one can deny that these legal truths have an impact on our lives.[11]

All these have obvious political ramifications because it places the power of the State behind a certain conception of how the world is and what is true and false within it. Jack concisely summarizes –

> law adds things to reality and colonizes the human mind. That is how it proliferates its power over the world. It creates tools for understanding one's self, others and the social world in which one lives. What law is doing, in short, is more than simply giving

5 *Id*.
6 CAROL SMART, FEMINISM AND THE POWER OF LAW 4 (1989).
7 *Ibid.*
8 *Id*.
9 Balkin, *supra* note 3.
10 SMART, *supra* note 6.
11 Balkin, *supra* note 3.

> people sanctions, or prices for their conduct. What law is doing is giving people tools with which to think.[12]

This article will lay out how law's definition of rape and other offences under the sub-chapter of 'Sexual Offences'[13] establishes a law to regulate human conduct in the manner the law chooses to prescribe which create the legal truth to be followed. It shall examine the different categorisations of sexual offences created by the legal definition and also attempts to show what it includes and excludes from its definition. The article flags the issues in the rape policy of India. It argues that the present legal truth of rape makes the rape policy in India questionable.

Legal Truth of Rape in India

Part I above attempts to explain the connection between the law laid down by an authority and the subsequent creation of a legal truth. Hence, by that jurisprudential approach, law and its command (or demand) to be adhered to, go hand in hand. The questioning of the existence and the relevance of law as propounded by the legislature itself is not a very comfortable territory to tread on. This is because the law is reflective of not the society *per se*, but how the society is perceived, the background of legislators, situations that necessitate the introduction of the law, etc. These complicated questions do not have definitive solutions. Since legislation is seen as a major source of law, it is an apt concern to ponder over why and how a provision comes into existence and how it is defined. In the process, there could be a possibility to fathom what is included and excluded from the realm of such law.

This article focuses on the 'legal truth' that law on rape as laid down in the Indian Penal Code (IPC) creates. The legal definition of rape as it presently exists, under Section 375 of the IPC creates the following legal truths:

A man is said to commit "rape"...[14]

As per the IPC, the crime of rape can be committed only by a man, only on a woman. In the eyes of law, a woman or a transgender is not a rapist and a man is not a victim of rape.

While there are no official statistics to show if men have been raped, there have been cases discussed by People's Union of Civil Liberties[15] about male prisoners being sodomized by their prison inmates. The Supreme Court in *National Legal Services Authority v. Union of India*[16] mentions transgenders being sexually assaulted (including raped). However, the legislature via, amendments to IPC or The Transgender Persons (Protection of Rights) Bill, 2016 has not shown much inclination in including them as victims in the

12 Balkin, *supra* note 3.
13 Chapter XVI, INDIAN PENAL CODE (1860).
14 Section 375, INDIAN PENAL CODE (1860).
15 Raman Nanda, *Jails in India: An Investigation* (November, 1981), http://www.pucl.org/from-archives/81nov/jails.html (visited March 23, 2018).
16 (2014) 5 SCC 438.

definition of rape under IPC. Further, in *Priya Patel v. State of M.P.*,[17] the only issue involved was whether a lady can be charge-sheeted for gang rape. On revision, when the case reached the Supreme Court, it decided that since a woman cannot commit rape, she cannot commit gang rape in pursuance of a 'common interest'.

The legal definition of rape assumes the strict dichotomy between a man and woman that divides people on the basis of their sex. It ignores the existence of biological, hormonal, anatomical, natural differences among people that may tend to disturb the abovementioned strict dichotomy.[18] The homogenisation of all victims of rape as women and all perpetrators as men is a natural consequence of such dichotomy. It is pertinent to discuss the Criminal Law (Amendment) Ordinance, 2013 that made the offence (under a different title of 'sexual assault') gender-neutral thereby addressing the victim and perpetrator of rape as a 'person', and not compartmentalising them as man and woman. Further, there is enough literature in existence that discusses the 'subject' of law and the compulsory order of sex and gender.[19] The 'unity' of men and women is problematic because it ignores the nature of sex and gender being spread across a spectrum, and perpetuates the notion of men and women being classified under two strict categories.

Therefore, homogenisation of men and women as victims and perpetrators respectively, backed by proliferation of this legal truth is a concern because voices of many citizens who come under the purview of IPC, are not only ignored but thwarted.

Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape[20]

This is probably the most widely discussed topic of late under rape.[21] The exclusion of marital rape as a crime from the definition of rape leads to not only creating legal truths about rape, but also about marriage. Mrinal Satish[22] in his article mentions the shift that has taken place from the traditional justifications ('contractual theory', 'property theory' and 'unification theory') to the modern justifications (fabrication of rape charges, breakdown of the institution of marriage and the availability of other legal remedies in the Indian legal framework) regarding the exclusion of marital rape. Interestingly, the Justice

17 (2006) 6 SCC 263.

18 NIVEDITA MENON, SEEING LIKE A FEMINIST (2012); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2006); JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2008).

19 *Ibid*.

20 Section 375, INDIAN PENAL CODE (1860).

21 Madhu Mehra, *Reflections on the Limitations of the Call for Full Criminalisation of Marital Rape*, (December 10, 2015), https://kafila.online/2015/12/10/reflections-on-the-limitations-of-the-call-for-full-criminalisation-of-marital-rape-madhu mehra/ (visited March 23, 2018); *Independent Thought v. Union of India* (2017) 10 SCC 800.

22 Mrinal Satish, *Rape is Rape*, INDIAN EXPRESS (March 21, 2013) http://archive.indianexpress.com/news/rape-is-rape-no-exceptions/1090958/3, (visited March 21, 2018).

Verma Committee[23] recommended the inclusion of marital rape as a crime with following arguments:

i. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;

ii. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;

iii. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentence for rape.

However, the Criminal Law (Amendment) Act, 2013 (hereinafter Amendment Act) retained marital rape as an exception to rape under Section 375. Further, in a recent judgment[24] of the Supreme Court of India, the issue for the court to consider was whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape. According to the court:

> The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions.[25]

Interestingly, after discussing a plethora of case laws on how rape affects the victim, Justice Lokur in the case remarked, "[i]f such is the traumatic impact that rape could and does have on an adult victim, we can only guess what impact it could have on a girl child."[26] In the subsequent paragraphs, on comparing the provisions of IPC and the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO), the court discussed the repercussions of marital rape on a girl and acknowledged that they saw "no rationale for such an artificial distinction."[27] However, despite such arguments, the court refrained from making any observation with regard to the marital rape of a woman who is 18 years of age,[28] without sufficiently combating the artificial distinction the legislature (and even the judiciary) creates in such cases.

The second perspective on marital rape is given by Madhu Mehra. She makes an interesting observation that how the present definition of rape

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23 REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 117 (January 2013).
24 *Independent Thought v. Union of India* (2017) 10 SCC 800.
25 *Ibid*, ¶ 1 (Lokur J.).
26 *Id*., ¶ 70 (Lokur J.).
27 *Id*.
28 *Id*., ¶ 2.

selectively excludes actions that may be experienced as sexually violative only by women specially in a marital tie.[29] She further explains that exception of marital rape reduces a potentially tranformatory agenda on gender, sexuality and marriage to one of law, crime and punishment.[30]

As can be seen above, there are different perspectives to critique the manner in which marital rape stands in IPC today. First, by establishing an age limit which decides whether the sexual autonomy of a woman is violated by marriage and secondly, through a restrictive view of what actions could be seen as rape under marital rape.

It is appropriate to quote Carol Smart here:

> This 'no' is the very core of the rape trial. A wife's 'no' is meaningless in (English) law; she is simply not entitled to say it to her husband. So the law does not (yet) have to concern itself with its possibility. But theoretically a woman can say 'no' to a man who is not her husband. The question is how can women 'no' in law when their subjective 'no' is objectively overlaid with contradictory meanings.[31]

…whoever, except in the cases provided for in sub-Section (2)[32]

When the nature of the act, i.e., sexual intercourse without consent, remains the same for the creation of offences under Sections 375 and 376, the offence under Section 376(2) concentrates on the position of the accused/perpetrator. For instance, the perpetrators in Section 376(2) includes police officer, public servants, member of Armed Forces, management/staff of jail, relative/guardian/teacher/person in a position of trust, etc. which are seen as positions that ought to discharge their noble duty to serve the society. The punishment for rape convicts as prescribed under Section 376(2) is also higher as compared to the punishment as prescribed for convicts under Section 376(1).[33] Rape is rape, whosoever commits it. On perusing the cases as given under Section 376, it seems like rape convicts are seen as sharing a fiduciary and like relationship with the victim. Creation of such categories of rape is questionable. As mentioned in Part I, legal truths have the ability to influence the minds of people, the varying punishments and the inclusion (aggravated rape) and exclusion (marital rape) of certain relationships from the purview of rape has a tendency to perpetuate the notion of how some sex is acceptable and

29 Mehra, *supra* note 21.
30 *Ibid*.
31 SMART, *supra* note 6, at 32.
32 Section 376, INDIAN PENAL CODE (1860).
33 For cases under Section 375, the punishment comprises of rigorous imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. For cases mentioned under Section 376(2), the punishment is rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

some sex unacceptable and some other sex as the most unacceptable, when in fact the people involved in the act may not even adhere to such categories.[34]

Lastly, taking into consideration the pedestal at which the institution of marriage and a husband are kept at, it is ironical to see how a violation of a fiduciary and an intimate relationship involving the husband is not seen as rape.

Sexual intercourse by a person in authority[35]

Section 376C deals with cases when the act is "*a sexual intercourse but does not amount to rape*". The Amendment Act broadens the definition of this class of offences from the amendments introduced in 1983[36], by making it general by including – "*whoever in the position of authority or in a fiduciary relationship*." This section comes under the chapter of 'sexual offences'. Since the term 'sexual offence' that is used in various sections[37] is not defined in the IPC, there may be an issue in deciphering why a particular act involving sexual intercourse comes under Section 376C and why another act that also involves sexual intercourse comes elsewhere (Sections 375 or 376 or 376B).

The crux of the concern with respect to Section 376C is that under the same chapter of 'sexual offences', it creates another branch of offence where even though consent is present, the act of sexual intercourse is still criminalized.

This leads to three questions. First, what is the understanding of the term 'free consent' by the State.[38] Secondly, who does the State view to be the person in the position.[39] Lastly, where is the line drawn between protection of women and seeing them as able humans to take sexual decisions on their own. While there does not seem to be much discussion around the amendment to Section 376C, a discussion by some Members of Parliament indicates that they intend to target sexual intercourse that happens at workplaces.[40] A Member of Parliament wanted to know about the safety of a woman working in private places like corporate sector, construction work, and farming sector because it (sexual intercourse) could happen there also. The Joint Secretary, Ministry of Home Affairs, replied that the provision of "[b]eing in a position of authority or in a fiduciary relationship under the Section, covers all of it in the private sector as well."[41]

Sexual intercourse by the husband upon his wife during separation[42]

The intention of incorporating the provision of a judicial separation under family/marriage laws is to give couples a chance to reconcile before taking the

34 Colleen Hall, *Rape: The Politics of Definition*, 105 S. AFRICAN L. J. 67 (1988).
35 Section 376C, INDIAN PENAL CODE (1860).
36 Criminal Law (Amendment) Act, 1983 (Act no. 46 of 1983)
37 Sections 375, 376, 376B, 376C, INDIAN PENAL CODE (1860).
38 Under Section 376C, it is clearly mentioned sexual intercourse not amounting to rape, which means sexual intercourse with consent. This goes against the legal definition of rape as prescribed by IPC.
39 Section 376C, INDIAN PENAL CODE (1860).
40 167TH REPORT, PARLIAMENT OF INDIA, DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HOME AFFAIRS (March 2013).
41 *Ibid*.
42 Section 376B, INDIAN PENAL CODE (1860).

final step of annulling the marriage. Section 376B criminalizes sexual intercourse by husband upon his wife during separation. Hence, it views non-consensual sexual intercourse during the time of judicial separation different from non-consensual sex when there is no separation and when the couple is living under the same household.

The legal truth given out is that if the couple is not staying under the same matrimonial household and is separated, it is the State's responsibility to act as a protector of the female individual when the sexual intercourse lacks her consent. This sexual protection in matrimony does not, however, materialise under Exception 2 to Section 375. Section 376B, read along with marital rape clause creates the truth that marriage ought to be protected by the State even at the cost of the individual sexual autonomy. An interesting research could be to observe how couples view the regulation by State during their judicial separation.

Unnatural Offences[43]

With respect to Section 377, the drafters themselves did not devote much time in deciding what it ought to contain. It is different from all the above-mentioned parts because it specifically includes the terms 'voluntary carnal intercourse' and something as personal as a voluntary sexual intercourse is criminalized. Since the legislative intent behind Section 377 was not clear, the judiciary took its own course to determine the contours of the provision.[44] Emphasis has been laid on "*against the order of nature*" while interpreting this provision. Before the Amendment Act, through *Smt. Sudesh Jhaku v. K.C.J.*[45] and *Sakshi v. Union of India*[46] any sexual intercourse that did not lead to procreation was seen as against the order of sex. Further, these cases focussed on the sexual abuse of minor children. However, with the introduction of POCSO and the amendments made to Section 375 through the Amendment Act, Section 377, in the researcher's opinion, undergoes an existential crisis.

After *Navtej Singh Johar v. Union of India*,[47] the judiciary has liberally interpreted 'voluntary carnal intercourse' in favour of transgenders, homosexuals, asexuals, etc., i.e., declaring that insofar as Section 377 of IPC criminalizes consensual sexual acts of adults in private, it is violative of Articles 14, 15, 19 and 21 of the Constitution of India, and has further held that Section 377 is arbitrary, irrational and indefensible, thereby legalizing gay sex. Thus, Section 377, the way it stands today, contributes to the creation of a legal truth – through so many perspectives – the individual choice to exercise sexuality, the State's surveillance into the private lives of the citizens, etc.

The discussion above shows how only some aspects of sexual intercourse and marriage get highlighted as legal truths by virtue of being defined in and by

43 Section 377, INDIAN PENAL CODE (1860).
44 *Khanu v. Emperor* AIR 1925 Sind 286; *Lohana Vasantlal Devchand v. The State* AIR 1968 Guj 252; *Brother John Anthony v. State* (1990) SCC OnLine Mad 498; *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.
45 (1998) Cri LJ 2428.
46 (2004) 5 SCC 518.
47 (2018) SC 1350.

law. These legal truths are invariably propagated by Legislature through legislations and Judiciary through judgments, thereby synchronising the synergy between law and power, the State yields to obtain the desired results. The remaining aspects – the individual responses are the ones that get hidden or curbed by law itself since they do not receive any recognition. This selective highlight happens because law and politics go hand in hand neither can function without the other and both have a symbiotic relationship with each other. The excluded aspects hence go outside the realm of law and judicial discretion is then resorted to. But as is seen and confirmed in the cases of *Independent Thought* and *Priya Patel* above, other realities continue to be excluded.

Rape Policy in India

X: The law has to separate from other standards of human behaviour.
Y: You're sure about that?
X: Absolutely, positivist![48]

The policy documents around rape span across Law Commission Reports, Parliamentary Standing Committees, legislative amendments and judicial pronouncements. Rape provisions in the IPC have been amended twice since 1860. The definition of rape as it originally stood in IPC revolves around sexual intercourse by a man with a woman against her free consent or will. The first amendment to this was made in 1983,[49] followed by the one in 2013.[50] Mrinal Satish and Shwetasree Majumder discuss the episodes resulting to these amendments.[51] Both sets of the amendments focus on different things. While the former focuses on consent, the latter focuses on not only consent but also on elaborating the definition of 'sexual intercourse', which was hitherto left to the interpretation by the judiciary. It is important to note that the amendments have been noteworthy because of enlarging the definition of sexual intercourse and including the Section on the offence of gang rape, etc. However, they fall short on incorporating/discussing some factors, as has been discussed in Part II above.

Hence, we observe that the collaboration between law and rape has not exactly been one of satisfaction and peace, more so, since the policy debates around rape continue to intensify with each passing day. The matter of concern is the reason that determines the contours of rape. This reason comes into existence out of strict structures, one of them being phallocentric in nature. Quoting Ratna Kapur, "If women are always already victimized and subject to sustained violence, then where is politics to get her out of this predicament to be located?".[52] The problems for policy making arises from the preconceived

48 Margaret Davies, *Legal Theory and Law Reform – Some Mainstream and Critical Approaches*, 28 ALTERNATIVE L. J. 168, 168 (2003).

49 Criminal Law (Second Amendment) Act, 1983 (Act no. 43 of 1983).

50 Criminal Law (Amendment) Act, 2013 (Act no. 13 of 2013).

51 Mrinal Satish and Shwetasree Majumder, *A Brief Synopsis of the New Offences/Procedures Recommended by the Justice Verma Committee on Amendments to Criminal Law*, 1 J. NLUD 172 (2013).

52 Ratna Kapur, *Slut Walk Couture and Pink Chaddis: Law and the Postcolonial Politics of Feminism 'Lite'*, 20(1) FEMINIST LEGAL STUD. 1, 15 (2012).

notion of homogenization of women or/and men and their reaction to sexual intercourse, marriage, and rape.

As have the rape provisions been discussed above, the problem with having the binary considerations of 'victim (women) - perpetrator (men)', 'legitimate consent (consent in marriage) - illegitimate consent (consent in judicial separation and in any case outside of marriage)', 'natural sex - unnatural sex', is that, we then formulate incomplete, non-inclusive and incoherent solutions, which not only ignore the different voices everyone has but also attempt to normalize the society with their reforms and legal truths.

The most obvious response that then follows is if there can be any solution that fits everyone. While there is no doubt that this concern is true, the differences in the conception of sexual intercourse, consent, marriage, etc. by different human beings ought to be considered by law. However, where ever it is unable to consider, the role of law should be de-centred, which means that it is important to think of non-legal strategies and to discourage a resort to law as if it holds the key to unlock oppression.[53]

Legal truths essentially hold that theoretical debates about the nature of law are distinct from social, moral or political debates about its content.[54] In Carol Smart's view, it is a strategic mistake to over-emphasize the power of law. She further elaborates that the argument is essentially that we can and should be working to achieve change along at least two fronts, one 'internal' to law and accepting (however conditionally) its power to define and redefine; the second from a position of skepticism and critique of law. Taken in a context of acknowledging the limitations of law, that is, that we should not expect mere legal reform to effect significant social change - such an argument provides a practical path for theorists who remain critical of law's role in enhancing and legitimising social division.[55]

Conclusion

In the aforesaid paragraphs, the researcher has discussed legal truth, the questions that legal truths of rape under IPC raise and the trajectory of rape policy in India. The policy on rape in India as it stands today, hence, produces a mesh with respect to bodily integrity, marriage, sexual intercourse, harm and rape itself.

Carol Smart emphasizes on the juridogenic nature of law, i.e., "we need to consider that in exercising law we may produce effects that make conditions worse, and that in worsening conditions we make the mistake of assuming that

53 SMART, *supra* note 6, at 5. (Carol specifically used this phrase in the context of oppression against women. However, the author is stretching that statement to a broader recipient of oppression in the society).

54 Margaret Davies, *supra* note 46.

55 *Ibid*.

we need to apply for more doses of legislations."[56] In the Indian context, this cannot be truer for the provisions on rape.

Rape is seen as a crime of sexual offence against the bodily integrity of the woman. However, as is amply discussed under Part II, there are multiple perspectives that put the act of rape in different lights, thereby questioning the (legitimacy/validity) of rape laws under IPC. Since only some of those perspectives - men and women, marriage and separation, natural and unnatural, etc. are highlighted by law, in the form of legislations, pondering over what the exact problem, from a bottom-up approach, is better since it may have the capacity of equipping the State agencies and citizens to better deal with the issue of rape. In the absence of this approach, deeper questions on individual and marital autonomy towards sex are raised which lead to the difficult implementation of the same.

Because of the kind of specific power law yields in the society, it sets itself above another piece of knowledge like psychology, sociology or common sense.[57] If we reject the idea of law as a simple tool of liberation or of oppression and look at how it constitutes a kind of institutionalised and formalized site of power struggles - one that can provide resources for women, children, and men, albeit differentially then it is possible to acknowledge that it remains an important strategic element in political confrontations.[58] Yet it seems we cannot know in advance whether a recourse to the law will empower women, children or men, although there is a substantial and well-founded fear that legal power works better for men than for anyone else.[59]

Since this article closely adopts the argument of Carol Smart of decentring law, the researcher will adopt her line of argument in conclusion as well. There may be a need for the law to refrain itself from legitimising the notions as perpetuated by the existing popular social structures. In refraining that, it is important for law makers to appreciate the kind of power law propagates-to define and demolish a phenomenon as legal. The strategy could be to focus on this power. This strategy does not preclude other forms of direct action or policy formation.[60] For example, it is important to sustain an emphasis on non-legal strategies and local struggles[61]. However, it is important to resist the temptation that law offers, namely the promise of a one size fit all solution.[62]

Law, along with other social sciences co-exists in the society that has people, performing various functions - mandated or not mandated by law. To say that what is mandated by law is the only truth that is problematic because that way law not only gains precedence over other social sciences but also questions the ability of an individual to act for himself/herself. This ability be given a direction through other social sciences.

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56 SMART, *supra* note 6, at 161.
57 *Ibid*, 10.
58 *Id.*, 6.
59 *Id.*
60 HILLAIRE BARNETT, SOURCEBOOK ON FEMINIST JURISPRUDENCE (1997).
61 SMART, *supra* note 6.
62 *Ibid*.

At the risk of sounding cynical towards law throughout the article, the researcher would like to conclude on a positive note, by stating that every social phenomenon has a life cycle. In terms of redressing the issue of rape, as a society, we have travelled far, not only in terms of legal reforms but in terms of social awareness, gender sensitization and dissecting the myriad issues in rape. Hence, we need to have patience in travelling the remaining trajectory not just with the help of legal truths but with its collaboration with other branches of social sciences, i.e., "the need to not accord law so much power, while at the same time not disengaging entirely from it."[63]

"What law brings to the world is the way that world looks to law."[64]

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63 *Id.*,41.
64 Balkin, *supra* note 3.

REINFORCING INDIA'S COMMITMENT TO INTERNATIONAL HUMANITARIAN LAW- A CASE FOR RATIFICATION OF ADDITIONAL PROTOCOLS TO GENEVA CONVENTIONS

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Abstract

India is a High Contracting Party to the Geneva Conventions of 1949, which regulate the fundamental aspects of International Humanitarian Law. India incorporated them into its municipal law through the Geneva Conventions Act, 1960. However, the said legislation did not create any enforceable rights. The Additional Protocols of 1977 supplement the Geneva Conventions and strengthen the protection for victims of armed conflict, including civilians, in both international (Additional Protocol I) and non-international (Additional Protocol II) armed conflicts. However, India has still not signed or ratified the two Additional Protocols of 1977 to the Geneva Conventions. This paper argues that ratification of the Additional Protocols by India would ensure better compliance with humanitarian obligations, thus reducing the number of casualities. It deals with the inter-relation between India and international humanitarian law and traces its history. It also delves into the reasons for India's non-accession to the Additional Protocols of 1977 and addresses the various concerns arising therefrom. The paper concludes by expounding certain important reservations relating to the sovereignty of State Parties and political legitimacy of non-State actors.

Key Words: High Contracting Party, Geneva Conventions, Additional Protocols, Ratification, Non-State actors

Introduction

The term 'international humanitarian law' refers to the current understanding of the *jus in bello* - the laws concerning the conduct of warfare. International humanitarian law is, broadly speaking, that branch of public international law that seeks to moderate the conduct of armed conflict and to mitigate the suffering that it causes.[1] The Geneva Conventions of 1949 along with the Additional Protocols of 1977 together form the core of contemporary international humanitarian law.[2] The Additional Protocols further strengthened

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1 H. MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 1 (1998).

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3 ('Additional Protocol I'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

the Geneva Conventions and brought some significant changes, especially with regard to regulation of the conduct of hostilities and non-international armed conflicts. Although India has adopted the Geneva Conventions, it is not a party to the Additional Protocols. Therefore, this paper primarily seeks to analyse the reasons for India's non-accession of the Additional Protocols. For the aforementioned objective, the paper is mainly divided into four Sections. The first Section gives an overview of international humanitarian law in general. The second Section expounds the relevance of the Additional Protocols to the Geneva Conventions. The third Section discusses the concept of humanitarian law in the Indian context with special emphasis on the history of ancient warfare rules in India. Finally, the last Section endeavours to look into the reasons for India's non-ratification of the Additional Protocols of 1977 seeks to alleviate the various concerns arising from the application of the said Protocols.

International Humanitarian Law- an overview

Humanitarian law has been defined as "a branch of public international law which owes its inspiration to a feeling for humanity and which is centered on the protection of the individual"[3] especially those who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, by defining the rights and obligations of the parties to a conflict in the conduct of hostilities.[4] Its purpose is mainly to make warfare subject to the rule of law by limiting its destructive effects and mitigating human suffering.[5]

The modern International Humanitarian Law (IHL) is rooted in the rules of ancient civilizations and religions dating back to 3000 BC, when there existed rules protecting certain categories of victims of armed conflicts and regulations limiting or prohibiting the use of certain means and methods of warfare.[6] However, its universal codification began only in the 19th century.[7] It started precisely in 1859, when Henry Dunant, a Swiss businessman traveling through Solferino, Italy, witnessed the aftermath of a bloody battle between French and Austrian armies and suffering of thousands of wounded and dying men who lay were left unattended on the battlefield.[8] Moved by such outrageous incidents, Dunant published a short book in 1862, titled 'A Memory of Solferino',[9] in

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Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609 ('Additional Protocol II').

3 JEAN PICKET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 11 (1975).

4 *War and International Humanitarian Law*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/war-and-law/overview-war-and-law.html (visited March 4, 2018).

5 Daniel Thurer, *International Humanitarian Law: Essence and Perspectives*, 17 SWISS. REV. INT'L AND EUR. L. 157 (2007).

6 INT'L COMM. OF THE RED CROSS, OUTLINE OF INT'L HUMANITARIAN LAW: HOW DOES LAW PROTECT IN WAR? CHAPTER 3,1 (Marco Sassòli et al. eds., 3rd ed. 2011), https://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf (visited March 4, 2018).

7 *What is International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (visited March 20, 2018).

8 *Development of International Humanitarian Law*, AM. RED CROSS, http://www.redcross.org/images/MEDIA_CustomProductCatalog/m21968852_37310 12_Development_of_IHL.pdf (visited March 22, 2018).

9 HENRY DUNANT, A MEMORY OF SOLFERINO 145 (2nd ed. 1959), https://www.icrc.org/eng/assets/files/publications/icrc-002-0361.pdf (visited March 30, 2018).

which he vividly evoked the horrors of the battle. In addition, he also tried to seek remedies by inviting the States to formulate certain international principles, sanctioned by a Convention inviolable in character, and to give legal protection to wounded soldiers in the field.[10] Dunant's proposals met with enormous success all over Europe.[11] In 1864, the Swiss Government hosted a conference in Geneva at the suggestion of Dunant's newly formed International Committee for the Relief of Military Wounded (which later become the International Committee of the Red Cross or ICRC in 1876)[12] in which 12 States participated which culminated in the signing of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[13] Since then, ICRC had undertaken various initiatives which led to the conclusion of the Geneva Conventions for the Protection of the Victims of War of 1864, 1906, 1929 and 1949 and the adoption of Additional Protocols to Geneva Convention in 1977.[14] These treaties primarily regulate the core aspects of international humanitarian law: protections for certain persons and property that are, or may be, affected by international or non-international armed conflict, as well as general limitations on the methods and means of warfare (the law on the conduct of hostilities).[15]

However, there exist two important impediments to the application of these treaties to present armed conflicts. First, treaties apply only to States that have ratified them. In effect, different treaties of international humanitarian law apply to different armed conflicts depending on the nature of treaties the concerned States have ratified.[16] Daniel Thurer's comments are pertinent in this regard:

> The four Geneva Conventions have become universally applicable now that all the world's 194 States are party to them. This is not (yet) the case for the Additional Protocols of 1977. Important States such as the USA, India, Pakistan, Iraq, Iran and Israel that

10 1 INT'L COMM. OF THE RED CROSS, OUTLINE OF INTERNATIONAL HUMANITARIAN LAW 2 (Marco Sassòli et al. eds., 3rd ed. 2011), https://www.icrc.org/eng/assets/files/publications/icrc-0739-part-i.pdf (visited March 9, 2018).

11 *Minutes from Meetings of the International Prisoner-of-War Agency*, THE INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/assets/files/publications/icrc-002-4220.pdf (visited March 18, 2018).

12 *Development of International Humanitarian Law*, AM. RED CROSS, http://www.redcross.org/images/MEDIA_CustomProductCatalog/m21968852_37310-12_Development_of_IHL.pdf (visited March 23, 2018).

13 Francoise Bory, *Origin and Development of International Humanitarian Law*, 2 WORLD BULL. 1, 2 (1986).

14 JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INT'L HUMANITARIAN LAW VOLUME 1: RULES 32 (2005), https://www.loc.gov/rr/frd/Military_Law/pdf/Cust-Intl-Hum-Law_Vol-I.pdf (visited March 15, 2018).

15 Knut Dormann and Louis Maresca, *The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments*, 5 CHI. J. INT'L L. 217, 218 (2004).

16 JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES (2005), https://www.loc.gov/rr/frd/Military_Law/pdf/Cust-Intl-Hum-Law_Vol-I.pdf (visited March 15, 2018).

> are involved in acute or potential international crises are not yet bound by Protocol I and II.[17]

The next Section of the article will analyze the significance of the Additional Protocols to the Geneva Convention, 1977 and discuss the need for States to ratify these protocols, in order to uphold the universal principles of humanitarian law.

Relevance of Additional Protocols to Geneva Conventions

After the devastating effects of World War I and II, four additional new Conventions were formulated to protect the victims of war. However, with the changing circumstances such as the decolonization conflicts, the proliferation of new States and the rapid advances in means and methods of warfare, it was felt expedient to regulate such hostilities.[18] Further, Article 3 common to all the four Geneva Conventions of 1949,[19] which regulates the conduct relating to armed conflict of non-international character, was proving to be inadequate. This is so because about 80 percent of the victims of armed conflicts since 1945 were non-international conflicts which were often fought with more cruelty than international conflicts.[20]

This view of the ICRC was shared by the United Nations General Assembly, which in 1968, emphasized the need for additional humanitarian conventions, or for revising existing law to better protect victims and to limit or prohibit the use of certain means and methods of warfare.[21] Hence, on June 8, 1977, the Protocols additional to the Geneva Conventions of 1949 were adopted by 124 States, including many newly formed countries. They strengthened the protection for victims of armed conflict, including civilians, in both international (Protocol I) and non-international (Protocol II) armed conflicts.[22] A key achievement of the Additional Protocols I and II was codifying and developing rules on the conduct of hostilities and those related to the protection

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17 Daniel Thurer, *International Humanitarian Law: Essence and Perspectives*, 17 SWISS. REV. INT'L AND EUR. L. 157, 160 (2007).

18 *The 1977 Additional Protocols to Geneva Conventions: A Historical Perspective*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/document/china-Yves-Sandoz-additional-protocols-40-years (visited March 21, 2018).

19 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), August 12, 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), August 12, 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), August 12, 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) August 12, 1949, 75 UNTS 287.

20 *Treaties, States Parties and Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/ihl/INTRO/475? (visited March 26, 2018).

21 *Relevant and Practical: The Additional Protocols at 40*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/document/relevant-and-practical-additional-protocols-40 (visited March 10, 2018).

22 *40th Anniversary of the 1977 Additional Protocols To The 1949 Geneva Conventions*, INT'L COMM. OF THE RED CROSS MAG., http://www.rcrcmagazine.org/wp-content/uploads/2017/10/40th-Anniversary-en.pdf (visited March 29, 2018).

of civilians from the effect of hostilities. In treaty law, these rules had remained untouched since the Hague Conventions of 1907.[23]

In the 1990s, there existed uncertainties with regard to the binding nature of Additional Protocol I since the description of a *jus in bello* was dominated by military imperatives. However, by the end of the decade, the Additional Protocol I came to be regarded as customary law.[24] Today, discussion of any subject of humanitarian law without recognition of the Additional Protocol I is unimaginable. Military manuals of major powers such as Germany are based on the Protocol, and even the US Air Force and Navy commanders' handbooks commonly use its language.[25] The United Nations General Assembly has also unanimously recognized the necessity to fully respect civilians and not to target them during armed conflict.[26] Further, there has been an increase in the relevance of Geneva Conventions and its Additional Protocol I to secure the rights of victims in the event of international armed conflict. For instance, during the conflict between Eritrea and Ethiopia, the ICRC visited, in the year 2000 alone, over 1,000 Ethiopian prisoners of war and 4,300 civilian internees. In addition, it facilitated the exchange of 16,326 messages between Ethiopian and Eritrean prisoners of war and their families. The ICRC also organized safe passage across the front lines for 12,493 civilians of Ethiopian origin. In cooperation with the Eritrean Red Cross, the ICRC distributed aid to over 150,000 civilians affected by the conflict and provided surgical supplies for the treatment of 10,000 war-wounded, in cooperation with the Eritrean Ministry of Health.[27]

These humanitarian services rendered by the ICRC in the international armed conflict between Eritrea and Ethiopia was only possible because Ethiopia was a party to the Geneva Conventions, especially to its Additional Protocol I.[28] The expression 'High Contracting Party' under the Additional Protocol I directly cover only the Parties in the strict sense, i.e. such Parties as have given their consent to be bound by those treaties through ratification, accession or notification of succession.[29]

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23 Jonathan Cuénoud, *40th Anniversary of the Additional Protocols of 1977 of the Geneva Conventions of 1949*, EJIL TALK (June 8, 2017) ,https://www.ejiltalk.org/40th-anniversary-of-the-additional-protocols-of-1977-of-the-geneva-conventions-of-1949/ (visited March 13, 2018).

24 Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT'L L. 109, 130 (2015).

25 Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L.678, 681 (1994).

26 *Sixth Committee (Legal)-71st Session*, GENERAL ASSEMBLY OF THE UNITED NATIONS, http://www.un.org/en/ga/sixth/71/protocols.html (visited March 19, 2018).

27 *The Geneva Conventions Today*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm (visited March 28, 2018).

28 *Treaties, States Parties and Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties and xp_treatySelected=470 (visited March 2, 2018).

29 YVES C. SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1345 (1987).

Further, even though major parts of the Geneva Conventions only regulate international armed conflicts,[30] the significance of the Additional Protocol II which strictly applies to armed conflict of a non-international character cannot be underestimated. It must be noted that the non-derogable principles under ICCPR have been inserted almost completely into the Additional Protocol II.[31] These principles are binding not only on the established government but also on the insurgent party.[32] This is evident in the explanation to the scope of Additional Protocol II clearly which stipulates that all the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.[33]

In addition, in regard to the situation in Afghanistan, the United Nations Security Council reaffirmed that "all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular under the Geneva Conventions of 1949."[34] The recent judgments of various jurisdictions across the world also suggest that there has been an increase in the applicability of the Additional Protocol II in order to adjudge the culpability of the individuals who are in violation of international humanitarian principles. For example, where the accused [member of an armed group] was charged for the execution of seven persons who were *hors combat*, the Swedish District Court held him guilty for violations of norms under Additional Protocol II.[35] The International Criminal Court in *Prosecutor v. Al Mahdi*[36] held the accused was guilty of war crime under Article 8(2)(e)(iv) of the Rome Statute[37] for wanton destruction of the sites belonging to cultural heritage in a non-international armed conflict. The court in this case reaffirmed the principles enshrined under Additional Protocols I and II of the Geneva Convention regarding the protection of cultural property.[38] The ICTY, in *Prosecutor v. Radovan Karadzic*,[39] held that the accused was criminally responsible for unlawful attacks on civilians as a violation of the laws or customs of war, in furtherance of the principles under Additional Protocols I and II.

30 New Zealand Red Cross, *The Red Cross and The Geneva Conventions – 60 Years On*, 41 VICTORIA U. WELLINGTON L. REV. 113, 116 (2010).
31 Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 34 (1983).
32 Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT'L REV. RED CROSS 491, 498 (2006).
33 YVES C. SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST,1949 1345 (1987).
34 S.C. Res. 1214, ¶ 3, U.N. Doc. S/RES/1214 (December 8, 1998).
35 *Sweden/Syria, Can Armed Groups Issue Judgments?*, INT'L COMM. OF THE RED CROSS, https://casebook.icrc.org/case-study/swedensyria-can-armed-groups-issue-judgments (visited March 13, 2018).
36 *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence (September 27, 2016).
37 Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.
38 *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, ¶ 14 (September 27, 2016).
39 *Prosecutor v. Radovan Karadžić*, Case No.IT-95-5/18-T, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia March 24, 2016).

Thus, it is clearly discernible that the Additional Protocols constitute a significant body of law that has played a vital and continuing role in limiting the horrors of warfare. They rest on respect for the inherent dignity of the individual. Without them, the barbarism and brutality of armed conflict would be unmitigated.[40]

India and International Humanitarian Law

The wars in ancient India were more civilized, humane and ethical than the conventional wars of today.[41] The traditional Hindu science of warfare valued both *niti* and *saurya* i.e., ethical principles and valour and dictated that waging war without regard to moral standards degraded the institution into mere animal ferocity.[42] It mainly followed the concept of 'Dharmayuddha' which was war carried on the principles of Dharma, meaning the 'Ksatradharma' or the law of Kings and Warriors, which prohibited the slaying of the unarmed, of women, of the old, and of the conquered. Megasthenes had noticed a peculiar trait of Indian warfare - they never ravage an enemy's land with fire, nor cut down its trees.[43] The Bhagavad Gita, one of the most important Hindu texts, mentions that there is nothing more productive for a warrior than to be engaged in righteous warfare, even though it might lead to the destruction of one's own race.[44]

Further, the modern humanitarian law principles resemble the traditional rules of warfare in ancient India. For instance, the rule of international humanitarian law not to attack civilians during warfare was similar to that purported in the Manusmriti:

> One who surrenders or is without arms or is sleeping or is naked, or with hair united (i.e. unprepared) or an onlooker (non-combatant) must never be killed, irrespective of whether the opponent was a believer or an arya or a yavana (alien non-believer) or whether he was fighting a just war or not.[45]

In addition, there were provisions which were meant for the protection of auxiliary personnel like medical personnel and camp followers, and those who were engaged in carrying the wounded from the front lines were to be treated as peaceful non-combatants.[46] If the wives of soldiers who had been killed in the field were captured, they had to be treated with courtesy and consideration.

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40 *The Relevance of the Geneva Conventions in Contemporary Warfare*, DEP'T. OF FOREIGN AFF. AND TRADE, IR., https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/internationallaw/statement-60th-anniversary-geneva-conventions.pdf (visited April 15, 2018).

41 *War Rules in Ancient India still World`s Best*, ZEE NEWS (February 28, 2011), http://zeenews.india.com/news/nation/ war-rules-in-ancient-india-still-worlds-best_690087.html (visited March 18, 2018).

42 *War in Ancient India*, HINDU WISDOM, http://www.hinduwisdom.info/War_in_Ancient_India.htm, (visited March 26, 2018).

43 *Ibid.*

44 *Bhagavad Gita*, II.31.

45 NAGENDRA SINGH, INDIA AND INTERNATIONAL LAW 4 (1969).

46 Chacko, *International Law in India, Ancient India*, 1 INDIAN J. OF INT' L L. 185, 199 (1960).

They were to be sent home under proper escort, if they were not pleased to stay.[47]

The concept of 'military object' and 'the use of weapons' as enunciated under modern humanitarian law constituting the Geneva Conventions and Additional Protocols can be traced back to the incidents that took place in ancient India. The following observations of Manusmriti are pertinent in this regard: "When he (the king) fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire."[48] In a similar way, Yajnavalkya proclaims that he who kills his opponents in war with weapons, carried openly, not covered or disguised, goes to heaven like ascetics.[49] This principle is also found in Mahabharata.[50]

Hence, it is sufficiently clear that in terms of the ideals of humanitarianism of ancient India, the laws of war were progressive.[51]

At present, there is no law in India which contains any specific provision obliging the State to enforce or implement international treaties and conventions including the implementation of IHL. Amongst the domestic legislations, the only law that directly deals with the principle of IHL is the Geneva Convention Act, 1960.[52] However, the Act has a limited scope as has been explained by the Supreme Court of India in *Rev. Mons. Sebastian Francisco Zavier Dos Remedious Monterio v. State of Goa*.[53] In this case, it was held that:

> Under the Geneva Convention there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population, but there is no right created in respect of protected persons which the Court has been asked to enforce.

It is argued that the members of the armed forces are adequately trained in humanitarian law and human rights law at the time of recruitment and while in service since the Geneva Conventions form part of their training manuals.[54] However, the limited scope of the Geneva Convention, 1960 and the "immunity under AFSPA allows soldiers to make mistakes."[55] This is evident from the fact

47 *Mahabharatha*: *Santi*: *Rajadharma*, 96.5.
48 *Manusmriti*, 7.90.
49 *Yajnavalkya Rajadharama Prakaranam*, 322-3.
50 *Shanti Parva*, 11.3.
51 Manoj Kumar Sinha, *Hinduism and International Humanitarian Law*, 87 INT'L REV. OF THE RED CROSS 285, 293 (2005).
52 *Ktaer Abbas Habib Al Qutaifi v. Union of India* 1999 Crim LJ Guj 919.
53 *Rev. Mons. Sebastian Francisco Zavier Dos Remedious Monterio v. State of Goa* AIR (1970) SC 329.
54 *Report on Practice of India, 1997* (Chapter 6.6), INT'L COMM. OF THE RED CROSS, https://www.icrc.org/customaryihl/eng/docs/v2_cou_in_rule142 (visited March 26, 2018).
55 *Denied :Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, AMNESTY INT'L, https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF (visited March 27, 2018).

that between 1990 to 2011, 3,642 civilians have been reported to be killed by security forces.[56]

However, this does not imply that the Indian Army is the sole violator of human rights. In fact, apart from the civilians, they have also been one of the main victims of violations of IHL in the form of indiscriminate attacks by non-State actors. Sumantra Bose has stated that more than 4600 security personnel and 13,500 civilians were killed between 1989 and 2004.[57] The number of security personnel killed in terrorist violence in the state of Jammu and Kashmir has increased 72 percent from 111 in the last three years to 191. Moreover, the overall deaths from Maoist violence have also increased 60 percent from 259 in 2014-15 to 414 in 2016-17.[58]

Therefore, judging the above statistical figures, it is apto suggest that there has been a very minimal compliance of the international humanitarian principles as there has been a rise in casualities especially caused by the indiscriminate attacks by the non-State actors. It is definite that where IHL is not respected, human suffering increases and the consequences of conflict become more difficult to repair.[59]

It is argued that the ratification of Additional Protocols, especially Additional Protocol II, by India would have imposed an additional obligation on the armed groups as well as the Army in the States of Jammu and Kashmir and Chhattisgarh to comply with certain basic humanitarian principles, which would have eventually brought down casualities. However, it is also essential to delve into the reservations or the plausible reason for India's reluctance to the implementation of Additional Protocols. The next part of the article will explore the possible reasons or concerns for non-ratification of Additional Protocols, and offers plausible methods to overcome such concerns.

India and the 1977 Additional Protocols to the Geneva Conventions

Additional Protocol I to the Geneva Conventions of 1949 provided new rules on international armed conflicts. It defined combatants and non-combatants and codified the principles of *jus in bello*. Additional Protocol II to the Geneva Conventions develops and supplements the Common Article 3 in all the Geneva Conventions. It regulates armed conflicts 'not of an international character'. It specifically regulates such armed conflicts occurring between States' armed forces and dissident armed forces or other organized armed groups which, are

56 Randeep Singh Nandal, *State data refutes claim of 1 lakh killed in Kashmir*, THE TIMES OF INDIA (June 20, 2011), http://timesofindia.indiatimes.com/india/State-data-refutes-claim-of-1-lakh-killed-inKashmir/articleshow/8918214.cms (visited March 20, 2018).

57 SUMANTRA BOSE, KASHMIR: ROOTS OF CONFLICT, PATHS TO PEACE 4 (2003).

58 Abheet Singh Sethi, *3 years of Modi Govt: Terrorism claims more lives in Kashmir, situation mixed in Northeast*, HINDUSTAN TIMES (May 27, 2017), https://www.hindustantimes.com/india-news/3-years-of-modi-govt-terrorism-claims-more-lives-in-kashmir-situation-mixed-in-northeast/story-BqKHK87xJtx9ETdnt0GuMI.html. (visited March 15, 2018).

59 Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, INT'L COMM. FOR RED CROSS, https://www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf (visited March 26, 2018).

under responsible command and exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Hence, it can be construed that Additional Protocol II limits the application of Common Article 3 which applies even in situations where the control or responsible command criterion is not satisfied.[60] It is, however, argued that the distinction between international and non-international armed conflict should be removed from the definitions of war crimes due to a multitude of reasons, including recent developments in treaty law, particularly weapons treaties.[61]

India's non-accession of the two Additional Protocols is deeply concerning and requires serious debate. Some political commentators argue that ratification of the said protocols militates against the country's sovereignty and can be invoked to interfere in the internal affairs of our state.[62] However, such concerns are unfounded, primarily on two grounds. First, Additional Protocol II only deals with humane treatment of persons who do not take part in the hostilities. Second, Additional Protocol II does not provide a justification for interfering in the affairs of another state and thereby affect its sovereignty.

India had actively participated in the formulation of Protocol I, and supported all the articles of the Draft Protocol I.[63] However, the Indian delegation consistently opposed Protocol II.[64] There was significant opposition to Additional Protocols from other developing countries as well.[65] This is indicative of the recalcitrance of the State participants to be bound by the Protocols. Many of these nations consider Additional Protocol II to be an encroachment on their national sovereignty.[66] While the Geneva Conventions have been incorporated into Indian municipal law, they have not created any enforceable rights. The Conventions have not been made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. There is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of the civilian population. However, there is no mechanism provided under the said Act to enforce the rights of the protected persons. In effect, the Geneva Conventions Act, 1960 has been rendered toothless.

During the diplomatic conferences leading up to the adoption of the Additional Protocols 1977, India had firmly maintained that with the exception

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60 A. G. Noorani, *India and the Geneva Convention Protocols*, 33 ECON. POLIT. WKLY. 746 (1998).

61 Deidre Willmott, *Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. OF INT'L L. 196, 207 (2004).

62 L. R. Penna, *Status of the Geneva Conventions and the Additional Protocols in India*, 21 MIL. L. AND L. OF WAR REV. 135, 144 (1982) [Hereinafter 'Penna']; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switz., 20th February-10th June, 1975, *Summary Records of the Plenary Meetings: Fourth Session*, (Vol. VII), 76 (1978).

63 Penna,144.

64 *Ibid*.

65 *Id*.

66 *Id*.

of national liberation movements, any other conflict taking place wholly within the territory of a state must be resolved only by the domestic legal framework.[67] The Indian delegation had further objected that Additional Protocol II was wholly unnecessary because national liberation movements had already been included in Additional Protocol I.[68] They had argued that other non-international armed conflicts were essentially law and order problems within the exclusive domestic jurisdiction of each state.[69] This position is unsustainable because the primary criteria that govern the application of international humanitarian law is the gravity of conflict on the territory of a state and its humanitarian consequences. Therefore, its application must be broad, based upon the gravity of the conflict and humanitarian considerations. The reasons for such conflicts must not be the relevant criteria.

The very high threshold set by Additional Protocol II indicates that it applies to situations at or near the level of a full-scale civil war or belligerency.[70] Article 1 of the Additional Protocol II clearly stipulates that it is applicable only when a conflict between an incumbent government and internal belligerent forces arises, and not when the state is affected by conflicts among different dissident groups, in which case only Common Article 3 is applicable.[71]

Additional Protocol II is not to be considered as incompatible with the Geneva Conventions. As the name suggests, the objective of an Additional Protocol is to develop the law in such areas which the drafters of the parent conventions consider to be underdeveloped.[72] Moreover, Additional Protocol II clearly indicates that it develops and supplements Common Article 3, which has already been regarded to reflect customary international law.[73]

India did not significantly oppose Additional Protocol I, which dealt with international armed conflicts. Article 1 (4) of the Additional Protocol I expanded the definition of international armed conflict to include national liberation movements, which India consented to. Additional Protocol I also established an International Fact-Finding Commission to inquire into any facts alleged to be a grave breach as defined in the Geneva Conventions and Additional Protocol I.[74] India objected to this proposal on the ground that such a tool may be politicized which may result in non-cooperation between state parties. Further, India supported existing institutional mechanisms to resolve

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67 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switz., 20th February-10th June, 1975, *Summary Records of the Plenary Meetings*, (Vol. V), 345-46 (1978).

68 *Ibid.*

69 *Id.*

70 Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 21 (2002).

71 YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS 1347 (1987).

72 D. Turns, *War crimes without war? The applicability of international humanitarian law to atrocities in non-international armed conflicts*, 7 AFR. J. INT'L AND COMP. L. 804, 817 (1995).

73 *Military and Paramilitary Activities in and Against Nicaragua* [Nicar. v. US] Judgment, 1986 I.C.J. 14 ¶ 218-19 (June 27).

74 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3.

disputes.[75] However, it is to be noted that Article 90(2)(a) of the Additional Protocol I clearly stipulates that a state must separately consent to the formation of the Commission. Therefore, it is optional and non-binding in nature and ratification of Additional Protocol I does not automatically lead to the recognition of the commission's competence.[76]

It is argued that ratification of the Additional Protocols would oblige India to extend their protection to the parties to the armed conflict. However, it is to be emphasized that application of the Geneva Conventions and the two additional protocols in no way grants non-State armed groups any political status or recognition as the focus of these treaties is on their conduct in the conflict.[77] Instead, such armed groups would also be bound by these treaties, which will ensure better protection to the victims of armed conflict.

Conclusion

Thus, it is understood that there arises an imminent necessity for reviewing India's stance on the Additional Protocols to the Geneva Conventions. It is imperative that the Parliament exercise its will, and ratifies the Additional Protocols. This would send a strong message to the entire world and clarify India's position on the international plane. As a vibrant democracy which guarantees fundamental human rights and gives them constitutional protection, India must also ensure respect for humanitarian obligations and be a pioneer in the promotion of global values. India must adopt a suitable methodology to adhere to the rules of Additional Protocols which will allow it to protect the security of the nations. Ratification of the said Protocols will only ensure better protection of victims of armed conflict (international as well as non-international) and will be important tool in furthering India's efforts in counter-terrorism and counter-insurgency operations.

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75 Vinai Kumar Singh, *Additional Protocols: Where India Stands*, 8 INDIAN SOC'Y OF INT'L L. YEARBOOK OF INT'L HUMANITARIAN AND REFUGEE L. 38, 39 (2008).

76 Md. Tabish Eqbal, *Revisiting India's Non-Ratification of the Additional Protocols to the Geneva Conventions: Does it Hold Up Today*, JURIST – STUDENT COMMENTARY (August 20, 2017), http://jurist.org/student/2017/08/md-tabish-eqbal-india-nonratification.php (visited March 16, 2018).

77 Srinivas Burra, *Why India Should Consider Signing the Additional Protocols of the Geneva Conventions*, THE WIRE (June 8, 2017), https://thewire.in/144682/india-humanitarian-law-additional-protocols/ (visited March 16, 2018).

PUTTASWAMY: PRIVACY AND DECISIONAL AUTONOMY

Sholab Arora[*]

Abstract

The quest for privacy is present in all spheres of life. The demand for its protection has increased owing to the intrusive measures by the State through various legislations and policies. In the past, the Courts have struggled to define the contours of the right to privacy and thereby, making it vulnerable to be exploited by the State. Justice K.S. Puttaswamy (Retd.) v. Union of India, filled this void, by declaring it as a fundamental right and defining the various freedoms it entails. The Court held that the decisional autonomy i.e. freedom of choice in personal and bodily matters is an essential attribute of one's privacy. In the status quo, various legislations, enacted or pending, and rules governing intimate matters like reproduction, abortion, sexual orientation, euthanasia, suicide, and food choices, pose a grave threat to the individual autonomy. This article analyses different aspects of decisional autonomy, as discussed in Puttaswamy, and examines the impact of the judgment on such legislations and rules. It also discusses the effect of the judgment on other cases concerning such intimate matters.

Keywords: Privacy, Decisional Autonomy, Abortion, Surrogacy, Euthanasia

Introduction

> Privacy isn't about something to hide. Privacy is about something to protect. And that's who you are. That's what you believe in. That's who you want to become. Privacy is the right to the self. Privacy is what gives you the ability to share with the world who you are on your own terms. - *Edward Snowden*[1]

The right to privacy in modern times is of immense social significance for it enables the individuals to protect what is 'private' from scrutiny and control what others know about them. The expression of the desire for privacy permeates society. It is exhibited by people in their daily activities, such as locking the doors, clothing their bodies and setting passwords for their computers and phones. This is testament to the instinctive nature of this desire. The concept of privacy has proven to be elusive and has meant different things to different people. Courts across the world have faced difficulties in articulating what comprises the right to privacy and determining its contours in

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1 Yohana Desta, *Read Edward Snowden's Moving Speech About Why Privacy Is "Something To Protect"*, VANITY FAIR (Sep. 15, 2016), https://www.vanityfair.com/hollywood/2016/09/edward-snowden-privacy-speech (These observations were part of one of the responses given by Edward Snowden in the Q and A session which followed the screening of the Oliver-Stone directed film 'Snowden' in New York City) (visited April 8, 2018).

our ever-changing world. It has evolved from a spatial concept (such as the privacy interests of one's home,[2] protection from unreasonable searches and seizures[3]) to decisional autonomy (protection of an individual's interests in making personal choices such as the right to abort a foetus,[4] the right to marry,[5] the freedom of procreation,[6] the right to use contraception)[7] and informational privacy (the right to protect one's personal data).[8]

The Courts in India had grappled with the concept of privacy for about 70 years before it was explicitly declared as a fundamental right. In the initial years after independence, the Supreme Court refused to recognize the right to privacy as a right guaranteed under the Constitution. An eight judge bench in *M.P. Sharma v. Satish Chandra, District Magistrate, Delhi*,[9] refused to read the right to privacy into Article 20(3) of the Constitution of India in the absence of a provision similar to the Fourth Amendment to the US Constitution. Similarly, in *Kharak Singh v. State of Uttar Pradesh*,[10] a six-judge bench refused to recognize a constitutional right to privacy while dealing with the issue of violation of privacy by intrusion into an individual's home through police surveillance. However, Justice Subba Rao dissented and held that though Article 21 does not expressly provide for the right to privacy, it embodies the right to be free from encroachments which implicitly protects bodily privacy.

Developments in the laws of foreign jurisdictions and increasing interference by the State led the Supreme Court, for the first time in *Gobind v. State of Madhya Pradesh*,[11] to recognize the right to privacy "as an emanation from Articles 19(1)(a), (d) and 21" requiring a case to case elaboration. It was only in *R. Rajagopal v. State of Tamil Nadu*,[12] that the Supreme Court clearly asserted a citizen's right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters." In *People's Union for Civil Liberties v. Union of India*,[13] the Court ruled on the communicational aspect of privacy condemning arbitrary acts of telephone tapping by the State. In *Mr. X v. Hospital Z*[14] and *District Registrar and Collector, Hyderabad v. Canara Bank*,[15] the Court, on account of the informational privacy, held that the mere disclosure of personal information or confidential documents voluntarily by a person to a third party carries with it a reasonable expectation that it will be utilised only for the purpose for which it is provided and shall not be shared without the prior consent. Expanding the

2 *Wolf v. Colorado* 338 US 25 [1949].
3 *Boyd v. United States* 116 US 616 [1886].
4 *Roe v. Wade* 410 US 113 [1973].
5 *Loving v. Virginia* 388 US 1 [1967].
6 *Skinner v. Oklahoma* 316 US 535 [1942].
7 *Eisentadt v. Baird* 405 US 438 [1972].
8 *District Registrar and Collector, Hyderabad v. Canara Bank* (2005) 1 SCC 496.
9 AIR 1954 SC 300.
10 AIR 1963 SC 1295.
11 AIR 1975 SC 1378.
12 AIR 1995 SC 264.
13 AIR 1997 SC 568.
14 (1998) 8 SCC 296.
15 (2005) 1 SCC 496.

horizons of decisional privacy, the Supreme Court in *Hinsa Virodhak Sangh v. Mirzapur Motikuresh Jamat*[16] observed, "what one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution." Similar observations were made in *Suchita Srivastava v. Chandigarh Administration*[17] and *National Legal Services Authority v. Union of India*[18] regarding the exercise of control over one's body and intimate choices. While emphasizing on the intellectual privacy or the privacy of thought, the Court, in *Selvi v. State of Karnataka*,[19] held that the involuntary administration of the medical techniques like narco-analysis, polygraph test and Brain Electrical Activation Profile (BEAP) infringes the right to privacy. However, all the above mentioned decisions were pronounced by the smaller benches of the Supreme Court and did not have the force to override the decisions of the Court in *M.P. Sharma*[20] and *Kharak Singh*.[21]

It was only in 2017 that a nine-judge bench of the Supreme Court of India explicitly declared the right to privacy as a fundamental right in *Justice K.S. Puttaswamy (Retd.) v. Union of India.*,[22] and overruled the decisions in *M.P. Sharma* and *Kharak Singh*. The Court held the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India. This case is an offshoot of a petition which challenged the Aadhaar scheme[23] which was subsequently declared as constitutionally valid.[24] The Supreme Court's declaration of the right to privacy under the right to life and personal liberty of an individual is indubitably a significant milestone for modern India. By declaring the right to privacy as a protected constitutional value, the Court has redefined, in significant ways, the concept of liberty and the entitlements which flow from its protection. It has dealt extensively with two major aspects of privacy- decisional autonomy and informational privacy. Premised on decisional autonomy, the Court has upheld the freedom of an individual over bodily matters and personal affairs. It observed that the right to privacy includes the freedom to choose on two levels.[25] At one level, an individual can choose the activities for performance and specify the persons to be included while performing the same.[26] At another level, an individual has the autonomy of choice and specification for the non-performance of certain activities.[27]

16 (2008) 5 SCC 33.
17 (2009) 9 SCC 1.
18 (2014) 5 SCC 438.
19 (2010) 7 SCC 263.
20 AIR 1954 SC 300.
21 AIR 1963 SC 1295.
22 AIR 2017 SC 4161.
23 Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 was passed to provide legislative backing to the Aadhaar scheme.
24 *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2018) SCC OnLine SC 1642.
25 *Justice K.S. Puttaswamy (Retd.) v. Union of India* AIR 2017 SC 4161 ¶ 43 (Bobde J.).
26 *Ibid.*
27 *Id*.

This Article analyses the effect of the upholding of decisional autonomy of an individual on various laws and policies in light of the *Puttaswamy* judgment. It traces the evolution of various contemporary issues, through legislations and judicial decisions, which concern the private sphere of an individual, and shows the impact of the observations made by the judges in *Puttaswamy* on such issues. It is divided into five sections viz. abortion; surrogacy; euthanasia, suicide and living wills; the beef ban; and LGBTQ rights vis-à-vis Section 377. It discusses the fate of various legislations and policies of the government which have the potential to transgress the constitutional principles laid down in *Puttaswamy* with respect to decisional autonomy.

Abortion

Feminists believe that the social role ascribed to a woman by a patriarchal society is attributed to her child bearing capacity owing to their sex.[28] Women's subjugation is the result of the equation of sex with gender which are fundamentally different.[29] Therefore, to take-down the male hegemony in the society, the fight for reproductive rights became a crucial part of the feminist movement, especially during its second wave. Pioneers of the feminist movement in the USA, Susan B. Anthony and Elizabeth Cady Stanton, who lead the suffrage rights movement, were against abortion and compared it to infanticide.[30] Similar views are shared by the pro-life feminists of the present day.[31] On the contrary, the pro-choice feminists are in favour of reproductive freedom and abortion rights. However, there is a difference of opinion among the pro-choice feminists. A majority of them base the claim for abortion rights on the rights based approach to reproductive freedom while relational feminists base their claim on the 'ethics of care' approach.[32]

Abortion was not prohibited in the USA and the Western Europe until the 19th century. The main cause behind the criminalization of abortion was unsafe abortions which were carried out by midwives without proper facilities. Therefore, the State decided to protect women from the dangers of abortion by confining them to their traditional child bearing role. However, the number of illegal and unsafe abortions kept on increasing at an alarming rate. The US Supreme Court came to the rescue of vulnerable pregnant women in *Roe v. Wade*,[33] a case which marked the victory for the abortion rights movement. The court stated that the "right of privacy... founded in the Fourteenth Amendment's concept of personal liberty... is broad enough to encompass a woman's decision

28 ANDREW HEYWOOD, POLITICAL IDEOLOGIES 233 (5th ed. 2014).
29 *Ibid.*
30 Susan B. Anthony and Elizabeth Cady Stanton, *Child Murder*, THE REVOLUTION (New York), March 12, 1868.
31 Kristen Jordan Shamus, *Abortion divide: Can you be pro-life and be a feminist?*, DETROIT FREE PRESS (October 2, 2017), https://www.freep.com/story/news/2017/10/02/can-you-be-pro-life-feminist-and-included-in-womens-convention/720941001/ (visited April 7, 2018).
32 Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. REV. 1323 (1995).
33 410 US 113 [1973].

whether or not to terminate her pregnancy."[34] The Court legalized abortion only during the first two trimesters of pregnancy because in the third trimester, the foetus becomes viable. The Oxford English Dictionary defines foetal viability as the "ability of a foetus or an unborn child to live after birth."[35] The abortion was allowed in the third trimester only if there was a threat to the life or health of the pregnant woman.

India was ahead of the USA in respect of abortion liberalization. The Parliament of India enacted the Medical Termination of Pregnancy Act in 1971 (MTP Act) (while *Roe v. Wade* ruling was in the year 1973) on the basis of the report prepared by the Shantilal Shah Committee.[36] Before the enactment of the MTP Act, Sections 312 to 316 of the Indian Penal Code (IPC) governed the abortion law in India and these have not been repealed. Therefore, an abortion which is not permitted by the MTP Act amounts to an offence under the IPC. Unlike *Roe v. Wade*, the MTP Act was not a result of an abortion rights movement but was the need of the hour. It was not a victory for the feminist movement in India as this law did not intend to recognize an Indian woman's reproductive freedom, rather, it was a part of the family planning programme which was initiated by the Indira Gandhi government to keep a check on the rampant population growth.[37]

Sripati Chandrasekhar, the Minister of Health and Family Planning in Indira Gandhi's government, justified the MTP Act by adopting the individual choice and freedom approach and argued, "the fundamental right to choose whether to bear children is a right of privacy which no government of any country should curtail."[38] Catharine A. Mackinnon argues that in a male dominated society, a woman's access to abortion will always be controlled by men.[39] Her observation seems to be in consonance with the ground reality of Indian society where women are not allowed to make a free choice. Therefore, Chandrasekhar's justification is tenuous. Moreover, the provisions of the MTP Act contradict this justification. Only a qualified right to have an abortion is provided to a woman under the Act. The Act allows an unwanted pregnancy to be terminated up to 20 weeks of the pregnancy only on certain grounds which include grave risk to the physical or mental health of the woman or where there is a reason to suspect substantial risk that the child would be born with a deformity or disease.[40] Therefore, a pregnant woman can exercise her right to abortion only on limited grounds and no absolute right is provided to her. Hence, Chandrasekhar's justification is flawed.

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34 *Ibid*, 153.

34 A.S. HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY (8th ed. 2010).

35 A committee under the chairmanship of Dr. Shantilal Shah was formed by the Government of India in 1960s and submitted its report on December 30, 1966.

36 Nivedita Menon, *Abortion and the Law: Questions for Feminism*, 6 CAN. J. WOMEN AND L. 103, 106 (1993).

37 SRIPATI CHANDRASEKHAR, ABORTION IN A CROWDED WORLD: THE PROBLEM OF ABORTION WITH SPECIAL REFERENCE TO INDIA 2 (1974).

38 Catherine A. Mackinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983).

39 Section 3, The Medical Termination of Pregnancy Act, 1971 (Act no. 34 of 1971).

Though the MTP Act limits the ability to terminate a pregnancy within twenty weeks of the same, a pregnancy can still be terminated beyond twenty weeks with the permission of the court in severe cases involving threat to the pregnant woman's life, health, etc. The Supreme Court has taken differing positions in deciding the petitions seeking permission for abortion beyond twenty weeks. In certain matters, petitions have been allowed[41] but they have been rejected on other occasions.[42] While the Draft Medical Termination of Pregnancy (Amendment) Bill, 2014 *inter alia*, proposes to increase the limit of abortion from 20 weeks to 24 weeks, it does not propose to change the nature of the right to have an abortion which continues to remain qualified.[43]

In *Puttaswamy*, Justice Chandrachud, who held that 'decisional autonomy' is an important component of the right to privacy, observed, "Decisional autonomy comprehends intimate personal choices such as those governing reproduction."[44] Justice Chelameswar observed that the 'intimate decision', which comes under the realm of privacy,[45] includes "a woman's freedom of choice whether to bear a child or abort her pregnancy."[46] Similarly, Justice Nariman observed that the right to privacy has been extended to include the right to abort a foetus[47] while also stating, "The privacy of choice, which protects an individual's autonomy over fundamental personal choices" is one of the aspects of the right to privacy[48] and the core value of a democratic nation.[49] Justice Kaul opined that privacy is "about respecting an individual and it is undesirable to ignore a person's wishes without a compelling reason to do so."[50]

When such opinions are analysed along with one of the core leitmotifs of the judgment which is bodily autonomy, it can be rightly concluded that the right to privacy includes the absolute right to have an abortion in the first two trimesters of pregnancy when the foetus is not viable[51] and cannot be restricted to the circumstances mentioned in Section 3 of the MTP Act. Moreover, cases

40 *Mrs. X v. Union of India* (2017) 3 SCC 458; *Sarmishtha Chakrabortty v. Union of India* (2017) SCC On Line SC 897.

41 *Sheetal Shankar Salvi v. Union of India* (2018) 11 SCC 606.

42 The Medical Termination of Pregnancy Amendment Bill, PRS (2014), http://www.prsindia.org/uploads/media/draft/Draft%20Medical%20Termination%20of%20Pregnancy%20Amendment%20Bill%202014.pdf. (visited March 27, 2018).

43 AIR 2017 SC 4161 ¶141 (Chandrachud J.).

44 *Ibid*, ¶ 36 (Chelameswar J.).

45 *Id.*, ¶ 38.

46 *Id.*, ¶ 46 (Nariman J.).

47 *Id.*, ¶ 81.

48 *Id.*, ¶ 82.

49 *Id.*, ¶ 10 (Kaul J.).

50 This portion of the article will not analyze the relationship between the right to privacy and the right to have abortion in the third trimester of pregnancy. Foetus generally becomes viable during the third trimester and becomes entitled to right to life under Article 21 of the Constitution of India. The extension of the right to life to a viable foetus is highly debatable but a generally accepted rule in the present day. Therefore, a pregnant woman's right to have abortion in the third trimester cannot be understood without understanding the balance between her right and a viable foetus' right to life. This is a different debate which does not fall within the scope of the present article. Hence, the impact of the *Puttaswamy* judgment on the right to have abortion in the first two trimesters of pregnancy is analysed.

including *Roe v. Wade*[52] and *Planned Parenthood v. Casey*,[53] which have held that the right to privacy includes the right to abort, have been referred to throughout the judgment and no judge has disagreed with the principle laid down. Though it is highly unlikely that the cabinet will incorporate this obiter into the Draft Medical Termination of Pregnancy (Amendment) Bill, it will hopefully come to fruition sooner or later and shall prove to be another milestone in the women's rights movement in India.

Surrogacy

Surrogacy is a reproductive practice in which one woman bears child for another and after birth, the woman who has given birth to the child waives all the parental claims to that child.[54] There are two kinds of surrogacy i.e. traditional and gestational. In traditional surrogacy, the surrogate mother is inseminated with the semen of either the commissioning father or a donor. In gestational surrogacy, the egg of the commissioning mother or a donor is cultured with the sperm of the commissioning father or a donor through *in vitro* fertilization and the embryo is transferred into the surrogate mother's uterus. Hence, the surrogate is not genetically related to the child, unlike the case in traditional surrogacy.[55] Surrogacy can be further divided into commercial and altruistic surrogacy. In the former category, the surrogate mother provides services in exchange for money or other consideration while in the latter, the surrogate lends her womb without seeking any consideration.[56] There are various moral controversies and ethical issues surrounding surrogacy. It is believed that the womb of a mother is sacrosanct and that such sanctity shall not be destroyed by opting for surrogacy or other assisted reproductive technologies.[57]

In the Indian context, the recent debate involving ethics, privacy and exploitation of surrogate mothers is with regard to the Surrogacy (Regulation) Bill, 2016.[58] This bill proposes to ban commercial surrogacy and restrict altruistic surrogacy to legally wedded infertile couples while imposing age restrictions for the same. Hence, it bars single parents, unmarried couples, etc. from commissioning surrogacy. It is argued that this Bill violates, *inter alia*, the right to privacy. In *B. K. Parthasarthi v. Government of Andhra Pradesh*,[59] the Andhra Pradesh High Court held that the right of reproductive autonomy is a facet of the right to privacy while referring to the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*,[60] which held that the right to

51 410 US 113 [1973].
52 505 US 833 [1992].
53 Mark E. Lones, *A Christian Ethical Perspective on Surrogacy*, 2 BIOETHICS IN FAITH AND PRACTICE 23 (2016).
54 *Ibid.*
55 *Id.*, 24.
56 *Id.*
57 Surrogacy (Regulation) Bill, PRS (2016), http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20%28Regulation%29%20Bill,%202016.pdf. (visited March 25, 2018).
58 AIR 2000 AP 156.
59 316 US 535 [1942].

reproduce is "one of the basic civil rights of man." On the contrary, it was concluded by the New Jersey Supreme Court, in the *Baby M case*,[61] that a surrogacy contract is against the public policy.

Propositions of the Surrogacy (Regulation) Bill, 2016 must be tested against the touchstone of the *Puttaswamy* judgment. Freedom to decide matters concerning one's personal sphere either in the form of 'choice' or 'intimate decision' or 'decisional autonomy' has been recognized as an important facet of the right to privacy in all the opinions of the judgment. Justice Chandrachud observed, "Decisional autonomy comprehends intimate personal choices such as those governing reproduction."[62] Justice Chelameswar stated that the 'intimate decision', which is autonomy with respect to the personal life choices, comes under the realm of privacy.[63] It also includes "a woman's freedom of choice… to bear a child".[64] Justice Nariman observed that autonomy over personal choices is an essential attribute of the right to privacy.[65] Justice Bobde and Justice Kaul also highlighted the importance of 'choice' in matters concerning the daily lives of people, in their respective opinions.

After analysing the whole judgment, it can be concluded that the freedom over personal affairs, including reproduction and other bodily matters, is a fundamental right implicit in the right to privacy. This freedom encompasses the freedom to bear someone else's child. Therefore, any statute curbing such a right will be a direct infringement of the right to privacy of a prospective surrogate mother. As the right to free speech and expression includes the right to remain silent,[66] it can be argued that the right to bodily autonomy includes the right to not use one's body for reproduction and simultaneously be a parent either through adoption or surrogacy. Therefore, the right to privacy of a potential commissioning parent is also violated as the infertile couples are the only stakeholders who have recourse to surrogacy, according to the Bill. It can be concluded that the Surrogacy (Regulation) Bill 2016, when enacted, will be unconstitutional as it transgresses the principles enshrined in the *Puttaswamy* judgment.

Euthanasia, Suicide and Living Wills

The Oxford English Dictionary defines euthanasia as "the painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma."[67] The word 'euthanasia' is derived from the Greek words 'eu' and 'thanatos' meaning 'good death' or 'easy death'. It is also referred to as mercy killing. Euthanasia can be classified into two categories. The first is active euthanasia where death is caused by the administration of a lethal injection or

60 *In re Baby* M537 A.2d 1227.
61 AIR 2017 SC 4161 ¶141 (Chandrachud J.).
62 *Ibid*, ¶ 36 (Chelameswar J.).
63 *Id.*, ¶ 38.
64 *Id.*, ¶ 81 (Nariman J.).
65 *Bijoe Emmanuel v. State of Kerala* AIR 1987 SC 748.
66 HORNBY, *supra* note 34.

drugs.[68] It also includes physician-assisted suicide where the drugs are supplied by the physician but are administered by the patient themselves. The second category is passive euthanasia where the medical practitioner does not provide life-sustaining treatment or removes a patient from it.[69] Passive euthanasia can be further classified into voluntary and non-voluntary passive euthanasia. In the former, consent is obtained from the patient before the withdrawal or withholding of treatment.[70] In the latter, the patient is unable to give consent or form an informed decision by reason of being in a coma or persistent vegetative state (PVS).[71] In India, active euthanasia is illegal and considered a crime under Section 302 or Section 304 of the IPC. Physician assisted suicide is criminalized under Section 306 of the IPC.

The Oxford English Dictionary defines suicide as "the action of killing oneself intentionally."[72] The attempt to suicide is an offence under Section 309 of the IPC. The Bombay High Court has distinguished between euthanasia and suicide. According to the Court, suicide is an act of termination of one's own life without assistance from others.[73] But euthanasia includes the intervention of another human agency to terminate one's life.[74] Despite there being a difference, the claim to decriminalise both euthanasia and the attempt to commit suicide has been founded on the right to die. The Constitution of India does not guarantee such a right explicitly. The issue of whether the right to die is implicit in Article 21 of the Constitution came for consideration for the first time before the Bombay High Court in *State of Maharashtra v. M.S. Dubal*.[75] The Court answered in the affirmative and struck down Section 309 of the IPC. This decision was upheld by the Supreme Court in *P. Rathinam v. Union of India*[76] observing that if the freedom of speech and expression, association and movement includes the freedom to remain silent, not join any association or move anywhere, similarly, the right to live includes the right not to live, i.e., the right to die or to terminate one's life.

The decision in *Rathinam* was overruled by the Constitution bench of the Supreme Court in *Gian Kaur v. State of Punjab*[77] holding that the right to life under Article 21 of the Constitution of India does not include the right to die. The Court reasoned that life is sacrosanct and that the right to life is a natural right and cannot vindicate the act of suicide which is an unnatural termination or extinction of life. The Court also criticized the analogy provided in *Rathinam* opining that there is a difference between the freedoms mentioned in Article 19 and the right to life in Article 21. While freedoms are positive in nature, the inclusion of negative aspects which demand no positive overt act is benign. But

67 Aruna Shanbaug v. Union of India, (2011) 4 SCC. 454 ¶ 38 (Katju J.).
68 *Ibid.*
69 *Id.*, ¶ 40.
70 *Id.*
71 HORNBY, *supra* note 34.
72 *Maruti Shripati Dubal v. State of Maharashtra* (1987) Crim LJ HC 743 (September 24, 1986).
73 *Naresh Marotrao Shakre v. Union of India* (1995) Crim LJ HC 96 (August 17, 1994).
74 AIR 1977 SC 411.
75 (1994) 3 SCC 394.
76 (1996) 2 SCC 648.

"when a man commits suicide he has to undertake certain positive overt act". However, the Court held that Article 21 includes the right to die with dignity in a restrictive sense, opining, that the case of a dying person who is terminally ill or in a permanent vegetative state does not fall under the category of a person extinguishing their life since they are only accelerating their natural death. The need to enact a law to protect this restricted right to die with dignity was highlighted by the Law Commission of India in their 196th report.[78] This legislative void was filled by the Supreme Court in *Aruna Shanbaug v. Union of India*[79] by sanctioning passive euthanasia or withdrawal of life support systems for patients who are terminally ill or in a permanent vegetative state. The Court laid down certain guidelines to regulate passive euthanasia which will continue to be law until the Parliament makes a law on the same. The Court also observed that Section 309 of the IPC must be omitted by the Parliament as a person who attempts suicide is in depression and needs help not punishment.[80]

The Medical Treatment of Terminally Ill patients (Protection of Patients and Medical Practitioners) Bill, 2016[81] was prepared by the Ministry of Health and Family Welfare in pursuance of 241st report by the Law Commission of India.[82] The Bill provides a framework for passive euthanasia. However, the Bill has faced widespread criticism because it refuses to give legal effect to living wills or advanced directives.[83] Oxford English Dictionary defines 'living will' as "a written statement detailing a person's desires regarding future medical treatment in circumstances in which they are no longer able to express informed consent, especially an advance directive";[84] 'advanced directive' is defined as "a living will which gives durable power of attorney to a surrogate decision-maker, remaining in effect during the incompetency of the person making it."[85] In other words, an advance directive or living will is a document executed by a person providing instructions to caregivers and doctors on what treatment must or must not be provided or what shall or shall not be done at the time when the person is unable to take decisions on their own health on account of illness or incapacity.[86]

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77 196th Report on *Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)* Law Commission of India (2006), http://lawcommissionofindia.nic.in/reports/rep196.pdf (visited March 26, 2018)

78 (2011) 4 SCC 454.

79 Section 115, The Mental Healthcare Act, 2017 (Act no. 10 of 2017) (It has decriminalized an attempt to suicide by persons suffering from severe stress. However, this decriminalization is based on the right to health and not the right to privacy or the right to die).

80 Medical Treatment of Terminally Ill patients (Protection of Patients and Medical Practitioners) Bill, PRS (2016), http://www.prsindia.org/uploads/media/draft/Draft%20Passive%20Euthanansia%20Bill.pdf (visited March 19, 2018).

81 241st Report on *Passive Euthanasia- A Relook* Law Commission of India (2012), http://lawcommissionofindia.nic.in/reports/report241.pdf (visited March 26, 2018).

82 Clause 9, The Medical Treatment of Terminally Ill patients (Protection of Patients and Medical Practitioners) Bill 2016.

83 HORNBY, *supra* note 34.

84 *Ibid.*

85 Emanuel LL et al., *Advance directives for medical care – a case for greater use*, NEW ENG. J. MED. 889 (1991).

Common Cause filed a writ petition in 2005 in the Supreme Court seeking the enactment of a law similar to the Patient Autonomy and Self-determination Act of the USA. The Patient Autonomy and Self-determination Act allows for the execution of a 'living will' in the form of an advance directive to refuse life-prolonging medical procedures when the testator is incapacitated. In 2014, the matter was referred to a Constitution bench which had to resolve the inconsistency between the judgment of a division bench in *Aruna Shanbaug*, which allowed passive euthanasia, and of a Constitution bench in *Gian Kaur*, which held that the right to life does not include the right to die.[87] Arguments for the matter were heard after the *Puttaswamy* judgment.[88]

In *Puttaswamy*, Justice Chelameswar adopted Bostwick's[89] idea of privacy consisting of three aspects: repose, sanctuary and intimate decision.[90] While elaborating on the intimate decision and the bodily autonomy, he stated, "[a]n individual's rights to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of the right of privacy."[91] One might argue that Justice Chelameswar's observation was restricted to passive euthanasia and did not advocate for the legalisation of advanced directives. However, in the next statement, he commented that the matter was *sub judice*. Passive euthanasia was already legalized by the *Shanbaug* case and the government had drafted a legislation for the same. The issue before the court in *Common Cause v. Union of India*[92] was restricted to living wills or advanced directives. Therefore, it may be inferred that Justice Chelameswar's observation that he envisages a case for living wills or advanced directives. Moreover, a common thread of decisional and bodily autonomy runs throughout the judgment.

The support for advanced directives is predicated on the freedom of personal choice and the right to bodily autonomy, which form the crux of the judgment. Therefore, *Puttaswamy* had a positive impact on *Common Cause v. Union of India* as the Court held that the right to live with dignity under Article 21 includes the right to have a dignified death and an individual has the right to execute a living will or an advanced directive. The Court, in all four opinions of the judgment, relied heavily on *Puttaswamy* to come to the said conclusion. Justice Misra[93] and Justice Chandrachud[94] adverted to *Puttaswamy* for the essential requirements of dignity and liberty for the actualisation of Article 21. Justice Sikri relied on *Puttaswamy* for highlighting the importance of providing autonomy and choice to an individual for guaranteeing the right to life and

86 *Common Cause v. Union of India* (2014) 5 SCC 338.
87 *SC Constitution Bench Hears Crucial Arguments on Euthanasia*, LIVE LAW (October 10, 2017), http://www.livelaw.in/SC-constitution-bench-hears-crucial-arguments-euthanasia (visited March 15, 2018)
88 Gary Bostwick, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).
89 AIR 2017 SC 4161 ¶ 36 (Chelameswar J.).
90 *Ibid*, ¶ 38.
91 AIR 2018 SC 1665.
92 AIR 2018 SC 1665, ¶ 152-153 (Misra J.).
93 *Ibid*, ¶ 83 (Chandrachud J.).

personal liberties.[95] Importantly, Justice Sikri[96] and Justice Bhushan[97] relied on the above-mentioned observation of Justice Chelameswar (in *Puttaswamy*) to further the case for living wills.

As the issue before the Court in *Puttaswamy* was restricted to the right to privacy, the Court did not explicitly comment on the right to die. It is unlikely that *Puttaswamy* would have a direct impact on the debate concerning active euthanasia since a case for decriminalising them cannot be made without there being a clear constitutional position on the right to die.[98] Nevertheless, the court has added a lot to the debate through *Common Cause*.

The Beef Ban

Worship of the cow and abstention from the consumption of beef, a tool manufactured by Brahmanism to establish its supremacy over Buddhism,[99] has been used by the State to force its people to refrain from eating what they like. However, such coercive State action has never passed muster with the Judiciary. In *Shaikh Zahid Mukhtar v. State of Maharashtra.*,[100] the Bombay High Court struck down Section 5D of Maharashtra Animal Preservation (Amendment) Act, 1995 which prohibited the possession of beef. In this case, Justice AS Oka observed that prohibiting a citizen from possessing or consuming beef is an infringement upon his right to privacy as consumption of food is a part of an individual's autonomy. The same principle was observed by the Allahabad High Court.[101] The Central Government notified the Prevention of Cruelty to Animals (Regulation of Livestock Market) Rules, 2017 on May 23, 2017. The Rules prohibited the sale of cows and buffaloes for slaughter at animal markets. These Rules were perceived as imposing an indirect beef ban[102] and were stayed by the Madras High Court[103] and subsequently by the Supreme Court which lead to the rules being withdrawn by the government.

The Supreme Court, in *Puttaswamy*, has included the right to eat food of one's own choice under the ambit of the right to privacy. Justice Chelameswar observed, "I do not think that anybody would like to be told by the State as to what they should eat" and said that in liberal democracies, the State does not have unqualified authority to intrude into such aspects of human life.[104] Justice

94 *Id*., ¶ 95-96 (Sikri J.).
95 *Id*.
96 *Id*., ¶ 78 (Bhushan J.).
97 The case for passive euthanasia and living wills is made without relying on the right to die. In passive euthanasia, an individual is accelerating her natural death and not terminating her life unnaturally. The support for living wills is based on personal autonomy and an individual is not directly terminating her life while issuing advanced directives.
98 B.R. AMBEDKAR, THE UNTOUCHABLES: WHO WERE THEY AND WHY THEY BECAME UNTOUCHABLES (1948).
99 AIR 2017 Bom 140.
100 *Saeed Ahmad v. State of U.P. Through Principal Secretary Urban Development Lucknow* (2017) SCC OnLine All 1245.
101 Gautam Bhatia, *Cow slaughter and the Constitution*, THE HINDU (June 1, 2017), http://www.thehindu.com/opinion/lead/cow-slaughter-and-the-constitution/article18683942.ece (visited March 13, 2018).
102 *S. Selvagomathy v. Union of India* (2017) SCC OnLine Mad 2350.
103 AIR 2017 SC 4161 ¶ 40 (Chelameswar J.).

Chandrachud referred to *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat*,[105] while stating that the right to privacy also covers food preferences.[106] In *Hinsa*, the two judge bench of the Supreme Court held that what one eats is a personal affair and it is included under the right to be let alone under Article 21 of the Constitution. Millions of Indians including Dalits, Muslims and Christians consume beef on a daily basis.[107] Any rules or legislation imposing a beef ban will be unconstitutional when tested against the touchstone of *Puttaswamy* in which the scope of the right to privacy, protected under Article 21 of the Constitution, is wide enough to include the right to consume the food of one's choice.

LGBTQ Rights vis-à-vis Section 377

Section 377 of the IPC, which was inserted by Lord Macaulay to make sure that the Indian society imbibed Victorian morality, had acted as an impediment in the fight for the LGBTQ rights and the freedom of expressing one's sexual orientation in India. *Puttaswamy* provided strong *obiter dicta* on this issue. In *Naz Foundation v. Government of NCT of Delhi*,[108] the Delhi High Court decriminalized consensual non-heterosexual and non-vaginal intercourse and declared Section 377 unconstitutional to that extent, as violative of Articles 14, 15 and 21 of the Constitution of India. However, in *Suresh Kumar Koushal v. Naz Foundation*,[109] a Division Bench of the Supreme Court set aside the judgment of the Delhi High Court stating "a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted… for committing offence under Section 377 IPC"[110] and that this could not be a ground for declaring Section 377 unconstitutional.

In *Puttaswamy*, the court criticized the *Suresh Kumar Koushal* judgment observing that the test of popular acceptance or mainstream belief is not a valid ground to disregard the rights of the minority.[111] Justice D.Y. Chandrachud observed, "Sexual orientation is an essential attribute of privacy"[112] and dealt extensively with the rights of the LGBTQ community. Justice Kaul agreed with the observation made by Justice Chandrachud while stating, "One's sexual orientation is undoubtedly an attribute of privacy."[113] Justice Nariman observed that the right to privacy has been extended to include the rights of same sex couples including the right to marry.[114] The Bench, therefore, included the freedom from interference in matters of sexual orientation within the right to privacy. These observations of the *Puttaswamy* Court had a significant impact

104 AIR 2008 SC 1892.
105 AIR 2017 SC 4161 ¶ 91 (Chandrachud J.).
106 Soutik Biswas, *Is India's ban on cattle slaughter 'food fascism'?*, BBC (June 2, 2017), http://www.bbc.com/news/world-asia-india-40116811 (visited March 8, 2018)
107 2010 Crim LJ HC 94 (July 2, 2009).
108 (2014) 1 SCC 1.
110 *Ibid*, ¶ 43.
109 AIR 2017 SC 4161 ¶ 126 (Chandrachud J.).
110 *Ibid.*
111 *Id.*, ¶ 80 (Kaul J.).
112 *Id.*, ¶ 46 (Nariman J.).

on *Navtej Singh Johar v. Union of India*,[115] which decided the constitutional validity of Section 377. In this case, the Hon'ble Supreme Court relied heavily on *Puttaswamy* for its strong criticism of *Suresh Kumar Koushal* and its conclusion that the right to privacy under Article 21 encompasses the freedom of sexual orientation. The Court observed that after the decision in *Puttaswamy*, "the challenge to the *vires* of Section 377 has been stronger than ever."[116] The Court further observed that *Puttaswamy* is an "important nail in the coffin of Section 377 insofar as it pertains to consensual sex between same-sex adults"[117] and because of *Puttaswamy*, "the basis on which *Koushal* upheld the validity of Section 377 stands eroded and even disapproved."[118] All the opinions in the judgment agreed with *Puttaswamy* and unanimously read down Section 377 to exclude from its scope, the consensual sexual acts of adults in private, and thereby overruled *Suresh Kumar Koushal*.

Conclusion

This article has endeavoured to analyse the impact of the *Puttaswamy* judgment on issues concerning the decisional autonomy of an individual. Even though Justice K.S. Puttaswamy (Retd.) failed in achieving what he intended i.e. to have the Supreme Court declare the entire Aadhaar scheme (now an Act) unconstitutional, the present landmark judgment has the capability of changing the dynamics of the society. Through *Puttuswamy*, the Supreme Court recognized that the loss of privacy leaves individuals vulnerable to social harm affecting not just their self-esteem but also the relationship they share with others and the State. Shashi Tharoor, a prominent politician and Member of the Parliament, rightly remarked "getting into the kitchen, into the bedroom, into people's personal life, it's not the business of the state."[119] The judgment will prove to be efficacious only if the State develops the political will to protect the constitutional values laid down by the Court and transpose the same to legislations mentioned throughout the present Article.

Puttaswamy sets a high threshold for the justification to be provided by the State in respect of any sort of infringement on individual freedom. Every present and future legislation or government scheme, posing a threat to personal autonomy or individual choice in any manner, will come under the scrutiny of the judgment, owing to new and expansive boundaries of the realm of individual autonomy set by the Court. Therefore, the calculus to be adopted by the State in future, while drafting any legislation or implementing any policy, has been modified significantly in favour of individual liberty.

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113 (2018) SCC OnLine SC 1350.
114 *Ibid*, ¶ 168 (Misra J.).
115 *Id.*, ¶ 58 (Nariman J.).
116 *Id.*, ¶ 55 (Chandrachud J.).
117 Priyanka Sharma, *Shashi Tharoor slams govt for dropping Nude, S Durga from IFFI*, THE INDIAN EXPRESS (November 17, 2017), https://indianexpress.com/article/india/shashi-throor-slams-govt-for-dropping-nude-s-durga-from-iffi-4941997/ (visited March 2, 2018)

CREDITORS, AT LAST!

AN ANALYSIS OF THE LEGAL POSITION OF HOMEBUYERS

Arpit Jain[*] *and Anisha Agarwal*[♠]

Abstract

The Insolvency and Bankruptcy Code, 2016, which came as a knight in shining armour to resolve and simplify the otherwise complicated and time-consuming process of insolvency, has failed in certain areas, creating chaos for a large class of people. One of the classes among them is the class of homebuyers. Initially, the homebuyers were excluded from the category of creditors but are now entitled to initiate proceedings against the builders under the new amendment to the Insolvency and Bankruptcy Code, 2016. This paper highlights and discusses the changed status of homebuyers as creditors and their newly acquired rights against builder companies. This paper also discusses the stand of the judiciary regarding the delivery of flats, especially its recent decision in the Jaypee case. Further the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has been brought in to bridge this gap, is also analysed. Lastly the paper looks at alternate legal remedies available to the homebuyers in case of delay or refusal in the delivery of flats.

Keywords: Homebuyers, Creditors, Insolvency and Bankruptcy Code, Committee of Creditors, Financial Debt

Introduction

The Insolvency and Bankruptcy Code, 2016[1] was seen as a remedy to cure the "infirmities plaguing the erstwhile insolvency and bankruptcy regime in India." The Code was seen as unifying the law on insolvency and bankruptcy and improving "an area which required radical reform… and for alleviating the distressed credit market".[2] The reform was expected to benefit stakeholders across a wide spectrum given the scheme of the Code[3]. Inspite of a robust law in place, there existed a void with respect to purchasers of residential property and their categorization under the Code. The objective of the Code is to

> consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and

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1 Hereinafter referred to as the "Code".

2 Singh and Associates, *India: Homebuyers Under The Insolvency and Bankruptcy Code, 2016 – A Visible Lacuna*, MONDAQ (September 21, 2017), http://www.mondaq.com/india/x/630424/Insolvency+Bankruptcy/Homebuyers+Under+The+Insolvency+Bankruptcy+Code+2016+A+Visible+Lacuna (visited April 4, 2018).

3 *Ibid.*

> individuals, in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an insolvency and bankruptcy fund, and matters connected therewith and incidental thereto.[4]

The presence of an effective legal framework for the timely resolution of insolvency and bankruptcy cases is considered instrumental in the development of credit markets and an entrepreneurial atmosphere. It also attracts foreign investment in the country and further improves the ease of doing business.[5] In the light of the underlying object behind the enactment of the Code, it would be prudent to speak about the kind of creditors who can, under the Code, initiate the insolvency resolution process against the corporate debtor. According to Sections 7, 9 and 10 of the Code, the financial creditor, the operational creditor and the corporate debtor may initiate the corporate insolvency resolution process (CIRP) against the corporate debtor in the form and manner as specified in the provisions. The different classes of creditors are classified into their respective heads in accordance with the nomenclature of the debt owed to them by the corporate debtor.

Judicial Attitude towards Homebuyers

Under Chapter II of the Code only the financial creditor, the operational creditor and the corporate debtor can initiate corporate insolvency resolution process. It remained unclear under the statute and also in the light of various judicial pronouncements whether the homebuyers would come under any of the above categories. The first case in line which dealt with the aforesaid question was *Nikhil Mehta v. AMR Infrastructures*[6] then due in the NCLT principal bench in New Delhi, where the applicants had approached the NCLT under Section 7 of the Code, claiming themselves to be the financial creditors. The corporate debtor undertook to pay a particular amount to the buyer each month, as Committed Returns/ Assured Returns from the date of execution of the Memorandum of Understanding (MoU) till the time of handing over the actual physical possession to the buyer. In the present case, after the execution of various MoUs, the Respondent started paying the monthly 'Assured Returns' to the applicants, although erratically. It was alleged that the cheques issued by the respondent were dishonoured for lack of sufficient funds. It was also alleged that many others like the applicants had been duped into investing their money in the projects belonging to the respondent. The Court held that the 'Assured Returns' associated with the delivery of possession had nothing to do with the requirement of sub-Section (8) of Section 5 as it was the time value of money

4 Institute of Company Secretaries of India, *Corporate Restructuring Corporate Restructuring Valuation And Insolvency* 315 (2017), https://www.icsi.edu/media/webmodules/PP-CRVI-2017%20-%20MARCH%207.pdf (visited April 2, 2018).

5 *Ibid.*

6 National Company Law Tribunal (Principal Bench, New Delhi) (January 13, 2017).

which was missing from the transaction at hand and as such the applicants did not satisfy the definition of 'financial creditors' within the meaning of the Code.

The applicants preferred an appeal against the aforesaid order to the NCLAT. The NCLAT after due perusal of the MoU, the annual returns and the subsequent Tax Deduction at Source (TDS) under Form 16A, arrived at the conclusion that the 'Corporate Debtor' treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for a commercial purpose treating at par with a 'loan' in their return. Thereby, the amount invested by appellants came within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of the Code. The instant pronouncement by the NCLAT was specifically applicable to cases where there was a 'Committed return plan' but did not deal with the larger issue of homebuyers as creditors. This meant that their position in absence of such a plan was condemned to oblivion.

The NCLT considered the question of whether the applicants could be treated as operational creditors within the meaning of Section 9 of the Code in another case.[7] The NCLT placed reliance on the decision rendered in *Col. Vinod Awasthy v. A.M.R. Infrastructures Ltd*.,[8] where it was held that given the timeline in the Code it is not possible to construe Section 9 read with Section 5(20) and (21) of the Code so widely to include within its scope even those cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company. It declined to admit the petition considering the fact that the applicant has a remedy available under the Consumer Protection Act, 1986 and the general law of the land. In an appeal preferred against the order, the NCLAT held that the appellants were merely allottees of the flats and thus did not come within the meaning of operational creditors within the meaning of the Code.

The NCLAT in the matter of *Rubina Chadha v. A.M.R. Infrastructures* Ltd.,[9] even though it shied away from deciding the question of law pertaining to the *locus standi* of the homebuyers, referred the matter back to the NCLT with the following finding:

> The appellants herein, whether they are 'Financial Creditors' or 'Operational Creditors' or 'Secured Creditor' or 'Unsecured Creditors', as claim to be creditors are now entitled to file their respective claims before the Interim Resolution Professional and their claims are to be considered in accordance with the provisions of the Code.

Apart from the aforementioned cases there have been landmark cases in which the Courts have taken an affirmative stand against the errant builders. The Courts have, without any hesitation, imposed hefty penalties on the unethical acts of the builders, either on them delaying the possession, or in certain cases, denying the delivery on the ground of insolvency.

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7 *Pawan Dubey v. J.B.K. Developers* Company Appeal (AT) (Insolvency) No. 40 of 2017.
8 National Company Law Tribunal (Principal Bench, New Delhi) (February 20, 2017).
9 National Company Law Appellate Tribunal (New Delhi) (July 21, 2017).

Unitech Builders case

In a dispute adjudicated in the State Consumer Dispute Redressal Commission where there was a delay in handing over the possession of flats to homebuyers, the National Consumer Dispute Redressal Commission (NCDRC) levied a penalty of Rs.3 crores on the developer Unitech for failing to hand over the possession of the flats to the owners.[10] In an appeal against this order, the Supreme Court held that the developer of a project cannot delay possession to its rightful buyer or owner beyond the period of time as specified in the contract and in case of delay in the same, the buyers have a right to get their money refunded.

The three-judge bench consisting of Justice Deepak Misra, Justice A.M. Khanwilkar and Justice Amitav Roy ordered a refund of the amount to the respondents who had invested their life earnings in the purchase of a flat and had been waiting for seven years for possession. Further, the Bench ordered the developer to refund the total amount of Rs.17 crores to thirty-nine flat buyers who were denied possession of flats within the specified time.

The Court also directed the payment of additional interest as compensation to the flat buyers for intentionally denying possession for seven years.

Jaypee Kalypso case

Another significant decision by the NCDRC came against the Jaypee Group's delay in handing over possession in *Developers Township Welfare Society v. Jaiprakash Associates Limited*.[11] In this case, the owners filed a case through their registered association 'Developers Township Property Owners Welfare Society' raising several issues. The time promised for possession was thirty-nine months but inspite of the lapse of four years, the possession had not been handed over. Further, the owners had already paid 90% of the consideration to the company, despite which there had been no action from its side. The developer argued that there had been changes in the super area of the property and moreover, a *force majeure* situation had occurred which was beyond the control of the developer. The NCDRC imposed a penalty at 12% per annum on the developers, which was much higher than the stipulated amount in the contract in cases of delay in handing over the possession. A further penalty of Rs.5,000/- was ordered to be paid by the developer on failure to give possession by July 21 of that year. The NCDRC also observed that the developer had no right to increase the super area without the consent of the homebuyers. Protecting the interests of the homebuyers, the NCDRC also observed that the developer could not charge additional consideration for provision of parking space.

10 Vimal Chander Joshi, *Consumer court orders 12% compensation for flat delivery delivery delay*, TIMES OF INDIA (June 9, 2015), https://timesofindia.indiatimes.com/city/gurgaon/Consumer-court-orders-12-compensation-for-flat-delivery-delay/articleshow/47593071.cms (visited March 21, 2018).

11 National Consumer Dispute Redressal Commission (New Delhi) (May 2, 2016).

Jaypee Insolvency case

Insolvency proceedings initiated by IDBI against the Jaypee group at the NCLT, Allahabad were stayed by the Supreme Court against the group in *Chitra Sharma v Union of India*[12] at the behest of the numerous homebuyers who pleaded that they would not have a say in the insolvency proceedings against Jaypee. Subsequent to an interlocutory application filed by IDBI the Apex Court vacated the stay order because the earlier order by the Court had resulted in the transfer of the management back to the debtor company instead of the former Interim Resolution Professional (IRP), thereby prejudicing the rights of the creditors and consumers of Jaypee Infra.

The Hon'ble Supreme Court adjudicated on the said application and vacated the stay order directing the continuance of liquidation proceedings against Jaypee Infra in compliance with the Code. The Apex Court directed the IRP to take over the management of Jaypee Infra again and appointed an *amicus curiae* to participate in the committee of creditors to represent the interests of the homebuyers. The Court had also directed the payment of a sum of Rs.2,000/- to the Court.[13] In further orders, the Court directed that the web portal which had been earlier created be kept alive. Reserve Bank of India also filed an interlocutory application before the Court seeking to move the NCLT against the developer under the provisions of the Code, however the Court deferred the matter to be dealt with at a later stage.[14]

The Court in *Chitra Sharma v. Union of India*[15] noted that an amount of Rs.1,300/- crores was required to be paid to the homebuyers but could not start the bankruptcy process for not being perceived as budgetary leasers. IDBI Bank as the initiator of the insolvency proceedings was seeking an amount of Rs.526.11 crores as repayment for its dues to the bank. The Court took note of the lack of a resolution plan on May 12, 2018 and also the changes which had been brought in the Code by way of the Ordinance. Keeping in mind the changes made to the Code, the Court ordered the revival of the CIRP and the reconstitution of the Committee of Creditors to include the home buyers.[16]

Home buyers have been rightly vindicated by their inclusion in the Code as 'financial creditors' and have now acquired the right to start the CIRP under Section 7 of the Code. The Committee of Creditors which is established by the Interim Resolution Professional under Section 21 of the Code is involved in every single money related loan of the corporate debtor. With the changes, home buyers will now be allowed to be incorporated into the Committee of Creditors. Right off the bat, this allows the distressed homebuyers to take a substantial interest in the insolvency process. They can favor or reject the Resolution Plan and now have a respected position in the Committee which they lacked before.

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12 (2017) SCC OnLine SC 1656.
13 *Ibid.*
14 (2018) SCC OnLine SC 982.
15 (2018) SCC OnLine SC 874.
16 *Ibid*, ¶ 52.

Efforts at Equality: amendments in the Code

A perusal of the Code prior to the amendment would not have yielded any provisions safeguarding the interest of creditors who did not lie under the categories of financial creditors and operational creditors during the Corporate Insolvency Resolution Process.

However, some amendments were made to the under the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations) and Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution for Corporate Persons) Regulations, 2017 (Fast Track CIRP Regulations), with effect from August 16, 2017.[17] These provided a Form F for the class of creditors who did not lie under the categories of financial creditors and operational creditors to file their respective claims with the Insolvency Resolution Professional (IRP) at the time of insolvency. However, these amendments were seen as merely facilitating the process of collection and collation by the IRP and not instrumental in bringing any substantial relief to the homebuyers.[18]

Another amendment to the regulation stated that "*a Resolution Plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor*." But these provisions were not that sufficient to safeguard the interest of the homebuyers as they do not fall in any categories of the creditors as mentioned under the Code. It has also been argued that there is no reasonable classification to set aside homebuyers from the categories of operational or financial creditors and there was no connection with the object of the Code.[19]

The ambiguity around the status of the homebuyers was put to rest on June 6, 2018 when the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 was promulgated to facilitate the insolvency resolution and streamline the provisions regarding the eligibility for insolvency resolution, with specific focus on safeguarding the interest of the homebuyers and Micro, Small and Medium Enterprises (MSMEs). This ordinance bestows on the homebuyers the status of financial creditors and the amount raised from them during a real estate project (allotment debt) will now be covered under the ambit of 'financial debt', in order to empower them to claim as financial creditors. This ordinance was subsequently passed as an amendment by the Parliament.

The amendment to the Code shows that it continues to develop gradually in order to retain its relevance in changing times. Further, the ordinance allows necessary changes and clarifies the process of insolvency resolution. The term

17 Manswi Agarwal and Aayush Mitruka, *The Curious Case of Homebuyers under the Insolvency and Bankruptcy Code, 2016*, INDIACORPLAW (October 14, 2017), https://indiacorplaw.in/2017/10/curious-case-homebuyers-insolvency-bankruptcy-code-2016.html#comments (visited March 12, 2018).

18 *Ibid.*

19 *Id.*

repaid/repayment has been substituted with paid/payment in many provisions which changes the restricted meaning of 'repayment' to the broader meaning of 'payment' which includes taxes and cess amounts. As a victory for the homebuyers the definition of 'Financial Debt' under Section 5(8)(f) has been expanded to include money raised through the transactions of real estate projects. The amount is deemed to have the commercial effect of borrowing. The homebuyers will now be considered as 'financial creditors' and have adequate representation on the Committee of Creditors (CoC).

Alternate Legal Remedies

Civil Court

It is been held by Supreme Court that a home buyer has a legal right under the Indian Contract Act, 1872[20] for perpetual relief in a case where the industrialist or builder commits any fraud or breach in performance of his duty. There are many state laws such as the Maharashtra Ownership Flats Act, 1963 (MOFA) or the Development Control Rules under which a case can be initiated in the civil law court for a claim of damages by way of a refund of the said amount along with interest charged on it.

It has been stated by the Supreme Court in *Tata Engineering and Locomotive Company Ltd. v. The Director (Research) on behalf of Deepak Khanna*[21] that invitation of applications for allotment through advertisement in cases where the names of the sites or projects have not been decided, is a prejudicial practice on part of the builders. A consumer is also entitled to claim compensation if the contractor uses sub-standard quality material or product in construction of building or makes any false statement about the condition of structure of the project.

Consumer Protection Act, 1986

The Consumer Protection Act, 1986 (the Act) came into force in order to provide protection and safeguard the interest of consumers from the malpractices of service providers. Under the said Act a consumer is any person who hires any service through payment of any consideration.[22] The Act provides a remedy to the consumer when deficient services are provided by the service provider. When a particular piece of land is allotted or developed by any development authority in order to give benefit to the service taker, this practice comes under the ambit of services as provided by any builder or a contractor.

Whenever a situation arises where the possession of the property is not delivered in the agreed time period, a delay may cause denial of the services. In *Haryana Urban Development Authority v. Smt. Raj Dulhari*[23] it was held that any dispute or claims are known as deficiency in rendering of facilities or services of specific standards, grade or quality under the Consumer Protection

20 Section 73, The Indian Contract Act, 1872 (Act no. 9 of 1872) (The buyer can also ask for the specific performance of the contract).

21 Civil Appeal No. 2069 of 2006.

22 Section 2(1)(d), Consumer Protection Act, 1986 (Act no. 68 of 1986).

23 AIR 1998 P and H 283.

Act, 1986. Home buyers may be considered as 'consumers' as per the statutory definition and can avail a remedy under the Act. The Consumer Protection Act, 1986 acts as a shield in order to protect a home buyer, i.e., a consumer against the bad practices of the service provider, i.e., builders and developers. Any individual dissatisfied with the service rendered by the service provider for delays in providing the possession of the project can directly approach the consumer forum for a speedy resolution of the dispute.

The Act provides redressal of consumer disputes through a three tier mechanism. The lowest among this is the District Forum. The Forums are established in every District and have the power to adjudicate matters where the claim or compensation amount is below Rs.20,00,000/-. The second level is the State Commission of India which is present in every state. They have the power to adjudicate on matters of claim or compensation which are above the amount of Rs.20,00,000/- but do not exceed the amount of Rs.1,00,00,000/- (one crore). The apex level is The National Commission which has the power to adjudicate on matters where the pecuniary limit or amount of claim exceeds one crore. A complaint for claiming compensation can be filed in the forum against the builders as well as developers and the time period to file such a complaint is two years from the date of the dispute.

In the landmark judgment of NCDRC in *Emmar MGF Land Ltd. v. Gurdev Singh Badial*[24] it was held that not giving possession of property to the allottee gives rise to a claim for compensation for the delay. In *Jalandhar Improvement Trust v. Munish Dev Sharma*[25] the NCDRC held that in case the allottee wants to opt out from the project because of a delay in possession by the developer, he may opt out and the developer is obliged to return the amount paid by the buyer along with interest up to date of the final payment. Further the Commission also observed that a developer cannot decline to pay additional interest along with the base amount paid by the buyer and such a denial would lead to an unfair trade practice on the part of the developer.

Regulatory Forum

A homebuyer or an allottee can approach the authorities under Real Estate Regulatory Authority (RERA), in case of non-compliance of statutory obligation imposed upon the builder. An allottee can file a complaint under Section 31 of the Real Estate (Regulation and Development) Act, 2016 with the authority or the adjudicating officer. RERA being a recent legislation, the buyers can expect timely ownership as per the promises made by the developers. The mandate for the builder to get himself registered comes with certain advantages for the homebuyers such as timely delivery of units, furnishing of accurate project details, specification of the carpet area. All clearances are mandatory before beginning a project and each project should have a separate bank account.

24 National Consumer Disputes Redressal Commission (New Delhi) (July 3, 2015).
25 National Consumer Disputes Redressal Commission (New Delhi) (July 1, 2015).

Indian Penal Code

In case of non-compliance with the legislative requirements, an allottee can approach the sessions court. For instance, where builders or developers make false undertakings to the home buyers or purchasers and do not comply with the necessary requirements, the buyer is conferred with the power to file a criminal case in the competent court against the builders or developers along with a consumer complaint in the consumer forum. Cases can be filed under certain provisions of the Indian Penal Code, 1860, for example, cheating under Section 420, criminal breach of trust under Section 405 for not answering the complaint, or giving possession of the project with a poor quality of construction. The builder or developer can be notified by an issue of a statutory notice and if the builder or developer does not answer to the notice, then the parties have a right to approach the competent criminal court. The process for the same is that a police complaint is to be filed after the dispatch of such a notice and further a criminal complaint is to be filed before the magistrate highlighting the wrongs committed by the builder or the developer during the development of the building.

Competition Commission of India

Where the homebuyer or purchaser feels that the builder or developer is taking an undue advantage of his dominant position, the homebuyer can directly approach the Competition Commission of India (CCI) to file a suit against the builder or the developer. The CCI may investigate the anti-competitive actions of the developer and impose heavy penalties on anyone found guilty. So, a homebuyer has the option to approach the CCI when he feels that the developer has taken an undue advantage of his superior position and is levying additional ambiguous terms and conditions on the agreed contract.

In *Belaire Owner's Association v. DLF Limited*[26] the commission highlighted the fact that the real estate sector is the most unregulated sector of the nation. Accepting the contentions made by the appellant it was held that DLF Limited had abused its power by taking consideration for unapproved projects and further, by forcing buyers to invest in their project based on their good reputation in the market. DLF Limited took consideration from the interested homebuyers, and, invested the amount received into new projects without assuring the homebuyers of a possession date. After looking into the matter the Commission decided to impose a penalty on DLF Limited at the rate of 7% of the average turnover for last three financial years, which amounts to Rs.630 crores in light of Section 27 (b) of the Competition Act, 2002 .

Arbitration

The homebuyer could also opt for arbitration if there exists an arbitration clause in the 'Builder Buyer Agreement', under the Arbitration and Conciliation Act, 1996. The arbitration process is not only cost effective but also time saving since the rules of evidence is not applicable. The award of arbitration related to

26 Competition Commission of India, Case No. 19/2010.

the dispute can be expected within six months from the initial demand.[27] Unlike the court litigation the parties can save hefty amounts as it is not necessary to hire a lawyer for the process.

Conclusion

To have a home of one's own is a dream of every individual. An individual invests his entire life savings in purchasing a dream home, only to realize that the process is nothing less than painstaking. The intention of the legislature behind the Code to facilitate the insolvency proceedings was a great initiative, however, the implementation of the same did not turn out to be satisfactory. The exclusion of the homebuyers from the class of creditors had led to immense troubles for them. The legislature did come up with an amendment to curb the defect, after multiple cases of failure on behalf of the established builders, though the introduction of Form F is far from giving any relief to the homebuyers. The amendment recognizes the allotment debt as a commercial debt having the effect of borrowing, generalizing all allotment debt as financial debt. The homebuyers in order to claim under the Code will still need to justify that the allotment debt is "disbursed against the consideration for time value of money", to be categorized as a financial debt.

In case the homebuyer fails to make a case where the allotment debt provides for the time value of money or when there is no time lapse between deposit and final realization on investment, then in the above mentioned cases the allotment debt would be *ultra vires* the definition of financial debt, thereby dismissing their claims. The amendment fails to address the distresses faced by courts in protecting the homebuyers' right to participate in CoC meetings in a meaningful way. While the deeming provision may create the impression that any and all homebuyers have a say in the insolvency resolution process, this ideal is far from reality unless the homebuyers' status is determined with absolute certainty. However, the amendment is a step towards improving the status of homebuyers as creditors who in their own right can initiate insolvency proceedings against the debtor. Comparatively this is a much better position for the homebuyers who were earlier excluded from the entire process itself. Whether the amendment goes all the way in fulfilling its objective remains to be seen.

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27 Surbhi Gupta, *Guide to Filing a Legal Case Against Defaulting Real Estate Developer*, PROPTIGER (April 18, 2017), https://www.proptiger.com/guide/post/legal-remedies-for-home-buyers-against-defaulting-developers (visited March 16, 2018).

AN ANALYSIS OF MATERNITY BENEFIT (AMENDMENT) ACT, 2017 AND THE EXPLORATION OF PATERNITY LEAVE

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Abstract

This is an era of justice and equality where gender justice is one of the most contested topics. In this atmosphere, the issue of maternity benefit has also gained momentum. The Maternity Benefit Act, 1961 is the central legislation that governs the maternity benefit leave and pregnancy-related issues. But due to a realization that has dawned upon the masses, it is now felt that the issue of maternity leave should be handled prudently, given the immense contribution women can make to the country's development process. For this purpose, The Maternity Benefit (Amendment) Bill, 2016 was introduced and passed in 2017. The much-needed change that the progressive Amendment Act proposed is to increase the maternity benefit leave to twenty-six weeks, from the existing twelve weeks. But there are several lacunae in the Act that need to be addressed. This paper addresses these lacunae of the amendment. This paper also elucidates on the concept of paternal leave. Discussing its origin, development and effects, the paper shares the author's view on this concept. Lastly, it argues that the greatest challenge in rendering justice to women lies in overcoming the flaws in the law and making men feel more responsible towards their parental obligations.

Key Words: Maternity Benefit, Maternity Leave, Paternity Leave, Organized Sector, Equality

Introduction

> The respect and protection of woman and of maternity should be raised to the position of an inalienable social duty and should become one of the principles of human morality.
>
> *-Maria Montessori*[1]

In the current era of globalization, characterized by modernization, we find a plethora of literature containing thought-provoking articles covering everyday problems. One would find a person at every other corner talking about the existing problems of cyber-crimes, environmental issues, privacy, poverty and most significantly, gender justice. When we talk about gender justice, we usually talk about issues such as the atrocities committed against women, their

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1 MARIA MONTESSORI, PEDAGOGICAL ANTHROPOLOGY 357 (1913).

plight, marital issues, conditions of rural women and conclude it with the final solution of educating them, so that they can be employed and become self-reliant. But in doing so, we leave behind a very sensitive issue untouched, that is, maternity benefit. Gone are the days when women used to sit at home, taking care of the household responsibilities and waiting on men, who in most cases worked as the sole breadwinners. Nowadays, with the increased participation of women in the workforce, we need to probe into the issue of maternity leave in order to ensure that their contribution is not undermined. In this article, the author covers the issue of maternity benefit and the present legislation governing it, along with the other recent efforts made by the government in solving the issue. As per the survey report 'Second Innings' by CII's Indian Women's Network, 37% of women opt out of their jobs due to reasons like childcare issues maternity, spouse relocation, and organizational politics.[2] Therefore, the problem of retaining the women in the workforce also needs to be addressed accurately.

Even if women are well educated and employed, and belonging to a well-to-do family, at the time of pregnancy their biological needs demand rest. This becomes a trying time for women in India because of the inadequate implementation of the laws governing their rights. Though there are companies like Flipkart, Godrej that already give maternity leave more than what is prescribed by the law, very few women are benefitted by it. Therefore, a better remedy was definitely required. On realizing the need for a proper mechanism of maternity benefit leave, efforts were made by the government to revisit the law, i.e., the Maternity Benefit Act, 1961 in order to fulfill the existing demands, by passing the Maternity Benefit (Amendment) Act, 2017. In order to address the concept of maternity benefit, we must first understand the existing framework.

Understanding the Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961,[3] which came into force from 12th December 1961 is an Act aimed at regulating the employment of women in certain establishments during the time of their maternity, along with a provision for maternity benefit and other related benefits.

In common parlance, the term 'maternity benefit' is used interchangeably with maternity leave. Maternity leave refers to the paid leave which is given to a woman for a period of time, before and after her pregnancy, when she stops working to take care of her child or herself. This leave can be either before or after her pregnancy and the amount payable to her by the employer is at the rate

2 *Second Innings - Barriers Faced by Indian Women on Re-Entering the Corporate Workforce*, INDIAN WOMAN NETWORK (March 2015), http://www.openspaces.in/Knowledge_center/Open_Forum/IWN_Report.pdf (visited March 12, 2018).

3 The Maternity Benefit Act, 1961 (Act no. 53 of 1961).

of the average daily wage for the period of her actual absence. The rationale behind the Act was to safeguard the interest of women as many cases of breach of contracts were reported due to pregnancy. One of its objectives is also to protect the dignity of motherhood by providing financial and mental support to her, so that she can be healthy and thus provide a healthy environment to her child. The Act provided maternity benefit for a maximum period of 12 weeks, out of which only 6 weeks or less can be taken before her expected delivery.

However, before the 2017 amendment, the condition of women in the private sector was way behind those in the government sector. Women employed in government jobs used to get a four-and-a-half months' maternity benefit, which was increased to six months leave as per the Central Civil Service (Leave) Rules 1972.[4] Along with this, women employees were allowed to take child care leave of up to two years in fragments, at any point till their child turned eighteen.[5] However, there were not many women who had benefitted from the same. In 2009, the share of the total Central Government female employment stood at 10%. A total of 20.4% women were employed in the organized sector in 2010 with 17.9% working in the public sector and 24.5% in the private sector.[6] These statistics clearly reveal the true state of maternity leave laws in India.

Applicability of the Act

The provisions of the Act apply to-

i. Every establishment being a factory, mine or plantation including any such establishment belonging to Government and to every establishment requiring physical labour, skills or performances, and

ii. Shops or establishments where more than 10 people are employed or were employed on any day in the preceding twelve months.[7]

Also, the state government, with the approval of the central government, after giving a notice of at least two months, may decide that the provisions of the Act may apply to any other establishment.

However, those employees/establishments which are covered under Employees' State Insurance Act, 1948[8] (hereinafter referred as the 'ESI Act'), fall outside the ambit of this Act. Women employed in a factory/establishment,

4 Central Civil Service (Leave) Rules 1972, Rule 32(2)(b).
5 *Ibid*, Section 43C.
6 *Women and Men in India*, MINISTRY OF STAT. AND PROGRAM IMPLEMENTATION (2012), http://mospi.nic.in/Mospi_New/upload/women_men_2012_31oct12.pdf (visited April 11, 2018).
7 Section 2(1), The Maternity Benefit Act, 1961 (Act no.53 of 1961).
8 Employees' State Insurance Act, 1948 (Act no. 34 of 1948).

governed by the ESI Act, stand disqualified from claiming maternity benefit if they earn more than Rs.15,000/- (or the amount so specified under Section 2(9) of the ESI Act).[9] Any such female employees can claim maternity benefit under the 1961 Act. Also, an insured woman should have contributed/contribution payable for not less than seventy days in the last two consecutive contribution periods i.e. one year.

Maternity Benefit: understanding the technicalities involved

Every woman employee who has actually worked in the establishment for a period of at least eighty days during the twelve months directly preceding the date of her expected delivery is entitled to receive maternity benefit. But the qualifying period of eighty days does not apply to a woman who has immigrated to the State of Assam and was pregnant at the time of immigration.

This payment of maternity benefit is at the rate of the average daily wage for the period of her actual absence, i.e., the day of delivery and any period after and before, for which she absents herself on the pretext of maternity leave.[10] A female employee is required to give her employer notice in writing asking for the maternity leave and benefits with the specified time period of that leave (not being more than six weeks before the date of expected delivery). She can even nominate a person to whom it is to be paid. Such notice may be given as soon as possible after the delivery, if not given before.

One can claim the corresponding wages either before delivery, i.e., during six weeks leave or after the delivery, on giving proof of delivery. Also, the failure to give such notice shall not disentitle a woman to maternity benefit or any other amount under the Act if she is otherwise entitled to such benefit or amount.[11]

No woman should work in any establishment during the said period of six weeks. Even the employers are not allowed to knowingly employ a woman during the period of six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy. During the period of one month preceding the period of six weeks before the date of her expected delivery, the employer cannot make a pregnant woman employee do arduous work involving long hours of standing or any work which is likely to affect her pregnancy, health or cause a miscarriage.[12]

Every woman entitled to a maternity benefit is also provided a medical bonus of Rs.3,500/- if no pre-natal confinement and post-natal care are provided

9 Section 5B, The Maternity Benefit Act, 1961(Act no. 53 of 1961).
10 *Ibid*, Section 5.
11 *Id.*, Section 6.
12 *Id.*, Section 4.

by the employer free of charge.[13] This bonus can be increased to a maximum limit of Rs.20,000/-.[14] The Central Government is authorized to increase the basic amount every three years. Initially, this bonus was Rs.1,000/- but was then increased to Rs.2,500/- in 2008, which has been further raised to Rs.3,500/- in 2011.

An employer cannot discharge a pregnant woman or terminate her service while she is expecting or is on maternity leave, and doing this is unlawful. If a pregnant woman absents herself from work in accordance with the provisions of this Act, her employer cannot discharge her, nor can he give any notice in that regard.[15]

Other Benefits

Along with the maternity leave, there are some other benefits attached to it:

i. Leave for miscarriage, etc. - In the case of miscarriage or medical termination of pregnancy, a woman is entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of the same, provided a proof is produced.[16]

ii. Leave for tubectomy operation- In the case of a tubectomy operation, a woman is entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of operation, provided a proof is produced.[17]

iii. Leave for illness arising out of pregnancy, delivery, premature birth of a child, miscarriage, medical termination of pregnancy or tubectomy operation- A woman suffering from illness arising out of these shall be entitled to leave with wages at the rate of maternity benefit, for an additional period of maximum one month.[18]

iv. Nursing breaks - Every woman who, after the delivery a child, returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of prescribed duration for nursing the child until the child attains the age of fifteen months.[19]

13 *Id.*, Section 8(1).
14 *Id.*, Section 8(2).
15 *Id.*, Section 12.
16 *Id.*, Section 9.
17 *Id.*, Section 9A.
18 *Id.*, Section 10.
19 *Id.*, Section 11.

Penalty for contravention of the Act by employer

The Act also provides for penalties for the breach of duties by employers. If the employer dismisses or discharges women or fails to pay maternity benefit as provided under the Act, the penalty is imprisonment upto one year and fine upto Rs.5,000/-, the minimum being 3 months and Rs.2,000/- respectively. Moreover, an employer may be held liable to pay as much as Rs.20,000/- for failing to provide free medical care to expectant employees.[20]

It is the duty of Chief Labour Commissioner (Central), who heads the Central Industrial Relations Machinery (CIRM) or Chief Labour Commissioner (Central) [CLC(C)] Organization to look for the proper implementation of the Act. It is a right of an employee to make a complaint to the inspector, appointed by the appropriate government for the purpose of this Act and claim the amount of maternity benefit if it is improperly withheld by the employer. All offences have to be tried by no court subordinate than the judicial magistrate first class.[21]

With growing demands and the changing structure of the society, the needs evolved further and gradually it was being felt that the Act might have become redundant with time. Therefore, after various protests by people, NGOs and on the recommendation of various commissions, a new Bill was drafted to cater these demands, which received the assent of the President on March 27, 2017.

The Maternity Benefit (Amendment) Act, 2017

The Minister of Labour and Employment, Shri Bandaru Dattatreya, introduced the Maternity Benefit (Amendment) Bill, 2016[22] in the Rajya Sabha on August 11, 2016, with the preamble reading that the Act had been brought *"...further to amend the Maternity Benefit Act, 1961"*. After due deliberation, the Rajya Sabha passed the bill on August 18, 2016, which received the assent of the President on March 27, 2017. The changes as proposed in the Act were recommended by the 44th Indian Labour Conference (ILC), 2012, which recommended an increase in the maternity benefit to twenty-four weeks from the current twelve weeks. The same view was reiterated in the 45th and the 46th sessions of ILC, which were held in 2013 and 2015 respectively. Even the Ministry of Women and Child Development supported the need to enhance it to eight months. According to the Global Employment Trends, the 2013 report of the International Labour Organization (ILO), India's labour force participation rate for women fell from just over thirty-seven percent in 2004-05 to twenty-nine percent in 2009-10. Out of the 131 countries with available data, India

20 *Id.*, Section 21.
21 *Id.*, Section 23.
22 The Maternity Benefit (Amendment) Bill, 2016 (Act no. 43 of 2016).

ranks 11th from the bottom in female labour force participation[23]. This data justifies the various legitimate demands by people, for improving the condition in India and this Amendment Act is a result of these demands. The Amendment Act has made some significant changes in the duration and applicability of maternity leave and other facilities.

Duration of Maternity Leave

The major accomplishment under this Act is the increased duration of maternity benefit. The Act mandates an increase from the current twelve weeks' benefit to twenty-six weeks. It also changes the six weeks' time, before which maternity benefit should not be availed, to eight weeks. But, the maternity benefit will continue to be twelve weeks in case of a woman who has two or more children and it cannot be availed before six weeks from the date of the expected delivery.

Maternity Leave for Adoptive and Commissioning Mothers

Keeping in mind the efforts other ministries are putting in with regard to adoption and surrogacy, this Act supports their efforts by including provisions for adopting mothers and commissioning mothers. A commissioning mother is defined as a biological mother who uses her egg to create an embryo, implanted in another woman.[24] The Act introduces a provision to grant twelve weeks of maternity leave to a commissioning mother and also to a woman who legally adopts a child below three months of age. This twelve-week period of maternity benefit will be calculated from the date the child is handed over to the adoptive or commissioning mother. This is a welcome change as the existing Act did not provide leave for commissioning or adopting mothers.

Option to Work from Home

The amendment also makes it easier for women to work from home. The Act introduces a provision which states that an employer may permit a woman to work from home, even after the period of maternity leave. This would apply if the nature of work assigned to the woman permits so for such duration, as mutually decided by the employer and women.

Crèche facilities

The Act also ponders the issue that many women have to leave their jobs for childcare. For this, the Act has introduced a special provision which mandates every establishment with fifty or more employees to provide crèche facilities

23 *Global Employment Trends 2013: Recovering from a second jobs dip*, INT'L LABOUR ORGANIZATION (2013), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_204762/lang--en/index.htm. (visited January 6, 2018).

24 Section 2, The Maternity Benefit (Amendment) Act, 2017 (Act no. 6 of 2017).

within a prescribed distance. Along with this, the employer shall allow the mother four visits to the crèche in a day. This will include her interval for rest allowed to her.[25]

Informing Women Employees of the Right to Maternity Leave

In order to assure that no beneficiary is left unaware, the Act introduces a provision which necessitates every establishment to intimate women at the time of their appointment, of the maternity benefits available to them. Such communication has to be in writing and electronically.

This Amendment Act is indeed a big victory for the mothers who had anxiously struggled to make it a reality. It relaxes the norms to a great extent which will help in including these mothers in the potential economic force. If one looks at the World Bank database, the labour force participation rate for women of fifteen-plus age was 28.6% in 2010, 26.9% in 2012 and 27% in 2014. This percentage has decreased from 35% in 1990. But a look at the statistics of our neighbouring countries reveals the disparity. For Nepal it is 79.9%, 64% in China, 35.1% in Sri Lanka and 24.8% in Pakistan, for the year 2014.[26] This shows that there still exist some problems with our approach. On giving a rational look, we will find that the new features of the Act are commendable, but not sufficient enough in the long run. Very soon, people would grasp the other incidental issues which it has brought with itself and again raise their voice to further amend it.

> Every time a woman leaves the workforce because she can't find or afford childcare, or she can't work out a flexible arrangement with her boss, or she has no paid maternity leave, her family's income falls down a notch. Simultaneously, national productivity numbers decline.
>
> - Madeleine M. Kunin.[27]

Lacunae in the New System

The various problems present in the Act, which need prompt resolution are-

Limited Application to Organized Sector

Since this law is applicable to the organized private sector, it is believed that the new law will benefit only a minuscule percentage of women. According to a

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25 Section 11 A(1), The Maternity Benefit Act, 1961, (Act no. 53 of 1961).

26 *World Development Indicators*, THE WORLD BANK, http://databank.worldbank.org/data/reports.aspx?source=2and series=SL.TLF.CACT.FE.ZS and country (visited August 9, 2018).

27 Madeleine M. Kunin, *Sheryl Sandberg Is Half Right*, HUFFINGTON POST (March 13, 2013), https://www.huffingtonpost.com/madeleine-m-kunin/sheryl-sandberg-is-half-r_b_2871382.html (visited April 13, 2018).

report by National Commission for Enterprises in Unorganized Sector, 2007 (commonly referred to as the Arjun Sengupta Committee Report), 96% of the women work in the unorganized sector.[28] In a country like India, where women have just made few steps in the organized sector, the lawmakers should not be so selective and ignore the larger group of women who are employed in the unorganized sector. Women in the unorganized sectors such as farmers, contractual workers, self-employed women have been left out from the ambit of this Act, and thus it has a very restricted applicability.

Limited to Only the First Two Children

According to the new provision, maximum period entitled to maternity benefits by women having two or more than two surviving children shall be twelve weeks.[29] This is a bit irrational for the mother as well as for the child. According to the World Health Organization (WHO), breastfeeding is one of the most effective ways to ensure child health and survival. It recommends that every child should be breastfed within an hour of birth and given only breast milk for their first six months of life[30]. This shows the extent of a mother's duty, which has to be same for any number of children she gives birth to. Even if a woman gives birth to her third or fourth child, she needs the same amount of care that she had required the first or second time if not more. But the law restricts it. It seems as if the provision has been made as a penalty for having more than two children. This is not only detrimental to the health of the mother, but also to the child who is deprived of the care that his elder siblings got and which he also rightly deserves. Dipa Sinha, a Right to Food campaigner said "Women who have more than two children do not necessarily choose to get pregnant. Many have no reproductive rights or have no access to contraception."[31] This is also because of the mind-set of a patriarchal society, which has haunted women for decades. Though the overall condition of women is improving, but there is a need to popularize the modern contraceptive methods also. As per a survey,[32] current use of family planning methods is limited to 53.5% of the population. Thus, by working more religiously on this problem, women can avert the various maternity problems that may arise in the future.

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28 *Report on Conditions of Work and Promotion of Livelihoods in the Unorganized Sectors*, NATIONAL COMM'N FOR ENTERPRISES IN THE UNORGANIZED SECTOR (2008), http://www.prsindia.org/uploads/media/Unorganised%20Sector/bill150_20071123150_Condition_of_workers_sep_2007.pdf (visited April 14, 2018).

29 Section 5, The Maternity Benefit Act, 1961(Act no. 53 of 1961).

30 Robert E. Black et al., *Maternal and child under nutrition and overweight in low-income and middle-income countries*, 382 THE LANCET 427 (2013).

31 Menaka Rao, *Maternity leave increases to 26 weeks – but only for a small section of Indian women*, SCROLL (August 13, 2016), http://scroll.in/pulse/813888/maternity-leave-increases-to-26-weeks-but-only-for-a-small-section-of-indian-women (visited April 14, 2018).

32 *National Family Health Survey-4, 2015-16*, MINISTRY OF HEALTH AND FAMILY WELFARE, http://rchiips.org/NFHS/pdf/NFHS4/India.pdf (visited April 15, 2018).

Lack of awareness

It is very difficult to defeat a vigilant citizen; welfare legislations cannot take away the right granted to an aware citizen. But what about those who do not have the slightest awareness of what the law has to offer them? Most of the women remain unaware of the rights that the Act confers on them. Even if they are aware of maternity benefit, they remain unaware of other benefits like medical bonus, work from home and leave for other operations. On observing these problems closely, the lawmakers have made a provision in the new law which makes it compulsory for an establishment to educate its employees about the benefits available to them under the Act.[33] But given the degree of effective implementation of such provisions, which is low for rights and remedies under the Act, nobody is going to question the employer about the fulfillment of this obligation.

Most of the women are unaware of the free check-up facilities meant for them and their child, free transport service or that they cannot be fired from their job on the pretext of pregnancy.[34] Many are also unaware of the existence of many government schemes like National Maternity Benefit Scheme, which was introduced in 2001 to provide nutrition support to pregnant BPL women through a one-time payment of Rs.500/- eight to twelve weeks prior to delivery.[35] In 2005, this scheme was merged with Janani Suraksha Yojana, launched under the National Rural Health Mission. There are other schemes also which run parallel to it like- Pradhan Mantri Surakshit Matritwa Yojana (PMSMY), which aims to provide free medical check-up and proper healthcare to those women who suffers from high blood pressure and hormonal disorder due to their pregnancy, Janani Shishu Suraksha Karyakram (JSSK), which entitles pregnant women to free drugs, diagnostics, delivery, free transport facilities and others. Also, Ministry of Women and Child Development, in accordance with the provisions of Section 4(b) of National Food Security Act, formulated a scheme under which Pregnant women and lactating mothers will also be entitled to receive maternity benefit of not less than Rs.6,000/-.[36]

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33 Section 11A (2), The Maternity Benefit Act, 1961(Act no. 53 of 1961).

34 *Women unaware of Maternity Benefit Act, says minister*, JAGRAN POST (July 3, 2013), http://post.jagran.com/women-unaware-of-maternity-benefit-act-says-minister-1372840114 (visited April 14, 2018).

35 *National maternity Benefit Scheme (NMBS)*, PLANNING COMM'N (2006), http://www.planningcommission.gov.in/reports/sereport/ser/maker/mak_cht5c.pdf (visited April 15, 2018).

36 *Pan-India expansion of Maternity Benefit Programme (MBP) to benefit pregnant and lactating mothers across the country*, IIFL (January 3, 2017), https://www.indiainfoline.com/article/capital-market-economy-reports/pan-india-expansion-of-maternity-benefit-programme-mbp-to-benefit-pregnant-and-lactating-mothers-across-the-country-117010300487_1.html (visited April 16, 2018).

No mention of Paternal Leave

It is the law of nature and the will of God that a woman has to be a mother. But it is not the sole responsibility of women to take care of 'their' children. The law that prevails makes it apparent that it is the duty of only the mother to be available for the child and that is why there is a concept of maternal leave, which fully eclipsed the concept of paternal leave. This glaring flaw is a blow to gender equality. At a time when family courts are emphasizing on the importance of the institution of marriage and the responsibilities of parents, we are stuck with a law that provides for just fifteen days of paternity leave in government jobs and remains tight-lipped for private sectors. There is an immediate need to raise this issue as it is the duty of the father too to look after his child as well as his wife. A father plays an important role in the healthy development of the child and at the same time shares the responsibilities with the mother. According to medicine practitioners, there is no reason why fathers should not play a significant role in childcare:

> Paternity leave allows the father to support his spouse at a critical time. Also, early bonding between fathers and infants ensures a healthier and a more sensitive father-child relationship. It also offers support to the new mother feeling overwhelmed by her new parental responsibilities.[37]

Paternity Leave: An Unexplored Area

Though the idea of paternity leave may appear alien to Indians, provisions for this have existed in developed countries since long. According to a 2014 International Labor Organization (ILO) report, seventy countries offer their male employees paid paternity leave to enable them to participate in bringing up their children.[38] The realization that granting leave to both parents boosts the chances of women resuming her job with greater peace of mind and better job prospects, has appealed to many countries to further enhance it.

Sweden was the first country to conceive paternity leave in its policies and amazed the world with its positive effects. Way ahead of India, in 1974, both parents were encouraged to take time off when a child was born. But due to low involvement by the parents, in 1995 government introduced a policy under which one-month subsidies were to be taken away from family if they did not

37 Neeta Lal, *India's New Maternity Benefits Act Criticized as Elitist*, IPS NEWS AGENCY (August 19, 2016), http://www.ipsnews.net/2016/08/indias-new-maternity-benefits-act-criticised-as-elitist/ (visited April 12, 2018).

38 Pallavi Jha, *All You Need to Know About Increased Maternity Leave*, THE TIMES OF INDIA (May 2, 2017), https://timesofindia.indiatimes.com/life-style/relationships/work/All-you-need-to-know-about-increased-maternity-leave/articleshow/50622146.cms (visited April 16, 2018).

avail of paternity leave. This period was stretched to two months in 2002.[39] As a result of this true citizen-welfare policy, cases of divorce and separation have also declined.

Most western countries are generous with the terms of leave. For instance, in Slovenia, a male employee is entitled to thirteen weeks leave with 80% pay, thirteen weeks leave in Sweden and ten weeks leave in Norway with 80% pay.[40] Canada gives its employees thirty-five weeks of leave with 55% pay.[41] On the other hand, there are still some countries which provide for a small period of paternity leave. These are Saudi Arabia (one day), Indonesia and Argentina (two days), Brazil (five days), Philippines (seven days) and UK, Denmark, Portugal (fourteen days),[42] while there are some countries like US and Germany which still do not provide for paid paternity leave.

According to the World Bank report titled *Women, Business and the Law* (2016), over eighty-six countries provide for paternity leave including Iceland, Finland and Sweden.[43] Among India's neighbours, Afghanistan, China, Hong Kong and Singapore mandate a few days of paternity leave.

It is not that our lawmakers are totally ignorant of this situation. We have laws in place which address the issue of paternity leave, but the awareness about such laws remains low. Section 43A[44] and Section 43AA[45] of the Central Civil Services (Leave) Rules, 1972 provide for the paternity leave for a male Central Government employee for a period of fifteen days to take care of his wife and child. But it can be availed only for the first two children and that too within six months from the date of delivery of a child or his adoption. This leave, if not availed, lapses after a period of six months. And for this paternity leave, the employee shall be paid leave salary equal to the pay last drawn immediately before proceeding on leave.

While these provisions are applicable to government employees only, the private sector still has discretion on deciding the paternity leave provisions and rules. The period of leave offered varies from company to company. On the one hand, we have companies like Cisco Systems, which offers a twelve weeks' paternity leave and on the other hand, companies like Infosys, which only offers

39 Aparna Chandra, *Father, you are eligible*, BANGALORE MIRROR (May 8, 2011), http://epaper.timesofindia.com/Repository/ml.asp?Ref=QkdNSVIvMjAxMS8wNS8wOCNBcjAwNjAwand Mode=HTML (visited April 13, 2018).

40 *The 8 countries with the best paternity leave policies in the world*, BUSINESS INSIDER INDIA (June 18, 2017), https://www.businessinsider.in/The-8-countries-with-the-best-paternity-leave-policies-in-the-world/Finland/slideshow/59206724.cms (visited April 17, 2018).

41 Yash Ajmani and Sanya Singh, *Paternal Leaves in India: Mainstreaming the Role of Father in Expecting Family*, 3 INT'L. J. SOC. LEGAL ANALYSIS AND RURAL DEV. 80 (2017).

42 Chandra, *supra* note 39.

43 SARAH IQBAL, WORLD BANK, WOMEN, BUSINESS AND THE LAW: GETTING TO EQUAL 16 (2016).

44 Inserted in 2002.

45 Inserted in 2009.

five days of leave.[46] But recently in 2016, many companies have increased the time period of paid paternal leave; five months in Twitter, two months in Levi Strauss and Co. and others.[47] There is a need for such companies, who out of generosity are offering a considerable period of leave for parents. Their support is important for future law-making in this regard.

Furthermore, according to National Sample Survey Organization's 68th round (2011-2012), the statistics for labour force participation rate for persons of age 15-59, according to the Current Daily Status (CDS) approach are eighty-one percent for rural males, twenty-seven percent for rural females, eighty percent for urban males and twenty percent for urban females.[48] Is it rational to think that 90% of the law related to child care leave talks about women, whose share is 24% in labour force participation and for the rest; we just have a provision for a fifteen-day leave?

Though this fifteen days time period is still not sufficient for proper care from the father, nonetheless its existence is proof that the government recognises the importance of paternity leave. However, this recognition has to be addressed more enthusiastically by enabling provisions, which govern the private sector as well. This will bring men at par with women in the child care which will also cater to the demands of a changing society.

Conclusion

In the present scenario, this amendment has braced the expectations of many mothers who look forward to a gender equal society. It is a great relief that the twelve weeks time has been increased to twenty-six weeks, which would make India stand third after Canada and Norway in the ranking of countries with the highest amount of maternity leave. Though India might be able to achieve the various standards laid down for the protection of pregnant women in the ILO's maternity protection conventions,[49] there is a lot to be achieved in mainstreaming the women workforce. According to a report by McKinsey Global Institute, women presently contribute only seventeen percent of India's Gross Domestic Product (GDP) and makeup just twenty-four percent of the workforce, compared with the forty percent globally and if it matches the progress toward gender parity of the fastest improving country, it could add

46 Ajmani and Singh, *supra* note 41, at 83.

47 Clare O'Connor, *These Companies All Boosted Paid Parental Leave in 2016*, FORBES (December 30, 2016), https://www.forbes.com/sites/clareoconnor/2016/12/30/these-companies-all-boosted-paid-parental-leave-in-2016/#56d08b35a3d6 (visited April 18 2018).

48 *Key Indicators of Employment and Unemployment in India*, NSS 68th Round, NATIONAL SAMPLE SURVEY OFFICE, MINISTRY OF STATE AND PROGRAM IMPLEMENTATION (June 2013), http://www.indiaenvironmentportal.org.in/files/file/key%20indicators%20of%20employment%20and%20unemployment%20India%202011-12.pdf (visited April 17, 2018).

49 The International Labour Organization (ILO) has adopted three maternity protection Conventions: in 1919, 1952, the most recent being in 2000, the Maternity Protection Convention (no. 183).

$700 billion to its GDP in 2025.[50] With the large extent of unutilized potential, we should realize the economic benefits that an increased participation from women can bring.

Furthermore, special initiatives by the states can help in eliminating these problems. The State of Tamil Nadu is a notable example. Recently, the late Chief Minister of the state, Ms. Jayalalithaa had announced that maternity leave would be increased to nine months from the existing six months and a Government Order had been issued to implement it.[51] The state also has a special scheme, launched in 1987 for BPL families- 'Dr. Muthulakshmi Reddy Maternity Benefit Scheme', named after the prominent women's rights activist, which initially provided for Rs.300/-, now provides Rs.12,000/- to every woman below the poverty line to help cover the expenses incurred during childbirth.[52] This kind of welfare initiatives should be promoted by the Central government and should be implemented in other states as well. But along with this, we must do justice to women by making appropriate provisions for paternity leave. Some say that paternity leave will be just a holiday for men, but those who preach humanity and understand the sacrosanct bonds between the family members can only state the true meaning!

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50 Noshir Kaka and Anu Madgavkar, *India's ascent: Five opportunities for growth and transformation*, MCKINSEY GLOBAL INSTITUTE (2016), http://www.mckinsey.com/global-themes/employment-and-growth/indias-ascent-five-opportunities-for-growth-and-transformation (visited April 17, 2018).

51 *Maternity Leave from 6 to 9 Months*, NEWS 18 (November 7, 2016), http://www.news18.com/news/politics/tamil-nadu-government-enhances-maternity-leave-from-6-to-9-months-1309307.html (visited April 18, 2018).

52 T. Ramakrishnan, *Modi's scheme for pregnant women has roots in TN*, THE HINDU (January 2, 2017), http://www.thehindu.com/news/national/tamil-nadu/Modi%E2%80%99s-scheme-for-pregnant-women-has-roots-in-TN/article16976844.ece (visited April 18, 2018).

CINEMA IN INDIA: A CRITICAL ANALYSIS OF GRANT OR REFUSAL OF CERTIFICATE

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Abstract

The Central Board of Film Certification (CBFC) is a statutory body which has been vested with wide powers. However, there have been instances where the body has exercised its powers quite arbitrarily, without considering the rights of movie-makers while approving, or restricting, or not granting the certificate for exhibition. It is perturbing that the members of the Board act as if they are the sole guardians of free speech, public morality and permissiveness in the society. When a movie is banned, it is not only the movie-maker who suffers due to the infringement of the fundamental right to freedom of expression, but even the viewers, who have the right to information. The fact that much content is in circulation today without any censorship on the internet, while the same content is being changed, cut, altered or erased before screening in a cinema hall, is contentious. Moreover, by banning a movie, direct impact falls on revenue which entails a film's wide reception by audience across the country. The reduction in the box-office collection affects the state fund as well. This paper analyses whether pre-censorship in case of movies is justified. It also analyses the dichotomous stance of censorship for the content available on the internet today, vis-à-vis movies. Further, the paper also suggests that it is time for the law relating to screening of movies to change according to the social setting.

Keywords: CBFC, Arbitrariness, Sole Guardians, Free Speech, Reasonable Restrictions

Introduction

Cinema came into India in the year 1896 when Auguste Lumiere and Louis Lumiere presented the first show at the Watson Hotel in Bombay. In India, Dadasaheb Phalke in 1913 produced the first film named 'Raja Harish Chandra.'[1] The Central Board had been in operation at that point of time, but had been under the supervision and control of police chiefs.[2] The regional censors had also been in effect from before independence. When India attained independence, regional censors were abolished and were succeeded by the

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1 Central Board of Film Certification, <https://www.cbfcindia.gov.in/main/> (visited January 6 2018).

2 Preetha Khadir, *Film Censorship: How does it work?* THE HINDU (February 4, 2013), https://www.thehindu.com/todays-paper/tp-in-school/film-censorship-how-does-itwork/article4376371.ece. (visited January 26, 2018).

Bombay Board of film censors.[3] Thereafter, the Cinematograph Act, 1952 (the Act)[4]came into force as the Central Board of Film Censors. Further, in 1983 the Cinematograph (Certification) Rules were revised and since then the Central Board of Film Certification (CBFC) has been autonomously regulating the exhibition of film in India.[5]

India is the largest film producing country in the world. Every year over 1,250 feature films in more than 20 languages are produced in India, and about 15 million people watch films every day.[6] This signifies the amount of revenue which would be collected through cinema.

Movies or the motion pictures have the ability to sway people's minds to an extent which can influence their way of life, perceptions, habits and even their thinking abilities. Movies have a massive impact and hold much significance in the viewers' eyes, as while watching those films, people not only watch but also 'live' those films. Moreover, through motion pictures, the producers, directors, and all others involved express their ideas and opinions, as they are potent tools of expression. Cinema has been widely accepted as a medium of expression through which the artist depicts the society, in the way he perceives, it to the public at large.

This paper describes the role and functioning of the Censor Board of Film Certification in India. It further analyses the validity of the ban on movies in Indian cinema in the light of the right to freedom of speech and expression and right to freedom of trade. It also highlights various controversies of motion pictures, referring the relevant judgments and legal provisions, and suggests some recommendations.

The author recommends that there should be a delicate, and a balanced approach between the freedom of expression and the imposition of reasonable restrictions. The author concludes with suggestions for regulation of the censor board through a legal mechanism for the betterment of the Indian society by minimising the deprivation of individuals' fundamental rights.

Cinema: a medium of expression

No individual should be deprived of his right to freedom of speech and expression because it is one of the most sacrosanct fundamental right enshrined in the Constitution of India under Article 19(1)(a).[7] However, this right is not an absolute right and has reasonable restrictions under Article 19(2).[8] Cinema as a medium of expression is a potent tool for depicting opinions, ideas and

3 *Ibid.*
4 Cinematograph Act, 1952 (Act no. 37 of 1952)
5 *Id.*
6 Central Board of Film Certification, https://www.cbfcindia.gov.in/main/certification.html (visited January 10, 2018).
7 CONST OF INDIA. article 19(1)(a).
8 *Ibid*, art. 19(2).

perceptions of society, or individuals, groups, special class, etc.[9] In the contemporary world, cinema serves as one of the most significant contrivances for publicity of ideas, thoughts, perceptions or reasoning. It is widely accepted that the cinema is a form of expression as under the ambit of Article 19(1)(a). Internationally, Article 19 of the Universal Declaration of Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1976 (ICCPR), and Article 10 of the European Convention of Human Rights, 1950 (ECHR) endorse this right.[10] However, unlike the USA, these rights in India are not absolute, and are subject to reasonable restrictions. The imposition of restrictions on the freedom of speech and expression must conform to three tests, which are: they should be under the ambit of law, the aim should be legitimate, and there has to be proportionate accomplishment of the aim. The aim includes the protection of rights and reputation, public order, morals and national security. In the context of India, the term 'reasonable' plays a crucial role in deciding what should be restricted from exhibition. The term reasonableness is very wide, having non-exhaustive and subjective aspects. The reasonableness of any act can be verified by the judiciary on the sole discretion of judges. In *Chintaman Rao v. State of Madhya Pradesh,*[11] it was proposed that there is a need to strike a balance between social control and the rights of the individuals. Whether the restrictions are reasonable is determined by grounds such as interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence[12].

The abovementioned restrictions are the same in the Act[13] as well, which regulates the certification of films. These restrictions are expressed by certain guidelines provided in the abovementioned Act. As far as the legislative power of the Union and State legislature over cinema is concerned, the regulatory power is vested in the Parliament under Entry 60 of the Union list under the Schedule VII. Thus, under Article 246(1) the Parliament has exclusive power to make a law regarding the subject-matter in the List I, provided that the respective states have no objection to it.[14] Regardless of all this, the states have limited jurisdiction over cinema in the regulation of motion pictures under Entry 33 of the List II which is further subject to the provisions of Entry 60 in the List I. Thus, it can be concluded that the power to make legislation regarding cinema is more or less vested with the Centre.[15]

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9 Subhradipta Sarkar, *Right to free Speech in a censored Democracy*, http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf (visited January 28, 2018).

10 Irum Saeed Abbasi and Laila Al-Sharqi, *Media Censorship: Freedom Versus Responsibility*, 21 ACADEMIC J. (August 31, 2015), https://academicjournals.org/journal/JLCR/article-full-text-pdf/DCFC77E54997 (visited January 20, 2018).

11 (1950) SCR 759.

12 P.M. BAKSHI, THE CONSTITUTION OF INDIA 1041- 43 (14th ed. 2017).

13 Section 5B (1), Cinematograph Act, 1952 (Act no. 37 of 1952).

14 DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 529 (22nd ed., 2015).

15 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 530 (7th ed., 2016).

CBFC: emergence, role and critique

In India, the censorship legislation was introduced in 1918 when the British supposed that cinema could serve their colonial interests unflinchingly. At that time there existed no established film industry but there existed a rule of censorship which was borrowed from the West, especially from the US.[16] After two years, around 1920, the Regional Censor Boards were constituted in respective territorial jurisdictions, and these were autonomous bodies. These Boards outlined certain guidelines regarding 'sensitive issues', 'objectionable subjects' and 'forbidden scenes'.[17]

By the mid-1920s, film industry turned into a burgeoning industry; a need to align films with censorship was felt. Subsequently, censorship was introduced and the decisions regarding it were kept beyond judicial scrutiny, i.e., they were non-justiciable. Even after independence, according to the people in power, the New Age Cinema needed purging since they thought it was deeply associated with harmful western influences.[18] Several meetings were held between the representatives of the film industry and the bureaucracy. They discussed the matter at hand and agreed that the moral and ethical standards were indeed a priority in the process of the exhibition of films. The industry also decided to renovate the existing structures and overhaul the philosophy of film censorship. But the bureaucrats largely ignored the demands of the industry. Subsequently, the Government of India appointed a film enquiry committee on August 29, 1949, under the chairmanship of a member of the Constituent Assembly, Shri S.K. Patil. The committee came to the conclusion as to what measures should be adopted to promote national culture, education, and a healthy environment and outlined further development through motion pictures.[19] The committee also showed confidence in regulating and controlling the industry. The autonomy of the regional censor boards was also abolished. However, these boards were brought under the unified command of Censor Board of Film Censors in 1951.

Thereafter, the bureaucrats felt a need to utilize motion pictures for development of the national culture. The centralization of film censorship was a disobedience to the principle of federalism guaranteed in the Constitution of India. The leaders thought that their broad political objectives like democracy, citizenship, and nationalism can be served through motion pictures. For this, they preferred formulating a uniform code of control by the bureaucrats that would be exercised by the Central Board of Film Censors. The Regional Censor Boards were constituted again, but with reduced power and were subordinate to Central Board of Film Censors. After some time, the film fraternity sought for

16 Someswar Bhowmik, *From Coercion to Power Relations: Film Censorship in Post-Colonial India*, 38 ECON. POL. WKLY. 3148 (2003), https://www.epw.in/journal/2003/30 (visited January18, 2018).

17 *Ibid.*

18 *Id.*

19 *Report of the film enquiry committee*, MEDIA CLASSIFICATION, https://www.mediaclassification.org/timeline-event/report-film-enquiry-committee-india (visited January 15, 2018).

further concessions and revocations in its regulation and control. The Act was a significant and important Act which repealed the 1918 Act.[20]

The Central Board of Film Certification (CBFC or Censor Board) is a statutory body regulated under the Ministry of Information and Broadcasting, Government of India. The Board was constituted to regulate the exhibition of films under the provisions of the Act. The Board comprises of 25 members and 60 advisory panel members as per Section 5 of Cinematograph Act appointed by Ministry of Information and Broadcasting which constitutes of actors, writers, scholars, composers, singers, politicians, and industrialists.[21] The Board works on various aspects, its main objectives are to spread national culture, ensure a healthy environment, to harmonise the societal differences, to modernise and educate the audience. The directives serve their purpose when the certification process becomes transparent, independent and responsible. The role of regional officers is also a part of the process of verification and grant of a certificate to the film. When the Board receives an application for granting certification to a film for public exhibition, the regional officer appoints an examining committee which when satisfied with the content of the movie and its impact on the society, grants the certification.[22] When the Board examines the film in the prescribed manner, it considers that whether the film is suitable for unrestricted public exhibition[23], if so, it shall grant to the person applying for certificate a "U" certificate[24], if the Board considers that the film seems to be under the parental guidance for children below twelve years of age, it shall grant to the person applying for certificate a "U/A" certificate[25], if the Board finds that the film is not suitable for unrestricted public exhibition but can be restricted to adults, it shall grant to the person applying for certificate an "A" certificate[26], or if the Board considers that the film is suitable for exhibition restricted to the special class of persons like doctors, scientists, lawyers, etc., it shall grant to the person applying for certificate a "S" certificate.[27]

According to Section 5B(1) of the Act which is in consonance with Article 19(2) of the Constitution, if the competent authority considers that the film or any part of it is against the interests of the sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality, defamation or contempt of court or likely to incite the commission of any offence, then the applicant is not granted certification for public exhibition.[28] After examination of a film, the Board either directs the carrying out of relevant modifications or permits a restricted or unrestricted exhibition of

20 Section 18, Cinematograph Act, 1952 (Act no. 37 of 1952).
21 Shyam Benegal Committee, MINISTRY OF INFORMATION AND BROADCASTING,http://pib.nic.in/newsite/PrintRelease.aspx?relid=142288 (visited January 25, 2018).
22 *Ibid*.
23 Section 5A, Cinematograph Act, 1952 (Act no. 37 of 1952).
24 *Ibid*, Section 5A(1)(a).
25 *Id*.
26 *Id*., Section 5A(1)(b).
27 *Id*.
28 *Id.*, Section 5B(1).

the film or as it thinks fit, refuses to grant certificate at all for public exhibition. Usually, if the Board considers a film to be unsuitable for the exhibition, it is not granted a certificate unless the applicant makes certain necessary changes or removes the scenes which the Board finds unacceptable for the society. In this way, the Board puts list of a 'suggested changes' which applicant must adhere to, otherwise, the certificate applied for is not granted. In the case where the applicant is not satisfied with the Board's list of suggested changes, he/she can apply to the Revising Committee.[29] The similar process would be followed for revision; the final word in this case rests upon the chairperson. Further, if the applicant is still not satisfied with the decision of the Revising Committee then the matter goes to the Appellate tribunal constituted by the Central government.[30] It is also specified in the Act that an applicant if is aggrieved by the order of Board, can go for an appeal.[31] If the dispute is still not resolved, the applicant can approach the court.

The decision of Central Board is not the final verdict; the final words rest upon the Central Government, even though the Board is an expert body for granting the certificate of the exhibition of the film. There have been some instances where the Board and the Central government both approve a film for exhibition but the State government or State-owned channels like Doordarshan refuse to screen the movie.[32] In such cases, the role of CBFC becomes quite confusing and poses a question: where does the importance of the Board's decision lie? The main shortcoming of the Board, under Cinematograph Act, is that if Board considers that a film is not suitable for public exhibition then it directs the person applying for a certificate to exercise necessary modifications in the film 'as it thinks necessary', before permitting the film for public exhibition.[33] This means that the Board is authorized by the Central government itself to act in an arbitrary manner. The judicial scrutiny of the film is nowhere directed by the Cinematograph Act and thus the Board is free to function in a manner suited to the officials. But as far as freedom of expression of the applicant under Article 19(1)(a) is concerned, there is a high chance of infringement of the fundamental right of the person applying for a grant of the certificate when the Board deems a film to be unsuited for exhibition in an aforesaid manner. Also, the advisory panel members and the core members are neither judicial bodies, nor do they apply judicial reasoning in the verification of films suitable for exhibition. Then how can they exercise the power vested in them in a manner similar to the judiciary? It is submitted that the same is *ultra vires* and proceeds in an unconstitutional manner. In addition to this, the Central government is vested with powers to guide the competent authority while granting of certificates and can direct in a manner as 'it may think fit.'[34] Even here, the arbitrary power vested with the Central government is evident. As far

29 Abbasi and Al-Sharqi, *supra* note 9.
30 Section 5D, Cinematograph Act, 1952 (Act no. 37 of 1952).
31 *Ibid*, Section 5C.
32 *Director General, Directorate General of Doordarshan v. Anand Patwardhan* (2006) 8 SCC 433.
33 Section 4(1)(iii), Cinematograph Act, 1952 (Act no. 37 of 1952).
34 *Ibid*, Section 5B(2).

as the constitution of the Appellate tribunal is concerned, the Central government can appoint the secretary or other employees for the functioning of Tribunal as 'it may think necessary' under the Act.[35] The arbitrary power of the Central Government can be seen in the appellate tribunal as well. On examining the entire process from the beginning of the examination of film, one can observe that first, CBFC acts arbitrarily while granting a certificate as it thinks fit, after which the revising committee is appointed by the Central government where absolute power is vested in the Centre, and ultimately the tribunal also retains the secretary or other employees where the sole discretion is with the Central government for performance as it deems fit. Hence, throughout the verification and examination process of any film received by CBFC, there is no judicial involvement for interpretation and the government appointed body itself acts as a judicial body, which is itself in contravention of the Constitution of India. It bars an individual's freedom of speech and expression.

Whether Censorship is Tenable

The legacy of the ban is quite interesting as well as confusing. The motion pictures which are shown on the large screen are very engrossing. The various scenes in any motion picture can impact the viewers to a great degree. This reason is cited while allowing pre-censorship in case of movies. No other medium of expression entails the subject of pre-censorship.[36] If the Censor Board finds that a film comprises of strong (bold or crude) language, obscenity, substance abuse, Kashmir issues, involves religious sentiments and various others sub-issues like riots, communal violence, serial killers, etc., it is understood that those films have the potential to disturb the harmony of the society which is in consonance with the restriction under Article 19(2) of the Constitution, and then CBFC refuses to grant a certificate and ultimately the film is banned.

If we analyse the controversies surrounding the ban of various movies in Indian cinema, there are many examples. 'Bandit Queen' (1994) was a movie by Shekhar Kapoor and it comprised of many scenes that include nudity and explicit sexual content. The Board banned this movie which was based on the life of Phoolan Devi, even though it bagged various awards worldwide. Subsequently, the Supreme Court in *Bobby Art International v. Om Pal Singh*[37] permitted some violent scenes and frontal nudity on the ground that it would serve a larger social purpose. 'War and Peace' (2002) was a documentary created by Anand Patwardhan based on nuclear testing and it included a few scenes of communal violence. The board suggested modifications to it with twenty-one cuts. Anand Patwardhan objected to these cuts, stating that it would be unreasonable and if those cuts were included, his freedom of expression would be curtailed. Subsequently, when the matter went to the Supreme Court in *Director General, Directorate General of Doordarshan v. Anand*

35 *Id.*, Section 5D(7).

36 Someswar Bhownik, *Politics of Film Censorship: Limits of Tolerance*, 37 ECON. POL. WKLY. 3574 (2002), https://www.epw.in/journal/2002/35 (visited January 14, 2018).

37 (1996) 4 SCC 1.

Patwardhan,[38] the Court permitted the release of the documentary in its original uncut state. 'Padmaavat' (2018), a recent movie by Sanjay Leela Bhansali, which attracted a lot of controversies, got a certificate for release in India after many modifications in various scenes of the film. The movie was based on Muslim and Rajput conflicts over queen Padmini. The movie got banned because of the protests kindled by the Rajput Karni Sena which claimed that it was full of distorted facts and portrayed the queen Padmini in a bad light, degrading the sentiments of the Rajput community. Due to instances of vandalism and threat to public order, the movie got banned in Gujarat, Madhya Pradesh, Haryana, Himachal Pradesh, Uttarakhand and Rajasthan. But when the movie was released in other states it was found that there was no such content that degraded or disregarded the sentiments of the Rajput community. In this recent controversy, the Supreme Court stated that it was the role of individual states to tighten the security in particular regions if the public order gets disturbed or is likely to get disturbed. Hence, it was not found acceptable to ban the movie itself in the particular states citing the reasons as public disorder.

The maintenance of public order is a state subject but this does not mean that the state officials can restrict the screening of a movie, claiming that there is a threat of vandalism. It is unacceptable that the state officials or executives violate the fundamental rights of moviemakers in this manner. If there arise protests against a film, as in the case of the movie 'Padmaavat', then the violent groups end up ransacking theatres, damaging private vehicles, shops and houses. Thus, a lot of times, the ban on movies is to serve the interests of people in power whether it is socially, economically, or politically. However, when public disorder is caused, it is more or less indicative of the recklessness of functioning of the state and it directly or indirectly affects the rights of the movie-makers.

In the aforementioned examples, it has been shown that so many films did not receive a certificate for public exhibition and there was a violation of the filmmaker's fundamental rights. However, in *State of Madras v. V.G. Row*,[39] it was held that if the restriction on screening of the film is done reasonably (though there is no specific or standard pattern for its determination) then the violation of fundamental right shall not be questioned. But it should be noted that reasonableness is the sole factor for determining what should be presented and what should not be presented. In case reasonableness is not proven by some legal reasoning then there is a violation of fundamental rights. Thus, in *Romesh Thapar v. State of Madras*,[40] the reasonableness test has been given great importance as to avoid infringement of someone's fundamental rights. In *K.A. Abbas v. Union of India*,[41] the Supreme Court had given the ordinary prudence test; the test of reasonableness should be as per common sense and prudence of an ordinary man and not as per a hypersensitive man.

38 (2006) 8 SCC 433.
39 (1952) SCR 597.
40 (1950) SCR 594.
41 (1970) 2 SCC 780.

The Censor Board though applies its reasoning to determine what is suited for the society, but it does not apply legal reasoning. It is also possible that what the Board finds unreasonable could be reasonable to a great extent. Also, the Central government has given too much power to the executive that it has become impossible to impartially examine the films. The legislation is brimming with examples where there is potential scope for arbitrariness in varying degrees. In a democratic country like India, everyone has the freedom to express their views and opinions that might not be accepted by the majority but does this mean that their views should be restricted? This question was also stressed upon in *Maneka Gandhi v. Union of India*[42].

Similarly, although a movie is made for public at large, but nobody is forced to watch it. It depends on an individual whether to watch a film or not. Movies are not mandatorily screened for everyone, it is available for the people who want to watch them and are willing to buy a ticket and go to the theatres. It does not matter if a large number of people are not willing to watch them, they would still be available for those who want to watch them. The directors or producers make a movie with their hard work, effort, time and money. They should have the full opportunity to exhibit their message through any medium. Moreover, the directors, producers and all others who are involved in the exhibition of a movie can only collect revenue through screening in lieu of their hefty investment in making a movie. Therefore, when a film is banned, loss of revenue also results. As far as banning of a film by Censor Board is concerned, the Censor Board should keep in mind that the society's morality in general has undergone a huge change. What seemed to be vulgar and against public order to a person years ago could seem acceptable to a person today. This means it is very subjective and the perspectives of people differ from one individual to another.

The same reasoning has been given by the Supreme Court in *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra*[43], where the Court specified that the Board has to take all the conditions into account and ensure in-depth analysis of the way society perceives the contemporary world. Only then could a ban on a film be justified and remain bona-fide, otherwise there will be a violation of the fundamental right to freedom of speech and expression of the people involved with the film. The ground of obscenity should also be examined reasonably, by people who understand that obscene and vulgar are two distinct terms. This has also been stated by the Supreme Court in *Samaresh Bose v. Amal Mitra*[44]. The test of obscenity has been laid down in *Hicklin's*[45] case where it was held that-

> Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may

42 (1978) 2 SCR 621.
43 (1962) 2 SCC 687.
44 (1985) 4 SCC 289.
45 *Regina v. Hicklin* 3 L.R. Q.B. 360 (1868)

> fall. If it is quite certain that it would suggest to the minds of the young of either sex or even to persons of more advanced years, thoughts of a most impure and libidinous character.[46]

Once a movie is released and then gets banned, it is mainly because of the reason that it fell short of the taste of the people in power. In *Ushaben Navinchandra Trivedi v. Bhagyalaxmi Chitra Mandir*[47], it was claimed that the movie 'Jai Santoshi Maa' should be banned as it contained contents of conflicting ideas relating to mythology, but the appeal was dismissed by the court on the grounds that the movie could not be simply banned because the religious sentiments of certain people got hurt; there are no criteria to judge who is an overly ardent believer of God and who is not, and this could not be a basis to ban a movie. Restricting a movie without any justification would also violate the right of the viewers because they too have the right to freedom of speech and expression.[48] Thus, banning a movie does not only violate rights of the maker, but also the right of the viewers.[49] Hence, Article 19(1)(a) includes the right to expression and right to acquire information and disseminate it to the public at large.[50]

The total prohibition on any film by the Censor Board has been declared as unjustified by the Supreme Court in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,*[51] holding that the total prohibition under Article 19(2) to (6) must satisfy the test that any other alternative than a ban on exhibition of a film would be inadequate. After all, banning the film would not only affect the fundamental rights of the director or the producer, but would also impact the people involved financially. Film making, collection, distribution, promotion, screening, etc. are essentials of the film industry which comes under trade as guaranteed under Article 19(1)(g) of the Constitution. It seems questionable to the author that on the one hand, a movie on the Gujarat massacre which was based on real facts was banned, while on the other hand, a movie like 'Gadar' based on fiction consisting of so many violent scenes depicting a rift between India and Pakistan got immense commendation. In *Ajay Goswami v. Union of India,*[52] the Supreme Court held that by considering the adult content in a newspaper which may somehow be readable by a minor, individual freedom of the people who are above the age of eighteen, to receive information which may even comprise of adult content, cannot be restricted. No guidelines were given by the court which would ensure particular content to be suitable for publication. In the same manner, if a movie contains few shots of adult content, it must not be banned on the ground that the movie in essence is harmful.

What are the grounds or criteria to determine what is within the restriction of public order, obscenity, sovereignty, integrity, defamation etc. and what is not?

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46 *Ranjit D. Udeshi v. State of Maharashtra* (1965) SCR (1) 865.
47 AIR (1978) Guj 13.
48 *L.K. Koolwal v. State of Rajasthan* AIR (1988) Raj 2.
49 *Ministry of I and B v. Cricket Association of Bengal* (1995) 2 SCC 161.
50 *India Express Newspapers Pvt. Ltd. v. Union of India* (1986) 2 SCR 287.
51 (2005) 8 SCC 534.
52 (2007) 1 SCC 143.

In *S. Rangarajan v. P. Jagjivam Ram*[53], the Supreme Court said that the restrictions under Article 19(2) must have a direct nexus and should be proximate to the peril sought to be remedied. The ban would not be appreciable unless it is not far-fetched. Under no circumstances, as also mentioned in the above facts and reasoning, a ban on the movie is justified unless it justifies the above conditions.

Need for Reformation in Cinematograph Act, 1952 and the Board

In the above heads it has been established that loopholes continue to exist in the Act itself. If the Act had been made more specific and non-arbitrary then such a question would not have arisen. The author recommends that the arbitrary power given to the members of the Board should be regulated to a certain extent. The absolute power exercised over movie-makers leads to the latter's suffering and raises questions as to the reasoning which is applied for not banning a particular film, and for not banning another. The author contends that there should be a use of the mechanism of delegated legislation. The principle of federalism should be followed as to empower both union and state, though state's power to legislate upon matters with respect to a movie can be limited. The members of Board should keep in mind the circumstances of the contemporary society. A public-centric approach must be taken into consideration; which implies that today what the people want to watch cannot be compared with what the people living decades ago preferred watching. Otherwise, the terms like modernization, globalisation, and awareness will be rendered meaningless. It should be noted that what seems unreasonable to one person, may be reasonable to some other. Thus, screening or restriction of a film is a very subjective issue and needs to be handled with delicacy and stringency.

It is submitted that if a film is disregarded by few people, it does not become unsuitable for all. It is the choice of the viewer. The people or the communities which feel humiliated can stay away from it and choose not to watch it. It is a choice, not an inducement. Some random group of a certain number of people cannot decide what the entire population of the country should watch. Moreover, it is very elusive to judge which scenes debase and corrupt the morals of the viewers. Thus, a survey mechanism must be brought to some extent in the Act since a lot of money, time and assets are invested in making a film. On analysing the composition of members of the Board or advisory panel, it can be found that no one belongs to a judicial background. The author does not argue for all members of CBFC to be judges of High Court or Supreme Court or Advocate General or professionals of law, however, does contend that there should be an endeavour to include some members within the Board who possess the judicial mind, as there is an excessive requirement for the same, due to involvement of interpretation of Constitution and other related laws. Till now, the emphasis has only been on the restrictions which have been given in the Act. However, nowhere in the Act, Article 19(1)(a) and Article 19(1)(g) have been emphasised. Thus, the right to freedom of expression can be easily

53 (1989) 2 SCC 204.

curtailed since the officials or members have been given absolute power. Therefore, it is recommended that there must be an emphasis on Article 19(1)(a) and Article 19(1)(g). Therefore, the author wants to say that there is an urgent need on the part of the legislation to amend the current Act; otherwise only judicial activism would be the recourse left to cater to such a social need.

Conclusion

Why does pre-censorship persist only in the case of screening of movies? What does the term 'reasonable' depict, or is it merely used to make something acceptable? Whether banning the movie alone will really serve the purpose? All these questions have to be answered step by step. The author agrees that it is possible that implementation can change perspective to a great extent, however, it is to be understood that movies which people watch today are very different from movies of the earlier times. The reasonable restrictions on the various freedoms are very much acceptable unless they are twisted with the will of people in power. The term 'reasonable' is not exhaustive, thus it uncovers its meaning in the way it is interpreted. One such major restriction is public order. If the movie is banned on the ground of disturbance of public order in a particular state then it should be understood that it is not the producer or the director of the movie who would be responsible for the disorder, but the concerned state authorities, since it is their duty to maintain public order if the situation turns violent due to any reason. The curtailment of the right to freedom of expression in this manner is not tenable at any cost. Moreover, India being a developing country, advancing at a high pace, issues such as a movie hurting religious sentiments or creating violence because of a little adult content are very frivolous grounds for banning a movie.

The projection of reality through movies, like issues related to Kashmir, Gujarat riots, partition, discrimination and backwardness, through audio-visuals must be appreciated because it depicts true stories. Also, it is the easiest way to acquire information. Movies serve a varied purpose, on one hand, they depict the reality through which people get information and on the other, they influence the viewers. Restrictions on movies eventually make people adopt the easier routes possible to watch the movie, i.e., they access pirated films. So banning a movie is not a complete solution. In addition, it terribly impacts the revenue collection. In this way, Article 19(1)(g) is infringed and the purpose of restraining people from watching the movie is also not served.

Therefore, the Bill for amending the Act must be brought and passed. It must include broad reformations in the current way of working of the Central Board of Film Certification. It is a matter of fact that passing a bill and making a law quickly is not very easy process, but this is the only recourse available to protect the right of peoples' speech and expression, right to information and right to know without affecting public order.

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