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Foreword

I am delighted to receive Indian Law Conclave Volume I published by Adhrit Foundation. The Law is a multi-faceted discipline that affects the societal norms. The Law is organic; it keeps on evolving with changing times. De-criminalization of homosexuality is one such example. Law is a great balancing act. It has to balance rights of victims with that of accused. Freedom of speech and expression is to be balanced with issues ranging from privacy to national security Indian Constitution is my only Bible or Gita or Quran. The ideals of our Constitution is what I live by. It is our duty to uphold constitutionalism and constitutional morality.

As the citizens of this great nation it is our duty to make a good Constitution such as ours, better Life of law is to be lived and not to be shackled in ivory towers. Its objective is not to be lost in jargon. This is where Indian Law Conclave comes into place. Adhrit Foundation by its never-ending efforts is taking discourse out of ivory tower. It is debating the foundational ideas of justice, liberty and equality with students' community, providing them a platform to interact with seniors in professions.

These enchanting debates, of which I'm fortunate to be part of, have deliberated on moral and ethical dilemmas over various aspects like patenting a gene or on rights of animals and rivers. It has debated on latest legislations like Insolvency and Bankruptcy Code. The present volume is a manifestation of such zeal by the Adhrit Foundation.

This is a rich issue which examines various facets of law. It examines law as pure sciences; law as applied sciences and it goes on tracing entire spectrum of spectacular issues. This issue is special as it sees light of the day in the middle of a pandemic. This shows resilience and commitment of the Adhrit Foundation.

My congratulations and good wishes to the entire team.

Dr. Charu Mathur
Advocate on Record, Supreme Court of India

Introduction

It is a pleasure to write an Introduction to this timely publication initiated by the team of Indian Law Conclave. The Conclave, as many would know, has been a remarkable platform for young professionals and students to come together and discuss topical issues in law and policy. My long association with Indian Law Conclave has convinced me that youth of this country are true agents of change.

This book is an acknowledgment of great discourse that has taken place in ILC in the past. It is also a validation to the fact that knowledge is not to be measured by age of a scholar but their authenticity of idea, intensity of research and clarity of thoughts.

The chapters in books are divided into three parts: 'Law' as 'pure science' and Law as 'Applied science' and other miscellaneous issues. The ten research papers in the book touch upon spectrum of issues such as "*Animal as a legal Person", "Genocide", "Sixty years of resistance by Tibet*" etc. It offers a fresh perspective on some topical issues such as data privacy, gene patenting etc. The book is rich in its content and offers a wide range of discussion on a myriad of legal issues.

The dedication of team ILC is exemplary and they have demonstrated leadership in bringing youth from various parts of the country together under one roof, to discuss, debate and develop an objective perspective on socio legal issues that certainly warrants our attention. This effort will help in building a strong legal profession and a great citizenry.

My congratulations to all the young authors and best wishes to the team.

Sincerely

Dr. Neeti Shikha
Head, Centre for Insolvency and Bankruptcy,
Indian Institute of Corporate Affairs
Ministry of Corporate Affairs, Govt. of India

Preface

The book ***'Indian Law Conclave Review'*** is a flagship publication series initiated by the team of Indian Law Conclave. The 1st and 2nd Editions of Indian Law Conclave were held at the International Youth Hostel, Chanakyapuri, New Delhi from June 29 – July 1, 2018 and August 10-11, 2019 respectively.

The inaugural edition's central theme was ***Changing Landscapes of Legal Systems in India***. Similarly, the second edition's central theme was ***Ideas for a New India***. Together, both the conclaves have had participation of over 150 delegates from all parts of the country. 85 Speakers from diverse fields such as Politics, Law, Business & Management, Education & Research, Technology, Media, and Development have spoken at the conclaves and inspired the young delegates.

Our Editorial Board has reviewed the papers we had received for both the editions of the conclave, and the best papers are now incorporated into the First Annual Volume of the series of publications.

We would like to extend our regards to the Advisory Board for their contributions in shaping this book. We would also like to extend our gratitude to Mr. Umesh Kumar, Mr. Kunal Mandal, Mr. Arpit Gaharwar, Mr. Rahul Rautela, Mr. Prateek Pandey, Organizing Committee Members, Speakers and Partners of both the editions of Indian Law Conclave for their guidance and support.

Lastly, we would like to invite comments, suggestions and guidance from various experts and readers about this book for improvements in future. The comments/suggestions can be mailed to us at ***aditya@adhrit.in***.

- Aditya Singh
Editor-in-Chief

MORALITY OF PATENTS: ANALYSING THE MORAL ISSUES SURROUNDING GENE PATENTS

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1 WHAT ARE PATENTS AND HOW ARE THEY USEFUL

A right is essentially a privilege to devoid everyone else from using or exploiting the subject matter of right, to their advantage without the consent of the holder of right. A right is an entitlement to one which prohibits everyone else from performing or not performing certain actions with regard to the subject matter.[1] The owner of a land thus has the right against the whole world to exclude anyone from using that particular land. Intellectual Property Rights are a bunch of intangible rights granted over the products of intellect. This right varies depending on the form of intellectual property. For instance, patent rights are granted over patents, copyright over creative expression of ideas, design rights over designs, geographical indications for products and services representing unique characteristic of a specific geographical location etc. Intellectual Property Rights fulfil dual purpose of incentive and reward. These rights serve as a reward for the inventor/creator who has put in labor to transform an idea into a tangible expression. It also serves as an incentive to further develop/create, which will result in granting of monopoly right to the creator/inventor. The process of innovation and development should be everlasting as change is the only constant.

A patent is an exclusive monopoly right which is bestowed upon the inventor. This right is given over novel inventions, which excludes others

[1]Leif Wenar, *Rights*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2015 Edn.), Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/fall2015/entries/rights/

from exploiting the invention during the term of the patent.[2] Patenting an invention is useful to exclude probability of an invention being exploited by someone other than the inventor himself without his knowledge or consent. Not only does the holder of patent right get to exploit the invention exclusively, but also exclude the entire world from using the same without his consent.
Patent eligibility criteria consists of three major aspects-

- Novelty
- Inventive step/non-obviousness
- Industrial application/utility

These aspects may vary with regard to how stringently they are applied while judging an invention. In addition to these basic criteria, certain jurisdictions also pose the requirement of the subject matter of invention to not be against 'public order and morality'. For instance, India in compliance with the TRIPs agreement has the requirement that "an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment"[3]. The European patent Convention also expressly prohibits patent over inventions, "... the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment".[4] This implies that inventions which are either based on or make use of subject matter which is opposed to public policy & morality will not be granted patent. Gene Patents are one such controversial subject matter of patents which even though resented by many jurisdictions, have been granted protection by others.

2 THE CONCEPT OF GENE PATENTING

The developments in the arena of biotechnology have not only opened but widened the horizon for inventors to explore the field. Inventions in the form of high yielding plant varieties, genetically engineered genomes, and cancer cells eating medicines are only some of intended to take

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[2]Joseph G. Hadzima, Jr., *The Importance of Patents*, BOSTON BUSINESS JOURNAL (1994), available at http://web.mit.edu/e-club/hadzima/pdf/the-importance-of-patents.pdf

[3] Article 27.2 TRIPs; Section 3(b), Indian Patent Act, 1970.

[4] Article 53(a) European Patent Convention, 16th edition, (2016).

development to an altogether new level. Gene patent is a comparatively new phenomena in the field of biotechnology which has raised concerns at the cost we are ready to pay in the wake of development and progress.

Every living organism is made up of cells. These cells contain genes which are a section of DNA molecules coiled up inside each cell. The DNA is a double stranded molecule which is split into smaller chunks known as 'chromosomes.[5] The DNA acts as instruction manual for an organism. Genes are responsible for making proteins and are responsible for the way living organisms appear, the characteristics they carry and the functions they perform. Genes possess the data which is required to build and maintain cells. An offspring carries the genes from mother and father which may at times faulter and can cause serious diseases in the offspring. To remove such a defect gene editing is done so as to either insert or remove the specific gene to get desired results. For instance, if a pest resistant variety of a particular crop is required the researcher or plant breeder will edit the genome of that particular crop to get the desired result. Such techniques often come under the ambit of patent and are often granted the same.

Gene patenting thus, is a patent right granted over genes which have either been specifically isolated, altered, the processes and methods for obtaining or using it, or a combination of any of these.[6] When through human effort and labor a product of nature such as gene in a living organism is turned into something of a different or greater utility as compared to its natural counterpart, is the phenomena that entails worthiness of getting a patent over a gene. The very fact that a gene, with however much amount of modification, still remains a product of nature is the very beginning point of controversy surrounding gene patenting.

3 THE CONTROVERSY BEHIND GENE PATENTING

The road to reach destination is often met with obstacles and hurdles, mere crossing of which often becomes a success story in itself. In a world where no one could have seen the possibility of having property rights in genes, not only has that become a reality but such a possibility has opened the

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[5] Silke Schmidt, *Explainer: What are Genes?*, SCEINCE NEWS FOR STUDENTS (JULY 8, 2019 , 6:30 AM), available at https://www.sciencenewsforstudents.org/article/explainer-what-are-genes

[6] *Patenting Genes*, GENETICS GENERATION (July 29, 2019, 10 A.M.), available at http://knowgenetics.org/patenting-genes/

doors for progress which largely affects human health and longevity. Even so, critics around the world have vehemently opposed the patenting of life for specifically genes for various reasons, ranging from legal to technical and even moral, which makes the issue extremely debatable.

The very first argument is posed regarding the nature of the gene itself. A gene is essentially a product of nature. Its existence in living organisms is by the virtue of the fact that the organism is a living being. A patent essentially requires the invention to be novel in nature i.e. should not have been in public domain. Under such prevailing law, granting patent to gene, which has been in existence and public domain as a product of nature, is invalid and against the patent law itself. Various case laws have stressed upon this point. For instance, in the Amgen case,[7] wherein the invention claim related to purified and isolated form of any gene that codes for the EPO protein. A DNA is essentially made up of a coding region called the exon and a non-coding region called the intron. The non-coding region has no function or role to play and thus when it is isolated from the DNA, there remains an exon only DNA which is purified form of DNA. The subject matter of patent was thus "novel purified and isolated sequence which codes for EPO,".[8] The novelty criteria was thus not fulfilled in the technical sense and the district court emphasized the same point, characterizing human EPO as "a non-patentable natural phenomenon free to all men and reserved exclusively to none."[9] The proposition by Amgen was intended to defy the technical criteria and in the eyes of the court "is not simply a lawyer's trick."[10]

Another case that changed the landscape of gene patent is Myriad Genetics case. Myriad genetics was successful in locating sequences of two human genes, BRCA 1 & BRCA 2. The mutations of these genes had the potential of increasing risks of breast and ovarian cancer. Based on the precise location of these sequences, Myriad sought patents on the same. The issues at hand were-

- Whether a naturally occurring segment of DNA, isolated from the rest of the genome can be granted patent &

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[7] Amgen, Inc. v. Chugai Pharmaceutical Co 927 F.2d 1200 (Fed. Cir. 1991).

[8] Amgen, 927 F.2d at 1206 (quoting U.S. Patent No. 4,703,008 (filed Nov. 30, 1984)).

[9] Amgen Inc. v. Chugai Pharm. Co., 13 U.S.P.Q.2d 1737, 1759 (D. Mass. 1989) [quoting Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980)].

[10] Rebecca S. Eisenberg, *Re-examining the Role of Patents in Appropriating the Value of DNA Sequences*, 49 EMORY L.J. 786 (2000).

- Whether synthetically created complementary DNA is patent eligible.[11]

Addressing the issues, the Supreme Court of the United States held that a naturally occurring segment of DNA is not patentable by the virtue of it being a product of nature and thus "a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated". Regarding complementary DNA it was held that a cDNA is synthetically created and thus is not a product of nature per se. Complementary DNA "contains the same protein-coding information found in a segment of natural DNA but omits portions within the DNA segment that do not code for proteins.[12] The rationale behind granting patent specifically to cDNA and not to isolated or purified genes is that these patents would have given exclusive right to isolate an individual's BRCA1 and BRCA2 genes. The patents would also give Myriad the exclusive right to synthetically create BRCA cDNA. Thus, by the virtue of the intellectual property right granted to myriad, even merely possessing the said genes in the body would be an infringement. It was thus, a very sound decision on the part of the Supreme Court, which does not hinder progress and at the same time doesn't award undue credit for a product of nature. In addition to this, the very purpose of incentivizing research so as to progress more will also be hindered if products of nature itself will be granted patent. Such a right will exclude every researcher but the patentee from further researching and exploring related horizons.

Patent law works on the assumption that the invention patented will benefit the society at large. But what if the invention poses threat in the longer run to humanity? The nuclear bomb is a perfect example to comply with the patent eligibility criteria but falling into the hands of evil, did not do any good for the society at large. Arguments to exclude life forms from patentability are also premised on the doubt regarding the wisdom of the ultimate users of the invention which may exploit it to the disadvantage of the majority.[13] The very purpose of granting patent will be defeated in such a scenario. Possible future scenario may entail creating genetically engineered species which will not be beneficial to mankind in any way. The process of genome editing facilitates transfer of genetic material inter and intra

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[11] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2111 (2013).
[12] Id.
[13] Rebecca Dresser, *Ethical and Legal Issues in Patenting New Animal Life*, JURIMETRICS, American Bar Association, Vol. 28, No. 4 (Summer 1988), pp. 399-435, available at https://www.jstor.org/stable/29762094?seq=6#metadata_info_tab_contents

species. Introducing genes in different species will result in different outcomes, with the overall pattern of gene expression altered by the introduction of a single gene.[14] The precise location and sequence of the gene along with its specific function in the organism it is inserted, may have a relatively well-characterized function in comparison to the donor organism. Even with this precise information, the result of such a transfer cannot be predicted.[15] The resulting genome may have duplicate genes, changes sequence, altered locations, all of which may result in lack of operation of the genes instability or interference with other gene functions possibly cause some potential risks.[16] Thus, genetically modifying genes of an organism can have a number of predictable and unpredictable risks. Law Centre of IUCN[17] prepared a report contemplating the effects of genetic modifications. This report enlists numerous environmental risks like enhanced pathogenicity, emergence of a new disease, loss of management control measures etc. which will affect mankind in the long run. Changing patent policies or even strengthening patent policies that set stringent standards with regard to gene patenting will act as a barrier to prevent rampant patenting of genes.

The issue of separating diagnostic tests and DNA patents also arises which often hinders medical field with regard to research and experiment. Diagnosis is important from the perspective of acquiring knowledge of an individual patient while DNA patent pertain to knowledge regarding the subject matter as a whole.

Another major issue that has been raised from the very inception of the idea of gene patenting is who owns genes if they are isolated from the person's body. Patent can only be granted over genes once they are extracted from the body of an organism and then researched on resulting in the claimed invention. Valid question that arises from this hypothesis is whether the person from whose body the genetic material was extracted will or will be the owner of the patent as well along with the inventor or

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[14] Dhan Prakash et al., *Risks and Precautions of Genetically Modified Organisms*, INTERNATIONAL SCHOLARLY RESEARCH NETWORK, L. Chıcharo ed., ISRN Ecology Volume 2011, Article ID 369573, 13 pages doi:10.5402/2011/369573 (2011).

[15] N. C. Ellstrand, H. C. Prentice, and J. F. Hancock, *Gene Flow And Introgression From Domesticated Plants Into Their Wild Relatives*, ANNUAL REVIEW OF ECOLOGY AND SYSTEMATICS, vol. 30, pp. 539–563 (1999).

[16] C. Dennis, *The Brave New World Of RNA*, NATURE, vol. 418, no. 6894, pp. 122–124 (2002).

[17] The World Conservation Union (2004).

once the tissues or cells are outside of that person's body, they no longer remain his to own or claim ownership over. Technically, once removed from the body, these tissues and cells belong to the doctor or hospital. In the case of *Moore v. Regents,*[18] researchers of the University of California had developed a cell line for cancer research using a patient's cells. This patient claimed ownership of these cell lines.[19] The Supreme Court of California decided that in the interest of promoting medical research "a person does not retain ownership of any tissue or cells that have been excised from the person's body with his or her informed consent." This is also applicable for DNA and thus one cannot claim ownership of an already extracted genetic material from his body. This is a controversial rule from the viewpoint of those opposing gene patenting.

4 RIGHT OR WRONG: THE ISSUE OF MORLITY

Patents is purely economic in nature. The invention contributed to the overall development and wellbeing of the society in return for the monopoly rights granted to the patent holder. But it is not pure economics that this Intellectual property is confined to. There are moral and ethical objections that surround the subject matter of a particular invention which may play a vital role in deciding the fate of the invention.[20] Morality in a society plays an immensely important role with regard to deciding how a particular act will be viewed. It includes the totality of the accepted norms which are deeply rooted in a society and this morality may vary from culture to culture.[21] Various jurisdictions including India have imbibed the policy of an invention's requirement of not being against public order and morality.[22] This implies that an inventions use or commercial exploitation of the subject matter of inventions should not be such which is against public order or morality.

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[18] Moore v. Regents of the Univ. of Cal., 51 Cal.3d 120 (Cal. 1990).

[19] Ibid.

[20] 6 PHILIP W. GRUBB ET AL., PATENTS FOR CHEMICALS, PHARMACEUTICALS, AND BIOTECHNOLOGY, (Oxford University Press, 6th edn., pp 301-320).

[21] *Patents: Ordre Public and Morality*, P1: IBE, Chapter 19, CY564-Unctad-v1, Nov.,2004, available at https://www.ipr-sonline.org/unctadictsd/docs/RB2.5_Patents_2.5.3_update.pdf

[22]Section 3(b), Indian Patent Act, 1970.

Morality could be interpreted in a number of ways considering its subjectivity. Even so, morality is established by the prevailing norms in a particular society and everyone who is a part of that society is subject to those set standards of morality. It is the function of these moral norms to safeguard the interest of the people of the society.[23] These moral standards guide a person in deciding the nature and consequences of a particular act he chooses to do which will either be in conformity of these morals or against it. It is thus the purpose of moral laws to perfect personal character.[24] Acts against the moral norms of a society are deemed to be morally "wrong" and discouraged. For instance, lying to your parents may not be legally wrong or have sanctions attached to it but by societal standards it is a moral "wrong". The relevance and issue of morality in patent could be understood from the very purpose for which patents are granted.

Patents are granted to promote innovation which will be useful for the society at large. Inventions the use of which will be against the moral standards will not serve any purpose to the society and thus the exclusive rights granted to the inventor will be of no use since the invention itself is not going to serve any purpose or may even not be utilized or exploited. Justice Story of the United States has often quoted that "*a useful invention is one which may be applied to a beneficial use in society, in contradistinction to an invention injurious to the morals, health, or good order of society, or frivolous or insignificant."*[25] A study conducted by WIPO has identified six justifications based on public policy for the exclusions from patentability.[26] The very first and the soundest justification is with regard to the purpose of patent laws in reflecting undesirable subject matter which has to be avoided by the inventor.[27] The public order & morality clause intends

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[23] Terrance Mcconnel, *Review: On The Nature and Scope of Morality*, PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH, International Phenomenological Society, Vol: 54, No. 2 (Jun., 1994), pp 421-425, DOI: 10.2307/2108503, available at https://www.jstor.org/stable/2108503

[24] 3 T.J. GARDNER, *CRIMINAL LAW: PRINCIPLES AND CASES (*West Publishing Company, 3rd ed., pp.7).

[25] Viola Prifti, *The Limits Of "Ordre Public" And "Morality" For The Patentability Of Human Embryonic Stem Cell Inventions*, THE JOURNAL OF WORLD INTELLECTUAL PROPERTY, Volume 22, Issue 1-2, Pages 2-15 (March, 2019).

[26] Lionel Bently et al., *Exclusions From Patentability And Exceptions And Limitations To Patentees' Rights*, WIPO STANDING COMMITTEE ON THE LAW PATENTS, SCP/15/3, Annex 1 (2010), available at https://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex1.pdf

[27] I. Schneider, *Can Patent Legislation Make A Difference? Bringing Parliaments And Civil Society Into Patent Governance*, THE POLITICS OF INTELLECTUAL

to safeguard the public trust in the patent system of their country and the same can be achieved by ensuring that inventions which may hurt or are objected by the society are discouraged. This ground can also be understood from an economic perspective. Neoclassical economy recommends that inventions which have been or may be granted patent, serve as an incentive for investors to invest in the same prospecting returns in the future from the exploitation of the same. If patents are discouraged in a particular field, there will be no investments in that field, but in the area where patents are encouraged. Thus, there will be direct flow of investments towards R&D in areas of current & more profitable research. Thus, the morality clause helps in promoting desirable inventions and indirectly influences the inventive activities. Thus, morality finds a place in patent legislation and based on this justification there are many issues that arise with regard to patenting of genes.

4.1 Who owns the genes?

Patent rights grant exclusivity to the patentee to use or exploit his invention. With regard to human gene patent specifically, the very first question to be answered is who owns genes? The critics of gene patents have always believed that human genome is a part of "common humanity". It is thus by the virtue of this principle that no one has a right to own it. Thus, patenting of genes turns it into a property to be owned exclusively which thereby violates humanity.[28] It is also claimed that these patents exploit and earn at the expense of the personal nature of a particular gene. What this essentially implies is that even though all living being have a similar framework of cells yet there are minor differences in each living being which make him peculiar or apart from the others. For instance, no two humans have the exact same face or fingerprints. Every gene is a part of one's own individuality and patenting the same violates the privacy of diaries which reflect variations which are unique to a particular person. Thus, no one should be allowed to turn something that is common in nature to a private item.[29]

PROPERTY: CONTESTATION OVER THE OWNERSHIP, USE, AND CONTROL OF KNOWLEDGE AND INFORMATION, Sebastian Haunss & Kenneth C. Shadlen eds., pp 129-157 (2009.)

[28] Gabriel Ben-Dor, *Ethics of Gene Patenting: Moral, Legal, and Practical Perspectives*, STANFORD- BROWN iGEM, Jason Hu & Bryce Bajar, and Julia Borden eds. (2012).

[29] Annabelle Lever, *Is it Ethical to patent Human Genes?*, INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE, A. Gosseries, A. Marciano & A. Strowel eds. Palgrave MacMillan, UK. (2008).

4.2 Effect on consumer

Monopolizing of market is an anti-competitive policy yet patent system works on exclusivity on the pretext that the invention is to benefit the society at large and thus suitable rewards should be given to the inventor who invests his time and labor for the betterment of the society. There is thus a balance maintained between the reward and the public access to the benefits of the invention. Theoretically as good as this may sound, there never truly exists a balanced situation and the cost of rewards reaped by inventor have to be paid by the public at large. These inventions are made available to public at insanely exorbitant prices which cannot be afforded by majority section of the society. What good does a newly invented cancer medicine do if it not accessible enough for patients?[30] The landmark case of Myriad genetics, which changed the landscape of gene patenting in the United States, shouts the tale of how notorious the patent owners become with exclusivity in their hands. Myriad itself, after gaining patent over BRCA 1 & BRCA 2, licensed the same on the terms that tests to determine the presence of these cancer causing genes will only be done by its own lab and at a price of 3000 USD.[31] Women thus were left with only one option of getting tested for the presence of these genes which determines the probability of cancer in the body. This price was extremely expensive making it unavailable for a majority of women and thus failing the entire purpose and intent of patent.

4.3 Consequences of over-patenting

Man is inherently greedy and this nature of his will not allow him to not extend gene patenting on a societal and global scale. Patenting genes could take an enormous form where every living entity could come under the purview of exclusive rights granted by patents thus depriving them authority or privacy of any kind over their own genetic material. This "development" will take ugly form, when owning patent over subject matters that impact everyone will only exacerbate the difference between rich and poor developing countries. Such a gap can extend to the limit of depriving the poorer nations from availing benefits of a patent granted to an invention in their own jurisdiction. For instance, a cancer drug invented and patented in the United States may be sold at unreasonably exorbitant prices to poor developing nations like Bangladesh, which will not be able

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[30] Hridayesh Joshi, *The Cost of Cancer: WHO Report Says Expensive Drugs Impairing Access to Cure*, NEWS 18, Jan. 18, 2019, available at https://www.news18.com/news/world/the-cost-of-cancer-who-report-says-expensive-drugs-impairing-access-to-cure-2016493.html

[31] Id. 28.

to afford it and thus thereby depriving cancer patients of an available treatment.[32] The purpose of patent will thus be defeated and it will only remain to serve as an economic resource to the patentee.

Thus, the idea of excluding inventions not adhering to public order & morality can be regarded as a tussle between morality and technological development.[33] With progress there is an inherent need to walk along the pace of progress in order to gain clear understanding of the process. Some are able to cope up with this change while those who don't fear the unknown. It is indeed a difficult process to adapt but that does not imply that it is necessarily immoral or wrong by the morality standards. The society relies on beliefs that scientists or researchers working on this aspect of development will neglect factors like religion, dignity, morality etc. in the process of development. Gene Patents become an easy target for critics on the pretext of disregarding the values of society and dignity of mankind in the wake of "owning" them. Even arguments of owning and treating life as a commodity do not act as major barriers to IP development in certain jurisdictions which focus more on development than morality.

An infamous example of this is the Monsanto saga. The company owned several patents based on transgenic plants. Introduction of the invention in Europe was a barrier owing to the public order & morality provision in the patent legislation.[34] The market for them was limited due to lack of trust of people since the company could not guarantee safety. Green peace, an international organization dedicated to the protection and preservation of the environment protested against Monsanto and blocked its way out of Europe. This was later supported by the research which reflected that transgenic pollen was harming the monarch butterfly.[35] This led the Americans to join the protest against the company and Monsanto had to admit their wrong. This has instilled fear and lack of faith in the idea of gene related technology. The smart step here is to not oppose morality standards but to

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[32] L. Bently & B. Sherman, *The Question of Patenting Life, Perspectives on Intellectual Property,* Vol 4: INTELLECTUAL PROPERTY AND ETHICS, Sweet & Maxwell, p. 113 (1998).

[33]Sun Tianchu, *Reasoning the Morality Behind Life Patents*, Master of Laws In Intellectual Property, 2016-2017 edn., available at https://www.itcilo.org/masters-programmes/ll-m-in-intellectual-property/final-research-papers/MrSun.pdf

[34] Article 53, European Patent Convention, 16th edition, (2016).

[35]Anthony M. Shelton & Mark K. Sears, *The Monarch Butterfly Controversy: Scientific Interpretations of a Phenomenon,* THE PLANT JOURNAL, 27(6), pg. 483-488 (2001) available at https://onlinelibrary.wiley.com/doi/epdf/10.1046/j.1365-313X.2001.01118.x

compromise and adhere to these concerns so as to envisage the misconceptions people may have and find suitable solutions for eliminating stigmas associated with gene patenting.

5 CONCLUSION

The fundamental issue and solution lie in understanding the reaction of people of a society adhering to a particular set of norms. What may be morally right for one society may not be the same for the other. Thus, to understand the relationship or concerns one has to map the reactions to new forms of life technologies. The task of defining and understanding morality is on the patentee who has to judge the same from the present and existing standards a society follows. The morality factor can sometimes be used to block advancement not because it has negative impact but solely on the pretext of non-compliance with morality standards. To avoid such situations, there has to be a balance between the moral standards of people and motivation for biotechnological inventions. Intervention of government becomes indispensable when the stakes of development are higher than moral laws. A novel invention should not be criticized or out rightly rejected merely because it does not reflect moral values and standard compliance. At the end of the day, development has to be given more importance unless the cost of the same is so high that it can only be paid by sufferance and irreversible consequences.

RESPONSIBILITY TO PROTECT OR A LICENSE TO OPPORTUNISTIC INTERVENTION?

Gauri Mishra
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1 INTRODUCTION

The Responsibility to Protect hereinafter referred to as the R2P is one of those big ideas that come every once in a while. The purpose of this paper is not to disregard the genuine concerns and the initiative taken by certain individuals to challenge the international community to come forward to the rescue of smaller people and victims by preventing and punishing mass atrocity crimes happening across nations but to highlight that we as an international community have failed to ensure the promise of 'never again'. The hypothesis on which this article begins is - R2P is a ground breaking idea which has definitely been fostered by noble intentions involving humanitarian assistance to those in need but noble intentions alone do not seem to be guaranteeing the success of this doctrine.

In the year 2009, the US president Barack Obama on his visit to the Nazi concentration camp at Buchenwald said that the incident, "*teaches us that we must be ever vigilant about the spread of evil in our own time, that we must reject the false comfort that others' suffering is not our problem and commit ourselves to resisting those who would subjugate others to serve their own interests*."[36]

In response, Nobel Laureate Eli Weisel said, "But the world hasn't learned ... [M]any of us were convinced that at least one lesson will have been learned— that never again will there be war; that hatred is not an option, that racism is stupid; and the will to conquer other people's minds or territories or aspirations ... is meaningless ... Had the world learned, there

[36] Remarks by President Obama, German Chancellor Merkel, and Elie Wiesel at Buchenwald Concentration Camp, 6-5-09, whitehouse.gov (2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-obama-german-chancellor-merkel-and-elie-wiesel-buchenwald-concent (last visited Aug 9, 2019).

would have been no Cambodia and no Rwanda and no Darfur and no Bosnia. Will the world ever learn?"[37]

Since then, '**never again**' has continued to be a solemn affirmation being reiterated across the globe not only with regards to this particular enormity but also in the context of several other acts of savagery be it that of military dictatorship in Latin America, the war in Yugoslavia, the Genocide in Rwanda and so on and so forth. The phrase, 'never again' is suggestive of a word of an honor by the international community to those who had been racked with pain in the face of these atrocities that such repression will not be repeated.

Thereafter, having failed to protect the civilians from such mass atrocities of genocide, war crimes, crimes against humanity and ethnic cleansing, **the global community tried to counter in two fashions**. "They relate to efforts to combat impunity through protection of **rights of victims and criminal responsibility of culprits**, on the one hand, and developing an **alternative to the tainted concept of humanitarian intervention** in order to prevent and halt such atrocities, on the other."[38] In this paper we shall limit our focus to the second of the two.

2 HISTORY AND EVOLUTION OF R2P

R2P is one of the most influential doctrines which emerged in the post-cold war scenario. This marked a shift from the traditional Westphalian model of absolute sovereignty to the concept of '***sovereignty with responsibility***'. Along with this came the idea of '***shared responsibility***' of the international community towards the countries in need which were either incapable or unwilling to protect their citizenry.

In the aftermath of cold war, international law witnessed twofold developments –

One through furthering the idea of **Individual Criminal Responsibility** wherein tribunals such as ICTY, ICTR, International Military Tribunal for Germany, Special Tribunal for Lebanon etc. were setup which finally culminated in Rome statute establishing the ICC in the year 2002.

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[37] Id.

[38] Stephen P. Marks & Nicholas Cooper, *The Responsibility to Protect: Watershed or Old Wine in a New Bottle?*, VOLUME 2 JINDAL GLOBAL L. REV (2010).

The other set of developments were aimed at **preventing and responding to outrageous actions against the populations at large by certain countries through the collective security system** envisaged under the UN Charter under articles 39-51. The 'collective security system' aims at preserving international peace and security by attaching an obligation towards all the states collectively to tackle any hostility that may occur amongst the nations. In the light of the same, the UNSC in order to restore sovereignty in Kuwait authorized forces under the United States command ensuing the invasion by Iraq in the year 1990.

Certain **developments were also witnessed in the non-governmental front**, an international, independent, humanitarian organization Médecins sans frontières (MSF) found its inception as the medical workers expressed their dismay during the Nigerian Civil War and came about with a concept of 'a right and duty to intervene' when lives are at stake and notwithstanding state sovereignty. However, this concept failed to achieve a full-fledged recognition.

The collective security mechanism also was not able to achieve its required mandate which is evident from the following examples –
Rwanda: Genocide against the Tutsi and moderate Hutu in Rwanda.
Yugoslavia: Perpetration of enormity against Bosnian Muslims and Croatian civilians by the Bosnian Serb forces with major support from The Yugoslav National Army.
Somalia: Systematic, government supported mass murder of Isaaq civilians by the Somali Democratic Republic known as the Isaaq Genocide.
NATO intervention in Kosovo: Unauthorized military operation by the NATO against Yugoslavia during the Kosovo War.
US invasion of Iraq: Coalition established by the US during the first Iraq War to free Kuwait from the Iraqi army.
Bosnia and Herzegovina: The armed conflict in Bosnia and Herzegovina that broke out in late 1992.

The inadequacy of the system led to establishment of **ICISS by Canadian government**. It was inspired by an appeal by former UN Secretary General Kofi Annan. He appealed to the UN General Assembly in the year 2000, "*If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?*"

In an attempt to reduce the gap between the legality and the legitimacy of intervention, the ICISS report made four fundamental contributions.

Firstly, by changing the language of the discourse from the "right to intervene" to "the responsibility to protect" thereby making it more digestible to the member states and the public.
Secondly, by widening the scope of involvement of nations in the entire framework that is by including not only the international players having the ability and willingness to make use of force but the international community as a whole.
Thirdly, by widening the scope of responses in the face of atrocities by shifting the focus from mere military action to inclusion of preventive measures and by adding on a responsibility to rebuild so as to prevent recurrence of harm in the post-crisis situation.
Lastly, by clearing identifying the criteria for use of force as the last resort.
After three years of the ICISS report came the second landmark moment for the R2P doctrine in the year 2004 when it came to be endorsed in the **Secretary General's High-Level Panel Report on Threats, Challenges and Change titled 'A More Secure World: Our Shared Responsibility'**. The UN High-level Commission utilized RtoP as a benchmark for judging the Sudanese government's actions in Darfur. This instance marked the first time that a UN commissioned report had applied the RtoP principle and found that a state had "manifestly failed to protect its citizens." The High-level Panel document outlined the doctrine in the context of Chapter VII of the UN Charter and emphasized every state's duty to protect people from suffering from preventable tragedies. However, the question of which state should assume said responsibility was left unanswered, since 'every state' could be interpreted as "a simple reminder of the erga omnes nature of the international obligations" or as a "shift from the host state to every other state in cases where the former is unable or unwilling to act."[39]

An year later, in **2005 United Nations World Summit** was held, where more than 150 heads of state, identified with the RtoP concept and showed their support for a more restricted concept of the 'responsibility to protect.'[40] The Summit Outcome document articulated the shared commitment of states to address "the multifaceted and interconnected challenges and threats confronting our world" and to build consensus on major threats and

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[39] Camila Pupparo, *The Responsibility to Protect: Emerging Norm or Failed Doctrine?*, Volume 9 Global Tides (2015).
[40] Id.

challenges, which must be translated "into concrete action, including addressing the root causes of those threats and challenges with resolve and determination". [41]

The **starting point for the official definition of R2P** is the language of the Summit Outcome, establishing in **two key paragraphs** the responsibilities of states and the international community with respect to populations subject to these atrocities:

"138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those that are under stress before crises and conflicts break out."[42]

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[41] Stephen P. Marks & Nicholas Cooper, *The Responsibility to Protect: Watershed or Old Wine in a New Bottle?*, VOLUME 2 JINDAL GLOBAL L. REV (2010).

[42] Resolution adopted by the General Assembly on 16 September 2005, Un.org (2005), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (last visited Aug 9, 2019).

These paragraphs should be read with paragraph 97 on the responsibility of states and the United Nations to assist in recovery and rebuilding:

97. "Emphasizing the need for a coordinated, coherent and integrated approach to post-conflict peace building and reconciliation with a view to achieving sustainable peace, recognizing the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development, and recognizing the vital role of the United Nations in that regard, we decide to establish a Peace building Commission as an intergovernmental advisory body."[43]
In its very essence the responsibility to protect principle guarantees to every individual that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."

Having made this commitment, **the international community both collectively and individually made an affirmation to ensure human security and dignity**, from the most heinous crimes faced by the mankind namely, genocide, war crimes, ethnic cleansing, and crimes against humanity, and that they would not occur again.

Now, in order to understand whether this principle of R2P is groundbreaking in its very essence or an already existing idea has been offered in a distinct fashion to make it more acceptable to the international community at large, in the next section we will compare the older doctrines of Just war and Humanitarian intervention with that of R2P.

3 JUST WAR, HUMANITARIAN INTERVENTION AND THE RESPONSIBILTY TO PROTECT

With regards to the circumstances that demand the international community to take action, the ICISS Report, the Summit Outcome and other UN reports have specifically laid down certain criteria's which must be complied with in order to qualify the intervention in the State sovereignty as a legitimate one. As stated in the ICISS report, an action must be:

1. "In response to actual or intended large scale loss of life or large-

[43] Resolution adopted by the General Assembly on 16 September 2005, Un.org (2005), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (last visited Aug 9, 2019).

scale ethnic cleansing (just cause);
2. Undertaken with the primary purpose of halting or averting human suffering (right intention);
3. The last resort, where all other options for prevention or peaceful resolution have been explored and would not have/did not succeed (last resort);
4. The minimum necessary scale, duration, and intensity to secure the defined human protection objective (proportional means);
5. Undertaken with a reasonable chance of success in halting or averting the atrocity (reasonable prospects);
6. Legitimate, undertaken with the right authority (right authority)."[44]

While all the three reports subscribed to the adoption of these basic criteria's by the UNSC in order to ascertain the legitimacy of military intervention in cases of genocide, war crime, crime against humanity and ethnic cleansing, it should be noted that *these yardsticks of determining legitimacy were to a great extent already long-established in the Just War framework.*[45] This can be indisputably established by briefly looking at the fundamental principles of the Just War tradition:

Just war theory establishes four conditions which must be met in order for a war to be considered justified:

A. There must be a just cause;
B. The war must be declared by a lawful authority;
C. There must be an appropriate proportion between the goals sought and the costs, both physical and moral; and
D. War must be the last resort.[46]

Further, there are two principle restraints on how war may be waged:

1) the immunity of civilians from direct attack, and
2) the principle of proportionality.[47]

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[44] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, Idl-bnc-idrc.dspacedirect.org (2001), https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y (last visited Aug 9, 2019).

[45] Stephen P. Marks & Nicholas Cooper, *The Responsibility to Protect: Watershed or Old Wine in a New Bottle?*, VOLUME 2 JINDAL GLOBAL L. REV (2010).

[46] John F. Coverdale, *An Introduction to the Just War Tradition*, Volume 16 Pace International Law Review (2004).

[47] John F. Coverdale, *An Introduction to the Just War Tradition*, Volume 16 Pace International Law Review (2004).

Comparing the standards laid down under both the R2P and the Just war theory reflect the commonalities in their nature and a parallel can be drawn between the two. Therefore, it can be stated that it is apparent that **R2P is mere encapsulation of the already existing standards**.

Further, **when looked at it in the light of humanitarian intervention, we witness certain overlaps here too**. Firstly, with regards to the third pillar of R2P which states that, "*If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter*."[48]

Secondly, it is a manifestation of the already existing legal standards in the sense that, "Back in 1945, the drafters of the UN Charter recognized military action and aimed to strike a balance between the sovereignty and equality of individual states which was safeguarded by Article 2(1), 2(4), and 2(7), and the collective international responsibility for the maintenance of international peace and security which is regulated under Chapter VII."[49] Lastly, both of them have a disputed nature in the international realm.

However, the major and the most **prominent difference** between the two is that the R2P makes an endeavor to bring about a shift from the idea of right to intervene to that of a duty or obligation to intervene. Not only this, it is also broadening the scope by talking about the right to prevent and rebuild in the face of atrocities.

4 UNDERSTANDING THE PROBLEMS ASSOCIATED WITH R2P IN THE LIGHT OF INTERVENTION IN LIBYA

The UN Security Council swiftly responded to the violence which erupted in Libya in February 2011. According to Gareth Evans, the intervention constituted "a textbook case of the R2P norm working exactly as it was

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[48] About R2P: Global Centre for the Responsibility to Protect, Globalr2p.org, http://www.globalr2p.org/about_r2p (last visited Aug 9, 2019).

[49] Nihan Cetin, DOES R2P REPRESENT A MEANINGFUL SHIFT FROM THE DOCTRINE OF HUMANITARIAN INTERVENTION? https://www.academia.edu/4450276/r2p_v_humanitarian_intervention?, https://www.academia.edu/4450276/r2p_v_humanitarian_intervention? (last visited Aug 9, 2019).

supposed to."[50] It was indeed an "unprecedented moment" which gave hope to many. United Nations Secretary-General Ban Ki-moon summed up the mood: "By now it should be clear to all that the Responsibility to Protect has arrived."[51] The reasons for passing the Resolution by the Security Council in response to the hostilities in Libya were many.

Some of them being that the Libyan government was trying to dehumanize its population to meet their political ends. After broad assessment of the entire scenario it was clear that it was a R2P situation as the risk of mass atrocity situation in certain places were evident, Colonel Gadaffi had announced that any Libyan that takes arms against Libya shall be executed and he had called the rebels cockroaches which was exactly the same term which was used in the Rwandan Genocide. Even the regional organizations of Arab states had appealed for international action.

An earlier resolution adopted by the security council implementing the third pillar of R2P through non-military measures like travel bans, arms embargo, referral to ICC etc. did not prove to have much effect. Therefore, decisive and timely actions were necessary in the light of which military actions were authorized by the UNSC against the Libyan government.

However, the military intervention did not succeed in meeting the desired objectives one of them being to established democracy. The political and economic situation across Libya went haywire.

The intervention definitely was inspired by a humanitarian impulse or is it so? It is important to ask this question because of certain evidences which point towards the other side. HRW had reported that "*of the 949 people wounded there in the rebellion's initial seven weeks, only 30 were women or children*."[52] Doesn't this indicate that the forces of Gadaffi were focused on the combatants? In the cities of jdabiya, Bani Walid, Brega, Ras Lanuf, Zawiya, and much of Misurata which were captured by Gadaffi before the intervention by the NATO forces did not show any signs of a bloodbath as

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[50] Interview: The "RtoP" Balance Sheet After Libya, Globalr2p.org (2011), http://www.globalr2p.org/media/files/gareth-_interview-the-rtop-balance-sheet-after-libya.pdf (last visited Aug 9, 2019).

[51] Aidan Hehir, *The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, Volume 8 International Security (2013).

[52] Alan Kuperman et al., Lessons from Libya: How Not to Intervene Belfer Center for Science and International Affairs (2013), https://www.belfercenter.org/publication/lessons-libya-how-not-intervene (last visited Aug 9, 2019).

such. This makes us question the narrative that had he been permitted to capture the last city of Benghazi, it would have resulted in such mass atrocities which would have shook the conscience of humankind.[53] Such evidences force us to think about the false propagandas which are served on the basis of misinformation.

Also, it resulted in much greater harm to the Libyans. The intervention by the NATO resulted in utter chaos by increasing the duration of the conflict, the civil war, almost six times and the death toll multiplied almost seven times.[54] After the intervention there was a rise in Islamic radicalism which resulted in gross human rights violations and thus increasing the already existing sufferings of the civilian population.[55] Well, if this is the result of an intervention, some serious thinking needs to be put in behind the entire mechanism.

5 LESSONS TO BE LEARNT FROM THE FAILURE OF INTERVENTION IN LIBYA

This brings us to discuss on the lessons that need to be learnt from the Libyan intervention –

The focus on regime change can result in much greater risks such as those of a failed state and which happened in Libya. It has been explained lucidly by Alan Kuperman in his article - Lessons from Libya[56] what happens when an intervention takes place? **Initially, the interveners are motivated by the desire to help the civilians. Later, their objectives start expanding to include those of regime change as well**. When this objective sets in, then major problems arise. Now the intervening states start to demonize the country's regime in order to justify their use of force. Due to this demonization, the interveners fail to arrive at a negotiated settlement which would have allowed the leaders of the ongoing regime to retain some power and thus would result in quickest way to resolve the conflict. Since this does not happen, the conflict continues even if it comes at an increased cost of dangers to the civilians.[57]

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[53] Id.
[54] Id.
[55] Id.
[56] Id.
[57] Id.

The Security Council's **decision to opt for coercive means in an event of humanitarian crises in a country cannot be in total disregard of the sovereignty of the host country**. [58] In the case of Libya, we witnessed that the government which was established by the international community after the Gadaffi government was overthrown could not survive. It was weak and therefore toppled pretty soon. What is the use of establishing such a regime which will result in further crippling the nation?

One more lesson to be learnt from the situation in Libya is **how one failure can perpetuate lack of trust and result in further failures.** The Libyan aftermath created a deficit of trust between the Western and Non-Western powers in the UNSC and therefore, no significant steps could be taken when it came to Syrian crisis.

Undeniably, there are situations where use of force is necessary in order to establish a peaceful regime for a longer duration and this comes with certain collateral damages which cannot be avoided. However, in the case of Libya this entire narrative failed. The damage went far from what could have been anticipated and the desired result could never be achieved. This makes us question this narrative and forces us to think towards an alternative or at least a more nuanced way of approaching such situations which of course include more peaceful approaches.

6 CONCLUSION AND ANALYSIS

Before coming on to concluding observations on the aspect of R2P, the author would like to draw the attention of the readers to a question – **Why are the Third World States so apprehensive when it comes to any form of foreign intervention?** Probably, it can be owed to the impressions resulting from colonial history which have led the countries with a colonial past to believe that regardless of the good intentions, international power relations, the colonial history, the economic inequalities created by it and military interventions cannot be viewed in isolation from each other.[59]

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[58] Heidarali Teimouri & Surya P Subedi, *Responsibility to Protect and the International Military Intervention in Libya in International Law: What Went Wrong and What Lessons Could Be Learnt from It?*, Volume 23 Journal of Conflict and Security Law (2018).

[59] SUE ROBERTSON, *'Beseeching Dominance':*Critical Thoughts on the 'Responsibility to Protect' Doctrine*, AUSTRALIAN INTERNATIONAL LAW JOURNAL (2005).

This is quite a valid argument. Imagine, will we Indians ever support the idea of a foreign intervention which would involve British forces? After all the brutalities committed in the British regime, there will always be an element of suspicion in our minds. Hence, it would be very difficult to pose complete trust in such an intervention even if it is sanctioned by the U.N. Similarly, it stands true for other countries with a colonial past.

However, going by an optimistic approach where we would like to believe that the past is past and the international community is moving towards peace and harmony. Therefore, proceeding from a neutral stance freed from the prejudices of a colonial past, the author would like to present the following observations on the concept of R2P –

One way of looking at the concept of R2P is **dismissing the idea in its entirety** and accepting that mass atrocities are a part and parcel of armed conflicts. Alternatively, an attempt can be made to **address the challenges that are encountered while implementing** the doctrine of R2P. Undoubtedly, the implementation of the R2P principles took an unprecedented turn in Libya but that should not let us lose all our hopes in the said doctrine.

We cannot forget the noble intentions behind crafting of this principle. It was intended to bring about a **sense of responsibility** to the notion of sovereignty so that it could not be used as a license to violate human rights of the population of one's own country and force the international community to stand as a mute spectator.

Definitely, the noble intentions can lead to doctrinal formulations but mere intentions or willingness of the international community to abide by the R2P principles is not enough. What is needed is **acute attention to the technical glitches** involved in practical implementation of such ideas as R2P.

We, as an international community need to keep in mind that **every nation has its own intricacies** related to governance, the people, the economic and social structure etc. In such a scenario advocating a ***'one size fits all'*** formula can result in a havoc which we saw in the case of Libya as interveners tried to establish a democratic regime. It would be a wiser approach to leave it to the citizens to decide the kind of regime they want to adopt for themselves. The interveners have to be very careful regarding their objectives. Freeing the civilians from the atrocities is one thing and trying to impose their own ideas of human rights is quite another. An intermixing of the two ideas can result in a failure of the desired objective.

For this kind of shift in attitude, what is needed is enhanced ***'inclusiveness'*** in the formulation of international law and the decision-making processes. The voices of the developing nations should not be usurped by the opinions of the developed ones.

Another very important aspect when it comes to decision making by the international community is – **trust, confidence and consensus** amongst the members. Lack of these aspects can result in breakdown of the entire process. For example, what happened in Libya led to a deadlock in Syria. To avoid this sort of a failure, consensual decision making becomes very important. This urges us to deliberate on the question as to how can consensus be secured in UNSC?

As already stated above, the purpose of this article was not to dismiss the idea of R2P. Instead, it aimed at presenting the challenges involved in implementation of the said concept and accordingly aimed to provide for a way forward. The article began on a hypothetical premise that R2P is a ground breaking idea which has definitely been fostered by noble intentions involving humanitarian assistance to those in need but noble intentions alone do not seem to be guaranteeing the success of this doctrine.

There is a famous Chinese proverb which says – "Talk doesn't cook Rice !!!". Well, applying it in the current context further strengthens the hypothetical premises with which this article began. Indeed, R2P is a great concept but we need a more nuanced implementation of these principles to make them a success. For that, a more careful planning based on deliberations and discussions by UN member states is needed. Other factors which can ensure the success of this doctrine are inclusive decision-making processes, consensus amongst the decision makers and understanding the technicalities of implementation by not basing the decisions on one narrative entirely.

Now it is up to the international community to decide how it wants to take forward the issue in hand – Does it wish to work upon the implementation challenges and make the idea a success or does it wish to take its failure in Libya pessimistically and refrain from resolving the deadlock that has arisen thereafter which would further strengthen the critical views which treat R2P as a licence to opportunistic intervention.

THE DE RIGUEUR OF LEGAL DIMENSIONS: PROCEDURAL JUSTICE

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1 INTRODUCTION

The mind of every man of ordinary prudence in his quest of nurturing or catering to the obligations put forth by the legislative or the political sovereign of the state evidently ponders over certain questions , so as to arrive at a conclusion regarding the legitimacy of the laws promulgated , accountability of such a legislature which has been vested with the power and the duty of law making , the efficiencies of implementation of such laws , reliability on the justice system as a whole and most important being ,the ethical and the legal validity involved in the procedure of both law making and delivery of justice. When a procedure commanding a justice, system is without the adoption of both ethical and legal sentiments, or either of them, then the very intent of establishing such a judicial and a legislative system shall be deemed to be defeated.

The answer to question as to why the law has to be obeyed, and what is the benefit arising out of fulfilling such an obligation, is what which primarily determines the legal and political adherence to the supreme legislative power of the state or in other words, the sovereign. It is often debated over the fact that this compliance of the general public to the sovereign is majorly because of the personally and socially unfavorable circumstances that follow or the sanctions that are usually imposed, if there exists a manifestation of such disobedience and on the other end, it is contended that the citizens can be inspired morally to submit themselves to a legally valid legislature, the functioning of which has managed to convince the citizens[60]. Thus, the reason behind the law-abiding behavior of the citizens, though being a subjective one falls in broader hemispheres of legitimacy and morality. Citizens are programmed to look for personal gains and benefits they would acquire from behaving in a certain way or from comprehending to someone's instructions and this is what a carefully deduced

[60] KRISTINA MURPHY, THE REGULATORY THEORY 43-44 (Peter Drahos, ANU Press, 2017)

model of procedural justice must look for and evaluate – what personal gain the citizen is aiming to procure from such an obedience[61].

It is often opined that "Procedural justice has to do with how authority is exercised and how people experience it."[62] Having sufficiently understood about what procedural justice is and what procedural justice seeks, the next question for which the answer must be sought is how can the exercise of a just legal procedure be ensured. The concept of procedural justice cannot be treated as an exclusive prerequisite of any justice system. It is a mandatory task on the part of the sovereign of the territory to ensure that both substantive laws and the procedural laws are constructed in a manner that the unjust furtherance of the state , of any body of the state or its citizens do not possess the power to render such provisions in effective. Thus, it can be said that "the very notion of procedural justice as an independent criterion of fairness is empty"[63].

However, an important question that would venture into the arena of procedural justice is that if the rights pertaining to procedural justice are only restricted to the certain substantial laws which are recognized by the legislature. "The right to a procedure is puzzling because what we have a right to is certain states of affairs; we have a right to just treatment by the state, and the process by which such treatment is accorded individuals would seem to possess no independent moral value."[64] . At this point, having put forth the above sentences, I would assert that the judgment delivered by a system which is bereft of either of the procedural justice or the legitimacy of substantive provisions of the so called statutes, is not a reliable delivery of the system of judicature , rather it is nothing but a piece of a carelessly operating legislative and judicial system delivering illusionary justice.

This kind of the mostly unaccountable illusionary justice, further becomes a bone of contention in examining if the due process was followed or not and contributes to the prominent area of concern – the miscarriage of justice, especially when an innocent is forced to remain in incarceration, either because the suit is still under trial, and hence not pronounced guilty yet, or

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[61] "The basic premise of the instrumental model of compliance is that people are motivated to maximise their own personal gains; they are rational actors who behave in a manner that personally benefits them." Ibid.

[62] ROBERT E WARDEN & SARAH J MCLEAN, MIRAGE OF POLICE REFORM pg 69 (University of California Press,2017)

[63] LAWRENCE B SOLUM , PROCEDURAL JUSTICE , 78 S. CAL. L. REV. 181, 322 (2004).

[64] David Resnick, Due Process and Procedural Justice,18,ASPLP, pp 206-228 1977

because he has been prosecuted wrongfully. This very violation of the fundamental human rights and principles of natural justice, coupled with the reactions of victims of such miscarriage of justice, is in itself an enough motivating factor to persuade the sovereign to device better judicial systems, while also examining the darker shades of the existing approaches of judicial systems.

2 MISCARRIAGE OF JUSTICE IN INDIA

The concept of procedural justice can be perceived and approached in majorly two important ways: procedural justice in a system of certainty confined to the legal grounds and the procedural justice is a system which is comparatively uncertain, for the fact that lies outside the domain of the legal discipline, perhaps more on the grounds of individual morality. Having submitted this, the challenge lies in establishing a counterpart relationship between them [65] and the same is applicable to socio-legal circumstances prevailing in India. The domain of miscarriage of justice was brought into the red-light area by the alarming rates at which the number of under-trial prisoners was increasing in India. "According to PSI 2015, there were 4, 19,623 prisoners across the country; out of which, 67.2% i.e. 2,82,076 were under trials (i.e. people who have been committed to judicial custody pending investigation or trial by a competent authority); substantially higher than the convict population i.e. 1,34,168 (32.0%).A review of the data in PSI shows that across the country as well as in States, under trial prisoners continue to be higher in numbers than the convict population."[66] Nevertheless, let alone the under trial prisoners, it was also important for the sovereign to take into its reigns the matters of wrongful prosecution of innocent persons due to the fault in the legal machinery of the state. The matter became a hotly debated issue especially after the case of Babloo Chauhan @ Dabloo v State Government of NCT Delhi[67] , where the emphasis was thrown on the need of the hour to revisit the legislative provisions, evaluate their efficiency and also amend them if necessary. In the context of the case mentioned above, Dr Justice B S Chauhan said that - "An effective response from the state to the victims of miscarriage of

[65] "Before considering possible reform strategies one should dwell on this relationship between formal justice (justice according to law) and informal justice (justice outside the formal legal system) "
Kim Economides, Small Claims and Procedural Justice, Vol 7 No 1,British Journal of Law and Society ,pp 111-112 (1980)

[66] Report No 277 , Wrongful Prosecution (Miscarriage of Justice), The Law Commission of India (2018)

[67] 247(2018)DLT 31

justice resulting in wrongful prosecution is lacking in the criminal justice system in the country, as it stands today. [68]" He further asserts that the Constitution of India is a home of fundamental rights assuring a qualified and just life to every citizen. Factually, the Article 21 of the Constitution of India provides for the fundamental right of a person to enjoy protection of life and liberty.[69] It is the vested duty of the state to ensure that its various organizations, employees, institutions work in consonance with the established due process of law, and in circumstances where there is failure of such adherence, then it shall give rise to a circumstance where state liability can be invoked. The state shall then be obligated to not only impose sanctions on the guilty wrong doer, but also compensate for the very fact that an innocent was victimized. Despite such an obligation put forth on the state by virtue of morality, natural justice and legislations, the manner which the state would adopt in tackling the same is yet to be free of ambiguity. Thus, tackling the existence of miscarriage of justice, irrespective of the fact that it is deliberate on the part of the state or not, must be taken into consideration as the need of the hour. It is however asserted that one of the major challenges towards combating the lack of procedural justice of miscarriage justice is the lack of international and national consensus among the law-making bodies and the general societies about what exactly 'miscarriage of justice' amounts to. However, it can be understood that "miscarriage of justice is "errors in the interpretation, procedure or execution of the law- typically, errors that violate the due process, often resulting in the conviction of innocent people"[70].

Further as pronounced by the courts of Indian Judicature, the term simply denotes a deviation from the standard procedures which are to be followed while administering justice, and it is that disregard of the rules laid down by the state machinery for the purpose of delivery of justice. Such a manifestation would however only negate the very concept of judicial procedure.[71]

To vindicate the fact that there have been incidents where the victims were not only detained for unreasonable period of time during their case being under trial but also that there exists instances where even after the acquittal,

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[68] Dr Justice B S Chauhan , para 2 , D.O No6(3)319/217-LC(LS)

[69] Protection of life and personal liberty : No person shall be deprived of his life or personal liberty except according to procedure established by law , Art 21 Constitution of India

[70] BRIAN FROST, ERRORS OF JUSTICE, NATURE, SOURCES AND REMEDIES (Cambridge University Press,2004)

[71] Bibhabati Devi v Ramendra Narayan Roy (AIR 1947 PC 19)

the victim has been detained in the country's prisons, some of the landmark cases can be cited. In the case of Rudal Shah v State of Bihar[72], the plaintiff was wrongfully detained in the prison for 14 years, even after the judgment was delivered in his favor, thus acquitting him. Such an act on the part of an employee of the state, who has failed to act ethically and legally and instead acted carelessly and negligently, with or without having the intention to do so, can be rendered to be violating the provisions of Article 21 and Article 22 of the Constitution of India. However, the court in this case, concluded that such a disobedience and wrongful implementation of procedural laws must be treated with an order for compensation. The court in the same case also advanced that compensation is perhaps the only way the court can attempt to combat the occurrences of wrongful prosecutions or miscarriage of justice.[73] The case is given the status of being the first one to determine a matter and a remedy for the reasoning of this sort. Thus, this pronouncement of the court leaves an ordinary man, that if the remedy which is in the form of mere compensation, would be a sufficient action against the wrong doer.

While dealing with the case of *Bhim Singh, MLA vs. State of Jammu* and Kashmir and Others[74] too, the Supreme Court delivered the judgment holding the defendant liable to pay compensation to the plaintiff victim. Hence the victim had a right to obtain a sum of fifty thousand rupees from the defendant as compensation.

However, the system of judicature can only be helping out such victims, only if such cases have been reported or if the system itself has been approached by the victim for a remedy. It is contended that though the cases of wrongful prosecution are more, the courts and the legislature have not ventured into devising a certain model which puts forth a uniform process and a criterion to evaluate the amount of compensation which has to be awarded for the victim.

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[72] AIR 1983 SC 1086

[73] "One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt "Ibid. Also mentioned in Report No 277, Wrongful Prosecution (Miscarriage of Justice), The Law Commission of India (2018)

[74]1985 4 SCC 677

The administration of justice and governance of its procedural legality and ethicalness is vested with the state, thus in circumstances of miscarriage of justice, the state or the sovereign shall be held vicariously and strictly liable. Unfortunately, in many instances the state is covered and protected by 'sovereign immunity', however it may not always be the case. On the other hand, some jurists take a different stance, that 'sovereign immunity' very rarely comes into the picture when the issue is about violation of the fundamental rights of any person.

The Supreme Court in the case of *Nilabati Behera vs. State of Orissa*[75] reiterated the same principle and asserted that the defense of 'sovereign immunity' is inapplicable irrespective of the fact that it is recognized as a defense under the law of torts[76]. The cases with respect to procedural justice are mostly viewed as an infringement of fundamental right (of Article 21 in specific) and therefore it is a right which is guaranteed by the Constitution of India. Violation of such a right, doesn't deserve to be brushed off under the defense of the principle of sovereign immunity for the very reason that the remedies to such infringements are claimable under Article 226 and Article 32 of the Constitution of India and the same was reiterated by the Supreme Court with further observations[77] in the case of Consumer Education and Research Center and others v Union of India.[78]

Let alone these cases, even in the landmark case of *State of Rajasthan vs. Vidyawati Mst*[79] , the court reiterated the same principle and also laid down a ratio decidendi that the state shall be vicariously held liable for all the negligent acts committed by its employees.

However, the Law Commission of India, in its report No 277, recognized a model which had three path ways to implement remedial measures against the practice of procedural injustice and the miscarriage of justice. According to the report, Indian legal machinery tackles the cases of wrongful prosecution mainly by the virtue of public law, private law or criminal

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[75] AIR 1993 SC 1960

[76] Report No 277 , Wrongful Prosecution (Miscarriage of Justice), The Law Commission of India (2018)

[77] "… It is a practicable and inexpensive mode of redress available for the contravention made by the State, its servants, it instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or license issued under the statute or for the enforcement of any right or duty under the Constitution or the law." AIR 1995 SC 922

[78] AIR 1995 SC 922

[79] AIR 1962 SC 933

law.[80] While under the public law and the private law , the writ petitions can be filed to the High Courts or the Supreme Court, the criminal law extends its support for the victims of wrongful prosecution by the virtue of Chapter IX and XI of the Indian Penal Code of 1860 , and the provisions of the Criminal Procedure Code 1973 too contains provisions that govern the facets of procedural justice. Nevertheless, India has instituted many Constitutional and non-Constitutional Bodies for the same. The National Human Rights Commission and the State Human Rights Commission established by the virtue of the provisions contained in The Protection of Human Rights Act 1993 have been working towards providing remedies to the innocents who have been wrongfully prosecuted. Further, the governance of procedural justice is not just a National Legal Mandate, but instead is also an international obligation. The International Covenant on Civil and Political Rights 1966, which has been ratified by India is regarded to be one of the most important international covenants governing the sphere of miscarriage of Justice. Article 14(6)[81] and Article 9(5)[82] of the covenant provides for the same.

Despite having such statutes and governmental bodies working towards enhancing the procedural justice, the rates of crime haven't really decreased. The major reason for this is the fact that wrongful prosecution of the innocents would often put them into the verge of manifesting a revengeful attitude and on the other hand also reduce the scope for reformations. If by practice of procedural injustice the guilty wrong doers are exempted from being prosecuted, it is obvious that such individuals would have the

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[80] "A review of the existing laws and the case law brings forward three categories of court-based remedies with respect to miscarriage of justice resulting in wrongful prosecution, incarceration or conviction etc.: (i) Public Law Remedy; (ii) Private Law Remedy; and (iii) Criminal Law Remedy. This Chapter also takes note of the relevant provisions of the Police Act, 1861, and of the role of the Human Rights Commissions in this context."

- Report No 277 , Wrongful Prosecution (Miscarriage of Justice), The Law Commission of India (2018)

[81] "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[82] "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"

tendency to commit a wrongful act again and thus at this point it can be asserted that chances of reducing the crime rates are low, if the matters of procedural justice are not looked after well.

The next domain that comes into the picture while talking about the concept of procedural justice is its applicability with reference to practice of Alternative Dispute Resolutions. It is held that the procedural justice is a "novel idea" and if that is, is it comparatively feasible and pragmatic to implement and govern it in the sector of ADR than the conventional system of Judicature. However, the answer to this matter is indeed inconclusive. Thus, it can intermediately assert that the concept of procedural justice and substantive justice must run as the parallel facets of legal systems so as to render it effective.

3 DISCUSSION AND CONCLUSION

At this point, an important point to be noted is if mere monetary compensation would be sufficient to restore the life of an innocent who has been wrongly prosecuted – no, it definitely is not and the same was opined by the Supreme Court in the case of *Thama Singh vs. Central Bureau of Narcotics*[83]. The major shortcoming lies in the determination of what constitutes a wrongful prosecution. For a person to avail the remedy for wrongful prosecution, he must have been judicially prosecuted undergone trials and must be finally acquitted by the court.[84] The scope of further investigation of this report lies in determining how to tackle scenarios where the innocent has been wrongfully convicted, even at the final stages of appeal and that there is enough evidence to prove the same, but the state machinery is blind towards it. Having said that it can also be concluded that it is the need of the hour to look into the provisions of the Indian and the International Laws that govern the principles of procedural justice. Further, it can also be

[83] "For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence since the damning finger and opprobrious eyes of society draw no difference between the two….", Thama Singh Vs Central Bureau of Narcotics

[84] "Wrongful prosecution, as noted above, are the cases of miscarriage of justice where procedural misconducts - police or prosecutorial, malicious or negligent – resulted in wrongful prosecution of an innocent person, who was ultimately acquitted, with a court making an observation or recording a finding to that effect. The underlying sentiment being that such person should not have been subjected to these proceedings in the first place." -Report No 277 , Wrongful Prosecution (Miscarriage of Justice), The Law Commission of India (2018)

concluded that a judicial system which has imbibed in itself the principle of procedural justice and substantial legitimacy shall get the best of obedience of the citizens, thus fulfilling the very object of a republican democracy.

ENDORDING UNPRECEDENTED CANONS OF DATA PRIVACY: REMOULDING INDIAN DATA PROTECTION FRAMEWORK

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1 INTRODUCTION

With dynamism being a significant trait of an evolving society, adoption of Right to Privacy as an intrinsic part of Article 21 of the Constitution of India was just a conception which embraced the Fundamental Rights family to broaden their ambit and let citizens live with dignity and pride in order to ensure that no one encroaches upon their private realms by processing their personal data through collection, storage and dissemination of information. The onset of privacy regime had already begun in the late 1900s in *M.P. Sharma & Ors. v. Satish Chandra*[85] and *Kharak Singh v. State of U.P.*[86], where questions of fundamental freedom of protecting one's personal sphere had originated, yet such efforts could not materialise enough to be included as a right. The constant struggle to recognise privacy as a right never stopped, however the only constraint in its recognition was the fact that every time a privacy issue emerged, the higher judge bench's opinion would not match with those who recognised privacy as a right.[87] It was finally in the nine judge bench judgement *of K.S. Puttaswamy v. Union of India*[88], where right to privacy was recognised as a fundamental right, finding its genesis in Article 21 which recognises the Right to Life and Personal Liberty. Article 21 encompasses within it a broader sphere of rights like right to food, right to shelter, etc. which upholds an individual's life, however right to privacy upheld an individual's autonomy in protecting his personal data from state surveillance and non-state actors, it became a negative right imposing upon the state the duty of non-interference in his personal sphere and a positive right in the sense that the state had to take all measures to ensure that no personal data of any of its subject is

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[85] M.P. Sharma & Ors. v. Satish Chandra**,** 1954 SCR 1077.

[86] Kharak Singh v. State of U.P. 1964 SCR (1) 332

[87] *Vrinda Bhandari et.al., An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict*, INDRASTRA (Nov. 18, 2017), https://medium.com/indrastra/an-analysis-of-puttaswamy-the-supreme-courts-privacy-verdict-53d97d0b3fc6.

[88] K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

encroached upon.[89] However, the judgement was lucid to the extent that it is not an absolute right and there exist ***just, fair and reasonable*** restrictions to the exercise of such right like legitimate state interest, prevention, detection and investigation of crimes, etc.[90] The recent Supreme Court Judgement, *Ritesh Sinha v. State of U.P*.[91], has highlighted this aspect that Right to Privacy is not absolute and can be compromised when it comes to larger public interests.[92]

An important criticism to broadening the horizons of privacy is that it is in direct contrast to a few other Fundamental Rights, like the right to be forgotten which is an important right from a data subject's angle giving it the right to erasure of data after the purpose of processing has been established, runs contrary to the right to freedom of speech and expression to the extent that complete erasure might not keep citizens informed, which is again not in public interest. Justice B.N. Srikirishna in his Draft Data Protection Committee Report has already highlighted such concerns. Also, freedom of press has been recognised as a right under Article 19 (1)(a),[93] however the Right to Privacy runs in stark contrast to the freedom of press as publishing content which might infringe an individual's right to privacy[94] may well be an important public disclosure in the nature of public interest, at times which is not defined yet the judiciary has laid down effective standards to restrict its scope.[95] Hence a balanced approach is a necessity in this era as clashes between intrinsic rights within the golden triangle pose a

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[89] Columbia University, *Case Analysis of K.S. Puttaswamy v. Union of India*, GLOBAL FREEDOM OF EXPRESSION, https://globalfreedomofexpression.columbia.edu/publications/.

[90] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna , *A Free and Fair Digital Economy Protecting Privacy: Empowering Indians*, COMMITTEE OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA (Data Protection Committee Report), https://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf

[91] Ritesh Sinha v. State of U.P. Criminal Appeal No.2003 OF 2012.

[92] Ashok Kini, *Fundamental Right to Privacy Not Absolute and Must Bow Down to Compelling Public Interest: SC*, LIVE LAW (Aug 2, 2019 18:39 Hrs.), https://www.livelaw.in/top-stories/fundamental-right-to-privacy-not-absolute-146884.

[93] Indian Express Newspaper v. Union of India, 1985 SCR (2) 287

[94] *Supra* note 7, *see* William F. Woo, *Defining a Journalist's Function*, 59 NIEMAN REPORTS 33(2005).

[95] R.K. Jain v. Union of India, (1993) 4 SCC 120

serious challenge as standards of proportionality and necessity to every reasonable restriction are difficult to achieve definitiveness.

The current data protection framework of India is somewhat fragile as there exists no comprehensive data protection legislation in India, there are only provisions in the IT Act (Sec. 43A) and sub-delegations within it and some other provisions in other Acts like Aadhar Act, 2016, IPC, etc. which deal with fragments of rights under data protection regime.[96] The Data Protection Bill, 2018, which is still pending, has attempted to outline a data protection framework replacing Sec. 43A of the IT Act, in order to clarify the law on data protection in terms of defining the data subject's (data principal) rights and data controller's (data fiduciary) (can be a state or a non-state actor) liabilities. However, the present Bill might need some changes in order to strike a balance between both these subjects and ensure that the privacy regime does not get hit by administrative failures. The Bill aims to create a regulatory authority, the Data Protection Authority (DPA) which would monitor the data controller in terms of its obligations towards the data subject and impose penalties in case they fail to carry out their obligations.[97] The Bill seems to be a reflection of the EU GDPR, which is a European data Protection Framework with slight changes.[98]

The technological and digital worlds with no territorial bounds have far reaching impact on the data protection scheme of any state especially India, which ranks second in the world in terms of internet usage.[99] While every state desires for a free and fair digital economy, such goals are in direct conflict with the objective of preserving an individual's right to privacy and to set up a data protection framework in place, there needs to be a balance such that the individual interests do not hamper the collective interests of the society of being informed and exercising their right to freedom of speech and expression, as an informed mind is in a better position to elucidate upon and speak freely. With contemporariness emerging so rampantly, there exist new modes of fintech and e-commerce platforms in

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[96] Vijay Pal Dalmia, Data Protection Laws In India - Everything You Must Know, MONDAQ (Dec 13, 2017), http://www.mondaq.com/india/x/655034/data+protection/Data+Protection+Laws+in+India.

[97] Section 38, Personal Data Protection Bill, 2018.

[98] European Union General Data Protection Regulation, 2018 (*EU*) 2016/679.

[99] World Internet Stats, *Top 20 Countries in Internet Users vs. Rest of the World-June 30, 2019*, INTERNET WORLD STATS, https://www.internetworldstats.com/top20.htm.

order to facilitate new modes of payment, banking and trade, it becomes difficult to establish an intermediary's liability in data breaches, IP infringements and to control the dissemination of information as the spheres of technology are beyond surveillance at times.[100] The transformative potential of the digital economy to improve lives in India and elsewhere, is seemingly limitless at this time. Artificial Intelligence holds out the promise of new breakthroughs in medical research[101] and Big Data generates more calibrated searches and allows quicker detection of crime.[102] The new 'data sovereignty' agenda of the Government which thinks of data as a national economic asset to be protected from foreign surveillance by western tech companies has been widely debated. The selling of vehicle registrations and driver license records to private and government entities and the 'Digi Yatra' Programme of Hyderabad Airport has raised concerns about state surveillance.[103] The need to strike a balance between the aforementioned rights and the right to privacy is an important exercise in order to achieve public good and reduce ambiguity for achieving individual autonomy without burdening data fiduciaries with responsibilities and inordinate penalties.[104] Embracing transformations as these which can alter the entire legislative fabric of a nation are progressive to adopt yet strenuous to adapt.

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[100] Sindhuja Balaji, *India Finally Has A Data Privacy Framework -- What Does It Mean For Its Billion-Dollar Tech Industry?*, FORBES(Aug. 3, 2018, 2: 55 Hrs.), https://www.forbes.com/sites/sindhujabalaji/2018/08/03/india-finally-has-a-data-privacy-framework-what-does-it-mean-for-its-billion-dollar-tech-industry/#48388a1070fe.

[101] E. Hickok et al, *Artificial Intelligence in the Healthcare Industry in India*, THE CENTRE FOR INTERNET AND SOCIETY, INDIA (undated), https://cis-india.org/internet-governance/files/ai-and-healtchare-report.

[102] See Rohan George, *Predictive Policing: What is it, How it works, and its Legal Implications*, , THE CENTRE FOR INTERNET AND SOCIETY, INDIA (Nov. 24, 2015) https://cis-india.org/internet-governance/blog/predictive-policing-what-is-it-how-it-works-and-it-legal-implications.

[103] Amba Kak, *Privacy law needs public debate: Data protection law must guard against internal as well as foreign threats to citizen privacy*, THE TIMES OF INDIA (Jul. 30, 2019, 2: 00 Hrs.), https://timesofindia.indiatimes.com/blogs/toi-edit-page/privacy-law-needs-public-debate-data-protection-law-must-guard-against-internal-as-well-as-foreign-threats-to-citizen-privacy/.

[104] Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 46, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf.

2 CURRENT DATA PROTECTION FRAMEWORK IN INDIA

After recognition of Right to Privacy as a fundamental right within the broad contours of Article 21, it was time to make legislative efforts to ensure such a right does not remain dormant and accordingly the Right to Privacy Bill, 2017 and subsequently the Personal Data Protection Bill, 2018 began taking shape. However, the efforts in terms of amendments to existing legislature were already made earlier. The current legislations dealing with data protection in India is primarily the Information Technology (IT) Act, 2000.The IT Act has provisions dealing with imposition of civil and criminal liabilities in cases of wrongful disclosure and misuse of personal data and violation of contractual terms. Section 43A of the IT Act[105] makes a body corporate dealing with or processing sensitive personal data or information of any person without ensuring that reasonable security practices are taken care of, liable to pay damages, however to what extent these damages could be awarded find no mention in the provision, leaving the judiciary to decide upon the maximum penalty justified on a case to case basis. Under this provision, the Government has notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (SPD Rules) which only deal with sensitive personal data including within its ambit passwords, financial information, physical physiological and mental health conditions, sexual orientation, medical records and history and biometrics of an individual.[106] This also propagates a consent based approach for disclosure of such sensitive personal data or information except in cases of legitimate state interests and for prevention, investigation or detection of a crime.[107] Transfer of sensitive personal data out of India has been permitted on the condition that the same level of data protection is provided for in the

[105] 43A Compensation for failure to protect data: Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.

[106] Rule 2, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

[107] Rule 6, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

country, which is applicable to the body corporate under the SPD Rules.[108] The body corporate would further be deemed to have complied with reasonable security practices if it has complied with security standards and has comprehensive data security policies in place.[109] However the SPD Rules have made the definition of sensitive personal data unreasonably narrow, certain categories of personal data including GPS location of an individual have not been included in its protective remit[110] and the provisions can be obviated by government agencies and a literal interpretation of Sec. 43A can render it nugatory and as a result overridden. Also, adjudicatory failures result in implementation failures.[111]

Under Section 72A[112] of the IT Act, any disclosure of information, knowingly or intentionally, without the consent of person concerned and in breach of a lawful contract is punishable with imprisonment of up to three years and fine extending up to 5 lacs, Sec. 69 of the IT Act articulates the exceptions to the general rule of maintaining privacy and provides that where the Government is satisfied that such disclosure is necessary in the interest of sovereignty, defence and security of India or in maintaining friendly relations with foreign states or public order or for investigation and detection of a crime, it may by order, direct any data controller to

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[108] Rule 7, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

[109] Rule 8, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

[110] GRAHAM GREENLEAF, INDIA – CONFUSION RAJ WITH OUTSOURCING IN ASIAN DATA PRIVACY LAWS: TRADE AND HUMAN RIGHTS PERSPECTIVES 415 (Oxford University Press 2014) (2016).

[111] Sreenidhi Srinivasan and Namrata Mukherjee, *Building an effective data protection regime*, VIDHI CENTRE FOR LEGAL POLICY (Jan. 2017), https://www.scribd.com/document/338204284/Building-an-effective-data-protection-regime-in-India.

[112] 72A Punishment for disclosure of information in breach of lawful contract.: Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.

intercept, monitor or de-crypt any information generated, stored, transmitted or received in any computer source.

Other prominent of provisions of the IT Act which might be useful reference are: Section 66E (Punishment for violation of Privacy) and Section 72 (Penalty for Breach of Confidentiality and Privacy). The exemption to Section 8(1)(j) of Right to Information Act which deals with non-disclosure on account of being not related to public activity or which may cause unwarranted invasion on one's personal data and the sub-delegation like-IT (Procedures and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 and IT (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009 deal with data privacy in India.

3 THE PERSONAL DATA PROTECTION BILL, 2018: PREVENTIVE OR PUNITIVE?

With increased digitization and rampant dissemination of information at the click of a mouse, the current data protection framework was ineffective as a comprehensive data protection framework was need of the hour, which could elucidate upon the rights of data subjects and obligation of data processors and data controllers, from which data subjects avail of the necessary services and the associated liabilities in case of negligent approaches towards disclosure of personal data of an individual. Finally realising such need, the *Personal Data Protection Bill* was again drafted in the year 2018. It is significant to understand the terms like data principal and data fiduciary in this context in order to comprehend the legislative language of the Bill. ***Data Principal*** is the individual whose rights are being dealt with and whose data is being collected as he/she becomes the focal actor in the digital economy and ***data fiduciary*** is the entity which collects the data and uses it in a fair and reasonable manner. The latter term was coined in order to demonstrate that the relation between these two is of trust and loyalty, wherein the data principal entrusts the data fiduciary to deal with his/her data with utmost care and in the interests of data principal and for a purpose which is reasonably foreseeable, which is the hallmark of any fiduciary relationship.[113] Another important aspect was the definition of ***Personal Data*** which was defined as any data from which an individual is identified or identifiable or reasonably identifiable, which could either be direct or

[113] Tamar Frankel, *Fiduciary Law*, 71(3) CALIFORNIA LAW REVIEW, 795 (1983).

indirect.[114] Thus, opinions, religious belief are all within the broad contours of this term.[115] The white paper had argued for a broader interpretation however, it was felt that chances of misuse could also proliferate.[116]

With the twin objective of protecting an individual's personal data while unlocking a digital economy, it becomes quintessential that every provision should strike a balance between the two in order to achieve the public good of a free and fair digital economy. In order to analyse the same, it is appropriate to delve deeper into the propositions of the Bill:

Applicability of the Bill: The law will have jurisdiction over the processing of personal data if such data is being used, processed, share, disclosed, collected or otherwise processed in India (Territorial Application). Fiduciaries not incorporated in India but carrying out business activities or such activities as profiling which could hamper individual movement and autonomy or otherwise cause any privacy harms to data principals in India and entities incorporated in India but carrying out processing activities out of India have also been included with the jurisdictional ambit of the Bill. Processing of anonymised data has been excluded,[117]which have also been excluded in other jurisdictions as South Africa and EU, which has endorsed pseudonymisation, where personal identifiers are replaced by pseudonyms.[118]

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[114] Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 32, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf

[115] Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 39, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf.

[116] Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 39, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf.

[117] Section 2, The Personal Data Protection Bill, 2018.

[118] Mark Elliot et. al, *The Anonymisation Decision-Making Framework* (UKAN Publications, 2016).

Processing: The Bill would cover data breaches by both state and non-state actors.[119] The DPA will have the authority to determine standards for anonymisation and de-identification of data, de-identified data will be within the purview of this law whereas anonymisation would not.[120] The definition of sensitive personal data has been broadened to include official identifier, political beliefs or affiliations of an individual, intersex status, caste, tribe, transgender status and DPA can extend such categories.[121] A consent based approach is stated for all types of public disclosure except a few with a product liability regime, making fiduciaries liable for privacy harms to principals.[122] Consent needs to be clear, specific, free and capable of being withdrawn[123] and for sensitive personal data, it needs to be specific.[124] A minor data principal (child) is required to be protected more and fiduciaries should undertake processing after taking their best interests into consideration and all fiduciaries processing significant children's data have been classified as guardian fiduciaries, appropriate age verification mechanism with parental consent have been mandated.[125]

Obligations of Data Fiduciaries: All data fiduciaries are required to process the data in a fair and reasonable manner.[126]Data fiduciary is obligated to provide notice not later than the stage of collection of data[127] and has to adhere to the standard of purpose specification, the obligation of maintaining data quality and storage limitation will be on data fiduciary, however the responsibility of delivering accurate information is on the Principal[128] as he/she is the best and primary source of his/her personal data. The personal data breach notification is required to be mandatorily given to the DPA as soon as possible[129] and all data security obligations (maintaining integrity and confidentiality of personal data including technical measures of physical and computer or information technology security, physical

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[119] Section 3(13) and Section 3(15), The Personal Data Protection Bill, 2018.

[120] Sections 3(3), 3(16) and Section 61(6)(m), The Personal Data Protection Bill, 2018.

[121] Sections 3(35) and Section 22, The Personal Data Protection Bill, 2018.

[122] Section 12, The Personal Data Protection Bill, 2018.

[123] *Id*.

[124] Section 18, The Personal Data Protection Bill, 2018.

[125] Section 23, The Personal Data Protection Bill, 2018.

[126] Section 4, The Personal Data Protection Bill, 2018.

[127] Section 8, The Personal Data Protection Bill, 2018.

[128] Section 9 and Section 10, The Personal Data Protection Bill, 2018.

[129] Section 32, The Personal Data Protection Bill, 2018.

security of premises, proper disposal system of papers and e-waste, etc.) need to be complied with.[130]

Data Principal Rights: The following rights have been recognised under the Bill:
Right to Confirmation, access and Correction[131] (Right to confirmation refers to the right to inquire against processing of personal data by fiduciary, right of access grants the data principal with the right to gain access to the personal data stored by the fiduciary and right to correction refers to the right to rectify, complete or update inaccurate information about the data fiduciary, which includes both input and output data, input refers to data provided by data principal to data fiduciary and output data refers to data analysed from input data.)[132]

Right to data portability[133] (right to store data in machine readable formats in structured way to use it for their own uses and to facilitate transferability from one data fiduciary to another but such right should not reveal trade secrets of a data fiduciary and should take into consideration technical feasibility).

Right to be Forgotten[134] (right to delink, delete, limit, or correct the disclosure of personal information on the internet which is misleading, embarrassing, irrelevant or anachronistic and should be based on the five point criteria: sensitivity of data, scale of disclosure or degree of accessibility sought to be restricted, role of data principal in public life, relevance of data to public and nature of disclosure and activities of data fiduciary.)[135]

Cross- border Transfer of Data: Cross- border transfer of data will be through model contract clauses inclusive of key obligation with the transferor being liable for harms caused to principals due to violations committed by a transferee, with intra-group scheme being applicable for transfers

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[130] Section 31, The Personal Data Protection Bill, 2018.
[131] Section 24 and section 25, The Personal Data Protection Bill, 2018.
[132] Article 29 Data Protection Working Party, *Guidelines on Automated Individual decision-making and*
profiling for the purposes of regulation 2016/679 , EUROPEAN COMMISSION (Feb. 6, 2018), file:///C:/Users/akkub_000/Downloads/20171013_wp251_enpdf.pdf.
[133] Section 26, The Personal Data Protection Bill, 2018.
[134] Section 27, The Personal Data Protection Bill, 2018.
[135] Michael J. Kelly & David Satola, *The Right to be Forgotten*, 1 UNIVERSITY OF ILLINOIS LAW REVIEW 1 (2017).

within group entities.[136] Central Government would be able to green light certain jurisdictions in consultation with the DPA.[137] Critical personal data would be processed only in India, with Central government having the power to determine critical personal data on the basis of strategic interests and enforcement.[138]Personal data relating to health will be allowed to be transferred for prompt action and emergency, other data can be additionally transferred on basis of central government approval.[139] Other categories of data will be subject to keeping at least one serving copy being maintained in India.[140]

Non- Consensual Grounds of Processing: Non- consensual grounds of processing include: functions of the state[141] which relate to welfare activities of the state (as defined under Article 12 of the Constitution of India), Compliance with law and order of court or tribunal[142] which relate to compliance with other laws (as defined under Article 13 of the Constitution of India) and other judicial order so that it does not act as an impediment to the judicial fabric of the nation, Prompt Action[143] which relates to critical situation where an individual is incapacitated to give consent and the processing is necessary to meet the exigency of the situation, employment[144] wherein the processing would take place on a non-consensual basis only if there involves disproportionate effort on part of the employer or there is consent fatigue on part of the employee and Reasonable Purpose[145] which include the remnant purposes like detection and prevention of unlawful activities.

Exemptions: These include: Security of the State[146] and must be proportionate and necessary encroachment upon the personal data of an individual, Prevention, Detection or Investigation and Prosecution of Contraventions of Law[147] (including protection of revenue), however the same must

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[136] Section 41(1)(a), The Personal Data Protection Bill, 2018.
[137] Section 41(1)(b), The Personal Data Protection Bill, 2018.
[138] Section 40(2), The Personal Data Protection Bill, 2018.
[139] Section 41(3), The Personal Data Protection Bill, 2018.
[140] Section 40(1), The Personal Data Protection Bill, 2018.
[141] Section 13 and Section 19, The Personal Data Protection Bill, 2018.
[142] Section 14 and Section 20, The Personal Data Protection Bill, 2018.
[143] Section 15 and Section 21, The Personal Data Protection Bill, 2018.
[144] Section 16, The Personal Data Protection Bill, 2018.
[145] Section 17, The Personal Data Protection Bill, 2018.
[146] Section 42, The Personal Data Protection Bill, 2018.
[147] Section 43, The Personal Data Protection Bill, 2018.

be authorised by law, Disclosure for the Purpose of Legal Processing[148] in the nature of defending or availing of a legal remedy or seeking advice from an attorney, research activities[149] which are not exempted absolutely and would only be subject to achievement of research objectives laid down by the DPA, personal or domestic uses[150], journalistic activities[151] which would try to seek a balance between the two conflicting rights of Freedom to Speech and Expression and the Right to Information and manual processing by small entities[152] as they do not rely on automated means and chances of any privacy leak are relatively lesser.

Enforcement: The DPA is vested with task of monitoring and enforcement, legal affairs, policy and standard setting, research awareness and inquiry, adjudication and grievance handling. The DPA has also been vested with the task of classifying certain fiduciaries as significant which can cause greater privacy harms to an individual based on volume of data processed, types of processing activities undertaken, etc.[153] An appellate tribunal has been advised to hear and dispose of appeals from the DPA and appeals from the appellate tribunal will be to the Supreme Court of India.[154]Penalties and compensation levied upon data fiduciaries for data breaches against the data principal with a fixed upper limit (for acts in violation of the Bill- fine up o 5cr. Or 2% worldwide turnover and for other specific provisions fine up to -15 cr. Or 4% of the worldwide turnover, whichever is higher[155], for failure to comply with data principal's request- fine of Rs. 5,000 per day up to 10 Lacs,[156]etc.)

3.1 Analysis and Possible Alternatives

With overarching data protection framework, it has become plausible to infer the conception of data privacy in a more lucid form, however there are certain loopholes which can defeat the very purposes of the Bill for which it had come into being. The use of terms like fair and reasonable standard to determine obligations of a data fiduciary under Section 4 of the

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[148] Section 44, The Personal Data Protection Bill, 2018.
[149] Section 45, The Personal Data Protection Bill, 2018.
[150] Section 46, The Personal Data Protection Bill, 2018.
[151] Section 47, The Personal Data Protection Bill, 2018.
[152] Section 48, The Personal Data Protection Bill, 2018.
[153] Section 38, The Personal Data Protection Bill, 2018.
[154] Section 84 and Section 87, The Personal Data Protection Bill, 2018.
[155] Section 69, The Personal Data Protection Bill, 2018.
[156] Section 70, The Personal Data Protection Bill, 2018.

Bill, can create an ambiguity[157] as there is no such guidance provided to determine the essence of these terms, this will only lead to increasing litigation to discern the legislative intention. A prudent person's test could justify what reasonable and fair means in this context what a reasonable main in ordinary circumstances would have reasonably foreseen and undertaken. Even the White Paper has recommended the usage of terms reasonably necessary or necessary in order to determine storage limitation to ensure clarity in implementation.[158] The Applicability is broad enough to encompass the affected subjects and impose penalties on stated fiduciaries which are likely to impact the data subjects in India. However, the obligations of data fiduciaries are slightly unclear in terms of the time limit under which the data fiduciary should report a data breach incident and that too only if it is likely to harm the data principal, this could lead to serious mishandling as there is discretion vested in data fiduciaries as they might perceive a data breach incident as not encroaching upon the private realms of the data principal which runs in stark contrast with the object of the Bill of ensuring individual autonomy with unlocking the doors of a free digital economy. Like the EU GDPR a maximum time limit (which is 72 hrs. Under the EU GDPR[159]) could be prescribed so that adherence of the same is taken seriously and every data breach should be registered with the DPA and the power to decide whether any breach is likely to hamper the data privacy of an individual should vest with the DPA. The Bill has infrastructure to operationalise consent though digital licker system and electronic data consent and the information codified is consent artefact, which became a national standard in 2016 by regulators like RBI and SEBI. Also, the Account Aggregator provides a better control over the data like UPI.[160] Another important aspect which should be taken is journalistic exemption which needs to be balanced with an individual's right to preserve his

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[157] Ministry of Electronics and Information Technology, *Draft Personal Data protection Bill, 2018*, PRS INDIA, http://www.prsindia.org/billtrack/draft-personal-data-protection-bill-2018.

[158]Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 102, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf.

[159] Art. 33, European Union General Data Protection Regulation, 2018 (*EU*) 2016/679.

[160] Sudhir Singh, *Demystifying India's Data Protection Bill By Supratim Chakraborty And Siddharth Shetty*, ISPIRIT PRODUCTNATION (Sept. 2, 2018), https://pn.ispirt.in/demystifyingdataprotectionbill/.

privacy, there should not be a blanket exemption, it should always try to ensure that larger public interests are catered to and not for merely adding spices to their display of such content. As suggested by the Data Protection Committee, it would be useful to undertake a balancing test which should weigh individual interests against larger public interests with ethical standards which are made effectual in real. Reporting of incidents to Data Protection Officers (DPO) appointed by the data fiduciaries may lead to significant bias and might lead to undue procrastination in grievance redressal mechanisms, either DPO should be made independent by giving the responsibility of appointing to the DPA or only DPA should be made a grievance redressal platform. The Bill should try to define offences not levy inordinate penalties on data fiduciaries, the same must also take into consideration the compliance costs and accordingly should be lessened, there are provisions for attachment of property without following CPC procedures. Also, offences under the Bill have been made cognizable and non-bailable, which is unduly disproportionate.

4 DATA PROTECTION AND JOURNALISTIC FREEDOM

With India's ranking dropping to three places at 138 in the World Press Index[161], it becomes imperative as to why the Data Protection Committee and the drafters of The Personal Data Protection Bill were apprehensive of increased compliance on part of Journalists and had allowed for an exemption when it came to data protection.[162] A balance between free dissemination of information as an indispensable part of the Freedom to Speech and Expression and restricting such flow in order to achieve data privacy objectives in the form of restricting publication of personal data without consent,[163] is necessary for public good. Journalist has been defined as an analyst or an interpreter of events[164] and to serve as proxy witnesses and informational gatherers,[165] whereas journalism has been defined as the

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[161] Press Trust of India, *India's ranking in press freedom falls to 138: RSF*, THE ECONOMIC TIMES (Apr. 26, 2018, 7:05 Hrs), https://economictimes.indiatimes.com/industry/media/entertainment/media/indias-ranking-in-press-freedom-falls-to-138-rsf/articleshow/63918702.cms?from=mdr

[162] *Supra* note 62.

[163] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

[164] Donald H. Johnston, *Journalism and the Media* 108 (1979).

[165] Judith Clarke, *How Journalists Judge the Reality' of an International _Pseudo-Event*, 4 JOURNALISM (2003).

process of gathering, selecting, interpreting and disseminating news.[166] At times, journalism does include opinions and analysis of an event, with a broadened definition of journalism it becomes necessary to restrict such definition in order to make such exemption meaning and not prone to misuse, criteria like- the number of years in carrying out journalistic activities and whether it has become a source of livelihood or not can be appropriate to define journalists' eligible to take the journalistic exemption.[167] A balance between these conflicting rights can be struck by consideration of factors like-interests of the public and the relative proportional harm it is likely to cause to an individual as held in *Indu Jain v. Forbes Incorporated*.[168]

To really strike a balance the ethical standards as suggested by the Data Protection Committee need to be strengthened in terms of enforcement. The New Broadcasters Association in its submission to the Data protection Committee has outlined ethics standards of accuracy, neutrality, relevancy, impartiality of facts, security of data, dissemination with the object of communicating ideas, information, opinions while ensuring that right to privacy of an individual is taken care of.[169]If such standards and tests are not clear enough as to what all constitutes as journalistic activity and what media houses are covered, it might end up giving too much interpretative window to judges and lead to ambiguity.[170] The recent case of Ser*gers Buivids v. Datu Valsts Inspecsija*[171], the EU court has held that citizen journalists as bloggers can rely on derogation for journalistic purpose.[172] Hence a proper guidance with more training to media houses with clear accountability assessment criteria could resolve the conflict and harmonise the two most predominant Fundamental Rights in the Golden Triangle.

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[166] *Supra* note 73.

[167] *Supra* note 7.

[168] Indu Jain v. Forbes Incorporated, (2007) ILR 8 Delhi 9.

[169] *Supra* note 7.

[170] *Prashant Reddy Thikkarvarapu, Ramifications of a Potential Data Protection or Privacy Law for Journalists*, THE HOOT (Feb 6, 2018), http://asu.thehoot.org/media-watch/law-and-policy/the-right-to-privacy-will-impact-journalism-10500.

[171] Sergers Buivids v. Datu Valsts Inspecsija, C–345/17 (Feb. 14, 2019).

[172] Patrick Van Eecke et. al, *EU: European Court ConfirmsJournalism Exemption for Citizen-Journalists, But Not in France?*, DLA PIPER (Feb. 15, 2019), https://blogs.dlapiper.com/privacymatters/eu-european-court-confirms-journalism-exception-for-citizen-journalists-but-not-in-france/.

5 DATA PROTECTION IN CYBERSPACE

The world digital competitiveness Rankings have ranked India 48th, a remarkable improvement of three places owing to its fast transformation in terms of government policies and business models.[173] With massive content uploading on the internet, it is becoming onerous to control such rampant dissemination of data. One such example is of Facebook, which was recently fined $ 5 billion by FTC for causing data breach of 87 million users. Joseph J. Simons who lead the commission had explicitly said that it is hard to prove data leaks without a consumer privacy law.[174]With emerging Artificial Intelligence and Big Data Analytics, it is pertinent to establish appropriate mechanisms to ensure that with a free access to internet, there is meagre surveillance by intermediaries and state. Big Data Analytics pose a serious challenge to the principals of data minimisation and purpose specification (these requirements ensure that only what is necessary is collected from the Principal and the purpose of processing is clearly specified to the Principal) as the digital economy works on the principle of data maximisation,[175] hence, data is processed in order to analyse it through machine learning and is used for prediction and targeting[176], though probabilistic in nature, yet the harms it can cause abound as these can even lead

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[173] Akanksha Kar, *India moves up three places in World Digital Competitiveness Rankings*, FORBES INDIA (Jul 4, 2018, 14.45 Hrs), http://www.forbesindia.com/article/leaderboard/india-moves-up-three-places-in-world-digital-competitiveness-rankings/50645/1.

[174] Jamie Condliff, *The Week in Tech: Huge Fines Can't Hide America's Lack of a Data Privacy Law*, THE NEW YORK TIMES (Jul 26, 2019), https://www.nytimes.com/2019/07/26/technology/facebook-data-privacy.html

[175] Committee of Experts on a Data Protection Framework for India, *White Paper of the Committee of Experts on a Data Protection Framework for India*, MINISTRY OF INFORMATION AND TECHNOLOGY (Nov. 27, 2017) 8, http://meity.gov.in/writereaddata/files/white_paper_on_data_protection_in_india_18122017_final_v2.1.pdf.

[176] International Working Group on Data Protection in Telecommunications, *Working Paper on Big Data and*
Privacy, *Privacy principles under pressure in the age of Big Data analytics*, INTERNATIONAL WORKING GROUP ON DATA PROTECTION IN TELECOMMUNICATIONS (2014) https://www.datenschutz-berlin.de/pdf/publikationen/working-paper/2014/06052014_en.pdf

to inaccuracy of results.[177]Solutions proposed by the Committee where Big Data analytics can be continued for better service provision but not for profiling and if it such processing is directly a detriment to data principal, the same should be with consent. Mechanisms established under the Bill like data trust scores and data audits can successfully minimise the data maximisation exercises of Big Data Analytics.

With uncontrollable personally identifiable information being processed in fintech industry and e-commerce platforms, a stronger and effective data protection regime needs to be fostered. Recently, the government has constituted a working group on Fintech with Singapore for excelling fields of Application Programming Interfaces, regulatory sandboxes, security in payment and digital cash flow, UPI FAST payment link, etc. With a comprehensive data protection framework, the fintech companies were fast in introducing KYC techniques to capitalise on growing consumer traction. The fintech industry is regulated by the RBI under the Payment and Settlement System Act, 2007 and the Payment and Settlement System Regulation, 2008 which governs e-payment platforms like debit card operations, smart card operations, etc. The RBI had already made it a necessary facet for payment system data to be localised even before the Bill came into light. The Reserve Bank of India's (RBI) statement on development and regulatory policies, issued with the 6 April bi-monthly monetary policy document, has a section called storage of payments system data which requires all players in the payment system to store data in India: "In order to ensure better monitoring, it is important to have unfettered supervisory access to data stored with these system providers as also with their service providers/intermediaries/third-party vendors and other entities in the payment ecosystem."(Paragraph 2) [178] Such a provision will enhance transparency in public policy articulation as many foreign identity transaction though settled in India are denied access to Indian agents. Data labelling, selective data sharing and identity aware data sharing hold possible alternatives to data ubiquity and data security concerns in the fintech industry. Managing consumer data where authentication is provided through mobile

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[177]Scott Mason, *Benefits and Harms of —Big Data,* THE CENTER OF INTERNET AND SOCIETY (Dec. 30, 2015) https://cis-india.org/internet-governance/blog/benefits-and-harms-of-big-data.

[178] Rajrishi Singhal, *Like the Govt, RBI Policy Also gets Unpredictable*, LIVEMINT (Apr 24, 2018), https://www.livemint.com/Opinion/uHT6wK5VUNDpb4Tw2OJMvK/Like-the-govt-RBI-policy-also-gets-unpredictable.html, *See* RBI Notification- RBI/2017-18/153 DPSS.CO.OD No. 2785/06.08.005/2017-2018.

phones (finger prints, OTPs, code generating apps, etc.) can make data prone to Application Programming Interface threats and Cross- platform malware contamination.[179]A recent case is that of the British Bank Scam where about1.2 billion pounds were stolen due to data breach.[180] However, many databases have created mirror sites for business continuity, such can increase risks in times of national websites cyber-attacks. However, data localisation though might lead to no foreign surveillance, but might lead to increased local surveillance, now that Right to Privacy is a Fundamental Right imposing the obligation of protection on both state and non-state actors, the drafters need to reconsider this regime.

6 CROSS BORDER TRANSFER OF DATA AND INTERNATIONAL TRADE AND DEVELOPMENT

As per the Personal Data Protection Bill and the Data Protection Committee Report, any cross border transfer of data without regulation would go against the tenets of data protection of any individual as India exercises territorial and passive personality jurisdiction over its subjects and if Government is given an option to select countries with which free flow of information could be carried out, it would lead to a lever for adequacy assessment, contingent on capacity of developing over time, reducing transaction costs, which is the biggest criticism to data localization.[181] These would be subject to exceptions like bilateral trade operations, emergency situations, etc. Such transfers, other than critical personal data, would be facilitated by model contract clauses which would specify key obligation of the transferor and other non-critical data would be subject to requirement of storing at least one serving copy in India. The propagates of this scheme highlight benefits associated like more availability of data with Indian enforcement agencies, no more relying on optical cable networks which are ineffective, a comprehensive AI ecosystem and prevention of foreign

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[179] Siddharth Vishwanath et. al, Security Challenges in the Evolving Fintech Landscape, PwC, https://www.pwc.in/assets/pdfs/consulting/cyber-security/banking/security-challenges-in-the-evolving-fintech-landscape.pdf.

[180] Kanishka Gupta, Data breach and cybersecurity: Challenges and solutions!, BUSINESS TODAY(Apr. 16, 2019, 19:39 Hrs.), https://www.businesstoday.in/opinion/columns/data-breach-cybersecurity-data-breach-and-cybersecurity-challenges-and-solutions/story/337851.html.

[181] *Supra* note 7.

surveillance which could have major impact as more and more intermediaries are foreign based, an example of such impact is that of amendment to PATRIOT Act to FISA.[182] Whereas the critics state that data localisation would lead to increased economic costs which were relatively cheaper in other jurisdictions and moreover, there is non-affordability of cloud computing by Indian SMEs and they lack the potential expertise of operating the same, which would lead to monopolisation of data. Balkanisation of the internet and domestic surveillance is another argument which states there is censorship vulnerability.[183] Several multinational companies had expressed concerns that localisation of all personal data of Indians would hurt their planned investments by raising costs to set up new storage centres in the country. All these provisions relating to data localisation have a nugatory impact in case India has bilateral agreement with any foreign country.[184] It is better to let the model run by bilateral and multilateral trade agreements, rather than making a generalised law.

Article XIV(c)(ii) of the WTO's General Agreement on Trade in Services has specifically permitted restrictions in case they hamper the personal data of an individual provided that it is not arbitrary or unjustified discrimination, this is a positive law recognising an individual's data privacy however, the laws and regimes need to reconcile themselves in order to reduce friction over cross border data transfers and any regulation or restriction in this respect directly affects global trade. Unreasonable burdens and regulations might have the following impact:

Proposed economy-wide data localization requirements would lead to a negative impact on GDP in several countries where such requirements have been considered (Brazil -0.8%, India -0.8% and Republic of Korea -1.1%) or implemented (Indonesia -0.7%)[185] for many countries that are

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[182] Federal Bureau of Investigation, *Testimony*, FEDERAL BUREAU OF INVESTIGATION (Apr. 27, 2005) https://archives.fbi.gov/archives/news/testimony/usa-patriot-act-amendments-to-foreign-intelligencesurveillance-act-authorities.

[183] *Supra* note 7.

[184] Anandita Singh Mankotia, *Changes likely in proposed data privacy rules: Only critical data may need to be housed in India* , THE ECONOMIC TIMES (Jul 24, 2019), https://economictimes.indiatimes.com/tech/internet/changes-likely-in-proposed-data-privacy-rules-only-critical-data-may-need-to-be-housed-in-india/articleshow/70355298.cms.

[185] European Centre for International Political Economy (ECIPE), *The Costs of Data Localisation: Friendly Fire on Economic Recovery*, EUROPEAN CENTRE FOR

considering forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country's borders.[186]

Data protection is also important for industries like Business Process Outsourcing and Information Technology Enabled Services especially for developing nations as their progress is vital, hence more trust and confidence of data protection is quintessential to strengthening international counterparts as there can always be bilateral arrangements which can attract penalty if there is breach.[187]

7 GLOBAL APPROACHES TO DATA PROTECTION

With burgeoning concerns for protecting personal data of individuals, various jurisdictions have in place a data protection framework in place in order to ensure accountability for data breaches and secure data privacy of individuals. The largest economy of the world, US has a laissez faire approach to data protection , with no overarching legislation for data protection it has statutes (Privacy Act, 1974, the Electronic Communications Privacy Act, 1986 and the Right to Financial Privacy Act, 1978, Financial Services Modernization Act, 1999) for ensuring liability against the federal government in cases of data breaches, however the courts have recognised the right by interpreting and piecing First, Fourth, Fifth and Fourteenth Amendments to the US Constitution.[188] The EU has recently adopted the EU General Data Protection Regulation, 2018, which has a comprehensive

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INTERNATIONAL POLITICAL ECONOMY (2014) http://www.ecipe.org/app/uploads/2014/12/OCC32014__1.pdf.

[186] Brendan O' Connor , *Quantifying the Cost of Forced Localization*, Leviathan Security Group (Jun. 24, 2015), https://www.leviathansecurity.com/blog/quantifying-the-cost-of-forced-localization.

[187] United Nations Conference on Trade and Development, *Data Protection Regulations and International Data Flows: Implications for Trade and Development*, UNCTAD/WEB/DTL/STICT/2016/1/iPub (2016), https://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf.

[188] Roe v. Wade 410 U.S. 113 (1973); Griswold v. Connecticut 381 U.S. 479 (1965). *See* Ryan Moshell, *And*
Then There Was One: The Outlook For A Self-Regulatory United States Amidst A Global Trend Towards
Comprehensive Data Protection, 37 Texas Tech Law Review (2005).

data protection regime in place which recognises data subject's rights and data controller's liability in cases of breach with an extra territorial applicability on nations which are likely to impact the EU trade. China has perceived data leaks as a threat to national security and hence the cyber-security law[189] in China has top-level securities for handling of personal data and a follow-up for cross border personal data sharing was issued in 2018.[190] The UN Resolution 68/167 in December 2013 has also taken into account increased risks of surveillance and interception of communications on human rights of an individual especially in the digital age and accordingly suggested changes in the policies of domestic framework.[191] The International Covenant on Civil and Political Rights[192] also recognised right against arbitrary and unlawful interference with an individual's privacy.

7.1 Impact Assessment Study

The Indian Personal Data Protection Bill, 2018 is a slight reflection of the EU GDPR.[193] Hence, the impact of implementing an EU GDPR on the EU and affected nations could reveal, the implications and aftermath of the Bill on India. This impact assessment study is subject to limitations on grounds of differential allied legislative policies and trade regimes of the nations along with differences in provisions of the Bill and EU GDPR. The assessment study would cover analysis relating to awareness and complaints as these are the starting points of the Data Protection enforcement regime.

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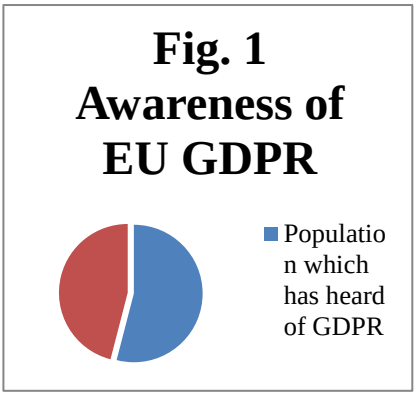
[189] Cyber Security Law of China.

[190] *See* Samm Sacks, *New China Data Privacy Standard Looks More Far-reaching than EU GDPR*, CENTRE FOR STRATEGIC AND INTERNATIONAL STUDIES (2018),https://www.csis.org/analysis/new-china-dataprivacy-standard-looks-more-far-reaching-gdpr.

[191] Office of the United Nations High Commissioner for Human Rights , *The Right to Privacy in Digital Age*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, https://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx.

[192] Article 17, International Covenant on Civil and Political Rights, 1966.

[193] Risk Advisory, Deloitte, *India Draft Personal Data Protection Bill, 2018 and EU General Data Protection Regulation A comparative view*, DELOIITE, https://www2.deloitte.com/content/dam/Deloitte/in/Documents/risk/in-ra-india-draft-personal-data-protection-bill-noexp.pdf.



As per the European Council, since May, 2018 when the EU GDPR had come into place, the awareness is about 67% in May 2019 and only 57% of the population knows that there exists a public authority to whom data breaches can be communicated. Within these, there are only 20% who know in actuality which public authority, i.e., Data Protection Board, to report to.[194] It is an astonishing fact that in a Union with a literacy rate of 99.13%[195], such is the scenario, the awareness levels would be much lower as India has a literacy rate of 74.04%.[196]

With about 1, 44,376 complaints registered, mostly related to Tele marketing, e-mails and video surveillance.[197] With lesser literacy rates, awareness would be a major hindrance to effectual implementation of the Personal Data Protection Bill, 2018 as intended beneficiaries would not be able to secure their rights. Data breach notifications to the Data Protection Board were numbered at 89,271[198], the probability of such numbers are nearing actual numbers, however India would have comparatively lower number

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[194] European Data Protection Board, *GDPR in Numbers*, EUROPEAN COUNCIL (May 2019), https://ec.europa.eu/commission/sites/beta-political/files/infographic-gdpr_in_numbers_1.pdf.

[195] World Bank, Literacy Rate, *Adult Total for the European Union*, FEDERAL RESERVE BANK OF ST. LOUIS (Aug. 6, 2019); https://fred.stlouisfed.org/series/SEADTLITRZSEUU.

[196] Office of the Registrar General and Census Commissioner of India, MINISTRY OF HOME AFFAIRS, *2011 Census Data*, Ministry of Home Affairs, http://censusindia.gov.in.

[197] *Supra* note 100.

[198] *Supra* note 100.

as there is a discretion vested with the Data Fiduciaries to report data breach which are likely to harm data principals and that too as soon as possible, under the EU regime an Upper time limit of 72 hrs is prescribed. The abovementioned analysis is subject to limitations as to the differences in economic structure and business cultures of both the countries as EU is a developed country, whereas India is a developing nation. Other than this, there are major differences in legal frameworks and government policies. Another limitation is one relating to differences in provisions of EU GDPR and the Personal Data Protection Bill, 2018. Prominent among them being differences in restrictions on cross border data transfers (in EU, no live serving copy needs to be maintained), conditions for cross border data transfer (EU GDPR has additional conditions like-approved code of conduct, approved certification mechanisms, etc.), Time limit for breach notification (EU GDPR specifies a maximum time limit of 72 hrs.), definition of sensitive personal data (trade union memberships, racial, ethnic origin, political beliefs, etc are considered as sensitive personal data and there exist no category as critical personal data in EUGDPR.), Data Protection Officer (has added responsibility of spreading awareness in EU) and right to be forgotten (EUGDPR has provisions for permanent erasure, right to object to processing are also there).

8 CONCLUSION AND SUGGESTIONS

After blissful embracing of the Right to Privacy in Part III of Constitution of India, it was imperative to draft a data protection framework which would enable to achieve the twin objectives of free flow of data in public interest and ensuring individual autonomy in a digital world by implementing data protection regimes. With present data protection mechanisms present in different legislations proving to be ineffective, the need for an overarching framework escalated. The Personal Data Protection Bill, 2018 attempted to clarify rights and obligations of its subjects to regulate data flows within and outside the nation, however the intended benefits could be better delivered if there is a clarity in terms like imposing of fair and reasonable standard on data fiduciaries, prescription of a maximum time limit for notification of data breaches to DPA with no discretion given to fiduciaries and there is no overburdening of the DPA, which is relatively a newer authority. The conflict in data privacy regimes and right to freedom of speech and expression need to be reconciled by carrying out balancing exercises and likewise the journalistic exemption needs an explanation as to on what journalist the exemption applies.

With unbridled dissemination of information, data privacy issues in cyberspace pose a great threat in terms of widespread availability and intermediary accountability, profiling by Big Analytics and AI are added threats. The Fintech industry was already apprehended of data leaks and chose data localisation vide RBI notification dated April 6, 2018. However the impact of data localisation on trade and development can prove to be detrimental to GDP of the nation. With global concerns over Right to Privacy, the US, EU and China have in place different regimes based on the citizen-state relationship and their international relations. The impact assessment study conducted above, points to the fact that awareness of the Personal Data Protection Bill, 2018 might pose a challenge at the threshold and the actual numbers for data breaches might not come to light as there vests a discretion with the fiduciaries.

Based on the aforementioned, the following can be suggested:

- **Effective Awareness Mechanism:** The task of awareness has been vested with the DPA, however this must be placed with authorities on ground level to increase accountability, like in case of the EUGDPR it vests with the DPO.
- **Effective Training if data localisation is imperative for national interests:** There should be adequate provision of training by experts for SMEs which cannot afford cloud computing services and have no expertise on the same. However, data localisation can be replaced by effective bilateral and multilateral arrangements.
- **Prescription of Maximum Time limits for Breach Notification:** A reasonable maximum limit along with mandating breach notification without vesting a discretion on the fiduciaries would enable more actual numbers of data breaches to come in light.
- With the above in mind, the unprecedented data privacy regimes and remoulding of the data protection framework could result in greater public good without compromising on an individual's liberty in securing his data with better consent architecture.

INFORMATION TECHNOLOGY ACT, 2000 AND THE COPYRIGHT ACT, 1957: SEARCHING FOR THE SAFEST HARBOUR?

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1 INTRODUCTION

There are several types of hackers that exist today and with the change in the techno-legal regime in the country, several aspects of hacking have to be studied. This paper seeks to explore the emergence of ethical hacking as a profession and how so far it has been overlooked by authorities. Under the current scenario types of hackers which currently exist in this profession.

'Black Hat' Hackers

This is an individual who attempts to gain unauthorized entry into a system to exploit them for malicious reasons is called a black-hat hacker. They try to administer to damages by compromising security systems. This is done by the act of gaining access to passwords, financial information and other personal data.

'White Hat' Hackers

The white hat hackers strengthen the security of an interface, they have the permission to engage the targets within the prescribed rules. These are commonly referred as ethical hackers. These individuals specialize in ethical hacking tools, techniques and processes to secure an organisation's database.[199] These hackers are legally permitted to exploit security networks. Ethical hackers are used in various multinational corporations.

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[199] EC-Council, *Types of Hackers and What They Do: White, Black, and Grey,* EC COUNCIL OFFICIAL BLOG (Nov 20, 2018), https://blog.eccouncil.org/types-of-hackers-and-what-they-do-white-black-and-grey/

'Grey Hat' Hackers

Grey Hats are very similar to the black hats, the difference arrives within their intention whether in good faith or malice. They exploit computer systems exposing the loopholes to law enforcement agencies. For example, many grey hats extort the hacked, charging people to provide a remedy in order to correct the defect.

These professionals who use their skills to exploit pieces of code and loopholes in program run, or, find exploits in physical networks of computers to gain access into systems and network without proper authorization. Several educational and professional associations have been formed to regulate and codify educational curriculum to learn this skill.

One of the governments recognized ethical hacking association is the International Council of E-Commerce Consultants which is the world's largest cyber security technical certification body. This association operates in 145 countries globally and they issue professional and world recognised Certified Ethical Hacker (CEH)[200], Computer Hacking Forensics Investigator (C|HFI), Certified Security Analyst (ECSA), License Penetration Testing (Practical) programs. Under this consultancy association they have trained and certified over 200,000 information security professionals all over the globe, the same has influenced the multinational firms to take into consideration that cyber security is the need of the hour. This association has received endorsements from government bodies such as the US Federal Government and the US Government National Security Agency.

There is Indian Cyber Army[201] which is an Association of Ethical Hackers & acts as a resource center for National Police Agencies, Intelligence Agencies, Research Centers, Industry Experts, Government Agencies, Academic Leaders along. It is a platform providing the individuals with to meet the long-term security challenges in the digital arena of the modern world, by bridging the gap between the latest changes and innovations in cyberspace.

Another nationally recognized not-for-profit organization established in 1999 is the Australian Information Security Association (AISA)[202] champions who have developed a compatible and reliable information security

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[200] EC-Council, *Certified Ethical Hacker*, https://www.eccouncil.org/

[201] Indian Cyber Army, https://www.ica.in/

[202] Austrailian Information Security Association, *About AISA*, https://aisa.org.au//

sector by emphasizing on the professionals who are directed in the area of cyber security in Australia and advancing the safety and security of the Australian public as well as the bigger government organisations and business firms which exist in Australia.

In the European continent, one of the most reliable organisations is the European Cyber Security Organisation (ECSO)[203] which is established under the Belgain law, in 2016. The European Commission for implementation of the Cyber Security contractual Public-Private Partnership (cPPP) is where ECSO is its contractual counterpart. The members of the ECSO have many entities as their stakeholders which include research institutes, startups, countries part of the European Economic area and European Free Trade Association. The main motive is to develop cybersecurity market in Europe and implement solutions in different entities to combat cybercrimes.

To resolve the issue of cyber-crime to provide network security to government and business houses, firms have commenced following the approach of including security measures and in order to prevent any malicious activity in their surfaces. The profession initially intruded into the system similarly as a security professional, the term hacker has its own negative connotations to it but instead ethical hackers report back about the loopholes and vulnerabilities of the existing system. So ethical hacking is legal as it is performed with the permission of the proprietor to discover vulnerabilities of the system and suggest ways to improve it. Firms consider it as an information risk management program which permits security improvement and prevention of cyber torts.

2 IMPORTANCE OF GOVERNMENT RECOGNITION AND CODIFICATION OF ETHICAL HACKING AS A PROFESSION

Many important professions we know of nowadays and take for granted in day to day life were not always there to begin with but had emerged with time and advancements in technology. Doctors as we know of have been around since the 12th century with the emergence of medical schools in

[203] ECS, *European Cyber Security Organisation*, https://ecs-org.eu/

Italy (Schola Medica Salernitana, in Salerno)[204] and the Legal profession according to the Bar Council of India emerged during the reign of Edward I during 1272.[205] We see a pattern of professions developing to meet the needs of a society with doctors there was a need for adequate network and uniformity in medical care so their profession was regulated and code of conduct made for regulatory purposes apart from the Hippocratic Oath. The profession of advocacy was also regulated and codified and is regulated by The Advocates Act, 1961. Codification of professions is extremely important for the following reasons:

1. To ensure an Ethical Code of Conduct is followed to avoid malpractice.
2. To ensure uniformity and standard of service across the profession.

The reason Ethical Hacking needs to be recognized and codified as a profession is that in the current social scenario network systems are an integral part of society. From electronic records of identity in the form of Aadhar database to filing of First Information Reports, from informal communications to formal electronic orders through mail or gazettes Information technology form the infrastructure on which other pillars of society rely on for their day to day functioning. One of the objectives of Information Technology Act, 2000 was in its preamble to "Promote efficient delivery of Government services by means of communication and storage of information", making it an essential medium for democracy to function. We do have cyber cells in our police departments but that shouldn't be the only perspective through which we should look at the aspects of this profession. We need Ethical Hackers the same way roads require traffic policemen making sure no one takes advantage of an unattended traffic sign or an empty road for speeding.

While we recognize the importance of computer networks, we must also acknowledge that these computer networks are also constant danger of being compromised which compromised in turn our societies' ability to function. India has problems with old ATMs running on Windows XP an outdated[206] and easily hackable system, cyber illiteracy which makes systems

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[204] NLM, *Medieval Manuscripts: Salerno*, U.S. NATIONAL LIBRARY OF MEDICINE, https://www.nlm.nih.gov/hmd/medieval/salerno.html

[205] The Bar Council of India, *History of the legal profession, http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/*

[206] Tech2 News Staff, *RBI has ordered banks to remove Windows XP from all ATMs in the country by 2019- Technology News*, FIRSTPOST, (Jun 25, 2018,

susceptible to a compromise due to the operator's negligence (Bangladesh Bank Robbery[207]). With our personal data now stored in servers as Aadhar information and online payment transactions on the rise if we as a county don't update and prepare for exploits within the system the consequences could be disastrous. In the recent Democratic National Committee (DNC) hack involving[208] Hillary Clinton's email leaks, the hacker was only identified dude to a mistake he made, which was that he forgot to switch on his VPN during one infiltration run. Which points out how important it is to have adequate security measure before hand as matters of security should not be left to the chance that the perpetrator will make a mistake.

With reference to how integral computer networks have become in our society we cannot afford to have our line of defense is disarray. Especially in reference to grey hat hackers and black hat hackers selling exploits to the highest bidder online. We as a society instead of using human capital are wasting it by not inviting these black and grey hat hackers and not giving them a professional association through which they can channel their skills for productive and legal uses. If unregulated and unlicensed this said professionals can easily be tempted to perform unauthorized activities as they will have no incentive for restraint for their actions. Such behavior is generally exhibited by grey hat hackers who tough partake in unethical hacking may also assist law enforcement in certain situations. Such rouge elements can be kept in check and incentive in form of recognition and status can be given for them to be full time white hat hackers. Apart from recognition, trustworthiness can also be assessed, for which, right now, there is no universally recognized certificate.

10:59 PM) https://www.firstpost.com/tech/news-analysis/rbi-has-ordered-banks-to-remove-windows-xp-from-all-atms-in-the-country-by-2019-4586911.html

[207] Al Jazeera, *Hacked: The Bangladesh Bank Heist*, AL JAZEERA (May 24, 2018, 11:49 AM), https://www.aljazeera.com/programmes/101east/2018/05/hacked-bangladesh-bank-heist-180523070038069.html

[208] Philip Bump, *Timeline: How Russian agents allegedly hacked the DNC and Clinton's campaign*, THE WASHINGTON POST (Jul. 13, 2018), https://www.washingtonpost.com/news/politics/wp/2018/07/13/timeline-how-russian-agents-allegedly-hacked-the-dnc-and-clintons-campaign/?noredirect=on

3 PROBLEMS WITH INFORMATION ACT WITH REFERENCE TO CHANGING ENVIRONMENTAL DYNAMICS

The pace at which technology changes simply cannot be matched by legislation's ability to pass updated new laws to protect us from the dynamic and ever-changing dangers of the virtual world. It would require in depth knowledge of computer networks and at the same time a person must keep updating himself about new emerging dangers in order to keep up with the changing technological environment.

1. Cases such as *K. Ramajayam vs. The Inspector of Police*[209], in which the question was raised regarding, The DVR being an electronic record within the meaning of Section 2(t) of the Information Technology Act, 2000, as it stores data in electronic form and is also capable of output, can be avoided if we have a professional whose reasoning and knowledge can be relied upon in matters of confusion, especially a professional who can be trusted with a form of certification which inspires trust, giving weightage to his opinion in matters of decision making. As Judiciary through its interpretation of legislature fills in the gaps which might be in a piece of legislature, Ethical Hackers can act as a body of academic authority and an advisory body which can instruct the judiciary and the executive, specifically the police departments in matters regarding enforcement and investigation.

2. Perpetrator of a cyber-crime cannot be identified easily as he commits such crime using a computer terminal or a computer module which is not always linked to the perpetrator in a concrete manner. Tough every computer has a NIC with a unique MAC address it cannot be said with certainty that a certain MAC address represents only one person. A family computer is used by all the members in a family, not just the owner/buyer of the device. Not to mention hardware hacking enables perpetrators to change their mac addresses to avoid detection.

Internet Protocol address also doesn't provide us with certainty regarding the perpetrator's identity as a single person as a certain IP mostly handles traffic from many devices at the same time. People connected to single wifi router use a single IP address which can now represent more than one person, which makes identification difficult.

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[209] K.Ramajayam @ Appu vs. The. Inspector of Police. 2016 (2) CTC 135.

Further usage of Virtual Private Networks makes it even more difficult to identify the perpetrator, therefore, the services of an Ethical Hacker, one whose report can be used as fact in a court of law makes the judiciary's job of analyzing and understanding the case easier.

Interpretation of Indian evidence act for obtaining certificate of originality under the Indian Evidence Act, 1872 is vague in nature and no procedure for evaluation of originality of the proposed evidence is stated all it requires is submission of original. Through reading of the paper Digital Manipulation and Photographic evidence: Defrauding the courts one thousand words at a time by Zachariah B. Parr, we can see the need for a protocol for evaluation of the aforesaid original evidence which must be produced to gain the certificate. methods such as analog manipulation and more over the power of digital manipulation is even harder to detect. We live in the age of real-time ray tracing using powerful Graphic Processor Units, photoshop, which can crop red eye correct and manipulate images beyond reality. What started by NASA as a method of preventing image distortion in space can now be used as a tool to fake the original evidence on the basis of which certificates are issued making the practice of issuing the certificate illogical if the original itself is fraudulent.

With the advent of different platforms of news media and social media platforms, it is hard to, with conformity to affix responsibility on the platform or either the user of the platform who has posted the said article for post for their respective transgressions. In some cases, the news site or the platform only acts as the medium and the control over what to post and the knowledge that said post is going to cause an offense rests entirely on the individual posting. In other cases, the news site or social media has total control and review over what is posted on their platform and they had allowed under their duty of care, for that said offence to occur knowing that it can have adverse effects. While deciding upon whose responsibility it might have been rests upon the judge. A person acquainted with emerging platforms and new online social structures can provide an assistive report with much accuracy, describing all the steps which were involved in publication upon which the judge can deliberate or not if he wishes not to rely upon the report. Regardless of what the judge might do it cannot be overlooked that the judge can in all cases make use of an opinion from a professional, a professional which can be trusted.

4 CONCLUSION

Information technology has become a strategy to conduct business as well as crimes, so the two worlds of information technology and legal system have had to approach each other independently and need to meet at a point called cyber law. In 2008 the word “hacker” was removed from the IT act as ethical hacking was considered legal. Government bodies, private information security organizations and law enforcement professionals have regulated technologies to counter each new and emerging form of contracts on their databases.

The moral problems which arise with ethical hacking is the complexity to teach ethical hacking as a course accredited certification as no institution and authority would be ought to guarantee about the learner’s intention and motive for which they are obtaining the qualification, said the purpose of ethical hacking itself is to differentiate them from the cyber-criminal.

Apart from ethicality the benefits which can be reaped if this profession is regulated strengthens democracy beyond anything which segregated technology firms can offer right now. It is high time we as a society dealt with technology not with fear mongering but with open arms and regulation. Understanding of the environment and how it has changed is paramount and instead of trial and error we should rely upon professional opinion to tackle the adversities ahead.

THE CATASTROPHE OF GENOCIDE: A PERPEUAL HORROR

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1 INTRODUCTION

Classification is the basis of all civilizations. Every individual is inherently classified into a specific group based on his/her nationality, ethnicity, race and religion. This group has a significant impact on the individual's identity. Ancillary to such inherent classification, all human beings possess certain intrinsic rights that are essential for their existence and considering their fundamental value; these rights are indispensable in nature. However, crimes against humanity in the form of "genocide" and "ethnic cleansing" have existed amongst man since the emergence of the civilized world. These crimes are intentionally committed as part of an organized attack against a specific and identifiable section of the society. Even though the international community acknowledges the gravity of these crimes, the world has witnessed six labeled genocides besides a significant number of undesignated cases in the present century.

Countries across the world have responded to these concerns by adopting various international treaties such as, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide[210], the 1966 International Covenant on Civil and Political Rights[211], the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[212]. In recent times, the International Court of Justice has played a major role in establishing the legal framework regarding the crime of genocide. Judgments of the International Court of Justice in *Bosnia and*

[210] Convention on the Prevention and Punishment of the Crime of Genocide [General Assembly resolution 260A (III) of 9 Deceber 1948]
[211] International Covenant on Civil and Political Rights, Adopted on 19 December 1966
[212] Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, 1985

Herzegovina v. Serbia and Montenegro (2007)[213] and *Croatia v. Serbia (2015)*[214] have cleared the ambiguity surrounding the provisions of penal liability in these crimes. The Court, in the case of *Democratic Republic of the Congo v. Rwanda*[215] observed that the prohibition of genocide is a peremptory norm of general international law (*jus cogens*). However, the peremptory status of the obligation to prevent genocide is still in question.

In recent times, persecution of the Rohingya people has sparked dialogues in the international community and has induced certain states to act upon it. Moreover, the United Nations has described Rohingya's as the world's most persecuted minority. Constant atrocities committed against the Rohingyas have led to this unfortunate situation. Perpetrators have killed, caused serious bodily and mental harm, deliberately inflicted conditions to harm, imposed measures to prevent birth, inflicted severe sexual violence and committed every possible crime to demonstrate intent to destroy the Rohingyas[216]. Even after the crimes have reached this horrifying degree, various international organizations have failed to identify the situation as genocide.

Against this background, the paper's contribution to this debate is threefold – first, it seeks to study various independent and United Nations' reports, international conventions ratified by majority member states and judgments by the International Court of Justice on the subject matter. The objective of the study is to analyze the implication and outcomes of these binding instruments on the prohibition and prevention of genocide.

Second, it explores the status of the obligation to prevent genocide as a peremptory norm under the general international law and interprets its consequences.

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[213] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montengro), Judgment, I.C.J. Reports 2007

[214] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015

[215] Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), Judgment, I.C.J. Reports 2005

[216] Report of the detailed findings of the Independent International Fact-Finding Mission on Mayanmar (Human Rights Council) A/HRC/39/CRP.2

Third, it expounds the Rohingya crisis and examines the applicability of the aforementioned binding instruments. Furthermore, a conclusive solution is proposed for the prevention and prohibition of genocide.

2 INTERNATIONAL LEGALLY BINDING INSTRUMENTS

2.1 International Conventions

The Universal Declaration of Human Rights (UDHR) is a milestone document that guarantees basic human rights to every individual across all nations. It the basis of all human rights and other associated conventions. Article 1 of the UDHR states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[217]. This specific provision articulates and conceptualizes the most elemental aspects of the human life. These rights are inherent to all human beings, inalienable and equally applicable to everyone.

Building on the same principle, genocide was first codified as a crime in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention), which almost 150 States have now ratified. Article II of the Convention defines genocide as under[218]:

Article II *- In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

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[217] Article I of the Universal Declaration of Human Rights

[218] Article II of Convention on the Prevention and Punishment of the Crime of Genocide [General Assembly resolution 260A (III) of 9 Deceber 1948]

In order to constitute as a crime of genocide, the acts require consideration of whether there is a protected group involved, whether the committed acts fall under one or more categories of the definition, and whether the acts were committed with a genocidal intent. Protected groups are the identifiable sections of the community that can be constituted as national, ethnical, racial or religious groups. Articles IV[219] and V[220] of the Convention provide punishments for all guilty persons whether constitutionally responsible rulers, public officials or private individuals. Any dispute between the contracting parties regarding the interpretation of applicability and fulfillment of the obligation to prohibit genocide shall be submitted to the International Court of Justice.

Forwarding the foundation laid by the Genocide Convention, the 1966 International Covenant on Civil and Political Rights has endorsed the same principles. Article 6[221] of the Covenant states that the covenant shall not authorize any member state to derogate from its obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

2.2 International Court of Justice judgments

In the case concerning application of the convention on the prevention and punishment of the crime of genocide *(Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice in its Judgment dated 26th February 2007 had stated that, *"The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those relating to the interpretation, application or fulfillment of the Convention"*. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide vests power in the Court to adjudicate cases relating to the crime of genocide. While dealing with the issue of state responsibility and that of its representatives, the court has observed that the reference to Article IX to 'the responsibility of a state for genocide or for any other acts enumerated in Article III', does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates

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[219] Article IV of Convention on the Prevention and Punishment of the Crime of Genocide [General Assembly resolution 260A (III) of 9 Deceber 1948]

[220] Article V of Convention on the Prevention and Punishment of the Crime of Genocide [General Assembly resolution 260A (III) of 9 Deceber 1948]

[221] Article 6 of International Covenant on Civil and Political Rights, Adopted on 19 December 1966

the commission of an act by 'rulers' or 'public officials'[222]. The applicability of the Genocide Convention is limited to the member states that have voluntarily ratified its principles and any breach of such obligation shall be liable for punishment. However, the Court in its 2007 Judgment clarified that, "it has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*"[223]. Hence, it can be concluded that the International Court of Justice in its 2007 Judgment critically examined the above-mentioned aspects regarding the legal framework arising out of the Convention.

Taking a step further, the International Court of Justice in the Case Concerning Armed Activities on The Territory of Congo[224] observed that the prohibition of genocide is a peremptory norm of general international law (*jus cogens*). When the principles of a binding international treaty are elevated to such a status, no derogation under any circumstance is permitted. States are required to fulfill their obligation under the concerned peremptory norm and they remain responsible for acts contrary to the law that is attributable to them.

The most recent judgment of the International Court of Justice on the subject matter is the case concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide *(Croatia v. Serbia)*[225]. The Judgment observes that it was the intention of the United Nations to condemn and punish the crime of genocide. It further went on to express that genocide is the denial which shocks the conscience of mankind and results in great loss to humanity[226]. While referring to the subject of jurisdiction, the Court again clarified its earlier stance that jurisdiction is always based on the consent of the parties. Therefore, it is safe to comprehend on the basis of the Court's judgments that the jurisdiction, implication and legal consequences arising from the Genocide Convention are well-established and elucidated.

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[222] Ibid., 4

[223] Ibid.,13

[224] Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), Judgment, I.C.J. Reports 2005

[225] Ibid.,5

[226] Ibid.,16

3 'PREVENTION' OF GENOCIDE AS A *JUS COGENS* NORM

The obligation not to commit genocide is a principle of *jus cogens* however; the obligation to *prevent* genocide is not. As the International Court of Justice has clearly stipulated, the obligation to prevent genocide under the Genocide Convention has a completely separate existence. It is completely distinct from the obligation to prohibit the crime of genocide[227]. As the international community is well aware that *jus cogens* norms trumps other substantive norms of international law. Therefore, if the obligation to prevent the crime of genocide is a *jus cogens* norm then it overrides other general international laws; for example, it may override the law prohibiting use of force. By way of this line of interpretation it can be established that accepting prevention of genocide as a *jus cogens* norm would open doors to the lawful humanitarian intervention.

4 THE ROHINGYA CRISIS

1. Rohingyas are the stateless ethnic group who reside in Rakhine state, Myanmar. The Myanmar government has denied citizenship to the Rohingya population under the 1982 Myanmar Nationality Law. They are restricted from freedom of movement, state educational programs and civil services employments. Therefore, they have migrated to the neighboring countries of Bangladesh and India in search for employment and better standards of living. Considering these aspects, the United Nations in 2013 has described Rohingyas as the world's most persecuted minority. The ongoing atrocities against the Rohingya population have shaken the international community. The Myanmar security forces have been carrying out series of large-scale campaigns against the Rohingya population with intent of ethnic cleansing. The atrocities committed by the security forces include mass killings, sexual violations and widespread arson[228]. However, military and civil officials have repeatedly denied any acts of abuse.

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[227] Mothers of Sebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Law (Manuel J. Ventura), Published 6th September 2013

[228] Rohingya Crisis- Human Rights Watch (https://www.hrw.org/tag/rohingya-crisis)

2. In order to term the ongoing atrocities as genocide, facts of the crisis and provisions of the aforementioned international instruments have to be compared. The elements of this study are:

    (i) Whether the Rohingyas form a 'protected group'?
    (ii) Whether any physical acts were committed contrary to the Genocide Convention?
    (iii) Whether the International Court of Justice has jurisdiction over present case?

Genocide can be committed against any national, ethnical, racial or religious group. The Rohingyas can be seen as an ethnic group that constitute of persons sharing a common language and culture. The Rohingyas consider themselves as a distinct group and so do the Myanmar security forces. If anything, the differential and discriminatory treatment of the Rohingyas in every aspect, through the adoption of specific laws and policies, supports the argument that they form a 'protected group' as provided under the Genocide Convention.

The Convention on the Prevention and Punishment of the Crime of Genocide requires that the alleged acts shall fall under the five prohibited categories of the definition under Article-II. In the present case, gross violations of the most basic and human rights are suffered by the Rohingyas in the hands of the Myanmar security forces[229]. Perpetrators have killed, caused serious bodily and mental harm, deliberately inflicted conditions to harm, imposed measures to prevent birth, inflicted severe sexual violence and committed every possible crime to demonstrate intent to destroy the Rohingyas. The Tatmadaw and other security forces have intentionally killed Rohingya men, women and children. Sexual violence against Rohingya women had reached a horrific stage and as stated by the Human Rights Council in its Independent Fact-Finding Mission Report, "Given the substantial number of women and girls affected, it is difficult to believe that this was not an intentional act akin to a form of branding. Even without such permanent and disturbing reminders, rape and sexual violence are steps in the destruction of a group: the destruction of the spirit, of the will to live, and of life itself"[230]. The security forces are also alleged to have deliberately inflicted on the group conditions of life calculated to bring about its physical destruction.

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[229] Ibid.,7
[230] Ibid.,20

Myanmar is a member state of the United Nations and has ratified the Genocide Convention in 1956. Therefore, under Article IX of the Convention, International Court of Justice has the requisite jurisdiction over the matter.

5 CONCLUSION

Various international treaties regarding the crime of genocide have been accepted and ratified by member states. The International Court of Justice by way of its judgments has demystified all the ambiguous provisions and has established a clear legal framework for the implementation of the 'punishment' aspect under the Convention on the Prevention and Punishment of the Crime of Genocide. Therefore, taking into account these developments it is necessary for the *prevention* of the crime of genocide to attain the status of *jus cogens*. Such elevation would open necessary doors to the lawful humanitarian intervention into the crime of genocide. Hence, the only possible solution for the effective prevention of genocide throughout the world is to elevate its status as a peremptory norm under the general international law. Furthermore, for the actual implementation of the solution, nations with vested interests need to develop alternate foreign policies by way of which, interest of the humanity would trump personal interests.

ANIMALS AS LEGAL PERSONS

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1 INTRODUCTION

Animal Preservation has received massive attention not merely in the Indian scenario, but globally. It has been echoed year after year and can barely be confined to the term "movement" anymore, it has acquired a different significance of its own in the field of law keeping in mind the various legislations and attempts of the courts of the country to constantly uphold what has now acquired status of laws rather than mere human virtues. Contemplating Animal Rights Advocacy as a movement, it must be noted that it has profoundly cleaved into various subgroups each with a different set of principles.[231] These principles although differ widely when bored into deeply when construed broadly have some degree of mutuality with respect to protection of animal rights.[232]

David Dilbert expressed that it is a plea for *all the inhabitants of this planet.*[233] He embarked on the concept of *moral schizophrenia* to further clarify as to how people end up being the *pseudo-preservers* while preserving several animals and eating several others, this is in itself ironical, thus making it further imperative to be careful and take well-thought out initiatives when animal movement is stirred each time.[234] The reliance was also placed on the fact that human interests are always given priority over animal interests, no matter how trivial are the human interests and how major are the animal interests. One of the most prolific writers about "animal rights" places emphasis on the fact that such works on animal rights should rather sharpen the idea of animal preservation rather than limit the idea to a narrow point of view which delimits it to a normative position which vaguely concerns animals.[235] His work is credible as it adds great value to the understanding of both *human* and *non-human* animals. This paper is

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[231] ALBRIGHT, K. (2002). *'The Extension of Legal Rights to Animals under a Caring Ethic: An Ecofeminist Exploration of Steven Wise's "Rattling the Cage"*. Natural Resources Journal, 42(4), 915-937.
[232] *Id.*
[233] Gary L. Francione, *Rain Without Thunder*,(1996).
[234] *id.*.
[235] Tom Regan, *The case for Animal Rights.*

chiefly divided into four parts- PART I deals with the animal prevention laws and the present state and a comparison of some foundational theories of *animal rights advocacy*, PART II comprises of the analysis of the concepts of *Personality, Rights and Rationality*, PART III glides through the central contention of *Morality Rationality,* PART IV deals with the *contemporary constitutional scenario* and conclusively sums up the debate on both ends, leaving a future line of thought.

2 HOW SUFFICIENT ARE ANIMAL PREVENTION LAWS IN INDIA TO PREVENT ANIMAL CRUELTY?

Section 11 (i) of Prevention of Cruelty to Animals Act, 1960 says that abandoning an animal, leaving it in a situation that it suffers pain due to starvation or thirst, is a punishable offence. In this case, the fine can go up to *₹50.* If the same crime is committed within three years again, the person has to pay a fine of anything between *₹25* and *₹100* or an imprisonment of up to 3 months or both. Evidently, neither the fine nor the imprisonment is strict enough to prevent people from harming animals. Killing, poisoning, maiming or torturing an animal is a cognizable offence under Section 428 and Section 429 of the Indian Penal Code. The punishment for such an act is rigorous imprisonment which may extend for up to 2 years or a fine or both. In this case, as well, the fine is just *₹10* or above, an amount so minuscule that places no value on an animal's life. The act of animal sacrifices is covered under Local Municipal Corporation Acts, Prevention of Cruelty to Animals Act, 1960, Wildlife (Protection) Act, 1972, Indian Penal Code (IPC). It is now a well-established principle of penalisation that punishment must always be proportional to the crime, however, given the *paltry nature* of the amounts above, it is saddening to note that the fines imposed are not sufficient to even seek compensation for the harm or injury done to the innocent creations of the divine power, let alone deter potential harmers. The two-fold constitutional mandate which was brought forth by the 42nd Amendment imposes two-fold responsibility- on government as well as citizens to have love and compassion for all living creatures, time and again these have been considered in a multitude of cases before the Apex court and high courts of the country. Despite the fact that the fines stated above are less, it is also pertinent that this two-fold mandate corroborates the contentions of animal preservers in several cases and the courts have reciprocated with equal zest. The concern of the Apex court is evident

in the fact that the old judgement[236] of the court which distinguished between breeding and old cattle and thus upheld the ban on slaughter of the former while not on the latter was overruled virtually by the 2005 judgement[237] wherein court taking into account several socio-economic factors and evolution in the scenario since the judgement in Hanif Qureshi's case thus the fundamental rights of the butchers and several others were not given primacy over animal preservation, this spirit of the court shows that the two fold mandate is not merely a dead letter.

Considering Jeremy Bentham's opinion, the fact that an animal can/ cannot reason or an animal can/ cannot talk is no determinant on whether or not it should be allowed to suffer.[238]

2.1 The comparison between two major theories- Ecofeminist and Wise's Theory:

Although both the theories[239], show a common object of preserving animals it must be noted that there is a key difference between the two as the ecofeminist theory seeks to blend the concept of rights of women with the rights of animals and seeks to preserve all the animals, thus making no distinction between various groups of animals, it is not so with the animal rattling theory as it seeks to preserve only certain classes of animals and the test as to which animals shall be preserved and which should not is the "rationality factor".[240] This is in stark contrast to the *caring ethic* which manifests itself in the various works which collectively demonstrate the ecofeminist concern for animals.[241] Two opposing opinions are also relevant here. Judge Richard Posner has an opinion too different from animal preservers.[242] While the critics of animal rights advocacy like Judge Posner himself hold that "animal right to bodily integrity cannot and should not happen", the others down the line have rather condemned such a

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[236] Hanif Qureshi v State of Bihar, (1959) SCR 629.

[237] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat (2005) 8 SCC 534.

[238] Jeremy Bentham, *Principles of Morals and Legislations*, 310-311.

[239] Steven M. Wise, *Rattling the Cage for Animals* 7 (2000).

[240] *id.*

[241] Carol Gilligan, *In A Different Voice* (2000).

[242] Leslie, Jeff, and Cass R. Sunstein. "Animal Rights without Controversy." *Law and Contemporary Problems*, vol. 70, no. 1, 2007, pp. 117–138.

supremacy of human rights over animals. Two thirds of American likewise believe on the unestablished statement of equivalence.[243]

3 MEANING OF RIGHTS AND THE CONCEPT OF PERSONS:

In constitution, natural rights are those that are believed to grow out of the nature of the individual human being and depend on their personality such as the basic rights of liberty, life and privacy and the pursuit of happiness.[244] The discussion over the animal rights advocacy and the conferment of the status of "legal persons" is incomplete without discussing the concept of "rights".[245] It is believed that with the evolution of the society when the existing natural persons which we know, form the chains of human interactions fell short, the cooperation is obviously incomplete without recognising a larger circle of humans as "juristic" or "artificial persons".[246] In a nutshell, legal persons are beings capable of bearing rights and duties.[247]

The said judgement takes the instinctive general behavioural tendency of human being to have an inclination towards the view that befits the general idea that "humans" are "persons" thus making the term person and animal appear as mutually exclusive categories.[248] Thus a contradiction is posed with respect to the definition of "legal persons' where even the aforementioned definition or the view that emanates from the result of it is highly widened.[249] Since there are two resulting conclusions from these submerging ideas which make it aptly clear that enabling such a construct of identity is purposeful, the two conclusions being: Firstly, rationality and self-consciousness are tenets considered for the ascription of personality on a being and secondly, the "legal person" which is an artificial construct is also made by agencies capable of doing so, thus solving the question of whether or not can such a status be bestowed upon animals which is contradicted by counter thinkers. In the said judgement, reliance is also placed

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[243] *Law and Contemporary Problems*, Vol. 70, No. 1, Animal Law and Policy (Winter, 2007), pp. 117-138

[244] Rule of Law

[245] *Supra* note 13

[246] Corpus Juris Secundum, Vol. LXV, 40.

[247] Paton, *Jurisprudence*, 3rd edn., 349-350.

[248] Macquarie Dictionary and the Concise Oxford Dictionary

[249] Ernest Barker

on David R. Boyd's work which is viewed as revolutionary and contemplates the changing paradox of "personality" being conferred upon a number of artificial entities. The author not only supports the idea strongly but also places emphasis on the international legal perspective on the same, which validates the same idea, thus has been very well-placed reliance upon in the judgement. This is in stark contrast with the view of critics of the aforementioned theory who believe that a rational enquiry into the nature of man makes it amply clear that it is a natural and inherent right of the believers of otherwise.

3.1 Rationality and the entire concept in a nutshell

Rationality can be understood, in a nutshell, in terms of two attributes: "sanity" and "orientation".[250] Creatures that display sanity and are well oriented to the society bring about rational behaviour. Now. from the second element it is amply clear that the *"normative"* aspect sets in too. Morality thus becomes an important aspect when discussing rationality.[251] Thus, those who argue against animal rights probably center their argument around the belief that "animals are immoral beings" or to oversimplify "morality has no room in the animal kingdom". To reason out the arguments on any side, first the *Morality-Rationality* as opined by the early thinkers need to be analyzed.

4 THE BASIS OF THE MORALITY ARGUMENT

Kant's theory which centrally revolves around morality and ethics while determining personality poses that a person is an end in himself and cannot be regarded as a means to be used for anything.[252] The concept is now viewed over and over and has extended to the debate of animal rights.[253] Christine Korsgaard also sides herself with Kant's view of rationality and further clarifies that it is not the ability to choose between options in an intelligent manner that determines rationality, rather it is the adherence to the normative aspect of life.[254] To put it aptly, this does not mean acting in

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[250] Korsgaard, Christine M., *Fellow Creatures: The Moral and Legal Standing of Animals*. Oxford: Oxford University Press, forthcoming.
[251] *id.*
[252]Immanuel Kant, *Groundwork for the Metaphysics of Morals*.
[253] http://www.bbc.co.uk/ethics/animals/rights/rights_1.shtml.
[254] *Supra* note 21.

a particular manner to fulfil a particular desire or save oneself from some potential danger, it means knowing that the act was done to fulfil the particular desire, thereby, being able to connect the two so as to establish a causal relationship.[255] On the discussion of animal rights this is contested on various grounds.

4.1 The Morality Paradox- "morality" concept used in favour of animal rights

When focusing on the statement of Kant echoed so widely- *"A person is an end in himself"*, what becomes clear is that the existence of humans is of intrinsic value and thus having rights is an obvious consequence.[256] The basis of rights according to Kant is autonomy, however, in the said judgement it has been contested by stating that it is not just the autonomous position which makes us zealous about our rights but more centrally- our interests and welfare. This is exactly where Kant's perception fails. Because it raises the limitation of "value for autonomy" to explain the concern emanating with respect to the human rights. The reason why this is flawed is as suggested, the distinction drawn between humans and other creatures. Thus, a conclusion which automatically comes to the forefront is that animals too have rights, choices, instincts and every being is thus centrally concerned about its own welfare. Even to suppose the otherwise would be blatantly wrong.[257] The adult mammals are *subject-of-life*, the expression finds presence in many works such as those of Tom Regan.[258] It has been conclusively held that since they are subjects-of-life too, human interests should not surpass their interests.[259]

4.2 Animals not subjects-of-life

There is a lot of testimony to the fact that beliefs propagated by theologists and religious scholars often influence people so dramatically that it might become the kernel-of-truth. The Bible postulates that humans have in subjection the life of other non-human creatures around, thus holding human

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[255] http://www.people.fas.harvard.edu/~korsgaar/CMK.Rationality.pdf.

[256] *Supra* note 23

[257] Refer to Gary L. Francione's Keynote, *L&CP Symposium*, Duke University of Law

[258] Tom Regan, *Case for Animal Rights.*

[259] Peter Singer (ed.), *In defense of Animals, New York: Basil Blackwell,* (1985)pp. 13-26.

life superior to the life of other creatures in every regard.[260] Despite this, Bible also says that any form of violence is a misdemeanor in itself.[261]

Thus, even as per the Bible it is not right to harm animals merely for pleasure or enjoyment. However, what is imperative to understand here is that, though the religious scripture might not support purposeless harm to animals, it does not hold animals as "subjects-of-life" to the extent that those argue for animal rights do.[262] Thomas Aquinas, a philosopher and theologian also opined on similar lines, thus completely rendering human minds guilt-free when it comes to the differential treatment being meted out to animals.[263] In a well-researched and an arduously written work, the author has analysed Rene Descartes *"Animals are Machines"* in depth.[264] Views like Descartes' do not hold animals as *subjects-of-life* and thus animals are not given moral consideration according to these thinkers.

4.3 The rights of animals with respect to other animals

A very interesting angle with respect to rights of animals which is often presented by many modern thinkers is that animals do not have rights against another animals because the animal kingdom is structured that way- one can simply not fathom the existence of animals without thinking clearly about food chains and food webs.[265] The reason why this is extremely relevant to the present aspect is because when non-human animals do not have rights against each other the question why non-human animals should have rights against human animals is bad and a little complicated to answer aptly.[266]

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[260] Genesis 1:28, Bible

[261] Psalm 11:5

[262] http://www.animalethics.org.uk/aquinas.html

[263] Thomas Aquinas, *Summa Theologica.*

[264]https://dhaydock.org/Philosophy/Unit%202%20-%20Animal%20and%20Machine%20Minds/Descartes%20Animals%20as%20Machines.pdf.

[265] Mary Warnock, *An Intelligent Person's Guide to Ethics*.

[266] https://www.thoughtco.com/top-arguments-against-animal-rights-127630.

5 CONTEMPORARY CONSTITUTIONAL SCENARIO:

In a very notable case which has been cited also in the said judgement centrally, Article 21 which is known for its wide ambit[267] was given a more liberal interpretation thus extending the ambit of the term "life" and it now connotes all forms of life, thus extending it to all existing forms of life in the natural environment. It has further been stated that it should be construed in the same manner as it is done with respect to the humans.[268] Thus the various provisions of PCA are valid even from the constitutional standpoint, although they are widely contested on the basis of religious grounds as the universe along with all its creatures belong to the land and therefore no creature can have supremacy over the other.[269] The doctrine of *parens patriae* is incorporated in the PCA by means of the Section 3 of the act.[270] It is well established that the functions of the state are not limited to the mere carrying out of the basic exercise of powers but it is necessarily the concept of "welfare state" which has taken the front-foot now. In a landmark judgement, it was clearly stated that Courts are covered within the meaning of state under Article 13.[271] Since parens patriae is of primary interest to the state in exercising such welfare functions, it becomes imperative that courts also act as Parens Patriae to secure justice to all.[272] Thus, doctrine of parens patriae makes the state responsible to guarantee equal justice to entities which are voiceless and to put it simply- "are incapable of protecting themselves against injustice". The critics of the doctrine of parens patriae however, have a very valid point to raise: the doctrine is in itself, a very absorptive doctrine. The obvious outcome of this is that even when it was employed by the progressive reformers of the 19th century, the intended outcome got limited by the personal prejudices of the reformers themselves, thus this can simply manifest itself again in the present times the state making its own prejudices while employing this doctrine.[273]

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[267] Maneka Gandhi v Union of India

[268] Animal Welfare Board of India v Nagaraja & others 2014 (7) SCC 547

[269] Isha Upanishads

[270] Prevention of Cruelty to Animals Act, 1960

[271] State of Kerala v. N.M. Thomas,1976 (1) SCR 906.

[272] Desi Kanoon, Law, Economics And Politics

[273] The Checkered Career of Parens Patriae: The State as Parent or Tyrant?, The De Paul Law Review, Volume 25, Summer Issue

The whole debate also boils down to the discussion of fundamental rights, even under ethical considerations- since both humans and non-human animals have the guarantee of fundamental rights, problem is encountered when it comes to the conflict between the two, the question that which of these must be sacrificed to give preference to the other is a problem. Applying the principle of minimal danger might help, but one cannot forego the problems of application of this principle.

6 CONCLUSION

Gary through his numerous contributions makes it amply clear that as per him absolute animal welfare means only and only the abolitionist approach and only resorting to veganism could ever help achieve that. He explains this in a behaviour driven manner- Most people are as per him, uncomfortable about the entire concept of exploitation and animal welfare, the animal welfare legislations only reduce this discomfort to an extent but they bring about no change in the behaviour which drives humans to exploit animals as, no matter what legislation comes into picture, irrespective of the creativity put into it, the "humane" treatment so advocated only lasts upto the time these animals die to ultimately serve human purposes in the end. This rather generates a comfort among consumers who believe since the animals were treated in a manner more humane, the guilt is assuaged, however, what Gary believes is this is rather a regressive approach, no treatment is "humane" if in the end it leads to the death of an animal so as to be used for human needs. Applying this ideology in the said judgement, the loophole which arises is if an animal is to be considered as an equivalent to a legal person, is it safe to assume that any legal person would hand over to any entity in order to be exploited on the pre-condition that "humane" treatment will be meted out until death or slaughter. *"For every human being who turns to veganism there would be an approximate decrease of 3,000 not sentient non humans".* The temperament of people however, makes abolitionist movement a distant dream.

In an exemplary and thoroughly researched article, the author has pointed out very well that in the contemporary scenario, given the existence of present degree of activism with respect to animal rights it is futile to apply the principles of Kantian level of absolute speciesism.[274] But at the same time the degree of animal rights advocacy when there is a growing demand of

[274] Richard A. Epstein, Animals as Objects, or Subjects of Rights, John M. Olin Law and Economics 2nd Working Paper Series

recognition of animals as legal persons, which has also been met in the said judgement, which will serve as a precedent for courts throughout the country, is also not free of problems. The problem chiefly is the extent to which such a status can be sustained and whether absolutism can be a parameter for the determination as contended by Francione or Wise, especially when it means "veganism" according to the former, moreover, in a country like India known for pluralistic diversity with a variety of eating habits and prayer rituals.

MINIMUM 'AGE' AND 'EXPERIENCE'- THE CONSTITUTIONAL BARS

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1 INTRODUCTION

Indian Constitution is one of the best constitutions in the world known for its unique features. Our constitution took nearly 3 years to take its shape. During this period, the constituent assembly had rigorously burnt midnight oil to give to the nation- 'The Constitution of Dreams'. Each and every provision of the constitution was very critically examined and analyzed by the members of the assembly. *Inter Alia*, the provisions for the appointment of members of Executive, Legislature and Judiciary of both Union and State were also deeply scrutinized. Thus, after long discussions and various amendments, the provisions for the appointment of these members were framed. However, our constitution was framed around 7 decades ago and it is very natural that in such a long time, the society and the psyche of the people undergo radical changes. In such a changing scenario, Law of the land also requires readjustments and modifications. One such modification needed in the present scenario is, the readjustment in the Qualifications for the offices of various constitutional entities and to be more specific, the 'Minimum Age' in the case of Legislative and Executive and 'Minimum Experience' in the case of Judiciary. With the changing society and the growing level of maturity in the young minds, following the decades old principles for qualifying on an important position is quite unfair if put in relation to the modern times. One must question of logic that come up here is the reason for setting 'Minimum Age and Experience bars' in the constitution. These qualifications were set by the constituent assembly keeping in view the level of maturity and wisdom in the minds of the people of that time. For instance, the minimum age to qualify as the President of the Union was kept 35 year considering it to be an age of full wisdom and maturity with enough strength to run the important issues in the country. Today's generation is growing much faster than the earlier ones. And thus, under-estimating the young minds for qualifying on such important post only on the basis of Minimum Age or experience is not just and reasonable in today's era.

"Age" is one of the most important legal considerations not only in the constitutional matters but in other legal matters as well. The constituent assembly set the voting age to 21 years and only on and after attaining that age a person was entitled to vote. However, in 1988 it was realized that voting is a very essential matter for any democracy and 21 years of age was not justifiable enough to include the young minds of that time, which were mature enough to participate in the machinery of choosing their leaders themselves. Thus, the voting age was reduced from 21 years to 18 years by the 61st Constitutional (Amendment) Act, 1988. Another important matter was in relation to the 'age of marriage'. The original Hindu Marriage Act, 1955 provided for the minimum age to constitute a valid marriage as 18 years and 15 years for boys and girls respectively. However, later it was realized that this age is not suitable enough both scientifically and legally and thus the age was raised to 21 years and 18 years for boys and girls respectively by the Child Marriage Restraint (Amendment) Act, 1978. The age of getting a driving license is also reduced keeping in mind the social structure and growing level of maturity amongst the youngsters. Another very important age modification is in Criminal Laws, where the age of Juvenile for certain heinous offences like Rape or Murder is reduced from 18 years to 16 years after the tragic *Nirbhaya* Case.

All the above illustrations of various age modifications in different laws highlight the fact that time and again it is accepted that age cannot be fixed in perpetuity for a particular objective. With the Changing social, political, economic, and psychological mindsets of the people, these ages also are required to be change to include or exclude from their ambits the changed pattern of society.

Here I find worth mentioning Mark Twain: "Age is an Issue of Mind over Matter. If you don't Mind it doesn't matter."

Practically stating, considering minimum 'Age' or 'Experience' as a qualification is no longer beneficial but a bar in the ways of many young and efficient Persons. Thus, these provisions require suitable adjustments to do justice with those, who deserve it.

1.1 The Age Of Candidacy

The Constitution of any country is the *suprema lex* of the land. It is the foundational law on which the entire legal system of that country is based. Along with the statement of Rights and Duties, it also provides for the system and mechanism of the functioning of the constitutional Bodies *viz.* the

Executive, the Legislature and the Judiciary. The constitution of most of the countries also provides the qualifications and means of appointment on these very constitutional posts. *Inter Alia*, one of the major qualifications in order to qualify to hold some major constitutional posts is a 'Minimum Age'. Different countries have a different Age criterion for the eligibility for various offices.

The Age of Candidacy is on the politico-legal rolls of many countries. In the United States (U.S.) there have been a long battle for reducing the age of election to minimum 18 years and standardize it throughout the states. Similarly, due to the raging youth movements in Britain and on the initiation of the British Electoral Commission, in 2003 the age of candidacy for parliamentary elections was reduced from 21 year to 18 years. Internationally, the young enthusiasts have always put forward their voice for reducing or striking down the minimum age qualification for various political offices.

Different countries have followed different ideologies while framing their constitutions. As a result of those philosophies, the eligibility qualifications for various important Constitutional offices were set. However, it must be pointed out here that most of the important world constitutions were drafted in late 1700s or 1800s and 1900s. It is worthless to mention that after centuries; still following the same archaic philosophy that only a 35- or 40-years old person is mature enough to run the country is something very conservative. There is no scientific method to prove that such age is the "age of ultimate Wisdom and Knowledge" to lead a country.

In Today's context there are many leaders in the world even older than 50-60 years of age but are actually ruining their nation. Where one wise old man is known for his tyrannical practices, another one has become a laughing stalk for his own country and for rest of the world. Then how does this age factor is proving to be beneficial.

Indian constitution was drafted in the late 1940s when the socio-psycho situation of the country was quite conservative and traditional as converse to the present date where the young minds are growing fast and achieving the levels of maturity much earlier. Technology is playing a very important role in this development. However, even during the framing of our constitution many prominent people felt the need to reduce this then proposed "Minimum Age Qualification".

Prof. Shibban Lal Saksena, during his address to the President of the Constituent Assembly- Dr. Rajendra Prasad debating over the age of candidacy of Members of Parliament had observed the following:

"Sir, I frankly confess that I am not happy over the amendment of Dr. Ambedkar. I do not think it improves the constitution. As has been pointed out there have been cases in the world where younger men than 25 years of age have occupied the highest position. The case of the younger Pitt was just cited; Shankaracharya became a world teacher when he was 22 and died when he was only 32. Alexander had become a world conqueror when less than 25 years of age and died when he was 32. Our country of 300 million may produce precocious young men fit to occupy the highest positions at an age younger than 25 and they should not be deprived of the opportunity. This question of age should have no connection with the qualification of a man to become a candidate for election."[275]

Another prominent personality, Mr. Tajamul Hussain observed:

"Sir, I rise to support the amendment to the amendment moved by my honourable Friend Shrimati Durgabai. The amendment which Dr. Ambedkar has moved is that the age of a person who wants to be a candidate for a seat in the Council of State must be at least 35. The amendment to amendment is that the age should be 30. In fact, I am of opinion that it should be less than 30. When a person has attained his majority, he should be eligible. As there is no amendment to this effect, I have no alternative but to support the amendment moved by Shrimati Durgabai." He further quoted a Persian Couplet: *"Bazurgi ba aql ast na ba sal. Kawangri ba dil ast na ba mal*" he further added, "The first part means that, seniority is not according to age but according to wisdom. I shall not translate the second part. If a person is a genius, why prevent him from entering the Council of State though he may be under 30?"[276]

The point here is that, even though the amendments passed by many leaders regarding this minimum age criteria were not accepted yet they hold grave importance i.e. even the prominent leaders in late 1940s were of the opinion to reduce the minimum age for various posts.

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[275] Prof. Shibban Lal Saksena, Constituent assembly of India Debates (Proceedings) Vol. 8.86.132 ,May 18, 1949 (Aug. 5, 2019, 3:19 PM), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-18

[276] Mr. Tajamul Hussain, Constituent assembly of India Debates (Proceedings) Vol. 8.86.136 ,May 18, 1949 (Aug. 5, 2019, 3:19 PM), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-18

Indian Constitution provides for the minimum age requirement for the qualification as 35 years in the case of the President[277], the Vice President[278], and the Governor[279]; 30 years in the case of Election as Member of Parliament in Rajya Sabha[280], and Member of Legislative council of the States[281]; 25 years for the membership of House of People (Lok Sabha)[282],and Member of Legislative assembly of the states[283].In a country like India where more than 60% of the population is below the age of 35-40 years, qualifying age for such constitutional offices being so high is unjust with respect to the young population. Thus, this minimum age must be reduced.

2 THE CONCEPT 'MINIMUM EXPERIENCE'

Where 'Minimum Age' is acting as a hindrance in young entries in Legislature and Executive of both union and state, there is another constitutional concept of 'Minimum Experience' barring young lawyers from the appointment in Higher Judiciary. In order to qualify as a judge of Supreme court, Article 124 (3) (a) provides for a minimum experience of 5 years as a judge of High Court or of two or more such courts in succession and Sub-clause (b) of the said provision, provides for the requirement of a minimum experience of 'At least' 10 years an advocate of a High Court or of two or more such courts in succession. Similarly in order to qualify as a judge of any High Court, Article 217 (2) (a) provides for the minimum experience of at least 5 years of holding a judicial office in the territory of India and Sub-clause (b) of the said provision provides for the requirement of a minimum experience of at least 10 years been an advocate of a High Court or of two or more such courts in succession.

The authors agree with the fact that experience is something which is even greater than knowledge. Someone who knows a lot but doesn't have the experience of practicing the same is actually worthless. However,

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[277] INDIA CONST. art. 58, cl. 1 (b)
[278] INDIA CONST. art. 66, cl. 3 (b)
[279] INDIA CONST. art. 157
[280] INDIA CONST. art. 84, cl. (b)
[281] INDIA CONST. art. 173, cl. (b)
[282] *SUPRA NOTE* 6
[283] *SUPRA NOTE* 7

providing for the constitutional limits by putting these 'Minimum Experiences' clause is actually barring efficient judicial entries.

There are many young and efficient young personalities in the country doing amazingly well in the field of Law yet are still not happy as they are actually aspiring to be the judges in Higher Judiciary. Some of the prominent and extra-ordinary lawyers lose their charm by just the thought of struggling for 10-15 years more to achieve their actual goals. Some passionate ones burn midnight oil and in order to gain experience work hard and rigorously yet in most cases they are not appointed to their desired posts either due to the corrupt system or due to degradation of their skill in the years of struggle.

Most possibly, the object of setting a 'minimum experience' qualification was to polish the skills to strengthen the potential judicial officers who would be adjudicating over the most important matters, to avoid any anomalies or absurdities in the delivery of justice. But setting up the "Minimum" at 10-15 years is not fair in the present-day context. India is known for its slow justice system and as it is said: "Justice Delayed is Justice denied". One of the most common reasons for delay in judgments is lack of judges in the country. However, it is quite ironical that at one point we are talking of an efficient and pristine judiciary by appointing only "experienced Judges" and at the same time we are calling upon for lack of Judges. India is in a dire need of 'Judges Explosion' where maximum judges could be added to its judicial machinery to ensure: first, all the pending cases are disposed off as quickly as possible and second to ensure that no more cases are left pending for years. The author is of the opinion that an ideal sitting judiciary would be the best day India could ever imagine.

Young and effective lawyer must be included in the higher judiciary. A young mind would be able to establish a new perspective, developing with the changing society. It will be meritorious where the young enthusiastic judicial officer coupled with a well experienced one, sitting on a single bench and adjudicating the issue before hand. By this way both the young perspective and the experience factor can be coupled and be utilized to derive the best results. Subsequently, the young one will gain experience and another young mind can be partnered with him and the system will go on. This Judicial Revolution would not only give way to many liberal judgments but also it would help in speedy disposal of the cases.

3 THE DISCRIMINATORY MINIMUM "AGE" AND "EXPERIENCE"

One of the cardinal principles that run throughout the body of our Constitution is the Principle of Equality. Article 14 of the Indian Constitution provides that, "The state shall not deny to any person Equality before law and Equal protection of laws within the territory of India". But by setting up of minimum "Age" and "Experience" requirement is practically not granting 'Equal Protection of Laws' to the individuals. An unreasonable classification has been done by arbitrarily setting up "these Minimums" which practically lacks an *intelligible differentia*.

Satirically, the *intelligible differentia* can be traced from the following fact. It is both ironical and questionable that we all are aware of the fact that the President is only the nominal Executive in India and the Real Executive is the Prime Minister And his Council of Ministers. That in short means that it is actually the prime minister of India who has to deal with major issues of the country. Still, the president has to be of more age i.e. 35 years or above, which is actually liked with wisdom, than that of the prime minister. A 25-year-old is able to hold the most important position in India; The Prime Minister provided he should be the leader of the majority party. Then how far is the logic behind the minimum age requirements is good and not arbitrary?

While discussing the qualification for Council of States in the constituent assembly, the minimum age proposed was initially 35 years and amongst others one of the reasons cited was that Upper House must contain elders, as it is the revising house to review over the youngsters in the lower House. Now practically stating such a reason is absolutely inappropriate as if we look at the composition of both the houses today, we can find that the lower house is composed of more elders than Rajya Sabha as against the reason cited by the drafters. Such age qualification thus is absolutely arbitrary and obsolete in the present context.

Smt. G. Durgabai while suggesting an amendment in the above context said:

"……It was held for some time that greater age confers greater wisdom on men and women, but in the new conditions we find our boys and girls more precocious and more alive to their sense of responsibilities. Wisdom does not depend on age. …As I said our boys and girls are now more precocious and the educational curriculum is now so broad-based that it will

educate them very well in respect of their civic rights and duties. I therefore think we should give a chance to these younger people to be trained in the affairs of State. I said wisdom does not depend on age. Our present Prime Minister became President of the Congress before he was 40 and Pitt was 24 when he became Prime Minister of England. Therefore, we have no reason to fear that because a man is only 30, he will not be able to perform his functions in relation to the State. I hope the House will accept this amendment. Sir, I move."[284]

The authors are of the opinion that the minimum "Age" and "Experience" qualification is creating a class within a class, the classes of "Above" or "Below" the required age or experience amongst the already existing classes of politicians and lawyers. Thus, there are two categories of potential candidates *viz.* Young Ones and Old ones. Even though Article 14 permits classification, yet that classification must be on some reasonable and intelligible basis. Just classifying the potential candidates only on the basis of their Age or Experience over their capability and strength is absolutely not a valid and reasonable ground of classification.

Talking of Minimum Experience in Judicial Appointments, the experience required is 5 years or 10 years or even more to achieve a desired post. However practically stating, if a fresh law graduate is aspiring to be a judge of Supreme Court one day, he has to fulfill the qualification of minimum experience. In doing so he has to spend 15-20 years in the industry and only after that he 'may' achieve his ultimate goal and that too is not assured. The authors agree that the intention behind setting up of the minimum experience is only to maintain the standard and quality of higher judiciary but the system is not accurate in the realistic world. Even the most experienced judges sometimes make erroneous judgments that do not however mean that the particular judge is an inefficient one. Passing the aspiring candidate just through an experience test is not logical enough in today's context. Even though the experience gained from time to time polishes the potential judges but that is not sufficient enough. The great epic Mahabharata contains a wonderful shloka:

"*Na tena Vriddho bhavati Yenasya palitam shirah*
Yo Vai yuvapyadhiyanastam devah sthaviram vidhu."

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[284] Smt. G. Durgabai, Constituent assembly of India Debates (Proceedings) Vol. 8.86.125 ,May 18, 1949 (Aug. 5, 2019, 3:19 PM), https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-18

This means that a person is not wise or old merely because his hair has turned white. The young minds are capable enough to pronounce wise and more efficient judgments. Putting the judicial system into the hands of young population will not only reduce the burden of the elderly judiciary but will also rejuvenate it and will take the Indian Judiciary back to the peaks.

Qualifying a candidate only on the basis of a minimum 'age' or 'experience' is not actually wise enough. Today's youth is no more immature enough it is well efficient to be able to run the country. All the citizens of India today deserve an equal opportunity to stand a chance to hold a public office even if it is the highest office of the country- The President. Article 16 (1) of the Indian Constitution provides for the equal opportunity in the matter of public employment. Then why the aspiring candidates have to go through an age scrutiny before qualifying for some post? With more and more young leader beginning to show in the political premise, it is now high time to reduce if not eliminate the unreasonable minimum age qualification to encourage young entries in the Legislature and the Executive. Even the present-day political giants accept the power of youth today and that is one of the reasons why politicians often take help of the young student political groups in various universities or campuses to empower their election support.

Indian Constitution has set up the requirement of a minimum age where the need of many other more logical and necessary qualification in the lawmakers were not realized by the framers of the constitution. It is most humbly submitted that it is a great irony that those who are themselves either uneducated or illiterate are drafting laws for our country. Our constitution makers felt the need for setting up an Age requirement to be a member of parliament but not some basic education or literacy level amongst those members. There are certain qualifications that a parliamentarian must possess but surely classification on the basis of Age is a little arbitrary and discriminatory.

4 RECOMMENDATIONS AND SUGGESTIONS

The Minimum Age and Experience qualifications require readjustments and modifications. Where Legislature and Executive branch requires a change in the Arbitrary "Age Qualification", the Judiciary must have a modified system that do not judge an aspiring candidate only on the basis of experience. This section provides some recommendations and suggestions in this regard.

Readjustments in the Legislature and Executive candidacy

Age discrimination in the matters of appointment at constitutional positions is actually against the letter and spirit of the constitution itself. India is a Democracy where free and fair elections are one of its basic features, which mean that the people have the right to choose their own representatives. There may be situations where the general public would require someone younger than 25 years to represent them. Disallowing the same on the basis of an 'arbitrary qualification' will violate the constitutional mandate of FREE AND FAIR ELECTIONS. Similarly, putting high age barriers as qualification for appointment in the office of President or Vice-president are also illogical. The authors thus are of the opinion that these age barriers should be readjusted in such a way that the arbitrary character that has been assumed by these provisions with changing time must be removed.

First, in respect of being the Member of Parliament and state legislature, the "minimum age" qualification must be reduced to 18 years that would mean that anyone who has the right to vote can actually contest elections as well. It is quite genuine to receive a criticism about such a young age but it must be realized if we do not lower the age of parliamentary candidacy to 18 years, there will always exist an adult category discriminating against the young adults. There may be opinions that 18 years is too young an age to get involved into politics but these are mere opinions and everyone could have different opinions. Whosoever is entitled to vote should also be entitled to stand as a candidate for elections. There won't be any value of lowering the age limit from the current ages until we will lower it to 18 years, as otherwise there will always be some adults discriminating against the younger ones. It must be realized that everyone in India deserves equal opportunity and there should be no discrimination on the basis of age.

Thus, the age of qualifying as a candidate to be a member of Legislature of both Union and State should be 18 years.

In the case of the President and the Vice President of the Union, the minimum age requirement of 35 years should also be modified. Judging a person only on the basis of Age to have possessed ultimate wisdom and knowledge to run the country is no criteria. It might sound whimsical but practically and logically stating, the minimum age requirement to qualify as the president or the vice-president must be reduced to 25 years from 35 years. Now very obviously a basic question would arise in many minds that when age is such a discriminatory issue in the constitution then what

difference will reducing it by 10 years will make in the case of president or the vice president. The authors justify this question with the following reason:

Even though 18 years is too young an age for being an MP but it is we who choose our representatives in the parliament. Each voter has the right to choose the one who deserves the position and who could serve the public at large and thus age will not matter in this case and even an exceptional leader of 18-19 years could be the Prime Minister of the country provided that if he is the leader of the majority party winning the general elections. However, president is elected by the Electoral College containing Members of parliament and members of state legislative assemblies. Thus, general public can have a say in presidential elections only through their representatives and not by themselves. In such a scenario it would not be wise enough to choose an 18-year-old to be the president of India as such a candidate would not pass the scrutiny of the people and the sitting MP's and MLA's could easily choose a very young president for their own benefits. Due to the technicality of the powers and functions of the President, 18 years will be too young an age to qualify a candidate for the same. An MP is always chosen by those who wish him to lead them in his constituency and thus here age discrimination must not be there, as it is up to the people to decide. But in case of president and vice-president, there must exist a reasonable classification between those who are 25 years and above on one hand and those who are younger than 25 years on the other hand. Such age of 25 years is not arbitrary as there is a reasonable basis of such classification i.e. the choice of people and to eliminate any risks involved. Moreover if the age to qualify as a president is reduced to 18 years than obviously most of the young pass outs from the school will run in the race of filing nominations for the president post and such young enthusiasts would be very easily influenced by those who would probably vote for them in the presidential elections and consequently would be able to manipulate youngsters for their own cause. If the age would be 25 years, at least each potential candidate would be able to receive a minimal level of advanced thinking that the presidential rank demands. Thus, to avoid any negative implications, the age qualification for the president must be reduced to 25 years. Members of Parliament and the President should not be confused on the basis of age as each rank carries its own responsibilities thus the requirements for such rank may differ at least in the present context. Keeping in view the present society, if the age of presidential candidacy is reduced to 18 years, it would be quite whimsical as it could lead to the spread of nepotism already prevailing in the Indian politics. With time, there may be such a social transition to such an extent that the age of presidential

candidacy could also be reduced to 18 years to meet the changing social conditions of that time in future.

Readjustments in the Higher Judiciary

Just as age is a hindrance in the Legislature and executive and requires changes, the concept of 'minimum experience' in the higher judicial appointments also requires some changes. At present, the constitution set a requirement of *a not so* "Minimum Experience" in order to qualify as the Judges of High Courts and Supreme Courts. As already discussed, in order to qualify as a judge of Supreme court, Article 124 (3) (a) provides for a minimum experience of 5 years as a judge of High Court or of two or more such courts in succession and Sub-clause (b) of the said provision, provides for the requirement of a minimum experience of 'At least' 10 years an advocate of a High Court or of two or more such courts in succession. Similarly in order to qualify as a judge of any High Court, Article 217 (2) (a) provides for the minimum experience of at least 5 years of holding a judicial office in the territory of India and Sub-clause (b) of the said provision provides for the requirement of a minimum experience of at least 10 years been an advocate of a High Court or of two or more such courts in succession. This system requires changes and thus the authors suggest the following:

If practically thought, the objective behind providing for the qualification of having the minimum experience of a certain years at a certain position in judiciary is to retain and enhance the quality of higher judiciary. However, it is not wise enough in the present context. Time requires changes and thus there must some changes here as well.

First, in order to be appointed as judge of High Courts or the Supreme Court, the practice of considering the minimum experience of 5 years of holding a judicial office in the territory of India or as judge of high courts, should no longer exist. The authors recommend that a specific number of cases decided by a particular judge must be the consideration in order to be eligible for appointment as the judge of a High Court or the Supreme Court. In simple terms only after deciding a specific number of cases, a sitting judge would be eligible for the appointment as a judge in superior judiciary. The time taken in deciding these cases must not be considered it could be more than 5 years or less than 5 years depending upon the efficiency of the adjudicating judge but only after deciding such number of cases, eligibility can be maintained. This method would be quite beneficial as the sitting judges would get incentive to decide the cases quickly and the ration of pending cases could possibly be reduced and the slower judicial system

may gain pace. Efficiency is not by experience alone but by remarkable work. Thus setting a specific number of cases would actually act as test of efficiency of the judges and along with that the judges will be triggered to dispose off the pending cases as early as possible in order to achieve the required target of cases in order to be appointed as a judge of a High Court or Supreme Court.

On the other hand, the experience as an advocate in either case should be reduced to 5 years from 10 years as an advocate practicing in court for 5 years in both the lower courts or the high courts can gain ample experience required to be on such a high rank. A lawyer learns most of the things in the law schools and the experience required can be achieved in 5 years. However, in the race of gaining the required experience of so many years, a lawyer mostly loses his charm and efficiency due the emotions of distress and fear of achieving the required post. In order to do justice with such efficient individuals, this minimum limit should actually be reduced.

Just setting up an experience of a few years make possibilities of even some random judges being eligible for appointment into Higher judiciary but after deciding a specific number of cases not only they will gain the required skill and efficiency but also, they will be assured of their contribution in the judicial system. Moreover, the level of pending cases will also decrease.

5 CONCLUDING REMARKS

India is the land of diversity where people are different in many aspects yet are bound together by the string of nationality. Our constitution aims at establishing the welfare of all and to eliminate any kind of discrimination that exists in the society. Article 15 of the Indian Constitution provides for a few specific grounds upon which any sort of discrimination is prohibited. However, in today's society "Age" is a growing dimension of discrimination where the young ones are often discriminated against the older ones as it is commonly believed that youngsters are not capable enough for many tasks. One such discriminatory policy exists in the case of "Minimum Age" and "Experience" requirement in order to qualify for certain constitutional posts. Such Minimum age and Number of years of experience are arbitrarily set just taking into account the mental status of people at the time of framing the constitution. It must also be noted that the constituent assembly was composed mostly by older people and thus the young interests were not adequately represented. During the debates there were many concerns regarding these qualifications however, the social situation of that

time was quite different as compared to today. Today we cannot underestimate a young mind. The social, Economic, political, and psychological situations are now quite advanced where the concept of Student politics is on a rise. Youngsters are now capable enough to even challenge the government in many dimensions. Today's generation is not a calm generation but a roaring one that can even come out on streets if they are unhappy from those in power. Indian Constitution should strike on Discrimination wherever it exists, be it in the society or in the Constitution itself. Setting arbitrary qualifications of Age and Experience is unfair and thus require modifications.

A very obvious question would come up as: what differences will it make by lowering these limits? The authors agree that even though the present Constitutional positions are dominated by the older population, and there are hardly any young people of 25-26 years in the parliament even when the minimum age is 25 years but Discrimination is Discrimination. Where ever it exists it must be eradicated. Who knows many efficient people would have stepped back only because they are younger than the required age? If John Keats, who died at the age of 26, could produce immortal odes, Mark Zuckerberg can launch Facebook at the age of 20 and Malala Yousafzai, while still in her teens, be a Nobel peace prize winner, why can't today's India have elected representatives under 25? There are countries like France where even a 18 year old can become the president of the country. Having a few young individuals in the parliament or in the government or in the Judiciary will actually prove to be a boon as such young population would be able to efficiently represent the interests of the whole society especially the youngsters. Since young adults are the generation of the future, they would be able to most likely come up with solutions for today that does not create problems for tomorrow. Most of the youngsters are constantly receiving a more updated education than those who came before them and thus the quality of the top constitutional offices will actually improve. Younger generations can offer new and different perspectives. Young adults often think differently from other adults and this would provide alternative viewpoints on various issues. As it is said, Good decision making always involves the contribution of multiple points of views. Many people can be of the view that money is something that can actually tilt politics towards it. Younger candidates are less likely to have ties with large corporations, and many have not already been corrupted by greed and thus there is a little scope of cleaning up of our filthy system. India is a democracy where everyone is equal. Thus, the constitution should not empower only the aged persons to run the country where the amply capable young generation, full of energy and ambition is efficient

enough to do justice with whatever rank they deserve. Someone has rightly said:

"Give the Youth A Proper Environment. Motivate Them. Extend Them the Support They Need. Each One of Them Has Infinite Source of Energy. They Will Deliver."

SIXTY YEARS OF RESISTANCE BY TIBET

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1 INTRODUCTION

Indian Constitution is one of the best constitutions in the world known for its unique features. Our constitution took nearly 3 years to take its shape. During this period, the constituent assembly had rigorously burnt midnight oil to give to the nation- 'The Constitution of Dreams'. Each and every provision of the constitution was very critically examined and analyzed by the members of the assembly. *Inter Alia*, the provisions for the appointment of members of Executive

Tibet has been a civilization with a history of more than 2000 years from the second century BC to the middle of the 20th century. Tibet has been a sovereign independent nation, it has been over six decades since China occupied Tibet, yet the issue of Tibet has remained unresolved. Tibet has always maintained its statehood and has never signed any treaty or any document of accession with the People's Republic of China. The Tibetan people have their distinct cultural, religious and social identity, in 1950, China invaded Tibet and seized control by force. Tibetans have lived under China's military rule ever since. In Tibet, under Chinese rule, flying the Tibetan flag is a criminal offense, peaceful protestors are killed and shot, torture is widely used. Tibetans believe their culture, religion, and language is being systematically wiped out. China claims that Tibet is an integral part of its territory and claims have always been. These claims have no factual, historical or legal backing. In 1959, Tibetans rose up, China's response was immediate and brutal repression. The spiritual and temporal leader- the Dalai Lama- was forced to flee over the Himalayas and seek refuge in the neighbouring nation, India, and later set up a government in exile. Since 1959, Tibetans have never stopped resisting the occupation and the destruction of their way of life. The cost of defying China's occupation is incredibly high. Tibet is under Orwellian surveillance with cameras and police everywhere. Sometimes even the simplest expression of national identity can be criminalized.

The paper would cover the story of resistance by Tibet in four parts, the first part would cover the political history of Tibet. Tibet has been a sovereign independent nation with its flag, its political system and has been a part of many treaties with many nations from 821 BC. The question rises

on the statehood of Tibet, legally, Tibet has never lost its statehood, it is an independent nation under illegal occupation. China's only claim has been that Tibet was always a part of its territory, which has not been proved by any evidence in history. Therefore, we must study the history of Tibet and its international relations with other states.

The second part would focus on China's invasion in Tibet and the violations of human rights of Tibetans by the Chinese invaders. The Chinese claim that Tibet is an integral part of China, but the Tibet government in exile maintains that Tibet is an independent nation under unlawful occupation. If Tibet is under unlawful occupation, Beijing's large-scale transfer of Chinese settlers into Tibet is a serious violation of the fourth Geneva Convention, 1949, which prohibits the transfer of civilian population into occupied territories. The question of this falling under domestic jurisdiction cannot rise as China has no basis to support its claim over Tibet. Therefore, it is a matter of international concern. The issue of human rights violations, including the right of self-determination and the right of the Tibetan people to maintain their own identity and autonomy are, of course, legitimate objects of international concern regardless of Tibet's legal status[285]. Furthermore, the 17- point plan for the peaceful liberation of Tibet, 1951 was signed between China and Tibet, China has been violative of the treaty as well. Tibetans have not been able to exercise the autonomy over their land, they have not been granted rights to maintain their culture and practice their religion.

The third part highlights the question of Tibet in International law, the legal status of the nation. The support and stance of the international community, the resolutions and the discussions have taken place in the United Nations concerning the situation of Tibet. For holding China responsible for the violations of the human rights committed by them against the Tibetan community, the use of advisory jurisdiction of the International Court of Justice. This part would focus on the rule of law for Tibet.

The final part of the paper aims to consist of the suggested solution to the issue of Tibet. As proposed by the Dalai Lama, in the 1980s, the analysis of the "Middle-way approach". The restoration of Tibetan's community rights according to the international covenants. The regional autonomy and urge for international intervention in Tibet to hold China responsible for the atrocities committed by them against the Tibetan nationalities. This

[285] https://freetibet.org/about/legal-status-tibet.

paper aims to highlight the plight of under-developed nations when they are unlawfully occupied by developed nations, it is called upon us to join the movement with Tibetans in their fight to regain their autonomy over there region.

2 HISTORY OF TIBET

Tibet- the roof of the world, is a vast country, it is a land rich in minerals and a variety of flora and fauna. Contrary to popular belief, Tibet is not entirely arid and barren – it has vast areas rich in forests, endless pasturelands suitable for animal husbandry and extensive fertile valleys. Tibet covers an area of 2.5 million square kilometers, sharing its borders with India, Nepal, Bhutan, Burma to the south; with eastern Turkistan to the north and with China to the east. Tibet is also the land of origin for many river systems like Indus, Brahmaputra, Mekong, Sutlej, Salween, Yangtze, Huang He. Tibet proper is divided into three geographical areas—the central plateau, the valleys of the upper Indus and Brahmaputra river systems in the southwest and southeast, and the fertile lower regions of eastern Tibet. China claims that the third area falls within her boundaries[286].

The early history of Tibet involves how it grew to be a great military and carved itself into a huge empire in Central Asia, a kingdom known as Bod. In 821A.D the first Sino-Tibetan treaty was signed which recognized both as separate independent and sovereign countries. The reign of Tibet was prosperous with a strong army, during the reign of King Trisong Deutsen, the Samye, the first monastery in Tibet, was founded by Guru Padmasambhava, who also established the supremacy of Buddhism, it was also declared as the state religion. In 1642, the V Dalai Lama adopted both spiritual and temporal authority over Tibet, he set up the Tibetan Government, known as the "Tibetan Government Gaden Phodrang, Victorious Everywhere". He was invited to China by the Manchu Emperor and received him as an independent sovereign and as an equal. In 1717, the Dzungar Mongols invaded Tibet. The Qing Emperor sent troops and crushed them in 1720. Taking advantage of Tibet's instability, the Qing then declared Tibet a tributary state and turned Kham and Amdo into the Chinese province of Qinghai in 1724. This was a period of great change and instability within Tibet. In 1876, the Thirteenth Dalai Lama Thubten Gyatso took charge and

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[286] JOSEPH T. THORSON & et al, *The Question of Tibet and The Rule of Law*, International Commission of Jurists Geneva (1959) .

helped Tibet reassert its sovereignty. At this period, China persuaded the British that they exercised ‘suzerainty' over Tibet. The Tibetan's refused the ‘rights' granted to the Britishers under the Sino-British Chefoo Convention, 1876, as they did not recognize China's authority. After the British and the Chinese troops invaded Tibet in the early 1900s, in 1913, Tibet and Mongolia signed a bilateral treaty in Urga, declaring themselves free and separate from China. The Shimla treaty, 1914, Britain, Tibet and China met to negotiate the borders of India and her northern neighbors. The treaty gave secular control of Qinghai to China and recognized the autonomy of the rest of Tibet. China refused to sign as a result of south Tibet being ceded to British India. In 1949, Communist China, without any provocation, invaded eastern Tibet and captured Chamdo. In the following year, the Tibetan Government protested to the U.N.O. against Chinese aggression. In 1951, Tibet and China signed a 17-point agreement for the peaceful liberation of Tibet, the Chinese government coerced the Tibetan delegation to sign the agreement. The Chinese soon overtook the capital city of Lhasa and have violated many articles of the said agreement. Tibetans refer it to as the "ill-fated agreement", the Tibetans did not enjoy any autonomy over their region, the Dalai Lama had to flee from Lhasa, for his safety and seek refuge in India in 1959. He later set up his government in exile in Dharamshala, India. The fight to regain autonomy and rights for self-determination for the people of Tibet continues. Mandarin, not Tibetan, has become the language of government, business, and education in Tibet. Ethnic Chinese people have outnumbered Tibetans in many places, including the capital, Lhasa. China's immigrant dominates business and the economy, while Tibetans maybe even denied permission to move within Tibet in pursuit of work and economic opportunities.

Despite the claims made by China that Tibet has always been an integral part of its territory, the Tibetan people always have been a distinct race with their own culture, language, and religion. The population of Tibet recorded in 1959 was estimated at six million. An estimated 1.2 million Tibetans died as a direct result of China's oppression. Tibetan culture and way of life was primitive and simple, they were predominantly pastoral people, due to the high terrain and climate conditions, the economy of Tibet was more self-reliant. Despite Tibet being aloof from the technological advancements, the XIII Dalai Lama, after the British-China invasion in the early 1900s, started international relations, introduced modern postal and telegraph services and, despite the turbulent period in which he ruled, had introduced measures to modernize Tibet.

The Chinese were motivated by the desire of the land and the immense mineral wealth that the land contains. It is strategic and economic. Ever

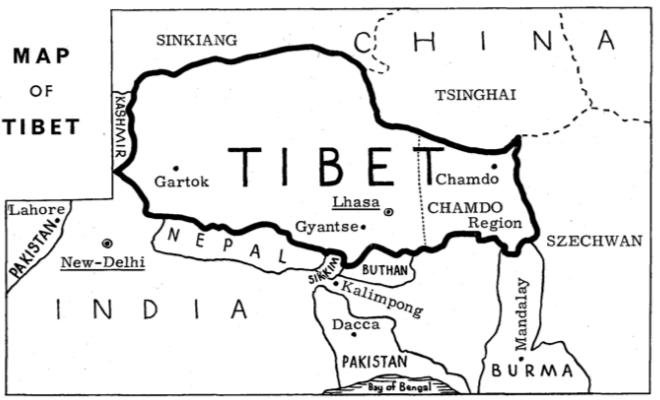
since the invasion, millions of Tibetans have died, some from starvation as a result of agricultural reforms. The culture has also been under sustained attack, thousands of monasteries have been closed, monks have been evicted and there are all sorts of restrictions on religious practices. The Tibetan people themselves, many of whom are nomads are being moved, taken away from the land they stewarded for centuries. Nomads are being moved to urban settlements which are completely alien to them and the skills that they have are not relevant: they face nothing but poverty and social exclusion.

The social structure, government, and customs of Tibet are largely determined by the distinctive character which Buddhism has assumed in Tibet. The spiritual head of the religion, Tibetan monks believe that the Dalai Lama is a reincarnation of Lord Buddha of Compassion and are enlightened beings. Tibet is a sort of theocracy, in which the Dalai Lama, enthroned at Lhasa, is supreme in both spiritual and temporal affairs and in which the grand lamas of the various monastic centers, together with their thousands of lamas or monks, virtually rule the nation. Another significant figure in Tibetan Buddhism is the Panchen Lama (the second highest Lama in Tibet), the Dalai Lama is as the sun and the Panchen Lama is as the moon. In 1995, Gedhun Choekyi Nyima was recognized by the Dalai Lama as the reincarnation of the next Panchen Lama, he was kidnapped by the Chinese authorities when he was six-years-old, making him the "youngest war prisoner" in the international community. The Chinese government has refused to share information about the whereabouts of the Panchen Lama, the Tibetans believe that the reincarnation of the Dalai Lama shall be recognized by Panchen Lama, the abduction of the Panchen Lama has threatened Tibetan Buddhism. The question of the kidnapping of the Panchen Lama by the Chinese authorities was raised in international forums like the United Nations Human Rights Council (UNHRC), the United States Commission on International Freedom of Religion and many international organizations working for human rights violations. The Chinese government failed to answer questions about the whereabouts of the Panchen Lama, they blamed the Dalai Lama, saying that his selection of Gedhun Choekyi Nyima "demonstrates the political plot of the Dalai clique in its continuous splittist activities by making use of Panchen Lama's reincarnation"[287]. China's abduction of the Panchen Lama and denial of his religious identity

[287] Interfaith International, *WS on Panchen Lama Case*, UNREPRESENTED NATIONS & PEOPLES ORGANIZATION (Mar 09, 2006) https://unpo.org/content/view/3948/84/.

violates basic principles enshrined in the general human rights instruments such as the Universal Declaration of Human Rights, the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights. The Chinese authorities have also violated the Convention on the Rights of the Child, 1989. It is called upon the Chinese government to let the international committee decide the fate of the Panchen Lama.

Currently, Tibetans are still under the unlawful occupation of China. Neither do they enjoy autonomy over there region nor are they granted independence. China has tortured the Tibetan people, destroyed their culture and has been exploiting their land for economic purposes. Since 1959, Tibetans have never stopped their resistance.



The map of Tibet and the three geographical regions[288]

[288] JOSEPH T. THORSON & et al, *The Question of Tibet and The Rule of Law*, International Commission of Jurists Geneva (1959) .

3 THE SINO-TIBET RELATIONS AND VIOLATION OF INTERNATIONAL LAWS BY THE PEOPLE'S REPUBLIC OF CHINA

The unlawful occupation by China over Tibet started with the so-called "ill-fated agreement", in 1951, China and Tibet signed the "17-point plan for the peaceful liberation of Tibet". China claimed that the Tibetan nationality is one of the nationalities with a long history within the boundaries of China and, like many other nationalities, it has done its glorious duty in the course of the creation and development of the great motherland. But over the last hundred years and more, imperialist forces penetrated China, and in consequence, also penetrated the Tibetan region and carried out all kinds of deceptions and provocations[289]. According to the People's Republic of China, Tibet has always been a part of its territory, the Tibetan delegation was coerced into signing the agreement. The Chinese government did recognize the fact that the Tibetans hold a different nationality and shall be integrated with China, they used this agreement as a document of the accession of Tibet. The question rises on the validity of this agreement, under the international law the 17-point agreement, never had validity. Under Article 52 of the Vienna Convention on Law of Treaties[290]which reads as follows:-

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

Therefore, treaties and similar agreements concluded under the use or threat of force are invalid under international law *ab initio.* In the spring of 1951, the People's Liberation Army had already defeated the small Tibetan army and killed half of their troops and China threatened to continue the bloodshed until the Tibetan government did not agree to sign the agreement. China's argument for validated the agreement is an alleged telegram sent by the Dalai Lama to Mao Zedong, which concluded the agreement expressing his support for the Agreement, after which the PLA took all major Tibetan cities. The Dalai Lama has refuted the claims made by

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[289]http://www.history.ubc.ca/sites/default/files/courses/documents/%5Brealname%5D/17_point_agreement_0.pdf.

[290] Volume No. 1155, I-18232, Vienna Convention on the law of treaties, UNITED NATIONS(1969)

China, moreover, he repudiated the Agreement at the first opportunity he had of doing so in freedom, days after he escaped into exile in India, in 1959.

By the use of coercion to get the Tibetan delegation to sign the agreement, the People's Republic of China not only violated Article 52 of the Vienna Convention on Law of Treaties but also violated Article 2(4) of the United Nations Charter which provides that: -

"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 any other measure inconsistent with the purposes of the United Nations."[291]

Furthermore, Article 69 of the Vienna Convention on Law of Treaties provides that an invalid treaty is void and without legal force. If acts have nevertheless been performed in reliance on such a treaty, each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed[292]. Per these provisions, China's claim of using the "17-point plan for the peaceful liberation of Tibet" as a document to prove their accession over Tibet is illegitimate under international law.

The PRC has also been in constant violation of obligations under the "17-point agreement" as well. The article 3 & 4 of the agreement provides the Tibetan people have the right of exercising national regional autonomy and the Central Authorities will not alter the established status, functions, and powers of the Dalai Lama[293]. Whereas, the PRC deliberately undermined the authority of the Dalai Lama in temporal matters, a matter of the utmost gravity in a theocratic society; the constitutional structure of Tibet was formally changed; Tibetan institution and new institutions with Tibetan representation had no effective power in the government of the region; and there were other methods used with the design of establishing Chinese government in Tibet as a plan to assimilate the Tibetans to the Chinese Communist way of life[294].

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[291] United Nations Charter, § 2(4)(1945).

[292] MALCOLM N. SHAW QC, INTERNATIONAL LAW 944-945 (Sixth Edition, 2008).

[293]http://www.history.ubc.ca/sites/default/files/courses/documents/%5Brealname%5D/17_point_agreement_0.pdf.

[294] JOSEPH T. THORSON & et al, *The Question of Tibet and The Rule of Law*, International Commission of Jurists Geneva (1959).

Irrespective of the legal status of the sovereignty of Tibet as a nation, there has been a grave violation by the PRC under the Universal Declaration of Human Rights, 1948 (hereinafter referred to as UDHR). The UDHR was adopted by the United Nations General Assembly, resolution 217 (III), the declaration is not a legally binding instrument as such, nevertheless, some of its provisions either constitute general principles of law (the Statute of International Court of Justice, Article 38(1)(c)[295]), or represent elementary considerations of humanity. The Declaration has considerable indirect legal effect, and is regarded by the Assembly and by some jurists as part of the "law of United Nations". Under Article 2 of the Declaration which provides: -

"Everyone is entitled to all the rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be the independent, trust, non-self-governing or under any other limitation of sovereignty.[296]"

The people of Tibet have been the victim of Chinese torture since 1951, the Dalai Lama had lost the power in the autonomous region as well, as the PLA had entered Tibet. In 1959, the Tibetan agitation towards Communist China started, the Chinese government's quick response was torture and oppression. The Dalai Lama fled from Lhasa and took refuge in India. The Tibetan people, nonetheless, lost their rights and were also not allowed to practice their religion. The Dalai Lama was seen as a separatist by the Chinese government and any followers of the Dalai Lama were treated as criminals. The Chinese government has also banned foreign media and human rights activist to enter the province of Tibet.

Every aspect of Tibetan life has been under siege. The International Covenant on Civil and Political Rights, 1966[297](hereinafter, ICCPR) provides

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[295] INTERNATIONAL COURT OF JUSTICE, Statute of Court, § Art.38(1)(c).

[296]UNIVERSAL DECLARATION OF HUMAN RIGHTS, § Art. 2 (1948).

[297] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)
treaties, *International Covenant on Civil and Political Rights*, UNITED NATIONS(1966).

provisions for every person to enjoy civil and political rights, irrespective of the kind of political system they are a part of. The covenant talks about the inherent right of life; no cruelty or torture shall be inflicted on anyone; no one shall be subjected to arbitrary arrest or detention; right to freedom of thought, conscience and religion; and right to peaceful assembly shall be recognized. The Tibetans have been under constant surveillance by the Chinese army, their activities and movements are recorded by the police officials. The Tibetan protestors are tortured, imprisoned and maybe killed as well, peaceful protests are also suppressed by the use of violence. People in Tibet are arrested for any expression of their desire for freedom, or if they send information about the situation prevailing in Tibet, or even if they wave the Tibetan flag or call for the returning of the Dalai Lama. There are testimonies of many Tibetan protestors who have managed to escape from the Chinese prisons or have been released. One of such testimony is of a monk, Palden Gyatso[298], he testified that over seven decades now China has kept a grip on Tibetan monasteries, even destroying some, and restricted aspects of Tibetan culture, like the Tibetan language and Buddhist religious practices. He further reveals the conditions in prisons and the torture inflicted by the officials on the Tibetan prisoners, he testifies:-

"Guards in Gutsa Prison raped nuns who were political prisoners and sexually violated them with electric cattle prods. In another prison, the chief administrator said to me, "I will give you Tibetan independence." Then he rammed the cattle prod into my mouth. When I regained consciousness, I found myself in a pool of blood and excrement and I had lost most of my teeth.[299]"

The inhumane treatment, killing, and torture inflicted by the PRC on the people of Tibet and grave violations of their human rights, leads us to the Question of Genocide. Genocide has been regarded as an international crime since the second world war, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (hereinafter referred as Genocide Convention) defines Genocide in Article 2, which reads: -

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

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[298] Daniel E. Slotnik, *Palden Gyatso, Monk Who Suffered for a Free Tibet, Dies at 85,* NYT, 9 Dec, 2018,a 26.

[299] A.M. Rosenthal, *On My Mind; You Are Palden Gyatso* ,NYT, 11 Apr, 1995, a 25.

b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.[300]"

Furthermore, Article 3 of the Convention provides: -
"The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

The convention defines both the *actus rea* and the *mens rea of* Genocide, the *mens rea* of Genocide is defined in Article 2 as the intention to destroy in whole or in part a national, ethnic, racial or religious group as such. In 2010, the Dalai Lama accused China of attempting to "deliberately annihilate Buddhism". The killings of Buddhist monks and Lamas have been explicit. In 2011, a new kind of protest emerged, a monk called Phuntsog set himself on fire in protest against the Chinese rule, before then only one self-immolation had taken place in Tibet. More than 135 Tibetans have since done the same, China's response has been to punish their families and communities and blame the Dalai Lama. These facts act to prove the *actus rea by* the Chinese government. In criminal trials its rarely that we get direct evidence to prove the *mens rea.* The fact that there is no official Chinese policy statement directed towards the destruction of the Tibetans is no ground for withholding an accusation of Genocide if an inference of the requisite intention can properly be drawn. The acts on which these inferences are based can properly be adduced as evidence of general intention.

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[300] Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III), *Convention on the Prevention and Punishment of the Crime of Genocide,* UNITED NATIONS(1948).

The Panchen Lama, the second in command, after the Dalai Lama, was kidnapped by the Chinese authority in 1996. Gedhun Choekyi Nyima was recognized by the Dalai Lama as the reincarnation of the next Panchen Lama, he was six-years-old when the Chinese authority kidnapped him. Many international organizations called killed the "youngest war prisoner". When the Chinese authority was questioned by the United Nations Committee on the Rights of the Child (CRC), China denied it held Gedhun Choerkyi Nyima. Later in 1996, a Chinese spokesman Wu Jianmin replied that "since separatists were seeking to kidnap the boy, the parents became fearful for his safety and requested Chinese government protection, which has been provided. The boy is living with his parents in good condition." However, to this date, no government body, concerned organization or independent observer has been allowed to see the child, and the Chinese government has provided no evidence of either the alleged kidnap plot or the conditions of the family's confinement.[301]Later in 1998, UN High Commissioner for Human Rights was denied access to the Panchen Lama, the following year the Chinese authority issued a statement saying that the Panchen Lama is still under their "protection". The kidnapping of Panchen Lama and the denial of his religious identity violates the basic principles enshrined in general human rights instruments. The Convention on the Rights of the Child, 1989[302](hereinafter, CRC) in Article 5 specifically acknowledges the extended family, referring not only to parents and others legally responsible for the child's upbringing but also refers to the extended family or community where they are recognized by local custom. The Panchen Lama traditionally receives years of intensive religious education from senior Tibetan lamas, including the Dalai Lama, to practice his traditional religious duties and functions. He cannot receive the education in China's custody as the political motivation for his kidnapping, it unlikely that the PRC is fulfilling its obligation to ensure that he gets access to information and knowledge about his culture. By forcing the Panchen Lama

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[301] Interfaith International, *WS on Panchen Lama Case,* UNREPRESENTED NATIONS & PEOPLES ORGANIZATION (Mar 09, 2006) https://unpo.org/content/view/3948/84/.

[302] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25, *Convention on the Rights of the Child,* UNITED NATIONS(1990).

to live outside his community and requiring him to attend schools outside Tibet where Tibetan culture and values are neither taught nor honoured, the PRC has breached its obligation to direct his education to the development of his own cultural identity and values. Furthermore, Article 8 provides the child to preserve his/her cultural identity, Gedhun Choekyi Nyima's identity as the Panchen Lama is protected from State interference within the scope of Article 8. PRC has violated the right of the Panchen Lama to freedom of thought, conscience, and religion. Article 29 also states that State Party shall ensure that the educational system prepares the child for responsible life in a free society. The continued confinement of this child and his family is contrary to this principle. China has denied the Panchen Lama's right to enjoy his own culture, to profess and practice his religion, to use his language and to use his religion in his community. Article 30 of the CRC explicitly protects the rights of children of ethnic and religious minorities to practice their faith and culture without undue interference from the State. Through interference in the Panchen Lama's religious identity and removal of the child from his community, the Chinese government has blatantly violated this article.

China has violated the human rights of the Tibetan community, over and over again. The Chinese government not only kidnapped the next Panchen Lama but has also recognized the next Panchen Lama to be someone else[303], this has not been accepted by the Tibetan Buddhist. The Chinese government has been constantly intervening in the religious and political practices of Tibet. It is urged upon the world community to take action against such acts that go against the principles of humanity. Tibetans have been suffering under the Chinese rule for over six decades now, the people of Tibet are under direct threat of Chinese guns. The community has lost their rights to practice their religion, their culture has been destroyed by the Chinese regime and there have been systematic and traumatic crimes committed against them, till the extent that endangers their lives and existence as a community. The acts done by Communist China in Tibet make a strong *prima facie* case of Genocide.

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[303] Clifford Coonan, *China appoints Panchen Lama in tactical move to quell unrest*, Independent UK, 01:00, 2 Mar, 2010.

4 INTERNATIONAL COMMUNITY ON THE ISSUE OF TIBET

The international community has been sympathetic towards the Tibetan community but has not been able to resolve the issues that they have been facing since the past six decades now. Tibet was not a member state of the United Nations, despite that in 1950, after the invasion of China in the eastern province of Tibet and capturing of Chamdo, the headquarters of the Governor-General of Eastern Tibet, the Tibetan Government approached the United Nations against the agitation by China. Under Article 2(4) of the UN Charter, which reads: -

"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 any other manner inconsistent with the Purposes of the United Nations."

The use of force by the Chinese military against Tibet falls under the ambit of Article 2(4) of the UN Charter. The question of Tibet was raised in the United Nations General Assembly (hereinafter, UNGA) by El Salvador, the issue was postponed by the Assembly. In the meanwhile, the ground reality in Tibet had worsened, after the coerced "17-point agreement" on Tibet with China, the Chinese military had captured [304]Tibet. In 1959, the Dalai Lama fled Tibet and took refuge in India, he set up his government-in-exile and approached the international community on behalf of the Tibetan people.

In 1959, UNGA passed resolution 1353 (XIV) on Tibet-China issue, affirming its belief the fundamental human rights and freedoms to which the Tibetan people, like all others, are entitled include the right to civil and religious liberty for all without distinction. Later in 1961, the UNGA passed resolution 1723 (XVI)[305] calling for the cessation of practices by China by which they deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination.

The European Parliament also passed several resolutions in support of Tibet and condemning China for violating the human rights and freedom of

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[304] United Nations Charter, § 2(4)(1945).

[305]https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/76/IMG/NR016776 .pdf?OpenElement.

the Tibetan community, the resolutions focused on the grave violations faced by the Tibetan's in practicing their religion and the destruction of their culture. The European Parliament, in 1987[306], passed a resolution urging the Chinese Government to respect the rights of the Tibetans to religious freedom and cultural autonomy.

The United States of America has made significant efforts to support dialogue between the Tibetan government, headed by the Dalai Lama, and the People's Republic of China. The relationships of Tibet and the USA strengthened after 1987, the Dalai Lama made his first public political speech in the United States, in the form of an address to the U.S. Congressional Human Rights Caucus[307]. In the address, the Dalai Lama denounced "China's illegal occupation of Tibet," which he blamed for inflicting a "holocaust" on the Tibetan people. For the first time, he also presented a five-point "peace plan." The Five-point “peace plan"[308] are: -

1. Transformation of the whole of Tibet into a zone of peace;
2. Abandonment of China's population transfer policy which threatens the very existence of the Tibetans as a people;
3. Respect for the Tibetan people's fundamental human rights and democratic freedoms;
4. Restoration and protection of Tibet's natural environment and the abandonment of China's use of Tibet for the production of nuclear weapons and dumping of nuclear waste;
5. Commencement of earnest negotiations on the future status of Tibet and relations between the Tibetan and Chinese peoples.

The USA also passed the Tibetan Policy Act, 2002, as a part Foreign Relations Authorization Acts, FY2003(P.L. 107-228), it lists its "purpose" as being "to support the aspirations of the Tibetan people to safeguard their distinct identity." On the political status of Tibet, the USA has never taken a clear stand, many times Tibet has been referred to as a separate nation from PRC. In 2014, the Obama Administration says that it considers Tibet to be a part of China and that this has always been the U.S. government's

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[306] Lobsang Nyandak Zayul, *International Resolutions and Recognition on Tibet (1959 to 2004)*, Central Tibetan Administration.

[307] https://fas.org/sgp/crs/row/R43781.pdf.

[308] Address to the U.S. Congressional Human Right's Caucus, *Five Point Peace Plan*, (21 Sept, 1987).

position. In 2015[309], The US House of Representatives passed a resolution on Tibet, calling for substantive dialogue, without preconditions, to address Tibetan grievances and secure a negotiated agreement for the Tibetan people. The USA has always tried to play the role of a mediator between the people of Tibet and the PRC, the efforts and resolutions passed by the US government reaffirming the friendship between the people of the United States and the people of Tibet.

The non-governmental international organizations working for the protection of human rights of the people and developing better international relations between the states; and the state and the people. The International Commission of Jurists (hereinafter, ICJ), Advocates for Human Rights and Justice, published a report and highlighted the facts and the violations made by the PRC to the people of Tibet. In 1959, "the question of Tibet and the rule of law" was published by the ICJ, the report was aimed to constitute a legal inquiry about the political status of Tibet, furthermore, examine the violations of various international law in Tibet. The committee held the acts done by the PRC against the Tibetan community fulfills the ingredients of the Crime of Genocide. The report concluded that is clear that the events in Tibet constitute *prima facie* a threat to and a breach of the fundamental legal principles, it is submitted, a *prima facie* case of the worst type of imperialism and colonialism, coming precisely from the very people who claim to fight against it. A solution to this problem, through the United Nations or by any other peaceful means, remains to be found.

The most important role in the international community was played by the neighboring nation, India, the Dalai Lama, and the Tibetans had sought refuge in India since 1959. The Indian government has allowed the Dalai Lama to set up his government-in-exile. The Dalai Lama and the Indian government have good relations, even though the Dalai Lama had expected that the state of India would represent the case of Tibet, but the Indian government never took any such initiation. India's stands on the question of the sovereignty of Tibet has always thought that they recognize Tibet as an autonomous region in the People's Republic of China, India does not recognize Tibet as a separate nation. In 1994, World Parliamentarians Convention on Tibet**,** passed the Delhi Resolution in which the participants subsequently adopted a program of Parliamentary action based upon these "Ten Commandments of Delhi", which broadly included steps to assert

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309 https://tibet.net/international-resolutions/us-house-of-representatives-passes-resolution-on-tibet/.

pressure on the Chinese government and encourage dialogue between the Dalai Lama and the PRC.

The world community has condemned the People's Republic of China for their acts against the Tibetan community, they recognize the violations of the rights and freedoms of the Tibetan. Despite the concrete pieces of evidence and facts known to the international community, there have been no concrete actions taken by any state or the United Nations to resolve the issue of Tibet. China has banned foreigners and international representatives to enter the region of Tibet. The question of Tibet and the acts of the PRC have still not been accounted and discussed in the United Nations Security Council, neither the plea for justice for the people of Tibet has been heard in the International Court of Justice. The people of Tibet have been globally recognized as a separate ethnicity and as a separate nationality, even by the PRC, yet the oppression by the PRC continues and no concrete action has been taken against the state.

5 MIDDLE WAY APPROACH: THE WAY TO PEACEFUL CO-EXISTENCE

His Holiness, the 14th Dalai Lama, was awarded the Nobel Peace prize award in the year of 1989 by the Norwegian Nobel Committee. The Dalai Lama has been representing the people of Tibet even after the unlawful occupation of their territory, the Dalai Lama has not accepted the claims made by the PRC over the Tibetan territory, but with years of inhumane torture and cruelty that the people of Tibet have been subjected to by the PRC, the Dalai Lama, in the last three decades proposed the "middle-way approach" to resolve the issue of Tibet. In the late 1970s, with the change in the Chinese leadership, Deng Xiaoping initiated an open-door policy, in the meeting China made it clear that anything but independence could be discussed. As there was no breakthrough with talks with China, the Dalai Lama approached the international community, particularly the European Parliament and the US Congress, with the "Five-point Peace Plan" and the Middle-way approach.

The middle-way approach proposed that Tibet would remain part of the People's Republic of China, but Tibetans would have meaningful autonomy. This approach is consistent with China's constitution, which allows for autonomy in ethnic minority regions. The middle-way would allow China to oversee the defence and foreign affairs of Tibet, whereas, the people of Tibet would manage their affairs, including religion, culture, education, economy, and the environment. The aim of resorting to the middle-

way approach is the restoration of fundamental rights for the people of Tibet. The Dalai Lama declared that "the autonomy that China follows is not real autonomy"[310], the Tibetan's demand for a high-level autonomy, wherein they can maintain their culture and way of life. The PRC refuses to allow the people of Tibet to practice their feudal economic system, whereas, the other autonomous regions in China are allowed to continue their capitalist form of economy, despite PRC being a socialist economy.

In the case of Tibet, the Chinese government continues to view Tibetan Buddhism, Tibetan distinct culture, language and identity as a threat to the stability of the Chinese rule in Tibet. The lack of true autonomous rights and freedoms in Tibetan areas in China, enabling Tibetans to protect and develop their unique and distinct culture, religion, language, and identity, poses a serious threat to the very survival of Tibetans as a distinct people. The forced transformation of Tibet in China's image is uncovering the existing autonomy in Tibet as empty and meaningless. After analysing the facts and reading the history of Tibet and Communist China, it is evident that China is not supportive of the religious practices of Tibetans. As Tibet is a form of a theocratic society, religion is the main basis for each practice in society. The Chinese government refuses to allow the people of Tibet to give autonomy to them for managing their matters which are regional in nature and do not affect the safety or policies of China. China has been exploiting the region of Tibet for their economic means, and to ensure that there is no hindrance in the growth of their economy, they have ostracised the Tibetan way of life. The middle-way approach is an attempt to reconcile with China.

Unfortunately, the Chinese government rejected the Tibetan proposal for genuine autonomy "as demands for semi-independence and disguised independence". The then Chinese leadership lacked the political will to address the issue of Tibet in earnest. There is no dispute among independent experts and unbiased politicians and scholars that the Tibetan Memorandum calls for the exercise of genuine autonomy, not for independence, ‘semi-independence' or ‘independence in the disguised form'. The substance of the Memorandum, which explains what is meant by genuine autonomy, makes this unambiguously clear. The form and degree of autonomy proposed in the Memorandum are consistent with the principles of autonomy in the Constitution of the PRC. Autonomous regions in different

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[310] *What is Dalai Lama's 'Middle Way'*, China Daily, 08:47, 26 Jul, 2006.

parts of the world exercise the kind of self-governance that is proposed in the Memorandum, without thereby challenging or threatening the sovereignty and unity of the state of which they are apart. This is true of autonomous regions within unitary states as well as those with federal characteristics.

The shift from "fight for independence" to "higher autonomy for Tibet" shall not be seen as acceptance by the Tibetans, the resistance to the unlawful occupation over their territory remains an issue legally. In light of the growing atrocities against the Tibetan people by Communist China, the government of Tibet has resorted to saving the people and the rights and freedoms of the people of their community. The middle-way approach is a constructive solution for both the parties to peacefully co-exist. The international community is urged to join the negotiations and encourage dialogue between China and Tibet.

6 CONCLUSION

The issue of Tibet is an alarming call for help amidst the international community. The grave violation of international law and the unlawful occupation of Tibet by the People's Republic of China. It is well established that the issue between China and Tibet has not been bound to a territorial dispute, the acts done by China against the people of Tibet have violated the fundamental rights and freedom of Tibetans. The acts by the Chinese government and military are a systematic attack on the Tibetan culture and society, the kind of suppression and torture inflicted on the people of Tibet falls under the ambit of genocide. This war for Tibetans is for the human rights and freedom for the people of Tibet, and not just for political status as a nation. The Chinese claim over Tibet's territory has never been proved, whereas, in the "17-point agreement", China promised to give regional autonomy to the people of Tibet. In reality, the Chinese government deliberately undermined the authority of the Dalai Lama, the Tibetan language was replaced by Mandarin, monasteries were locked and destroyed, the culture of Tibet was under a Chinese gunpoint.

The point of international law is to protect the people of the states wherever there is a conflict, the people of Tibet shall be subjects to such protection against China. There has been no use of aggression by Tibet against China, neither had Tibet provoked China to commit such atrocities. The idea of conquering states in the medieval era was different, back then there wasn't a well-established international legal system, in the 21st century, states shall not be entitled to take leverage over economically weaker nations. The

Charter provides for peaceful co-existence of all times of governmental structures, irrespective of a socialist or a theological society.

It is called upon the international community to support Tibet and promote dialogue between China and Tibet, the United Nations shall play its role as a strong mediator between the two states and sought to resolve the issue of Tibet and hold China accountable for the violations made by them under various covenants and declarations of international law.

A UNIFORM CIVIL CODE – ITS EVOLUTION THROUGH TIME

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1 INTRODUCTION

"We are all afraid for our confidence, for the future, for the world. That is the nature of human imagination. Yet every man, every civilization, has gone forward because of its engagement with what it has set out to do. The personal commitment of a man to his skill, the intellectual and emotional commitment working together as one has made the ascent of man"

---J.Bronowski

Independence from colonial rule, to our leaders, meant not just freedom from tyranny or injustice. It brought a modernist approach, an opportunity to portray a Secular, Democratic Independent Nation[311]. to the world at large. The Nation through the enactment of the Constitution[3] wanted a State which would be an example to the world, in independence, in the faith in progress. It is with this ideology that Article 44……*"The State shall endeavour to secure for citizens a* ***uniform civil code*** *throughout the territory of India."* was incorporated in the Constitution of India as one of the Directive Principles of State Policy and left it upon the successive governments to incorporate and act upon them in the years to come.

The duty of firing this progressive and gallant ambition has been carried forward by the Judiciary, in light of being the "upholder and protector of the Constitution of India" and with timely changes in the Central Legislature, "the law-making body". Persuasive calls for fundamental reform, changes in personal laws, ridding India of its backward religious and cultural practices, bringing forth the true spirit of our scriptures, eliminating the backward provisions contained in them by a proper interpretation of these holy books has never been an easy feat. Keeping perfectly in toe with the demands of the modern century while appeasing a vast section of diverse opinions at large is evidenced through the performances each such law or precedent produced. Be it the political turmoil of the Shayara Bano judgment in 1995(Emphasis later) and its subsequent passage of the

[311] (on November 26, 1949, contained a Preamble, 395 Articles, and 8 Schedules)

Dissolution of Muslim Marriage Act, 1987 (Emphasis Later) or the very recent uproar on the Triple Talaq judgment of the Supreme Court in 2017.

Since "custom"[312] "behavioural patterns" and "tradition" have always influenced the law of the land, personal laws have evolved and progressed gradually through time. If the European nation had Plato and Aristotle[313] we had philosophers like Chanakya, Valmiki and Bharata Muni, as Indian sages (Emphasis Later)

We, therefore, relied on morals, teachings, holy scriptures in drafting the law and went through time adapting and changing our personal laws. We relied on the way our kings and administrators dealt with day to day affairs, resolve relied on "Dandniti", and "Rajniti"[314] as proper measures.

Sources of such law can be traced back to the "Brahmanas"[315], the "Upanishads"[316] on Hindu rules. Pali Scriptures to elaborate on the teachings of Lord Buddha[317], The Quran, comprising of 6666 verses, which meted outlaws to both Shia and Sunni sects of Muslims (emphasis later), while Acharya Kundkund's "Samayasara" and "Niyamasara" discussed Jain Philosophy.

2 HISTORY UNRAVELLED-TRACING PERSONAL LAWS THROUGH TIME

Every aspect of the law has slowly but surely evolved with time. While polygamy was widely prevalent among Hindu nobles and kings in the early days, it has been prohibited by law today. Sati was abolished as late as

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[312] refers to those long-established practices or unwritten rules which have acquired a binding or obligatory character through time.

[313] Greek and Latin philosophers

[314] "Dandniti-"administration of force", Rajniti," the conduct" of kings-RS Sharma

[315] . texts of Hindu Sruti"Sruti" means revealed literature which is essentially a collection of texts with commentaries relating to philosophy, rituals and law(*) Indian Art and Culture, Nitin Singhania" Indian Literature" Pg 13.4)

[316] . were treatises written in Sanskrit which give an account of the Hindu Vedas. meaning "to sit down near the teacher and read"

[317] (propounder of Buddhist religion) containing "Tripitakas" or baskets of knowledge and the "Vinaya Pitaka" among these contained rules and regulations to be followed in religion(*) Indian Art and Culture, Nitin Singhania" Indian Literature" Pg 13.4)

1829, and women were allowed equal rights to a property only in 2006. The position of women in the Early Vedic age was a place of respect and inclusion. With time came the compulsion where Indian Hindu women had to set themselves alight on the pyre of their husbands, Indian Muslim women were compelled to cover from top to toe in a “burqa”.

Only a few fortunate upper-caste Brahmins were allowed knowledge of the holy scriptures and came up with their interpretations of it. The "Age of Rig Veda" dating way back into 1900 BC[318] treated women on equal footing with men. She was given her place beside men in society. Women attended assemblies and offered sacrifices with men. The practice of widow remarriage was also prevalent. There however was no child marriage. The age of 16 to 17 was the acceptable age of marriage.

The Later Vedic Era (1,000-500 BC) was the era of the formation of the "Vedas" and "Upanishads"[319] they were heavily relied on when framing of Codified law in the 1700s and 1800s. This age saw a decline in the position of women. The "Sabhas" and the "Samitis"[320] were now dominated by male warriors and Brahmanas. A notice in the rise in power of the Son, the patriarchal lineage is seen, male ancestors were worshipped and women were gradually occupying an inferior position to men.

The *Mauryan Age* can be found in the writings of "*Arthashastra"* by Kautilya[321] and in "*India"* by Megasthenes[322] The ruler (political head) was accompanied by learned priests and nobles(assembly) in the framing of laws. State control was marked by a firm hand in law, *absolute absence of foreign influence* despite travellers of European origin attending and interacting with nobles and the King. Society was built on lines of "*Dhamma”*[323] Society was rigidly defined in terms of class and caste lines. Patriarchy was the order of the day. Polygamy (the practice of taking over

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[318] Vedas comprised of the Rig Veda, Sama Veda, Yajur Veda, Atharva Veda which throws light on the rituals, sacrifices, political and social life of that time. "Upanishads" laid stress on value and knowledge,

[319] Hindu religious text

[320] Sabha and Samiti were a collection of village elders and village assembly, who met and decided on policy matters, passed decisions.

[321] Contains policy, political and social life alongside acquisitions and conquests of the Mauryan Empire

[322] a traveller’s account of those times

[323] Ashokan policy of Kindness and Compassion built on lines of the philosophy of Buddhism

one wife, at times the count went to over fifty or even a hundred!) among Hindu nobles, property traced down patriarchal lines, the inferior and pitiful state of women began to show its mark upon society[324]. One can, for the first time in Indian history note the presence of "One Nation, One Law" on both civil and criminal front. The empire stretched virtually beyond territories of modern India to Pakistan and eastward well into Bengal and Assam (present-day Bangladesh) the reliance on one script which was made law of the Land, the script of "Brahmi" allowed ultimate power in the hands of the King.

Few centuries into time, the *Gupta Era* heralded a modern outlook in comparison to its earlier counterparts. Its political texts, *"Nitishara"(*the Essence of Politics) and "*Nitivakyamarta"(*Nectar of Aphorisms on Politics) have been known to survive. Civil and Criminal Laws were differentiated from each other for the first time. *Theft and Adultery* fell under criminal law. *Property rights* were a part of civil law. Brahmana priests meted out judgments and the law of the land was carried out in the name of the ruler. Land tax was increased[325] , a tax was paid in the form of a supply of animals, foodgrains, army food, expenses by the royal household or forced labour.

The *Mughal Rule* in India was administered by "Kazis"(judges), framed by the present Mughal Rule (political head), the law of the land was drawn on the lines of the *holy Quran.* Now since the Mugal Rule brought changes in the lines of the introduction of a significantly different religion than the one prevailing in the land, they brought with them a religion significantly different from the one India was generally used to, both civil and criminal law of the land showed certain changes. The principles of *Sharia* overtook the existing laws. applicable to both Hindus and Muslims despite the cultural differences between the two. The judicial officers (Faujdars) were known to act at the discretion in several instances. The Khojas and Cutchi Memons[326] were reluctant to accept the differences in law as they had been governed by Hindu law through generation. Herein lay the difference in opinion. Since the political head was a Muslim command, the State was under autocratic rule, the minority was not allowed an audience. The Law was what the ruler said it was.

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[324] RS Sharma "Ancient India..... Chapter 18, "The Mauryan Age" Pages 171, 172

[325] from one fourth to one-sixth of produce-RS SHARMA "India's Ancient Past" Pg 238 Life in Gupta Age

[326] Hindu judicial officers, RS SHARMA "India's Ancient Past" Pg 238 Life in Gupta Age

3 THE BRITISH RULE IN INDIA: CODIFICATION OF LAWS

The grant of the Diwani to the British[327] in 1765 gave the East India Company to begin changes in the land to suit their needs. The transition from Mughal law administered by “Kazis” to the codified form of Colonial Law was not a sudden one. From their rights over trading, established in 1765 (emphasis provided earlier) to the First law Commission by Lord Macaulay (the then Governor-General of India) in 1835 significant alterations were needed to adapt and serve the purpose of the British now. Criminal laws were made stringent and were systematically penalized. Civil code, being laws relating to personal life were tampered with, more to serve the needs of the Colonial Rule than to lead to progression. However, civil society did see a revolution in personal laws. Education and liberal reforms for women, changes in the age of marriage[328] to mention a few.

The judicial administration of the subahs (areas of political administration) remained initially in hands of the Indian officers. From 1762 to 1772 and the Mughal system was followed in both civil and criminal justice. Several Governors-General and Viceroys[329] The initial rule of the Nation was marked by The East India Company rule and acquisitions by the East India Company. Only after passage of the Crown's Act, 1958 did India officially transfer to Crown's Rule) brought their alterations and amendments to the system of governance to the country.

Warren Hastings in 1772, "The people of the country should be accustomed to the Company's sovereignty".[330] Laws were made applicable in criminal justice and both Muslim and Hindu laws in personal matters like marriage, divorce, succession, so on and so forth. At the time, "Bishop's Courts" were of great significance in Britain. Personal Laws on marriage, divorce, property, civil partition of land, succession rights followed the law of land (Eg, women both Hindu and Muslim were denied any right to property) but they were meted out by these Bishop Courts. The Civil Courts in India were presided over by European Legal luminaries; they were trained in English Law, boasted of formal "civilized" training but meted out justice

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[327] By emperors Jahangir(Mughal ruler) and then Farukhshiyar(Mughal ruler)

[328] The age of child marriage changed from time to time by the Sarada Acts, from 12 to 14 and then to 16.

[329] Spectrum's, "A Brief History of Modern India" by Rajiv Ahir.

[330] Spectrum's, "A Brief History of Modern India" by Rajiv Ahir.

in India without any initial training in the Indian heritage, or Indian legal system. They did it as rulers, of the territory they had no prior knowledge of, to rule, to derive profits to send back to their land.

Dadaabhai Naoroji stated ([331])" from 1867 to 1905, economic drain of India transgressed from 8 million pounds a year to 51.34 million pounds annually".

Personal and Criminal Laws were both governed by Indian Laws (both Muslim and Hindu), were headed by a “Kazi" or "Mufti" but presided over by European District Collectors. The Appeal Court, called "Sadar Nizamat Adalat" was brought under the "Regulating Act of 1773". The natural Principles of "Justice, Equity and Good Conscience" governed judgments passed, however making sure not to digress severely from the principles of Hindu, Muslim, Parsi laws to welcome the wrath of society at large.

The "Regulating Act of 1781" brought more finesse to the earlier law. it clarified rules on revenue collection, and the obligation to separate Executive from the Judiciary. "Mofussil Courts" were created now. Presided over by legally trained judges, who were, however, again, European in origin.[332] The uncertainty and lack of uniformity in the Indian Legal System was a perversion from the English frame of mind. Codification and verification being norms they lived by, they now began a genuine hunt for verified sources of law. Brahmans with knowledge of script were called for an interpretation of the "dhammashastras', "Upanishads" and The "Vedas". Qazis and "Muftis" were summoned to translate the Quran", all 6666 verses of them. " A Digest of Hindoo Laws" were created as a result in 1775, "A code of Muslim laws" in 1778. The "Code of Civil Procedure" in 1859 and "The Indian Penal Code" in 1860 formally overhauled the system of the uncoded, unverified legal system and are regarded as substantial sources of law even today. These laws pointed out the universal system of jurisprudence, based on a notion of sovereignty, and its claims over an equally abstract and a universal legal subject. personal laws governed sensitive interpersonal and religious issues while religious issues such as inheritance, marriage, property rights, divorce, after its bitter lesson in the 1857 sepoy mutiny to steer clear of regulating religious laws.

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[331] "Poverty and unBritish Rule in India'. backed by Dinshaw Wacha, and GV Joshi with their estimates)

[332] Mofussil is an area adjoining a Presidency town, “Indian legal History” Supra Note 1 at 1539).

One could find a number of justifications ranging from pure religious fanaticism to scientific rationalism and sociology. However, in a country where Hindus shared their day to day lives with other religions, where women who need not deliberately die with their husbands existed, questions were raised that why Hindu women are subjected to such atrocity? In fact, those who raised such questions became the beacon lights for a movement of social reform such as Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar and others. Religious Laws were thus reformed on painstaking and often perilous moves by Indian social reformers. Sati, therefore was justified because the religious tenets supported it. The Abolition of Sat Act 1829, was the first such reform influencing Hindu society from Bengal to Madras and then to the rest of India, Ishwar Chandra Vidyasagar through has efforts influenced the "Hindu Widow remarriage Act" in 1859, after quoting extensively from the Vedas on their prevalence and permanence in the Hindu scripts, the "Vedas" and "Upanishads". Akshay Kumar Dutt gave a medical opinion against Child Marriage, Raja Roy gave examples of the monotheism of Vedas and the Unitarianism of Christianity while attacking the "polytheism of Hinduism and the trinitarianism of Christianity'.

Syed Ahmed Khan urged that all prophets have the same "din" or "faith" even though every nation had different prophets. Universalism and basic ethics were heavily relied upon by Indian Nationalists on bringing change in personal law. *Keshub Chandra Sen*, "Our position is not that truths are yet to be found in all religion, but that all established religions of the world are true"[333] Our reformers attempted not only to identify with the social and political history of India, to bring its cultural norms to the modern stage but also to modify and rid India of the evil, and outdated practices, to be more in tune with the demands of Natural justice of the modern world. As a result, personal laws, religion, marriage were interspersed with both traditions of Indian society, alongside a modern cultural outlook. Codification and formalization of these laws ensured its sustenance and its permanence in society.

[333] Spectrum's, "A Brief History of Modern India" by Rajiv Ahir.

4 UNIFORM CIVIL CODE: THROUGH CONSTITUTIONAL ASSEMBLY DEBATES

Shri Aurobindo Ghosh says[334] In a booklet called “Bhavani Mandir” in 1905,

"India or Bharat is a 'Shakti', the living energy of the great spiritual connection and fidelity to it is the very principle of her existence. For, by this virtue alone she has been one of the immortal nations, and this alone is the secret of her amazing persistence and perpetual force of survival and revival"

When in 1934 the idea of a Constituent Assembly was put forward by M.N. Roy, it did not contain the elaborate, carefully debated and well thought out provisions it did when enacted, in 1950. India at the time, seemed to be aping the West. The Constituent Assembly members derived great pride from the fact that most of its provisions were derived from several countries including Britain, USA, Ireland, Soviet Union, Japan, Germany, so on and so forth. B.R. Ambedkar had acclaimed with pride, "The Constitution of India has been framed after ransacking all the known Constitutions of the world"[335] embodying a newly invigorated civilizing mission. A mission for a unified nation, with a strong elected government and a Supreme Court as the "protector and upholder of the Constitution of India"[336]

The Uniform Civil Code was reasoned in the Constitutional Assembly Debates on bringing uniformity is the way of life of the people, which in turn will result in national solidarity and unity. The clarion call for a modern outlook on the Nation’s laws embodying territorial integrity, Fundamental Rights, and supremacy of the Constitution needed –finish this.

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[334] Aurobindo Ghosh, was a social reformer, monk, national leader and one of the most eminent thinkers of his time.

[335] Constituent Assembly Debates, Volume VII Pgs 35-38.

[336] The Supreme Court of India has been assigned a very significant role in the Indian democratic political system. It is a Federal Court, the highest court of appeal, the guarantor of fundamental rights and guardian of Constitution vide Sections 124-147, Part V, Constitution of India.

Having come up with the concept for the first time, the Uniform Civil Code[337] was difficult to accept as most sections of society had awakened to a new concept of liberation from any form of rule. The very concept of their personal laws being hampered with made them rile up with arguments. Hence there was a demand to make UCC not obligatory, but optional, and, personal laws be kept out of its purview-

"..... provided any group, section or community of people shall not be obliged to give up its law in case it has such a law."[338]

Many conservative groups feared it would rob them of their traditions. KM Munshi's rigid view upheld coercive enforcement of majoritarian view over a minority[339].

"…… It is not therefore correct to say that such an act is the tyranny of the majority. If you will look at the countries in Europe which have a Civil Code, everyone who goes there from any part of the world and every minority has to submit to the Civil Code. It is not felt to be tyrannical to the minority. The point, however, is this, whether we are going to consolidate and unify our personal law in such a way that the way of life of the whole country may in course of time be unified and secular. We want to divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession. What have these things got to do with religion I really fail to understand."

Munshi sought to portray a unifying force of secularism, the hold of a particular way of life for society over and above all. In his opinion,

a) Even in the absence of Art 35, it will be lawful for the Parliament of enacting a UCC, since the article guaranteeing religious freedom given to the State the power to regulate secular activities,
b) Religion and Personal laws are separated and completely divorced from each other
c) The imposition of laws over minorities was acceptable in view of the fact that in certain countries like Turkey and Egypt the laws of the minority was not protected. This was, however controversial, given India's diverse social and cultural backgrounds. The view Munshi held may have been true for European Nations where social milieu isn't as diverse.

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[337] hereinafter referred to as UCC was originally identified under Article 35 of the Draft Constitution

[338] Constituent Assembly Debates, Vol VII. Nov. 1948).

[339] Ibid.

The primary reason for bringing a UCC was the uniformity in the law. Since a women's right to equality, right to vote, a considerable age at marriage had already been protected under the Constitution of India and other special laws, any inequality in between the genders could not be tolerated. The common civil law governing personal matters would bring all civil and personal laws under one ambit, irrespective of race, religion, social status. Shri. Alladi Krishnaswamy Iyer[340] gives a more realistic opinion. He notes how the interaction between different religions and diverse sections of society in a country such as India is not just desirable, but imminent.

"……In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue"

The Muslim members of the assembly vehemently opposed the bill on fear of loss of identity. Mohammed Ismail from Madras moved to add the following proviso,

"……..any group section or community shall not be obliged to give up its own personal law in case it has such a law"33He believed in the complete right to protection of religious laws. There was however a need to differentiate between inequal and modern practices, to engage in righting wrongs done through the centuries. So distraught was certain conservative sections of society that in fear of losing their individuality, their voice and in fear of losing ground to majoritarian leaders they were ready to subject their women and civil society of despotic and unfair laws."

Mr Ismail, to strengthen his argument narrated examples of Yugoslavia, kingdoms of Serbs, Croats, Slovene where they (Muslims) were able to hold their ground and persuade these countries to grant the right to their laws. He said,

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[340] Ibid.

"……..The Serbs, Croats, and the Slovene States grant to Muslalmans in the matter of family law and personal status, provisions suitable for regulating these matters by musalman usage."[341]

This argument of Md. Ismail was negated by another member, H.C. Majumdar who opinioned that it resulted in an outright negation of Clause 35. Another member, Nazir Ahmed desired to restrict the applicability of the UCC. He said,[342]

"Provided the personal law of any community which has been guaranteed by the statue shall not be changed except with the previous approval of the community may ascertain in such manner as the Union Legislature may determine by law".

Shri. Bhim Rao Ambedkar was a staunch supporter of the UCC. He stated that the only sphere that did not have a uniform civil code was marriage and succession. Civil laws of other fields like property, contract, sale of goods, easement was more or less uniform[343] He was a firm believer in the power of the Western interpretation of the law. He opposed delegates who wished to immortalize personal laws. He says,[344]

"……..I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon this field. After all, what are we having this liberty for? We are having this liberty to reform our social system, which is so full of inequities, discrimination, and other things, which conflict with our fundamental rights."[345]

Besides being a social reformer Ambedkar Ji was also a critic of the Hindu religion. Known to have changed his faith towards the end of his life, he portrayed many dogmas that infested the Hindu religion. He viciously lobbied for the removal of untouchability,[346] casteism and the desperate need for its removal by the introduction of reservations. Being a Dalit himself and having faced the stigma of society at a very early age he well

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[341] Mohd. Shabbir, "Muslim Personal Law, Uniform Civil Code, Judicial Activism: A critique, LJ 1997 pg 47).
[342] Ibid.
[343] Constituent Assembly Debates, Vol VII. Nov. 1948)
[344] Ibid.
[345] Ibid.
[346] Refer to Art. 17, Constitution of India, 1950.

understood the drawbacks the lower classes of society had to withstand daily. Derived from this core of understanding of Indian society did he advocate the need for a UCC.

He attempted to bridge the differences between Muslims and Hindus by taking an example of how differences between Sharia and Sunni Law[347] were bridged under the Sharia Act, 1936 and were binding on both sects, pointing out how easy it was to bring about uniformity under law. He firmly disagreed with Munshi's implication (a reference to earlier note) of the tyranny of the majority.

He portrayed how a UCC could result in a progressive, forward-looking society which supported the growth of all. He says[348]"...for the purpose of evolving a single civil code applicable to all citizen irrespective of religion, certain portions of Hindu Law, not because they were Hindu law but because they were found to be most suitable, were incorporated in the new civil code projected by Art 35....."

No Constitution, by itself can bring about social revolution. That revolution is usually gradual, formed based on the co-operation of people and their governments. It must factor in a desire to change, amend and look toward a better future, together, as One Nation. The enactment of a UCC or the Directive Principles[349], the broad ambit under which it is covered does not, thus, direct a government on what to do, it suggests what it "ought to do, and leaves them free to do it or not!" This principle is best suited for a multi-party democracy like India, where progressive and gradual change has been noticed in the last sixty-odd years, symbolizing the will to change, of the public at large, in a gradual manner and not at once.

We may as well remember the awe-inspiring words of Chandrachud J., "the promise of a better tomorrow must be fulfilled today; day after tomorrow it runs the risk of being conveniently forgotten. Indeed so many tomorrows will have come and gone without a leaf turning....."

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[347] Muslim Law can be divided into two sects, Shia(comprising of Ithna, Ismaili, Zyadia) and Sunni sect(comprising of Hanafi, Hanbal, Maliki, Shafii)- Mohammedan Law, Insights)

[348] Constituent Assembly Debates, Vol VII. Nov. 1948)

[349] Ibid.

5 CHANGES IN PERSONAL LAWS IN INDIA

5.1 Hindu Law

- Hindu Marriage Act, 1955 defines a Hindu, specifies the applicability of the Act, to the area of the country (excluding J&K) and sections of religion (Hindus including all form of Hinduism Virashaiva, Lingayat…) it shall apply to. It further specifies: conditions of marriage, matrimonial relief available to parties such as restitution of conjugal right, judicial Separation vide Sec. 12; Sec 13 on divorce; void and voidable marriages vide Secs.11 and 12 It also decides on maintenance, the penalty for bigamy and custody of children.
- Hindu Succession Act, 1956- deals with laws relating to the succession of property under Hindu Law. It again specifies the applicability of the Act, to the territories (excluding J&K) and sections of religion (Hindus, Buddhist, Jains) it shall apply to. The amendment in 2005 specified the right of a daughter to get equal right to property as the son.
- Hindu Minority and Guardianship Act, 1956- confers the right to guardianship of a minor to the father and then the mother.
- Hindu Adoption and Maintenance Act, 1956

5.2 Muslim Law

- Dissolution of Muslim Marriages Act, 1939- which lists grounds for dissolution of Muslim marriages; eg. If whereabouts of a husband if unknown for over four years if husband neglects to provide maintenance for over two years; husband is sentenced to imprisonment for seven years, insanity, impotency, child marriage under fifteen years of age (vide Section 2), grounds for dissolution of marriage.
- The Muslim (Protection of Rights on Divorce) Act, 1986.
- Change to Maintenance rights and divorce of a woman after divorce were provided in--

    1. Sarla Mudgal judgment,1995(Emphasis Later)
    2. Shah Bano Judgement, 1985(Emphasis Later).
    3. Shayra Bano Judgement (2017) and subsequent Triple Talaq Law (2019 July)

5.3 Christian Law

- Indian Christian Marriage Act, 1872

- Indian Divorce Act,1986

5.4 Judicial Pronouncements

With articles 14[350], 15[351] on one hand and article 25[352] on the other, the courts found themselves in at loggerheads over the years between giving precedence to which fundamental right. The Supreme Court's use of a uniform law to provide remedy has mostly been sidetracked in favour of citing examples from criminal law(Shah Bano Judgement) and Equality (Articles 14 and 15) to avoid a painful theology based debate on personal laws which would draw attention away from the plight of women.

Sarla Mudgal judgment[353], a Hindu (Jitender Mathur) had converted himself to Islam to marry another wife while the earlier wife(Meena Mathur) was still living. Meena Mathur claimed her husband had converted to Islam only to circumvent the provisions of Section 494 of the Indian Penal Code. The Supreme court asked the government of its action on Article 44, however, made its directions on the case not binding but merely "Obiter Dicta". Kuldip Singh J. opinioned that a Uniform Civil Code would strengthen the national integration and that the minorities should give up their commitment to the two-nation theory and agree to a uniform civil code. He stated how the Hindus had sacrificed for national unity by accepting changes in personal law. Held, by the Apex Court that the first marriage would have to be dissolved under the Hindu Marriage Act, 1955. It issued no directions for implementation of a UCC but a suggestive directive on the necessary steps forward.
In *Mohd. Ahmed Khan v. Shah Bano*[354] (hereinafter referred as Shah Bano case) the Supreme Court brought a divorced Muslim woman under the

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[350] The Constitution of India, 1950, Art: 14: Equality before law.—The The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[351] The Constitution of India, 1950 Art. 15 (1): The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

[352] The Constitution of India, 1950, art. 25 (1): Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

[353] Sarla Mudgal v. Union of India, AIR 1995 SC 1531

[354] *Mohd. Ahmed Khan vs. Shah Bano Begum* (1985(2) SCC 556)- A landmark judgment provided in 1985

cover of section 125 of the Code of Criminal Procedure, 1973 and declared that she was entitled to maintenance even after the completion of her iddat period. Held,

"Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essential of a prophylactic nature, cut across the barriers of religion

The husband on divorce placed reliance on traditional Muslim Law. It had already been established in 1979, a Muslim ex-husband would only be exempt if "payments were sufficient to keep body and soul together". Social welfare considerations were introduced by a combination of judicial activism and legislative alertness to assist divorced Muslim wives against vagrancy and destitution. The five-judge bench of the Supreme Court held, deriving from Quranic provisions that a husband must have an obligation under them to provide maintenance for divorced wife.[355]

The Indian Parliament, however, took a different view from that of the Supreme Court, which led to the passage of The Muslim (Protection of Rights on Divorce) Act, 1986 which restricted the right of maintenance of divorcees. The Act states, "one-time payment" of maintenance by a husband to his wife, during the period of "Iddat"[356]

The constitutional validity of the aforesaid Act was questioned before the Supreme Court in *Danial Latifi vs. Union of India*. Section 3(1)(a) of the said Act was questioned[357]. The Court held, that the words "within the iddat period" did not mean restricted to the period of Iddat alone, but for the extent of life till the widow remarries.[358]

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[355] Ibid.

[356] Iddat period is the period a Muslim woman is obligated under the Quran to observe after the death or separation from her husband, during which she may not marry another man, usually a period of three months

[357] *Danial Latifi vs. Union of India* (2001)

[358] which states that "reasonable and fair maintenance be made and paid to her within the iddat period by the former husband".

It was argued in the John Vallattam[359] case that the Uniform Civil Code does not in any way infringe upon the right guaranteed under Article 25 of the Constitution of India. Clause (2) to Article 25 specifically safeguards all secular activity associated with religious practices from the guarantee of religious freedom under Clause (1) of Article 25.

In *Shayara Bano v. Union of India & Others,* 2017 the five judges from five different communities including Chief Justice JS Khehar, a Sikh, Justices Kurian Joseph a Christian, RF Nariman a Parsi, UU Lalit a Hindu and Abdul Nazeer a Muslim had to examine whether Triple talaq has the protection of the constitution—if this practice is safeguarded by Article 25(1).The Court had to establish whether or not Triple talaq is an essential feature of Islamic belief and practice.

Though two judges upheld the validity of Instant triple talaq[360] three other judges held that it was unconstitutional, thus barring the practice by 3–2 majority. The bench asked the central government to promulgate legislation within six months to govern marriage and divorce in the Muslim community.

The court said that until the government should formulate a law regarding instant triple talaq, there would be an injunction against husbands pronouncing Instant triple talaq on their wives

The President introduced The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 pursuant to the court direction on 19th September 2018. It was passed by the Rajya Sabha and Lok Sabha a week ago, thus making it a law.

5.5 The Progression of The UCC

The social revolution has been a part and parcel of India through time. The Uniform Civil Code when introduced was deliberately left to future generations to ponder upon. A part of the non-justiciable Directive Principles which may be adapted at ease, as the people of the nation wished.

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[359] *John Valattam vs. Union of India* (2003) 6 SCC 611, AIR 2003 SC 2902)

[360] also called Talaq-e-bidat, a form of divorce on pronouncing the word "Talaq" thrice over either social media, over video conference or in-person was enough to dissolve marriage among Muslims

"*… It is said that the directive principles have no legal force.....I am prepared to admit it. But I am not prepared to admit they have no binding force at all, nor am I prepared to concede that they are useless because they have no binding force in law... the Draft Constitution as framed provides the only machinery for the government of a country. It is not a contrivance to install any particular party in power as has been done in some countries. Who would be in power is left to be determined by the people, as it must be if the system is to satisfy tests of democracy*."

-BR Ambedkar.

The Constitution Makers were also prudent enough to allow a scope to successive state and Central governments to legislate on matters on marriage, divorce, infants and minors, adoption, wills, intestacy and succession as specific matters away from the purview of the UCC[361] Entry 5 in List 3 of Schedule VII of the Constitution of India.

6 PREVALENT DISPARITIES IN UNIFORMITY IN LAW TODAY

"Raw haste, half-sister to delay"

-Lord Alfred Tennyson[362]

- Hindu Marriage Act, 1955 is applicable to all forms of Hindus, Virashaiva, Lingayat, Vaishnava, Prarthana, Arya Samaj followers, but not to other religions -vide Section 1 of HMA,1955
- Like most other laws the state of Jammu and Kashmir has for over sixty-five years been excluded from the benefits of several personal laws, the Hindu Marriage Act, 1955; The Muslim Dissolution of Marriage Act, 1939; The Indin Succession Act, 1925, so on and so forth. Women were denied succession rights if they married someone who hailed from outside the state, Indians were denied the right to buy property in the state as per the laws framed by the Constitutional Assembly of Jammu and kashmir[363] However in 5th of

[361] Lord Alfred Tennyson in his poem Love Thou Thy Land, With Love Far Brought, first published in 1842.

[362] as per the special status granted to it under Article 370 of the Constitution of India) allowed the state of Jammu and Kashmir is governed by its own laws.

[363] which repealed the special status granted under Article 370 by exercising his powers under

August 201957, Article 370, Clause(3) of the Constitution of India, 1950) the President issued an Ordinance to the State of Jammu and Kashmir makes the Constitution of India applicable to the State of Jammu and Kashmir and so there may be a marked change in-laws of that territory

- Adultery cannot be grounds for divorce under Christian law, it must be coupled with cruelty for the law to be valid.
- Muslim women are severely subjected to injustice in the inheritance of the property of their family. They get only a fraction of the property and a major chunk of the same goes to her male siblings under Shia and Sunni Law alike.

Adoption

- HMA,1955 gives the father the right to guardianship of a child after divorce vide Section 6(a) of the Act.
- Among Parsis, when a Parsi woman marries a non Parsi she loses her right to property, so do the legitimate children of that marriage.
- The UCC is applicable as law to the state of Goa but not to the rest of India.
- Triple Talaq was abolished only in 2017 by the Supreme Court(Emphasised earlier.)
- Nikah Halala Muslim women are not allowed to marry the husband who divorced her unless she marries and consummates her marriage with another first, a practice prevalent among Muslims.
- Polygamy as grounds for a legal way to have more than one wife among Muslim men is literally a black spot on any modern democracy;

7 CONCLUSION

Be it a “One Nation, One People” Motto or an absolute eradication of gender-based injustice. Be it uniformity of law across states or across religion. A UCC connotes unity in law. On one hand, it will uphold the original intent of national integration, while on the other hand, it will promote gender equality as an ancillary effect. Extensive cultural diversity is the truth of India, and uniformity in law is desirable to safeguard treating one individual dissimilarly from the other. The clarion call for UCC in India has always been with the idea of divesting law from all kinds of religious influences. That law, even the personal laws should be stoic without specific religious and cultural hurdles creeping in. Religion and culture since a very long time have been the ultimate explanation to any and every social evil that exists in society. In a heterogeneous society like our comparisons are

normally to be made. These rigid and compartmentalized personal laws which cannot, in any probability, be influenced by others. It might have a tendency to throttle any scope of social reform. Codification of scattered laws and legal norms, religious edicts, traditions and cultural laws gives a fixed recognition to rules and eases the enforceability of laws. The rights and duties which flow out of such laws and rules also get due recognition and traceability. Indeed, a uniform law with all populace equally and uniformly governed by it is the desired goal and as Dr Ambedkar had said the society to inch towards its complete realization.

ADHRIT FOUNDATION

Adhrit Foundation is an internationally recognized youth-led, not-for-profit and non-political organization working on Agriculture, Education, Entrepreneurship, Healthcare and Youth Empowerment in India.

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We believe in making a difference by tapping the rich demographic dividend of a multicultural society by celebrating diverse cultures, religions and people for peaceful co-existence.

Our pan-Indian team comprises of most promising college students and young professionals who bring their vibrant perspectives to the organization and are unified by the common vision of improving the future of our country.

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