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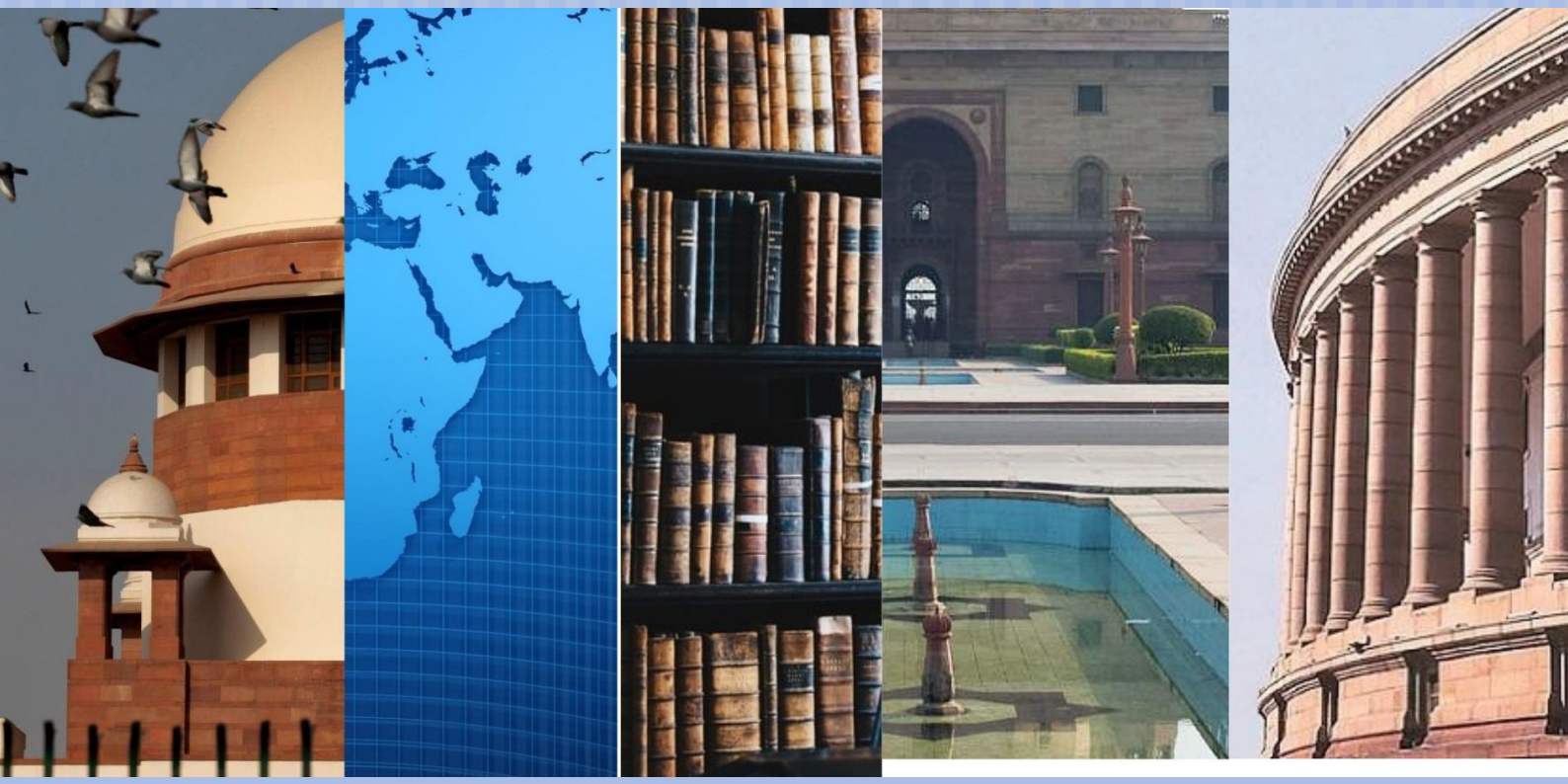

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OIL SPILLS: ANALYSIS OF LIABILITY REGIME OF MAJOR JURISDICTIONS

VARUN KUMAR*

ABSTRACT

Crude oil is one of the most important energy resources available to mankind. With the help of oil rapid development has taken place in the field of science, transport, etc but has also brought dangerous and irreversible damages to the environment. Various different regions and countries have come up with different treaties for their respective countries or regions to combat marine pollution due to oil leaks or accidents. International Organisations have developed laws regarding offshore drilling and oil spill and accidents which can be adopted by the signatory countries. International Maritime Organization (IMO) is the first of all the international treaties and United Nations Convention on the Law of the Sea (UNCLOS) is one of the most important treaties. The United Kingdom, United States of America, Gulf Countries and India all these countries have strong laws regarding marine pollution but lack compensatory regime, which is necessary for the implementation of the laws made by international organisations as well as nationally developed laws. The compensation is necessary to protect the ecology as well as protect the communities dependant on the marine coastal ecology for their livelihood.

1. INTRODUCTION

"You wouldn't think you could kill an ocean, would you? But we'll do it one day. That's how negligent we are."

- Ian Rankin[1]

Offshore resources comprise of 70% of world's undiscovered resources, including minerals, oil and gas. It was just only before World War 2 when offshore oil and gas started getting exploited at a commercial rate and by the middle of 1990, offshore oil and gas was accounting for around 1/3rd of total production in the world. As the exploration began to take place at commercial rate, different problems started to emerge including marine pollution and also over exploitation. Hence, the development of various treaties took place, the International Maritime Organization (IMO), known as the Inter-Governmental Maritime Consultative Organization (IMCO) until 1982, being the first one. After which many other treaties came up under IMO and also separate treaties were also

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[1] Ian Rankin, Novelist <www.goodreads.com/quotes/331808-you-wouldn-t-think-you-could-kill-an-ocean-would-you> accessed 22 December 2018.

developed concentrating on specific factors. United Nations Convention on the Law of the Sea (UNCLOS) is the biggest convention, which is viewed as a 'constitutive' instrument providing a legal framework made of existing and subsequently enacted international agreements and customary international law whereas IMO has been basically concentrated on developing international rules and standards for the safety, security and environmental performance of international shipping[2]. Overall UNCLOS and all the other treaties must work endorsing the IMO.

A conference was held in Paris in July 1989, by the IMO, which was called by leading industrial nations to discuss and find ways to prevent pollution from ships. After which in November 1989, work began to make a draft convention, which will provide a global activeness and co-operation to fight back marine pollution. All the parties to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) were requested to develop measures to fight marine pollution in any way either nationally or with international cooperation from other states. Ships were made compulsory to move only with an oil pollution emergency plan and inform coastal authorities if any oil spill or polluting incident takes place and similarly offshore operators of the signatory states must also always have an oil pollution emergency plan to check the pollution immediately. The Convention has asked for establishing oil spill combating equipment, holding of oil spills equipment and also develops detailed plans and spill combating exercises. Parties to convention must provide help to other states in any case of pollution emergency and the provision of reimbursement must be made.[3] IMO alone was not enough to make laws on ships, spills, offshore leaks etc. therefore various other treaties were adopted by IMO to support and strengthen the motives of protecting the water from get polluted. But as there were various oil spills so there grew up a demand of redressal and compensations, leading to treaties specifically concentrating on compensations and liability.

In this paper we will be discussing about some major oil spills, convention and treaties of how to avoid and manage them and will concentrate on International Liability Regimes, Domestic Liability Regimes of specific countries and finally a conclusion stating why global liability is not successful but

[2] Robert Beckman and Zhen Sun, 'The Relationship Between Unclos And Imo Instruments' (2017) 2 Asia-Pacific Journal of Ocean Law and Policy.

[3] 'International Convention On Oil Pollution Preparedness, Response And Co-Operation' (*Imo.org*, 2018) <http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx> accessed 11 December 2018.

necessary for prevention and redressal of victims of environmental damage from offshore oil and gas exploitation and exploration.

2. OBLIGATORY ACTION CAUSINGOIL SPILLS

We will be looking towards major oil spills all over the world and the damages caused by it, and also will concentrate on the lack of treaties and the development of other treaties after these spills.

2.1 Torrey Canyon Disaster

Torrey Canyon Disaster took place in 1967. It is still one of the most serious oil spills the world has ever faced. This spill occurred on the western coast of Cornwall, England; It was calculated that approximately 50miles of French and 120 miles of Cornish Coast were contaminated with crude oil from the ship destroying the marine habitat and also killing an enormous number of birds, after which there was a situation of alarm, and a thought for development of international liability and compensation came up.[4]

2.1.1 History

This incident led to the formation of IOPC compensation regime under which Civil Liability Convention (1969 CLC) and the 1971 Fund Convention (International Fund for Oil Pollution Damage 1992) were present. The 1969 CLC entered into force in 1975.Unfortunately, even after such incident and also development of conventions, they only concentrate towards marine pollution caused due to spillages of oil but only due to malfunctioning or by any means through a ship or tanker and are totally silent on offshore pollution by oil rigs.[5]

2.2 Montara Oil Spill

Montara Oil Spill was the worst disaster in the oil drilling history of Australia; it took place in Australian economic exclusive zone (EEZ) on 21 August 2009.[6] This oil spills holds importance because it was only after this disaster, Indonesian Government requested the IMO to make some

[4] By Bethan Bell & Mario Cacciottolo, BBC News,
<www.bbc.co.uk/news/uk-england-39223308> accessed 16 December 2018.
[5] International Oil Pollution Compensation Funds<www.iopcfunds.org/about-us/> accessed 17 December 2018.
[6] Australian Government, Department of the Environment and Energy <www.environment.gov.au/marine/marine-pollution/montara-oil-spill> accessed 15 December 2018.

international binding liability and compensation regime. The Indonesian government claimed $2.5 billion as damages from Australia as the water of Indonesian borders and sea had got contaminated causing marine life loss and also pollution, but as there was no insurance cover for the oilrig of Australia, hence making it was tough to pay.[7] Indonesia requested IMO to make a body to resolve such problems because even if it would have been insured, it may have had a cap, which would ultimately not lead to any solution.

2.2.1 History

The first ever convention which took place for International Liability and Insurance was known as Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE)[8]. It was adopted in London in 1976 but never came into effect due to very a smaller number of ratifications. After which, in 1977, The Comité Maritime International (CMI) prepared a draft, as asked by IMO known as the Rio Draft[9], but it was clearly turned down by the IMO stating that there were more important matters to be discussed at that moment. After which only in 1994 the Rio Draft with some changes was put before IMO in Sydney, hence named Sydney Draft[10], But again it was turned down by the IMO stating that it needed more amendments and requires study. In 2001, CMI was ceased to exist by the IMO as United States argued that there was no need of such mechanism and hence these drafts are not necessary. Finally, in 2004 Canadian Maritime Law Association (CMLA) made Draft Offshore Units Convention (Canadian Draft), which was even a better version of Sydney Draft, it basically covers offshore units, artificial islands, and other related structures, excluding pipelines. It has also enlightened on registration and ownership about offshore units. The major drawbacks of Canadian Draft are that it is generally silent or there is ambiguity on aspects of marine pollution and lacks uniform International laws.

2.3 Ixtoc I Oil Spill

[7] Reuters <www.reuters.com/article/us-indonesia-thailand-oil-idUSKBN182063> accessed 15 December 2018.
[8] Foreign and Commonwealth Office, United Kingdom <www.gov.uk/government/publications/convention-on-civil-liability-for-oil-pollution-damage-resulting-from-exploration-for-and-exploitation-of-seabed-mineral-resources-london-151977> accessed 17 December 2018.
[9] Dr Michael White, (1999) 18 AMPLJ.
[10] Ibid, 22.

Ixtoc I oil spill was one of top 5 oil spills of the world where the spillage was recorded to be around 140 million gallons.[11] On June 3, 1979, an exploratory well-named Ixtoc I in the Bay of Campeche in the Gulf of Mexico leaked. Petroleos Mexicanos (PEMEX) was drilling in the Gulf of Mexico and due to some technical failure the offshore well exploded, the well remained uncapped for nearly 9 months and the pollution caused by it not only harmed the marine living organisms of Mexico but also harmed the marine environment of the USA at beach of Texas. Many steps were taken by the government of Mexico to stop the damage but most of them were futile and the damage done was irreversible. The oil spill killed many birds, polluted lagoons, and beaches destroying the marine ecosystem to the limit that turtles (endangered species) had to be airlifted from the spot.[12] PEMEX spent nearly $100 million dollars for capping of the well and also for cleaning up but it avoided all the compensation calls from the USA, as Mexico went under the immunity of the sovereign principle.[13]

2.3.1 History

The history of Ixtoc I oil spill takes us to the concepts of Customary International Law (CIL), where we will look towards the principle developed in the Trail Smelter Arbitration.[14]We will be connecting that how Trail Smelter case is connected to cases occurring on water, like of offshore spills. In this case between 1925 and 1937, the USA asked for damages from Canada for air polluting (sulphur dioxide fumes) the state of Washington, by the fumes of smelter, which was situated in Canada[15]. In this case the International Court of Justice (ICJ) held Canada to be guilty and liable for damages and also mentioned that no state has the right to damage another by trespassing its borders.

The UN is also using this arbitration as Principle 21 in Stockholm Declaration,[16]which states "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to

[11] Laura Moss, MNN <www.mnn.com/earth-matters/wilderness-resources/stories/the-13-largest-oil-spills-in-history> accessed 19 December 2018.
[12] Henri Fernandez, Stanford University <large.stanford.edu/courses/2017/ph240/fernandez2/> accessed 19 December 2018.
[13] Robert Campbell, Reuters <www.reuters.com/article/us-oil-rig-mexico-sidebar/bps-gulf-battle-echoes-monster-79-mexico-oil-spill-idUSTRE64N57U20100524> accessed 20 December 2018.
[14] REPORTS OF INTERNATIONAL ARBITRAL AWARDS, Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).
[15] Ibid, 1913.
[16] Declaration of the United Nations Conference on the Human Environment, <www.un-documents.net/unchedec.htm> accessed 20 December 2018.

the environment of other States or of areas beyond the limits of national jurisdiction."[17] This arbitration also gave birth to a custom, which is followed in CIL.

But in 2011 International Tribunal for Law of the Sea (ITLOS) Advisory Opinion,[18]it was stated "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law."[19]

It is only because of this principle; USA was unable to get damages from Mexico.

3. MAJOR CONVENTIONS AND THEIR APPLICABILITY ON OFFSHORE MARINE POLLUTION

Many conventions and treaties have been developed regarding Marine Pollution by oil spills, but nearly all of them concentrate on leakage from ships, tanker leakage or and other sources but they are generally silent or ambiguous on terms of offshore oil leakages and the pollution caused by it. Mostly all of them do not have any part of them related to compensation or insurance mechanism to pay damages to the effected people.

3.1 The United Nations Convention on the Law of the Sea

The United Nations Convention on the law of the Sea (UNCLOS) also known as "constitution of seas" was adopted on 10 December 1982.[20] The article 1(4) and article 1 (5)(a) define the meaning of pollution and dumping respectively stating that any introduction of substances by man either directly or indirectly in the oceans including estuaries, which makes a deleterious effect on the living marine life, human life or fishing and destroying the quality of sea water. Also defining dumping as any man-made thing deliberately in the ocean by aircrafts, vessels or platforms.[21] "The goal of the Organization is to help States to better understand and implement the Convention in order to utilize

[17] Ibid, Principle 21, Stockholm Declaration, June 1972.
[18] ITLOS advisory opinion, 2011, Pg41, 112, <www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf> accessed 21 December 2018.
[19] Ibid, 41, 112.
[20] Oceans and Law of the Seas, United Nations. <www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective> accessed 24 December 2018.
[21] United Nations Convention on the Law of the Sea, Part I, <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>accessed 24 December 2018.

their marine resources in an environment relatively free of conflict and conducive to development, safeguarding the rule of law in the oceans."[22]

By the previous mentioned articles, UNCLOS seems like a strict convention but the situation changes in Part V of UNCLOS, where there is a mention of Exclusive Economic Zone (EEZ),[23]where UNCLOS has provided all the rights to states to exploit their EEZ in article 77 and in article 60 also giving permissions to build artificial islands and structures for EEZ, with just making it compulsory for the states to make regulations which avoid the pollution of the marine environment.[24]All the articles of UNCLOS have given a basic structure of what is marine pollution and the need to avoid it, but ultimately it has failed to provide any strict legal regime related to offshore pollution and has basically left it on to states to develop their own marine laws.

3.2 International Convention on Oil Pollution Preparedness, Response And Cooperation, 1990 (OPRC)

OPRC basically binds the signatory states to develop strong maritime emergency response plans mutually, also helping the nations to fight an emergency of oil spills or any marine pollution together. It provides an International platform for countries to come up and help each other at the spot of pollution through technology or manpower.[25] "The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC 90) is the international instrument that provides a framework designed to facilitate international co-operation and mutual assistance in preparing for and responding to major oil pollution incidents and requires States to plan and prepare by developing national systems for pollution response in their respective countries, and by maintaining adequate capacity and resources to address oil pollution emergencies."[26] OPRC lacks any kind of redress mechanism and is completely silent on offshore drilling or platform developments; it just globally binds the signatory states to help each other in case of emergency.

3.3 International Convention for the Prevention of Pollution from Ships (MARPOL)

[22] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations <www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#The%20United%20Nations> accessed 24 December 2018.
[23] Exclusive Economic Zone, UNCLOS <www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed 25 December 2018.
[24] Ibid, Pg 45, 54, 55.
[25] IMO, Pollution Preparedness and Response <www.imo.org/en/OurWork/Environment/PollutionResponse/Pages/Default.aspx> accessed 26 December 2018.
[26] Ibid.

MARPOL was adopted on 2 November 1973 at IMO but later some additions were made to it due to tanker accidents in 1976-1977, and then combined MARPOL came up in 1978.[27]

MARPOL just applies to the pollution occurring from ships or mobile objects in the sea, it does not cover the offshore drilling platforms. It is therefore criticised to be of no help to the states as if there will be an emergency leakage from the offshore drilling place, MARPOL will not be applicable. MARPOL also cannot supersede UNCLOS's drilling designs and safety mechanisms. It is completely silent on any type of compensation regimes.[28]

4. REGIONAL CONVENTIONS WITH REDRESSAL

As we have previously seen various major international treaties and the lack of their implementation various regional treaties and conventions have taken place with the help of IMO. These regional treaties have developed their own laws related to marine pollution and some have even successfully come up with compensation and liability regimes. Some of the important ones are mentioned here.

4.1 United Kingdom

In the UK, the Department of Energy and Climate Change (DECC)(DECC has now been shut down under the orders of Prime Minister Theresa May)[29], The Health and Safety Executive (HSE) and Maritime and Coastguard Agency (MCA) all operate making exploration licenses, laws on work place health and implementation of maritime policies respectively. But further laws for compensation were needed so, various treaties got developed regionally in the United Kingdom's Continental Shift regarding oil pollution, where some laws have developed directly on liability, which will be discussed further.

4.1.1 The Offshore Pollution Liability Agreement (OPOL)

OPOL is a regional agreement, which was adopted in September 1974. OPOL is basically an agreement defined between all the offshore miners and explorers, but here the states are not involved. All the parties to the OPOL agreement are the offshore operators, who are exploring in

[27] International Maritime Organisation, MARPOL <www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx> accessed 26 December 2018.
[28] Ibid.
[29] OffshoreWIND.biz <www.offshorewind.biz/2016/07/15/uk-decc-is-no-more-energy-climate-change-and-business-now-under-one-roof/> accessed 1 January 2019.

the United Kingdom's Continental Shelf. The law used is the English law making OPOL a contract between operators.[30] "Operating companies agree to accept liability for pollution damage and the cost of remedial measures with only certain exceptions, up to a maximum of US $250,000,000 per incident. Within this limit there may also be included the cost of remedial measures undertaken by the party to OPOL involved in the incident."[31]

However, in December 2010, UK House of Commons Select Committee Report put the $250 million compensation scheme under question, after taking into consideration of Deepwater Horizon spill.[32] The committee has also shown concern on the language of the agreement, which states "direct damage", according to OPOL will only compensate if there is any direct damage faced by someone, making the compensation out of reach of people if only marine pollution occurs.[33] People also claiming for compensation after one year from the date when action took place will also be placed out of the compensation regime.[34]

4.1.2 Environmental Damage (Prevention And Remediation) Regulations 2009

It provides strict liability in cases of damages caused to marine, land or in any way to the biodiversity but this regulation does not include any third-party claims, it applies only to authorities who can gain compensation from a company or any operator causing the pollution.[35]

4.2 Convention for the Protection of the Marine Environment of the North-East Atlantic

This convention is also known as OSPAR ("OS"=OSLO and "PAR"=PARIS), it came into force on 25th March 1998.[36]It is a replacement to the Oslo and Paris convention but has attained the essence of the previous conventions also. OSPAR lacks any kind of insurance scheme like in OPOL and also the most concerning factor is that according to Article 3:

1. Any dumping of wastes or other matter from offshore installations is prohibited.

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30 The Offshore Pollution Liability Association Ltd <www.opol.org.uk/about.htm> accessed 27 December 2018.
31 Ibid.
32 Michael Faure, "Civil Liability and Financial Security for Offshore Oil and Gas Activities", Cambridge University Press.
33 Ibid.
34 Ibid.
35 Department for Environment Food and Rural Affairs<adlib.everysite.co.uk/resources/000/253/561/quick-guide-regs09.pdf> 1 January 2019.
36 Ospar Commission <www.ospar.org/convention> 1 January 2019.

2. This prohibition does not relate to discharges or emissions from offshore sources.[37]

OSPAR has the feature of "polluter pays principle" but it not much useful in cases of offshore pollution, and OSPAR is also silent on any kind of compensation regime. In the case of OPOL convention, it has talked of at least $250 million compensation, whereas in OSPAR it is completely absent. The polluter pays principle is tough to get into force because it requires the party to show negligence on the part of operator and the most upsetting part which puts down OSPAR is that it is governing pollution control and prevention but does not provide laws in case of marine accidents or offshore accidents or mishappenings.

4.3 Convention for the Protection of the Mediterranean Sea against Pollution

It basically comprises of Barcelona Convention and Madrid Protocol, the Barcelona Convention came up as a response to United Nations Environmental Programme ('UNEP') Mediterranean Action Plan in 1976.[38] Barcelona Convention binds the signatory states to maintain and develop techniques to prevent, abate, and combat marine pollution in Mediterranean Sea. The basic aim being is to make Mediterranean Sea pollution free and also protect it from further pollution. Madrid Protocol (Offshore Protocol) can be said as a further extension to Barcelona Convention providing more specific guidelines, it is in Madrid Protocol where it is mentioned that parties must take internationally accepted measures to stop any kind of damage or pollution through offshore installations and also get best available environmentally effective techniques, environmental impact assessment, discharges of sewage and garbage from offshore platforms, and plans for removal of platforms.[39]

Madrid protocol has stated that operators are liable for any damage and they are liable for immediate and adequate compensation for which the protocol has made it mandatory for the operators to take proper insurance cover. Madrid Protocol has held the use of Polluter pays principle and has a strict liability. Hereby, providing compensation to all the people (fisheries, tourism, cleaning of waters,

[37] Ospar Commission<www.ospar.org/convention/text> 1 January 2019.
[38] United Nations Environment Programme <web.unep.org/unepmap/1-barcelona-convention-and-amendments> 3 January 2019.
[39] United Nations Environment Programme, Offshore Protocol <web.unep.org/unepmap/6-offshore-protocol> 3 January 2019.

etc.) who faced losses due to the operator.[40] But due to this strictness added by the Madrid Protocol very few numbers of states have signed it and it is still awaited to get adopted completely.

4.4 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment

Kuwait Convention comprises of all the Persian Gulf countries, namely, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. It came into force on 24 April 1978, dealing with marine pollution and environmental protection[41] but later in 1989 Kuwait Protocol took which added laws to be followed by the signatories related to activities on the seabed.

Basically, with the help of Kuwait Convention and Protocol the signatory countries are bound to follow the internationally accepted best technology (for offshore drilling) and must also develop best fighting plans if any accident takes place in the sea. They must also avoid and restrict any kind of pollution the marine ecosystem. With the help of the protocol the coastal states must administer and only allow drilling by those operators who have a valid license to do so.[42]

Despite of such provisions, both convention and protocol both are silent on the terms of any kind of liability regime in case of an accident.

4.5 United States of America (USA)

In the USA, there are basically two acts governing marine pollution which are, The Outer Continental Shelf Lands Act (OCSLA) and Oil pollution Act 1990 (OPA). These two acts are further strengthened by various other acts where, OPA specifically deals with liability and compensation regimes. USA basically developed these laws only after the Exxon Valdez spill.

4.5.1 The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act (OCSLA) was created on August 7, 1953.[43] OCSLA is silent on the compensation or liability occurring due to oil spill through offshore installation. It applies only to those offshore installations, which are not permanently fixed to the seabed. OCSLA places offshore installation, which are in USA's continental shelf but are beyond the territorial water within

[40] Offshore and Barcelona Protocols<www.ifrc.org/docs/idrl/I449EN.pdf> 3 January 2019.
[41] Kuwait Convention,<http://www.ropme.org/Uploads/Protocols/Protocols_PDF/1978.pdf> 4 January 2019.
[42] Marine Pollution Bulletin, Vol 21, No1, pp 8-10, 1990 <www.sciencedirect.com/sdfe/pdf/download/eid/1-s2.0-0025326X9090144W/first-page-pdf> 4 January 2019.
[43] Bureau of Ocean Energy Management <www.boem.gov/OCS-Lands-Act-History/> accessed 10 January 2019.

the federal jurisdiction and helps USA to get control over it through federal oil pollution legislation system.[44]

4.5.2 Oil Pollution Act of 1990 (OPA 90)

The OPA 90 took place after the historic Exxon Valdez oil spill of 1989, spilling 11 million gallons of crude oil, making it one of the biggest oil spills in the history of USA.[45] "In the wake of the Exxon Valdez oil spill, the U.S. Congress passed the Oil Pollution Act of 1990, which President George H.W. Bush signed into law that year. The Oil Pollution Act of 1990 increased penalties for companies responsible for oil spills and required that all oil tankers in United States waters have a double hull."[46]

OPA 90 has imposed strict liability and has also drawn a line in between removal of oil cost and damages claim after a disaster. A cap of $75 million is imposed on the party that made the offshore installation excluding removal of oil costs. Overall OPA 90 has provided with strict liability, caps on liability, and has successfully created funds to compensate claimants and also has taken steps for financial security. The funds developed have also been divided into various parts, so that it can be easy during the division of compensation.[47]OPA 90 is the most effective provision present at international level for offshore regulations worldwide

4.6 India's Plan Towards Marine

The Mumbai High Field was discovered for the first time in India in 1974, located in the Arabian Sea.[48] A major accident took place at Mumbai High Field on 27 July 2005 which led to the death of eleven people and several went missing. The whole platform was destroyed within 2 hours of fire, a total loss of 300 million USD was faced by ONGC (Oil and Natural Gas Corp.). In the recent times in the year 2017 one of the biggest oil spill occurred in the history of India. It took place on 28 January 2017 and is known as The Ennore Oil Spill, it

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[44] Ibid.
[45] Alan Taylor, The Atlantic <www.theatlantic.com/photo/2014/03/the-exxon-valdez-oil-spill-25-years-ago-today/100703/> accessed 8 January 2019.
[46] History.com Editors, Exxon Valdez Oil Spill.
<www.history.com/topics/1980s/exxon-valdez-oil-spill> accessed 8 January 2019.
[47] National Pollution Funds Center, United States Coast Guards, US Department of Homeland Security <www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/> accessed 10 January 2019.
[48] Mumbai High Fields <www.offshore-technology.com/projects/mumbai-high-field/> accessed 14 December 2020.

took place at Kamarajar Port in Ennore, situated in Tamil Nadu. This spill occurred as two heavy containers namely M.T. BW Maple and M.T. Dawn Kanchipuram collided leading to the worst ecological disaster for India.[49] The leak caused pollution upto 35 kilometres of the shoreline and oil reached till the beaches in Chennai. The ecological damaged can be assessed as thousands of dead tortoise and fishes came to the shore due to the oil leak. India failed miserably in containing the leak as well as removing the oil from the shore, the exact ecological damage became impossible to assess.[50]

4.6.1 National Oil Spill Disaster Contingency Plan (NOS-DCP)

India has been a part of United Nations Convention on the Law of the Sea (UNCLOS) hence it is the duty of India according to the treaty that to protect and preserve the marine environment. Furthermore, The Constitution of India (1950) through the forty-second amendment obliges India to protect and improve the environment. It is due to these obligations that the National Oil Spill Disaster Contingency Plan (NOS-DCP) was developed.[51] It has been operational since July 1996. With the help of NOS-DCP the disasters occurring in the Indian Borders steps can be taken to fight the oil spills or accidents, but it is silent on the parts if it happens further than the offshore Indian platform. Furthermore, India has been a part of all the International treaties but no law present in India talks about the compensatory relief for the party aggrieved due to the oil spills. The ecological damage faced by the nature, or its direct impact on the population dependent on the ocean for the daily needs do not get any kind of compensation. The contingency plan talks about punishing the polluter (if caught) and punishing him for the pollution but speaks nothing as how compensation will be provided for the damage occurred.[52]

4.6.2 Merchant Shipping Act 1958

The Merchant Shipping Act 1958 (MSA) applies to all the Indian ships and foreign ships (if they are in Indian nautical territory or at Indian ports), under these conditions India exercises control over all

[49] Yuling Han, Indumathi M. Nambi, T. Prabhakar Clement, "Environmental impacts of the Chennai oil spill accident – A case study" Vol. 626,2018 Pg. 795 – 806.
[50] The Chennai Oil Spill <thediplomat.com/2017/02/the-chennai-oil-spill-a-lesson-for-indias-maritime-agencies/> accessed 14 December 2020.
[51] National Oil Spill Contingency Plan <www.indiancoastguard.gov.in/WriteReadData/bookpdf/20151228122156579312 7NOSDCPCGBR771.pdf> accessed 16 December 2020.
[52] Ibid.

the marine pollution caused due to these ships. But as a flaw in this act or can be assessed as a loop hole, this act does not apply warships or any ship either Indian or foreign which is not for commercial purposes.[53] Thus the present Indian laws have talked about the penalties and punishments but are silent on the compensation towards ecology and the marine environment. They do not talk about any compensatory regime for the local people or the destruction caused to the shorelines and people affected by it.

4.6.3 Regional Contingency Plan

India having a very big coast line is prone to oil spills, accidents etc. and being the most dominant country of South Asia it is also the responsibility of India to develop plans to counter such spills to protect the seas around it, and hence a Regional Contingency Plan is being developed for South Asia Region. It is being completed under the guidance of United Nations Clean Seas Program. This regional agreement will be covering nations like Bangladesh, India, Maldives, Pakistan and Sri Lanka. The basic essence of this regional plan is that across border assistance must be developed between nations (bordering nations) so as to come together in case any accident occurs in the seas, which may damage the ecology of the region.

5. HELSINKI CONVENTION

Helsinki Convention or Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992 entered into force on 17th January 2000. It applies to the Baltic Sea region including inland waters, seabed and islands.[54] It is one of the most well-defined conventions with precisely defining all the words necessary, without leaving any kind of ambiguity. This convention has successfully defined pollution, ships, and offshore platforms and has also clearly mentioned that all the signatory countries must use best kind of technology available for exploring the sea. It also binds the countries to mandatorily have an emergency plan in case of a machinery failure or accident. Articles 10 and 11 talk about incineration and dumping respectively.

"The Contracting Parties undertake jointly to develop and accept rules concerning responsibility for damage resulting from acts or omissions in contravention of this Convention, including, inter alia, limits of responsibility, criteria and procedures for the determination of liability and available

[53] Implementation of OPRC Convention In India–A Report, <www.indiancoastguard.nic.in/> accessed 14 December 2020.
[54] HELCOM <www.helcom.fi/about-us/convention> accessed 12 January 2019.

remedies."[55] Article 25 is talking about liability and available remedies but it is only this part of the convention, where ambiguity is felt, because there is no specified insurance scheme or any pool of money through which the compensation will get paid. Since there is no specified pool of money or source of money for payment as compensation, it will be very tough to make all the countries pay for an incident, even if they were not involved in it.

Hence, making the Helsinki Convention a toothless tiger in the field of compensation and providing any mechanism for paying the damages to the normal people who are dependent on the Baltic Sea for their day-to-day income. Emergency plans have been made compulsory, but the convention is not particular on the point that who will be the one paying for the cleaning costs incurred.

6. CONCLUSION

A global agreement is required in order to effectively prevent and redress victims of environmental damage arising from pollution from offshore oil and gas exploration and exploitation activities because by seeing the various types of offshore disasters and the lack of implementation of treaties and conventions, it is clear that globally an initiative must be taken to provide compensation for the people who get effected by these disaster, irrespective of any kind of compensation claim caps, negligence factors or any other critical issues of the treaties. It is necessary for the people to get redressal because the companies dealing in offshore drilling are massive and have really deep pockets, so they also must understand that if they cause pollution in water it may even lead to loss of livelihood of people and even some countries are dependent on tourism, causing loss of employment and financial problems. Not only the harm to people but also the harm done to the environment must be taken under consideration because it is necessary to understand that it is the right of every person living in this world to enjoy the beauty of the planet and also the animals present in the marine habitat get harmed leading to deaths of other coastal animals who depend on them as their food and overall disrupting the ecosystem.

The offshore oil and gas excavation is going on at a global level, and not only the states that are involved in the drilling but also all the other states of the world are buying oil and gas from those states. This clearly states that whole globe is involved in this procedure; therefore, it is necessary for government of all the countries to come and make laws for the liability regimes. We must thank

[55] Ibid, article 25.

science and technology for providing such technology that in the normal course of nature offshore accidents do not occur, but if we look at any of the world's offshore oil spill which have taken place in the past, we can clearly calculate the amount of damage done by every single one them to the environment, especially the marine ecosystem. It is tough to come up with multilateral treaties but there should be some division done either zone-wise or continent-wise, especially in the coastal states where offshore drilling is done, to come up with agreements where operators are able to compensate every person who faces loss of his daily income due to such accidents by man. After the offshore disaster incidents many fisheries company even went bankrupt and some marine organisms lost their habitat, which calls for compensation because if an offshore disaster is taking place it has been noticed that the intensity of it has the potential to destroy marine life as well the human's dependant on the marine ecosystem for their livelihood.

Hence some kind of redressal mechanism must be developed to face such kind of important issues. The companies indulging in offshore drilling must be only allowed to do drilling if they prove they meet the international status of safety. Secondly, it must be made compulsory for them to get insurance if any disaster occurs and they must have an emergency plan to fight the offshore leakage in case of a disaster. A global step must be taken, and a global standard law must be developed about what should be done in such kind of emergency and there should also be a pool of money made by all the countries that indulge in offshore drilling for compensation. By looking at various previous occurred disasters and also by analysing the main impacts of offshore accidents we can clearly chalk out some main points, which are necessary in the upcoming world. Firstly, there is an urgent need for an international civil liability regime for oil pollution damages arising from offshore activities because now developing countries are also participating in offshore oil drilling and they do not have an effective or even some not internationally accepted mechanism for oil exploration and they also don't have any kind of compensation regime. Some developing also lack any emergency plan to execute in case of a spill, all these conditions leading to problems across the globe. Secondly, "the existing international regimes on marine oil pollution may not provide the answers/solutions to the problem at hand, as they are primarily designed for vessel-source marine oil pollution and not for oil pollution arising from offshore facilities (floating and fixed platforms);"[56] Thirdly, mere inclusion of

[56] Sundaram, Jae. (2016). Offshore Oil Pollution Damage: In Pursuit of a Uniform International Civil Liability Regime. Denning Law Journal. 28. 66-108.

terms like "offshore oil pollution" is not enough in the treaties, they must come up with some strict rules (compulsory insurance).

As seen before, different countries/regions have come up together and have developed laws to avoid offshore oil pollution; this has been a great step at regional to fight pollution and also to protect people from losing their livelihood but the whole problem is that such steps are geographically bound and hence cannot be of much help globally because not all geographical agreements are equally good. By seeing the various regional conventions, we can clearly see that some points of various regional conventions can be picked up, bundled up and a globally recognised offshore pollution mechanism can be developed. OPOL, Barcelona Convention, Madrid Protocol have the potential to provide some major points which are necessary for a global convention.

"OPA 1990 presents a template at the domestic level to process civil liability claims for both vessel-source and non-vessel-source oil pollution damages. This can be used as a model to develop a uniform international regime to work alongside other civil liability regimes like the CLC, any regional agreements, and the OPOL Agreement."[57]A conclusion can be drawn by stating that by borrowing different laws developed by different regional countries, a globally effective treaty can be developed which will be helpful for proper compensation for the effected people and also the liability of the operator can also be decided in an easier way. All this can only be possible if a global initiative is taken to protect the ecology and mother nature.

[57] Ibid.

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MANAGING THE DISASTERS OF LOCKDOWN: A CONSTITUTIONAL ANALYSIS

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ABSTRACT

On the 30th day of January 2020, the World Health Organization declared the outbreak of pneumonia of unknown cause as a Public Health Emergency of International Concern. Named COVID-19, the Director-General of WHO explained that the virus is capable of community transmission but can be contained with the appropriate measures. Countries all across the world had to ensure prevention by enforcing social distancing of 6 feet at all times. The enforcement of social distancing has posed an unprecedented requirement for swift action which has proven to be a logistical nightmare for India's crumbling healthcare systems, bearing an enormous burden of patients and infrastructural ineptitude. This article critically evaluates the legal, more specifically, the constitutional framework surrounding the ground-level implementation of emergency-like measures by invoking of a 2005 disaster-related enactment, in the face of a global public health emergency. The authors have attempted to test the imposition of a "lockdown" in India, under constitutional law and jurisprudence, by explaining the ambit of the impugned legislation, determining the legitimacy of its invocation against principles of federalism, and exploring the potential violation of the fundamental rights of the people of India.

1. INTRODUCTION

The world today is witnessing the greatest health crisis in history. With the Covid-19 virus out to take millions of lives, nations all across the globe are trying their best to contain the damage to the best of their capabilities. On the night of March 24th 2020, the Prime Minister of India in an attempt to mitigate this damage declared that the country would observe a nation-wide lockdown. While the decision seemed like the country's best bet against the lethal virus, what cannot be overlooked is that the way the lockdown was implemented and everything that followed thereon must be put to careful legal scrutiny. For it is exactly in these times that we must take note of what Justice Khanna observed in his dissent in the landmark *ADM Jabalpur* case[1]: *"experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent…the greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law."*

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[1] *Additional District Magistrate Jabalpur* v. *Shivkant Shukla*, (1976) 2 SCC 521.

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2. WHAT IS "LOCKDOWN"?

The collective action of bringing economic, social and other types of activity in the country to a halt has been termed a "lockdown" of some measure, which has been achieved by the central government invoking powers under Disaster Management Act, 2005[2](hereafter referred to as the 'DM Act').

Vide an order dated 24th March 2020, signed by the Home Secretary as ex-officio chairperson of the National Executive Committee, the Ministry of Home Affairs (hereafter referred to as MHA) issued certain guidelines directing their strict implementation by Ministries/Departments of Government, State/Union Territories Governments, and State/Union Territories Authorities in their respective jurisdictions. In brief, these guidelines included: Shutting down of all offices of various governments, with the exception of essential services; Hospitals and all related medical establishments to remain functional; commercial and private establishments to be closed down, with the exception of few essential services like ration shops; Industrial establishments to be closed, with the exceptions of manufacturing units of essential commodities; suspension of all transport facilities with the exception of transport of essential commodities; legal prosecution of those found disobeying underlined directions as per the guidelines, as per Ss. 51-60 of the DM Act, as well as S. 188 of the Indian Penal Code(hereafter referred to as IPC).[3]

This was complexly accompanied with various State Governments invoking the Epidemic Diseases Act, 1897 (hereafter referred to as EDA) and announcing a "state-level" lockdown. The Government of the State of Maharashtra, for instance, invoked provisions of the EDA (namely, Ss. 2, 3, and 4) to frame regulations that were meant to provide a framework to follow for the prevention of the spread of the disease.[4]

Similarly, the Government of the State of Haryana released a list of comprehensive guidelines that essentially restricted free movement.[5] Finally, various district-level administrators (such as senior police officers) issued orders under various provisions of the IPC to impose curfew and prohibit assembly of 5 or more people, as was done by Delhi Police vide an order dated 22.3.2020.[6]

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[2] The Disaster Management Act No. 53 of 2005, Acts of Parliament, Government of India.
[3] Annexure to Ministry of Home Affairs Order No. 40-3/2020-D, 24.3.2020, Government of India.
[4] Notification No. Corona-2020/CR-58/Aarogya-5, Public Health Department, Government of Maharashtra.
[5] Notification No. 46/4/2020/5HB-II, Public Health Department, Government of Haryana.
[6] Notification No. 11212-11313/C&T (AC-IV) PHQ, Delhi Police, Government of India.

It is imperative to perceive "the lockdown" as a three-layer series of executive actions (in the form of orders, guidelines, and notifications) that have been issued deriving powers under two main legislations. There is a rather web-like legal framework that the national lockdown has been structured around and in order to attempt any analysis of whether it survives the test of constitutionality, it is of utmost relevance that the schemes of both the legislations are comprehensively understood.

3. THE TWO-PRONGED LEGAL FRAMEWORK

3.1 Scheme of Epidemic Diseases Act, 1897

Tracing its origin to the bubonic plague in Bombay presidency in 1896, the Epidemic Diseases Act[7] (hereafter referred to as "EDA") was enacted in the backdrop of an epidemic that was believed to have spread through rats, causing widespread loss of life. The Act was enacted to provide for better prevention of spread epidemics. Introduced by council member John Woodburn in the Council of Governor-General of India, it was noted by him that the Act provided for sweeping and extraordinary powers, but necessary in exceptional circumstances, which is executive discretion that the people must trust.

The provisions of the enactment primarily provide the State governments, the function of empowering any person, or itself making regulations by way of a public notice, to be observed by the public as measures undertaken for the prevention of an epidemic, if the government concerned is satisfied that ordinary law in effect is insufficient for the purpose.[8] The Central Government is empowered to do the same in respect of shipping vessels arriving at the territory to which the Act extends.[9] The Act also deems a violation of any of the provisions or regulations under the Act, to be an offence committed under S. 188 of the Indian Penal Code, 1861.[10] Finally, it is also provided for that no person acting in good faith under the powers under the Act, shall be liable for legal prosecution for anything done in such pursuance of the powers, functions, etc.[11]

It is important to note that the EDA has been the only legislation governing outbreaks of diseases such as the COVID-19 pandemic. Various state governments have invoked the powers under the EDA time and again to deal with the spread of diseases like the Cholera Outbreak due

[7] Epidemic Disease Act, Act no. 3 of 1897, Acts of Parliament, Government of India.
[8] Epidemic Disease Act, 1987, § 2.
[9] Epidemic Disease Act, 1987, § 2A.
[10] Epidemic Disease Act, 1987, § 3.
[11] Epidemic Disease Act, 1987, § 4.

to the O-139 strain (1992), plague in Surat (1994), Avian influenza (H5N1) and H1N1 influenza, all of which had created public health emergencies of extraordinary parameters. Though the Act is short, has a history of unreasonable control imposed by the British Colonial Government in India (including the arbitrary demolition of suburban neighbourhoods to deal with plagues) and provides little detail as to the duty of the government, rights and liabilities arising under the enactment, it remains the primary legislation in India to this day, to deal with an outbreak of diseases.

3.2 Scheme of the Disaster Management Act, 2005

The DM Act was enacted on 23rd December 2005 and is the culmination of approximately a decade-long of discussions, meetings, reports and global initiative to stir the political will of the Parliament which first materialized substantially when the Government of India constituted a High-Power Committee (HPC) under the chairmanship of J.C. Pant, in 1999. The committee was tasked with reviewing the already existing mechanisms for disaster management, as well as recommending measures and a model plan to be adopted at the National, State and District level for strengthening the organizational structure, following which it submitted its report in October 2001. Later, the same committee was made a Working Group under the All-Party National Committee, where the group submitted its report in 2003, following which the DM Act, 2005 was enacted.[12]

The Government of India, in the aforementioned backdrop, sought to provide for a formal legislation encapsulating a disaster management strategy and mechanism at the national, state as well as district level.

The Act runs into 79 Sections spread over XI chapters that deal with: the constitution of a Disaster Management Authority at the National, State as well as District Level; Measures to be taken by the Government for Disaster Management; Offences and penalties thereof in case of violations as under the Act; Establishment of the National Institute of Disaster Management; Establishment of the National Disaster Response Force (NDRF), and related miscellaneous provisions.

4. PURVIEW OF THE DM ACT: INTERPRETING ALEGISLATION

[12] Third Report of The Second Administrative Reforms Commission, "Crisis Management: From despair to hope" (Sep. 2006) 108.

The essential purpose behind interpretation is to ascertain the intention of the legislature behind enacting the statute in question.[13] Such interpretation may be based on external as well as internal aids to construction that may act as tools for facilitating interpretation.[14]

4.1 Brief Historical Context

India particularly had had a terrible ordeal of frequent disasters causing widespread destruction. In 1999, localized yet massive destruction took place in Odisha, and Andaman and Nicobar Islands, India, after all places were hit by the Cyclone BOB 06[15](also known as "The 1999 Odisha Cyclone"). In 2004, the Sumatra-Andaman Earthquake and Tsunami struck Indian boundaries affecting the coastal states of Kerala, Andhra Pradesh, Tamil Nadu, as well as the Andaman Nicobar Islands, causing widespread destruction of property and loss of human life. The worst-hit in terms of percentage of people affected was the Katchall Island (Andaman and Nicobar chain) reporting 303 people confirmed dead and 4,354missing out of a total population of 5,312.[16]

The Government of India had constituted the J.C. Pant Committee which made numerous recommendations to the government of India which dealt with, inter alia, legal and constitutional framework for disaster management; conceptualizing a National Centre for Calamity Management (NCCM); and reviewing and recommending measures to improve on the already existing mechanisms available for disaster risk reduction, mitigation and management.[17]The same committee was later constituted as a Working Group of the All-Party National Committee on Disaster Management in 2001. The Working Group submitted their report to the Hon'ble Prime Minister in June 2003 and recommended a National Disaster Management Policy to be adopted by the government of India. Later in 2005, the Government of India enacted and notified on 26.12.2005, the Disaster Management Act.

With the help of above-mentioned external aids, it is quite accurately ascertainable, the circumstances surrounding which the DM Act came into existence. Firstly, India had been lacking by irrationally huge parameters in having a definitive National Policy for Disaster Management. It had for long been left to the sole incidental responsibilities of the various States

[13] *Commissioner of Customs* v. *Dilip Kumar and Co*., (2018) 9 SCC 1.
[14] *Ibid.*
[15] India Meteorological Department (IMD), "Report on Cyclonic Disturbances Over North Indian Ocean During 1999" (2000)50-64.
[16] Paul, D.K. & Singh, Yogendra&Dubey, R.N., 'Damage to Andaman & Nicobar Islands due to Earthquake and Tsunami of Dec. 26, 2004' (Department of Earthquake Engineering, IIT Roorkie).
[17] J.C. Pant Committee, "Report by High Powered Committee" (8th Oct. 2001) 70.

that they handle the task of disaster management, based on the Relief Manuals each state had which contained guidelines for relief procedure in case of famines and droughts.[18]The closest India came to having any form of disaster management policy, was renaming the Food Scarcity Relief Division, as "National Disaster Management (NDM) Division" in the 1970s, and later in 1995 constituting a National Centre for Disaster Management (NCDM) within the Indian Institute for Public Administration (IIPA).[19]Secondly, the experience of The Odisha Cyclone in 1999, Gujarat Earthquake in 2001, and the Indian Ocean Tsunami in 2005, had left India completely devastated with how untethered the administrative as well as legal framework was from the reality of disastrous consequences caused by natural disasters. Thirdly, there was considerable international inertia to focus on improving disaster management capabilities.

The intention of the legislature behind enacting the DM Act is discernible from the history it is born out of. It is a fact that the DM Act was enacted in the backdrop of India's lack of preparedness for natural calamities and disasters (the likes of which ranged from Tsunamis, Earthquakes, and Cyclones). To assume in the intention of the legislature, the inclusion of a health issue, a disease, a pandemic like COVID-19, in the same category as disasters of the nature of earthquakes and tsunamis, is fairly questionable from a legal standpoint. It stands to reasonable doubt as to whether the legislature could have ordinarily expected that the provisions of the DM Act would be invoked to prevent spread of a contagious disease like the Sars CoV (2) Virus.

4.2 Understanding the Term "Disaster" as under the Law

In carrying out the task of interpretation of statutes and specific terms there under, the Hon'ble Apex Court uses some basic rules of interpretation that guide the exercise of interpreting any set of words under a statute.

When a word is defined to "mean" something, the definition is exhaustive in nature, its meaning cannot be enlarged, as opposed to when a definition contains the words "to include/includes", the definition is extensive and capable of being interpreted beyond and deeper than ordinary meaning.[20]Firstly, it is presumed that the Legislature intends to, and will, provide a precise definition the exact meaning of which ought to be prima facie discernible.[21] Secondly, at times such precise use of language itself requires interpretation which must be carried out to ascertain

[18] Ministry Of Home Affairs (MHA), "Report of the Task Force: A Review of the Disaster Management Act 2005" (Mar. 2013) 11.
[19] *Ibid.*
[20] *Vanguard Fire & General Insurance Co. Ltd., Madras* v. *Fraser & Ross*, AIR (1960) SC 971.
[21] *Walker* v. *Leeds City Council,* (1976) 3 All ER 709.

the appropriate meaning according to the intention of the enactment.[22] The definition section may itself prove to be ambiguous and thus, must be interpreted in light of other provisions of the Act as well as ordinary connotation related to the term(s). This must be done in order to give a definitive meaning to a word that can otherwise cover too vast a category by itself.[23]

At the outset, it is important to understand that the word "disaster" has been defined under the Act[24] consisting of the following essentials:

- A catastrophe, mishap, calamity, or grave occurrence,
- arising from natural or man-made causes, accident or negligence,
- which results in loss of life or human suffering, destruction of property, or damage to environment,
- beyond the coping capacity of the community of the affected area.

A bare reading of the definition of disaster would reveal that it has vaguely and barely explained what a catastrophe, mishap, calamity, or grave occurrence would be for the purposes of this Act. This ambiguous definition thus requires some determination as to the extent to which "disaster" can be applied, liberally enough that it may include a pandemic within its ambit.

Other provisions in the Act make no apparent reference to what a "disaster" may mean. The circumstances (as explained above) behind the birth of this legislation, are far more indicative of what this act is meant to achieve. It came into existence after India's terrible tryst with natural calamities. India's lack of preparedness and no apparent law or mechanisms to deal with disaster management, can be said to be the primary causes that acted as the purpose of enactment. It must be pondered upon that India has a long history in suffering the damage done by natural calamities, perhaps the single largest reason why the DM Act came into existence; and therefore it begs the question whether the Act is meant to take a pandemic situation, caused by the spread of a contagious disease borne out of man-made consequences?

4.3 Can the DM Act be thus held applicable to a pandemic like situation?

One view taken is that the manner in which the Act defines a "disaster" leaves no room for doubt that it would certainly cover an epidemic of extraordinary severity, spreading rapidly.[25] 30% of the National Disaster Risk Management Fund (NDMRF) was allotted as the Quick

[22] *Sir George Rankin, ILM Cadija Umma* v. *S. Don Manis Appu*, AIR (1939) PC 63.
[23] *Hotel and Catering etc. Board* v. *Automobile Proprietary Ltd.*, (1968) 3 All ER 399.
[24] Disaster Management Act, 2005, § 2(4).
[25] Third Report *supra* at Note 12.

Response Fund for relief and rehabilitation of those communities affected by epidemics.[26]However, it is relevant to mention that the report cited also expressed comments on the EDA being the primary legislation dealing with spread of epidemics, noting that a robust public health system is the bulwark against any impending dangers of epidemics. It also made references to how many States have enacted laws on the public health system, illustrating with the example of the Madras Public Health Act, 1939.[27]

On the other hand, it is also pertinent to note that the J.C. Pant Committee[28] noted that the spread of epidemics was at that time the primary responsibility vested with the National Programme for Surveillance of Communicable Diseases.

What is also of utmost relevance is the fact that after the Gujarat Earthquake of 2001, a decision was taken to transfer the subject of disaster management from the Nodal Ministry taking charge earlier, i.e., from the Ministry of Agriculture, to the Ministry of Home Affairs.[29]This transfer of subject specifically excluded the category of "epidemic" and, thus, the Ministry of Agriculture retains the subject of "epidemic and pest attack" under its domain of functioning. Therefore, there seems to be no conclusive basis for decidedly declaring a pandemic as a "disaster" within the meaning of the DM Act.

It has been held that words that are capable of being given a wider meaning, should ordinarily be given a definitive and narrow meaning to suit the context as it appears.[30] The definition clause (Section 2, in the Act under question), may sometimes be preceded by the phrase "unless context otherwise requires" (as is the case in the present scenario and Act under consideration) implying that ordinarily and under normal circumstances, the natural meaning of the words in the definition would be given effect to, though it may be permitted to depart from this position if it can be shown that an unusual context requires so, that the definition should not be applied.[31]At the same time, it is important to keep in mind that any definition can be easily interpreted liberally, but such a risk ought to be avoided for the sake of certainty in law. [32]

The context in which the Act presents itself has been made abundantly clear above. There is little doubt about the circumstances that led to the enactment of the Act. However, there is a

[26] Ministry Of Home Affairs (MHA), "Report of the Task Force: A Review of the Disaster Management Act 2005" (March 2013) 101.
[27] Madras Public Health Act, 1939, Act No. 19 of 1941.
[28] JC Pant Report *supra* Note 17.
[29] Government of India (Allocation of Business) Rules (Amendment), 2002.
[30] *Hood - Barrs* v. *IRC*, (1946) 2 All ER 768.
[31] *S.K. Gupta &* Anr. v. *K.P. Jain* & Anr., (1979) 3 SCC 54.
[32] *Kalya Singh* v. *Genda Lal*, (1976) 1 SCC 304, 309.

case to made for the qualification envisaged by the legislature in the phrase "unless context otherwise requires". It makes a peculiar case in favour of including pandemics under the head of "disaster" based on a rather abnormally liberal interpretation of the term "disaster". That would mean that the word may include quite literally every possible "grave occurrence" fathomable that leads to loss of life or causes harm to human life or environment or property, which would open the floodgates for extending the DM Act and the overriding[33]powers under it, to even a devastating situation by communal riots. By the flawed logic, this would be justified by the Parliament as essentially an unfortunate occurrence would liberally come under the guise of "grave" that causes harm to life and property. This may be a dangerous precedent of "judicial legislation" set in stone where the Court interprets a defined term unreasonably liberally, crossing the line of remaining within the ambit of what the legislature intended.

5. THE CONSTITUTIONAL FEDERAL SCHEME AND THELOCKDOWN

In the context of India, the federal scheme is materialized in Schedule VII to the Constitution of India, which contains 3 lists that enumerate a variety of field of legislations that are specifically allotted to: a) The Union Government (Centre) (Union List), b) The State governments (State list), and c) Both Centre and State governments (Concurrent List). It is also a constitutional provision[34] that whatever finds no mention in the 3 lists as a subject for legislation, shall be deemed to be within the legislative powers of the Union government. In the context of the DM Act and the lockdown, this discussion is important to check if it is even within the legislative competency of the Parliament to use the Act to deal with COVID-19.

The COVID-19 pandemic is a public health emergency. There are a variety of subjects of legislation that can be held to be relevant to a public health emergency. These are the following:

- Public Health and Sanitation - Entry 6, List II
- Spread of a contagious or infectious disease across state borders - Entry 29, List III
- Port quarantine, including hospitals connected therewith; seamen's and marine hospitals - Entry 28, List I
- Social security and social insurance; employment and unemployment - Entry 23, List III

Entries like these under the 7th Schedule form the crux of legislative relations as governed by the Indian Constitution. It is inevitable that sometimes confusion and conflict may arise as to

[33] Disaster Management Act, 2005, § 72.
[34] Constitution of India, art. 248.

what area of legislation falls under which entry. The outcome of the resolution of such conflict, becomes the determinant for the constitutionality of a law that is questioned to have been enacted by a legislature outside of its competency. The constitutionality of a law, here, essentially becomes a question of power, which is determined based on the interpretation of the lists.[35]

5.1 Interpreting Entries Under The 7th Schedule

It is important to note that the fields of legislation under the 7th schedule were not, and could not have been, set out with perfect scientific precision. It is to be observed that each entry uses a broad and general term, the meaning of which cannot be set in stone within prescribed limits.

Therefore, any interpretation of the entries must be carried out liberally, giving the words used in an entry, meaning of the widest amplitude possible.[36] This also means that the words used in the entries must be given meaning in such a manner as it extends to including every matter that can be reasonably considered subsidiary, ancillary, and incidental thereto.[37] The reason behind giving such liberal interpretation to the 7th schedule entries, is that these entries provide for mere fields and areas of legislation, and not the power to legislate itself, which is drawn from Article 246 of the Constitution of India.[38] Therefore, it is of utmost importance to give such interpretation to these entries as can prove to be assisting the machinery of the government as far as practicable, and resolve fairly and reasonably, any conflict between legislative competencies. As fairly as possible, the widest meaning must be ascribed to entries of the 7th schedule in order to enable an interpretation, as far as possible, in favour of the legislature as there exists an initial presumption in favour of the constitutionality of a legislation.[39]

Why the aforementioned jurisprudence is relevant here, is because there are multiple entries that can prima facie be held to be relevant to the pandemic. The question which thus arises, is which legislative authority ought to be allowed to make law for controlling the pandemic?

Giving the widest meaning to "public health and sanitation": Entry 6 of List II (State list) provides that legislation concerning public health and sanitation ought to be the exclusive legislative field of State Governments. This requires little legal analysis to come to the most relevant conclusion that the pandemic is, without a doubt, a public health crisis that requires the

[35] *Federation of Hotel & Restaurant* v. *Union of India*, AIR (1990) SC 1637.
[36] *P.N. Krishna Lal* & Ors. v. *Govt. of Kerala* & Anr., (1995) Supp. (2) SCC 187.
[37] *Hans Muller* v. *Superintendent, Presidency Jail, Calcutta*, AIR (1955) SC 367; *Navinchandra Mafatlal* v. *Commissioner of Income-tax, Bombay*, AIR (1955) SC58.
[38] *Premchand Jain* v. *Chhabra*, AIR (1984) SC 981.
[39] *Goodyear India Ltd.* v. *State of Haryana*, AIR (1990) SC 781.

attention of that competent authority, which is constitutionally empowered to deal with public health issues. It is also logical to construe a pandemic as a matter incidental, ancillary and subsidiary to the broader category of "public health", while keeping in mind that the entry has to be given the widest meaning possible.

It must be noted that prior to the MHA notification dated 24.03.2020, various State governments had already begun to enforce a "lockdown" by invoking the relevant law (EDA, 1897)[40] assisted with powers of the district administration under provisions of the Code of Criminal Procedure.[41] However, the Central Government resorted to issuing binding orders to State and District Authorities, under the DM Act, explicitly providing for criminal prosecution and punishment for those that are found to be in violation of the impugned notification and appended guidelines. It has been established that the Constitution envisages that the matter of public health is primarily and exclusively entrusted to the various state governments at the federal level. However, the Central Government invoked DM Act (which itself provides that it has overriding effect over all other laws[42]) and centralized power including providing for measures to prevent the spread of COVID-19. The primacy of power and function to deal with public health afforded to State governments, was therefore, effectively completely undermined. The invoking of DM Act to prevent the spread of a pandemic, thus appears to be manifestly against the distribution of powers, and thus violative of the federal structure of the Indian Constitution.

5.2 India's "Quasi-Federal" Polity

There is a caveat to the above-mentioned seemingly simple way of resolving the question of which government can legislate on what matter. The language of the constitution can be interpreted in a way that supports further the argument that it is not within the legislative competency of the Parliament to use the DM Act to address a public health issue, thus raising a red flag that the lockdown may have been enforced using colourable legislation.

Before Article 246(1) goes on to state the exclusive power of the Parliament to make laws with respect to matters in the Union List, it contains the phrase "notwithstanding anything in clause (2) and clause (3)". Clause (2) and (3) are the clauses that provide for concurrent powers of both levels of government to make laws on subjects in the Concurrent List, and the States' exclusive

[40] Notification *supra* Note 4 and 5.
[41] The Code of Criminal Procedure, 1973, § 188, 144.
[42] Disaster Management Act, 2005, § 72.

powers to make laws on matters in the State List, respectively. Similarly, Clause (2) is notwithstanding anything contained in Clause (3), and Clause (3) is subject to clauses (1) and (2). This phrase denotes what is known as the "*non obstante clause*".

The function of the non-obstante clause is to essentially make Cl. (1) overriding over Cl.(2) and Cl.(3), and Cl.(2) over Cl.(3), should there arise any conflicts. In other words, wherever there appears to be an overlap between subjects enlisted in one list with those enlisted in another, the:

a) Union List prevails over State List,
b) The Concurrent List prevails over the State List,
c) The Union List prevails over the Concurrent List,

to the extent of the overlapping. However, as apparent at may seem from the above dissection of Article 246, the non-obstante clause does not overpower the competency of State governments in respect to the State List subjects, at all.

Lord Salmond[43] opined very wisely in relation to the Government of India Act, 1935, as remains relevant to this day, that it must be attempted that a fair reconciliation can be achieved by giving a meaningless wide than another in a different context, to a subject contained in the Federal (now Union) List, while retaining an equally appropriate meaning to a subject in the Provincial (now State) List, so as to resolve a conflict if and when it arises. The Hon'ble Supreme Court has also reiterated[44] the same principle terming it as a "principle of harmonious construction". The principle is crisp and straightforward, based on the following considerations:

1. The Constitution could not have intended to create an overlap and provides for exclusive powers to make laws for different subjects under different lists.[45]
2. The entries under Schedule VII could not have been made with scientific precision and since there is bound to be an overlap, it becomes the Court's duty to reconcile the difference by reading all entries of the lists together, and erasing the conflict by affording a workable meaning to all entries concerned.[46]
3. Where the conflict arises between a seemingly general subject as opposed to a more specific subject, the Court ought to give way to the specific nature of the latter and afford only as wide a meaning to the former as does not eat up the entirety of the latter.

[43] *Governor-General in Council* v. *State of Madras*, AIR (1945) PC 98.
[44] *Harakchand Ratanchand Banthia* v. *Union of India*, AIR (1970) SC 1453.
[45] *R.S. Rehchand Mohota Spg. & Wvg. Mills Ltd.* v. *State of Maharashtra*, AIR (1997) SC 2591.
[46] *P. Tulsi Das* v. *Government of Andhra Pradesh*, (2003) 1 SCC 364.

4. Where the reconciliation becomes impossible and there is no reasonable way to resolve the overlap, only then should the Court invoke the non-obstante clause and retain the primacy of the Union's powers, to the extent of the overlap so created.[47]

In a landmark judgment[48] on the matter, the Hon'ble Supreme Court relied on similar considerations and interpreted a List I subject narrowly, in order to give effect to the relevant State List subject more meaningfully, so as to prevent the Union List entry from swallowing up the entirety of the State List entry.

Therefore, although the non-obstante clause makes it such that the Union list appears to retain primacy over the other two, and the concurrent list over the state list, the Hon'ble Supreme Court has many a times interpreted it to meant to protect the state list which is "subject to" the other two, while also stating[49]that the relevant entry in List I, is not to be interpreted so as to rob the relevant entry in List II of all its content and substance.

It is submitted that allowing the invocation of DM Act to deal with a health emergency is completely opposed to upholding the federal structure of the Indian Constitution. There is an overlap: between the Parliament's broader power to legislate on matters of social security, and the power of the States to legislate on matters concerning public health. The arguendo that can be made is that, assuming but not admitting that the DM Act can be used to deal with a public health issue, it is not within the legislative competency of its enacting body, i.e., the Parliament, to enact legislation on public health issues.

At this point it is also imperative to appreciate that the High Powered Committee on Disaster Management (J.C. Pant Committee) had pointed out[50] that there exists an urgent need to provide for a specific entry for disaster management in the 7th Schedule, which was also then later recognized and equally urgently reiterated by the Second Administrative Reforms Commission,[51]the parliament has chosen to not provide for such an entry in the 7th schedule and has insisted on enacting the DM Act under the concurrent entry "Social security, social insurance, employment, unemployment". Though a desperate case can be made to somehow relate the DM Act to "social security and social insurance, employment and unemployment" as under Entry 23 List III, a poor connection drawn between social security and employment issues with the COVID-19 pandemic, the constitutional position on the interpretation of entries

[47] *Ajay Kumar Singh* v. *State of Bihar*, (1994) 4 SCC 401.
[48] *State of Bombay* v. *Balsara*, AIR (1951) SC 318.
[49] *Ibid.*
[50] JC Pant Report *supra* Note 17.
[51] Third Report *supra* Note 12.

in the schedule is in favour of considering COVID-19, a matter governed by Entry 6, List II, i.e., Public Health and Sanitation.

6. FUNDAMENTAL RIGHTS AND THE LOCKDOWN

The night India became a democratic republic, promising a new freedom to its people, the Constitution of this young nation guaranteed that every citizen will be protected under an umbrella of certain basic rights that would trump every other law, policy or decision enacted by governments over the years. Some of these rights came to be a part of what is called the 'Basic Structure' of the Constitution.[52]Hon'ble Justice HR Khanna in one of the most remarkable decisions in legal history propounded that these 'basic principles' of the Constitution would not be altered or destroyed by any law or amendment passed by the Legislature.[53] Today, the Covid-19 outbreak in the country and the measures undertaken by the Government there under are testing themselves in Constitutional waters. What is most certain is that for the less privileged class of the country, their fundamental rights are dying a slow death.

6.1 Article 14: The Right to Equality

Article 14[54] is the strongest pillar in the monumental structure of the fundamental rights under Part III of the Constitution. According to this Article, the State shall not deny to any person 'equality before law' and 'equal protection of laws'. The former is a negative concept [55] which ensures that no person is favoured or treated with privilege before the law. That the law applies the same for everyone irrespective of their class, caste, gender, etc. The latter is a positive concept[56] which means application of the same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances and that among equals the law should be equal and equally administered.[57] Where persons or groups of persons are not situated equally, to treat them as equals would itself be violative of Art. 14 as this would itself result in inequality.[58]

The lockdown orders announced by the government on March 24, 2020 under the DM Act[59] were applied to all persons across the country. This move disregarded the socio-economic

[52] *Keshavananda Bharti* v. *State of Kerala*, (1973) 4 SCC 225.
[53] *Ibid.*
[54] Constitution of India, art. 14.
[55] *Sri Srinivasa Theatre* v. *Government of Tamil Nadu*, AIR (1992) SC 1004.
[56] *Ibid.*
[57] *Jagannath Prasad* v. *State of Uttar Pradesh*, AIR (1961) SC 1245; *Mohd. Shaheb Mahboob* v. *Dy. Custodian*, AIR (1961) SC 1657.
[58] M.P. Jain, *Indian Constitutional Law*, 979 (Kamal Law House, 5h ed.,2005).
[59] MHA Order, *supra* at Note 3.

conditions of the less privileged class of the country. For the remaining citizenry, the lockdown was wrapped up and presented as a convenient step in the right direction amidst a public health crisis. The decision, therefore, mechanically violated Article 14 as it placed two unequal classes of people equally furthering injustice.

The constitutionality of any measure is tested considering its effect and not intent.[60] The effect of the lockdown was felt shortly when most workplaces announced a 'work from home' policy. This meant that those who were placed on the higher rungs of the income generation pyramid could afford these new changes but for the depressed classes, an economic hellhole was crumbling them. The disproportionate impact of the lockdown was felt rather strongly in terms of affecting the livelihood of a particular socio-economic class which is a relevant ground for testing the violation of Article 14.[61] There exists a positive obligation on the State under Article 14 to mitigate this disproportional impact[62] which was a direct consequence of its own decision.

Additionally, the Central Government gave only a four hours' notice before enforcing the lockdown.[63] On the off chance that their rights as citizens of this country had been calculated in, the decision should have been better planned and a large number of migrant workers would have had the chance to return home. This right was denied to them. Rather, this enormous force of India's work power was decreased to objects of doubt, considered as burdens, beaten for attempting to return home[64]treated less as humans, let alone citizens of the country with basic rights. The Kerala High Court has taken suo moto cognizance[65] of the situation and recognized the excesses of police violence specifically against the class of migrants, threatening their right to life under Article 21[66]. It is, therefore, abundantly clear that the lockdown not only failed to provide a level playing field[67] to the depressed classes but also actively discriminated[68] in the way they were treated as opposed to the wealthier classes, clearly attracting a violation of their Right to Equality as provided under Article 14.

6.2 Article 19: The Right to Freedom

[60] *I.R. Coelho* (Dead) by Lrs. v. *State of Tamil Nadu*& Others, Appeal (Civil) 1344-45/1976.
[61] *State of Maharashtra* v. *Indian Hotels and Restaurants Association*, WP (Civil) No. 576/2016.
[62] *St. Stephen's College* v. *University of Delhi*, WP (Civil) 1868/1980.
[63] MHA Order, *supra* at Note 3.
[64] Human Rights Watch, "India: Co-Vid 19 puts Poor People at Risk", (*Human Rights Watch*, March. 27 2020).
[65] AK Jayasankaran Nambiar J. & Shajy P. Chali, J, Suo Motu, WPC (Unnumbered) of 2020.
[66] Constitution of India, art. 21.
[67] *Reliance Energy Ltd.* & Anr. v. *Maharashtra State Road Development Corporation Ltd.* & Others, Appeal (Civil) 3526/2007.
[68] *Glanrock Estate Private Limited* v. *State of Tamil Nadu*, (2010) 10 SCC 96.

Article 19[69] guarantees the citizens six basic freedoms of speech and expression, movement, peaceful assembly, association, residence and practicing any trade or business.[70] However, these freedoms guaranteed under Article 19(1)(a)-(g) can be subjected to reasonable restrictions imposed by the legislature and the grounds for curtailing these freedoms are laid down in Article 19(2)-(6).[71] The test of reasonableness[72] of any restriction is adjudged by keeping in mind the social settings of the country at the time and the growing requirements of the nation.[73]

The government imposed blanket restrictions on all citizens alike curtailing their Right to Movement under Article 19(1)(d). However, these restrictions were justified by the authorities under Article 19(5) in the name of 'general public interest'.

The lockdown which was announced by the Central government on March 24[74] disregarded the socio-economic conditions of the country. It failed to consider the reality that the restrictions on movement imposed on the migrant workers robbed them of the only alternative choice they had and that was to return to their homes in the absence of work opportunities. These workers cannot be put under the same umbrella of restrictions because they do not enjoy the basic rights of food and shelter as everyone else does.

The first lockdown order was followed by the Centre directing the states[75] to seal their borders for the migrant labourers who were attempting to return to their home states, calling their movement a "violation of the lockdown orders." This led to the States taking extremely harsh measures[76] against migrants such as forcing them in cramped buses and leaving them where they started from after walking for hundreds of kilometres. The states have also lodged complaints under Section 51 of the DM Act[77] against workers travelling by foot who would face a year in prison if found obstructing the law. These restrictions on the freedom of movement of the workers clearly failed to meet the aforementioned test of reasonableness and are thus out of the purview of Article 19(5). The disproportionality of the restrictions on movement is also co-terminus with the violation of the right to equality under Article 14 and also, the right to livelihood under Article 21.

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[69] Constitution of India, art. 19(1).
[70] M.P. Jain, *Indian Constitutional Law*, 1124 (Kamal Law House, Calcutta, 5h ed., 2005).
[71] Constitution of India, art. 19(2)-(6).
[72] *State of Madras* v. *V.G. Row*, AIR (1952) SC 196.
[73] *Pathumma* v. *State of Kerala*, AIR (1978) SC 771.
[74] MHA Order, *supra* at Note 3.
[75] Annexure to Ministry of Home Affairs Order No. 40-3/2020-D, 29.3.2020, Government of India.
[76] WAN Message, From Director General of Police, Haryana. No. 5264-5304/L&O-3, 29.3.2020.
[77] Disaster Management Act, 2005, § 51.

Furthermore, imposing similar restrictions on freedom of movement of workers as the rest of the citizenry would mean that the government would have to provide similar conditions to this class thus creating an obligation on the state to act positively and create an equitable standing to ensure a meaningful exercise of the worker's rights, in this case the right to movement under Article 19(1)(d).[78] In an attempt to do so, the 'Shramik Special Trains' for the exclusive transportation of the workers were started by The Ministry of Railways.[79] These trains are not, thus, a matter of policy but a matter of right vested well with the workers. However, providing a medium of transportation does not in itself create an equal standing for migrants amidst this crisis. An equality of opportunity[80] with sources of income generation are what will really be able to put the worker class on a footing closer to the rest of the classes.

6.3 Article 21: The Right to Life and Personal Liberty

Article 21 guarantees to every citizen the Right to 'life' and 'personal liberty' except for procedure established by law.[81] Over the years, the Supreme Court has interpreted the meaning of the word 'life' very broadly and liberally. Justice Bhagwati in the case of *Francis Coralie*[82] noted that "*The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head.*" There are, therefore, a number of rights that flow from the expansive jurisprudence of Article 21. Some of these, in the context of the nation-wide lockdown are discussed below.

6.3.1 The Right to Livelihood

The Right to Livelihood was held to be a part and parcel of the Right to Life in the case of *Olga Tellis v. Bombay Municipal Corporation*.[83] It is now a widely recognized notion that the right to life cannot exist without an adequate means of livelihood. Furthermore, in the aforementioned case, the Court also opined that *"The state may not by affirmative action, be compelled to provide adequate means of livelihood or work to the citizens. But any person who is deprived of his right to livelihood except according to just and fair procedure established by law can challenge the deprivation as offending the right to life conferred in Article 21."*

[78] *Indibility Creative (P) Ltd.* v. *Govt. of West Bengal*, Writ Petition (Civil) No. 306 of 2019.
[79] Annexure to Ministry of Home Affairs Order No. 40-3/2020-D, 1.4.2020, Government of India.
[80] *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.
[81] Constitution of India, art. 21.
[82] *Francis Coralie* v. *Union Territory of Delhi*, (1981) AIR 746.
[83] *Olga Tellis* & Ors. v. *Bombay Municipal Corporation* & Ors., (1986) AI 180.

The lockdown that was enforced by the government directly affected the livelihood of 40 million migrant workers across the country.[84] Even though the lockdown was a policy decision, the fact that it directly infringes the right of livelihood of the migrant workers and thereby does not meet the standards of constitutionality, the decision attracts judicial scrutiny by the Court.

The large-scale movement of migrants after the first lockdown orders prompted the Home Secretary to pass an order[85] under the DM Act on March 29th directing the employers of all industries to mandatorily pay wages to their workers. The legality of this order is being challenged in Court in Ludhiana Hand Tools Association v. Union of India.[86] One of the contentions in the case is that the order violates the traders right to business under Article 19(1)(g) since their businesses have been hit hard enough for them to not be able to mandatorily pay wages to their workers. Therefore, what we see here is a clash between the rights of traders under Article 19 and the rights of the workers under Article 21. Declaring the order illegal would have disastrous consequences for the workers who already are marginalized in the society and whose livelihood depend upon monthly pay. For now, the status quo remains unchanged and slow disposal of this case is causing the poor to lose faith in the justice delivery system. What's sufficiently clear though is that the source of the dispute is against state action and therefore, the State ought to compensate the employers, since their loss of business is a direct result of the state-enforced lockdown, too.

6.3.2 The Right to Food

The Supreme Court gave out a landmark judgement in PUCL v. Union of India[87] and paved the way for realizing that the essential Right to Food is, in fact, a quintessential part of the right to a life that is more than mere animal existence.[88] The loss of livelihood for the poor also meant deprivation of their right to food. For the migrants, obtaining food from ration shops amidst the lockdown became incredibly difficult since most of them do not possess a BPL card as they do not have permanent addresses. Secondly, the States also failed in implementing the Public Distribution System and there have been reports of ration shops shutting down due to unavailability of food. With no jobs and no food, how the fundamental rights of the marginalized are being protected or rather, not violated in this crisis is a question that the Court must address through its powers of judicial review.

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[84] World Bank, "COVID-19 Crisis Through a Migration Lens", Migration and Development Brief no. 32, World Bank, Washington, DC (Apr. 2020).
[85] MHA Order *supra* at Note 84.
[86] *Ludhiana Hand Tools Association* v. *Union of India*, WP (Civil) 10993/2020.
[87] *People's Union for Civil Liberties* & Ors. v. *Union of India* & Ors., WP 196/2001.
[88] Francis Coralie, *supra* at Note 91.

6.3.3 The Right to Health

The pandemic has brought into sharp focus The Right to Health as a fundamental right and an essential component of Article 21.[89] A significant piece of the worries identified with the right to health as of now course around testing and affordable healthcare for all. Firstly, the lockdown was ordered under the flawed assumption that everyone is placed on an equal footing to protect themselves of the virus and with basic access to sanitation, clean water and housing. The denial of affordable and adequate healthcare also extends beyond the migrant workers to 68% of the population that lives in rural India.[90]For every 10,000 people that live in Rural India, only 3.2 hospital beds are available.[91] The lockdown strategy that was announced by the government at both the Central and State levels failed to address these concerns and now the right to affordable healthcare seems like a distant dream.

At another end of this spectrum stand our healthcare of workers and their Right to Health. The Court in the case of CERC v. Union of India[92] enforced the right of workers working in a hazardous industry. The healthcare workers on the frontlines qualify to fall under the category of workers in a hazardous industry according to the aforementioned case. The lack of PPE provided to these workers[93] directly puts them at the risk of infection and grossly violates their Right to Health.

With the Supreme Court directing free testing for the poor, a new hope has arisen that the judiciary will once again emerge as a guardian of rights. However, the restrictive eligibility for getting tested according to the ICMR guidelines[94] still poses a greater challenge in the way of Right to Health for all.

7. CONCLUSION

There is a very strong case to be made in favour of the lockdown being a necessary policy decision, based on broad considerations (not limited to) India's large population and logistical difficulties in enforcing social distancing. However, a much stronger legal argument exists against the lockdown being an illegitimate exercise of executive power under the impugned Act, which can very reasonably be understood as a violation of the federal scheme under the Indian

89 *Mohammed Ahmed* (Minor) v. *Union of India* & Ors., WP (Civil) 7279/2013.
90 Shouvik Mitra, 'The Implications of COVID-19 for Rural India' (*IDR*, Mar 25. 2020).
91 S.P. Mampatta, 'Rural India v.Covid-19: train curbs a relief but challenges remain' (*Business Standard*, Mar.23 2020).
92 *Consumer Education and Research Centre* & Ors. v. *Union of India* & Ors., (1995) SCC (3) 42.
93 Pranit Sarda, 'India's PPE Crisis puts workers in the line of fire' (*Forbes India*, Apr.29 2020).
94 Indian Council of Medical Research (ICMR), *Strategy for Co-Vid 19 Testing in India* (Version 5, 18th May 2020).

Constitution, as well as the fact that implementation failures of the lockdown have resulted in gross violations of fundamental rights of an enormous amount of citizens of the country, a large section coming from the poorest of the poor classes.

The Indian Constitution transcends the limitations imposed by the evils of reality. The holy book envisages an ideal standard of equality for all that we must strive to achieve every living day in our democratic existence so that in questions of power, we hear no more of the confidence of man than we bind him down from mischiefs by the chains of the Constitution.

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COMPENSATORY JURISPRUDENCE: A STUDY WITH SPECIAL REFERENCE TO JUDICIAL ATTITUDE UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA.

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ABSTRACT

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents. The approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of the citizen has been adopted by the courts of Ireland, which has a written Constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy of compensation for the infringement of those rights.

1. INTRODUCTION

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them. The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents.

Article 32 of the Constitution of India confers power on the Supreme Court to issue direction or order or writ, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by Part III of the Constitution. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is "guaranteed", that is to

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say, the right to move the Supreme Court under Article 32 for the enforcement of any of the rights conferred by Part III of the Constitution is itself a fundamental right.

The approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental right of the citizen has been adopted by the courts of Ireland, which has a written Constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy of compensation for the infringement of those rights. That has, however, not prevented the courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but also against the State itself.

Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in "appropriate cases".[1]

1.1 Idea of Compensation

The Idea of Compensation to victim of crime particularly to the crime victims by the state is gaining much importance. Though this idea is an age old one, its development on more scientific lines and also as a branch of criminology has begun since a few decades ago. The modern states which are described welfare states have realized the importance of the subject compensation to the victims of crime and are accordingly taping up several victim compensation programmes, as part of their General welfare.[2] Various countries have taken up the scheme of payment of compensation to victim of crime. There is a fund for payment of compensation to crime victims in Canada, Australia, New Zealand, United Kingdom, under the control of a board. We too need such fund to assist and assure the victims that 'we care'.[3]

1.2 Distinction between Compensation and Damages[4]

The concept of Compensation and damages occupy an important place in the programme of justice to victims. Though these terms are sometimes used interchangeably, the words

[1] Article 32 and the Remedy of Compensation, by Justice G. Yethirajulu Cite as : (2004) 7 SCC (J) 49.
[2] Mundrathi Sammaiah, Law on Compensation to Victim of Crime and abuse of power, 2002 at 178-79.
[3] Available at http://www.Tribuneindia.com/2006.
[4] Mundrathi Sammaiah, Laws on Compensation, Deep & Deep Publications Pvt. Ltd., edn. 2002, at 4 – 5.

compensation and damages have subtle distinction in their application. While "Damages" connote the measure of loss caused to the victims in monetary terms, the word "Compensation" indicates the form and occasion to pay damages.

There is an apparent distinction between the words "Compensation" and "Damages." While the former is used by the Indian Courts to denote the monetary redress that they offer to the victims of Constitutional Tort, damages is its equivalent in the western world. Therefore, a reference to these terms means almost the same thing. Though Indian Courts were so anxious to avoid duplicating Civil Proceeding for damages yet they used the expression Compensation rather carefully.[5] Most Indian Judges were careful to state that the sum of money awarded were in the nature of palliatives and would not prejudice a claim for damages to be filed in a Civil Court.[6] But there are several judgments that are an exception to this rule, notably Bhim Singh's Case[7] where it was held that, what has been awarded, though only a nominal sum must be taken to represent the equivalent damages in the western world.

2. LAWS ON COMPENSATION IN INDIA

The term 'Compensation' means amend for the loss sustained. Compensation is anything given to make things equivalent, a thing given to make amends for loss, recompense, remuneration or bay. It is counter balancing of the victim's sufferings and loss that result from victimization. The rationale or basis for compensation may be the following three perspectives:

1. As an additional type of social insurance
2. As welfare measure another facet of the Government/Public assistance of the Unprivileged.
3. A way of meeting an overlooked governmental obligation to all citizens.[8]

[5] See the judgment of Guhati High Court in a Public Interest Litigation, involving the rape of a Bodo Tribal by the Police. The court said "A payment of compensation would add insult to injury and the payment of the money in the form of compensation is wholly misconceived and would rather be undermining the honour of the girls…. However, an ex-gratia payment of some relief in the form of some monetary relief for rehabilitation of the girl is warranted"… (Emphasis mine).
In Re a Police gang rape of Bodo Girls. In 1988 (2) Madras Weekly, No. 14.
[6] See generally, Vikram Raghavan v. Compensation through Writ Petition, six students Advocates, 97, 1994, 103. For a list of the various 'Concomitant' rights that now form part of the guarantee of Article 21 see Unnikrishnan v. State of Andhra Pradesh, 1993 (1) SCC 645, (separate Judgment of Mohan, J).
[7] Bhim Singh v. State of Jammu and Kashmir, AIR 1986 SC 494; Sebastian Hongray v. Union of India, AIR 1984 SC 541.
[8] Supra note 2 at 3.

The penologist recognized that adequate compensation to the victims from the accused or alternatively from the state is objective of the science of victimology which is gaining ground and deserves attention.[9]

In India there is no comprehensive legislation or statutory scheme providing for compensation to victims of crime. In some European countries provisions are made for payment of compensation to the victims of crime in the course of criminal proceedings.[10] Justice requires that a person who has suffered must be compensated. Basically the accused is responsible for the harm caused to the victim. We have five statutes, under which compensation may be awarded to the victims of crime.

1. The Fatal Accident Act, 1855
2. The Motor Vehicles Act, 1988
3. The Criminal Procedure Code, 1973
4. The Constitutional Remedies for Human Rights Violation
5. The Probation of Offenders Act, 1958.[11]

3. CONCEPT OF VICTIMOLOGY

The word Victimology is a new coinage and has gained considerable importance due to the untiring work of Miss Margaret Fry of the John Howard Association of England, Benjamin Mendelsohn, who in 1937 developed a scientific method for the study of the criminal act which utilized biopsycho- social data on the criminal, on the victim and on the witnesses bystanders, and the World Society of Victimology having been himself the victim of discrimination, Mendelsohn became interested in the victim and in his/hers relationship with the criminal. Schafer defines Victimology as "the study of criminal victim relationship". Drapin and Viano define it as "that branch of criminology which primarily studies the victim of crime and everything that is concerned with such a victim". In the words of Fattah: "While studying biological, sociological, psychological, and criminological details about the victim -victimology brings into focus the victim-offender relationship and role played by victim."

The 7th United Nations Congress on Prevention of Crime and Treatment of Offenders came out with a declaration of basic principles of Justice of Victims of crime and abuse of power,

[9] Compensatory Jurisprudence in India, 42 (MU (2006) at 91.
[10] 42nd report on I.P.C. (1971) by Law Commission of India at 51.
[11] Available at http://www.lawnews.com/newsdisplay.

which was later adopted by the U.N. General Assembly. In the declaration, the U.N. defined the "Victims of Crime" as follows:

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Victims are several time suffering emotionally the most.

3.1 Compensation to Victims in Crime

The reactions to crime have been different at different stages of human civilization. There are number of theories available pertaining to 'Reaction to crime'. Important among these theories are Retribution theory, Utilitarian theory, Deterrent theory etc. In common, every theory provides justification punishment. We can summaries the objects of punishment as:

1. partly of making example of the criminal;
2. partly of deterring the criminal from repeating the same act;
3. partly of reforming the criminal by eradicating the evil will; and
4. Partly of satisfying society's feeling of vengeance which the act is supposed to evoke.

The law in the early stages of civilization was to compensate the victim and not to punish the offender. Narada was the first to recommend compensation to the victims by the offender in order to expiate his sins. If we go back to the origin of criminal law, we see that the victim and his family occupy a central position: it is the victim and his family who have the right to request revenge or penitence. However, over the centuries, with the evolution of the state and the organization of state prosecution the role of the victim has changed: from his central position the victim has been shifted to a marginal one.

4. COMPENSATORY JURISPRUDENCE TO THE VICTIMS OF CRIME AND ABUSE OF POWER – A NEW VISION[12]

An insight into the evolution of law regarding compensation to the victims of crime and abuse of power, thus reveals that in the course of history of civil and criminal administration of justice system, the payment of compensation to the victims of crime irrespective of the civil and criminal dichotomy has come to stay. Over the years several doctrinal principles have been developed concerning the need and justification for payment of compensation to the victims of crime be it a civil law case like torts or be it a criminal law case.

In the changed scenario, the state playing a predominant role in the socio-economic justice programmes for the peoples development, incidentally has also made the state often an agency encroaching upon the constitutional protection extended to the citizens in the matter of life, liberty and property, in the ultimate analysis not only the wrongful acts of private individuals but also the wrongful acts of the state are becoming the cause of worry of the victims. It is in this back-drop that the activist judiciary through its reasoned decisions and the efforts of various criminologists, scholars etc. over the years that new vistas have been opened up in the annals of jurisprudence, concerning compensation to the victims of crime and abuse of power, who has been hitherto a neglected lot in the criminal justice system.

4.1 Few Problems

The basic problem one has to face while dealing with the compensation aspect of the crime is, 'Is compensation for the Damage caused by Crime an objective of the Criminal Process'? A decision on this point is especially important when the judge imposes on the offender various financial obligations like court costs, fines, and compensation to the victim. Which of these obligations should take precedence over others if the offender's financial means are insufficient to satisfy all of them? One more important problem that arises is the financial background of the offenders because often they tend to be poor. If the offender has committed an economic offence then he has the capacity to compensate, otherwise it is very difficult for the victim to get sufficient proportion of compensation.

The case of restitution to victims of crime rested primarily on two obligations: an obligation of the criminal who inflicted the harm against person or property and an obligation of the state,

[12] Supra note 4, at 37.

which failed to protect the victim. The second obligation is much more important because it is the duty of the state to provide effective security against the crime. In India, the trend in this direction is quite good now. The dictum that 'King can do no wrong' is in the wane. Modern welfare society, has taken the responsibility to protect its citizens from crime. That is why the punishment aspect solely rests with the state. Though retribution is having subordinate position in Indian legal system yet it is trying hard to get its feet moving. In last few decades retribution aspect has found its way in to the mainstream of criminal law.

5. LITERATURE REVIEW

5.1 Compensation related to Constitutional Injuries

A constitutional solution to fill the gap in the legal right to compensation in the monetary way for the abuse of the many human rights has been found by the apex courts. The Apex Court in the case *Rudal Sah v. State of Bihar*[13] for the first time laid down the principle that compensation can be given in the cases where any fundamental right of an individual has been injured and that the upper courts have the authority to do so "through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence."[14]

We can clearly see that monetary compensation had been made in cases where an individual's legal rights have been damaged. Even though there isn't a statute defining such a claim, the courts have exercised this power wherever they deemed fit. If a person's fundamental right is violated or where a writ petition is not generated by the court itself, the said person's right to compensation comes into effect and he should be compensated adequately in such cases.

In *Sebastain v. Union of India*[15], "on account of failure of Government to produce in habeas corpus petition filed by wives, apex court awarded cost of Rs. 1 lakh to be given to wife of each of detenne."[16]

5.2 Compensation under Criminal Law

The theory of compensation in criminal law is mainly about compensation to the victim of a crime. A victim to a crime is one who has suffered any loss because of some act or omission of

[13] Rudul Sah v. State of Bihar [1983] AIR 1086 SC; (1983) 4 SCC 141.
[14] Ibid.
[15] Sebastain v. Union of India [1984] AIR 1826 SC.
[16] Ibid.

the accused. The victim not only suffers physical injuries but also psychological and financial hardships too. The plight of a victim is only made worse by lengthy hearings and tedious proceedings of courts and improper conduct of the police. The victim is literally traumatised again in the process of seeking justice for the first injury. The legal heirs/guardians of the victim too come in the same definition.

The law makers made provisions in the Criminal Procedure Code, 1973 under Section 357(3) to enable the Courts to award any amount of compensation to the victims of a crime. This was depicted in the landmark case of *Hari Kisan*[17] where the Supreme Court had awarded compensation as punishment, of Rs. 50,000. Not only this, the lower courts were asked and advised to "exercise the power of awarding compensation to the victims of offences in such a liberal way that the victims may not have to rush to the civil courts"[18]

5.3 Compensation related to Rape

The victim of rape has to suffer from many hardships like mental shock, lost income due to pregnancy and costs incurred during childbirth because of the offence. Also, in the present Indian society, a raped victim is looked down upon even though she is the victim and not the offender. During a rape trial, if the accused is just punished or asked to pay fine, the judgment does not favour the victim as her position is not restored. Hence it becomes extremely important to compensate such a victim.[19]

A women's right to compensation originates from Article 21 of the Indian Constitution which talks about right to life and personal liberty. The Supreme Court held that a woman can be compensated even in the middle stages of the trial as well as at the end of the trial. The Supreme Court even suggested the establishment of criminal injuries compensation Board under Article 38(1) of the Constitution of India whose function would have been to compensate such victims and provide them relief. However, no such board has been formed.

In the landmark case of *DK Basu v. State of West Bengal*, the Supreme Court held that a victim of custodial right has every right to be compensated as her Right to life has been breached by the officer of the State.[20]

[17] [1998] AIR 2127 SC.
[18] Ibid.
[19] Available at http://www.lawctopus.com/academike/theories-of-compensation-in-criminal-law/.
[20] DK Basu v. State of West Bengal [1997] AIR 610 SC.

In another case, the Supreme Court held that the session's court too has the power to award compensation to the victim even if the trial has not been completed. In fact, in the case *State of Maharashtra v. Madhukar N. Mardikar*, Supreme court held that "even a prostitute has a right to privacy and no person can rape her just because she is a woman of easy virtue."[21]

6. ARTICLE 32 AND THE REMEDY OF COMPENSATION[22]

Compensation to victims is a recognised principle of law being enforced through the ordinary civil courts. Under the law of torts the victims can claim compensation for the injury to the person or property suffered by them. It is taking decades for the victims to get a decree for damages or compensation through civil courts, which is resulting in so much hardship to them.

The emergence of compensatory jurisprudence in the light of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all the people irrespective of the absence of any express constitutional provision and of judicial precedents.

The renaissance of the doctrine of natural rights in the form of human rights across the globe is a great development in the jurisprudential field in the contemporary era. A host of international covenants on human rights and the concern for effective implementation of them are radical and revolutionary steps towards the guarantee of liberty, equality and justice. Though the concept is new, the content is not and these rights have been recognised since ages and have become part of the constitutional mechanism of several countries. India recognised these rights under Part III of the Constitution providing remedies for enforcement of such rights.

Article 32(1) provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in "appropriate cases".

A question regarding the awarding of monetary compensation through writ jurisdiction was first raised before the Supreme Court in *Khatri (II)* v. *State of Bihar*[23] In this case, Bhagwati, J. observed:

[21] Maharashtra v. Madhukar N. Mardikar [1991] I SCC 57.
[22] Justice G. Yethirajulu, (2004)7 SCC (J) 49.

"Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty."[24]

In *Sant Bir* v. *State of Bihar*[25] the question of compensating the victim of the lawlessness of the State was left open.

In *Veena Sethi* v. *State of Bihar*[26] also the Court observed that the question would still remain to be considered whether the petitioners are entitled to compensation from the State Government for the contravention of the right guaranteed under Article 21 of the Constitution.

In the light of the views expressed by the Court in the above cases it can be said that the Court had shown its concern for the protection of right to life and liberty against the lawlessness of the State but did not actually grant any compensation to the victims.

The seed of compensation for the infraction of the rights implicit in Article 21 was first sowed in *Khatri*, *Sant Bir* and *Veena Sethi*, which sprouted with such a vigorous growth that it finally enabled the Court to hold that the State is liable to pay compensation. This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty through *Rudul Sah*[27] The Supreme Court of India in *Rudul Sah* v. *State of Bihar* brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge.

7. COMPENSATION FOR VIOLATION OF FUNDAMENTAL RIGHTS A NEW REMEDY IN PUBLIC LAW DISTINCT FROM RELIEF OF DAMAGES IN TORT

In Rahul Sah's case[28] the apex Court for the first time was faced with a dilemma whether or not to award compensation for violation of right to life and personal liberty guaranteed under Article-21. The stand taken on behalf of the State, was that the petitioner should be left entirely

[23] (1981) 1 SCC 627.
[24] Ibid., p. 630, para 4.
[25] (1982) 3 SCC 131.
[26] (1982) 2 SCC 583.
[27] (1983) 4 SCC 141.
[28] Radul Sah v. State of Bihar, AIR 1983 SC 1086.

to claim damages under the ordinary Civil Law, by filing a suit in that behalf. This contention was, however, rejected by the Supreme Court as according to Hon'ble Mr. Justice Chandrachud, the then CJ it would have amounted to robbing Article 21 of its "Significant Content". He also felt it necessary to award monetary compensation of Rs. 30,000=00 without impairing the right of the petitioner to claim damages under ordinary law through Civil Courts, Chandrachud, CJ had observed that "the petitioner can be relegated to the ordinary remedy of suit if his claim to compensation was factually controversial in the sense that a Civil Court may or may not have upheld his claim but while the court has already found in the present case, that petitioner's prolonged detention after his acquittal, in prison was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention a decree for damages would have to be passed in that suit".

After this decision the Hon'ble Supreme Court had occasion to award compensation for violation of fundamental rights in four more cases, namely-**Sabastain M. Hongaray[29], Bhim Singh[30], Saheli[31] and Ravi Kant Patil[32].** Before proceeding further it would be appropriate them in Court in compliance with the Writ of Habeas Corpus issued by the Supreme Court. The Supreme Court, therefore, concluded that those persons must have met an un-natural death while in Army custody. Union of India was directed to pay an exemplary cost of one lack rupees each to the wives of those persons. In **Bhim Singh's** case the petitioner, who was M.L.A., was illegally arrested and detained with the object of preventing him from attending the Assembly Session. Supreme Court directed the State Government to pay Rs. 50,000=00 compensation to the petitioner. In **Saheli's** case[33], writ was moved before the Supreme Court by the mother of the child aged about 9 years who died as a result of police beating. The Supreme Court awarded Rs. 75,000=00 as damages to the mother of the child against the Delhi Administration. In **Ravi Kant Patil's** case[34] High Court's order awarding compensation for violation of fundamental right under Article 21 of an under trial prisoner, who was handcuffed and taken through streets in a procession by the police during investigation, was upheld by the Supreme Court.

The aforesaid four cases are the authority for legal proposition that the Union or the State Government would be liable for tortious acts committed by their officers in violation of Article

[29] Sebastian M. Hongray v.. Union of India (1984)3 SCR 544.
[30] Bhim Singh v. State of J & K. (1985)4 Se.c. 677 AIR 1986 SC 494.
[31] Saheli v. Union of India. AIR 1990 SC 513.
[32] State of Maharashtra v. Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.
[33] Saheli v. Union of India, AIR 1990 SC 513.
[34] State of Maharashtra v. Ravi Kant Patil (1991)2 SC 3C3: AIR 1991 SC 871.

21. However, it may be noted that the basis and the nature of the liability was not clearly spelled out by the Supreme Court in these decisions.

A survey of aforesaid four decisions discloses that in these cases no new jurisprudential foundation was provided for awarding monetary compensation to a person whose right to life and personal liberty guaranteed under Article 21 was violated. In **Rahul Sah's** case interim compensation was awarded as a "palliative" without impairing the petitioner's right to claim damages for wrongful detention under ordinary law of torts, as State was responsible for wrongs done by its officers. In **Sebastian M. Hongray's** case the Union of India was directed to pay exemplary cost of rupees one lac each to the wives of persons on their presumed un-natural death. This amount was awarded as an exemplary cost but was in the nature of compensation.[35] In **Bhim Singh's** case the Apex Court had awarded compensation to the M.L.A. petitioner for being illegally prevention by the State from attending the session of the Legislative Assembly, and in **Saheli's** case, damages had been awarded to the mother of child against the Delhi Administration and its police officers who had caused the death of the child. In **Ravi Kant Patil's** case compensation was awarded for hand-cuffing and parading an under trial prisoner in a procession in streets, during investigation. Thus the principles of vicarious liability of State was invoked in all these cases. It was in **Nilabati's** case[36] that the Supreme Court felt the need for clearly spelling out the true basis and nature of State"s responsibility to pay compensation for violation of fundamental rights of the citizen by their officers. The Supreme Court said:

> *"It would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between the liability and the liability in law for payment of compensation in an action on tort".*

7. THE DOCTRINE OF SOVERIGN IMMUNITY

It is pertinent to examine in brief historically the action taken by individuals against the state. The Indian law was in a state of confusion from its colonial times. This was because the concept of tortuous liability – as it existed in England – was blindly followed in India.[37] Though liability

[35] Bhim Singh v. State of J & K (".....word compensation was not used but it is obvious that the court awarded compensation").
[36] Nilabati Behera v. State of Orissa AIR 1993 S.C. 1993 S.C. 1960 (J.S. Verma, Dr. A.S. Anand and N. Venkatachala, JJ.)
[37] P. Leelakrishnan. "Compensation for Government Law Lessness". XVII C.U.L.R. (December 1992).

existed in some areas,[38] the Indian courts had been so obsessed with the maxim "King can do no wrong" that they made a distinction between sovereign and non – sovereign functions.[39]

The decision of the Supreme Court in *Kasturi Lal v. State of Uttar Pradesh,*[40] laid down that the exercise of a sovereign function will not give rise to a tort action. This decision was erroneous, and to an extent was resolved by later decisions enumerated in this article, but has still not been completely overruled. Most judges either conveniently avoid reference to it or distinguish its ratio.[41]

8. JUDICIAL JURISPRUDENCE TOWARDS COMPENSATION LAW IN INDIA

In Rudal Sah v. State of Bihar Supreme Court through Chief Justice Chandrachud held, "Article 21, which guarantees the right to life and liberty will be denuded of its significant content if the power of this court were limited to passing orders of release from illegal detention. 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." There must be direct and proximate nexus between the complaint and the arrest for the award of compensation under sec. 358 of the Cr. P.C. Any person is entitled to compensation for the loss or injury caused by the offence, and it includes the "wife, husband, parent and child" of the deceased victim. In Sarwan Singh's case court held that in awarding such compensation, the court is to take into consideration various factors such as capacity of the accused to pay, the nature of the crime, the nature of the injury suffered and other relevant factors. Power to award compensation to victims should be liberally exercised by courts to meet the ends of justice… in addition to the conviction; the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It is not alternative to but in addition thereto. The payment of compensation must be reasonable. The quantum of compensation depends upon facts, circumstances, the nature of the crime, the justness of the claim of the victim and the capacity of the accused to pay. If there are more than

[38] G.P. Singh (Ed.), Ratanlal & Dhirajlal's, Law of Torts, (Nagpur: Wadhwa & Co., 1992), 40 – 41.
[39] The first case in this regard was P.O. Steam Navigation Co. v. Secretary of State, (1868) 5 Bom. H.C.R. App. $_{p}$ 1. Where a distinction was made. It was followed by the decision in State of Rajasthan v. Vidyawati, A.I.R. 1962 SC 933. In so far as the tort was committed in the discharge of a non sovereign function. This was followed by Kasturi Lal's case.
[40] A.I.R. 1965 SC 1039.
[41] In State of Gujarat v. Menon, A.I.R. 1967 SC 1885., confronted with similar facts as the above, the Supreme court resorted to the contract of bailment to hold the state liable.

one accused, quantum may be divided equally unless their capacity to pay varies considerably. Reasonable period for payment of compensation, if necessary by installment, may be given.

In a certain case the Court held that where the amount fixed was repulsively low so as to make it a mockery of the sentence, it would be enhanced; the financial capacity of the accused, enormity of the offence, extent of damage caused to the victim, are the relevant considerations in fixing up the amount. The court in Balraj v. State of U.P. held that the power to award compensation under section 357 (3) is not ancillary to other sentences but it is in addition thereto.

The compensation for illegal detention is the area, which unearthed new doctrines pertaining to the compensation laws in India. In yet another case, two women filed a writ of habeas corpus to produce two persons (their husbands) who were found missing. The authorities failed to produce them. The Court concluded, on the basis of material placed before it, that the two persons 'must have met unnatural deaths, and that prima facie they would be offences of murder. The Supreme Court directed the respondents to pay Rs. 1, 00, 000/- to each of the wives of the missing persons.

9. AWARDS OF COMPENSATION TO VICTIMS BY COURTS

There is plethora of case law where the Supreme Court has awarded compensation to the victims whose plight was brought to the notice of the apex court either by themselves or by way of PIL with the aim of protecting the human rights of the victims in our criminal justice system and to fulfill the constitutional obligation the Supreme Court can direct the government to confer jurisdiction on the criminal courts by making statutory provisions for the compensation to the victims of crime irrespective of whether the accused is convicted or not and to make statutory provisions for participation of the victims in prosecution along with prosecuting agency in a criminal case instituted on a police report.[42]

The court has also granted monetary compensation to victims of custodial violence in many cases. In a landmark judgment of *Nilabati Behra case* the apex court awarded compensation of Rs. 1,50,000/- to the mother of deceased who died in police custody due to torture.[43] In *D.K. Basu v. State of West Bengal* – the Apex court held that compensation can be granted under the public law

[42] See, 1996 Cr. L.J. Journal Section at 46.
[43] Nilibati Behra v. State of Orissa, AIR 1993 SC 1960; also see people's union for civil liberty v. vol.AIR 1997 SC 1203; People's Union for Democratic Rights v. Police Comm., Delhi (1989) 4 SCC 230.

by the Supreme Court and High Court in addition to private law remedy for tortuous action and punishment to wrong doer under criminal law for established breach of fundamental rights.[44]

Universal declaration of Human Right, 1948 under Article 5 says that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and also Article 8 of Universal Declaration of Human Rights and Article 14 of International covenant on civil and political Rights in Provides for compensation for violation of fundamental Rights.[45]

9.1 Cases where Compensation was not Awarded

It is pertinent to note that, there are also cases, in which the Apex Court refused to award compensation to the victims of State abuses, though the court has emphasized the need for development of compensatory laws. Following are some of the instances where the courts were not inclined to award any compensation, keeping in view the nature and circumstances of the case, before it.

It is interesting to observe that there are cases where the courts were somehow found to be reluctant to award compensation in cases involving abuse of power, though the justice demands otherwise. A few of such notable instances are discussed below. In *Khetri v. State of Bihar,*[46] where the police authorities had blinded certain prisoners and the counsel for the blinded prisoners asserted a constitutional right to get compensation for the damage caused by Police excesses. For the first time an issue of constitutional importance was raised before the Supreme Court as to a person deprived of his right to life or personal liberty in violation of Article 21 by the State. The question raised was whether the Court can grant monetary compensation to such person. The Court imposed a liability upon the State to pay compensation to the victim for violation of the personal liberty under Article 21. The Court agreed that in the light of dynamic-constitutional jurisprudence such a claim of compensation could be made.[47] However, it is interesting to note that no compensation was paid to the victims in this case.

The issue of compensation to the victim of state excesses where the claim for compensation was rejected was again raised in *Sant Bir v. State of Bihar*[48] where the victim was a criminal lunatic. He had become perfectly sane and fit for discharge but remained under detention illegally for over

[44] 1997 Cr.L.J. 743.
[45] Article 5 and Article 8 of Universal Declaration of Human Right, 1948, and see, Article 14 of International Convention on Civil and Political Rights, 1966.
[46] Popularly known as Bhagapur Blinding's Case, AIR 1981 SC 928.
[47] Ibid at 930.
[48] AIR 1982 SC 1470.

15 years. The Court directed the release of prisoner and remarked that it was a matter of shame for the society as well as the administration to detain a person for over fifteen years without any justification. The Court appreciated the need to compensate the victims of lawless law enforcement but left the question again open. Thus, in both the above cases the Apex Court expressed its concern about the grant of any compensation to the victims of State excesses but failed to actually grant the same.

Similarly, in *Shri Padma Dev and Other v. State of Himachal Pradesh and others,*[49] the petitioner was detained illegally and confined unlawfully by the police authorities while abusing their powers. The High Court was satisfied regarding forgeries made in the police ziminis (general diary), but took rather a lenient view, on the plea that it was the first known lapse on the part of the respondent Police Officials and directed a departmental inquiry by the competent disciplinary authority and only Rs. 500 as cost of the petition was awarded tpo both the petitioners jointly in the ratio of Rs. 300 and Rs. 200. Thus no compensation was awarded by the court for the illegal detention. It is rather disappointing that the High Court showed leniency to the offence of forgery indulged in by the Police Officials and did not award any compensation to the victim of the Criminal Law.

It is indeed distressing that even higher judiciary is not keen to provide compensation to the victims of Crimes and is satisfied only to get the victims of Crimes freed from the clutches of the police and jail authorities.

10. STATUTORY PROVISIONS REGARDING COMPENSATION[50]

In India the statutory provisions concerning compensation exist in the Code of Criminal Procedure and Probation of Offenders Act. Though these statutes contain provisions dealing directly on the subject of compensation they are practically circumscribed by the conditions that the accused person must have been convicted and the fine amount if imposed is recoverable. These statutory provisions confer discretionary power to the courts and it is not mandatory for the courts to award compensation. Further, payment of compensation is linked to the imposition of fine. In the cases of abuse of power by the state the compensation contemplated to be paid is a paltry sum of Rs. 100 only. This statutory provisions as they stand today does not provide sure and speedy relief.

[49] Shri Padam Dev and Other v. State of Himachal Pradesh and others, 1989 Cr. L. J. 383, Himachal Pradesh.
[50] Supra note 12, at 179.

India which is a welfare State and which is guided by the constitutional goal of social; justice sat for it, is yet to take up the subject of compensation to the victims of crime on a large scale. It is only in the recent decades that the State started giving serious thought to the issues pertaining to payment of compensation to victims of crimes.

11. CRITICAL ANALYSIS

When a crime is committed against a person, the victim loses out a lot apart from incurring damages and injuries. The work of a judiciary should not only be to punish the guilty but also compensate the victim as even if the accused is punished, the victim's loss is not compensated. The compensation given should at least try to put the victim in a state in which he was before. It is not like victims of crime can never ask for compensation as such a prayer is available under civil laws, but filing two different suits for the same offence in two different courts. The proceedings for one suit are most of the times are agonizing, that such a procedure of filing different suits only gives the victim a second traumatisation.

The idea behind providing compensation is legal as well as humanitarian. The inability to protect the person by the State makes it legally obligatory for the State to compensate him. The victim goes through such pain and many times permanent loss of income only makes it logical for him to be compensated.

In cases where a person dies or is sent into a vegetative state, compensation should be very high as many times, the victim himself is the sole bread earner of the family and hence his injuries affect the life of his family too. In such cases, if the accused is only imprisoned or asked to pay a small fine, no good happens to either the accused or the victim's family.

In the Indian society of the 21st century, many people want their brides to be "pure" virgins. A victim of rape in such cases not only loses out on the opportunity to marry into an otherwise decent family but is also discriminated upon for no fault of hers. It is often said that the most prised possession of a woman is her dignity and respect. In the society where people still have an old mindset, the life of such a woman only degrades. It only makes sense to compensate such a victim well apart from punishing the accused.

Mental shock, loss of income and cost of litigation should be taken into consideration when coming out with compensation and the Courts should hence compensate the victims more frequently.

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12. CONCLUSION

We come to the conclusion that compensation is not only required but is in fact a very important aspect of even criminal law and the courts should not use this sparingly but a little liberally. Of course they should be careful of not awarding too high a compensation and hence should be careful.

The government should take into consideration the suggestions of the Supreme Court and set up Compensation Boards to help the victims with financial issues. Prior to Cr.P.C (Amendment) 2008, India lacked an all-inclusive legislation for compensation of victims. "Compassionate treatment of victims under the criminal justice system itself leads to the belief in the system which is enhanced by way of compensation programmes, independent of conviction of offenders"[51]

"It is need less to point out that the whole legislative paradigm coupled with lack of judicial determination has exposed numerous flaws of the present legal system about the compensation therefore there is need for revamping the whole legal system once. The mandatory changes that are needed are as follows:

- The suggestion given by the law commission of India in its 42nd report on Indian Penal Code must be taken in to consideration and it would be better if the legislature also take in to account the separate note of Justice R.L. Narsimha a member of the commission.
- The law must also provide recording of reason for not providing or providing the compensation as we have in the case of death sentence in Cr.P.C.
- The law must also provide for institutional set up as we have in western countries.
- If possible it would be better to give the compensation as a right to victim."[52]

[51] Bhumika Sharma, 'Compensation to Victims of Crime Under Criminal Law' (mightylaws.in 2011) <http://www.mightylaws.in/573/compensation-victims-crime-criminal-law>.
[52] Abhishek Anand, 'Compensation to the Victim of Crime: Assessing Legislative Frame Work and Role of Indian Courts' (legalserviceindia.com 2012) <http://www.legalserviceindia.com/articles/pun.htm>.

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RAPE AS WAR CRIME AND GENOCIDE: ENLIGHTENMENT ON THE IGNORANCE OF THE VENDORS OF HUMAN RIGHTS

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ABSTRACT

Rape during armed conflict has always been viewed as a consequence of war rather than a deliberate strategy of war. Before the conflicts in Bosnia and Rwanda some efforts were made to bring wartime rape to international attention but it left a lot to be desired mainly because there was no set precedent for dealing with rape. It was after the atrocities in former Yugoslavia and Rwanda that came to light, there was a change in the thought process in dealing with rape as a war crime and as genocide. The Akayesu judgement given by ICTR even made history by considering rape as an act of genocide. This paper will aim to trace the shift in thought process of rape as a consequence of war to rape as an act of war throughout history. It emphasises on the need of expressed incorporation of rape in defining provisions of genocide and war crime by giving examples of tragic situations the victims and their communities in Bosnia and Rwanda faced in significance to the philosophical foundation of the crimes. It also related the effects of rape to the provisions to the said defining provisions and advocates for self imposed obligation of the international community.

1. INTRODUCTION

Existence of number of inconsistencies is observed whenever there is a discussion regarding sexual violence in the international community. In recent times, this topic has attracted few innovative solutions. Such acts are considered more as a depiction of strike on the honour of women than as a "crime of violence".[1] This leads to problems, because it trivializes the 'seriousness as well as the violent nature of rape' under international humanitarian law.[2] To fulfil the objective of removing the ambiguous nature of the connection between rape and sexism, the latter should be considered and addressed as a method of torture. To have a proper mechanism of determining liability and victim redressal, formulation of an exhaustive and comprehensive definition of rape is a mandate. The international community has put forth great effort to fill up the caisson and clarify the ambiguity concerning the same; especially the after revelation of the

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1 Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" 46 *McGill Law Journal* 217, 221 (2000).

2 M. Cherif Massiouni, "The New Wars and The Crisis of the Compliance with the Law of Armed Conflict by Non-state Actors" 98 (3) *The Journal of Criminal Law and Criminology* 711, 798-799 (1973).

horrifying tragedies in Rwanda and the former Yugoslavia. Sanders gave recognition to the greater impact of the sexual violence in Yugoslavia especially in the Bosnia-Herzegovina conflict; as it opens the method of massacre to the world, unlike the instances vandalisms in countries like Bangladesh, Uganda or Iran.[3] According to her:

> *. . . it has taken a very long time for women themselves to grasp what it means when something like this occurs. For the first time, it is women who are now forcing this topic into public awareness. Until now, all the mass rapes mentioned were simply too far from Europe to frighten us.*[4]

Concerning this delay, the Nuremberg trial can be considered as the incident to be pointed at, as it treated, not only the notion of "genocidal rape", but also the very act of genocide as an act of war or war crime – including every violation of humanity as under the ambit of war crime.[5] The subject matter under question was given much of a consideration as most the law rules of international criminal law derived its path of development from these tribunals. At the later stage of development, the Rwandan and Yugoslav Tribunal (ICTR, ICTY) rectified the frame of reference of sexual crimes during armed conflict.

The primary objective of the paper is to look into the ignorant omissions in the conventions on international criminal law concerning rape being a possible form of war crime and genocide. It will discuss in two sections the philosophical foundation of the crimes and psychological effects rape and its misuse so as to it being significant to war crime and genocide. The subject of the paper is suggest the necessity of rape being expressly included as international crime through conventions as the treaties and conventions are considered the prime source for international law.

2. RAPE: WHETHER A CONSEQUENCE OR A TACTIC OF WAR?

Fruitless efforts to make genocidal rape a concern of international community and international criminal law was made even before the conflicts in Bosnia and Rwanda. The main reason of such veil of ignorance is the novelty of the incidence – not of the happening of it, as such practices were used by Romans[6] and foreign invaders in India,[7] but the world being an witness of it. For

[3] In early 1980s young girls were raped and executed as it was of a matter of belief that Koran prohibited execution of virgins. See, Helke Sander, "Prologue", in Alexandra Stigmayer (eds.), *Mass Rape: The War Against Women in Bosnia-Herzegovina* xx (University of Nebraska Press, Lincoln and London, 1994)
[4] *Ibid.*
[5] Richard J. Goldstone, "Prosecuting Rape as a War Crime" 34 *Case Western Reserve Journal of International Law* 277, 279 (2002).
[6] For detailed discussion, see Caryn A. Reeder, "Wartime Rape, the Romans, and the First Jewish Revolt" 48 *Journal for the Study of Judaism* 363-385 (2017).

example, Genocide Convention adopted by the UN General Assembly on December 9, 1948[8] did not mention rape anywhere. Even in the case of *Bosnia and Herzegovina* v. *Yugoslavia*,[9] the ICJ did not give any pronouncement whatsoever concerning the "killing, deportation, expulsion, ill-treatment or rape of non-Serbs and, particularly, members of the Muslim population".[10] 'Forced prostitution within concentration camps'[11] and documented reports of rape in Nazi Germany were seldom discussed and people perpetrating sexual violence were never held accountable during and after the Nuremberg Trials. This is especially visible in the trial of Rape of Nanking.[12]

The Tokyo war crimes tribunals, after the Second World War, did pay some attention to genocidal rape, with notable focus on the Japanese occupation of Nanking, where the Imperial Japanese Army raped an approximate estimation of 20,000 to 80,000 Chinese women and children in what was later termed as the "Rape of Nanking."[13] Substantial evidence of mass rape was presented by the Prosecutors to convict the Japanese War officials for "crimes against humanity"[14] – rather being convicted for rape as part of war crimes committed.[15]

Hesitation subsisted even after Nankin horrors when the international war crimes tribunals in Nuremburg and Tokyo were subjected to discuss rape as a serious issue occurring in war. The testimonial portray of the horrific rape accounts by two witnesses, led Justice Pal of the Tokoyo War Crimes Tribunal to make the following statement: "[I] might mention. . .that even the published accounts of Nanking 'rape' could not be accepted by the world without some suspicion of exaggeration. . . I am not sure if we are not here getting accounts of events witnessed only by excited or prejudiced observers."[16] He blatantly declined to appreciate the obvious evidences presented before him and decided that rape is a mere consequence of war.

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[7] The royal women used to practice Jauhar, that self-immolation to protect their dignity. See, Lindsey Harlan, *Religion and Rajput Women: The Ethic of Protection in Contemporary Narratives* 160 (University of California Press, Berkley and Los Angeles, California, 1992).

[8] The Convention on the Prevention of the Crime of Genocide, 1951.

[9] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Judgement)* 1996 ICJ Rep 595.

[10] Memorial of the Government of the Republic of Bosnia and Hezegovina ¶ 6.4.2.3 (1994), *available at* https://www.icj-cij.org/files/case-related/91/8616.pdf (last visited on April 25, 2004).

[11] Examples of such brutality can be found in, Robert Sommer, "Camp Brothels: Forced Sex Labour in Nazi Concentration Camps", in Dagmar Herzog (eds.), *The Brutality of Desire: War and Sexuality in Europe's 20th Century* 168-196 (Palgrave MacMillan, London, 2009).

[12] For detailed discussion see, Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (Basic Books, New York, 1997).

[13] *Id.* at 14 (ebook).

[14] The Rome Statute of International Criminal Court, 2002, art. 7.

[15] Caroline Kennedy-Pipe and Penny Stanley, "Rape in war: Lessons of the Balkan conflicts in the 1990s" 4(3-4) *The International Journal of Human Rights* 67, 80 (2000).

[16] *International military Tribunal for the far East: Dissent Judgment of Justice Pal* 606-609 (Kokusho-Kankokai Inc., Tokyo, 1953); See also, Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 181, 184 (Kluwer Law International, The Hague, 1997).

2.1. Consequence Theory of Rape During Armed Conflict

Since the early days of war, rape has been considered as a consequence of war. The Consequence Theory stipulates that sexual violence of such kind is, instead of being a strategic weapon, is rather an unfortunate and inevitable side effect of war due to existence of a 'rape culture'[17] that war facilitates. The process includes increased opportunities to carry out sexual violence, violent sexual fantasies which are a psychological impact of wartime, and poor training among soldiers who do not realize the wrongness of sexual violence.

According to Richard Malengule years of conflict have created a 'rape culture' in the Democratic Republic of Congo (DRC), and there sexual violence has been accepted as a consequence of the conflict.[18] Renowned feminist scholars like Susan Brownmiller, an author of femininity, in her best selling feminist classic, opined: "[W]ar provides men with the perfect psychological backdrop to give vent to their contempt for women."[19] This way of perceiving concludes the easily available opportunities for men to commit violence against women is the cause of sexual violence during war and hence, a foregone conclusion of war. Consequence Theory[20] thus holds that soldiers view rape as one of the negative outcomes of war,[21] and when sexual violence happens, it is "a randomized result of an individual's sexual desires."[22] Rape was depicted as a consequence of male desires in the absence of consensual sex and not as a consequence of war by the military leaders in the DRC and Japan. As a evidence of that, the Japanese commanders created a coercive system of sexual slavery – the 'comfort women'[23] who used to be an instrument to attain satisfaction of the soldiers.

Others consider sexual violence not as a weapon but an outcome of the morally ignorant young, poorly trained men with urges. The perpetrators are often unaware of the harm that their actions

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[17] Kristine Grønhaug, "Rape as a weapon of war, Quiet, cheap and scarily efficient", *Norwegian Refugee Council. available at* https://www.nrc.no/shorthand/stories/rape-as-a-weapon-of-war/index.html (last visited at April 26, 2020).

[18] GOMA, "War's overlooked victims", *The Economist*, January 13, 2011, *available at* https://www.economist.com/international/2011/01/13/wars-overlooked-victims (last visited on March 16, 2021).

[19] Susan Brownmiller, *Against Our Will: Men, Women and Rape* 32 (Ballantine Books, New York, 1975).

[20] Larry Baron and Murray A. Straus, "Four Theories of Rape: A Macrosociological Analysis" 34 *Social Problems* 467, 469-471 (1987).

[21] Anna Louie Sussman, "Is Rape Inevitable in War?", *The Atlantic*, May 26, 2011, available at *https://www.theatlantic.com/international/archive/2011/05/is-rape-inevitable-in-war/239480/* (last visited on March 16, 2021)

[22] *Supra* at 12 at 53, 94 and 119 (ebook).

[23] The term "comfort women" is a more sophisticated word to address the women, many from Korea, who were forced into prostitution and used to be sexually abused at Japanese military brothels before and during WWII. See, Philip Seaton, "Reporting the 'comfort women' issue, 1991–1992: Japan's contested war memories in the national press" 26 *Japanese Studies* 99, 110 (2014). For detailed discussion, see Pyog Gap Min, "Korean 'Comfort Women': The Intersection of Colonial Power, Gender, and Class Author(s): Pyong Gap Min" 17 *Gender and Society* 938-957 (2003).

cause because they are mostly a part of a never ending circle of violence that has led to normalization of rape and other sexual violences. Similarly, Antony Beevor asserted that it is the 'undisciplined soldiers', bound by no constraints, who perpetrate sexual violence.[24]

However, the Consequence Theory is not free of criticism, but is criticized widely. Sexual violence during armed conflict is not a foregone conclusion. There is a high level of discrepancy of occurrence of sexual violence among different demographic, geographic, social and cultural factors. Not all participants in a conflict are perpetrators proving that the senior leadership of armed groups can often limit the perpetration of sexual violence if they choose to do so. During the civil war in El Salvador, there was very rare perpetration of rape.[25] Same was the case in Sri Lanka, by the Sri Lankan Tamil secessionist group, the Liberation Tigers of Tamil Eelam (LTTE).[26] Hence rape cannot be said to be inevitable simply by virtue of the fact that some groups do not participate in it; because it is not condoned by their leaders. Non-inevitability, therefore provides stronger grounds for holding those groups, that engage in sexual violence, responsible for their actions.[27] This also makes void the argument that rape in war is caused by 'opportunism'. [28] Misconception lies in the very fact that upon being provided with an opportunity, men will rape merely out of, as per Brownmiller, 'contempt for women'.[29] This explanation is an exasperating over-simplification. Statements came from UN Secretary-General's Special Representative on Sexual Violence emphasises more on society being saturated of impunity than the notion of 'rape culture'.[30] However, wartime rape goes unpunished most of the times, thus creating a culture of impunity that ensures future perpetration.[31] The continuance of rape even after putting down guns and weapons shows rape to be a weapon rather than a consequence.

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[24] Antony Beevor, *Berlin: The Downfall 1945*, 14 (Viking, California, 2002).

[25] Through the examination of El Salvador's vibrant life-story, Erik Ching has written a great piece of literature in the aftermath of the terrible civil war that includes memoirs and testimonials. The author seeks to understand about the reason of the war being memorable, the manner in which it is rebottled by Salvadorans and its significance in today's society. See, Erik Ching, *Stories of Civil War in El Salvador: A Battle over Memory* (University of North Carolina Press, Chapel Hill, 2016).

[26] For detailed discussion, see Amita Shastri, "The Material Basis for Separatism: The Tamil Eelam Movement in Sri Lanka" 49 *The Journal of Asian Studies* 56-77 (1990).

[27] International committee of the Red Cross, *Sexual violence in armed conflict: Underlying causes and prevention strategies*, 2015, *available at* https://www.youtube.com/watch?v=oT48bH4zveY.

[28] Elisabeth Jeanwood, "Rape as a Practice of War: Toward a Typology of Political Violence" 46 *Politics & Society* 513, 515-16 (2018).

[29] *Supra* note 19.

[30] See, Margot Wallström, *Addressing Conflict-Related Sexual Violence as a Threat to Peace and Security*, Women, Peace and Security: Conflict-Related Sexual Violence, held on June 30th, 2010 in New York, *available at* https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2012/07/Statement_Analytical_Inventory_Launch_30_June_20101.pdf (last visited on March 16, 2021).

[31] Dorothy Q. Thomas and Regan E. Ralph, "Rape in War: Challenging the Tradition of Impunity" 14 *SAIS Review* 82, 91-2 (1994).

The fallacy in the philosophy revolved around 'uncontrollable male sexual desire' becomes prominent when viewed under the light of practicality. For example, it falls short while explaining sexual violence to be an unfortunate consequence of war.[32] Often, rape is committed even when the soldiers have full access to sex workers and moreover the sheer brutality of the rape and gang rape shows a violent thought process that cannot be synonymous with desire. Rather perpetrating rape is seen as a method for forging ties with the unit as it can be demonstrated in the case of The Revolutionary United Front (RUF) in Sierra Leone.[33] It has been theorised that more often than not when soldiers are forcefully recruited, they are more likely to perpetrate gang rape.[34]

Lastly the assumption, that sexual violence is a consequence of war committed by ill trained soldiers indulging in barbarism without much comprehension ignores the facts that: not all ill trained insurgents indulge in such violence, and some highly trained soldiers of professional armies perpetrate such violence. Exception includes the child soldiers who are raised in such conflict zones.[35]

Even so-called civilized nation of USA set an example of sexual violence used as a tool of war when the professional army sexually abused Iraqi prisoners at Abu Ghraib – resulting into the torturous scandal of 2003.[36] There are several reports of Iraqi prisoners being forced into homosexual acts. While dehumanizing is forbidden among all cultures, homosexual acts are strictly prohibited by Islam and are punished by execution in Iraq. From this instance it is clear as to what the true purpose of wartime rape is. The use of sexual violence was systematically calculated, conspicuously intentional, and was done on the foundations of cultural dynamics designed to fear-mongering and humiliate the prisoners. This consequence theory was for the first time challenged and given a new perspective in the International Criminal Tribunal for Rwanda and the International Criminal tribunal for the former Yugoslavia.

2.2 The Transition of Perceiving Rape: Misfortune of Bosnia and Rwanda

[32] Detailed analysis has been done by EB Freedman in his work where he analyses the psychology of a person with uncontrolled desire and substantiates the psychological defect. See, Estelle B. Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960" 74 *The Journal of American History* 83-106 (1987).
[33] See, Zoe Marks, "Sexual Violence Inside Rebellion: Policies and Perspectives of the Revolutionary United Front of Sierra Leone" 15 *Civil Wars* 359-379 (2013).
[34] Dara Kay Cohen, "Explaining Rape during Civil War: Cross-National Evidence(1980-2009)" 107 *The American Political Science Review* 461 (2013).
[35] See, Roos Haer, "Children and armed conflict: looking at the future and learning from the past" 40 *Third World Quarterly* 74-91 (2019).
[36] Elizabeth Mesok, "Sexual Violence and the US Military: Feminism, US Empire, and the Failure of Liberal Equality" 42 *Feminist Studies* 41-69 (2016).

During the aftermath of tragedies of Rwanda and Bosnia, the view towards wartime rape was changed into a 'tactic of method of war' rather than being a 'consequence of war'. A study of the cases of Bosnia and Rwanda show that rape was used a deliberate, strategic tactic of warfare. Both these events caused establishment of two institutions of justice, namely the International Criminal Tribunal for Yoguslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR), that considered rape as war crime and crime against humanity for the first time in history.

In 1992, eruption of the war between the Bosnian Muslims and Bosnian Serbs (assisted by Serbia) gave birth to a shattered Yugoslavia – creating many nations like Croatia, Montenegro, Macedonia, Slovenia, Serbia and last, but not the least, Bosnia and Herzegovina. In a political whim of Bosnian Serb to please Serbia, they rejected Bosnia's vote for independence on 1992. After the 'secession vote', the Bosnian Serb forces began an all out military assault on Bosnia-Herzegovina, covertly supported with arms and aids by Serbian military, under President Slobodan Milošević, and the Yugoslav People's Army. Ethnic cleansing was in integral part of this state sponsored destruction.[37] The horrific instances of this systematic sexual violence in Bosnia were reported to international domain by Pulitzer Prize winning journalist Roy Gutman. In his book titled "A Witness to Genocide"[38] he reported the mass rapes which were seemingly carried out under higher level orders for facilitating a systematic programme ethnic cleansing. Inferences can be taken from instances like transportation of people to the death camps in cattle cars causing death by suffocation of many, systematic killing of prisoners,[39] and government ordered rapes of all women and girl following Islam,[40] His book shares a partial responsibility of intervention by United Nation and International Red Cross. A United Nations (UN) Security Council Resolution also accentuated the systematic use of rape by referring to its use as 'massive, organized and systematic'.[41] The lack of official orders, viz documents, memos are compensated by the testimonies of several soldiers to prove that such actions were result of orders by higher officials.[42]

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[37] The attack was an attempt to get rid of all Bosnian Muslims even in those areas where Bosnian Muslims and Bosnian Serbs had history of peaceful co-existence for decades. For explanation, see, Rabia Ali and Lawrence Lifschultz, "Why Bosnia?" 15 *Third World Quarterly* 367-401 (1994).

[38] Roy Gutman, *A Witness to genocide* (Macmillan Publishing Company 1993).

[39] *Id.* at 39.

[40] Adriana Kovalovska, "Rape of Muslim Women in Wartime Bosnia" 3 *ILSA Journal of Int'l & Comparative Law* 931, 933-936 (1997).

[41] UN Security Council, SC Res 820, SCOR, UN Doc S/Res/820 (April 17, 1993).

[42] The testimony of one woman revealed that upon asking her rapist why he was doing so he responded with "[W]e have orders to rape the girls"; *Supra* note 38 at 5. Other testimonies reveal that the rapists all responded with "because you are Muslims and there are too many of you; *Supra* note 38 at 37. Many rapists upon being interviewed

The fact that the Bosnian Serbs used rape as a tactic of war can be deduced from the manner in which the same was carried out. The United Nation Committee on Bosnia categorised it five types. First, the ones aiming at driving people out of their homes. Women of one village were targeted and raped. When word of these incidents reached nearby villages, locals fled their homes to avoid the same fate[43] and ended up being homeless. This was a deliberate attempt to instil fear into the minds of the Bosnian Muslim Community.[44] Many rapists upon being interviewed said that they did not want to do it, but were under strict orders to do so with threats to their life upon failure to comply.[45] Second, the method of carrying out this systematic regime of rape was capturing women and keeping them captive at detention centres where they were raped continuously and repeatedly.[46] The UN reported that gang rape was especially prevalent in detention centres such as Foca High School and Partizan Hall.[47] In third category, rape was an action that happened at the very time of invasion by single or multiple persons publicly or privately.[48] The forth category established 'rape camps' where the main motive used to be forced impregnation of women with Chetnik babies.[49] As the Muslim culture the ethnicity of the father is inherited by the child,[50] the child born out of rape will have a Serbian father and Bosnian Muslim mother will not be a pure Muslim-Bosnian, but having an ethnicity of mixed parentage and a deemed Serbian.[51] Confinement of these women resulted in their inability to abort the foetus and bear with rapist's baby.[52]

An additional category was there where the women were subjects of makeshift brothels, and unlike that of those confined in detention centres, their fate lead to death instead of being released.[53] The other categories than this, killed two birds with one stone. Such rapes led to social ostracism towards the victims because in a community as patriarchal as the Bosnian Muslim community these girls were now seen as impure and unfit for marriage.[54] This in turn ensured that the ethnicity was 'corrupted' and the extension of that bloodline would not continue as the

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said that they did not want to do it, but were under strict orders to do so with threats to their life upon failure to comply.

[43] *Supra* note 15 at 73.

[44] *Ibid.*

[45] Claudia Card, "Rape as a Weapon of War" 11 *Women and Violence* 5, 10 (1996).

[46] *Supra* note 15 at 73.

[47] Teresa Iacobelii, "The 'Sum of Such Actions': Investigating Mass Rape in Bosnia-Herzegovina through a Case Study of Foca" in D. Herzog (ed.), *Brutality and Desire* 267-268 (Palgrave McMillan, 2009).

[48] *Supra* note 15 at 73.

[49] *Ibid.*

[50] Sherrie L. Russell-Brown, "Rape as an Act of Genocide" 21 *Berkeley Journal of Int'l Law*. 350, 362 (2003).

[51] *Ibid.*

[52] Kelly Dawn Askin, *supra* note 16 at 273.

[53] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* 73-4 (Intersentia, Oxford, 2005).

[54] *Supra* note 16 at 268.

women were no longer fit to bear a child on account of polluting the bloodline.[55] A conspicuous inference can be taken of strategic planning to humiliate and terrorize Bosnian Muslim communities and ethnic groups and a systematic execution of those plans from the very methods abovementioned. Thus the conclusion of rape being a tactic of war and not a consequence is undeniable.

The ICTY became the first supranational judicial body to considered rape on its gravity as human right violation and acknowledged it as a war crime; thus affirming the aforementioned viewpoint of rape. ICTY indicted eight individuals on the charge of breach of Geneva Convention by passing Foca indictment.[56] The ICTY further took an unprecedented step by issuing indictments which were expressly devoted the legal literature to rape and other kinds of sexual aggression that occurred in Foca. Then in 2001, the ICTY convicted three men who were charged on the ground of sexual abuse.[57]

The Foca Trial set a precedent on many laws, including bringing exclusive charges for sexual violence, considering rape as a form of torture and sexual enslavement as crime against humanity. These were invisible to the international community prior to the establishment of ICTY. In the opinion of Doris Buss, the establishment of 'rape as a weapon of war' laid down ground work to criminally recognize rape legally by ICTR and ICTY and thus the international law affirmed and assented to the fact that rape is not a mere consequence of crime, due to which the ICTY was enabled to legally deal with rape not only being a crime against humanity and war crime, but also as a systematically state sponsored and organized act of destruction and displacement of Bosnian Muslim population. This perspective transition was the enabling cause of ICTY being first of its kind to sanction against rape in war.

Rwanda faced a similar situation with a different ending for the women. In Rwanda the Tutsi women used to be killed after being raped, as the very intention was a complete extermination of Tutsis. The propaganda of Hutu community during the Rwandan Genocide was to infiltrate and control Tutsi community through the sexuality of Tutsi women.[58] The Human Rights Watch reports also reveals the pattern of abuse, includes being ". . . individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (collectively or

[55] *Supra* note 50.
[56] The charges included gang rape, sexual enslavement and torture, in the Foca region between 1992 and 1993. See, *supra* note 47 at 266.
[57] *The Prosecutor* v *Dragoljub Kunarac et. al.*, (1999) Case no. IT-96-23 & 23/1, Third Amended Indictment, Int'l Crim. Tribunal for the Former Yugoslavia.
[58] Human Rights Watch, "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath" 3 (September, 1993)

individually) or sexually mutilated."[59] This concludes that rape was used as a tool to utterly devastate the Tutsi community.

ICTR's judgement of *Prosecutor* v *Jean-Paul Akayesu*[60] in 1998 first time somewhat established the notion of rape as a probable act of genocide and looked towards conviction of individuals on the charges of crimes against humanity for encouraging the mass rape of Tutsi women. Jean-Paul Akayesu, a Rwandan citizen and Bourgmestre of the Taba Commune[61], had the responsibility for maintaining public order, executive functions, laws and regulations.[62] In his tenure as Bourgemestre there was widespread violence with reports of civilians being murdered and sexually violated in broad daylight with his permission and encouragement on or near the bureau communal premises.[63] The ICTR successfully established that such grave acts of inhumanity were not a foregone conclusion of war, but the act itself was a part of war which brought harm to, or rather eradicate, a group through the violation of women's bodies. This landmark decision considered rape as an act of genocide even in absence of any authority of leading instruments of international criminal law. Mikaeli Muhimana @Mika, a tradesman turned Municipal Councillor of Gishyita, a sector of Rwanda, was also convicted for committing genocide and ancillary involvement therein, rape of Tutsi women, murder and activities into crime against humanity.[64]

"Whether the victims were in fact Tutsi is irrelevant…He raped his victims with the knowledge that the rapes formed part of a widespread and systematic attack on the Tutsi civilian population."[65] The ICTR showed a shift in thought from rape as a war crime, to rape as an act of genocide.

3. RAPE AND THE INTERPRETATIONS OF GENOCIDE CONVENTION

After years of ignorance, finally in the of *Prosecutor* v. *Jean-Paul Akayesu*[66] the act of rape of such nature got recognition as war crime and an weapon of genocide in the domain of international law.[67] The problem lies with the fact that though in various conventions rape, forceful

[59] *Id.* at 23.
[60] *Prosecutor* v. *Jean-Paul Akayesu* (1998) Case No. ICTR-96-4-T, Judgment, Int'l Crim. Tribunal for Rwanda.
[61] *Id.* ¶ 507.
[62] *Id.* ¶¶ 3-4.
[63] *Id.* ¶ 12B.
[64] *Prosecutor* v *Mikaeli Muhimanaa* (2005) Case No. ICTR-95-1B-T, Judgement ¶ 558, Int'l Crim. Tribunal for Rwanda.
[65] *Id.* ¶ 561.
[66] *Prosecutor* v. *Jean-Paul Akayesu* (1998) Case No. ICTR-96-4-T, Judgment, Int'l Crim. Tribunal for Rwanda.
[67] *Supra* note 33 at 359.

impregnation, other form of sexual violence is declared as crime against humanity[68], it nowhere recognized in any convention of international criminal law that these can be considered as an act of genocide and war crime.

The previous section traced the history as to rape's recognition as war crime and genocides. The transition of rape being held as a ramification of war to a tactic of war is elaborates the jurisprudence of the rape being war crime efficiently. This section focuses more on philosophical and psychological foundation of it being genocide.

3.1 Ambit of The Offence of Genocide With Significance to Rape

The act of genocide is made a criminal act by the Genocide Convention of 1948.[69] Various sources[70] of definitions of genocide concerns state the same essentials. Abiding the general principle of criminal law, International Criminal Law also acknowledges that concurrence of *mens rea* and *actus reus* is essential to convict individuals.[71] In relation to genocide the very "intention to destroy intent to destroy, in whole or in part, a national, ethnical, racial or religious group"[72] is considered to be reflection of a guilty mind as per Article II of the Genocide Convention and the broad illustrations mentioned therein is the *actus reus*. Mainly killing, directly or indirectly causing physical and mental harm and acts effecting the future generation of the victim group is considered to be acts of genocide. The direction, public incitement, attempt, and complicity is also condemned apart for physical commission of it.[73]

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[68] Rome Statute of the International Criminal Court, art. 7.

[69] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. II.

[70] Rome Statute of the International Criminal Court, art. 6. Same definition of genocide is provided in both the Genocide Convention and the Rome Statute which says:

> ". . . '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."

[71] All though ICC Statute left the questions of mitigating factors (e.g. provocation, necessity etc.) to the Court, the foundational principals considered as mandatory as it is national laws. See, Johan D. Van der Vyver, "The International Criminal Court and the Concept of *Mens Rea* in International Criminal Law" 12 *University of Miami International and Comparative Law Review* 57-149 (2004).

[72] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. II.

[73] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. III.

Rape, as an act, though inflicts injuries upon both on the body and the mind of the victim; its overall consequences are farfetched. Various examples are provided in the previous section that heavily attracts illustrations (b), (c)[74] and (d) of Article II.

3.2 Effects of Rape: Attracting the Definition of Genocide

The notion of rape, as it was previously stated, was considered as a mere attack on the dignity of women but when done at large with more aggression, it affects the mental health of all persons associated with the victims, and also to the society at large. In fact, more than in the ethnic wars, in genocidal wars rape is likely to be used as 'central technique'.[75] It may take through various means, resulting several effects, as a form of lethal violence itself. For, example, raping till death, or raping in order transmit diseases like HIV,[76] or inflicting such kind of physical trauma that will make the victim psychologically unable to conceive child.[77] Great psychological disorders, like anxiety disorder, bipolar disorder, depressive disorder, eating disorder, obsessive compulsive disorder, PTSD, substance use disorder, are common among any rape survivor.[78]

When being raped in front of husband or father or publicly[79], it increases the humiliation many folds, not only for the victim but for the whole society. The object of such actions was to destroy the social bonds, to terrorize and to inflict enough psychological injury to make the whole community emotionally dead.[80] In addition to earlier discussion on the its efficiency as a mode of torture it had also social repercussions of forced impregnation. As seen in many countries like Bangladesh, Yugoslavia and Rwanda[81] the invading country destroyed the chance of inter-community reproduction through impregnating the women with 'enemy babies' by using the later' patriarchy in society.

3.3 Recognition by Institutions

[74] Relying on MacKinnon's feminist works on 'genocidal rape'. See, Catharine MacKinnon, "Rape, Genocide and Women's Human Rights" 17 *Harvard Women's Law Journal* 5-16 (1994).
[75] Christopher H. Mullins, "'He Would Kill Me with His Penis': Genocidal Rape in Rwanda as a State Crime" 17 *Critical Criminology* 15 (2009).
[76] Lisa Sharlach, "Rape an genocide: Bangladesh, the Former Yugoslavia , and Rwanda" 22 *New Political Science 89,* 99 (2010).
[77] Katrina Lee Koo, "Confronting a Disciplinary Blindness: Women, War and Rape in the International Politics of Security" 37 *Australian Journal of Political Science* 525, 529 (2010).
[78] For detailed analysis on psychological science, see, Emily R. Dworkin, "Risk of Mental Disorders Associated with Sexual Assault: A Meta Analysis", 21 *Trauma, Violence and Abuse* 1011-1028 (2020).
[79] *Supra* note 15 at 73.
[80] *Supra* note 45 at 9.
[81] *Supra* note 76.

Many institutions of international law, including nations, UN Bodies and international organizations have recognized rape being a usual element in the actions of genocide. Tadeusz Mazowiechi, an UN appointed special rapporteur, pressed on the significant role of rape as an instrument of 'ethnic cleansing' – attacking body and mind of the individual victim – being efficient in inflicting humiliation, shame and terror to the community at large.[82]

The International Committee of the Red Cross has also made declaratory observation that the idea of 'rape' comes under the ambit of the expression "[w]ilfully causing great suffering or serious injury to body or health"[83] – being included under grave breach of the 4th Geneva Convention.[84] This position was paralleled by many countries like US and France which can be traced through their draft charters submitted to United Nation Secretary General after the Security Council Resolution No. 808.[85]

4. CONCLUSION

Although the method of perceiving rape over the years has changed, the one thing that has remained common throughout the years is the fact that the occurrence of sexual violence during armed conflict still persists. With the passing of time, these occurrences are becoming more and more strategic and deliberate, aiming at hurting the core sentiment of either of the parties. It is however heartening to see that the mindset of the international community has progressed considerably. Elaboration is give the history that tell the character of rape and the transition of its recognition as inevitable consequence of war to considering it as a war crime to terming it as an act of genocide. It could have been included in 1948 itself during the very enactment of the Genocide Convention. But due to the ignorance, lack of awareness as well as rigidity of the international community as well as the various human rights bodies, it was disregarded and it was seen purely as an act of attack on dignity and contempt of women. The key focus should be eradicating the crime and not protecting the honour of the women, which is indeed the main concern. International Law is a dynamic subject, changing to fit the era. This study shows that not the aggression of the extremists, but the rigidity, orthodox views and unawareness of the regulators and the lacking sense of moral obligation is the truest enemy of protecting human rights.

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[82] Tadeusz Mazowiecki, "*Report on the situation of human rights in the territory of the former Yugoslavia*", United Nations Digital Library, *available at:* https://digitallibrary.un.org/record/152801/files/E_CN.4_1992_S-1 _10-EN.pdf (Last Modified October 27, 1992).
[83] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147.
[84] Theodor Meron, "Rape as a Crime under International Humanitarian Law" 87 *Journal of International Law* 424, 426 (1993).
[85] *Id.* at 427.

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NARCO ANALYSIS: A HELPING TOOL IN CRIMINAL JUSTICE SYSTEM OR NOT?

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ABSTRACT

In this paper, I have tried to assimilate information on the use and misuse, the technique and methods and the judicial approach in India as well as concerned laws on the scientific method like, Narco Analysis in administration of justice in a better way. This study also includes the pros and cons of the above scientific method for crime detection and other civil matters as well as the application of this technique in the Indian legal system, with a brief view of legal system of other countries. I have discussed the limitations as well as the shortcomings in application of scientific evidences in administration of justice. Scientific development and innovations are contributing immensely in the process of administration of justice and crime detection.

1. INTRODUCTION

In criminal investigations the evidence is gathered from information elicited from the suspects and witnesses. From times immemorial, several methods have been employed for detection of lies and deception. Also, as observed in ***Olmstead vs United States***[1] that the quality of a nation's civilization can be measured by the method it uses in the enforcement of its criminal law.

The major difficulties in criminal law are tracing of a crime and to find out the criminals and it can be made much easier if the scientific tests are adopted. As such, though the scientific test may not be enough evidence to convict a person, yet it can be looked upon as a tool or aid towards guiding the police and prosecution in the right direction to collect evidence.

The new scientific innovations are immensely contributed in the process of crime detection and administration of justice. The Courts are heavily depending upon the evidence obtained through scientific methods to find out the truth. This is so because the results of scientific methods used for obtaining relevant information's are accurate and can be relied upon. Many new scientific techniques like DNA, Fingerprinting, Narco Analysis, Brain Mapping, P300 tests etc. have

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[1] *277 US 438 (1928).*

developed considerably and the testing methods have been achieved with consent researches. The results of these scientific techniques are being widely used not only in the criminal justice system but even in civil cases also. Moreover, with the improvement in the computer technology, it has become very easy to store, search and analyse great amount of genetic data.

Deception Detection Test (DDT) such as polygraph, Narco – analysis and brain mapping have important clinical, scientific, ethical and legal implications.[2] The DDTs are useful to know the concealed information related to crime. This information, which is known only to self, is sometimes crucial for criminal investigation.[3] The DDTs have been used widely by the investigating agencies. However, investigating agencies know that the extracted information cannot be used as evidence during the trial stage. They have contested that it is safer than 'third degree methods' used by some investigators. Here, the claim is that, by using these so called, "scientific procedures" in fact - finding, it will directly help the investigating agencies to gather evidences, and thereby increasing the rate of acquittal of the innocent.[4] Recently, these methods are being promoted as more accurate and best to none, without convincing evidence.

The national criminal justice system policy prepared by ***Professor N.R. Madhavan*** has recommended that evidence collected through scientific method must be admissible in courts as substantive evidence and not just opinion evidence. The ***Malimath Committee*** has also recommended that there must be greater participation of the accused in the investigation. This will ensure that scientific tests are utilized more and more in the investigation process.

2. MEANING OF NARCO-ANALYSIS

It is a method of psycho – analysis practiced by psychiatrist.[5] Hence, it is a mode of psychotherapy which is an aid to the scientific interrogation in reality. In this technique, a short acting narcotic drug is introduced or administered in the body of the subject which affect his nervous system and in drugged state, information regarding crime is elicited from the subject.

The underlying theory is that a person is able to lie by using his imagination, but due to the influence of drug a person losses his self control as a result of which he fails to imagine the fact

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2 Wolpe PR, Foster KR, Langleben DD. Emerging neurotechnologies for lie-detection: promises and perils. *Am J Bioeth* 2005; *5* : 39-49.

3 Nose I, Murai J, Taira M. Disclosing concealed information on the basis of cortical activations. *Neuroimage* 2009; *44* : 1380-6.

4 Smt. Selvi & Ors vs. State of Karnataka Judgment on 5 May 2010. (Criminal Appeal No. 1267 of 2004). Available at: *http://supremecourtofindia.nic.in.html.*

5 Dr. B. Umadethan, "Medico – legal Aspects of Narco – Analysis" 2 *Nual Law Journal* 21 (2008).

and would speak the truth. In this state it is very difficult for him to tell lies, rather he would talk about which he had the knowledge. The utilization of such drug in police work or interrogation is alike to the traditional psychiatric practice of Narco – Analysis and the only difference in the two procedure is the difference in the objectives.[6]

A new terminology had been added in the field of Criminal investigation through forensic science in the year 1936 which is known as Narco-Analysis test.[7] The term 'Narco-Analysis' is derived from the Greek word Narco (meaning "anaesthesia" or "torpor") and is used to describe diagnostic and psychotherapeutic techniques that used psychotropic drugs, particularly barbiturates to induce a stupor in which mental element with strong associated effect come to the surface, where they can be exploited by the therapist.[8] It is also known as drug hypnosis or a truth serum or a combination of hypnosis or narcosis .Thus it is method to make human thought and communication manageable.[9] According to Webster Dictionary, "Narco-Analysis means psycho analysis in a state which is similar to sleep and this state is achieved by use of drugs. These drugs are known as 'truth drugs' or 'truth serum'."

3. NARCO-ANALYSIS TEST

The criminal justice system is no more different from other systems and it has also affected from new technological advancements. The deception detection test is one of the technologies which utilizes as a tool in the extraction of truth in the investigation process. It includes Narco analysis, Lie detector and brain mapping. As in present complex society numbers of new criminal activities have grown up and criminals have started using new techniques for hiding and committing crime making it very difficult for investigating agencies to solve these complex cases with traditional methods. One of the consequences is that there is great demand of new technologies in the criminal justice system. Even various experts and committees have also recommended for the use of these technologies. These technologies are not only important for investigating the crimes but also helpful in the tracking out the future criminal activities going to commit by the criminals in

6 Critical Study of validity of Narco – Analysis with reference to Article 20 (3) of the Indian Constitution available at www.google.com.
7 Gujarat Law Herald sponsored by the Bar Council of Gujarat, (20, 44) 2009.
8 Robert house, a Texas obstetrician used the drug scopolamine on two prisoners in 1922.
9 Naresh Kumar and Ved Pal Singh, "Narco – Analysis test in investigation process: Law and Judiciary" XVI, *MDU Law Journal* 108 (2009)

the society. Though there is a demand for the use of these techniques but at the same time it raises legal, ethical and some medical issues regarding use and implication of these techniques.[10]

Narco Analysis Test for criminal interrogation is a valuable technique which helps investigating agency to further investigate the crime when it finds itself clueless and no further headway can be made. The investigating agency i.e., the police is often accused of applying third degree methods to elicit information and there are instances of custodial deaths of the culprits or suspects during the course of investigation allegedly due to application of third degree methods. The police is therefore, blamed for flagrantly violating the human rights and fundamental rights guaranteed by Article 21 of the Constitution of India. Hence there is need to apply scientific tests to elicit information from the culprits or the suspects to solve crimes. This necessitates an urgent need for the detection of crime, based on scientific principles to minimize the scope for the investigating officers resorting to degrading treatment.[11]

The foundation of criminal justice system is to prove the guilt of accused beyond all reasonable doubt and to protect the innocent from wrong conviction. This is all possible by the search of truth. On the way of scientific evidence such as biological evidence cannot tell a lie and decision arrived at by such an evidence is said to be justice through science.[12] A generally acceptable scientific evidence which is to be acceptable to courts of law and scientific community is known as "Forensic" evidence. Such evidence must satisfy the test of admissibility according to the Indian Evidence Act 1872. But the problem is admissibility of evidence given under **Neuro Science** which is considered as rape of mind of person.[13] As it has destroyed safeguard which exist in Article 20(3) of Constitution of India.[14] Right to Privacy[15] is available under the Constitution of India as such no person can be compelled to undergo any scientific test for collective evidence against himself or herself.[16]

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10 Barnwal, Ajay Kr, and Dr. S.N. Ambedkar, "Narco Analysis Test: An analysis of various Judgments of Indian Judiciary", *IOSR Journal of Humanities and Social Sciences (IOSR-JHSS)*, Vol. 19, Issue 10, Ver. I p. 52, (Oct – 2014). Available at, http://www.iosrjournals.org.html.

11 Dr. Shakeel Ahmad, "Narco Analysis and Rights of Accused: An Appraisal", *Civil and Military Law Journal*, Vol. 50, No. 3, p. 259, July – September 2010.

12 Ajay Kr. Barnwal & Dr. S.N. Ambedkar, "Narco Analysis Test: An Analysis of various Judgments of Indian Judiciary", *IOSR Journal of Humanities and Social Science (IOSR-JHSS),* Vol. 19, Issue 10, (2014) available at http://iosrjournals.org/iosr-jhss/papers/Vol19-issue10/Version-1/H0191015257.pdf see also, http://www.tawandscience.com.html.

13 Raghurama Sulekhar, *Rape of the Mind*, Available at, http://www.raghurama.sulekhar.com.html.

14 The Constitution of India, Article 20(3).

15 The Constitution of India , Article 21.

16 *Teeku Dutta vs. State*, AIR 2004 Del. 205 (207).

Narco Analysis figured prominently in the news again when it became eye of the storm and sparked off the debate when media played tapes of **Telgi,** accused subjected to Narco Analysis procedure carried out by SIT on 20 - 22 December, 2003 under permission from a Special Court dealing with cases under the **Maharashtra Control of Organized Crime Act** (MCOCA) Located in Pune.[17]

4. NEUROSCIENCE

The study of brain and the nervous system is called *"Neuroscience"*. While investigating the cases some criminals prove to be a hard nut to crack.[18] In such cases, to prove evidence, the investigating teams generally end up by adopting unfair means, it is fruitful to rely on science. With the advance scientific discovery, working with their experts, the investigating officer can read the mind of suspect and dig out concealed information and evidence. The whole neuro law is based on brain science which moreover Indian Constitution have permitted legislative system to take necessary steps in making law for justice through science.[19] According to Constitution of India, Part IV-A, it shall be the fundamental duties of every citizens of India to develop the scientific temper, humanism the spirit of inquiry and reform;[20] that has bought volcano in present day administration of criminal justice system.

Narco Analysis Test is based on the principle that a person is able to lie by using his imagination and in Narco Analysis this capacity for imagination is blocked or neutralized by leading him into semiconscious state and in this stage it becomes difficult for the person to lie and his answers would be restricted to facts he is already aware of.

The questions that Narco Analysis poses are many and varied. How truthful is truth serum? Is it just nothing but a drug induces confession? Doubts are raised whether the accused to undergo Narco Analysis is violative of Article 20(3) of Constitution,[21] which guarantees right against self-incrimination. This privilege against self-incrimination also provides the individual right to remain silent. However the judicial sanctions for these methods of truth extraction rests on the

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17 Kumari S. Kususm, "Narco Analysis – Right to Self Incrimination vs. Public Interest", *Criminal Law Journal*, p. 137, June 2007.

18 Crime Scene Investigation, available at, http:// www.crime-scene –investigator.net.html.

19 Seventh Schedule of Indian Constitution provides for Institutions for Scientific or Technical Education under entry 64, 65, 66 of List 1: Union List of Constitution of India.

20 The Constitution of India, Article 51-A (h).

21 The Constitution of India, Article 20(3).

argument that guaranteed constitutional protection under Article 20(3) does not apply to investigation stage.[22]

5. PRESENT SCENARIO ON NARCO-ANALYSIS

Our criminal justice system is in need of a major overhaul owing to the snail's pace progress of investigation and trial. A large number of people languish in jails for years on the want of proper evidence.[23] In such a precarious situation, evidence gathered through scientific methods must be a welcome step.

Section 27 of The Indian Evidence Act provides the scope of immense progress in investigation in the event of taking the narco analysis test. The section clearly says that *"if a relevant discovery has been made on the basis of some information given by the accused, that information can be provided in court"*. This will be no less advancement that can hugely facilitate the work of the police for the purposes of investigation.[24]

Thus if an accused in a state of semi-consciousness because of the effect of narco-analysis test, gives valuable information which was hitherto unknown to the police but thereon on the basis of that information, a relevant discovery in regard to the offence has been found out by the police, that information as having a real link with the discovery made, can be proved in court. This is in fact a path-breaking provision, which subsumes in its fold these scientific methods of criminal investigation without infringing the right against self-incrimination.[25]

6. NARCO-ANALYSIS IN POLICE INVESTIGATION

Indian police officers believe that Narco-analysis as a scientific tool of interrogation and it helps a lot in crime prevention and detection. It also helps in getting clinching evidence and is an effective and non-hazardous method of inducing hypnosis. According to Indian police, if a criminal was put under Narco-analysis then he would reveal about the crime committed, where he had hidden the weapons used in committing the crime and why did he do it? This would help

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22 Kumari S. Kususm, "Narco Analysis – Right to Self Incrimination vs. Public Interest", *Criminal Law Journal*, p. 138, June 2007.

23 Colin Gonsalves, *"Clear the jails first"*, 6 Combat Law, Ed. 2007, pp 46 – 47. See also, over 2,50,000 undertrialds languishing in jails even though law presumes them innocent unless convicted. Seven out of every ten persons in jail are in this situation. Overcrowding in some jails is as high as 300 per cent.

24 Chatterjee Erina, "Narco Analysis and Brain Mapping-Means to Burst the Crime Bubble in the Context of the Privilege against Self-Incrimination", *Criminal Law Journal*, p. 77, March 2008.

25 Chatterjee Erina, "Narco Analysis and Brain Mapping-Means to Burst the Crime Bubble in the Context of the Privilege against Self-Incrimination", *Criminal Law Journal*, p. 77, March 2008.

in getting the motive for the crime and collect other evidence needed for prosecution. This investigative technique, as some argue, however humanitarian as an alternative to physical torture, still raises serious question of individual rights and liberties.

The use of so-called 'truth' drugs in police work is similar to the accepted psychiatric practice of Narco-analysis; the difference in the two procedures lies in their different objectives. The police investigator is concerned with empirical truth that may be used against the suspect, and therefore almost solely with probative truth: the usefulness of the suspect's revelations depends ultimately on their acceptance as evidence by a court of law. The psychiatrist, on the other hand, using the same 'truth' drugs in diagnosis and treatment of the mentally ill, is primarily concerned with psychological truth or psychological reality rather than empirical fact. A patient's aberrations are reality for him at the time they occur, and an accurate account of these fantasies and delusion, rather than reliable recollection of past events, can be the key to recovery.[26]

7. LEGAL ASPECT ON NARCO-ANALYSIS IN INDIA

There are several legal aspects connected with the narco analysis test. India follows the adversarial system of law and it requires that the investigative agencies have the duty to collect evidence and central point of this system is the assumption of doctrine of innocence.

Our constitution guarantees right to every individual not to give any self-incriminating evidence. But till date, it is difficult to assess the extent of his limit.

The legislature says that no evidence is admissible if it has been obtained under compulsion. However, there is difference between mere compulsion to give information and information obtained under compulsion. The Supreme Court has defined compulsion as duress[27] Duress is said to be caused when a man compelled to do an act by injury, beating or wrongful imprisonment or threatening much or harming persons related to the accused.[28] If we analyse the process of narco analysis, we find that compulsion or duress is not present in the 'narco analysis' test. However if we analyse from other point of view the constitutional provisions provide protection against compulsion to be a witness and protection against such compulsion resulting in his giving evidence against himself. The Supreme Court has also analysed that to be a witness means imparting knowledge in respect of relevant facts by an oral statement made in writing or

26 Richardson, *Scientific Evidence for Police Officers; Scientific Tests and Experiments; Specific Methods of Proof*, W.H. Anderson Company, (1963), pp. 146-149.
27 *Bombay* v *Kathi Kaly Oghad*, AIR 1961 SC 1808.
28 *Earl Jonlet Dictionary of English Law*, available at http://www.wonderwhat.biz.html.

given in Court or otherwise but giving thumb impression, impression of foot or palm or fingers or showing parts of body by way of identification do not constitute self-incrimination.[29]

In narco analysis test interrogation is conducted on the accused in a sleep like state. Thus the controversial question remains still unsettled that whether narco analysis test is a form of compulsion resulting in giving evidence by a person against himself or not and does it amount to duress?.

Right to silence has been provided to the accused and no one can forcibly extract statements from the accused who has a right to be silent during the investigation. This was affirmed by Supreme Court in ***Nandini Sathpathy v P.L. Dani***.[30] Narco analysis test may be interpreted as being against the right to silence as well as against the constitution provisions of right to privacy, because by this test forcible intrusion into a person's mind is being applied.

Contrary to this opinion, the view of Supreme Court in ***Dagdu* v *State of Maharashtra***[31] is also worth mentioning while evaluating the legal aspects of narco analysis test. The Court in this case specifically stated that, "it is a common sense that suspects are seldom willing to furnish a quick and correct clue to the crimes for which they are arrested. A certain amount of coaxing and promising has inevitably to be done in order to persuade the accused to disclose the outlines of the crime". Hence, if a question which does not have a tendency to incriminate the accused succeeds in extracting a confession or statement from him, the usage of scientific methods cannot be said to be violative of the provision of the law or protection provided by the Constitution.

Keeping in view all the facts and circumstances it can be said that the legal system should imbibe development and advances that has taken place in science. They do not violate the legal principles and they are beneficial to the society as a whole. The narco analysis test has raised a range of objections on its modus operandi of having access to critical information. However, procedural laws have been framed so as to allow scope for the inclusion and integration of scientific methods on investigation.

The recent amendments in the Code of Criminal Procedure, 1973[32] recognize the importance of this test and the legal admissibility of their test reports have been strengthened by some of the

29 Draft Human DNA Profiling Bill, available at http://www.fooffa.com.html.
30 AIR 1978 SC 1025.
31 AIR 1977 SC 1579.
32 The Code of Criminal Procedure, 1973, Section 96 – 106 deals with Investigation Procedure.

decisions of High Courts and Supreme Court. However the real position regarding evidentiary and legal value of this test would become more clearly with course of time unless and until more judicial views are not expressed there will be conflicting views regarding it.

Now a days, the importance of Narco-Analysis test is increasing with the time. It has great importance at the time of Crime investigation. In fact it has become an integral part of the crime investigation .It is generally thought that by conducting the Narco-Analysis test the truth may be successfully revealed. So the investigating agencies conduct the test for revealing the real truth from the accused person .There are so many cases in which Narco-Analysis test was conducted by the investigating agencies. It is used as a preventive forensic tool to apart the planned crime, bursting the conspiracies it can prove to be a valuable technique to prevent the organised crime in the hand of competent team of expert.[33]

To find out the answer of the following three question, Narco-Analysis test is conducted on the accused person –

(a) What is revealed in Narco-Analysis test?
(b) What is evicted in Narco-Analysis test?
(c) What is the outcome of Narco investigation?

In the **first** category, the person is accused because of enough material evidence and only some links are missing to connect the crime to the accused .In **second** category, he is an accused because of circumstances. In the **third** category, he is only a suspect because of the complaint and witnesses statement and there is no material evidence.[34] Narco-Analysis test is basically practised by the psychiatrist to diagnose and treat the mentally ill subjects so that they can exactly know the psychological truth about the subject who is not able to reveal it. But at present, it is used by police as a method for investigation. In police investigation physical coercion has been substituted for pain staking and time consuming inquiry in the belief that direct method produce quick result.[35] Sir James Stephen has well defined the practice of employing physical force and coercion during police investigation. While elaborating it in 1883, he lamented following word- "it is far pleasanter to sit comfortably in the shades ,rubbing red pepper in a poor devil's eyes than, to go about in the sun hunting up evidence .At present Narco-Analysis test is conducted by police authorities in place of third degree method on suspect ,which seems much humanitarian

33 *Nandini Sathpathy vs. P.L. Dani & Anr.* AIR 1978 SC 1025 at 415.
34 S.L. Vaijia, *"Narco-Analysis –an aid to crime investigation"* available at http://www.legalservice.com.html.
35 Rajesh Punia "Narco-Analysis-Investigating Tool or A Torture?"115 *Criminal Law Journal*, p. 22, (2009).

method. Through these tests, the investigation officers are much concerned about the empirical facts or truth rather than psychological one so that it can be used against the suspect as evidence.[36]

According to ***J.M. Donald, Psychiatrist, District Court of Denver***[37] says that drugs interrogation is of doubtful value in obtaining confession to crime .Criminal suspect under the influence of barbiturates may deliberately without information, persist in giving untruthful answer or falsely confess to the crime they did not commit. The psychopathic personality, in particular, appears to resist successfully the influence of drugs .He concluded that a person who gives false information prior to receiving drugs is likely to give false information's under the effect of Narco-Analysis also, that the drugs are of little value for revealing deception and they are more effective in releasing unconsciously repressed material than in evoking consciously suppressed information.

In India, like other countries Narco-Analysis test is also conducted by police officer for assistance in extracting confession from the accused person. In India where drugs have gained only marginal acceptance in the police work, their use has provoked cries of "psychological third degree" and has proved to be a scientific method of interrogation, on other hand such drugs are used in Narco-Analysis test. However it has been in the news in the past few years as new effective interrogating techniques which was used by various investigative agencies in many cases. For example it was first used in 2002 in case of ***Godhra Carnage Probe***, in 2003 in case of ***Abdul Karim Telgi, Arushi Murder case, Nithari case*** etc. In this way, it has wide importance in the field of legal science. Doubt have been cast on its reliability and legal validity i.e. admissibility in the court of law .The application of Narco Analysis test involves the fundamental question pertaining to judicial matter and human rights. However, the legal position of applying this technique as an investigative aid arises genuine issues like encroachment of an individual's rights, liberties and freedom. With crimes going hi-tech and criminals becoming highly trained professionals, the use of Narco Analysis by the investigating agency can be very useful, because whereas the conscious mind does not speak out the truth, unconscious may reveal the information, which could provide vital lead in. Even under the best condition, these tests could result in an output contaminated by deception, fantasy and garbled speech.[38]

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36 A.K. Kala, "Ethically comprising position and blatant lies about 'truth serum', *49 Indian Journal of Psychiatry*, pp. 6-9 (2007).

37 J.M. Mac Donald, "Narco-Analysis and Criminal Law", *A.M.J. Psychiatry* 1954:111:283.

38 Kalvakota Srinivas Rao, "Narco-Analysis" *ALTJ*, 14 (2008).

Every government whatever be its form, must uphold the law and maintain in the society which it govern .These are the basic functions which is essentially done through what is called "Criminal Justice System" (CJS).[39]

With the rapid increase in the activities of modern state, individualisation and changes in the socio-economic and political scenario, more and more new crimes are coming up such as the custodial crimes, insurgency, terrorism, organised crimes, political crime and cyber crime etc apart enomorous increase in the traditional crimes like murder, rape, cheating, dacoity, domestic violence against women and children etc. The Criminal Justice System has failed to deliver proper justice to people at large. The different sub-system of Criminal Justice System has not been able to meet their goals and people have lost their faith in the existing Criminal Justice System.[40]

Justice ***Gajendragadkar*** made the following observations in 58th report of law commission of India which is quite noteworthy:

> *"We have sound judicial tradition and a rational and systematic judicial process. There is no doubt that these factors have conferred great advantage on the country. An independent and efficient judiciary, a unified judicial system and a modernized procedure use though legacies of the pre-independence era, have always been cherished by us. The judicial system has earned in respect so earned is well deserved."*[41]

Science and Technology are the modern–day engines of change and they continue to turn relentlessly forwarded. The impact of change on all areas of human life has been dramatic. Advancing technologies, along with the legislation designed to control it, will create crimes never before imagined. The future will see a race between technologically sophisticated offenders and law the enforcement authorities as to who can wield the most advanced skill on either side of the age-old battle between crime and justice.[42]

The present technique of Narco-Analysis test is now being used rampantly in Criminal Justice System. It is an effective technique with which help the crime can easily solved. "Narco-Analysis" is a useful and non invasive asset for the investigation and for the prevention of crimes and if used in a scientific way, it can be very useful for the thorough interrogation of the suspect.

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39 CBI Bulletin, Vol. XII, Jan.2004, 14. Available at http://www.worldcat.org/title/cbi-bulletin/oclc/2580418.
40 *The Indian Journal of Criminology and Criminalistic*, Vol. XII, p. 1, May-Aug. 2003.
41 Ibid, at p 7.
42 Schmalleger Frank, *Criminal Justice Today, An Introductory Text for the Twenty-First Century 64*, Prentice Hall (North Carolina), 4th Edition ,1997.

There are so many other methods for interrogation of the suspects such as third degree methods, Polygraph examination, psychological profiling, electrical activation and hypnosis. But Narco Analysis has so far proved to be test methods of all.[43]

7.1 Declaration of Tokyo, 1975

As per the Declaration of Tokyo 1975, the test constitutes cruel, inhuman, and degrading treatment which amount to torture.[44] A subject in the narco analysis test is examined by the doctors and the narcotic is injected in the veins of the subject. The International Code of Medical Ethics[45] stipulates that, "it is a contravention of medical ethics for health personnel, particularly physicians to apply their knowledge and skills, in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect physical or mental health or condition of such prisoners or detainees and which is not in accordance with relevant International instruments". It is also argued that forcing a person to Narco Analysis test is a form of physical abuse and also constitutes a form of torture as in the United Nations Conventions against Torture.

8. CONCLUSION

As far as Narco Analysis is concerned, it is more debated for its use in criminal investigation. The success and genuine rate of this test is high but there are many other debatable aspects of it. The truth serum, injected into the human body for narco analysis has been proved to be extremely dangerous for human health and brain functioning. As such, this test even if done with the consent of the individual is derogatory and inhuman and against the basic fundamental constitutional rights of a person. Even the International Conventions have provided against the use of such tests. Though the privilege against self-incrimination enables the observance of civilized standards in the enforcement of criminal justice, the principles embodied in Article 20 (3) of the Constitution of India is also contained in Article 14 (g) of the International Covenant on Civil and Political Rights. The right to silence guaranteed by the Constitution is also interpreted as an essential feature of fair trial within the meaning of Article 6 of the European Convention of Human Rights.

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[43] Satyendra Kaul and Mohd. H. Zaidi, Narco-*Analysis, Brain Mapping, Hypnosis & Lie Detector Test, An Interrogation of Suspect,* Alia Law Agency, Allahabad, Ed. 2008, p. 438.

[44] World Medical Association. *Declaration of Tokyo* (1975). Adopted by the World Medical Association, Toyko, Japan. October 1975. Available at http://www.smh.com.au/news/world.html.

[45] Dr. Umadethen B, "*Torture- Principles and Practice of Forensic Medicine",* Swami's Law Publisher, Kotchi, 2008, pp. 615 – 617.

Narco Analysis has been widely discussed and there are controversial views in favour of and against of it. Many, who favour use of such tests, argue that the narco analysis is not an extraneous procedure and does not come within the ambit of testimonial compulsion. It is also argued that Section 53 (1) of Cr .P.C, 1973 permits use of reasonable force to ascertain those facts which may afford evidence. It is also observed that the narco analysis test is far better than the third degree methods employed by our police for extraction of truth from an individual.

Narco-analysis was for the first time utilized in India in 2002 in the **Godhra Carnage Case**. In ***Ramchandra Reddy and Ors. Vs. State Of Maharashtra,*** **Criminal Writ Petition NO. 1924 OF 2003**, their Lordships, upheld the legality of the use of P300, Brain Mapping and Narco analysis test on the accused. On the other hand, in the ***Abdul Karim Telgi Fake Stamp Paper (2006) Case,*** the prosecution got to the bottom of the matter successfully during the Narco Analysis in which King Pin, namely, Karim Lala Telgi blurted out the truth-gave out the names of his VVIP accomplices and illegal business details and immense amount of information was yielded, but doubts were raised about its credibility as evidence. The Apex Court of India stayed the order of a Metropolitan Judge in 2006, to conduct Narco-analysis on the accused in the ***Krushi Cooperative Urban Bank (Kucb) Case***. The raison d'être was that the accused refused to sign the consent form and the concerned Forensic Science Laboratory declined to conduct the Narco-analysis test without a duly filled and signed consent form.

As against the use of it the question remains unsettled as to whether such tests can be allowed to be conducted even when it has been proved that the narcotic drug inducted for the purpose of the test is harmful for the personal safety of a person and can endanger his life. It cannot be considered as a scientific test as it involves interrogation of a person in a drugged state and amounts to torture. The methodology of the test is illegal, inhuman and unethical and is a gross violation of human rights. Though, the test was held to be constitutional and legal by many High Courts across the country, but this test has been held to be illegal and against the constitutional provisions by the Apex Court of our country in **'Selvi's** case.

In the recent past the issue was brought before the Apex Court in ***Selvi vs. State Of Karnataka***.[46] The question required their Lordships to spell out the scope and extent of the protective umbrella enshrined in Article 20(3) which is commonly known as the "right against self incrimination". The Court addressed the rationale behind the non-derogable norms guaranteed under Article 20(1) to Article 20(3). In the case at hand, the accused had challenged

[46] AIR 2010 SC 1974.

the validity of each of the impugned scientific tests like **Narco Analysis, Polygraphy** and **Brain Finger Printing** as being violative of Article 20(3) of the Constitution because the tests were carried out without their consent. They pleaded before the Court that these scientific techniques violated their right against self incrimination guaranteed by Article 20(3) of the Constitution. On the other hand, the State argued that it is in the interests of the investigation that the crime should be efficiently investigated as ordinary methods are not workable in many such cases. The bench came to the conclusion that the results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence and the following tests were laid down in this case:

(i) That, the right against self incrimination and personal liberty are non-derogable rights,

(ii) That, the investigation of offence and examination of any accused cannot override Constitutional protection guaranteed by Article 20(3) and that the protection springs right from the stage of investigation,

(iii) That, under the law of the land a person who is examined during the investigation, has been given a choice, either to speak or to remain silent.

(iv) That, the statements having non-penal consequences are outside the purview of Article 20(3), but the accused in those cases, can invoke other articles of the Constitution like Article 21;

(v) That, the compulsory administration of the Narco-Analysis technique amounts to "testimonial compulsion", and thereby hits the protection guaranteed by Article 20(3).

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REALIZING HUMAN RIGHTS OF HOMOSEXUALS IN INDIA

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ABSTRACT

Human rights of homosexuals have always been ignored and discriminated by the mainstream, and also devoid of express recognition of their rights in legal paradigm. This paper analyses realization of rights of homosexual in India especially by providing deep insight into principles invoked by the higher courts to realize their rights and decriminalization of homosexuality. This paper analyses the concept of living constitution in context of changing social needs of society and rights of homosexuals, and also provides an insight into transformative constitutionalism which impels the courts to interpret human rights to bring equality in the society and apply equality in respect to confer equal rights to same sex marriage and other allied rights. This paper also provides an insight into how things are changing with time and society. New ideas must be accommodated and vulnerable sections of society must get equal benefit of all rights without any discrimination.

1. INTRODUCTION

Discrimination against homosexuals is prevalent around the globe, though majority of the States have decriminalized homosexuality. In September 2018, the Supreme Court of India decriminalized homosexuality, progressively interpreted the fundamental rights in wider context to realize rights of homosexuals in India. Homosexual rights have been violated in India; they are subjected to torture. Michael O'Flaherty and John Fisher explain, "This gap is startling when one considers the authoritative evidence of such persons (LGBT people who belong to a racial minority) facing forms of "double discrimination".[1]Recognition of same sex marriage in India will not only allow the couples to live together but it will also confer other social benefits arising from the institution of marriage, though some of the thinkers are against the institution of marriage.[2] Decriminalization has opened the door for homosexuals to enter into marriage but realizing their other civil rights as enjoyed by the heterosexual couples are really conflicted issue. Constitution of India ensures equality, liberty and dignity[3] of every individual and further these have been incorporated to be implemented under part III in form of Fundamental Rights and Part IV in form of socio-economic rights. Homosexuals couples' marriage has been become a

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1 Michael O'Flaherty & John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*"* 8 *Human Rights Law Review* 207 (2008).

2 *Ibid.*

3 The Constitution of India, Preamble.

debated issue due to non-recognition of marriage, and it leads to denial of other civil rights arising from the institution of marriage. These rights are required to be realized by interpreting the constitution liberally and as transformative document.

This paper argues the realization of rights of homosexuals in India and how it has been made possible in India with decriminalizing homosexuality by the apex court with invocation of progressive interpretation of fundamental rights beyond binary system like Constitution as living document which changes over time according to new social needs. To interpret the constitution widely the court has invoked comparative analysis approach with other countries especially invoking international human rights law treaties which have been signed by India and is bound to fulfill its obligations. The court invoked the concept of transformative constitutionalism for pragmatic and progressive realization of rights of homosexuals and how it will be inclusive for sexual minorities.[4] Part I of the paper opens with introductory remarks which led to denial of civil rights and discriminatory practices prevalent in society and legal domain. Part II of the paper argues international human rights regime that protects human rights of sexual minorities and how the international courts and bodies like Human Rights Committee, European Court of Human Rights and other regional courts are interpreting the existing human rights to accommodate same sex couples to confer civil rights without any discrimination. It also provides an insight into soft law instruments to do away with discrimination against homosexuals prevalent around the globe. Part III of the Paper critically analyses the concept of living constitution for realizing homosexual rights and broader interpretation that requires broader visualization of goals enshrined in the constitution. This will provide an insight how apex court has interpreted the constitution as living document for progressive realization of rights of citizens and bring equality in the society. Part IV of the paper argues transformative constitutionalism for rights of homosexual rights in India. It provides an insight into concept of transformative constitutionalism and how it impels the court to take progressive interpretation. This part provides insight how the court has interpreted preamblular goals, articles 14, 15, 19 and 21 of the constitution to accommodate homosexuals in changing society. Part V of the paper contains conclusive remarks on the basis of the discussion occurred in previous parts of the paper.

2. RIGHTS OF HOMOSEXUALS UNDER INTERNATIONAL HUMAN RIGHTS LAW

[4] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

International human rights have provided active shelter to homosexuals, though there is no specific mention of sexual orientation in binding and non-binding international human rights instruments except Yogyakarta principles. International human rights jurisprudence has been expanding very widely and becoming most inclusive due to liberal interpretation. International human rights regime recognizes human rights of every person. So far international human rights regime is concerned, there are no binding human rights instruments containing sexual orientation. Universal Declaration of Human Rights, 1948 recognizes inherent dignity of a human being and provides "recognition of inherent dignity and of equal and inalienable rights of all members of the human family."[5] Article 1 provides all human beings born free and equal in human dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[6] Article 2 further provides that there will be no discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[7] Article 7 of the UDHR contains everyone is equal before the law and has equal protection of laws. States should not discriminate any person on the basis of grounds contained in Article 2 of the Declaration.[8] Universal Declaration of Human Rights is legally non-binding but has been a part of customary international law. States are morally obliged to implement human rights declaration in their domestic laws. In 1966, the UN general assembly has adopted two legally binding human rights covenants, International Covenant on Civil and Political Rights, 1966 and International Covenant on Social Economic and Cultural rights, 1966. Article 2 of ICCPR contains principle of non-discrimination that no one shall be discriminated on the basis "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." And states shall also take all possible measures to eliminate every kind of distinction.[9] Article 12 provides equality before law and equal protection of laws for all human beings. Option Protocol I of ICCPR provides an opportunity to individuals to take action against their state for violation of human rights guaranteed under ICCPR before Human Rights Committee. Human rights committee has rendered various decisions regarding sexual orientation. Article 1 of the Vienna Declaration and Program of Action confirms that universality of human rights is beyond any question.[10] Though there is nothing, that is more paramount implying the universal standards of human rights nor anything violates the core of any culture. Instead, after reasserting the

[5] Universal Declaration of Human Rights, Preamble.
[6] *Id.* art. 1.
[7] *Id.* art 2.
[8] *Id.* art. 7.
[9] ICCPR, art- 2.
[10] Vienna Declaration and Program of Action 1993.

universality, indivisibility, interdependence, and interrelationship of all human rights, Article 5 of the Vienna Declaration states: "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms"[11]there are various human rights resolutions passed by United Nations General Assembly and Human Rights Council. In 2006, 54 states jointly submitted a statement regarding human rights, sexual orientation and gender identity. In 2011, similar joint statement submitted by 85 states titled "Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity"[12]. Human Rights Council on 30 June 2016, adopted "protection against violence and discrimination based on sexual orientation and Gender identity".[13]UN General Assembly adopted various resolution related to rights of sexual minorities are discrimination prevalent against them in society.[14] These resolutions mainly focus on extra judicial killings, violence, and torture and so on. These resolutions discuss violation of human rights violation of LGBT rights and also ask the states to enact laws for the protection of sexual minorities. These resolutions are soft human rights instruments which are non-legally binding.

From 6 to 9 September, 2007, International panel of independent experts adopted Yogyakarta Principles[15] meeting held in Yogyakarta, to recognize human rights of the sexual minorities. These principles are non-binding in nature international human rights courts and domestic judicial bodies are realizing and interpreting human rights and sexual orientation as human right. Yogyakarta principles consist of 29 principles. Preamble contains various terms and definitions for realization of sexual orientation and gender identity as human rights issue. Principle 1 recognizes universality of human rights and sexual minorities are entitled to all human rights. Principle 2 contains principle of non-discrimination and equality before law and other allied principles.[16] The said principle recommends that states must adopt such laws and modify existing laws to include sexual minorities in the realm of state laws. Principle 3 provides every state must recognize sexual minorities as equal as other sexualities are and enact laws for elimination of gender discrimination against sexual minorities.[17] These principles also recognize other human

[11] *Id.* art-5.
[12] UN General Assembly Resolution A/HRC/RES/17/19/2011.
[13] UN General Assembly Resolution A/HRC/RES/32/2/ 2016.
[14] UN General Assembly Resolutions A/RES/69/182, A/RES/67/168, A/RES/65/208, A/RES/57/214.
[15] Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2007.
[16] *Id.* principle 2.
[17] *Id.* principle 3.

rights like right to life,[18] security if human person[19] right to privacy,[20] right to freedom from arbitrary arrest and torture,[21] and other rights as contained in UDHR, ICCPR, and ICESCR.

Various judgments have been delivered by international courts, bodies and regional courts to realize rights of sexual minorities by interpreting human rights instruments with inclusivity of all persons without giving space to traditional practices related to gender and sexuality. ***Toonen v. Australia***[22], author was an activist for homosexual rights in Tasmania, one of the Australia's six constitutive states. He challenged two articles of Criminal Code as Sections 122(a) and (c) and 123 which criminalize various forms of sexual conduct between men, including consenting adult men. The author observes that the above sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life and to detain him, if they have reason to believe that he is involved in sexual activities which contravene the above sections. He adds that the Director of Public Prosecutions announced, in August 1988, that proceedings pursuant to Sections 122(a), (c) and 123 would be initiated if there was sufficient evidence of the commission of a crime. The committee held that "other status" includes sexual orientation and sexual conduct among consenting homosexuals is not crime and they are entitled to freedom. In *Young v. Australia*[23], The Applicant was in same-sex relationship with war Veteran for 38 years. He died on 20 December 1998 at the age of 73. The applicant on 1 March 1999 applied for pension under s. 13 of the Veterans' Entitlement Act 1986, as veteran's dependant. On 12 March 1999, the Reparation Commission denied for pension because of his sexual orientation not falling under the act and it is violation of Article 26 of ICCPR. The HRC held that applicant is a victim within the realm of Article 1 of Option Protocol because affected personally by the omission of State. In *Joslin v New Zealand*[24] complaint came before the HRC that state has violated Article 26 by denying their right to marry of same sex couples directly discriminating on the basis of sex and indirectly sexual orientation. Denial of marriage leads to greater sufferance to the same sex couples like civil rights, housing, socio-economic rights enjoyed by the heterosexual couples. The European Court of Human Rights realizing rights of homosexual held in *EB V. France*[25] family rights are also very essential. In the present case a lesbian was denied to adopt a child of her own. Single parents are allowed to adopt a child under

[18] *Id.*principle 4.
[19] *Id.*principle 5.
[20] *Id.* principle 6.
[21] *Id.* principle 7.
[22] *Toonen v. Australia*, Human Rights Committee, Communication No.CCPR//50/D/488/1992.
[23] Communication No.941/2000, U.N. Doc. CCPR/C/78/D/941/2000(2003 available at: http://hrlibrary.umn.edu/undocs/941-2000.html.
[24] Communication no. 902/1999, UN Doc.A.57/40.
[25] European Court of Human Rights, App. No. 43546/2, 22 January (2008).

civil law but, denial came to her because of her life style. She applied before the ECtHR that denial violates Article 8 and 14 of the European Convention of Human Rights[26]. The court held that discrimination was not legitimate and violated her rights arising under Article 8 and 14 of the Convention. Inter-American Court of Human Rights has also rendered various judgments where they have been ascertained civil rights without any discrimination especially in 2018 the court has delivered an advisory opinion. African court of human rights also has delivered various judgments on rights of same sex relations and discrimination prevalent in the states.

It can be said that international human rights courts have started interpreting the human rights treaties to realize rights of sexual minorities especially discrimination arising in the field of civil rights after the marriage. Human rights regime, though, does not contain sexual orientation as protective ground but it has been interpreted to accommodate sexual orientation and gender minorities in human rights context.

3. CONSTITUTION AS LIVING DOCUMENT TO REALIZE HUMAN RIGHTS

Living Constitution theory has been propounded by David Strauss in his famous work "the Living Constitution"[27] where he defines living constitution as "that evolves, changes over time, and adapts to new circumstances, without being formally amended"[28]. The Constitution of India is living constitution that has been interpreted pragmatically by the judiciary and expanded human rights jurisprudence through judicial activism without amending constitution formally especially Article 21 has been interpreted very widely to give real meaning to part III of the Constitution and added various rights under shelter of right to life and personal liberty. The constitution of India is organic charter of rights, it has been signified in Chief Justice of *Andhra Pradesh and Others v. L.V.A Dixitulu and Others*[29] that "Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs". In Case of *Saurabh Chaudhary and Others v. Union of India*[30], "our constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding" the court stated that it is duty of the court to give blood and

[26] European Convention on Human Rights 1950.
[27] David A Strauss,*The Living Constitution* (Oxford University Press, 2010).
[28] *Id.* at 1.
[29] (1979) 2 SCC 34.
[30] (2003) 11 SCC 146.

flesh to the document to balance the competing rights and must be interpreted as living liberally.[31]

The constitution has been designed not only to accommodate the needs of the present day but also consider the changing conditions of future. Ideals enshrined in the Preamble of the Constitution establish an egalitarian social order to provide socio economic and political justice to all sections of society especially to marginal and minorities with assurance of dignity of person with integration of fundamental rights ensured in Part III and Socio economic rights in Part IV by broad and lively interpretation of these rights.[32] "Judiciary acts as a Bastion of the freedom and of the rights of people". Judicial review is a potent weapon in hands of citizens for violations of their rights and "judges are participants in the living stream of national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other hand in the seemless web of life. The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the judges idly by. Law should sub serve social purpose."[33] For living constitution and to realize rights of vulnerable sections and coop up with the time, it is more required that judges should adopt purposive interpretation of dynamic concepts and armory interpretation must articulate the felt necessities of time.

The court in *Sakal Papers (P) Ltd. v. Union of India*[34], held that "constitution must be interpreted very broadly not in narrow and there are certain fundamental rights enshrined in the constitution, therefore considering the nature and content of those rights, courts must not take astute to interpret the language of the constitution in so literal sense as to whittle them down. On the other hand, court should interpret the constitution in such a way so that all citizens can enjoy their rights to the fullest extent, subject to permissible restrictions."[35]

Liberty and equality are dynamic rights which change over time and should not be read only from the document, rather as changing perspective of society. It has been signified in *Video Electronics Pvt. Ltd. And Another v. State of Punjab and Another*[36], "constitution is a living organism and latent expressions used in the document is not changing time only, rather meaning should change the essence of time and must be able to illustrate and illuminate meaning of expressions used". The constitution strengthens the spirit of equality and confers everyone has equal rights and it is duty of judiciary to keep up with changing times and constitution has also considered

[31] *Ashok Kumar Gupta and Another v. state of U.P. and others* (1997) 5 SCC 201.
[32] *Ibid.*
[33] *Ibid.*
[34] AIR 1962 SC 305.
[35] AIR 1962 SC 305.
[36] (1990) 3 SCC 87.

"change is inevitable."[37] So judiciary must interpret equality rights in consonance with changing demands of time to realize rights of individuals especially marginalized sections of society. the concept of living constitution requires to transform the constitutional idealism into reality by furthering respect for human rights, promoting inclusion of pluralism, bringing harmony i.e. unity in diversity and abandoning ideas of unacceptable social conceptions build on medieval egos.[38] More or less, it can be said that living constitution required that firstly equality and liberty must be interpreted very meticulously so that rights of weaker sections of society should be addressed and their sufferings can be mitigated. Homosexuals are people whose rights have been infringed for centuries, though principle of equality was enshrined in the constitution but reasonable interpretation and classification was not done to criminalize homosexual acts between consenting adults which violated their basic rights like liberty, equality and freedom of expression which give gist to concept of living constitution and were disabled to realize their civil rights arising from their sexual orientation and somewhat made constitution as dead letter for homosexuals who were not able to enjoy their rights.

Changing social norms require interpreting the constitution broadly to extend civil rights without any discrimination to sexual minorities and for that broader interpretation of expression "sex" in Art. 15 are required that judges have done in Naz Foundation, NLSA and Navtej Singh Johar judgments. Realization of rights of homosexuals and interpretation of constitution as living document can be made possible through transformative constitutionalism which has been discussed in next part of the paper.

4. TRANSFORMATIVE CONSTITUTIONAL AND REALIZATION OF RIGHTS OF HOMOSEXUALS

Before delving into the role of transformative constitutionalism in rights of LGBT communities, is required to provide an insight of concept of transformative constitutionalism. Transformative constitutionalism is an elusive concept and cannot be confined into narrow definition. Prof Klare[39] viewed transformative constitutionalism as *"a project of constitutional enactment, interpretation and enforcement committed to transforming a country's social and political institutions and power relationships in a democratic, participatory and egalitarian direction*."

[37] *Supra* note 4 para 86.
[38] *Ibid.*
[39] Karl KE Klare, "Legal Culture and Transformative Constitutionalism" 14 *South African Journal on Human Rights* 146 (1998).

Taking further note of this definition judge SM Mbenenge of High Court of South Africa explained "judges, other functionaries and institution play very pivotal role in transformative constitutionalism. Judges are custodian of constitutional values like human dignity, equality, liberty, having an obligation to ensure that constitutional provisions are applied in such a way to improve the quality of life of all citizens".[40] The transformative constitution ensures that constitution must be interpreted in very pragmatic way to do all historical injustice away. Preamble of constitution contains very significant goals to be achieved through transformative constitution and judiciary must adopt pragmatic approach to recognize realities of modern day. Apex court in Navtej Singh Johar stated "*Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose."*[41]Transformative ability of the constitution makes it organic and living document. A constitution constantly alters the lives of citizens in particular and society in general. Pragmatic interpretation of the constitution will help to realize rights of vulnerable ignored minorities in societies, especially sexual minorities in India. There are various instances which show the constitutional courts have used transformative constitutionalism to realize rights and purpose of transformative constitutionalism can be seen in *Road Accident Fund and Another v. Mdeyide*[42] that *"—Our Constitution has often been described as —transformative‖. One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy".* Moreover, it is duty of constitutional courts to view Constitution as transformative document and courts have already fulfilled its obligation to act as the sentinel on qui vive for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.

Equality is primary principle of constitution to be achieved. Achieving true equal society and provision for socio-economic rights to all is essential for social transformation. Constitution has been committed to transformation of our society from grossly unequal society to one "in which all are equal without any gender discrimination and racial discrimination. It has been observed by South African Constitutional Court that our constitution is not assumptive of equality of all citizens as in other constitution, rather it recognizes "decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may

[40] Justice SM Mbenege, *Transformative Constitutionalism: A Judicial Perspective From the Eastern Cape Speculum Juris*(Vol. 32(1) (2018).
[41] *Supra* note 4 para 96.
[42] (2008) 1 SA 535 (CC).

continue indefinitely unless there is a commitment to end it."[43] If we look to the transformation in case of LGBTI persons in India has been significantly considered in context of human dignity instead of criminality or pathology in *Naz Foundation Judgment*.[44] Constitution of India has also recognized the historic injustice not particularly for sexual minorities but the courts have interpreted the constitution in respect to historic injustice done to homosexuals in India through Indian Penal Code which was introduced by the British. The court considered that historic injustice of the law is not merely confined to arbitrary state actions against the LGBT persons, rather they have been interpreted in respect to "unnatural sexual acts". The question of love or intimacy, desire or ongoing was always reduced in the judicial register to "carnal intercourse against natural order."[45] For transformative constitutionalism and rights of homosexuals, it is required that law must be read in context of constitutional morality not social morality because social changes occur in society but sometimes, law remained constant on some point due to orthodox nature traditions. Moreover, social transformation through law is only possible if it law has been interpreted in very wider context like personal liberty and privacy must be considered in its actual context to realize rights of vulnerable groups in India.[46]Constitutional protection of an individual necessitates considering the worth of all human beings as members of society. The constitution recognizes that a person is a free being able to develop his body and mind according to his own will. At the root of the dignity is individual will and freedom of choice to choose his action. Human dignity is essential attribute of constitutional culture which makes an individual free to choose his action. Individual autonomy also allows a person to choose his/her sexual orientation and express his feeling as fundamental right.[47] If all human beings are equal in worth only then they can think to enjoy their civil rights freely in society without any discrimination and transformative constitutionalism makes it reality by adopting such constitutional interpretation including all sexual minorities equal in worth.

Social changes in society have occurred tremendously, so Section 377 of Indian Penal Code which has been adopted in 1860, having chilling effect on the rights of sexual minorities. Though, in NAZ and NLSA[48] judgments sexual minorities have been accepted. The court considered various judgments for transformative constitutionalism and rights of homosexuals. The court said that a person has freedom to choose his/her life partner. The court quoting *Shafin*

[43] *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others* (2004) ZACC 15.
[44] *Naz Foundation v. NCT Delhi* 160 DLT 277.
[45] *Ibid.*
[46] *Id.* para 25.
[47] *Id.* para 27.
[48] *NALSA v. Union of India* AIR (2016) SC 1863.

Jahan[49] stated that "it is a state obligation to recognize expression of choice in accordance with law is acceptance of individual identity. Individual identity cannot be restricted or curtailed due to social morals. If there can be restraints on individual liberty, can be applied in way constitutional morality and social mores cannot be above the freedoms guaranteed in the constitution. In *Shakti Vahini case* the court observed that choosing a life partner is quintessential for a human being and it cannot be curtailed or repressed in the name of honor of society. the court quoted that "When the ability to choose is crushed in the name of class honor and the person's physical frame is treated with absolute indignity, a chilling effect dominates over the brains and bones of the society at large".[50]

The principle of transformative constitutionalism obliges the judges to maintain supremacy of the constitution. It is also required while interpreting the constitution its objectives must be kept in mind and social changes must be introduced in the law and interpretation must reflect required social norms to be remolded to adopt new changes. Transformative constitutionalism also promotes the egalitarian society.[51]Transformative constitutionalism achieves the standard of an ideal model imbibing the philosophical and moral constitutionalism fostering respect for human rights.

The fundamental rights as inalienable rights have been incorporated in Part III of the constitution whereas part IV contains principles of transformative governance. Preamble contains objectives to be sought like equality, fraternity and dignity. Constitutional morality is a guiding spirit to achieve constitutional goals to transform society. Constitutional morality has been incorporated as an extension of ideas of social transformation. Dr B R Ambedkar signifying the importance of individual rights within social transformation paradigm considered that:

> *"The assertion by the individual of his own opinions and beliefs, his own independence and interest—over and against group standards, group authority, and group interests—is the beginning of all reform. But whether the reform will continue depends upon what scope the group affords for such individual assertion".*[52]

The constitution has visualized the aim of securing of inalienable rights to its citizens which are pivotal for individual development. There may be some segments of the society which are aspiring something different from the mainstream. The constitution guarantees everyone has right to be different and aspire different things without harming fundamental rights of the other

[49] *ShafinJahan v. Ashokan* K M, AIR (2018) SC 1933.
[50] *Shakti Vahini v. Union of India* (2018) 7 SCC192.
[51] *Supra* note 4 para 110.
[52] *Id.* para 115.

citizens. The constitutional morality plays very significant role in constitutional principles and laws must be adjudged or reviewed according to existing constitutional principles and rights especially on the anvil of basic structure of theory.[53] The court has invoked various legal principles to decriminalization and realization of human rights of homosexuals especially bearing in mind concept of human dignity which is inherent.

Progressive realization of rights of homosexual requires that society needs to be transformed according to emerging needs of the vulnerable sections of society and also needs to address their sufferings and remedial measures. Though the current personal laws are not meant from the perspective homosexual but these are required to be interpreted from that perspective or amendments can be made in the existing personal laws so same sex couples can seek benefits available to heterosexual couples. The apex court has very progressively interpreted constitution as living document and also adopted transformative approach for the same.

India has signed various international human rights treaties like ICCPR, ICESCR and CAT and so on. It is obligation of state to implement human rights treaties without any discrimination as Article 2 of ICCPR and ICESC and progressively realize socio-economic rights of the same sex couples. Part IV of the constitution contains social, and economic rights though which are not justifiable, but still these are required to be fulfilled by the state and especially as complementary to fundamental rights.

5. Conclusion

Though, human rights regime has been expanded and its application has been extended to sexual minorities and also adopted various soft law instruments specifically focusing on sexual orientation and gender identity. The constitution of India guarantees equality, dignity and liberty of an individual, but these were required to accommodate sexual minorities. The apex court has delivered judgment where the concept of living constitution has been invoked to interpret the constitution like articles 14 and 15 especially expression "sex" inclusive of sexual orientation with article 19 and 21 to express their feelings. Transformative constitutionalism approach has been adopted to realize their rights contained in Part IV of the constitution like social security, social justice, right to livelihood and other rights especially arising from institution of marriage. Progressive realization of rights of homosexuals requires to amend the existing personal laws to confer rights on same sex couples without any discrimination and develop their individuality and enjoy their liberty to choose their life style according to their own will.

[53] *Id* para 117-119.

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SHIELDING WITNESSES IN INDIA

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ABSTRACT

The right to a fair trial is one of the most important facets of a democratic polity, if one is unable to testify in courts due to threats or other pressures then it is a clear violation of the right to a fair trial, and denial of the fair trial is a denial of human rights. To ensure fair trial and rule of law to be applicable we need adequate security and safety to the witnesses as they have a profound impact on the criminal justice system which and makes them come forward and give testimony in the court of law. Unfortunately, our legal system is unable to give adequate protection, there are an ample number of instances where witnesses are killed or turned hostile and this has been happening very frequently. *However, recently in 2019 Supreme Court came with a concrete system to protect the witnesses. Against this background, the author will critically analyze the witness protection scheme and will suggest that for improving public confidence in the justice delivery system; we need well-equipped infrastructure. To strengthen the justice delivery system the government needs to increase the budget for law and justice so that the evidence can be recorded in a scientific method which can save time and as a result, there will be no backlog cases and no unnecessary adjournment for recording the statement of the witnesses in courts.*

1. INTRODUCTION

In the criminal justice system, witnesses play a pivotal role as they perform a sacred duty of assisting the court to discover the truth and ensure access to justice which is a core component of the rule of law.[1] In strengthening rule of law and maintaining the delivery of justice to be impartial and non-discriminatory, we need to ensure that investigation, prosecution and trial of criminal offences are not prejudiced that lead the witness to be hostile. The need for effective witness protection programmes is necessary to boost the confidence to a witness that they are protected by the government which helps the judiciary to arrive at a fair conclusion. But one of the major roadblocks to the administration of criminal justice is that they are not given proper protection and as a result, there is no fair trial.[2] Considering witness importance, Bentham an eminent jurist also stated that witnesses are the eyes and ears of the justice system but these eyes and ears are often intimidated by causing harm to witness or his property or his close relatives

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[1] UN Nations and Rule of Law, *Access to justice*, available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (March 13, 2020).
[2] *Zahira Habibulla H. sheikh and another v. State of Gujarat*, 2004 (4) SCC 158 SC.

which is a common method of making them hostile. Therefore, dispensing justice is easy because of this; the rate of acquittal is greater than the rate of conviction in India. The Supreme Court[3] has also analysed the importance of witness in many landmark cases that emphasized that a criminal case is built on the edifice of evidence and for evidence we need witnesses. In ***Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors***.,[4] the Hon'ble Supreme Court has categorically observed that if the witnesses get threatened or are forced to give false evidence that would not result in a fair trial.

It is very common in India to see witnesses turning hostile during the trial and the Supreme Court has come with a concrete system to ensure the criminal justice system fair and rule of law to be applicable and has highlighted in the number of cases that they are not accorded with appropriate protection by the state.

2. WHY THERE IS A NEED FOR SUCH SCHEME

To maintain the rule of law, people must come forward and offer their oral testimony in the courts and that can only be possible if they have faith in the criminal justice system. Witness must cooperate with law enforcement investigations without fear of intimidation or reprisal and at the same time, it is the duty of the state to protect the witnesses.

In the light of many violations and recognising the importance of witness ***the United Nations Convention against Transnational Organized Crime and its Protocols***[5] a global initiative that calls upon all the state parties' to take appropriate measures to provide effective protection as well as assistance to victims and witnesses of crime.[6] UNODC also provides technical assistance to support member states in reviewing and strengthening legislative frameworks for victim support and witness protection, and help in shaping the existing institutions and agencies to provide victim assistance services, following the International orders that can meet the challenges of the 21st century.

[3] *Swaran Singh V. State of Punjab AIR (2000)* 5 SCC 68.
[4] (2006) 3 SCC 374.
[5] United Nations Convention against Transnational Organized Crime in Palermo, Italy, in December 2000, the international community demonstrated the political will to answer a global challenge with a global response on protection of witnesses, available at <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime.pdf> (March 13, 2020).
[6] Article 23 and Article 24 of the United Nations Convention against Transnational Organized Crime and its Protocols, available at <https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf > (March 10, 2020).

Therefore, considering its importance, countries have enacted legislation or adopting policies to protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families.[7]

2.1 India's Position

In India, before this scheme, we do not have any specific law which actually talks about the protection of witnesses and historically we know the inefficiency of the Criminal Justice System of India, there are ample numbers of instances where witnesses are killed or turned hostile and this has been happening very frequently.

There are no legal provisions on witness protection barring few provisions like in Section 151 and 152[8] of Indian Evidence Act that protects the witnesses from being asked indecent, scandalous, offensive questions, and questions without any reasonable ground which intend to annoy or insult them. Similarly, **Section 16 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA) and Section 30 of the Prevention of Terrorism Act, 2002 (POTA)** also provide for the constitution of special courts to protect the identity of the witnesses in the orders/ judgments. Further, they can also issue directions for keeping the identity and address of the witnesses undisclosed. In case of any contravention of those provisions is made punishable under the respective enactments. But in the **Twin Blast Case**[9] in Hyderabad took 42 lives and more than 50 injured, Shivnarayan Pandey prime witness in this case, his identity was protected by the Mumbai Police but his family had not been given protection, as a result, Pandey turned hostile. Thus police were not able to give adequate protection and have contravened Section 30 of the Prevention of Terrorism Act (POTA).

In the rape-cum-murder of a **Delhi University law student, Priyadarshini Mattoo in 1996**, the case highlights the ineffectiveness of the criminal justice system. Santosh Kumar Singh, accused was acquitted as he came from an influential family. The trial court acquitted him and an Additional Judge, G.P Thareja recorded his displeasure over shoddy work by the investigating agency and said: ***"Though I know that he is the man who committed the crime I acquit him, giving him the benefit of doubt***.[10] On appeal death penalty was awarded on 30th October 2006 by High Court latter reversed into life imprisonment by Supreme Court in 2010. He was given for the premature release.

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7 Id.
8 Section 154 of the Indian Evidence Act.
9 *Yakub Abdul Razak Memon v. the State of Maharashtra,* (2007).
10 *Santosh Kumar Singh v. State through CBI* (2010) 9 SCC 747.

However, experiences in many sensational cases proved that the principle of justice and legal procedure is not followed and it was found that those provisions were not adequate for rendering actual protection to the witnesses.

Therefore, there was a need to upgrade Indian law to review the legal system. **The Criminal Law (Amendment) Bill, 2003 introduced Section 195A to the Indian Penal Code**[11], whereby threatening or inducing any person to give false evidence is made punishable for a term up to seven years with fine or both. Under this amendment new section 164-A of Cr.Pc was also added which would provide for recording of the statement of material witnesses by the Magistrate where the sentence for the offence is seven years or more. But due to the lack of implementation and negligence in our departments, the protection was only on paper. Social activist and Congress worker Nadeem Ahmed Sayed, one of the witnesses in the case of ***Naroda-Patiya massacre*** in Godhra violence in Gujarat, was stabbed to death even though he had been provided police protection.[12]

However, all these cases have highlighted the ineffectiveness of our criminal justice system and the government has realised that if this is continued people will be losing their faith in the criminal justice system and will never come forward and offer their oral testimony in the courts. In the year 2000, the Government of India formed a panel headed by the former Chief Justice V.S. Malimath, who suggested revamping the century-old criminal justice system**.** The Justice Malimath Committee submitted a report after two years with 158 recommendations along with a great concern for a strong witness protection mechanism. It also suggested that a separate witness protection law be enacted akin to the one in the United States.[13]

However, the 'witness identity protection bill' was prepared and was circulated to the state governments and UT administrators but no consensus could be formed. Since police and public order are State subjects under the Seventh Schedule to the Indian Constitution, the state governments were hesitated to implement this scheme due to high expenditure and the states are not reluctant to incur expenditure on witness protection. [14]

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[11] The Criminal Law (Amendment) Bill, 2003.

[12] Manas Dasgupta, "Naroda-Patiya case witness stabbed to death", *the Hindu*, November 5, 2019 available at <https://www.thehindu.com/news/national/Naroda-Patiya-case-witness-stabbed-to-death/article13473917.ece> (last visited March 7, 2020).

[13] Committee on Reforms of Criminal Justice System report available at <https://mha.gov.in/sites/default/files/criminal_justice_system.pdf> (last visited March 12, 2020).

[14] Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf> (last visited on March 13, 2020).

3. JUDICIARY ROLE IN PROTECTING WITNESSES

The Indian Judiciary has time and again, emphasized on the need for witness protection. It was observed by the Supreme Court of India in the case of ***NHRC vs. State of Gujarat***[15] that '***no law has yet been enacted, not even a scheme has been framed by the Union of India or by the state government for giving protection to the witnesses.'*** The Supreme Court said that there is an urgent need to protect the witness to stop the mockery of justice and has acknowledged and highlighted the role to be played by the states.[16]

The Judiciary of India on many occasions had discussed the importance of a fair trial in the criminal justice system and has categorically emphasized the need to have legislation on this matter and has stressed to give a shape to protect witnesses. More pertinently, the Court in ***Best Bakery case***[17] stated that ***"Legislative measures to emphasize prohibition against tampering with witnesses, victims or informants, have become the imminent and inevitable need of the day"***. The Supreme Court had also recognised that political patronage and corrupt practices have a role to play in witnesses turning hostile like in **Jessica Lal murder case[18],** the prime witness of this case actor Shayan Munshi turned hostile due to such practices.

The importance of this scheme arises from the observation of the Supreme court in the ***Himanshu Singh Sabharwal Vs. State of MP and ors[19]*** in which court held that witnesses are the eyes and ears of the justice system and when witnesses are threatened or killed or harassed, it is not only the witness who is threaten but also the fundamental right of a citizen to a free and fair trial is threatened. The protection of witness is the duty of the state and when it fails to protect the fundamental right of the citizen. For instance, we have seen in the ***Muzzafarnagar riots case***, where the key eye witness Ashbab, who witnessed the killing of his two brothers was shot dead just before the next hearing.[20]

Finally, in 2018, the Supreme Court gave birth to a Witness Protection scheme, 2018 in its landmark judgment of ***Mahendra Chawla v. Union of India[21]*,** Mahendra Chawla who was the

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[15] (2010) 15 SCC 22.
[16] G. S. Bajpai, *Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness*, available at< http://bprd.nic.in/WriteReadData/userfiles/file/20160824041904468252 1Report.pdf (last visited March 12, 2020).
[17] *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*, 2004 SOL Case No. 29 (p.395).
[18] NEWS 18, 'Jessica Lal murder: HC to decide the fate of hostile witnesses, (May 22, 2013), available at <https://www.news18.com/news/india/jessica-lal-murder-hc-to-decide-the-fate-of-hostile-witnesses-610719.html> (last visited on March 15, 2020).
[19] AIR 2008 SC 1943.
[20] Eyewitness in Muzaffarnagar Riots Case Shot Dead Ahead of Court Hearing, *News 18*, March 13, 2019, available at < https://www.news18.com/news/india/eyewitness-in-muzaffarnagar-riots-case-shot-dead-ahead-of-court-hearing-2065285.html> (last visited March 15, 2020).
[21] 2018 SCC online SC 1778.

prime witness in the sexual exploitation case against the self-proclaimed Godman, Asaram Bapu was attacked but other two witnesses were murdered. India finally introduced bolder measures to protect witnesses in criminal trials as witnesses have traditionally not given required protection to witnesses

3.1 Witness Protection Scheme, 2018 [22]

This scheme seeks to safeguard witnesses and their family members from threats against their lives and reputation. The Supreme Court directed all the states and Union Territories to implement the scheme. Odissa is the first state to implement this scheme.[23]

3.1.1 Salient features of Scheme

- **Categorization of witness protection**

According to the scheme comprise three categories of witnesses in accordance with the threat perception.

Category A	**Category B**	**Category C**
Where the threat extends to life of witness or his family members during an investigation, trial or thereafter. The Category 'A' forms the gravest among all because the threat extending therein may find its presence even after the trial or investigation is complete.	Where the threat perception extends to safety, reputation or property of the witness or his family members **during the investigation or trial,"**	Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's **reputation or property**,"

[22] Supra, note 5.
[23] The New Indian Express, Odisha Government implements Centre's Witness Protection Scheme, notifies state High Court, available at <http://www.newindianexpress.com/states/odisha/2019/jul/09/odisha-government-implements-centres-witness-protection-scheme-notifies-state-high-court-2001475.html> (last visited on March 15, 2020).

According to the notification, there will be a standing committee in each district headed by the district and session judge and the district police chief as a member and head of the prosecution as its member secretary. Depending upon the case, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application based on threat. The Threat Analysis Report shall be prepared after investigating the case while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

- **State Witness protection fund**: All related expenses incurred during the implementation of the scheme passed by the competent authority and other funds shall be met from this fund. The sources of fund are budgetary allocation made in the Annual Budget by the State Government; and whatever fines imposed under Section 357 of the Cr.PC ordered to be deposited by the courts/tribunals in the Witness Protection Fund; and donations received from philanthropist organizations.
- **Protective measures available:** Ensuring the witness and offender do not come face to face during investigation or trial, monitoring telephone and assist a witness to change his number, a new identity is given, close protection regular patrolling and change of residence, installation of security devices in the witness's home such as security doors, CCTV, provisions for government vehicles during hearings, holding in-camera trails to etc. any form of protection and schemes alarms, Thus this scheme ensures that the investigation, prosecution and trial of criminal offence is not prejudiced.

  However, the witness protection scheme does not provide answers to all the questions and leave some ends open as this scheme has given wider discretionary power to the law enforcement agencies. Under this scheme, the Indian police is responsible to protect a witness and recently in July 2019 country has witnessed in **Unnao Rape** case[24], where three policemen were assigned to protect the victim (the key witness of the case) but on the day of accident victim was travelling without police protection which claimed two lives of relatives and victim was badly injured. In this scenario, we can see that money, muscle power and political power can overshadow the fair trial thus law enforcement agencies were unsuccessful in giving protection to Witness.

Apart from technical issues, there are many other challenges for instance, the government should provide protection as early as possible but the scheme has a long process. This is a major hurdle

[24] 'Key witness in Unnao gang rape case had died in mysterious circumstances' *Hindustan Times*, July 29, 2019, available at <https://www.hindustantimes.com/india-news/key-witness-in-unnao-gang-rape-case-had-died-in-mysterious-circumstances/story-u1SR9cbVnPQlMoPRE36QeI.html,> (last visited in March, 2020).

for the successful implementation of this scheme. States instead of eliminating threat immediately, the investigation and pieces of evidence will prove whether the witness should get protection and if yes under which category. Further, how a scheme can differentiate the threat in a category and what if corrupt administration or police are assigned with the task to categorize witness based on its assessment, it will no longer constitute a fair trial. If we see the Corruption Perception Index, 2018, India ranked 78 in the list of 176 countries whereas in the United Kingdom where mostly this scheme is borrowed ranked 11th in CPI index.[25] Our country is very much prominent in adopting laws from developed countries without considering the actual problem of a country.

4. CONCLUSION

Hence, the time has come for the state to step into the role of guardian and protect witnesses so that they have the confidence to come forward and assist law enforcement authorities. But the state governments are reluctant to implement this scheme due to high expenditure as for the proper implementation of this scheme, State need funds and our parliament has not addressed any financial support in this sensitive issue. Whereas the 198 Report of Law Commission of India recommended that the expenses will be bear by Central Government as well as the State government but the Witness Protection scheme, 2018 has entrusted responsibility only to the States. For effective witness protection programmes, there should be cooperation amongst all the regulatory bodies. We can take the United States Federal Witness Protection Programme as an ideal model for inspiration, where the federal government comes forward who not only helps to relocate witnesses who are under threat but also issue new identities who are giving testimony as well as providing financial and employment aid. It works under the authority of an attorney general.[26] But a country like India with limited financial resources is difficult to afford such programmes and the justice delivery system is not modernised often there is a backlog of cases and in such a scenario to give protection for witnesses is a distant dream.

5. SUGGESTIONS/ RECOMMENDATIONS

Improvement of Infrastructure for recording evidence: There is unnecessary adjournment for recording the statement of the witnesses in courts which beset the justice system. The reason is very evident; the infrastructure of recording evidence is poor in India. The author is of opinion

[25] United Kingdom Corruption Rank, available at <https://tradingeconomics.com/united-kingdom/corruption-rank> (last visited on March 14, 2020).
[26] Witness Security Programme, US Marshals service, available at <https://www.usmarshals.gov/witsec/> (last visited on March 10, 2019).

that the government need to increase the budget for Law and Justice to strengthen the justice delivery system and to remove the long pendency of cases. In 2016, the Supreme Court has nearly 61,000 pending cases, the high courts have a backlog of more than 40 lakh cases, and all subordinate courts together are yet to dispose of around 2.85 crore cases.[27] Hence, if there is an adequate fund than the judicial system can be modernised and the evidence can be recorded in a scientific method which can save time and as a result, there will be no backlog cases and no unnecessary adjournment. In this way, witnesses can be protected but unfortunately, instead of allocating more funds, there was a drastic cut compared to the last financial year.[28] Therefore enacting new laws and lip service is not enough to make this justice system sound.

[27] Arghya Sengupta, 'Hidden factors that slow our courts and delay justice', *The Economic Times of India*(Mar. 27,2017), available at < https://economictimes.indiatimes.com/news/politics-and-nation/hidden-factors-that-slow-our-courts-and-delay-justice/articleshow/57887726.cms?from=mdr > (last visited on March 15, 2020).

[28] Soni Mishra, 'Budget 2019: Drastic cut in allocation for law and justice', *The week Magazine*, Jul. 5, 2019, available at <https://www.theweek.in/news/india/2019/07/05/budget-2019-drastic-cut-in-allocation-for-law-and-justice.html> (last visited on March 15, 2020).

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COVID-19 AND COMPULSORY LICENSING OF DRUGS

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ABSTRACT

Covid-19 has spread devastation throughout the world. The developing countries are severely affected by this disease. They not only have to fight the virus, they have to ensure that they have access to affordable drugs in order to combat the Corona Virus. Although multinational pharma companies such as Pfizer, Moderna, and AstraZeneca have developed vaccines to deal with Covid-19, it is yet to be seen how affordable the same will be in developing countries such as India. The pharmaceutical industry has been engaged in research ever since the disease hit the world, to develop a suitable vaccine. The moment a proper vaccine is developed, the next step taken by the pharma companies will be to gain monopoly over the same through Patents. Once the vaccine is patented, it will be priced at a very high cost, making it unreachable to the poor and down trodden classes of the society, especially in the developing countries. Therefore, employment of the TRIPS flexibilities becomes crucial in order to ensure access to the vaccine at an affordable price. This article deals with one such flexibility known as the "Compulsory Licensing" of patented drugs.

1. COMPULSORY LICENSING

Compulsory Licensing means granting of the right to make, use, sell or export any product under patent, by an authority to any individual or company without that patent owner's consent.[1] Chapter XVI of the Indian Patents Act, 1970, specifically deals with compulsory licensing of patented products. Section 84 and section 92 of the said act deal with the conditions to be fulfilled in order to obtain a compulsory license on a patented product. In order to grant a compulsory license on a patent, the controller of patents will ensure that the following conditions have been fulfilled[2]:-

i. that the reasonable requirement of the public with respect to the patented invention have not been satisfied[3], or
ii. that the patented invention is not available to the public at a reasonably affordable price[4], or

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[1] WTO, Glossary, Available at https://www.wto.org/english/thewto_e/glossary_e/compulsory_licensing_e.htm., (Last visited on 1st April 2020).
[2] The Patents Act, 1970, s. 84(1).
[3] *Ibid.*

iii. that the patented invention is not worked within the territory of India.[5]

1.2 Why is compulsory licensing of patented Pharmaceutical Medicines so important?

The Indian Patents Act, 1970 was an excellent brain child of the Ayyengar Commission Report.[6] This act recognized only "process patent" for food, medicines and drugs and that too for a limited period of 7 years.[7] This allowed the Indian Pharmaceutical companies to engage in reverse engineering and reproduce the highly expensive patented medicines at less than half the cost. For instance, in the year 1998, in Philippines, the cost of 150 mg of anti AIDS drug was $ 817, $ 703 in Indonesia and $ 697 in Malaysia, whereas the same drug costed only $55 in India.[8]*Ciproflaxin* (500 mg), an anti-infective, produced by an MNC costs Rs.979.80 in UK, Rs. 506.58 in Pakistan, and Rs.1548 in USA, while the same drug costs only Rs. 39.60 in India.[9]

10 mg of *Vinclastine,* an anti-cancer drug costs Rs. 976.35 in U.K., Rs.1743.22 in U.S., Rs. 400 in Pakistan, whereas, the Indian version of the same drug costs only Rs. 195.[10] This led to the glorious growth of the Indian Pharmaceutical Industry.[11] India attracted pharmaceutical companies like Torrent, Dabur, Wockhardt, Lupin, Cadila and Cipla to establish large production facilities.[12] These Companies started thriving and flourishing in India.[13] The Indian Pharmaceutical Industry witnessed a record growth from 15% to 18%.[14] The annual turnover of the Indian pharmaceutical industry was $ 3.5 billion, which conveniently enabled it to meet the domestic demands.[15] However, this glorious period came to an end when India signed the Marrakesh Agreement.[16] India was now obligated to amend its Patent Act in accordance with the

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[4] *Ibid.*
[5] *Id* at 1.
[6] Linda L. Lee, "TRIPS and TRIPSulations : Indian Patent Law and Novartis AG v. Union of India"23 *Berkeley Tech L.J.* 290 (2008).
[7] The Patents Act, 1970, s.5(1).
[8] UNDP, "U.N. Development Report" 84 (2000).
[9] G.B. Reddy, "Impact of TRIPS Agreement On Patent Regime in India With Special Reference to Health Care-Strategies For The New Millenium", 5 *Apex Code Expressions* 17 (2003).
[10] B.L. Wadehra, *Law Relating To Patents, Trademarks, Copyright, Designs & Geographical Indications*133, (Universal Law Publishing Co., New Delhi, 2nd Edn, 2011).
[11] Biswajit Dhar, C. Niranjan Rao, "Dunkel Draft on TRIPS Complete Denial of Developing Countries' interests", 27 *Economic political Weekly* 275 (1992).
[12] Chautvedi K. and Chataway J, "Strategic Integration of Knowledge in Indian Pharmaceutical Firms: Creating Competencies for innovation" 1 *International Journal of Business, Innovation and Research* 34 (2006).
[13] *Ibid.*
[14] Gopakumar G. Nair, "Impact of TRIPS on Indian Pharmaceutical Industry", 13 *Journal of Intellectual Property Rights* 433 (2008).
[15] Pradeep Agrawal and P. Saibaba, "TRIPS and India's Pharmaceutical Industry", 39 *Economic Political Weekly* 3788 (2001).
[16] A.D. Damodaran, "Indian Patent Law in the post-TRIPS Decade : S&T Policy Appraisal" 13 *Journal of Intellectual Property Rights* 416 (2008).

TRIPS agreement.[17] This means that India was now required to provide Product Patent for medicines as well. This was a huge setback for the Indian Pharmaceutical industry, as India could no longer engage in reverse-engineering and reproduce the expensive patented medicines and lesser costs. As far as the poor countries are concerned, India was their lifeline for medicines.[18] In the U.S., the cost of AIDS Triple therapy for a year was $ 10,000.[19] However, India through reverse engineering could provide the same treatment for as low was $ 200 per year.[20] This was possible only because the Indian Patent system provided for only process patent for drugs.

The inclusion of IPR in GATT was vehemently opposed by India and Brazil.[21] However, India had to give in to the proposal due to the immense pressure from the U.S. India feared restriction on its exports if it did not align its patent act in accordance with the international standards.[22] U.S.A. had threatened to use the special 301 Law against India, if it did not introduce Product Patent regime for medicines.[23] The inclusion of IPR in TRIPS severely affected the access to affordable medicines in the least developed countries and the developing countries. The intention behind inclusion of IPR's in TRIPS was to promote development process through greater transfer of technologies and enhanced flow of FDI.[24] However, with the acceptance of TRIPS the development divide between the developed countries and the developing countries started growing. This becomes evident from article 67 of the TRIPS agreement which requires the developed countries to provide technical and financial assistance.[25] The glitch in this article is that there is no obligation on the developed countries to assist the LDC's or the developing countries.[26] The TRIPS agreement failed to understand that as far as public health is concerned, a uniform level of IPR protection could not applied to all the countries, as the degree of

[17] *Ibid.*
[18] Brenda Waning, "A Lifeline to treatment: The role of Indian generic manufacturers in supplying Antiretroviral medicines to developing countries", *Journal of the International AIDS Society*, *available at* https://link.springer.com/article/10.1186/1758-2652-13-35, (Last visited on 13th April, 2020).
[19] Medecins Sans Frontieres, "Untangling the web of Antiretroviral Price Reductions", *available at* http://www.doctorswithoutborders.org/sites/usa/files/MSF_Access_UTW_16th_Edition_2013.pdf., (Last visited on 13th April, 2020).
[20] Randeep Ramesh, "Cheap AIDS Drugs Under Threat, The Guardian", *available at* https://www.theguardian.com/world/2005/mar/23/india.aids1., (Last visited on 13th April, 2020).
[21] Anitha Ramanna, "India's Patent Policy and Negotiations in TRIPS: Future Options for India and other Developing countries", *available at* https://www.iprsonline.org/ictsd/docs/ResourcesTRIPSanita_ramanna.doc., (Last visited on 23rd April 2020).
[22] Janice M. Mueller, "In depth Analysis of Indian Patents Law", *available at*http://www.nalsarpro.org/CL/Articles/InDepthAnalysisofIndianPatentLaw.pdf., (Last visited on 7th May 2020).
[23] *Supra note 19.*
[24] Correa C., "Review of the TRIPS Agreement: Fostering transfer of Technology to developing countries", *TWN Trade and Development Series*, *available at* https://www.twn.my/title2/t&d/tnd13.pdf., (Last visited on 4th May, 2020).
[25] Article 67, The TRIPS Agreement, *WTO Analytical Index*, *available at* https://www.wto.org/english/tratop_e/trips_e/trips_e.htm., (Last visited on 4th May, 2020).
[26]Vaish & Haji, "Is there a need to substantially modify the TRIPS Agreement?" 17 *Journal of Intellectual Property Rights* 203 (2012).

development of all the countries especially the developing countries and the LDC's were not the same.[27] The UN Sub commission on Human Rights realized that the implementation of the TRIPS Agreement could adversely affect human rights and therefore adopted the Resolution 2000/7 on 'Intellectual Property Rights and Human Rights'.[28] This realization dawned upon the UN Sub- commission when it saw that not even 5 percent of the people in the developing countries could have access to the anti-retroviral treatment.[29] As far as LDC's were concerned only 1 percent of the people could have access to the said treatment.[30]

There was a growing concern regarding the ability of the developing countries to be able to access the highly expensive patented medicines, which was in turn increasing the tension between the developing nations and the developed nations.[31] In order to pacify the same, the Doha Ministerial conference, in its 4th conference, adopted the Doha Declaration on the TRIPS Agreement and Public Health.[32] The main aim of the Declaration was to ensure that flexibilities mentioned in the TRIPS agreement could be employed to ensure the developing nations have access to the highly expensive patented drugs at a cheaper cost.[33] The main flexibility that this declaration focused on was that of compulsory licensing mentioned under article 31 of the TRIPS Agreement.[34] In the Post-TRIPS era, Natco v. Bayer is the first case ever in India, where a compulsory license was issued to an Indian Pharma company to reproduce a generic version of a patented drug.

2. JUDICIAL REVIEW ON COMPULSORY LICENSING

In India, Compulsory licensing was granted for the first time ever to an Indian Pharmaceutical Company, called Natco. This license was granted in order to produce the blockbuster drug called "NEXAVAR" produced originally by Bayer. Bayer is a German Multinational Pharmaceutical Company. This company produced a drug called "Sorafenib Tosylate" which is used to treat

[27] Commission on Intellectual Property Rights, "Report of the UK Commission on Intellectual Property Rights", *available at* http://www.iprcommission.org/graphic/documents/final_report.htm., Last visited on 4th May, 2020.
[28] Written submission by the World Health Organization before the UN Sub-Commission for the promotion and protection of Human Rights, Intellectual Property and Human Rights, *available at* https://www.who.int/hhr/information/Written%20submission%20to%20SCHR%20031.pdf., (Last visited on 4th May, 2020).
[29] Thompson D, WHO coordinates 2002, Charting progress against AIDS, TB and Malaria, (World Health Organization, Geneva), 2002, p.1.
[30] *Ibid.*
[31] *Supra note 24* at 3.
[32] M.D. Nair, "TRIPS and Access to affordable drugs, Journal of intellectual Property Rights"*,available at* http://nopr.niscair.res.in/bitstream/123456789/14458/1/JIPR%2017%284%29%20305-314.pdf., (Last visited on 4th May, 2020).
[33] WTO, Declaration on the TRIPS Agreement and Public Health, *available at* https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm., (Last visited on 4th May, 2020)
[34] *Ibid.*

kidney and liver Cancer. In 2008, Bayer obtained a patent on "Sorafenib Tosylate" in India and later started marketing the same drug worldwide under the trade name "Nexavar."[35] The cost of this drug for a month's course was Rs. 280,428.[36] Natco is an Indian Pharmaceutical Company. This company gave a proposal to reproduce a generic of "NEXAVAR" at a price of Rs. 8800 for a month's course.[37] This was a staggering difference. India is a country where still 70% of the population lives in rural areas.[38] An average Indian consumer will not be able to afford such an exorbitantly priced drug. Therefore in order to make the drug more affordable and accessible to the poor and down trodden sections of the Indian society, Natco approached Bayer for a Voluntary license to reproduce a generic version of "Nexavar".[39] Bayer did not grant the same. In April 2011, Natco, however managed to obtain a license from the Drug Controller General of India to reproduce the generic of the drug and market the same in India.[40] Bayer filed a patent infringement suit against Natco, on 5th June 2011.[41]Natco however, instead of responding to the suit for infringement, applied to the Controller of patents for a Compulsory license under section 84(1) of the Indian Patents Act 1970, which allows any interested person to make an application to obtain a license to reproduce a patented product after the expiry of three years from the grant of patent, on any of the following grounds:-

i. that the reasonable requirement of the public with respect to the patented invention have not been satisfied,[42] or
ii. that the patented invention is not available to the public at a reasonably affordable price[43], or
iii. that the patented invention is not worked within the territory of India[44]

Natco claimed that Bayer had not met the reasonable requirements of the public, nor was the drug available at a reasonable price and that the drug had not worked within the territory of

[35] Natco v. Bayer, Compulsory License Application No. 1 of 2011, *available at* http://www.gnaipr.com/CaseLaws/Controller%20Order%20-%2012032012.pdf., (Last visited on 7th May, 2020).
[36] *Ibid.*
[37] *Ibid.*
[38] Anonymous, "About 70 per cent Indians live in rural areas : Census Report", *The Hindu*, *available at* https://www.thehindu.com/news/national/About-70-per-cent-Indians-live-in-rural-areas-Census-report/article13744351.ece#.(Last visited on 7th May, 2020).
[39] Gautama, Savita & Meghna Dasgupta, "Compulsory Licensing : India's Maiden Experience", ARTnet Working Paper series no.137, available at https://www.unescap.org/sites/default/files/AWP%20No.%20137.pdf.(Last visited on 7th May, 2020).
[40] *Supra note 35.*
[41] *Ibid.*
[42] The Patents Act, 1970, s. 84(1).
[43] *Id.* at 44.
[44] *Ibid.*

India.[45] The Controller of Patents admitted the application of Natco for compulsory license to reproduce "NEXAVAR". Hurt by the decision of the Controller of Patents, Bayer filed an appeal at the IPAB. The appeal was dismissed by the IPAB on the grounds of right to health upheld by the article 21 of the Constitution of India.[46] IPAB granted 7% royalty on sales to Bayer.[47]

3. NATIONAL MEASURES ADOPTED BY DIFFERENT COUNTRIES TO COMBAT COVID-19

a) Canada

On 25th March, 2020, The Government of Canada enacted Bill C-13, the Covid-19 Emergency Response Act. This Act purports for stronger Compulsory Licensing provisions. [48] The Compulsory licensing provision in the Act enables the government to make, construct, use and sell a patented invention to the extent necessary to respond to a public health emergency that is a matter of national concern.[49] The patentee shall be compensated by the government of Canada by an adequate remuneration which shall be determined on the basis of the extent to which they make, construct, use and sell the patent.[50]

b) Israel

Israel has issued compulsory licensing measures with respect to Covid-19 vaccine. In order to treat the corona virus patients, the minister of health permitted the importation of a generic version of AbbVie's Kaletra from India.[51] Until the year 1995, compulsory licenses were granted by Israel for 7 products for domestic production. The Israeli government has invoked section 104 and section 105 of the Israeli Patent Law for the first time. The sections read as follows:-

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[45] Rachna Bakhru, "India grants first Compulsory License under Patents Act, Intellectual Property Magazine", *available at* https://www.rouse.com/media/126620/india_grants_first_compulsory_licence.pdf., (Last visited on 6th May, 2020).

[46] Mansi Sood, "Natco Pharma Ltd. v. Bayer Corporation and the Compulsory Licensing Regime in India" 6 *NUJS Law Review,* 105 (2013).

[47] Vindhya S. Mani, "Compulsory License : High Court upholds IPAB Order", *Lakshmi Kumaran & Sridharan Attorneys*, *available at* https://www.lakshmisri.com/insights/articles/compulsory-license-high-court-upholds-ipab-order/#., (Last visited on 7th May, 2020).

[48] Selin Sinem Erciyas & Zenep Cagla Ustun, "Inventing in Covid -19 Environment and Key Local/International Developments", *Managing IP*, *available at* https://www.managingip.com/article/b1m2zwhccstx8h/inventing-in-covid-19-environment-and-key-local-international-developments, (Last visited on 9th May, 2020).

[49] Covid-19 Emergency Response Act, Part 12, (2020), *available at* https://laws-lois.justice.gc.ca/eng/AnnualStatutes/2020_5/FullText.html, (Last visited on 9th May, 2020).

[50] *Supra note 46*.

[51] Ellen 't Hoen, "Covid -19 and the Comeback of Compulsory Licensing", *Medicines, Law and Policy, available at* https://medicineslawandpolicy.org/2020/03/covid-19-and-the-come-back-of-compulsory-licensing/, (Last visited on 12th May 2020).

Section 104:- That a minister designated by the government, "may permit the exploitation of an invention by Government Departments, or by any enterprise or agency of the State, albeit a patent has already been granted for it or applied for, if it appears to the minister that it is necessary so to try to within the interests of the defense of the State or the upkeep of essential supplies or services."[52]

Section 105:- "The minister may, if it appears to him necessary, to try to so for the needs mentioned in section 104, grant a permit there under section to an individual operating under a contract with the State, with a view to making sure or facilitating the execution of that contract and wants of the State only."[53]

This move is significant; as such a license under section 104 has been issued for the first time in the country.[54] Despite the global consequences that Israel may have to face, it issued the license keeping in mind that the health of the citizens was of utmost importance in the situation of the growing Covid-19 pandemic.[55] The patent holder, AbbVie, was unable to meet certain requirements for the drug produced by it.[56]The patent holder, AbbVie, was unable to meet certain requirements for the drug produced by it.[57] Due to this, like Israel, many nations have stepped in to enforce their compulsory licensing provisions against AbbVie's drug for Covid-19.[58]

c) Chile

In order to ensure access to drugs, vaccines, devices and technologies, the government of Chile has declared resolution 896.[59] This resolution will justify the use of compulsory license by Chile in order to ensure access to the Covid-19 vaccine.[60]The resolution received an overwhelming 127 votes in favour and 0 votes against it.[61]The resolution declared that:-

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[52] The Patents Law, 1967, s.104.
[53] The Patents Law, 1967, s.105.
[54] Adam Houldsworth, "The Key Covid-19 Compulsory licensing Developments so far", *iam*, *available at* https://www.iam-media.com/coronavirus/the-key-covid-19-compulsory-licensing-developments-so-far, (Last visited on 13th May, 2020).
[55] Aishani Singh & Arindam Purkayastha, "Israel issuing Compulsory License During the Time of Covid-19 Pandemic", *Mondaq*, *available at* https://www.mondaq.com/india/operational-impacts-and-strategy/917898/israel-issuing-compulsory-license-during-the-time-of-covid-19-pandemic, (Last visited on 13th May, 2020).
[56] *Ibid.*
[57] *Ibid.*
[58] *Supra note 55* at 7.
[59] Nirmalya Syam, "Intellectual Property, Innovation and Access to Health Products for Covid-19: A review of Measures taken by different Countries", *South Centre*, *available at* https://www.southcentre.int/wp-content/uploads/2020/06/PB-80.pdf, (Last visited on 14th May, 2020).
[60] *Supra note 57* at 7.
[61] Luis Gil Abinader, "Chilean Chamber of Deputies approves Resolution for compulsory licenses for patents related to the Corona virus", *Knowledge Ecology International*, *available at*https://www.keionline.org/32385, (Last visited on 13th May, 2020).

"There is justification for compulsory licenses for vaccines, drugs, diagnostics, devices, supplies, and other technologies useful for the surveillance, prevention, detection, diagnosis and treatment of people infected by the coronavirus in Chile."[62]

d) Germany

The Prevention and Control of Infectious Diseases Act has been adopted by Germany.[63]Under this Act, on the occurrence of a national pandemic, the Ministry of Health can issue government use authorization under the Patent law.[64] In addition, section 24 of the German Patent act, allows a private individual to request the government to issue compulsory license for reproduction of a particular drug, if the patentee has refused to grant voluntary license.[65]

e) Turkey

Turkey was able to handle the pandemic without any additional strengthening of its existing laws.[66]However, it must be noted that the compulsory licensing provisions in Turkey are strong enough to ensure access and affordability to the Covid-19 vaccine.[67] Article 132 of the Turkish IP code provides that the government shall permit production of any drug under compulsory licensing, in case of a public health crisis, which would eventually lead to a serious damage to the economic or technological development of the country.[68]

f) France

France has enacted the Public Health Code Article L3131-15 in order to ensure access and availability to the Covid-19 vaccine.[69] In case of a public health emergency, this Article will enable the Prime Minister to allow production of patented Covid vaccines under compulsory licensing.[70] This will ensure nobody is denied of the basic right to health due to strict patent laws.

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[62] *Supra note 59.*
[63] *Supra note 58.*
[64] *Supra note 61.*
[65] The German Patents Act, 1877, s.24.
[66] Okan Can, "Compulsory or Not? Licensing During the Covid -19 Pandemic", *Mondaq*, *available at* https://www.mondaq.com/turkey/patent/940300/compulsory-or-not-licensing-during-the-covid-19-pandemic, (Last visited on 13th May, 2020).
[67] *Supra Note 64* at 8.
[68] Industrial Property Code, art.132.
[69] Clifford Chance, "Compulsory Licensing and New Provisions Available During the State of Health Emergency", *Global Overview*, *available at* https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/04/compulsory-licensing-and-new-provisions-affecting-ip-holders-during-the-coronavirus-crisis-in-france-and-globally.pdf, (Last visited on 10th May, 2020).
[70] *Supra Note 67.*

In order to be able to fight the pandemic in an effective manner, this Article will also enable the Prime minister to commandeer the necessary goods and services.[71]

3.1 Other available options for ensuring access to affordable Covid vaccine

Article 66(1) of the TRIPS Agreement has provided flexibility to all the Least Developed Countries (LDC's). This Article provides the following:-

> *"In view of the special needs and requirements of least developed country members, their economic, financial and administrative constraints and their need for flexibility to create a viable technological base, such members shall not be required to apply the provisions of this agreement, other than articles 3,4, and 5, for a period of 10 years, from the date of application as defined under paragraph 1 of article 65, the council for TRIPS shall, upon duly motivated request by a least developed country member, accord extensions of this period"*[72]

As per this provision, all the LDC's have been granted an extended period of 10 years to comply with the TRIPS Agreement.[73] The current extended period is upto1 July 2021 and 31December 2033 for pharmaceutical products.[74]High debt levels, fragile health systems and lack of domestic financial resources are some of the major challenges being faced by the LDC's due to the Covid-19 pandemic.[75] This can adversely affect the food security, employment, human rights and economic development in these countries.[76]Hence, the LDC's can take advantage of article 66(1) of the TRIPS agreement to produce the patent protected drugs in order to combat with the Covid-19 emergency. In the past, LDC's such as Uganda, Cambodia and Rwanda have taken advantage of this extention to produce HIV related medicines.[77] Recently, Bangladesh took advantage of this provision in order to ensure affordability and access to Covid related drugs. Pharmaceutical patents are not being granted currently in Bangladesh. Two local pharma companies- Beximco and Eskayef are currently engaged in production of "Remdisivir" for Covid-19.[78]Another flexibility available under the TRIPS Agreement is Article 73. This article protects the actions taken by a country in order to protect its essential security interests or in a

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[71] *Supra Note 68*.
[72] The TRIPS Agreement, 1995, art. 66(1).
[73] *Supra Note 70*.
[74] *Supra Note 62* at 8.
[75] WTO, Members Discuss intellectual Property Response to the Covid-19 Pandemic, *available at* https://www.wto.org/english/news_e/news20_e/trip_20oct20_e.htm, (Last visited on 20th May, 2020).
[76] *Supra Note 72* at 9.
[77] Unaids Technical Brief, "Health burdens in Least Developed Countries- the challenge of access", *UNDP*, available at https://www.unaids.org/sites/default/files/media_asset/JC2474_TRIPS-transition-period-extensions_en_0.pdf, (Last visited on 21st May, 2020).
[78] *Supra Note 72* at 9.

time of war or in situations of emergency in international relations.[79] Thus a country has the right to suspend granting of patents during a pandemic in order to ensure affordability and accessibility to essential drugs needed for protection of the health of its citizens. Therefore, in order to combat with Covid-19, countries may also resort to Art.73 of the TRIPS Agreement.

4. CONCLUDING REMARKS

For the longest time, the TRIPS Agreement has been one of the fiercest subjects of confrontation between the developed and the developing countries. The issue of pharmaceutical patents and its effect on public health in the developing countries has been the area of argument, since the days of negotiation of the TRIPS agreement.[80] Adoption of minimum standards for IPR protection is imposed on the member states through this agreement. The members were thus required to give strong protection, especially in the pharmaceutical sector.[81] The result is that the patent owner would get monopoly over the patent for a long period of twenty years, leading to a rise in price of the patented medicine. Due to the rise in price of medicines, the poor people living in the developing countries have been adversely affected. The developed countries however, demanded stronger patent protection on the grounds that the R&D involved in the pharma industry required huge investments as an incentive to encourage innovation.[82] So, the developed countries lobbied hard for stricter patent regimes.[83] However, such strong pharmaceutical patents started posing a threat to the access to effective health care in developing nations, as they could not afford the high priced patented drugs. In response to this problem, two tools were introduced namely: Compulsory licensing and Parallel Imports. With the increasing spread of the Covid-19 disease, affordability and accessibility to the Covid-19 vaccine becomes more important, especially in the developing and the least developed countries. Once the Covid -19 vaccine is patented, it will become highly expensive and beyond the reach of the developing and least developed countries. In the Pre-TRIPS era, India had been producing generic versions of the highly expensive patented drugs. These versions costed only 1/10th the

[79] The TRIPS Agreement, 1995, art. 73.
[80] See, contributions in Daniel Kennedy and James Southwick (eds.),*TRIPS in the political economy of International Trade Law: Essays in honor of Robert Hudeo* (Cambridge University press, Cambridge, 2002).
[81] Jayashree Watal, "Intellectual Property Rights- in the WTO and developing countries*", Oxford University Press.*
[82] F.M. Scherer, *"The Patent System and innovation in Pharmaceuticals" Harvard University Press.*
[83] Ken Bluestone, Annie Heaton & Christopher Lewis, "Beyond Philanthropy : The Pharmaceutical Industry, Corporate Social Responsibility and the Developing World", *available at* https://books.google.co.in/books?id=SX0zU05s1wQC&pg=PA15&lpg=PA15&dq=developed+countries+lobbied+hard+to+protect+patents&source=bl&ots=RgMHazcOJw&sig=eVXmJJoiCy4-GnWC3ZZE5Nby5vg&hl=en&sa=X&ved=0ahUKEwjNp8WBgOvUAhUJuo8KHT7uCpkQ6AEIJDAB#v=onepage&q=developed%20countries%20lobbied%20hard%20to%20protect%20patents&f=false, (Last visited on 16th May, 2020).

price of the patented drugs.[84]This also led to India being known as the "pharmacy of the world", as India donated large amounts of the cheap generic versions of the patented AIDS drugs to Africa, when it was going through an AIDS epidemic.[85] However, in the post –TRIPS era, with the removal of process patenting for drugs, India could no longer engage in reverse engineering to produce cheaper generic versions of the patented drugs.[86] Therefore, employment of 'Compulsory Licensing' became crucial for the developing nations. It is therefore imperative that these countries use the flexibilities provided in the TRIPS Agreement. However, the glitch here is that, employment of these flexibilities has never been so convenient. In the past, such employment of flexibilities by the developing or the least developed countries was faced with immense opposition, especially from the developed countries.[87]Therefore, it is time for the developing and the least developed countries to adopt the measures and take the necessary steps to bring about changes in their IPR regimes in order to be able to take advantage of the flexibilities provided in the TRIPS Agreement in order to combat the Covid-19 disease.

[84] Hiroko Yamane, Interpreting TRIPS: Globalization of Intellectual Property Rights and Access to Medicines.
[85] Prabhu Ram, India's New TRIPS Compliant Patent Regime, *available at* http://studentorgs.kentlaw.iit.edu/ckjip/wp-content/uploads/sites/4/2013/06/11_5JIntellProp1952005-2006.pdf, (Last visited on 16th May, 2020).
[86] Shamnad Basheer, "India's Tryst with TRIPS: The Patents (Amendment) Act, 2005", *available at* http://docs.manupatra.in/newsline/articles/Upload/3EB650D0-BB14-48C0-AA47-B8AA992D5FF7.pdf, (Last visited on 16th May, 2020).
[87] Anitha Ramanna, "India's Patent Policy and Negotiations in TRIPS: Future options for India and other Developing Countries", *available at* https://www.iprsonline.org/ictsd/docs/ResourcesTRIPSanita_ramanna.doc., (Last visited on 17th May, 2020).

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VIRTUAL DISPUTE RESOLUTION IN INDIA

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ABSTRACT

With the advent of Information Technology in the recent decades, there was emergence of new mechanisms in the form of e-governance and e-commerce. Alternative Dispute Resolution mechanisms have always played a crucial role in the administration of speedy, efficient and effective justice. It won't be an exaggeration to state that in the modern world the emphasis of dispute resolution has shifted from litigation to alternative modes of dispute resolution to a large extent. As things are never static, with the advent of information technology recently, Virtual Dispute Resolution is of great relevance in the present era. In fact, the role of Virtual Dispute Resolution is expected to increase manifold in the years to come. With the enactment of Information Technology Act, 2000 in India, e-commerce and e-governance have been given a formal and legal recognition in India. Even the traditional arbitration law of India has been reformulated and now India has Arbitration and Conciliation Act, 1996. Even the Code of Civil Procedure, 1908 has been amended and section 89 has been introduced to provide methods of alternative dispute resolution (ADR) in India. The aim of this paper is to analyze the ongoing prospects and implications of use of Virtual Dispute Resolution in India and comment on the emerging and futuristic tendencies in dispute resolution.

1. INTRODUCTION

We have been following the traditional mechanism of judicial process for the dispute resolution since very long which has led to overburdening of courts and delay in trials. It has compelled us to adopt some alternate methods like arbitration, mediation and conciliation etc. Past years have seen a tremendous growth in science and technology. With the advent of computers and internet most of our activities have started through the online mode. This has pushed us to use the online mechanism for the dispute resolution.

Internet has emerged as a critical medium for online commerce as firms interact and indulge in commercial transactions with their customers and partners through internet only. This growth in e-commerce and online transactions has been accompanied by disputes arising out of these transactions. The prevailing era and disputes of such nature has given birth to different Virtual Dispute Resolution mechanisms. Virtual Dispute Resolution i.e. VDR is a collection of online, out of court techniques which serve as an e-alternative to traditional methods of adjudicating

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lawsuits. VDR can take place either entirely on internet or partly use internet as a medium. It concerns two types of disputes: those which arise in cyberspace and those which happen offline. VDR is the need of the hour as traditional methods such as litigation is expensive, time consuming and raise various other issues. These online techniques can act as a supplement to the traditional methods of resolving offline disputes.

2. VDR: MEANING AND CONCEPT

Alternative dispute resolution refers to the dispute resolution through methods other than litigation in courts such as mediation, arbitration, conciliation etc. VDR is a branch of ADR which involves use of technology in alternative resolution methods. It involves negotiation, mediation, arbitration or combination of all three. Hence we can say that it is an online equivalent of alternative dispute resolution. Virtual Dispute Resolution (VDR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT.[1] VDR was born from the synergy between ADR and Information and communication technology, as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable.[2] In VDR, the information management is not only carried out by physical persons but also by computers and software. The assistance of ICT has been named by Katsh and Rifkin as the 'fourth party because VDR is seen as an independent input to the management of the dispute. In addition to the two (or more) disputants and the third neutral party, the labeling of technology as the fourth party is a clear metaphor which stresses how technology can be as powerful as to change the traditional three side model. The fourth party embodies a range of capabilities in the same manner that the third party does. While the fourth party may at times take the place of the third party, i.e. automated negotiation, it will frequently be used by the third party as a tool for assisting the process.[3] Virtual Dispute Resolution ("VDR") is conceived as a means to achieve some of the most powerful legal ideals of the Western legal tradition, which include:

(1) Legal Certainty: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance. *(2) Access to Justice:* Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost.

[1] Chris Hodges, The hidden world of consumer ADR: Redress and behavior, CSLS Oxford, 2011.
[2] E. Katsh & J. Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace, 2001.
[3] S. H. Bol, *An Analysis of the Role of Different Players in E-Mediation: The (Legal) Implications,* www.odrworkshoinfo/papers2005/.

Virtual Dispute Resolution (VDR) in India is in its infancy stage and it is gaining prominence day by day. With the enactment of Information Technology Act *2000*, e-commerce and e-governance have been given a formal and legal recognition.[4]

3. HISTORICAL GROWTH

The origins of VDR can be traced back in 1996, with the making of 'Virtual Magistrate' project, due to issues that arose regarding Internet Service Providers' rights and responsibilities. This was the first on-line arbitration system that was supported by the Chicago Kent Law School and offered its free services to online users regarding defamatory postings and corrupted data files. Over a period of time, VDR has become popular among public and got termed as a 'legal or business fad'. VDR's basic purpose is to make justice more accessible, by improving the flawed parts of the justice process. In India, ADR is an attempt made by judiciary and legislature to achieve the constitutional goals of speedy and accessible justice to all. ADR was firstly sought to be the solution of the problem of increasing burden on judiciary, a process to find the way to reduce this burden later on developed as an independent and separate field, solely catering to the need of solving the dispute without going to the formal legal Adjudicating system. ADR in India has been derived from the constitutional principles laid down under article 14 and 21 which deal with equality before law and right to life and personal liberty respectively. Furthermore, ADR tries to achieve some of the aims of directive principles of state policy in article 39(A) relating to free legal aid and equal justice.

The law which deals with ADR is contained in arbitration and conciliation Act 1996, legal service authority Act 1987. Section 89 of civil procedure code 1908 made it possible so the arbitration proceedings could take place. But before the enactment of the Act in 1996, in 1940, Arbitration Act of 1940 was enacted to consolidate and amend the law relating to the Arbitration in India as contained Indian Arbitration 1899 and the second schedule of the civil procedure code of 1908, main defect of the same was that it was based, largely on English arbitration Act 1934. Though the act of 1940 was a good legislation but was to a great extent ineffective. In Guru Nanak Foundation v. Rattan Singh and Sons the Supreme Court observed that the Act of 1940 was ineffective and the proceedings conducted under the Act made lawyers laugh, and legal philosophers weep. The arbitration and conciliation Act 1996 also defines the law relating to conciliation provided for the matters connected therewith on the basis of Model Law on international commercial arbitration adopted by the UN general assembly in 1985.

[4] Available at https://www.e-arbitration-t.com/tag/india/.

4. THE SHIFT IN JUDICIAL OUTLOOK

The courts in India have realized that it is not possible for the existing judicial system to cater to the dispute resolution demands of the citizens of India. Particularly with reference to business disputes the courts have emphasized to use ADR methods and also to go Lok Adalats, which are friendly courts officiated by sitting or retired judges and decisions are made on the basis of settlement. The decision of a Lok Adalat is final and binding on the parties and cannot be challenged in any court. The Supreme Court has also upheld the changes made in the procedural law to make decision making faster. The courts are also encouraging the use of technology, like video conferencing, for speedier resolution of disputes. Thus, the judiciary is in favor of the use of latest technology. The only caveat may be that it should not widen the inequality in society. Shakespeare had written in one of his plays, 'the first thing we do, let's kill all the lawyers'. Advocates of VDR will surely agree with it. The lawyers are one of the biggest hurdles with their mindset of adversarial methods of dispute resolution. Also, there is a potential conflict with the fee earning of lawyers if VDR is followed. Lawyers in general are not trained for VDR in law schools. This makes the task difficult for the disputant to take a decision to go for VDR when the lawyer is strongly in favor of litigation. The primary task of a lawyer is to advise his clients on appropriate remedies and courses of action. Advice by lawyers is fine for the court matters, but without any proper training for VDR, who will advise them for VDR mechanisms. Thus, dependence on lawyers should be reduced which means more awareness for the businessmen and masses.[5]

5. MODUS OPERANDI OF VDR

VDR as a mechanism for resolving disputes in the global business-to-business market place, between internet business and consumers, and also between two consumers via the use of the evolved online arbitration and mediation services. Different kinds of web portals can be used such as web conferencing; e-mails etc where the parties in dispute can meet each other, without going to the courts and chose a forum that may be geographically convenient for the parties.

The process of VDR: In order to understand the mechanism of VDR, a few important steps are:

- Initial contact
- Initiation of dispute resolution process, terms of use, introduction to the system
- Assessment and checklists to be used to determine the suitability of the dispute for VDR

[5] Anurag K Agarwal, *Is India ready for online dispute resolution,* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.8592&rep=rep1&type=pdf.

- Information exchange, in which parties exchange data and information
- Formal lodgment, where parties can lodge formal documentation such as pleadings, records and other material
- Questions and answers by the parties
- Facilitation through a third party
- If there is a third party resolution, a decision is rendered

In an ordinary litigation only three parties are present which includes the aggrieved parties and the mediator or the arbitrator. But with the development of the VDR mechanism an additional two parties are found which are as significant as the other three which are omnipresent. The additional parties namely are fourth party: technology and fifth party: the provider of the technology. The fourth party is a realization from the contractual perspective which is actual parties having a conflict the neutral party (arbitrator and mediator) and the party that delivers the technology. Thus it is to be seen that it is the fifth party that delivers the fourth party.

Virtual Dispute Resolution mechanism has gone on to gain popularity in resolving e-commerce disputes among business and consumers. It carries with itself many advantages over the traditional mechanism of dispute resolution. A few advantages of Virtual Dispute Resolution are[6]: *Cost*- the Virtual Dispute Resolution is often less expensive than the traditional legal process.

Efficiency- Virtual Dispute Resolution can often resolve the dispute quickly.

Participation and control- parties using Virtual Dispute Resolution must work with each other to resolve the dispute and often have more control of the outcome of the dispute.

Flexibility- parties using Virtual Dispute Resolution can have more flexibility than the traditional legal process

Geographic flexibility- Virtual Dispute Resolution can allow parties in different locations or countries to avoid the cost and inconveniences of travel.

Even though there a few advantages of the VDR, but as the coin have two faces, so does VDR. On one face, it has the positive aspect in term of advantageous factors, and on the other face it has the negative aspect in the form of disadvantages. During negotiation and dispute resolution, users of VDR are devoid of the non-verbal clues such as those conveyed by body language,

[6] Eugene Clark, George Cho & Arthur Hoyle, Online Dispute Resolution: Present realities, Pressing problems and Future prospects, International Review of Law computers and Technology, Volume 17, No.1, pp. 8-9.

touch, smell, etc.[7] Even though technology has given a greater degree of flexibility of delivery, there are practical problems of the process, such as legal representation and input are difficult to build up during the entire mediation or other VDR process. Furthermore, the question towards safety and security also has not been answered properly, confidentiality and privacy are continuously at a threat, which further involves issues regarding matters of policy and regulation.

6. SUCCESS STORIES OF VDR

eBay/PayPal employ a tiered VDR process where parties first try to voluntarily settle their disputes by using assisted negotiation software; when they cannot reach a settlement the claim escalates to adjudication. PayPal freezes the money involved in the transaction of the dispute, thus ensuring the enforcement of the final decision. It resolves over 60 million disputes a year.
Domain Names: The UDRP, developed by ICANN, is an adjudicative VDR process that allows trade mark owners to fight cyber squatting (domain name holders, who had registered a domain name in bad faith for the purpose of reselling it for a profit, or taking advantage of the reputation of a trademark). The UDRP is similar to non-legally binding (but enforceable) arbitration. The most important VDR service provider is WIPO Mediation and Arbitration Centre. Thus far, more than 20,000 disputes have been resolved.

Cyber Settle uses blind-bidding negotiation to settle insurance and commercial disputes. Parties make confidential offers that will only be disclosed when both offers match certain standards (usually ranging from 30 to 5 percent) or a given amount of money. Cyber Settle has been working online since 1998 settling over 200,000 disputes with an accumulated value of more than USD 1.6 billion.

7. PROBLEMS WITH THE USE OF VDR

There are various problems which are related with the use of internet as a method for dispute resolution, few of the issues raised are[8]:

- Confidentiality, privacy, security, record keeping, storage of information
- Access issues such as concerns about the growing digital divide between the it haves and it have-nots
- Appropriateness of VDR for a particular type of disputes

[7] Ibid, p. 9.
[8] Eugene Clark, George Cho and Arthur Hoyle, Online Dispute Resolution: Present realities, Pressing problems and Future prospects, International Review of Law computers and Technology, Volume 17, No.1, pp. 7-26

- Training the it requirements to make it work, that is, the development of standards
- Development of ethical codes of practices

Further, the legitimacy of the process is also based on the assertion of a proper jurisdiction along with the fairness of the process. In order determine the appropriate law to be applied and jurisdiction in cyberspace, the internet's cross border nature from a technical standpoint and its implications are to be analyzed properly. It is suggested that structure of internet is such that there is no meaningful way to avoid contact with a given jurisdiction except to stay off the internet altogether. VDR in such cases helps in providing the proper method by employing techniques that can be applied regardless of the procedural or substantial jurisdictional framework. VDR further allows the parties in trans-border e-conflict to circumvent the issues of determining which court should hear the case, and the seat of arbitration in cyberspace is in accordance with the will and agreement of the parties, rather than on rules of procedure laid down in the law of country where an award was made or sought to be enforced.[9]

8. FUTURE OF VDR

As said by Jeffrey N. Rosenthal is an attorney with Blank Rome, the attractiveness of VDR services to the world-at-large will likely only increase. The availability of such systems can build trust in a company by reminding consumers and corporations dealing with it that a neutral third-party can cheaply and easily resolve disputes. However, India is yet to exploit the benefits of VDR. There is an acute lack of legislative action or awareness in this regard. This problem is teamed up with the lack of VDR institutions in India. Given the fact that its being predicted that the SME Sector would be the driving force in India, there is huge scope for application of VDR Mechanism in resolution of dispute for SMEs as VDR can be a cheap and easy way out of a disputes that are bound to arise during the course of business.

9. CONCLUSION

On the analysis of the Virtual Dispute Resolution mechanism and the various aspects related with it, such as advantages, the disadvantages, the problems face by VDR, and the future it has in the arena of dispute resolution via means other than traditional mechanism, it is to be seen that the slow adoption of VDR into formal justice systems is consistent with the tendency to resist technology, at least on a large scale. However it is reasonable to expect VDR will eventually

[9] Haitham A. Haloush, Jurisdictional Dilemma in online disputes: Rethinking traditional approaches, The International Lawyer, Vol.42, No.3, pp. 1135-1141

become part of the justice mainstream. The in depth analysis of the major issues makes it clear that the amount of faith in the VDR is still yet to reach its maxima. Disputants are still reluctant to let go of the face to face resolution mechanism, and are hesitant in adopting alternative dispute resolution mechanisms such as the VDR mechanisms. With the evolution and advancement in technology, the complications arising out of the contractual relationships in terms of transactions taking place through the medium of internet, would eventually lead to the development of Virtual Dispute Resolution mechanism so as to cater the needs and requirements of the changing times, it is then, that the mechanism of VDR might be able to realize its true potential and efficacy in regards to quick and effective resolution of conflicts. VDR needs Government interference for providing authenticity and assuring confidence in the mechanism. Government must exert this control because Government is the most trusted entity in the field of dispute resolution. Moreover, the problems of cyberspace as highlighted in this paper, needs to be taken care of. Trust, control, and Government are the three components that are essential for the development of VDR. Thus, what is required is a minimal but must interference by the Government.

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JIHAD TERRORISM VIA SOCIAL MEDIA: A STIGMA ON INTERNAL SECURITY OF INDIA

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ABSTRACT

By the utilization of social media platforms, Terrorism, psychological warfare, has acquired a status of the most worrisome and annihilating issues across the world to which India holds no exemption. Organizations associated with terrorist activities are utilizing web-based media for selecting, preparing, and speaking with their adherents, allies, benefactors, as it is a less expensive, simpler, quicker, and compelling strategy for correspondence.[1] *Since the platform of any social media is easily and readily available on any electronic device, it becomes affordable for the terrorists in influencing the minds, especially the young minds in propagating their idea of violence as a revolution and convert it into their holy belief of sinful activities. One such belief is of 'Jihad' that is highly used by the Islamic Terrorist organisations around the world to lure the people in bringing about a revolution by using violent means, that also besets India. The following research proposal shall discuss the meaning of Jihad and how it is misused by terrorist groups and organisation in order to fulfil their agenda of disrupting the tranquillity amongst people. This proposal shall mainly discuss and focus on how these organisations are using social media platforms, threatening the peace and posing various threats to the internal security of India, especially revolving around the issue of high misuse of Jihad, with the help of a few such terroristic instances in India.*

"Human security is the key idea in comprehensively seizing all the menaces that threaten the survival, daily life and dignity of human being and to strengthen their efforts to conferred these threats"[2]

1. INTRODUCTION

India, the place that is known for spiritualism and enlightenments, gives a home to incalculable religions, sub religious beliefs within those religions, co-existence of societies with distinct practices and cultural understanding, innumerable castes, variety of dialects, an array of customs and their followers that is interestingly delightful and also presents a spectacular image of the

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[1] Hossain Md Sazzad,*"Social Media and Terrorism: Threats and Challenges to the Modern Era"* 22 *Sage Journals March* 136-155 (2018).

[2] Understanding the Police in India, Arvind Verma and K.S. Subramanian, *available at*: https://doi.org/10.1177/1057567710374709 (last visited on February 03, 2020).

country.[3] It is a matter of fact that after every 15-20 km in India, there is a change in language, culture, and societal practices. Since India is a country with such high cultural and religious diversity, and also, since it is a developing country in matters of technology as well, it is natural for it to face numerous internal security challenges through digital platforms time and again. It is because of this reason that challenges to the Internal Security of India are innumerable. It faces many well-known problems right from corruption, which has become a casual topic for discussion to environmental degradation, which is yet to be considered as part of one of the serious threats to India. The extent and scope of such threats are varied and complex. No other country in the world faces so many threats to its internal security at the same time and with such intensity.[4] India has to protect its citizens and people not only from outside violent interferences but also, from the evil present at home. Moreover, this internal evil is given aid by external forces that are dedicated and loyal towards the idea of destroying India and claiming their control and authority over it. One such threat to internal security that India has to face on a regular basis is of propagation of false religious ideas, beliefs, opinions, and finally, their conversion into radicalization or extremism.

Every religion has a follower and a devotee and every such follower or devotee has been provided the fundamental right of freedom to practice any religion in India under Article 25 of the Constitution of India[5]. But when such follower exercises undue benefit of such freedom and paints its religion in such a violent manner so that those religious activities carried out by the individual interferes with the freedom of religion or any other fundamental freedom granted by our constitution of another individual under the cloth of practicing religion, then such devotees are known as 'Extremists' and the illegal activities are a demonstration of 'Extremism'. Although the word extremism isn't limited to only practicing, propagating, or following ideals of one's religion beyond peaceful limits, it refers to any such activity, the carrying of which is done beyond prohibitions. The present paper shall use the word Extremist to refer to the above-defined set or category of people. Since there are majorly four categories of religions that the people in India recognize and profess, amongst others, there is bound to be some unrest amongst the people belonging to different religions. Of the many clashes amongst different religions that take place in India, the most volatile is a religious clash between a Hindu and a Muslim. Extremists from both these religions try to establish religious supremacy over the other

[3] India: Confronting Internal Security Challenges, *available at:* https://www.vifindia.org/article/2017/may/19/india-confronting-internal-security-challenges (last visited on February 01, 2020).
[4] N Manoharan, *'India's Internal Security Challenges: Threats & Responses"* 69 *India Quarterly* 367 (2013).
[5] Constitution of India, art. 25(1).

by misleading people into believing that the other has been carrying out heinous acts on another religious group to claim dominance over the people of that religion.

One such religious extremism issue is of 'Jihad' practiced and propagated by the Islamic extremists or terrorists in India and the world. Jihad means a revolution to bring about a positive change in a country or a state, unfortunately, the same is used in form of threat and terror upon people belonging to other religions. The terrorists convey the justification of their terror acts, specifically through social media, by using the word 'Jihad' and claiming it to be the message of Allah for its obedient followers. They carry their acts of extremism to such an extent that it becomes a national headline and even finds a place of deliberation in the International media as well, putting a stigma on India's internal security and state of affairs.

2. MEANING AND MISUSE OF 'JIHAD'

Jihad, which is also spelled as Jehad, is a literal interpretation of an Arabic word that fundamentally means to struggle. It has derived its meaning from the word jahdu or jahada. Taking a more practical approach of the meaning of Jihad, it intends to endeavour or work in a way of utilizing oneself overwhelmingly, arduously, relentlessly, tirelessly, diligently, carefully, genuinely (Lane) and submit itself in the path of gaining freedom from an oppressor or such circumstance.[6]The focal importance of jihad is that it isn't basically a negative idea; rather it is an all-around peace accommodating and consisting of positive ideas. Islam utilizes the idea of jihad as a value-based "extreme exertion" considering it as the strict interpretation of jihad, to take out these hurtful components to make human culture more secure, conflict-free, and harmonious existence. Jihad gives moral approval to battle against anything treacherous and compromising for human culture. This is the central philosophical target of the idea of jihad. In any case, during the early time of Islamic development (622-750 CE), the term acquired broad authenticity in military use which stays common until the present time.[7]

Because of this procured significance of Jihad over many years, the impending age has embedded in their mind that to perform Jihad is to fulfill the aim of their God which is to destroy or suppress other religions and races through military use. It ought to be noticed that the Qurān (2:190) unequivocally restricts the commencement of the war and allows battling just against only genuine aggressors (60:7–8; 4:90). However, owing to the derivation of political authenticity, numerous pre-modern Muslim law specialists proceeded to allow battles of development to

[6] M. Moniruzzaman, *"Jihad and Terrorism: An alternative explanation"* 10 *Journal of Religion and Society* 03 (2008).
[7] *Ibid.*

broaden Muslim standard over non-Muslim domains. Some even came to respect the refusal of non-Muslims to acknowledge Islam as a demonstration of animosity against the entire Muslim religion in itself, which could welcome military reprisal with respect to the ruler being a Muslim.[8] The same is being interpreted by the young, innocent, and naïve minds today. These interpretations have taken hold in these minds and they play the role of generating sympathy towards the terrorists. They deem it to be their pious duty to protect their religion from a rather absent, yet visible to them, threats which they consider to have been vested on their shoulders by their God. They are brainwashed to believe that these acts are the holy war that has been initiated or waged on behalf of Islam as a religious duty. Because of such interpretation of Jihad, the Muslims in India are in a state of confusion as now their religious orientation and identity are seen as an anti-thesis to India's national and internal security.

The use of Jihad by the extremists is now becoming a stain on the Islamic religion not only in India but around the globe. The Muslims, unfortunately, have to carry this burden of always being doubted as a terrorist or being in contact with one. They have to constantly separate the violent interpretation of Jihad from the teachings of the Holy Quran. Terrorists and extremists make the youth believe that only by carrying out the acts of terror will they be sent to heaven and receive a holy reward by Allah himself. Jihad as an idea is perplexing and multi-layered. ISIS and different radical groups would prefer not to recognize the verifiable setting nor the Quranic setting to precisely comprehend the piousness of jihad. They would prefer not to see the abrogating merciful good Quranic message; they simply need to control the content to take care of their political brutality.[9]They prefer to manipulate and utilize the meaning of Jihad in order to fulfill their own hunger for violence. They lure the new recruits by make them interpret the meaning of Jihad as the word of Allah and spread the same.

3. OPERATION OF JIHAD VIA SOCIAL MEDIA IN INDIA

The social media has been surprisingly compelling in uniting various groups of people at a scale and a speed that was unfathomable only a couple of years earlier. While there is a positive part of the widespread of digital activism in bringing issues to light and assembling for fair cultural results, it is similarly obvious that online social media has a clouded or a dark side in empowering political polarization and radicalization.[10]As much as the countries are trying to keep up with the

[8] Asma Afsaruddin, Jihad, *available at:* https://www.britannica.com/topic/jihad (last visited on February 04, 2020).
[9] Abed Awad, What ISIS and the West get wrong about Jihad, *available at:* https://edition.cnn.com/2015/05/29/opinions/isis-jihad-meaning/index.html (last visited on February 03, 2020).
[10] Anjana Susarla, "*Unravelling the impact of Social Media on Extremism*", *George Washington University Program on Extremism* 3 (2019).

advanced weapon system or technology that the terrorists use or in other words, as the terrorists are failing to use brute force to compel a state, they are now gradually leeching upon the medium of electronic media, specifically the social media. They are waging a war against any country that refuses to bow down to their frenzied terms and conditions by influencing its young citizens via social media. A deeply worrying state of matter as it is, terrorism is now inconceivable without the medium of social media.

The social media is a group of the Internet or cyber-based applications that allow the creation of user-generated content, such as Twitter, Facebook, YouTube, WhatsApp, etc.[11] It is widely supported by the people, especially youth of any country as it makes communication less time-consuming as opposed to face-to-face communication. Moreover, its appealing platform engages and speaks out more to the young population as compared to other generations. The social media platforms are gradually assuming a significant part in shaping and diverting, either towards a positive or negative change in the manner individuals think. When precisely focused on, rehashed messages can fortify political thoughts or even flip the perspective of the most uncertain. In such a manner, Jihadism has been distinguished as one of the developments that depend on the most on such platforms to spread the propaganda of hate & violence using the term 'Jihad' and attempt to impact the general feeling.[12] They hope and are in fact successful in hoping that demonstrations of violence will point out the atrocities committed against them and their complaints and conceivably create such an incredible backfire that the subsequent restraint by the official authorities will drive more sympathisers towards their positions.

This is the reason anarchists alluded to their acts as "propaganda by the deed".[13] Through this, they work by the method of reverse psychology cloned under the 'oppressed population' approach and attitude. Not only that, but they are successful in diverting the attention of the Human Rights authorities from the victims and security personnel that suffer at the hands of terrorists, towards the Jihadists themselves. The way the online platforms, apps, and, websites adapt access, explicitly social media, expands our weakness as clients to disinformation. Rather than fanatic recordings being covered up in some more obscure corners of the Internet, online media stages make it simple for anybody to unearth and post negative substance spreading hatred against a specific community, with the result that radicalization through the introduction

[11] *Supra* note 1.

[12] Sánchez-Rebollo Cristina, Puente Cristina, Palacios Rafael,Piriz Claudia,P. Fuentes Juan, and Jarauta Javier, Detection of Jihadism in Social Networks Using Big Data Techniques, *available at:* https://www.hindawi.com/journals/complexity/2019/1238780/ (last visited on January 16, 2020).

[13] Boot Max, Why Social Media and Terrorism make a perfect fit, *available at:* https://www.washingtonpost.com/opinions/2019/03/16/why-social-media-terrorism-make-perfect-fit/ (last visited on January 23, 2020).

to disdainful material.[14]These online networks are an extraordinary path for the extremists or jihadists to collect help and make a network of devotees, where rogue or deviant perspectives and beliefs might be traded, fortified, solidified and approved. It is anything but difficult to make networks supporting extremists' ideas using a social media platform in light of the fact that the idea of these destinations is profoundly decentralized and the massive enrolment makes control and supervision by surveillance of these platforms almost inconceivable. Youngsters, who are in general hopeful and desperate for a chance to do something worthwhile in their life, are frequently attracted to alluring pioneers, and many are looking for a reason to have faith in, regardless of whether that causes advances savagery, disdain, and annihilation.[15]

4. WHY DO THE JIHADISTS PREFER SOCIAL MEDIA?

In the words of terrorists, the primary reason in order to utilize Facebook and other similar media platforms was appropriately sketched out by the terrorists themselves in a jihadi online gathering calling for "Facebook Invasion": This (Facebook) is a good thought, and better than the discussions. Rather than sitting tight for individuals to [come to you so you can] advise them, you go to them and educate them! ...(I) can, in the event that you have a gathering of 5,000 individuals, with the press of a catch you (can) send them a normalized message: I beseech you, by God, to start enlisting for Facebook when you (wrap up) perusing this post. Acquaint yourselves with it. This post is a seed and a start, to be trailed by genuine endeavours to streamline our Facebook use. We should begin dispersing Islamic jihadi distributions, posts, articles, and pictures. We should envision an award from the Lord of the Heavens, commit our motivation to God, and help our associates.[16] There are numerous reasons why the terrorists capitalize on various social media platforms and why they choose social media to fulfil their attention-seeking goals, i.e., spread their Jihadist Propaganda. It is easy for them to carry out their recruitment process on social media instead of traditional telephony and other methods of communication.

Right off the bat, these social media channels are by a wide margin the most famous within their target group, i.e., the youngsters which permits the terrorists or extremists organisation to become a part of platforms like Facebook, Twitter, etc., and easily infiltrate the jihadist ideology amongst the vulnerable youngsters. Secondly, online media channels are easily comprehendible

[14] *Supra* note 10.
[15] Lieutenant Colonel Pradhan Sushil, Internet, Social Media and Terrorism, *available at:* https://usiofindia.org/publication/usi-journal/internet-social-media-and-terrorism/ (last visited on February 08, 2020).
[16] Department of Homeland Security, "*Terrorist use of Social Networking Facebook: Case Study*", *Public Intelligence* 5 December (2010).

for a new user and dependable, and of course free of cost. Lastly, person-to-person communication permits these oppressors to connect with their intended interest groups and essentially "thump on their entryways"- rather than more seasoned models of sites in which fear mongers needed to trust that guests will come to them. Person-to-person communication permits psychological oppressors (terrorists) to utilize and focusing on techniques known as narrow-casting.[17]The new atmosphere of web-based media, unfortunately, provides specialized favourable circumstances for not only the general population but also for the Jihadists, terrorists, extremists for sharing, transferring, or downloading records and recordings no longer requires fast computers or any other kind of specialised PCs for those sharping destinations or influence individuals fit for transferring such recordings. Rather, the technologically advanced mobile phones and online media accounts are everything necessary to quickly share material to all including countless jihadists. Consequently, the jihadists and their supporters and devotees immediately embrace these instruments and are using the most recent web advancements and news sources to keep up the huge and modern online media crusades used to impart, radicalize, enlist, and intimidate the young influential minds.[18]

5. MODUS OPERANDI

Unlike traditional media-characterized as "one-to-many," in which just a unit or units of setting up establishments disperses data to a successfully innumerable and limitless crowd, social media empowers anyone to distribute or gain access to any data and to do as such in an intuitive, two-way trade. New technological innovations in the area of one-on-one communications, for example, comparatively cheap and open portable and electronic systems, make exceptionally intelligent stages through which people and networks share, co-create, examine, and change the original content. With online media, data shoppers additionally go about as communicators, unfathomably growing the quantity of data transmitters in the correspondence market. This two-way correspondence advances the production of little, diffused arrangements of communicators and groups. Virtual groups and communities utilizing web-based media are progressively mainstream everywhere over the world, particularly among younger of the populations.[19] As soon as the Jihadists or terrorists gain a foothold on the social networks, they do not directly approach any person or any possible recruit. They never establish direct communication, instead, they develop a 'friend of a friend' relationto influencing sympathetic individuals. These existing members or sympathizers bridge the gap between potential recruits and terrorist leaders or

[17] Gabriel Weimann, *"Terrorist Migration to Social Media"*16*Georgetown Journal of International Affairs* 180-187 (2015).
[18] *Ibid.*
[19] *Ibid.*

influencers.[20]Once these self-proclaimed 'saviours of Islam' increase traction via social media destinations, they hope to assemble virtual online terrorist systems where impact and thoughts can spill out of existing individuals to possible volunteers. They influence friend of a friend relationships& connections where backhanded associations permit impact and propaganda to advance from the leading Jihadists, extremists, terrorists, etc., and websites to supporters who might be slanted to join them in their impious cause.[21]

They make an attempt to influence the minds through social media posts that help promote their violent ideologies and potentially pull in individuals to either joining or supporting that group. On most occasions, they will continue clarifying how a few nations have carried out acts of cruelty and monstrosity against different nations, specifically the nations majorly believing in Islam. They will likewise assault helpless nations for supporting the philosophies of these countries. They will guarantee that their point is to either bring retribution or guarantee equity. They tailor their messages to appear to be centered on bringing a cultural change that nations have fizzled. They make a case to set up harmony by forcing 'tranquil' strict laws that will guarantee that there is equity. An individual uninformed of the grave assaults that these organizations commit or aim to commit with complete dismissal to human life may be conditioned to trust in their publicity and propaganda.[22]

As per the Mid-Day report, in the years 2016-2018, the Maharashtra Anti-Terrorism Squad (ATS) has had the option to de-radicalize in excess of 60 young people from throughout a state, and 20 of them were from Mumbai itself. During this interaction, the ATS found out about numerous strategies ISIS utilized for attracting the adolescents that were clarified by the group as follows:

1. ***Online enlistment group:*** ISIS has an undeniable group of online spotters that are working from various pieces of the world, that especially consider such adolescents who are deeply involved in backing the use of arms and ammunition to ensure the existence and superiority of Islam. They also look for such youth that is slanted towards the philosophy of ISIS.
2. ***Online supervision and monitoring:*** The members, also known as the recruiters, of these radicalized groups, are entrusted with the responsibility to screen the online exercises of such young people who post statuses sympathizing with the ideals and

[20] Todd V. Waskiewicz, *"Friend of a Friend Influence in Terrorist Social Networks"*, *available at:* http://worldcomp-proceedings.com/proc/p2012/ICA6143.pdf(last visited on February 10, 2020).
[21] *Ibid.*
[22] Erdal Ozkaya, *"The Use of Social Media for Terrorism"*, 19 *Defence Against Terrorism Review* (2017).

activities of ISIS action and jihad and furthermore like, share and leave a supportive remark on those posts that substructure themselves around nature that is fundamentally Islamic.

3. ***Private messages to the preachers of ISIS of Jihadi Terrorism:*** Once the screening process of these young people has been successfully conducted and comes to an end, they are sent private messages by these online recruiters and the sender begins to interview them by talking about Islam and ministers about the religion.
4. ***World visits and open positions:*** Once the selected few show interest in the conversations about Islam, as observed by the online recruiters during the interview, the sender of those messages above starts the process of baiting these young people towards their association by tossing at them about the odds of them getting such job opportunities that would lead to world tours as offered by the ISIS. At that point, once the young succumb to these, the sender uncovers his actual personality. This is the main level of the enlistment interaction.
5. ***Radicalisation and handing over to the Indian controller:*** Once the few or more qualified youth are radicalized through a few selection representatives then the chosen ones are given over to the handlers or trainers already present in India.
6. ***The way to Syria:*** The last cycle in the enlistment process is done by the Indian Handlers where they are answerable for guaranteeing that the chosen youth is shipped off to Syria utilizing various and usually illegal courses.

The anti-terror squad during the process also found out that the young recruits are made to take an oath of allegiance or loyalty towards the terrorist organisation, either in writing or audio or video recording sent to ISIS recruiters through social media itself. The recording of the oath is used to blackmail those youths who may wish to quit the terrorist or Jihadist organisation in the future or who may change their mind and wish to report them to the authorities. This oath is proof enough under Indian law to book the young recruits under the Unlawful Activities (Prevention) Act because it is a confirmation that he joined the outfit. The electronic evidence of interactions exchanged between the recruits and ISIS recruiters can bolster the case.[23]

6. RADICALIZED HOUSEWIFE FROM HYDERABAD

One such case of radicalization over social media is of a woman Afsha Jabeen, a simple housewife from Hyderabad who appeared to be simply engaged in household chores and taking

[23] 6 steps ISIS uses to recruit Indian youths, *available at:* https://newsable.asianetnews.com/india/6-steps-isis-following-to-recruit-indian-youths (last visited on February 02, 2020).

care of her better half and family. However, away from prying eyes, the 38-year-old was running an online media ring to bait youngsters to the feared Islamic State. She made a fake social media profile with a name the Nicky Joseph and professed to be a citizen of the UK. The profile of Nicky Joseph, managed clandestinely by Jabeen, was engaged in the conversion of the interested individuals to Islam from Christianity. Utilizing the online symbol, she detected those reacting to IS writing via social media and deliberately snare them till they became radicalized.

Afsha carried out her activities in such a covert manner that even her family members had no suspicion of her activities before the whole family was expelled from the United Arab Emirates and captured by the police on September 11, 2015. Unfortunately, she isn't the only case. Like her, there can be other housewives and like Jabeen's family, they might also not be aware of her activities on social media. Hyderabad is presently a centre point for digital terrorists utilizing web-based media to radicalize the city's well-informed youngsters and selecting them for jihadist associations, most unmistakably the IS that is gradually spreading its arms in India. "The case of 'Nicky Joseph' is a classic example of social media being used for radicalisation and criminalisation," said Anurag Sharma, Telangana director general of police. Five days after her capture, the police opened a stylish 'Social Media Management Center' - a first-of-its-sort in the nation - blast in Hyderabad's IT centre point.[24]

7. RADICALIZED YOUTH FROM SOUTH INDIA

Three militants namely, Eisa Fazili, Syed Owais & Taufeeq were killed on the night of 11-12th March 2018 in an encounter at Awantipora, a town at the bank of the river Jhelum in the Pulwama district of Jammu & Kashmir. Eisa Fazli & Syed Owais were B-tech students who left their college to join the militancy in Kashmir and were the locals of the state and Taufeeq, 26, was a boy from Hyderabad, Telangana. According to the press note released by the Telangana Police states, the 26-year-old boy was radicalized into supporting the cause of ISIS and went to Kashmir to participate in the militant or terrorist activities as directed by ISIS.

A video was recorded by Eisa Fazili immediately before he was killed in an encounter where he was seen reprimanding the Indian Ulema for refusing to issue Fatwa against non-muslim oppressors. Through the issuance of the said Fatwa, he wanted to even the scores with those who issued the anti-terror Fatwas in various Islamic conclaves in Delhi in 2018, accusing them of

[24] Prasad Nichenametla, Chatting away to Jihad: Hyderabad becoming hub for Cyber terrorists, *available at:* https://www.hindustantimes.com/india/chatting-away-to-jihad-hyderabad-becoming-hub-for-cyber-terrorists/story-BfCMlV2803pPufuTllj9XK.html (last modified November 25, 2015).

'siding with the government's bid to disparage the Ummah'. Eisa Fazili warned this ulema: "One day they have to show their faces to Allah who will punish them for failing in their duties to give a call for armed struggle."[25]

8. THE AGGRESSION AMONGST KASHMIRI YOUTH

In 2017, after the 22-year-old commander of militant organisation Hizbul Mujahideen administrator, Burhan Wani was killed in a skirmish between the militants and the police personnel in Kashmir, the 'Burhanwali Aazadi' estimation spread by his adherents has added fuel to the local insurgency or uprising in Kashmir. Beguiled by their young leader Burhan Wani, the new local variety of terrorists have emerged in the valley of Kashmir who doesn't leave any opportunity in romancing with the gun on the social media. Following a six-month test into episodes of distress in Kashmir in 2017, a team of National Investigation Agency (NIA) recognized 79 WhatsApp groups, having 6,386 telephone numbers, used to recruit and support young men for stone-pelting. Of them, around 1,000 numbers were discovered to be active in Pakistan and Gulf countries. Other 5,386 numbers were discovered to be in use in different areas of the Valley and neighbouring States. Huge numbers of these groups had managers who were situated and operating from Pakistan. As per a media report, more than 300 WhatsApp numbers and groups were engaged in hordes to disrupt and disturb the anti-terror operations carried out by the authorities in 2017, which they are still engaged in.[26]

The broad and ever-increasing utilization of web-based media along with the increment in the number of people entering the arena of online social media platforms has seeded and negatively administrated a dangerous bit of revolutionary substance in Kashmir, and as its consequence, given 30 years of devotion amongst the Kashmiris an orderly development, where, like parasites, radicalized way of thinking, terrorist or fanatic associations, and their chiefs make do with the injured Kashmiri mindset as an effect of their social, political and financial handicap. Used as a deadly weapon initially by Burhan Wani, commander of Hizbul Mujahideen resulting in a noxious effect, the online media sites like Facebook, YouTube, WhatsApp, Twitter, Telegram, etc have been furthermore used by Hizbul Mujahideen and Lashkar-e-Toiba after the commander was killed. The indoctrination circling around the anti-India speeches spread by the terrorist leaders fuse chronicles of Islamic Terrorist' instructional meetings on psychological

[25] Ghulam Rasool Dehlvi, South India's radicalized youths are joining Jihad-e-Kashmir, *available at:* https://www.sundayguardianlive.com/news/13091-south-india-s-radicalised-youths-are-joining-jihad-e-kashmir (last modified on August 7, 2018).
[26] Parjanya Bhatt, Cyber Jihad: The biggest challenge Kashmir, *available at:* https://www.orfonline.org/expert-speak/42391-cyber-jihad-biggest-challenge-kashmir/ (last visited on February 03, 2020).

warfare (terrorism), radicalism, jihad, and so forth, and declared badgering of local people of the valley by the security powers to prod the frail youth. The valley is now witnessing a stronghold of 'Digital jihad' to its roots, creating trendy aggressors in order to keep the deadly propaganda gurgling and alive. By weaponizing online media, they seem to have viably incised the message of merciless jihad on the mindset of the people in the valley, deceived the powerless youth to participate in barbarous exercises, familiarised them with guns, in conclusion, making them complete demonstrations of threatening individuals and put a huge stain on the Internal Security of India.[27]

9. CONCLUSION

Social media has been a powerful tool in empowering activism amongst citizens and interfacing with people over the world. However, it should be recognized that a clouded side of the online media exists that can push people towards extremist, jihadist substance where it can wind up radicalizing individuals.[28]Most of the content, videos, information, etc., that is posted on social media by the violence creating, including extremist ideology and propaganda, is designed with an aim to make it eye-catching and viral. While web-based media gives a feeling of personality, reason, and being closely connected with others, fanatics likewise comprehend the virality of online media wherein upsetting content that is related to dreadful feelings can be effectively communicated or even live-streamed.[29]The terroristic interpretation of Jihad has become so Allah in the holy Quran set the good, moral and ethical structure and, guidance for Muslims. No political teaching of Jihad and the related political savagery can override or rise above the compassionate message set out in the Quran. This unequivocal perfect voice restricts the slaughtering of the elder, women, and children. It restricts torment, force in one's religion, demolition of places of worship or holy places, the assault, and looting of towns and humiliating the individuals of other religions. The crooks of ISIS would prefer not to hear this voice of the Quran and the message of Allah since it negates their rule of fear, their idea of the terror that they wish to spread. However, it is the main true and celestial voice of Jihad that the remainder of the Muslims hears loudly and clearly.[30]

[27] *Ibid.*
[28] *Supra note* 10.
[29] *Ibid.*
[30] *Supra note* 9.

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SOCIO-CLIMATIC ANALYSIS OF WASTE MANAGEMENT AT HOUSEHOLD LEVEL

AKANSHA GHOSE*

ABSTRACT

Systemisation of household waste collection and disposal is an objective under the Swachh Bharat Scheme (Urban) that was scheduled to be achieved by October 2019. Apparently, in pursuance of the same, Ministry of Environment, Forest and Climate Change notified the Solid Waste Management Rules, 2016 (hereinafter referred to as "New Waste Management Rules") providing for solid waste segregation and management at household level. Libertarian as it may sound; its implementation still remains a bleak reality. Every coin has two sides to it and although waste segregation at household level may appear to solve the evil of climate degradation at the grassroot level to some respectable extent, it poses far reaching social concerns such as capitalisation of waste collection by multi-nationals and loss of livelihood of private waste collectors who are not adequately trained in waste management. The paper will be segregated into various sections focusing on watershed environmental decisions pronounced by the Supreme Court of India in light of Article 21 (Right to life) of the Constitution of India; Paradigm shift in waste management brought forth by New Waste Management Rules that replaced the 16 year old Municipal Solid Wastes (Management and Handling) Rules, 2000*; Requirement of robust public awareness systems and strong sanctions paving way for climate stabilisation at ground level; Social concerns entailing proper household waste management systems such as capitalisation of the sector leading to loss of jobs and livelihood of private garbage collectors; Potential environmental governance reforms such as imposition of stringent penalties in case of breach of New Waste Management Rules, empowerment of Residential Welfare Authorities to formulate necessary waste management regulations, vigorous public awareness schemes amongst others in order to ensure adherence to aforementioned norms.*

1. INTRODUCTION

India is a globalising economy. Rapid industrialisation does not merely impact the economy but has far reaching effects on surrounding ecology. With rampant increase in consumption, waste is being produced equally. Tracing the historical relevance of waste accumulation, it is observed that waste expulsion increased in the sixteenth century that marked migration of people from their villages to cities in search of job opportunities promised to them by the industrial

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revolution; which is when incessant dumping of wastes on streets happened[1]. Since the number of houses in urban areas increased, waste generation at household level amplified. Waste generation is inevitable however, its management ensures that is does not harm the climate and health of people. Waste generated by households is diverse and can be categorised into biodegradable, non-biodegradable, bio hazard amongst others. Household garbage consists of food, plastic, sanitary products and others. However, the Indian tradition of waste disposal is reckless to say the least where a large heterogenous bundle is waste is disposed off. Mixing distinct waste which varies in nature makes treatment of waste impossible thereby enhancing the waste volume. Considering the grim climatic future, it will not be an exaggeration to say that behavioural changes have to be made if one wants to see earth surviving another century. Waste segregation at household level may potentially aide climate cleansing by ensuring that waste generated by households is duly treated. Modern waste treatment techniques shall ameliorate environmental concerns exacerbated by traditional practices such as mass burning of large volume of waste (which is the greatest contributor to poor air quality), filling up of land pits with waste (that may result in land pit explosion) and thoughtless dumping on streets (which may be a potential deterrent to social evils like manual scavenging).

The Ministry of Environment, Forest and Climate Change notified the *Solid Waste Management Rules, 2016*(hereinafter referred to as "New Waste Management Rules") in 2018, providing for solid waste segregation and management at household level. These rules provided modicum of hope for citizens, who were gasping under the burden of a deteriorating environment. It fastens duty upon a person, residential society or any other establishment which generates solid waste to segregate the bio degradable waste, non- bio degradable waste and domestic hazardous waste before they hand it over to the waste collectors. The New Waste Management Rules replaced the Municipal Solid Wastes (Management and Handling) Rules, 2000, introducing new features such as segregation of waste at source and others which will be discussed in brief in the coming section.

2. ENVIRONMENT AND THE RIGHT TO LIFE

The Supreme Court of India under Article 32 of the Constitution has pronounced various progressive judgments enforcing fundamental rights of the citizens. The Supreme Court has lately interpreted Part III of the Constitution of India (Fundamental Rights) by giving it wide meaning and therefore, Article 21 has been discussed in such manner so as to give legal force to

[1] "This migration of people to cities led from rural areas to cities as a result of industrial revolution" Ebikapade Amasuomo & Jim Baird, *The Concept of Waste and Waste Management*, 6 JMS 88, 88-96 (2016).

rights which are expressly provided in the Constitution of India but concomitant to those stated in Part III. Most Environmental matters have been decided by the Supreme Court through numerous Public Interest Litigations.

In the case of *Rural Litigation Entitlement Kendra v. State of Uttar Pradesh*[2], lime quarries were ordered to be shut down since it posed risk to the environment and to the people who were living around the area. In a similar case leather tanneries in Kanpur faced closure on the ground that it its act of disposing of the waste in Ganga river was accelerating water pollution in that area[3]. The Supreme Court in *Vellore Citizen's Welfare Forum v. Union of India*[4]once again untreated waste generated by tanneries and other manufacturing industries were being dumped into rivers and open fields. The Court in this case reiterated that the *Polluter Pays Principle* and *Precautionary Principle* are parts of *Sustainable Development*; which is a necessary guarantee of Right to life under Article 21 of the Constitution. Recently, the Supreme Court in its order dated 12.12.2017 has acknowledged that the issue of solid waste management is brooding in our country and directed the Delhi Government to devise a strategy vis a vis solid waste management that can act as inspiration for other States of our Nation[5]. In *Paryavaran Suraksha Samiti & Anr. v. Union of India & Ors.*[6]the Supreme Court pronounced an order under Article 32 of the Constitution holding that the Municipalities have been vested with the onus to effectuate proper solid waste management under Article 243W of the Constitution; therefore, the municipalities shall maintain treatment plants and set up adequate sewer plants in order to ensure proper solid waste management. It also ordered halting of industrial activities till the time treatment plants were set up to deal with industrial waste.

3. WASTE SEGREGATION AT SOURCE BY HOUSEHOLDS IN LIGHT OF SOLID WASTE MANAGEMENT RULES, 2016

Households generate heterogeneous waste on a daily basis; the everyday waste disposed of by households consists of an amalgamation of degradable and bio-degradable waste. The segregation of waste becomes imperative considering the distinct nature of varied debris that needs different treatment. The Ministry of Environment, Forests and Climate has notified the Solid Waste Management Rules, 2016 which necessitates segregation of waste at the source level. The collection of household generated waste is to be done by waste generators. Under the Act,

[2] (1985) 2 SCC 431.
[3] M.C. Mehta v. Union of India (1986) 2 SCC 176.
[4] (1996) 5 SCC 650.
[5] In Re: Outrage as Parents end life after Child's Dengue Death SMW(C) No(s). 1/2015.
[6] WP (C) No. 375 of 2012.

waste generators have been defined to include every person, residential and non-residential establishments as also Indian Railways and defense establishments which generate solid waste. The waste generators have been vested with the duty under Section 4 of the Act to ghettoize the waste under three categories namely: biodegradable, non- biodegradable and domestic hazardous waste. Apart from the households, onus to treat waste meticulously has also been imposed upon the resident welfare associations and the like. The bio degradable waste shall be composted in accordance with the techniques provided for in the rules by the foregoing associations whereas the non- bio degradable waste shall be handed over to waste collectors or any other body as directed.

Waste treatment facilities are to be set up by the local bodies. Duty pertaining to waste segregation and management has also been affixed on educational institutions, hotels and other communities however, the paper shall focus on household generated waste and its due disposal. The local authorities and village Panchayats have been delegated the task to levy fines upon defaulters of the aforementioned Rules. A brief layout of duties of local authorities and village Panchayats of census towns and urban agglomerations has been discussed in the New Waste Management Rules (under Rule 15). Some of the responsibilities include designing solid waste management strategy within six months from the date on which the Rules are notified, providing assistance for door to door collection of segregated solid waste from household, establish systemic waste collection routine in which waste pickers or informal waste collectors shall also be involved, put in place infrastructure for separation of recyclable waste such as paper, metal, glass and the like from other waste and train waste collectors in efficacious segregation of waste in aforementioned manner amongst others.

The New Waste Management Rules are promising and progressive and pave the way for systemic waste management focusing at the very source of waste generation and mandating segregating and management at source level. However, statute books and ground realities are disparate most of the times; intention of the Rules and its actual implementation rarely unite with each other especially in matters of environmental sustenance in developing countries. Many hurdles come in the way of implementing this futuristic eco-friendly scheme and the major ones are lack of public awareness about the Rules, absence of strong sanctions in the event of breach of Rules and deficient training of the waste collectors in waste segregation and management. Not only this but also the investment in Solid Waste Management practices is below par. The quantum of waste generated and the range of activities involved in dealing with this waste in an efficient and optimal manner merits a large infrastructure in terms of manpower, machines and

therefore finances[7]. Waste segregation and management may look like a benign issue which is the case with most environmental legislations; they are not viewed with as much credibility as other statues especially those pertaining to criminal law. Benevolent environmental threat is a myth. Some of the health problems associated with poor water quality arising from inadequate waste disposal and waste management practices include typhoid fever, diarrhea, cholera, hepatitis, hook worm infestation, skin diseases, malaria etc.[8] Segregation of waste effectively reduces the waste volume. If the waste is segregated in the manner as provided under the New Waste Management Rules, varied waste are treated in isolation in accordance to their distinct nature. It curbs the evil of incessant dumping in landfills. Dumping in landfills lead to ground water pollution contaminates the soil and also produces toxic fumes due to interaction of diverse and potential hazardous elements all posing health peril. Proper disposal of solid waste in consonance with the above named Rules aids in stifling social evils such as manual scavenging.

The New Waste Management Rules lay down a participatory model which holds not only the authorities (local bodies) accountable for proper waste management but also mandates segregation of waste at source by individuals; the State and citizens compliment each other in effectual disposal and management of solid waste. However, simply entailing participation of citizens via legislative/ executive rules is not enough and steps shall be taken by the State to ensure that citizens are duly engaged in the model.

4. SOCIO-ECONOMIC CONSEQUENCES OF ENFORCEMENT OF SOLID WASTE MANAGEMENT RULES, 2016

Methodical waste management tends to exclude informal waste collector and leans in favour of privatisation of waste collection. This capitalisation of waste collection and management deprives many waste collectors and rag pickers of their income as they are very conveniently sidelined in the waste management business; the business then is overtaken by big corporates and conglomerates. There have been instances where the Municipal Corporation of Delhi (MCD) has entered into contract with private firms and directed them to commence door-to-door collection of solid waste from households of a particular locality as also transport the same and dispose it of duly. This led to the exclusion of poor waste collectors who were deprived of their livelihood. Instead of seeking to capitalise on the effectiveness of the informal sector and institutionalising

[7] Sandhya Venkateswaran, *Managing Waste: Ecological, Economic and Social Dimensions*, 29 Econ. Pol. Wkly 2909, 2907-2911 (1994).

[8] D. N. Ogbonna et al., *Waste Management: A Tool for Environmental Protection in Nigeria*, 31 AMBIO 56, 55-57 (2002).

its participation in waste management, the MCD sought to radically transform solid waste management[9].

Informal or independent waste collectors lack sufficient training in waste segregation, handling and transportation. Private firms which boast respectable capital and investments can afford to educate and train their employees in proper waste management, thereby enjoying an edge over the informal sector. There shall be endeavours to train poor waste collectors in waste management by local bodies so as to enable them to compete with giant corporate forces. Moreover, efforts may be made in engaging informal waste collectors and private waste collection firms; the engagement may be successful in extending employment opportunities to poor untrained waste collectors who may then be set free from the threat of loss of livelihood. The private firm in turn can train and educate the waste collectors; such decentralised power model ensures co-existence of corporate giants and impoverished sanitation workers/ waste collectors.

5. CONCLUSION

Orderly Waste Management has become imperative in view of the current environmental crisis. Environmental agenda are far from political manifestos and election promises; it is rarely deliberated upon and takes a subservient position in front of issues pertinent to religion, caste, language which enjoys political hegemony[10]. There are very few instances of widely acclaimed environmental activism and even few cases where the State has agreed to bring forth legislative reform in the environmental segment. The Solid Waste Management Rules, 2016 is the latest exertion by the Union Government to 'un-wrong' the wrong done to mother nature on a daily basis. The said rules are in consonance with the fundamental duty enshrined in the Constitution of India under Article 51-A(g) which states that "*It shall be the duty of citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures*"; The New Waste Management Rules thereby necessitates segregation of waste generated by households at source by individuals i.e. before it is handed over to the waste collectors. However consoling these Rules may look like to the current indignant ecology; impediments lie in its efficacious implementation of account of lack of public awareness

[9] Seth Schindler et al., *Delhi's Waste Conflict*, 47 Econ.Political Wkly 19, 18-21 (2012).

[10] "What is true of India is true also of Pakistan, Bangladesh, Sri Lanka and Nepal: climate change has not been a significant political issue in any of these countries, even though the impacts are already being felt across the Indian subcontinent, not only in the increasing number of large scale disasters but also in the form of a slow calamity that is quietly but inexorably destroying livelihoods and stroking social and political conflicts. Instead political energy has increasingly come to be focused on issues that relate, in one way or another, to questions of identity: religion, caste, ethnicity, language, gender rights and so on." AMITAV GHOSH, THE GREAT DERANGEMENT: CLIMATE CHANGE AND THE UNTHINKABLE 169 (2016).

regarding the Rules as well as lack of strong punishments entailing contravention of the concerned Rules. It is pertinent to mention at this juncture, that it has been quite few years since the Rules have been implemented at domestic level. The dismal state of ecology, had started improving post the nation-wide lockdown imposed in our country (like many others) in March 2020, as a result of COVID-19 pandemic. Pristine images of mountains being visible from once smog clenched cities, endangered wildlife roaming on once busy streets and river bodies once dead, reviving itself, were common on news channels during the time. With easing of lockdown rules, the hope of sustaining such immaculate ecological occurrences has started ebbing.

If at all there is anything that has been taught to us by the COVID-19 pandemic, it is the veritable need to co-exist with our surrounding environment, failing which the environment will take its own course to claim its planet back. Hence, it is suggested that wide scale public awareness drives shall be undertaken by the State to educate people about waste segregation at home. *Swachh Bharat Abhyan,* albeit criticism upon its outcome, shall be used to inspire effective widespread public awareness programs. Residential welfare authorities or the like local body may fasten strict penalties in the event of infringement of relevant waste management rules. The enforcement agencies shall also make certain that the informal waste collection sector comprising of poor and untrained waste collectors are not disregarded by virtue of privatisation of waste management by private firms. Training and skill development programs must be undertaken by the State in order to train these informal waste collectors in suitable and appropriate means of waste segregation, handling, transportation, treatment and disposal. The foregoing suggestions may enable the Solid Waste Management Rules, 2016 to achieve its objects in essence, than in dead letters.

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