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A TRUE VISIONARY

*“You see things and you say **Why?** But I dream of things that never were and say **Why not?**”*

- George Bernard Shaw



Shri Jagannath Gupta
(1950 - 1980)

*Also a true visionary...who dared to dream!
He lives no more but his dreams live on....and on!*

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And more dreams to come!

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From the desk of the Chief Editor

On behalf of the Editorial Team of the JIMS Journal of Law, it is my privilege to present Volume 7, Issue 1, a testament to our unwavering commitment to promoting critical legal scholarship and fostering a deeper understanding of law. This edition highlights a diverse range of perspectives, each offering valuable insights into the challenges and opportunities that define contemporary legal systems. The articles featured in this issue address both theoretical and practical dimensions of key legal issues, contributing meaningfully to ongoing discourse in the field.

The paper titled 'The Endless Struggle: Analysing the Conflict between Israel and Palestine in the Global Scenario' offers a thoughtful analysis of this enduring conflict, its global implications, and the pursuit of justice and resolution. It is followed by a thoughtful analysis of Punishment with special reference to community service where the research delves into the evolving nature of punishment in criminal justice systems, focusing on community service as a rehabilitative alternative to conventional punitive measures. *Mental Capacity and Its Implications in Contract Law* critically examines the legal interpretations and judicial precedents concerning mental capacity. The issue also includes a comprehensive study titled The Dilemma in Administration of NCT of Delhi: Issues & Challenges, which addresses the governance complexities and legal hurdles faced by the National Capital Territory of Delhi. Another significant contribution explores the role of Scientific Investigation in the Indian Criminal Judicial System, critically examining its challenges and potential for reform. Finally, *A Critical Study on Cyber Stalking in India* provides a timely investigation into the legal and societal implications of cyber stalking. The study examines legislative measures, judicial responses, and the broader impact of cybercrimes on victims in the digital era, emphasizing the need for robust legal frameworks.

The publication of this issue would not have been possible without the dedication and hard work of our editorial team, peer reviewers, and the authors, whose scholarly contributions form the essence of this journal. I extend my heartfelt gratitude to each of them for their invaluable efforts. I would also like to express my sincere appreciation to our readers for their continued support and engagement, which motivates us to uphold the highest standards of academic excellence and sustain the journal's role as a platform for meaningful legal scholarship.

Sincerely,



Prof. (Dr.) Pallavi Gupta
Thanking You

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THE ENDLESS STRUGGLE: ANALYZING THE CONFLICT BETWEEN ISRAEL AND PALESTINE IN THE GLOBAL SCENARIO

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ABSTRACT

One of the longest-lasting and most complicated wars in contemporary history is the one involving Israel and Palestine. The goal of this essay is to offer a thorough examination of the causes, consequences, and possible solutions for world peace. It looks at the conflict's beginnings, major incidents, important figures, and the sociopolitical processes that keep it going. In addition, it looks at global interventions, peace initiatives, and potential fixes to reach a long-term agreement. Historical, religious, territorial, and sociopolitical variables interact in a complicated way to shape the complex dynamics of the Israel-Palestine conflict. This examination will go back to the early 1900s and the rise of Zionism, which resulted in the founding of Israel in 1948, in order to gain a deeper understanding of the historical backdrop of the conflict. The objective of this paper is to investigate the underlying reasons behind the several attempts to settle the Israel-Palestine conflict that have failed. This essay argues that the four primary themes that are the focus of negotiations in every attempt are boundaries, security, Jerusalem, and refugees. This essay assesses each side's stance on these four issues and how it influences the negotiations' trajectory. This is achieved by employing the inductive technique to acquire data for an empirical generalization through library research.

Key words: *Palestine, Humanitarian, International Law and Territory*

Introduction

One of the longest political disputes in history is said to be between the two countries of Israel and Palestine. The conflict, which has lasted for more than 50 years, has been the focus of numerous research agendas and attempts at conflict resolution. Due to its persistently failed attempts at dispute resolution, this conflict has received special attention. Beginning with the signing of the Oslo I agreement in 1993, there were numerous attempts at diplomatic negotiations between Israel and Palestine that failed, including Oslo II in 1995, Camp David II in 2000, and other attempts at conflict resolution that were supposed to resolve the conflict (Barak, 2005). These initiatives have included the Deal of the Century (The Peace to itself within and below civilian infrastructure, and Israeli strikes have caused massive collateral damage. Raids and a lack of basic supplies have reduced the number of functioning hospitals to only fifteen, twelve of which are in the south, and the World Health Organization has warned of disease spread in addition to mounting civilian casualties. Meanwhile, the United States is conducting shuttle diplomacy amid simmering regional tensions.¹

The conflict between Israelis and Palestinians has persisted for over a century, characterized by territorial disputes, political tension, and frequent outbreaks of violence. The roots of the conflict can be traced back to the late 19th and early 20th centuries, with the rise of nationalist movements among Jews and Arabs.

2. Comprehensive Understanding of the topic: The primary aim is to provide an in-depth and comprehensive analysis of the Israel-Palestine conflict. It seeks to unravel the intricate historical, socio-political, religious, and territorial dimensions that underpin the conflict. By doing so, the paper intends to offer a holistic understanding that goes beyond surface-level observations.²

¹ Available at <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> visited on 22/11/2023

² "A Comprehensive Analysis of the Israel-Palestine Conflict" International Youths Organization for Peace and Sustainability | ISSN: 2456-4184

Contextualizing in the Global Arena: It aims to contextualize the Israel-Palestine conflict within the broader global scenario. This involves examining the influence and involvement of international actors, the implications of the conflict on global geopolitics, and its interconnectedness with other regional and international conflicts or issues. Another purpose is to highlight the multifaceted impacts of this conflict. This includes its effects on regional stability, humanitarian concerns, international relations, legal frameworks, and socio-cultural aspects, both within the region and globally.

The paper seeks to contribute to scholarly discussions and policy considerations. It aims to offer insights that could potentially inform policymakers, diplomats, academics, and stakeholders involved in conflict resolution efforts. It aims to propose considerations and potential pathways towards a sustainable and just resolution, aiming for peace and stability in the region.

Additionally, it may serve as an educational resource, raising awareness among a broader audience about the complexities, nuances, and historical underpinnings of the Israel-Palestine conflict. By fostering understanding, it aims to encourage informed discussions and engagement on this persisting issue.³

1. Historical Background

In a Report⁴ “The Israeli-Palestinian conflict dates back to the end of the nineteenth century. In 1947, the United Nations adopted Resolution 181, known as the Partition Plan, which sought to divide the British Mandate of Palestine into Arab and Jewish states. On May 14, 1948, the State of Israel was created, sparking the first Arab-Israeli War. The war ended in 1949 with Israel’s victory, but 750,000 Palestinians were displaced, and the territory was divided into 3 parts: the State of Israel, the West Bank (of the Jordan River), and the Gaza Strip.”

Over the following years, tensions rose in the region, particularly between Israel and Egypt, Jordan, and Syria. Following the 1956 Suez Crisis and Israel’s invasion of the Sinai Peninsula, Egypt, Jordan, and Syria signed mutual defense pacts in anticipation of a possible mobilization of Israeli troops. In June 1967, following a series of maneuvers by Egyptian President Abdel Gamal Nasser, Israel preemptively attacked Egyptian and Syrian air forces, starting the Six-Day War. After the war, Israel gained territorial control over the Sinai Peninsula and Gaza Strip from Egypt; the West Bank and East Jerusalem from Jordan; and the Golan Heights from Syria.

Six years later, in what is referred to as the Yom Kippur War or the October War, Egypt and Syria launched a surprise two-front attack on Israel to regain their lost territory; the conflict did not result in significant gains for Egypt, Israel, or Syria, but Egyptian President Anwar al-Sadat declared the war a victory for Egypt as it allowed Egypt and Syria to negotiate over previously ceded territory. Finally, in 1979, following a series of cease-fires and peace negotiations, representatives from Egypt and Israel signed the Camp David Accords, a peace treaty that ended the thirty-year conflict between Egypt and Israel.

Even though the Camp David Accords improved relations between Israel and its neighbors, the question of Palestinian self-determination and self-governance remained unresolved. In 1987, hundreds of thousands of Palestinians living in the West Bank and Gaza Strip rose up against the Israeli government in what is known as the first intifada. The 1993 Oslo I Accords mediated the conflict, setting up a framework for the Palestinians to govern themselves in the West Bank and Gaza, and enabled mutual recognition between the newly established Palestinian Authority and Israel’s government. In 1995, the Oslo II Accords expanded on the first agreement, adding provisions that mandated the complete withdrawal of Israel from 6 cities and 450 towns in the West Bank.

In 2000, sparked in part by Palestinian grievances over Israel’s control over the West Bank, a stagnating peace process, and former Israeli Prime Minister Ariel Sharon’s visit to the al-Aqsa mosque—the third holiest site in

³ *ibid*

⁴ Report published on 08/10/2023 “Israeli-Palestinian Conflict” By the Center for Preventive Action.

Islam—in September 2000, Palestinians launched the second intifada, which would last until 2005. In response, the Israeli government approved the construction of a barrier wall around the West Bank in 2002, despite opposition from the International Court of Justice and the International Criminal Court.

i. Early History and Ottoman Period

Before the 20th century, the region known today as Israel and Palestine was part of the Ottoman Empire. The area was home to diverse communities, including Muslims, Christians, and Jews. Jewish immigration to Palestine increased in the late 19th century, fueled by the Zionist movement, which aimed to establish a Jewish homeland in response to widespread anti-Semitism in Europe.⁵

ii. British Mandate and the Balfour Declaration

After World War I, the League of Nations granted Britain the mandate over Palestine. In 1917, the British government issued the Balfour Declaration, expressing support for the establishment of a "national home for the Jewish people" in Palestine. This declaration heightened tensions between Jews and Arabs, both of whom claimed historical and national rights to the land.

iii. Post-World War II and the Creation of Israel

The aftermath of World War II and the Holocaust intensified international support for a Jewish state. In 1947, the United Nations proposed a partition plan to create separate Jewish and Arab states, with Jerusalem as an international city. While the Jewish community accepted the plan, Arab leaders rejected it, leading to the 1948 Arab-Israeli War following Israel's declaration of independence. The war resulted in the establishment of Israel and the displacement of hundreds of thousands of Palestinian Arabs, an event known as the Nakba (catastrophe).

After doing preliminary explorative research on the turning points explained in the previous section, this research finds that there are four main variables that are negotiated in each attempt. The four variables are picked from the four points that seem to always exist in the various conflict resolution attempts.

1. Jerusalem

The most complex part of the territorial issues of the Israeli-Palestinian conflict is the contested holy city of Jerusalem. Jerusalem is home to key sites of high religious importance, such as the Temple Mount, the Western Wall, the Church of the Holy Sepulchre, the Dome of the Rock, and the al-Aqsa Mosque. For Palestinians, Jerusalem is the symbol of their sovereignty, identity, and the capital city for the future Palestinian state. Therefore, any partition of Jerusalem would be unacceptable for the Palestinians. On the other hand, it is also difficult for Israel to completely hand over Jerusalem to the Palestinians since it also represents a historical link between the Jewish and their homeland. For both parties, Jerusalem is part of their respective identities that not open to a discussion, negotiation, or compromise.⁶

Dividing this region remains one of the fundamental issues that keeps the dispute between Israel and Palestine unsolved. Israel argues that Jerusalem is its undivided capital, but no country recognizes this claim. The Resolution 478 of the United Nations Security Council has even condemned Israel's decision to annex East Jerusalem as a violation of the international law. Even the United States, Israel's biggest traditional supporter, has, for a very long time, refused to recognize Jerusalem as Israel's capital. This is due to the consideration that, when the U.S. starts supporting Israel's claim, its position as an honest broker between the conflicting parties would be undermined and violence would escalate in the region (Beauchamp, 2018a).

⁵ Bregman, A. (2016). *Israel's Wars: A History Since 1947*. Routledge.

⁶ Bar-Siman-Tov, 2010; Krieger, 2011).

For Palestinians, the Arabic word for Jerusalem is al-Quds, “the holy.” According to Palestinian nationalists' point of view, Israel's disregard for the rights of Palestine over Jerusalem would end the peace process. Due to the sacred attribute of Jerusalem, any attempt to negotiate on the status of this city is always put at the end of the stage (Newman, 1999). An example of this could be seen in the Camp David Summit in which U.S. President Jimmy Carter tried to bring the status of Jerusalem on the negotiating table by offering Anwar Sadat financial and military support incentivize the latter to maintain.

Jerusalem is ultimately an indivisible issue. As Johnson & Toft (2014) explain, Jerusalem could not be divided into smaller parts without devaluing its worth to either Israel or Palestine. The Temple Mount area especially makes it impossible for either Israel's or Palestine claims to be recognized without making it a problem starter for any negotiation attempt. Jerusalem appears to be the most complex and most difficult issue that any Israel-Palestine peace talks would have to face, as it plays profoundly into foundational collective memories and religious identities not only for Israel and Palestine, but the Christian and Muslim worlds alike.

2. Borders

In the case of the Israeli-Palestinian conflict, the issue of borders has turned this conflict into an intractable conflict, since both nations claim the same land. Territory remains a central issue in the Israeli-Palestinian conflict. Both Israelis and Palestinians claim to be the original owner and to possess sovereignty over the same piece of land. Both populations oppose sharing power within the same space due to fear of each other's domination (Caplan, 2011;Siniver,2012). The territory was known as the “Land of Israel” or “Palestine,” stretching over an area demarcated by the British as Palestine in 1921. It has been subject to multiple national and religious claims, opposing each other's interpretations regarding their historical origins, which are highly related to their collective identities. The land is closely linked with the efforts between Zionist-Jews and Palestinian Arabs who claim that the land served as their homeland (Yiftachel, 2002).

Palestinians assumed the land as apart of their home land and have already integrated it to their identity. However, for several years, they have seen their land being reduced. For instance, in 1936-1937, their share of the land was decreased to 75 percent of their initial territory through the Peel Commission. It was then reduced again into 44 percent due to the United Nations Partition Plan in 1947, only to be reduced again for the last time into 22 percent after the Arab-Israeli War in 1948-1949. After the war was finished in 1949, armistice lines began existing as effective borders upto 1967, also known as the Green Lines. Ever since this arrangement, Israel has controlled both the West Bank and Gaza Strip.

On the other hand, Israel also claims that their land encompasses areas stretching from the Jordan River to the Mediterranean Sea (Krieger, 2011). They argue that the lines in 1967 served as fixed borders since they had obtained it by winning the war. This Kind of conflictual situations directly indirectly involved the Israeli and Palestinian populations in this territorial contestation. For example, there are 12 large settlements and Israeli population centers outside the 1967 borderline. It would, therefore, be impossible to move those settlers into the Israeli border line. Meanwhile, Palestinians, who currently only hold 22 percent of the land (West Bank and Gaza Strip), demand to have total control over these areas (Krieger, 2011).

There is also the issue of settlement and the utilization of land in the border dispute. Grosplik, Handel, and Monterescu (2020) explain how, especially after renewed drive for settlers expansion after the announcement of the Peace to Prosperity plan, the practice of appropriation of occupied land, soil, and territory continues. Grosplik et al explains that, through organic farming and settler activity, the Israelis have created a political apparatus with which to uproot and divorce the connection between land and people and reinforces border encroachment through what they term as the Colonial Quality Turn. Organic farming is just one of the ways the Israeli settler project has reinforced use of violence and the appropriation of formerly Palestinian land, accentuating the Israeli view on the Malleability of the Palestinian borders.

This border issue has drawn Israelis and Palestinians into conflicts with one another. The state-building process, however, often hurts other national identities and the self-determination of groups within those boundaries. Therefore, it leads to the domination of the stronger over the weaker. In this case, it's the domination of the stronger Israel over the weaker Palestine (Newman & Ghazi, 1997).

3. Security

Security here serves as the basis to achieve conflict resolution in Israeli-Palestinian conflict. The threat, faced by both entities, would undermine the prospect of attaining conflict resolution. Consequently, it would be unlikely for both parties to trust each other, causing them to feel threatened by each other's existence. Israel, for instance, feels threatened by the existence of Palestine, and vice versa. There have been various threats on the ground to and from Israel such as the military attacks from both conflicting parties and the other Arab states that surround them (Siniver, 2012).

As is the case for Israel, Palestine also wants to feel secure and be able to exercise their sovereignty. With the Israeli military forces on the ground, Palestinians think that they were under Israel's rule, which threatened their lives in every single aspect (Krieger, 2011). There is a considerable percentage of people who regard terrorist acts by Palestinians as “justified” resistance against Israeli oppression. However, Goldberg (1991) argued that no justification can be made for the attacks made by terrorist groups, including the Palestinian Liberation Organization, against civilians. The targeting of civilians by Palestinian terrorists serves as the basis for Goldberg (1991) in his argument that Israel reserves its responsibility to ensure the security of its citizens by any means.

The repetitive sequences of negotiation attempts, failures, outcries, and clashes that followed throughout the long history of the Israeli-Palestinian pursuit for peace have reflected the existence of obstacles at two levels. Both parties therefore require, at least theoretically, a two-tiered approach to pave the way for a successful peace settlement. At the national and societal level, political views that reduce the likelihood of compromise continued to attract significant portions of both political entities' constituents.

Why choose Palestine?

The Jews had more than one option for establishing the state of Israel, but they chose Palestine for it, and the United Kingdom gave its full support and all possible assistance. While it has a religious foundation, the construction of the Temple of Solomon according to religious teachings, there have been some dangerous political conspiracies in the Western world behind it. The West knows that if the Jews succeed in fulfilling their dream of a greater Israel, they can play a dangerous role in the politics of the Muslim world, where there will be a gap between African and Asian Muslim countries.⁷ At the same time, they will continue to make the entire region a victim of their conspiracies. The fact is that since the establishment of the state of Israel, the entire Muslim world has been plagued by strange disturbances and troubles. It is a detailed topic of the dangerous effects of the establishment of the Jewish state on the politics of the Middle East or the Muslim world, but the fact remains that the state of Israel is currently playing a dangerous and influential role in the politics of the Muslim world. Whether it is the overthrow of Egypt's elected democracy, the accusations of terrorism against the great Islamic movements of the Islamic world, and the mass arrests of their activists. The obstacles to the establishment of democratic and independent governments in the Islamic world. Whether it's the problem of keeping the governments of the Islamic world economically dependent on others, Israel is playing a significant role.

⁷ Chomsky & Pappé 2015.

According to Dr. Mohsen Saleh, "The situation now is that in order to strengthen Israel, it is necessary to weaken the surrounding Muslim countries, and the condition for the strength, awakening and unity of the Islamic world is that the world through Israel The Zionist plan imposed on Islam should be weakened." Some consider the issue of Palestine to be a religious issue for the Jews. Of course, there is a religious dimension to it. Yes, and it is based on an anti-Islamic political agenda, in which the Western world is using the Jews as a mere card.⁸

4. Role of United Nation

Subsequent to the War, the British presented the issue of Palestine to the United Nations on April 2, 1947. On May 15, a special UN committee was set up, which unanimously agreed that the British occupation of Palestine should end. The committee members could not agree on a future government. The majority proposed the establishment of an Arab government in the area below Central Palestine. The territories of Jerusalem and Bethlehem should be handed over to the United Nations and a Jewish state should be established in the area above these cities up to the Mediterranean (McCarthy 1990).

On November 29, 1947, the UN General Assembly adopted a proposal by a majority of the committee members. The assembly also set up a five-member commission to implement the plan. The commission was tasked with assisting in the formation of an interim government in consultation with Jewish and Arab groups.

Almost every component of Israel's control of the Palestinian Territories disregards an arrangement of the Fourth Geneva Convention. A significant number of Israel's infringements are grave breaks of the Convention and are considered 'Atrocities' under International Law. The Arabs rejected the UN plan, saying that establishing a Jewish state in the Arab region was offensive and resisted. The United Kingdom also announced that the plan would not be implemented by force. The British government took over the administration on May 15, 1948, ending the occupation. This period of about 6 months in Palestine was the time of confrontations. Guerrilla warfare between Arabs and Jews had begun. The UN commission had not even begun implementing the partition plan.

The last High Commissioner of Palestine, Sir Gordon, left Palestine on May 14, 1948, in the midst of chaos. And at 4 pm on the same day, Ben-Gurion unilaterally announced the establishment of the Jewish state of Israel at a meeting of the National Council of Jews and the General Zionist Council in Tel Aviv. David Ben-Gurion was appointed the first Prime Minister of the Provisional Government of Israel, and on May 16, 1948, the United States and, just a day later, Russia recognized the Jewish state. Egypt, Jordan, Iraq, Syria and Lebanon invaded Israel to end the Jewish occupation of Palestine.

5. Territorial Disputes

The conflict revolves around the control of territories, particularly the West Bank, Gaza Strip, and East Jerusalem. Both Israelis and Palestinians lay claim to these areas, leading to continuous tensions and disputes over land ownership and borders. Israel often cites security concerns due to Palestinian militant groups' activities, leading to military actions such as blockades, air strikes, and incursions into Palestinian territories. On the other hand, Palestinians endure restrictions on movement, economic hardships, and periodic military offensives. Settlements and Occupation: Israeli settlements in the West Bank are a contentious issue. These settlements, considered illegal under international law, continue to expand, complicating efforts for a two-state solution and exacerbating tensions.

Humanitarian Concerns: The conflict's humanitarian toll cannot be overstated. Continuous violence, displacement, lack of access to basic amenities, and human rights violations affect millions, drawing global attention and concern.

⁸ *ibid*

Radicalization and Global Terrorism: The conflict's perpetuation can fuel extremism and radicalization globally, as it remains a potent symbol of injustice for many around the world.

While a comprehensive final resolution to their conflict can only be agreed between Israelis and Palestinians themselves, Palestinians are well within their rights as a nation to seek recognition of their state from international organizations and governments around the world. Binding themselves to the obligations of statehood and acceding to treaties that require responsible conduct is a non-violent, international law-affirming effort that should be applauded, not discouraged or penalized. The United States should therefore cease its practice of delegitimizing these efforts, and instead welcome them as bolstering the prospects for a peaceful and just resolution to the Israeli-Palestinian conflict.

Fully enforce U.S. law and arms policy to ensure accountability and adequate humanitarian aid delivery. Pressured by Democratic lawmakers' efforts to legislate against Israel's misuse of U.S. arms and its impeding of humanitarian aid delivery in Gaza, President Biden on February 8, 2024 issued National Security Memorandum 20 (NSM-20), requiring Israel and other recipients of U.S. military assistance to affirm that they would use American-origin arms in accordance with international humanitarian law and were complying with longstanding U.S. law, Section 620I of the Foreign Assistance Act (FAA), prohibiting countries from restricting the delivery of U.S. humanitarian aid. Contrary to the assessments of numerous international aid agencies and many of the interested lawmakers, on March 25, the administration indicated that it accepted Israel's initial assurance that it is and would remain in compliance with these requirements as "credible and reliable". Treating the assurances received from the Israeli government as credible and reliable in the face of deepening famine, disproportionate civilian casualties and repeated threats of an offensive in Rafah immediately undercut NSM-20 and damaged the administration's credibility while functionally green lighting the continued use of American weapons in ways that clearly violate U.S. laws, interests and values. Failure to take action under NSM-20 or Section 620I of the FAA also compounded the longstanding failure to adequately enforce the Leahy Law, which prohibits U.S. assistance to foreign security units engaged in a consistent pattern of gross violations of human rights. The administration should immediately correct course and fully enforce U.S. law by suspending delivery to Israel of the arms it is using in Gaza, while pressing for and helping coordinate a massive emergency increase in humanitarian aid and services to the territory, including by land through Israel.⁹

Concluding Remarks:

The Israel-Palestine conflict continues to be a multifaceted and entrenched issue with far-reaching global implications. While numerous peace initiatives, negotiations, and agreements have been attempted, a sustainable resolution remains elusive. Addressing the conflict requires a multifaceted approach involving diplomacy, dialogue, respect for international law, and a genuine commitment from all parties involved. The global community's engagement and support for a just and lasting solution are crucial. Until then, the cycle of violence, the struggle for self-determination, and the quest for peace will persist, impacting not only the lives of Israelis and Palestinians but also shaping the broader global narrative of justice, conflict resolution, and human rights.

The Israel-Palestine conflict remains deeply entrenched, driven by historical grievances, political disputes, and socio-economic challenges. While past peace efforts have failed to resolve the conflict, a renewed commitment to dialogue, compromise, and international cooperation is essential. Understanding the complex history and current realities of the conflict is crucial for identifying viable pathways to peace and ensuring a just and lasting resolution for both Israelis and Palestinians.

The Biden Administration should strengthen the legitimacy of Palestinians seeking a peaceful path to conflict resolution by upgrading the United States' own bilateral relations with the Palestine Liberation Organization

⁹ Available at https://internationalpolicy.org/wp-content/uploads/2024/04/The-Gaza-War-at-Six-Months_-Five-Recommendations.pdf visited on 13/04/2024 at 02:24pm

(PLO), including by finally following through on its promise to reopen a consulate in Jerusalem serving Palestinians, exercising existing executive authority to terminate the decades-old legislative designation of the PLO as a terrorist organization, and working with regional and other international partners toward a major economic support program benefitting the Palestinian people.¹⁰

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COMPARATIVE ANALYSIS OF PUNISHMENT WITH SPECIAL REFERENCE TO COMMUNITY SERVICE

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ABSTRACT

Punishment is an important feature of criminal law followed worldwide. Punishment serves several purposes within the legal system, including deterrence, retribution, rehabilitation, incapacitation, and restoration of justice. Punishments are typically defined and prescribed by statutory laws, such as criminal codes, sentencing guidelines, and other legal provisions. Earlier Indian Penal Code, 1860 did not recognize community service as a form of punishment but for the first time the Central Government has introduced community service as a form of punishment under Bharatiya Nyaya Sanhita, 2023. Community service as a form of punishment is an alternative to imprisonment or fine for certain non-violent offenses. It involves individuals performing unpaid work or service for the benefit of the community. The idea behind community service as punishment is to provide individuals with an opportunity to give back to society, make amends for their actions, and learn valuable skills. Community service as a form of punishment is implemented in various countries worldwide. The origin of community service as a form of punishment was observed in the United States in 1960s. Its prevalence in the present times may differ, but it is commonly used in the United States, the United Kingdom, Australia, UAE and many European countries. The new law, Bharatiya Nyaya Sanhita, 2023 penalizes six offences punishable with community services. The paper aims to study the need and purpose of community service as an alternative sentence, various provisions followed by other countries such as UK, United States and Australia regarding community service as a punishment and finally whether community service will be beneficial for the society and the offenders of law in India.

Key words: *Community Service, punishment, rehabilitation, society*

Introduction

Community service as a form of punishment is an alternative to imprisonment or fine for certain non-violent offenses. It involves individuals performing unpaid work or service for the benefit of the community. The idea behind community service as punishment is to provide individuals with an opportunity to give back to society, make amends for their actions, and learn valuable skills. Community service is one of the tools within the criminal justice system aimed at achieving rehabilitation and community benefit while avoiding the social and economic costs associated with imprisonment. They enable offenders to undergo rehabilitative programs or work in the country under supervision. The person convicted under community sentence is assigned with an offender manager or probation officer. Any person failing to do the assigned work would result in seeing the court or even being sent to prison. Offenders have much to gain from serving their sentences and can continue their employment. From the victim's perspective, non-custodial penalties have the advantage of increasing the likelihood that the offender will be able to work and pay compensation and maintain a tie with his family.

India follows the reformatory theory of punishment. The reformatory theory of punishment, also known as the rehabilitative theory, focuses on the idea that the primary purpose of punishment should be the rehabilitation and reform of the offender. Instead of simply punishing the offender for their wrongdoing, the reformatory theory aims to address the root causes of criminal behavior and work towards the individual's personal and social improvement. A crime is an undesired conduct that needs to be rectified in order to preserve a wave of peace and public order. The State finds it most convenient to do this through its institutional means. Since crime is viewed as

an infraction against the state, the state's principal responsibility is to punish offenders. People think that this kind of punishment will turn the criminal into a better person and teach him work while he is incarcerated, giving him useful skills that will make his life simpler once he is released. They contend that community service is a responsibility that offenders have to society rather than an actual form of punishment.

(1.1) Legislative Background in India

Earlier Indian Penal Code, 1860 did not recognize community service as a form of punishment. The only provision that existed in India to provide community sentencing, was for juveniles under Section 18(1)(c)¹ of the Juvenile Justice (Care and Protection of Children) Act, 2015. Under Indian Penal Code (Amendment) Bill, 1978, Clause 27 of the Bill provided for insertion of a new section 74A exclusively to deal with punishment of community service. The Commission felt that there were several difficulties in enforcing the same which is why the Indian Penal Code, 1860 did not implement community service as a punishment in India.

India introduced community sentencing, with reference to the clause 18 and 27 of the 156th Law Commission Report, The Indian Penal Code (Amendment) Bill, 1978.

“Under this clause, the existing section 53 is sought to be substituted. The proposed section 53 enumerates various kinds of punishments. Under this proposed new section 4, new forms of punishments such as Community service, Disqualification from holding office, Order for payment of compensation and public censure have been added.”²

“Under this clause new sections 74A, 74B, 74C and 74D are sought to be incorporated. New section 74A provides for imposition of punishment of community service.”³

However, due to various obstacles, community service was never implemented under the Indian Penal Code, 1860,

The Malimath Committee, officially known as the Committee on Reforms of Criminal Justice System, was constituted in 2000 in India. The committee, chaired by Justice V.S. Malimath was tasked with reviewing the criminal justice system in the country and suggesting reforms. The recommendations of the Malimath Committee covered various aspects of the criminal justice system, including police, judiciary, and prisons. The committee also suggested a model of community sentencing.

The Indian Penal Code, 1860 recognized 5 types of punishment as mentioned below:

- (1) Death Penalty: The death penalty is the most severe form of punishment. It is awarded in cases of heinous crimes like murder, terrorism, and certain types of offenses resulting in death.
- (2) Imprisonment for life: It is a rigorous form of punishment, where imprisonment is awarded till the last breath of the convict.
- (3) Imprisonment: Imprisonment is a common form of punishment where the offender is confined to a prison for a specified period. The duration of imprisonment may vary depending on the severity of the offense resulting into rigorous or simple imprisonment.
- (4) Fine: A fine is a monetary penalty imposed on the offender as part of the punishment. The amount of the fine is determined by the court and is payable to the government.
- (5) Forfeiture of Property: In certain cases, the court may order the forfeiture of property belonging to the

¹ The Juvenile Justice (Care and Protection of Children) Act, 2015

² The Law Commission of India, Clause 18 of the 156th Report on Indian Penal Code (August, 1997)

³ The Law Commission of India, Clause 27 of the 156th Report on Indian Penal Code (August, 1997)

offender as part of the punishment. This is often done to confiscate assets acquired through criminal activities.

In *R.K Anand v Registrar High Court Delhi*⁴ The Court held that it is going to be useful if the convict is kept out and let him do the things that will be utilitarian to society instead of sending him to jail.

In *Pappu Khan v. the State of Rajasthan*⁵ The Court observed that the state cannot afford a large non-productive prison population as it imposes a heavy economic burden on the state.

(1.2) Reasons for implementing Community Service as a punishment in India

Implementing community service as a punishment in India could be considered for several reasons, each contributing to the overall goals of justice, rehabilitation, and societal well-being. Here are some reasons by understanding of researcher why community service might be considered as a punishment in the Indian context:

- **Restorative Justice:** Community service aligns with the principles of restorative justice, emphasizing on repairing the harm caused by an offense. Offenders actively contribute to the community, fostering a sense of accountability and promoting rehabilitation.
- **Overcrowding in Prisons:** India faces challenges related to overcrowded prisons. Community service provides an alternative to incarceration for non-violent offenders, helping reduce the burden on correctional facilities and allowing resources to be allocated more efficiently.
- **Rehabilitation and Skill Development:** Community service offers offenders an opportunity to develop new skills and gain valuable work experience. This can enhance their employability and contribute to their rehabilitation, reducing the likelihood of recidivism.
- **Social Contribution:** Offenders, through community service, actively contribute to the betterment of society. This can include participating in environmental conservation, assisting in educational programs, or supporting community development projects, thereby fostering a sense of social responsibility.
- **Promoting Civic Engagement:** Involving offenders in community service encourages civic engagement and a sense of belonging. It helps individuals understand their role in society, promoting a positive change in behavior and attitudes.
- **Customization of Sentences:** Community service allows for a more individualized and proportionate approach to sentencing. Different types of community service can be assigned based on the nature of the offense and the offender's circumstances, providing a tailored response to wrongdoing.
- **Cost-Effective Alternative:** Compared to the costs associated with incarceration, community service can be a cost-effective alternative for the criminal justice system. It minimizes the financial burden on the state while still addressing the consequences of the offense.
- **Community Building and Social Harmony:** Participation in community service can foster community building and social harmony. Offenders working alongside community members may contribute to breaking down stereotypes and promoting understanding between different segments of society.
- **Flexibility and Innovation:** Community service allows for flexibility and innovation in sentencing. It can be adapted to various contexts and local needs, encouraging creativity in addressing societal issues.

⁴ The Juvenile Justice (Care and Protection of Children) Act, 2015

⁵ The Law Commission of India, Clause 18 of the 156th Report on Indian Penal Code (August,1997)

(1.3) Social perspective of Community Service as a punishment in India

The social perspective of community service as a punishment in India can vary, and opinions on this approach may be influenced by cultural, societal, and legal considerations. Here are some aspects to consider:

- **Cultural and Social Stigma:** Community service as a punishment may be viewed as a form of public humiliation or a way of stigmatizing individuals. This perspective might be changed as community service is not a punishment in an actual manner, it is the duty towards the society which the offenders owe.
- **Legal Framework and Judicial Perspective:** Indian courts may, in some cases, consider community service as an alternative or supplementary punishment, especially for non-violent offenses or first-time offenders. Judges might view community service to rehabilitate offenders and reintegrate them into society, promoting the idea of restorative justice.
- **Community Perception:** Community service as a punishment can be received in urban and rural areas. Communities may appreciate the idea of offenders giving back to society.
- **Implementation Challenges:** The success of community service as a punishment depends on effective implementation. Challenges such as monitoring, accountability, and ensuring that the assigned tasks genuinely benefit the community can impact the perception of this form of punishment.
- **Educational Institutions and Youth Offenders:** In cases involving youth offenders or those in educational institutions, community service might be seen as an opportunity for personal growth and character development. It could be viewed as an educational measure aimed at correcting behavior rather than simply punishing.
- **Criminal Justice Reform:** There is an ongoing discourse on criminal justice reform in India, with discussions about alternatives to traditional punitive measures. Advocates of community service as a punishment often argue that it aligns with modern principles of justice that focus on rehabilitation and reintegration.

In conclusion, the social perspective of community service as a punishment in India is diverse and can be shaped by cultural, legal, and community-specific factors. It can be seen as a progressive and rehabilitative approach.

(1.4) Community Service as a form of punishment in other countries

Community service as a form of punishment is implemented in various countries worldwide. The origin of community service as a form of punishment was observed in the United States in the 1960s. Its prevalence in the present times may differ, but it is commonly used in the United States, the United Kingdom, Australia, UAE and many European countries. The approach aligns with restorative justice principles and is applied to a range of offenses, emphasizing rehabilitation and community involvement as a means of addressing wrongdoing.

In the United Kingdoms, community service is generally known as a payback to the community and is implemented by the Ministry of Justice. Community service involves doing challenging jobs such as removing graffiti, cleaning up public spaces or working for charities.⁶ It is often considered for less serious offenses such as damaging property, theft, or assault where imprisonment may not be necessary or appropriate. The duration and intensity of community service are determined by the severity of the offense and the individual circumstances of the offender. The court considers factors such as the nature of the crime, the offender's criminal history, and any aggravating circumstances such as mental health. Offenders of community service are supervised by probation officers or designated supervisors. Regular check-ins and monitoring ensure that the individuals fulfill their

⁶ Community Sentences, UK, available at: <https://www.gov.uk/community-sentences> (last visited in February 2024)

obligations and contribute positively to the community. The legal framework for community service is set out in legislation such as the Criminal Justice Act 2003. The legislation provides guidelines on the use of community sentences and the conditions under which they can be imposed. It is important to note that the specifics of community service as a punishment may vary across different regions within the United Kingdom, and the implementation is subject to local policies and practices. The overall goal is to strike a balance between punishment, rehabilitation, and community restitution for certain offenses.

In the United States, the era of community service started in 1966 in California where the judges started imposing public work as an alternative to imprisonment. It included cleaning litter from parks and playgrounds, sweeping up public areas, clerical work, washing cars, serving at hospitals, nursing homes etc. The judges in the United States have the discretion to impose community service as part of a sentence for various offenses. This discretion allows them to tailor the punishment to the specific circumstances of the case and the individual offender. It is seen as a more lenient alternative to imprisonment, especially for first-time or minor offenders. Like other jurisdictions, the use of community service aligns with principles of restitution and rehabilitation. Offenders are allowed to make amends for their actions, take responsibility, and contribute positively to the community. Community service is often viewed as a cost-effective alternative to imprisonment. It allows offenders to remain in the community, maintain employment, and fulfill family obligations while still facing consequences for their actions. Community service as a form of punishment is often authorized by state laws and may be detailed in sentencing guidelines. The specific rules and regulations governing community service can vary from state to state. The effectiveness of community service as a punishment is a subject of ongoing debate, and different states may have different philosophies and approaches to its use in the criminal justice system.

In Australia, community service is commonly applied to offenses that are not considered extremely serious or violent. It may be used for offenses such as minor theft, property damage, or certain traffic offenses. The court determines the number of hours anything up to 500 depending on the crime or days an individual must complete. As per New South Wales (NSW) laws, if any person breaches the terms of the community service, it can be revoked and an alternative sentence can be announced⁷. Community service is a recognized sentencing option, its availability and specific rules can vary between different states and territories in Australia.

(1.5) Judicial approach on Community Service in India

Indian courts have passed many judgments awarding Community Service but it was only discretionary, a proper legislation was lacking.

In *Sunita Gandharv vs State of Madhya Pradesh*⁸,

“It is further submitted that accused was enlarged on bail vide order dated 26/2/2020 in which condition of community service was incorporated (at the instance of accused to perform community service) and accused regularly appeared at District Hospital, Bhand from 15th March, 2020 to 17th July, 2020 and he is working as Ambulance Driver of Emergency-108 to address any emergent situation and he is working with sincerity and devotion. Therefore, clause of community service in bail order has been voluntarily performed by the accused and he reformed himself by this condition of community service and got an occupation also of Driver of Ambulance.”

The High Court granted bail to the accused with a condition of community service incorporated to work as an ambulance driver to address any emergent situation. The Hon'ble court was of the view that scope and extent of bail under section 437(3) Cr.P.C are wide enough to include community service and other reformatory measures to ensure that the accused is within the limits of the criminal justice system.

⁷ A guide to Community service as punishment in NSW available at <https://www.sydneycriminallawyers.com.au/blog/a-guide-to-community-service-as-a-punishment-in-nsw/> (last visited in February 2024) YET

⁸ Sunita Gandharv vs State Of Madhya Pradesh, 2020 SCC OnLine MP 2193.

In the case of *Mahender Singh @ Sunny vs The State*⁹ The Delhi Court ordered community service to youngsters above the age of eighteen years to do community service even after quashing the F.I.R under section 482 Cr.P.C as a result to improve their conduct and not commit any offence in the future.

“The petitioners are accused of committing an offence punishable under Section 308 IPC and this petition has been filed on the basis of a compromise arrived at between the parties. Keeping in mind the fact that the petitioners are youngsters, petitioner No.1 is about 22 years old and the petitioner No.2 is about 25 years old, having entire life ahead of them, the fact that the parties are related to each other and the injury sustained by the complainant is only minor in nature, this Court is inclined to quash the FIR exercising its jurisdiction under Section 482 Cr.P.C. The petitioners have to understand that anger does not give a license to take law in their hands. In order to sober down the petitioners this Court feels that they should do some community service for at least one month. Accordingly, petitioners are directed to do community service at Dr. Ram Manohar Lohia Hospital for a period of one month i.e. from 28.03.2021 to 28.04.2021.”

Similarly, the Hon'ble High Courts has been effectively exercising community service as a form of punishment as an alternative to imprisonment and fines to restore and rehabilitate the offenders of law.

During the times of COVID-19 pandemic 2020 also, it was observed that courts directed offenders not following quarantine guidelines to work in COVID healthcare centers and hospitals as a part of their punishment along with fines.

(1.6) Implications of Community service under Bharatiya Nyaya Sanhita, 2023

For the first time the Central Government introduced community service as a form of punishment for petty offences in Bharatiya Nyaya Sanhita Bill, 2023. The new law makes community service as a punishment in cases of:

- (a) A public servant who trades illegally.¹⁰
- (b) Nonappearance in response to a proclamation under section 84 of Bharatiya Nagarik Suraksha Sanhita, 2023.¹¹
- (c) Attempt to commit suicide to compel or restrain exercise of lawful power.¹²
- (d) If someone is found guilty of theft for the first time and the value of the stolen goods is less than five thousand rupees, they will be entitled to have their money back or have the stolen property restored.¹³
- (e) Misconduct in public by a drunken person.¹⁴
- (f) Defamation.¹⁵

Community service provides rehabilitative opportunities for offenders to grow personally and learn new skills while staying connected to their communities. The law emphasizes on the social impact of imprisonment that it leaves a dark spot on the career especially of the youngsters who have their whole life ahead. Therefore, engaging in community service can instill a sense of pride and accomplishment in offenders, potentially leading to positive behavioral changes and reducing the likelihood of future criminal activity. Instead of traditional punitive measures, community service allows offenders to participate in meaningful activities. For certain offenses,

⁹ Mahender Singh Alias Sunny vs The State, Delhi High Court, CrI.M.C. 852/2021.

¹⁰ Section 202, Bharatiya Nyaya(Second) Sanhita, 2023

¹¹ Section 209, Bharatiya Nyaya(Second) Sanhita, 2023

¹² Section 226, Bharatiya Nyaya (Second) Sanhita, 2023

¹³ Proviso of Section 303(2), Bharatiya Nyaya Sanhita, 2023

¹⁴ Section 355, Bharatiya Nyaya Sanhita, 2023

¹⁵ (2) of Exception-10 to section 356, Bharatiya Nyaya Sanhita, 2023

community service can serve as a more humane and proportionate punishment compared to incarceration. This deviation from the strict framework of the Indian Penal Code highlights a dedication to the values of restorative justice, proportionality in punishment, and an understanding of the complex nature of criminal behavior. The evolution of community service as a punishment reflects a broader shift towards a holistic and individualized approach to justice within the legal landscape of Bharatiya Nyaya Sanhita.

Conclusion

As we all can understand, imprisonment always leaves a traumatic impact on the prisoners and their family. Society has a negative notion about people who have been punished with imprisonment for petty offences or even for a short duration of time. Community service as a form of punishment would bring this much needed change in the mind of society. Community service projects often focus on tasks that enhance the local environment, such as cleaning up parks, beautifying public spaces, or assisting with community events which would make society develop the impression of someone who is serving the environment and society instead of being an offender or a prisoner. Involving offenders in community service projects can promote greater community engagement and collaboration. By working alongside volunteers, local organizations, and government agencies, offenders become integrated into the fabric of their community and are more likely to develop supportive relationships and connections that can aid in their rehabilitation. Community service as a punishment offers a range of benefits for society, including promoting restorative justice, improving communities, reducing recidivism, and fostering positive social outcomes for both offenders and the broader community. The structure and condition of the prison administration system in India compels considerations to better alternatives of punishment in order to lighten the load of the prison population and unburden the prison infrastructure and facilities in India.

To the offenders of law, it will allow them to take some time to reflect on their actions and its consequences by ensuring that they have completed the designated number of hours or tasks required by the court or relevant authority. Also, it would develop accountability for their actions and demonstrate a commitment to making positive change while moving forward. Accepting responsibility is an important step in the rehabilitation process. As they conclude their community service, they would commit to avoiding future offenses and making positive choices by using the lessons learned from the experience to steer clear of behaviours that could lead to further legal consequences. The work assigned would contribute to their skill and personality development which would even create a future path for them to showcase the learned skill and earn hard earned money. Community service programs often incorporate elements of rehabilitation, such as counselling, education, or vocational training, which can address underlying issues contributing to offenders' criminal behaviour. By addressing these root causes and providing support services, community service programs help offenders address their needs and build a foundation for long-term success.

So, in the opinion of researchers, community service as a form of punishment is going to be beneficial for society and the offenders of law both.

MENTAL INCAPACITY AND ITS IMPLICATIONS IN CONTRACT LAW

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ABSTRACT

A legally binding agreement is called a contract. "Capacity" is a phrase that is used a lot while talking about contract law. To engage in business transactions in the globalised world of today, it is imperative that a party has the ability to contract. Like in many other legal systems, contract law in India is intended to safeguard the rights and interests of parties to agreements made by businesses and individuals. The law acknowledges that certain people may not have the mental capacity to make legally binding contracts, hence the power to contract is not absolute. This essay will examine the meaning and consequences of the idea of mental disability in Indian contract law. The inability of a person to comprehend the nature and implications of a contract they are engaging into is referred to as mental incapacity. This incapacity may be due to a variety of conditions, including mental illness, intoxication, or cognitive impairment, and it may be temporary or permanent. This study explores the complex relationship between contract law and mental disability. Mental impairment in contract law casts doubt on the legality and enforceability of agreements entered by people who might not have possessed the necessary mental capacity. This article will address the question of whether someone can or cannot enter into a legitimate contract with another party, with particular reference to the Indian Contract Act, 1872, relevant case law, and an analysis of the subject in light of Indian culture. Every Indian detail will also be explained in terms of the English law that gave rise to it. If an individual satisfies the three qualifications listed in the Act, they are considered capable of entering into a valid contract: they must be of legal age, they must not be mentally incompetent, and they must not be prohibited from doing so by any other legislation. It is crucial to remember that the contents of the contract shouldn't be unlawful or even null and void due to public policy considerations. The significance of safeguarding susceptible individuals is emphasized as the differences between void and voidable contracts in situations of mental incapacity are described. It is a doctrinal research paper that aims to use changing legal perspectives and precedents to support disputes involving people who are mentally incapacitated. The essay emphasizes the difficult balancing act that contract law must accomplish to protect the rights of people with mental health issues while also promoting autonomy and justice.

Key words: *Minor, Unsound mind, Incapacity to contract, Voidable Contract.*

Introduction

The term "mental capacity" describes a person's cognitive capability for comprehension, assessment, and reasoned decision-making. Regarding contract law, it is necessary for parties to be able to think clearly enough to voluntarily and intentionally enter into an agreement. Many legal and ethical issues arise when one of the parties lacks this competence, whether as a result of mental illness, cognitive disabilities, or other circumstances. These are important topics that have implications not only for the legal profession but also for a wider range of social and ethical issues. This investigation examines the complex field of mental disability, examining its several manifestations and the difficulties they provide in contractual negotiations. The inability of a person to comprehend the nature and implications of a contract they are engaging into is referred to as mental incapacity. This incapacity may be due to a variety of conditions, including mental illness, intoxication, or cognitive impairment, and it may be temporary or permanent. According to the Section 11, "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."¹ From the above definition from The Indian

¹ Available at: <https://www.coursehero.com/file/188108186/Capacity-Reading4docx/>

Contract Act, 1872 it includes three main aspects – The Age of Majority, The Sound Mind and Not to be disqualified by the law⁴.

1. Cognitive Functioning: Understanding, memory, reasoning, and communication are all parts of cognitive functioning, which is intimately related to mental ability. A person needs to be cognitively capable of comprehending pertinent data and assessing the possible effects of their choices.

2. Context-Specific: The intricacy of the decision being made can affect mental capacity, which is not a fixed attribute. It is possible for someone to be capable of making basic daily decisions but not more complex financial or medical judgments.

3. Making Informed Decisions: Possessing mental capacity entails the ability to comprehend and remember pertinent information, process it logically, and apply it to the creation of a decision that is consistent with one's own preferences and values.

4. Legal Implications: Mental capacity is frequently a crucial aspect in legal circumstances. For example, a patient's ability to consent to medical treatment is crucial in the healthcare industry. In order to enter into a contract, parties must be able to grasp the terms and implications of that agreement.²

5. Evaluation Procedure: Mental ability evaluations are frequently carried out by professionals in the fields of medicine, psychology, and law. These evaluations may include a look at the subject's capacity to comprehend the option, recognize its consequences, consider other options, and explain their decision.

6. Presumption of Capacity: Unless demonstrated differently, it is assumed in many legal systems that adults are capable of making their own decisions. This assumption supports the idea of personal autonomy.

7. Vulnerability: A number of circumstances, such as mental diseases, intellectual disabilities, aging related cognitive impairments, or transient states like delirium, can limit mental capacity. Such vulnerabilities necessitate giving serious thought when making decisions.

8. Ethical Considerations: It can be difficult to strike a balance between the need to protect those who are vulnerable and respect for an individual's autonomy. Finding this balance is especially crucial when it comes to medical interventions, since there is a conflict between the need to protect a patient's wellbeing and their right to respect.

9. Building ability: There are situations in which it is possible to try to improve a person's mental ability. This could include breaking down complex material into simpler terms, giving decision makers more time, or treating underlying cognitive deficiencies.

Age of majority

The Indian Majority Act of 1875 governs the age of majority in India. Section 3 declares: Individuals who are residents of India will be considered to have reached adulthood when they turn eighteen. As per this, an individual becomes a major at reaching the age of eighteen⁶. A person is considered a minor if they are younger than 18 years old, and a guardian appointed by the court must be at least 21 years old. Under the legal framework of *Mohori Bibee v. Dharmodas Ghose* in 1903.³

² Available at: <https://taxguru.in/corporate-law/compilation-articles-important-aspects-insurance.html>

³ Available at: <https://thelegallock.com/case-brief-mohori-bibee-v-dharmodas-ghose/?amp=1>.

In *Mohori Bibee v. Dharmodas Ghose*⁴ Dharmodas Ghose, the plaintiff, mortgaged his property in Brahmoo Dutt's favor while still a minor. Brahmoo Dutt is the money lender who secured the loan⁹. During the transaction the defendant was aware of the fact that the plaintiff was a minor. The minor bought the suit against the money lender representing that he was a minor at the time of contract and the same should be held void as the mortgage should stand cancelled.

The appellant contends that the respondent was of legal age at the time he executed the mortgage, despite the respondent's representations to the contrary in this case.⁵ It was unknown to the appellant and their attorney that the respondent was a minor. They contend that since the respondent misrepresented his age, he shouldn't be eligible for any type of redress.

Application of Section 115 of Indian Evidence Act, 1872

According to this section, no party or their representatives may subsequently deny the truth of that matter in any lawsuit or proceeding if one person knowingly leads another person to believe something to be true through their actions, declarations, or omissions and that person acts on that belief.

Under Sections 64 and 38 of the Indian Contract Act (1872) and Section 41 of the Specific Relief Act (1877), the appellant in *Mohori Bibee v. Dharmodas Ghose* contends that the respondent is obligated to reimburse the sum advanced to him. A promisor does not lose their rights under the contract or be held liable for non-performance if they offer to fulfil their portion of the agreement to the promisee and their offer is rejected, according to Section 38 of the Indian Contract Act, 1872.

A promisee cannot later enforce a promise against the original promisor after accepting execution of the promise from a third party, according to Section 41 of the Indian Contract Act, 1872. According to Section 64 of the Indian Contract Act, 1872, if one party elects to nullify a contract and rescinds it, the other party, who is the promisor, is released from any obligation to carry out any of the promises made in the contract.

The money lender was aware of the true age and had an intention to get back his money through the laws made against the minor. As the true age was known by the money lender the compensation should not be allotted to him.

Contract made with a minor is void ab initio which means the agreement stands void from very start. This contract cannot be enforced by law and depending on the situation the minor is not bound to pay anything to the other party.

The Privy Council ruled that the agreement with the minor was void ab initio, or that it was void from the beginning, after carefully reviewing the case file. The defendant's arguments were also heard by the court. First off, because Brahmoo Dutta's lawyer was aware of Dharmodas's minority status, the court in *Mohori Bibee v. Dharmodas Ghose* decided that the doctrine of estoppel would not apply in this particular instance. Secondly, the court made it clear that provisions 64 and 65 of the Indian Contract Act would not be relevant.

since there was never a legitimate agreement and that a contract must be between competent parties in order for these provisions to be applicable.

⁴ Young J, Lloyd A, Haraldsdottir E. A qualitative meta-synthesis of studies of patients' experience of exercise interventions in advanced cancer. *Front Rehabil Sci.* 2024 Jan 4;4:1298553. doi: 10.3389/fresc.2023.1298553. PMID: 38239628; PMCID: PMC10794311.

⁵ Shivprasad Swaminathan, Ragini Surana, *Minors' Contracts: A Major Problem with the Indian Contract Act, 1872*, *Statute Law Review*, Volume 42, Issue 1, February 2021, Pages 101–115,

In *Sri Kakulam Subrahmanyam v. Kurra Subba Rao*⁶, the respondent shared a Hindu family with his father. October 4, 1935 was the day of the respondent's father's death. The respondent continued to live with her widowed mother as a minor. Prior to his passing, the respondent's father had a few obligations, including one of Rs. 1,200 that was secured by a mortgage and another of Rs. 16,000 that was owed to the appellants and secured by two promissory notes. The mother of the minor respondent, who also serves as their guardian, entered into a written agreement to sell the land to the appellant for Rs. 17,200. In order to pay off the promissory note and the remaining Rs. 1,200 in mortgage debt owed to Ramayya, the purchase price of Rs. 16000 must be used. The agreement specified that at the appellant's request and at their expense, the sale deed was to be completed, registered, and delivered. The appellants were granted possession of the sold land after they paid off the RS. 1,200 debt, but no sale deed was ever completed or recorded. The defendant and his mother filed this lawsuit on September 10, 1938, seeking ownership of the land. Issues were, Is the contract made by the guardian valid and Whoever ought to be the landowner.

First, the subordinate judge rejected the lawsuit after ruling that the appellants are covered by Section 53A of the Transfer of Property Act. The respondent was granted possession of the land by the District Court, which overturned the subordinate's decision. The appeal filed by the present appellant was denied by the Madras High Court. The respondent's mother entered the contract, according to the Privy Council. Because it was made for the benefit of a minor, the respondent's claim for relief was rejected and the Subordinate Judge's order was reinstated. Respondent is required to reimburse appellant for the costs of appeal and procedures in India.

POSITION OF A MINOR IN CASE OF NEGOTIABLE INSTRUMENTS- A minor is incapable of doing two things, firstly making a promissory note, and secondly acceptance of a bill of exchange. A minor has been authorized to draw, deliver and negotiate negotiable instruments. The transferee of a negotiable instrument from a minor has the right to recover the amount from all those who are liable to pay the same, except the minor.

POSITION OF MINOR IN A AGENCY- A minor is not capable of entering into a contract as an agreement with a minor is void. But there is no restriction for the minor to not become an agent to the contract. An agent may not be competent to contract. An agent can be a minor. They won't be accountable to their principal for their actions, though. Negotiable instruments may be drawn, delivered, and endorsed by minors without exposing them to personal risk. According to Section 183 of the Indian Contract Act, a person must be of legal age and sound mind in order to become a principal. Since a juvenile lacks the legal capacity to enter into contracts, they are also ineligible to hire agents. As a result, a minor can never hold the position of principal. but, under section 184, a minor may become an agent; but, in such a scenario, the principal will be bound by the minor's actions and will not be held personally accountable.

POSITION OF A MINOR IN PARTNERSHIP- A contract establishes a partnership between the parties, and it is necessary for both of them to be of legal age. S(30) of the Partnership Act¹² does, however, provide an exception wherein a juvenile may be temporarily admitted to the benefits of a partnership with the full permission of each partner. However, none of his actions will make him accountable.

Insolvency: Since he is incapable of taking on debt, a minor cannot be deemed insolvent. Additionally, if the youngster has unpaid debts from his properties for which he is not personally responsible.

Joint contract by the minor and the adult: In the event that a guardian executes a joint contract on behalf of a minor and an adult, the adult is liable for the terms of the agreement¹³.

⁶ Shivprasad Swaminathan, Ragini Surana, Minors' Contracts: A Major Problem with the Indian Contract Act, 1872, Statute Law Review, Volume 42, Issue 1, February 2021, Pages 101–115,

No Estoppel against minor

It was decided that estoppel cannot occur in the context of a minor in the *Jagar Nath Singh v. Lalta Prasad* case. Minors can, however, adopt infantile defences. Minors are prohibited from entering into contracts, and contracts made for them cannot employ the doctrine of estoppel.

who enters into a contract cannot be stopped from utilising the defence of infancy in the event that a lawsuit is filed, even if the minor falsely claims to be older than he is. *Pearl's Dream*. According to the court in *Palaces Construction (P) Ltd. v. Vikas*¹⁶, the sale contract should not be regarded as a valid and lawful document and must be reserved to the extent of the plaintiff's share if it is proven that the plaintiff was a minor at the time the sale deed was executed. The law forbids estoppel from applying to statutes. A contract signed by a minor is not enforceable under the law of estoppel.

Compensation under Indian Law

DOCTRINE OF RESTITUTION : In a conventional meaning, restitution refers to giving back benefits received, with the primary goal being to put the victim back in their former position (Plaintiff) in the event of a contract to the pre-contract position he held, and secondly to stop the defendant from being unjustly enriched—that is, to keep him from profiting unlawfully from gains to which he is not legally entitled. The theory of restitution and the obligation of the party that has benefited from a void agreement or contract are the key topics covered under Section 65 of the Indian Contract Act of 1872. The premise of this section is that there must be an agreement or contract in order for the theory of restitution to apply; otherwise, it cannot. The foundation of this theory is the widely accepted principle of consideration, according to which one should only give regard in exchange for anything. The concept came under the case of *Leslie v. Sheill* where after it got applied to other cases. In this instance, a young person fooled a moneylender about their age in order to obtain some money. The minor was sued by the moneylender to recover unpaid money. This idea does not apply to money because the money could not be tracked. The child was not accountable.

Following points are important for doctrine of restitution to apply :

- A contract has been made between two parties in exchange for consideration. The aforementioned deal included some sort of incentive.
- It was legal for both parties to engage into a contract.
- After then, either side neglected to fulfill their end of the bargain, or some unanticipated circumstance rendered the agreement null and void.
- The other party is not entitled to an unfair advantage over it, and the party that paid any compensation in the form of an advance is now entitled to reclaim it from the other party.

Application of the doctrine - Section 65 is applicable only when an agreement was valid when it was entered into and became void only at a future date. Moreover if the agreement was entered into between a major person being the plaintiff and the minor defendant in this case then doctrine of restitution will not be applied, this was held in the case of *Mohiri Bibi v. Dharmodass Ghosh* but the scenario will be different if minor has misrepresented his age and then he can be enforced by the court to return the benefit.

MINOR'S LIABILITY FOR NECESSARIES - The voidability of a minor's agreement does not apply to contracts for necessities. Anything that is required for the minor's existence and well-being is referred to as a necessity. Food, clothes, and shelter are a few of these. Contracts for necessities are regarded as legitimate, and breaking them could result in legal action against the youngster. The minor's survival and well-being depend on

the necessities, which is why there is an exemption. It is therefore best to see to it that the minor receives these products or services. Furthermore, necessities are typically not prohibitively expensive or outside the minor's means. Consequently, there is little chance that the youngster will be exploited by dishonest people. The value of the products or services the minor receives is covered by liability under contracts for needs. Any further losses resulting from the contract breach cannot be attributed to the minor. The contract must also be fair in value and reasonable. The concept can be understood with the case of *Nash v. Inman*

NEGOTIABLE INSTRUMENT ACT A minor may draw, endorse, and negotiate in accordance with Section 26 of the Act, and he may bind everyone but himself. A promissory note, cheque or bill of exchange may be made, drawn, accepted, delivered and negotiated by any person who is competent to enter into contracts under the laws to which he is subject.

Sound mind

For being competent to contract the person should be of sound mind ie he should be able to make correct decisions according to his or her well being . He should be in a state to understand the problem and defend himself whenever required. The following are the conditions falling under this :

Idiots

A person with mental impairment who is younger than a three-year-old child is referred to as an idiot in medical terminology. Because of this, the contract will be worthless from the start because fools are unable to comprehend its terms. In the case of *Indar Singh v. Parmeshwardhari Singh* the court held that the person should be able to make a rational judgement to execute a deed in favour of anyone. According to the ruling in *Kanhaiyalal v. Harsing Laxman Wanjari*, mental instability is not the same as mental infirmity alone. A person suffering from mental incapacity, regardless of the cause, is deprived of both the awareness that he is not understanding the transaction and the ability to fully comprehend it. Thus, an individual with an unsound mind is not always insane. If the individual is unable to assess the repercussions of his actions, that suffices.

Lunatic A lunatic is someone who is sound mentally for a while and then becomes unsound for the rest of the time. A contract is enforceable when a lunatic signs it while he is still of sound mind, that is, when he can comprehend the terms of the agreement. It is void otherwise. *Inder Singh v. Parmeshwardhari Singh* , a person agreed to sell a property for ₹7,000 cheaply, even though its true value was ₹25,000. His mother provided evidence that the property seller was a natural-born fool who was unable to comprehend the implications of the sale. The property sale was declared void by the court. Determining whether he is signing the contract after having made an understanding of the transaction and his interest is therefore critical. It's not a requirement for a man to be insane in order to prevent him from signing a contract. While exhibiting typical behaviour, an individual may be unable to make their own decisions. The transaction is void in this instance because the individual was unable to use sound judgement.

Influence of drugs A deal made while under the influence of alcohol or drugs might or might not be enforceable. If the person signing a contract was too drunk to understand its terms and consequences, the agreement is void. Nevertheless, if he can understand the contents of the agreement, it will be enforceable.

Disqualified by the law

1. **Convicts:** While completing their term, convicted felons are prohibited from signing contracts. But after serving out his time, he is once again able to sign a contract.

2. **Insolvents:** A person under the burden to repay the loans and other assets and is unable to repay it due to the bankruptcy of the person's possessions.

3. **Alien adversary:** Any person of a country with which India is at war is regarded as an enemy. Any agreements established during combat with an extraterrestrial opponent are void. An Indian citizen residing in an alien adversary's land is regarded as an alien enemy under contract law. Contracts made before the start of the conflict are either annulled if they go against state policy or remain suspended and can be revived if allowed by law.

4. **Foreign sovereign:** India offers contractual immunity to its ambassadors and diplomats from other countries. To be sued in Indian courts, they have to agree to be subject to Indian jurisdiction. Furthermore, authorization from the central government is required in these kinds of circumstances. However, the foreign sovereign may enforce contracts against other parties in Indian courts.

5. **Body corporate:** A business is a manufactured individual. A company's memorandum and articles of association specify its ability to enter into contracts.

6. **Intoxicated or Drunk:** When someone consumes alcohol or drugs, they become temporarily incapable of contracting. For instance, he eventually loses the ability to comprehend the transaction when he is too inebriated to make any reasonable decisions. When an inebriated individual is not in his state of mind, their stance is null and void, no different from that of a mad man. In the case of *Chacko v Mahadevan* the appellant executed a sale deed of his land in favour of the respondents when he was suffering from alcoholic psychosis. The deed also showed that it was sold for a very partial amount. Thus the agreement was set aside and the principle of *res ipsa loquitur* was applied.

7. **Burden of proof** - In any event, the burden of proof rests mostly with the individual making the claim of mental illness because it is assumed that an individual is sound. Proof that the individual did not exhibit any signs of insanity at the time the contract was executed does not relieve the substantial burden.

Implications

1. **Void vs. Voidable Contracts:** In India, the legal ramifications of a contract involving a mentally incapacitated party can vary based on the specific circumstances.

Void Contracts: A contract is void from the beginning if one party is mentally incapable of entering into a binding agreement and the other party knows or should have known this. This indicates that neither party is obligated by its provisions, and it is completely void from the start.

Voidable Contracts: Agreements made by people who are mentally incompetent may occasionally be ruled voidable. This implies that until the incapacitated party decides to nullify it, the contract is enforceable. Nonetheless, the person who is disabled must prove that they were unable to comprehend the conditions of the contract when they signed it.

2. **Guardianship:** Contracts that a person enters into without the guardian's approval or consent may be voidable if they are under a legal guardianship because of mental incapacity. The disabled person's interests are safeguarded by doing this.

3. **Burden of Proof:** The party attempting to break the contract normally bears the burden of demonstrating mental impairment. To prove that they lacked the mental capacity to understand the ramifications of the contract, they must present proof.

4. **Repayment:** In the event that mental infirmity renders a contract unenforceable, repayment may be necessary. This implies that any advantages obtained under the terms of the agreement might have to be given back to the other side.

5. **Contracts with Mentally Ill People:** Indian contract law acknowledges the voidability of agreements made with mentally ill people. In the event that the other party behaved in good faith and was not aware of the mental condition, they might be eligible for compensation.

6. Contracts with Drunk People: If someone signs a contract while intoxicated, it may also be voidable if they were unable to comprehend the provisions of the agreement.

Conclusion

A person who suffers from mental impairment lacks the capacity to sign contracts. Alcoholism or mental disease may be the cause of this. A contract involving an mentally sick party is frequently declared voidable by the courts, indicating that the party with the incapacity may terminate the agreement. In certain cases like a lunatic person the contract is held valid until the conditions are such that the party is not able to understand the facts of the situation. In India, mental infirmity plays a big role in contract law. When parties enter into agreements, they must be cognizant of each other's mental capacity and take reasonable precautions, particularly when interacting with people who might be mentally ill or drunk. The goal of the law is to maintain the ideals of contractual freedom and fairness while simultaneously defending the rights of people who are mentally incapacitated. To guarantee the legality and enforceability of contracts in India, one must be aware of the consequences of mental incapacity under contract law.

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THE DILEMMA IN ADMINISTRATION OF NATIONAL CAPITAL TERRITORY OF DELHI: ISSUES AND CHALLENGES

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ABSTRACT

The National Capital Territory of Delhi is a constitutionally hybrid Union Territory with a fully elected Legislative Assembly and a cabinet form of government. The Government of National Capital Territory of Delhi (Amendment) Act, 2021, enacted by the Parliament, prohibits the Legislative Assembly of Delhi from making rules for the day-to-day administration and modifies the expression “Government” to mean “Lieutenant Governor” in all the laws that will be enacted by Legislative Assembly. Though claimed to be in line with two specific judicial pronouncements of the Hon'ble Supreme Court of India, the amendment seems to violate the principles of collective responsibility and representative governance in a Cabinet Government as laid down in those two pronouncements. This article attempts to analyse if the amendment violates article 239AA of the Constitution and to suggest appropriate legal measures that can be taken to restore representative governance.

Key words: *Governor, federalism, democracy, executive, and cabinet Government*

Introduction

Seamless administration depends upon various factors, including but not limited to a clear demarcation of powers and responsibilities among the people responsible for such administration. If such demarcation is not made, it might end up either in absolutism or administrative impotence, which is detrimental to the lives of the general public. To avoid such catastrophe in a country, it is preferable to demarcate the powers of administrative authorities. As defining the powers in detail might not be possible at every level of the administrative hierarchy, there will always be some discretionary powers given to certain authorities responsible for administration. With discretionary power comes the responsibility of exercising such discretion judicially or sensibly. Be it well-defined powers or discretionary powers, the power tussle is more likely between the authorities belonging to different political groups but administering a common sect. Such a politically motivated brawl in a democracy would affect the lives of subjects more than the authorities themselves. If the administrative power tussle is between an elected authority and an authority appointed by the President, subjects would want their elected representatives to win, but one cannot blindly support the elected representatives of a particular region, especially when the national interest is involved. In such circumstances, the might-right mentality cannot resolve the issue.

The capital of a country is like the mitochondria of a cell. The capital of a country is chosen based on a variety of factors like administrative convenience, military advantage, economic advantage, or even religious reasons. Such a chosen capital hosts a variety of public offices that are likely to be accessed by the whole country. For example, the Supreme Court of India and offices of many national authorities in India are situated in Delhi. This puts the capital in the limelight. The capital is always in the news, and it is usually the region that the government tries to be in control of as much as possible. Indians might not remember the capital of all the states at all times, but they definitely remember the capital of the country. Capital is a sign of unity, and it can very well be called the central node of a country. Indian Capital has a regional government of its own apart from the Government of India because India is democratic and it believes in collaborative federalism.

The Parliament of India enacted the law of the Government of National Capital Territory of Delhi (Amendment) Act, 2021 (hereinafter referred to as 'Amendment Act, 2021'). The said law has changed the meaning of the expression “Government” to mean the “Lieutenant Governor” for all laws which the elected Legislative

Assembly of Delhi can make.¹ It also prohibits the Legislative Assembly from making rules for the day-to-day administration of Delhi.² This has created political turmoil between the nominated Lieutenant Governor and elected representatives of the Delhi Legislative Assembly. In Indian states, it is usually the state government that takes care of the day-to-day administration. In other Union territories, the administrator takes care of the day-to-day administration usually. Delhi is special and cannot be seen merely as a Union Territory. Delhi has its own elected representatives and government. In such a situation, it is necessary to analyse the feasibility and legality of the power grab done by the Amendment Act, of 2021.

Representative Governance in the National Capital Territory of Delhi

The National Capital Territory is different from other Union Territories in India. The sui generis status of the National Capital Territory of Delhi under the Constitution makes it a class by itself.³ The residents of Delhi have a higher say in the governance of Delhi. The National Capital Territory of Delhi is currently the only Union Territory that has a fully elected legislative assembly. As per the Constitution, the legislative assembly of the National Capital Territory of Delhi cannot have Nominated members because all the seats have to be filled by direct election from the constituencies of the National Capital Territory of Delhi.⁴ This is not the case for the Union Territory of Puducherry. The Union Territory of Puducherry with a legislature can have partly elected and partly nominated members depending upon the law made by the Parliament in that regard.⁵ The National Capital Territory of Delhi though represents a democratic setup and representative form of Government for the residents, cannot be turned into a complete autonomous State. Such a move would cut off the national capital from the nation itself. In this context, the National Capital Territory of Delhi has now become a constitutional hybrid that is neither a complete State nor an ordinary Union Territory. A clear demarcation of executive powers between the Union Government and the Government of National Capital Territory Delhi is necessary to make sure this beautiful constitutional hybrid does not lose its shape. While the legislative powers can be understood from a plain reading of Article 239AA of the Indian Constitution, the demarcation of executive powers of administrative authorities is still not completely settled. The history of governance in Delhi is inclined more towards representative governance than the center's administrative supremacy.

The seed of representative governance in Delhi was sown in the Government of Part C States Act, 1951, which created the first Legislative Assembly in Delhi post-independence.⁶ The powers of the then Legislative Assembly were restricted concerning matters of public order, police (including railway police), constitution and powers of local authorities, public utility authorities, lands and buildings, jurisdiction and powers of courts, etc. Similar to the current setting, the then Legislative Assembly had powers to legislate on matters stated in the State List and Concurrent List, subject to those restrictions.⁷ The Council of Ministers headed by the Chief Minister were aiding and advising the Chief Commissioner in all matters for which the Legislative Assembly had powers to legislate but not for the matters in which the Chief Commissioner had discretionary powers. In case of a difference of opinion, the decision of the President was said to be final.⁸ This democratic setup was short-lived. In the year 1956, the Chief Commissioner's province of Delhi among the other Part C States was changed into a Union Territory. The legislative assembly was removed and Delhi went under the control of the Administrator

¹ Government of National Capital Territory of Delhi (Amendment) Act, 2021, § 2, No.15, Acts of Parliament, 2021 (India).

² Id. at § 4.

³ *New Delhi Municipal Corporation v. State of Punjab Etc. Etc.*, (1997) 7 SCC 339.

⁴ INDIA CONST. art. 239 AA (2) (a).

⁵ Id. at art. 239AA (1) (a)

⁶ The Government of Part C States Act, 1951, § 3, No. 49, Acts of Parliament, 1951 (India).

⁷ Id. at § 21.

⁸ Id. at § 36.

appointed by the President.⁹ This idea of reorganizing the Part C States into Union Territories without legislature was due to the recommendations of the State Reorganization Commission in 1955. The justification given was that federal countries like the United States of America and Australia have their capitals centrally administered and having legislatures or ministers in such less populated areas cannot be justified merely on the principles of responsible government.¹⁰ This justification is unacceptable because comparing India to the United States of America and Australia is not appropriate as the population of Delhi is way more than Washington, D.C., and Canberra. From the year 1966 to 1990, there was a compromised form of democracy in the form of an elected Metropolitan Council without full legislative or financial powers. The power of administration during that period was with the administrator designated as Lieutenant Governor.¹¹

After thirty-seven years of darkness, democracy returned to Delhi. The Report of the Committee on Reorganization of Delhi Set-up in 1989 found that there were multiple authorities with confusion and overlapping of jurisdiction among them. Giving due consideration to the difficulties of administration and dissatisfaction disclosed by the people of Delhi, the Committee recommended bringing in a Legislative Assembly and a Council of Ministers collectively responsible to such Legislative Assembly in the National Capital Territory of Delhi. The Union Territory was proposed to be changed into a National Capital Territory. This recommendation was to make sure the Legislative Assembly and Council of Ministers in the National Capital Territory of Delhi have adequate powers to deal with matters concerning a common man. The Report also clearly stated that in the cabinet form of government adopted in the Indian Constitution, the Lieutenant Governor is required to function with the aid and advice of the Council of Ministers except on matters outside the purview of the Legislative Assembly and matters in which any other law requires the Lieutenant Governor to exercise their discretion or judicial or quasi-judicial functions.¹² Based on the recommendations in the Report, the Constitution (69th Amendment) Act, 1991, was passed to add Article 239 AA and Article 239 AB to the Constitution establishing a Legislative Assembly in the National Capital Territory of Delhi.¹³ The Government of National Capital Territory of Delhi Act, 1991 was also enacted in this regard.¹⁴ Thus, constitutionally special and unique status was given to the National Capital Territory of Delhi.

Cabinet Government in National Capital Territory of Delhi

The Government of the National Capital Territory of Delhi is a Westminster-style cabinet system of Government in which the Council of Ministers, headed by the Chief Minister, are collectively responsible to a fully elected Legislative Assembly recognized by the Constitution. The Legislative Assembly of the National Capital Territory of Delhi was formed under Article 239AA inserted in the year 1991.¹⁵ The Constitution has provided for special provisions exclusively for the National Capital Territory of Delhi, which lays down the scope of legislative powers to be exercised. The lawmaking powers of the Legislative Assembly cannot extend to the matters of public order, police, and land in the State List. It can, however, make laws for other matters in the State List and all the matters in the Concurrent List.¹⁶ The matters of police and public order are outside the scope of National Capital Territory Delhi's legislative assembly because Delhi is different from other states or union territories in India. Being a capital territory, a larger national interest is involved in ensuring the security of the Union Government officials and their administrative convenience. However, this does not undermine the federal

⁹ The States Reorganization Act, 1956, No. 37, Acts of Parliament, 1956 (India).

¹⁰ Report of the State Reorganization Commission, 1955, Future of remaining centrally administered areas, 77 -79, available at: https://www.mha.gov.in/sites/default/files/State%20Reorganisation%20Commisison%20Report%20of%201955_270614.pdf. (last visited January 28, 2022, 10:30 PM)

¹¹ Delhi Metropolitan Council (1966-1990), DELHI ASSEMBLY.

¹² Committee on Reorganisation of Delhi Set-up Report, 1989, Drawbacks and deficiencies in the existing set-up, Chapter VI, 26-30, , <https://indianculture.gov.in/flipbook/675>. (last Visited January 28, 2022, 8:30 PM)

¹³ Statement of Objects and Reasons, The Constitution (Sixty-ninth Amendment) Act, 1991.

¹⁴ The Government of National Capital Territory of Delhi Act, 1991, No. 1, Acts of Parliament, 1992 (India).

¹⁵ supra note 13.

¹⁶ supra note 4, at art. 239AA, cl. (3)(a).

balance of a cabinet government conceptualized by the collective responsibility of the Council of Ministers towards the legislative assembly elected by the people of Delhi. The federal balance will not be affected by any partition of legislative or executive powers between the Union Government and the Government of National Capital Territory Delhi if such partition is explicit in the Constitution itself. A law made by Parliament cannot mess with the federal balance embodied in the Constitution. During the Constitutional Assembly debates, Dr. B.R. Ambedkar called this principle “the chief mark of federalism.”¹⁷ In the pretext of following this principle, the parliament has made an amendment to the Government of National Capital Territory of Delhi Act, 1991 which seems like an oxymoron. The Amendment Act, 2021 being passed by both the Houses of Parliament, received the assent of the President on March 28, 2021.¹⁸ This Amendment Act, 2021 has made the following changes to the Government of National Capital Territory of Delhi Act, 1991 that will adversely affect the constitutionally assured federal balance in National Capital Territory Delhi:

1. It has inserted a new sub-section (3) in section 21, according to which the expression 'Government' referred to in any law to be made by the Legislative Assembly shall mean the 'Lieutenant Governor'.¹⁹ Assigning the meaning of 'government' to a lieutenant governor when there is already an elected government in the National Capital Territory of Delhi is nothing but a mockery of democracy.

2. It has added a new provision to Section 33, which prohibits the Legislative Assembly from making any rule to enable itself or its committees to consider the matters of the day-to-day administration of the capital or conduct inquiries concerning administrative decisions. Any such rule made before the commencement of this Amendment Act, 2021 is also void.²⁰ This is a matter of concern because it restricts the Committees of the Legislative Assembly from conducting inquiries about administrative decisions. This will harm the accountability and transparency of administrative authorities in their decision-making.

3. It has inserted a new proviso in sub-section 2 of section 44 according to which the opinion of the Lieutenant Governor shall be obtained on all such matters, specified by a general or special order of the Lieutenant Governor, before taking any executive action in pursuance of the decision of the Council of Ministers or a Minister, to exercise powers of government, state government, or appropriate government.²¹ This will make the position of the elected government of the National Capital Territory of Delhi weak and will also make the Council of Ministers responsible to the Lieutenant Governor. The Lieutenant Governor, who was making decisions on the aid and advice of the Council of Ministers, will now influence the decision of the Council of Ministers itself. This amendment will also cause unnecessary delay for the Government of National Capital Territory Delhi in exercising the executive powers that fall within its domain.

On the whole, the Amendment Act, 2021, has made the position of the Government of National Capital Territory Delhi feeble because the elected Government of National Capital Territory Delhi is being barred from exercising its powers unless it obtains the opinion of the Lieutenant Governor. The Amendment Act of 2021 has literally metamorphosed the Lieutenant Governor into a government. The Amendment Act 2021 has made the Council of Ministers collectively responsible to the Lieutenant Governor instead of an elected Legislative Assembly. Even though the laws made by Parliament will prevail over the laws made by the Legislative Assembly of National Capital Territory Delhi in case of repugnancy,²² the Parliament cannot unjustly take away the assembly's lawmaking power itself. The legislative powers of National Capital Territory Delhi's Legislative Assembly are

¹⁷ The Honourable Dr. B.R. Ambedkar, Constituent Assembly of India Debates (Proceedings) Volume XI, (January 28, 2022, 8:30 PM), <http://164.100.47.194/Loksabha/Debates/cadebatefiles/C25111949.html>.

¹⁸ Ministry of Home Affairs, Press Information Bureau, Press Release ID: 1714828, (January 29, 2022, 7:30 PM), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1714828>.

¹⁹ Supra note 1, at § 2.

²⁰ Id. § 4.

²¹ Id. § 5.

²² Supra note 4, at art. 239 AA (3) (c).

being restricted without a constitutional mandate, which disrupts the federal balance enshrined in the Constitution of India.

Scope of Lieutenant Governor's executive powers

Executive powers denote the residue of government functions that remain after judicial and legislative functions are taken away. In India, the real executive power is with the Council of Ministers in Parliament or State Legislatures. The President or Governors are merely formal or constitutional heads of the executive.²³ This may not be the case for Union Territories without the Council of Ministers. As far as the National Capital Territory of Delhi is concerned, it does have a Council of Ministers headed by a Chief Minister. Therefore, the real executive powers including the day-to-day administration in the National Capital Territory of Delhi should not be carried out by the Lieutenant Governor or President and it should vest with the Council of Ministers unless the Constitution of India provides otherwise. Delhi being a National Capital Territory, certain executive powers do lie with the Lieutenant Governor in special circumstances as enshrined in the Constitution. Those powers and their scope were interpreted by the Hon'ble Supreme Court of India in the years 2018 and 2019. The press release on April 23, 2021, given by the Ministry of Home Affairs states that the Amendment Act, 2021, discussed earlier is in line with the judgments of the Hon'ble Supreme Court dated July 4, 2018, and February 14, 2019.²⁴ Therefore, it becomes imperative to understand the ratio of those two judgments to verify if the Amendment Act, 2021, is really in line with them.

In the case of the *Government of National Capital Territory of Delhi v Union of India & Ors.*,²⁵ The Hon'ble former Chief Justice Dipak Mishra, speaking for the majority, has held that the Lieutenant Governor of Delhi is an administrator in a limited sense only. The Lieutenant Governor should not differ from decisions of the Council of Ministers due to an attitude because it would negate the concept of collective responsibility of the Council of Ministers towards the Legislative Assembly of the National Capital Territory of Delhi guaranteed under Article 239AA of the Constitution of India. The executive power of the representative government in the National Capital Territory of Delhi is coextensive with the legislative powers of its Legislative Assembly. However, if Parliament makes law for the subjects in State List or Concurrent List, then the executive action of the government of National Capital Territory of Delhi should conform to it. The Lieutenant Governor of Delhi is bound by the aid and advice of the Council of Ministers as per article 239AA (4), unless a reference is made to the President in any matter of exceptional circumstances, and thus the words “any matter” in the proviso of article 239AA does not mean every matter. This reference cannot be made mechanically and it should be in line with the principles of collaborative federalism, constitutional balance, and the idea of representative government. If such a reference is made, the decision of the President would be binding.

In the case of *Government of National Capital Territory of Delhi v Union of India*,²⁶ the Hon'ble Supreme Court of India held that the appointment of a public prosecutor under Section 24 of the Code of Criminal Procedure, 1973 is to be done by the Lieutenant Governor acting on the aid and advice of the Council of Ministers. The Hon'ble Court also held that the word “State government” used in Section 2(5) of the Electricity Act, 2003 would mean the Government of National Capital Territory of Delhi and it does not mean the Lieutenant Governor. The Delhi Government also has the power to issue directions to the Delhi Electricity Regulatory Commission in matters of public interest and the power to revise minimum rates of Agricultural Land (i.e., circle rates) under the Indian Stamp Act, 1899. However, the powers concerning setting up a police station for the Anti-Corruption Bureau and setting up Commission of Inquiry was given to the Union Government as it was outside the scope of Delhi Government's powers. The Hon'ble Court reaffirmed the principles laid down earlier in 2018 concerning collective responsibility, collaborative government, and representative governance.

²³ Rai Sahib Ram Jawaya Kapur And Ors. v. The State Of Punjab, AIR 1955 SC 549.

²⁴ Supra note 18.

²⁵ (2018) 8 SCC 501.

²⁶ (2019) 3 MLJ 35.

After a combined reading of both the judgments discussed above, it can be concluded that the Amendment Act, 2021 violates the principles laid down by the Hon'ble Supreme Court. It has mischievously changed the meaning of "Government" into Lieutenant Governor which is taking away the executive powers of elected Delhi Government guaranteed. Prohibiting the legislative assembly from making rules of day-to-day administration is against Article 239AA of the Constitution of India which guarantees law-making power to the legislative Assembly on all matters of the concurrent list and state List except three matters as interpreted by the Hon'ble Supreme Court. Day-to-day administration is a wider phenomenon that does not fall specifically under those three matters alone, i.e. police, public order, and land. The formal head Lieutenant Governor is now being turned into an one-man government, and such absolutism is neither warranted by article 239AA of the Constitution of India nor by the judicial pronouncements with which the objectives of the Amendment Act, 2021 claim to comply.

Conclusion and Suggestions

The idea of democracy is not simply limited to what the majority says. It is what the majority says after listening to the dissenting opinions and considering them on merit. India cannot afford to lose its democratic charm in its Capital itself. The National Capital Territory is the cherry in the cake that gets projected to the foreign nations more easily than other territories. In this context, it would be hypocritical for India to give up on democratic Delhi and project itself as democratic ideal among the international community.

Delhi belongs to the whole country as much as it belongs to people residing in Delhi. Absolutism in the capital territory would demean not just the capital territory but also the whole nation. Taking away the law-making powers of the elected representatives is undemocratic no matter which law protects such power grab. Such absolutism also undermines collaborative federalism in a capital territory. If Absolutism is allowed then it would drive democracy into the path of oligarchy or something even worse than that. Decentralization of power is better suited for highly populated democratic countries. The concerns regarding the national safety and administrative convenience are reasonable but not reasonable enough to completely make the elected representatives in Delhi administratively impotent. There can obviously be some restrictions in their powers, keeping the national interest in mind. However, such restrictions should be warranted by the Constitution of India.

The judicial pronouncements in this issue are all inclining towards the grant of rule-making powers to the elected Legislative Assembly of Delhi as much as possible. The Parliament of India, while doing the exact opposite of what the Courts have suggested, either misunderstood the judgments or consciously misinterpreted the judiciary to meet its ends. Blaming the Parliament of India for conscious misinterpretation would serve no purpose and may also negatively impact the future of Delhi. It is more appropriate to consider the reasons stated by the Parliamentarians themselves for their actions to avoid politicizing the issue. Therefore, assuming the good intentions of the Parliament, it would be easier to resolve the issue both on paper and ground. In these types of issues, if one resorts to fight the Parliament in Court of law, the results would not be pleasing to the people of Delhi. If the amendment violating article 239AA is struck down, the Parliament might nullify the judgment by amending the Constitution itself to alter the special status of Delhi, which is undesirable in the long run. Negotiation and healthy debates can address the problem better. Parliament of India also contains elected representatives and would definitely value the democratic ideals more than anything else. It would be easier to convince the Parliament of India than to confront it. Therefore, the following suggestions are made in this regard: -

1. The Amendment Act, 2021 shall be withdrawn by the Parliament of India considering the public outcry. Any amendments that are to be made to the Government of National Capital Territory of Delhi Act, 1991 shall happen after consulting the stakeholders i.e., Legislative Assembly of National Capital Territory of Delhi. This will

ensure the idea of representative governance and collaborative federalism.

2. If the Parliament of India is not willing to withdraw the law as suggested above, then the President of India may refer this matter to the Hon'ble Supreme Court of India under article 143 of the Indian Constitution. The Hon'ble Supreme Court exercising its advisory jurisdiction can clarify if the controversial amendment to the Government of National Capital Territory of Delhi Act, 1991 was complying with its pronouncements on July 4, 2018 and February 14, 2019. This move will settle the legal debates revolving around the legal status of Delhi and its administration by clearing all the confusion.

3. The Government of India shall set up an Ad-hoc Commission under section 3 of the Commission of Inquiry Act, 1952 with a mandate to recommend the legislative draft of amendment in the Government of National Capital Territory of Delhi Act, 1991. The Commission's recommendation should give due weightage to the clarification which will be given by the Hon'ble Supreme Court of India, answering the reference (as suggested above) made by the President of India.

4. The above-said commission shall be directed to ascertain the public opinion in this regard by issuing a press note or notification inviting written memoranda from the citizens. The recommendations of the said commission should give 50% due weight to the information obtained from the people of Delhi and the remaining 50% to the citizens from other parts of India. Giving weight to the opinions of people from other parts of India will remind them that the capital territory belongs to the country as a whole and not just the people of Delhi.

SCIENTIFIC INVESTIGATION IN INDIAN CRIMINAL JUDICIAL SYSTEM- AN ANALYSIS

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ABSTRACT

Investigation is the first stage after the commission of crime. On the basis of investigation the police form an opinion as to whether; a case is made out or not. The Criminal Judicial system of any country more or less is dependent on the investigation report submitted by the police and in our country the magistrate takes cognizance of the police report. It is said that conviction rate in our country is low and among the various reasons for low conviction rate; unavailability of evidence is considered one of the prime causes which is directly linked with the investigation and crime conviction ratio. However, there may be various reasons for non availability of evidence, because evidence includes both oral and documentary evidence. In regard to oral evidence there are two types of evidence: first the statement of the accused himself and second the statements of witnesses. But the right to remain silent is another major hurdle in respect of the statement of an accused. So basically the police have to depend on other sources of evidence which are generally collected from the crime scene. Selection and collection of evidence are two different things, firstly knowledge of substantive law and secondly requires practical knowledge. So far as science and technology is concerned not only is it playing an important role but also having relevance in criminal investigation. Whenever, investigating agencies adopted scientific techniques of investigation they must have its knowledge. Basically lie detector, polygraph test, narco-analysis, brain-mapping and DNA profiling are some common techniques generally followed in criminal investigation by investigation agencies. But at the same time it is necessary that the officers should be well equipped and trained for collection of evidence. If it is collected by untrained investigating officers there is a possibility of damage to evidence or minimize its evidentiary value because of various scientific reasons.

This research paper will elucidate the relevance of scientific techniques of investigation and the lacunas in Crime investigation through scientific techniques. The author mainly will be dealing with the reasons for unskilled and unscientific investigation, consequences of such unskilled and unscientific investigation, forensic tools available for the investigation purposes and what is the way forward?

Key words: *Investigation, Forensic science, scientific investigation, Evidence.*

Introduction

As per section 2 (h) of Code of Criminal Procedure, 1973(hereinafter referred as Cr.P.C.) “*Investigation*” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf”. In **Directorate of Enforcement v. Deepak Mahajan**¹, the Supreme Court held that “the expression investigation in section 2 (h) of Cr.P.C. is an inclusive definition. An investigation means look for material and facts so as to seek out whether or not an offence has been committed.

If we analyze the meaning of investigation we will find that investigation includes all aspects of collection of evidence. To establish the fact the investigators use these tools such as: information, interview, interrogation, and instrumentation. It may be classified in two ways: internal and external. Internal refers to the process of logic, expertise, experience and knowledge that the investigating officer brings to the investigation. External refers to tools, scientific aids, additional personnel, and other resources that investigator brings to investigation.²

The oral testimony (internal aspect of collection of evidence) depends upon the power of observation, assimilation and reproductions of witnesses. It is modified by auto suggestion, external influence, descriptions

¹ (1994) 3 SCC 440.

² Richard H Wood, Introduction to Criminal Investigation, 15, (A.W. Publication Company 1975)

and opinions of others and rationality. In regard to the second aspect, investigators have to rely upon external resources like forensic experts, computer experts, and digital message experts. It is said that application of these techniques are not new.

We can trace the history of the application of science and technology to the detection and investigation which was not new in India. In *Kautilya's Arthshastra* we find the mention of study of various patterns of 'papillary lines' which is somehow linked with persistence and individuality of fingerprints.³ The fingerprint was in general use as a signature which was considered as a substantive piece of evidence especially in civil matters.

With the increase in crime records it is necessary that the conviction rate should also increase and it will not be possible unless the investigation agencies will adopt scientific techniques of investigation. Forensic science is an integrative subject joining a few parts of learning utilized for inquisitive wrongdoing scenes and gathering information to be utilized in the preliminary for arraignment of guilty parties in a courtroom. The strategies of forensic science are utilized to investigate passive consent with worldwide understanding in regards to weapons of mass pulverization. Earlier, the fundamental regions utilized in forensic science were science and medication. With the passage of time forensic science included different branches like toxicology, digital forensic, hand-composing, fingerprinting, ballistics, forensic brain research, human studies, topography, forensic building, and odontology. Forensic researchers analyze objects, substances (counting blood or medication tests), synthetics (paints, explosives, poisons), tissue follows (hair, skin), or impressions (fingerprints or tidemarks) left at the wrongdoing scene.

Use of Science and Technology in Investigation

The main purpose of investigation is ultimately to search for truth and to bring offenders before the law and fair investigation is also an essential part of fair trial. As the police receive information about the commission of cognizable offence generally police proceed to the spot to ascertain the facts and circumstances of the case and collect evidence. Also record the statement of those persons who are acquainted with the facts of the case. But in the present day context we know that the use of science and technology is increasing day by day in every field of human behaviour. Investigation is also greatly affected by use of science and technology. Law is a tool of social change and it is dynamic and law changes with the changes in the society. Scientific aids, especially forensic tools enhance transparency, fidelity and accuracy to brace fairness in administration of justice.⁴ With the use of innovative techniques in commission of crime by the criminals, it has become necessary that investigating agencies should also adopt scientific techniques in criminal investigation and investigating officers must also be trained in using these techniques in investigation because nowadays use of science & technology in investigation is unavoidable. Various scientific developments and their application in investigation is the need of the time. When the question arises whether in a criminal trial, evidence could be recorded by video conferencing; the court allowed the recording of statements through video conferencing in the light of the revolutionary changes in technology of communication and transmission and the marked improvement in facilities for legal aid in the country.⁵

In the case of *Dharam Dev Yadav v. State of U.P.*⁶ the court while emphasizing on the need of scientific method in crime detection investigation observed:

“Crime scenes have to be scientifically dealt with without any error. In criminal cases, especially based on circumstantial evidence, forensic science plays a pivotal role, which may assist in establishing the element of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. One of the major activities of the Investigating officer at the crime scene is to make thorough searches for potential evidence that have

³ Tewari R.K. & Ravikumar K.V., “History and Development of Forensic Science in India” posted in the year 2000 Available at: www.jpgmonline.com as (Last visited on February 22, 2020).

⁴ *Manohar Lal Sharma v. Union of India*, (2014) 2SCC 532, the court observed:

“Blending of science with traditional criminal investigation techniques offers new horizons of efficiency in criminal investigation, which reduces dependence upon informers and custodial interrogation and concentrates upon skilled scanning of the crime scene for collection of physical evidence.”

⁵ *State of Maharashtra v. Dr Praful B Desai*, AIR 2003 SC 2053, the Supreme Court observed:

“Video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.”

⁶ (2014) 5 SCC 509.

probative value in the crime. Investigating Officer may be guarded against potential contamination of physical evidence which can grow at the crime scene during collection, packing and forwarding. Proper precaution has to be taken to preserve evidence and also against any attempt to tamper with the material or cause any contamination or damage.”⁷

The court highlights the importance of science & technology and the use of scientific techniques in investigation for improving the quality of investigation if we want to make our criminal justice system efficient. The court also emphasised on the need for a robust legal framework so that the functionaries involved in the criminal justice system can work efficiently.

In developed countries the methods of scientific investigation have had a profound effect on the methods adopted by the police for crime detection and crime prevention, but so far as India is concerned the use of forensic investigation is not up to the marks due to lack of any specific law.

In our country we don't have specific laws to deal with scientific techniques of investigation. The existing laws e.g. the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 (Cr.P.C.) do not have sufficient provisions to deal with scientific investigation and collection of scientific evidence. Due to lack of legal backing investigating officers find it difficult to collect scientific evidence. However, section 53 of Cr.P.C. empowers the investigating officer to get assistance from a medical practitioner in investigation but there is nothing which enables the complainant to collect such scientific evidence like blood sample, semen *etc.* As per 2005 amendment of Cr.P.C. allows taking DNA samples on the advice of police officer yet consent is needed when the medico-legal examination or biological sample of the rape survivor has to be collected but only police officers, not below the rank of Sub-inspector, are allowed to collect DNA sample from the body of the accused and the victim with help of medical practitioner.⁸ However, he himself is not allowed to collect any such sample (evidence) and non-availability of medical practitioner at particular time may cause loss of evidence.

In *Natvarlal Amarshibhai Devani v. State of Gujarat & other*,⁹ the Gujarat High court expressed the use of advance technologies in investigation and observed:

“The crime scenario in the country has undergone a sea change in the recent times. Criminals are using the most sophisticated weapons and highly specialised means to achieve their objective. Highly sophisticated devices like blasting of land mines by remote control are being used to thwart the law enforcement machinery from doing its duty. The change in the pattern of crime and mode of its commission requires modern scientific methods of crime detection so that the criminals may not move about with impunity holding the entire community at ransom.”¹⁰

In *State of Rajasthan v. Vikramjeet Singh @ Vika Virk*,¹¹ the High Court of Rajasthan very categorically emphasised on the need of technology in criminal investigation and the court observed:

“Misuse of technology by the criminals can only be countered by good use of technology... We cannot stop any

⁷ *Ibid*, Para 25. The court by citing drawbacks in investigation observed:

“Criminal Judicial System in this country is at cross-roads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.”[Para 28]

⁸ *Dr. K.N. Chandrasekharan Pill (ed), R.V. Kelkar's Criminal Procedure (Eastern Book Co; 5th edn., 2008). Also see section 53A Cr.P.C.*

⁹ No.5226/2015.

¹⁰ *Ibid* para 50. The court further observed:

“Of all the functions of the police, the investigation is the most important and vital one. In the constantly evolving socio-economic scenario the criminals using sophisticated tools and techniques commit more and more crimes. In order to overcome these complexities the police all over the world are depending more and more on the scientific methods of investigation. A wide range of scientific techniques are now available for the analysis of varied nature of objects and materials encountered in the process of commission of crime by the culprit in and around the crime scene, on the suspect and victim. The study of such material evidence also known as the objective evidence or physical evidence applying the latest scientific tools and techniques for proving the guilt or innocence of the accused by the courts of law is broadly known as the Forensic Science.” [Para 35]

¹¹ 2018 SCC Online Raj 1343.

person, including the criminals, from using modern technology. When the criminals are using modern technologies to commit crime, it is not justified to restrain the police or investigating agencies to counter it with the aid of scientific method and modern technology on the ground that there is no provision of this effect in law, rules of game should be equal for all the players”¹²

In *Shrikant Prasad & Ors v. Union of India & Ors*,¹³ A PIL has been filed before the Supreme Court of India in January 2022 seeking directions to the Union of India to improve the method of investigation by using forensic science and scientific techniques. According to the petition, “solving criminal cases by efficient investigation with the help of forensic science and advanced technology is a blessing for reaching the conclusion by courts as early as possible.” We are waiting for the judgment of the court.

In the case of *Kamal Pal and Another v. State Of Punjab*,¹⁴ the Court also noted thus:

“With the advancement of technology, the modes of communication are changing. To keep pace with the change, new technology is required to be used for collecting and comparing evidence. One method being tapping of communication devices but after compliance of the procedure laid down. It is in that context that taking of voice samples are necessitated. The samples collected are not evidence in itself, rather are tools to identify the voice recording collected as evidence.”¹⁵

In criminal investigation number of factors to be taken into consideration by investigating agencies if they are following scientific method of investigation, these factors are:¹⁶

- whether or not the expert information is crucial to the decision the court has to make,
- whether serious doubts arise concerning the reliability of the available expert information,
- what interests, especially what possible penalties, are at stake,
- whether the execution of a new expert examination is in fact feasible and possible.

Thus, with the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant.¹⁷ There is no doubt that the use of science and technology is an inevitable part of investigation but is there any clarity about its evidentiary value?

Scientific Techniques of Investigation and its Evidentiary Value

Science and technology both have exerted their influence on the methods of criminal investigation. The image of police today in fact depends upon its ability to solve the problem of crime by modern methods of Investigation. Contribution of science and technology may have a good role in investigation and thus to improve the criminal justice system. Various branches of forensic science like- *Anthropometric measurements, Fingerprinting, Toxicology, Odontology, Polygraphy, Blood Identification and DNA fingerprinting* may be useful for scientific investigation. Training of police officers for these branches of science is must because this type of scientific method is very delicate and may have adverse effects on investigation.

¹² *Ibid.*

¹³ Available at: <https://www.livewlaw.in/top-stories/supreme-court-pil-forensic-science-appointment-of-forensic-experts-criminal-investigation-189795?infinite-scroll=1> (Last visited on 12/02/22).

¹⁴ CRR-677-2021 decided on: 9th July, 2021. Available at https://www.livewlaw.in/pdf_upload/voice-samples-privacy-punjab-and-haryana-high-court-397262.pdf. (Last visited on 12/02/22)

¹⁵ *Id.*, Para 15.

¹⁶ Tom Decaigny, Inquisitorial And Adversarial Expert Examinations In The Case Law Of The European Court Of Human Rights, *New Journal of European Criminal Law*, Vol. 5, Issue 2, 20L4 retrieved from <https://journals.sagepub.com/doi/abs/10.1177/203228441400500203>. (Last visited on 18/01/22)

¹⁷ *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1.

It is noteworthy on the pretext of fighting against crime; investigating agencies are hell-bent on curbing the rights ensured by the constitution. Investigating agencies find it easy to get scientific tests done instead of collecting the real direct evidence. On the basis of result of these tests they are treated as criminal rather than suspect, in spite of knowing that there is no scientific proof that '*truth serum*' (sodium pentothal, scopolamine and sodium anytal) test works without any doubt.¹⁸ By various human right prove it has been considered as mental torture test¹⁹ On the other hand, supporters of these tests argue that investigative agencies have a legal mandate to conduct this test because this test provides clues about the crime and does not have any evidentiary value. The question arises here if this test report is not considered as sufficient evidence to held one guilty then what is use of such test because ultimately the investigating agencies have to submit real direct evidence and on other hand these report are considered just on logic not on certainty and we know that it is established principle of criminal law that crime is to be proved beyond reasonable doubt as law doesn't work only on logic but on proof.

The Supreme Court in various judgments like in *Abhay Singh v. State of UP*,²⁰ *Santokben v. state of Gujarat*,²¹ *Dinesh Dalmia v. state*²² held that if *Narco analysis and Brain mapping* test can be helpful to find out the culprit and that if accused fails to co-operate with the investigation process undertaken during custodial interrogation to reveal the mystery surrounding a crime, scientific investigation methods may have to be carried out to find the truth because the discovery of truth is desideratum of investigation. However, whether the *brain mapping* test will be reliable or not will depend upon various considerations placed before the court and its authenticity.²³

But the Supreme Court in *Selvi v. State of Karnataka*,²⁴ (three judges bench) made it clear that *Narco analysis, Polygraph and BEAP* test are not permissible to be conducted on accused under Section 53, 53A and 54 of the Cr.P.C. However, general medical test can be conducted under these sections. In view of the bar of the constitution contained under article 20(3) of the constitution an accused person cannot be compelled to undergo scientific test like Narco analysis, Polygraph, Brain fingerprinting and its amount to self incrimination of the accused as well as violation of article 21 of the constitution.

In *Vinodbhai Gagandas Vanjani v. State Of Gujarat*,²⁵ the Gujarat High Court that “narco analysis test is always to be in the aid of investigation and cannot be accepted as evidence of a particular fact.”

However, the use of material samples such as fingerprints for the purpose of comparison and dedication does not amount to testimonial compulsion for the purpose of article 20(3) of the constitution and the taking and retention of DNA samples which are in the nature of physical evidence do not face constitution hurdles in the Indian context. It is also remarkable to mention here that such DNA tests or scientific tests cannot be ordered by the court on a routine basis and only in very specific cases such order shall be made.²⁶

Collection of fingerprints from crime scenes is very crucial. The permanence of fingerprints permits identification of a person even after a few years.²⁷ It is generally found that untrained police personnel destroy such crucial evidence during inspection of crime scenes. In *Hatendra Nath Sen v. Emperor*²⁸ Justice S.K.Ghose remarked that “I do not think that it can be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a fingerprint expert...”

¹⁸ Supreme Court judgment on polygraph, narco-analysis & brain-mapping: A boon or a bane By, Suresh Bada Math, Indian J Med Res. 2011 Jul; 134(1): 4–7. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3171915/> (Last visited on: August 20,2021).

¹⁹ National Human Rights Commission, NHRC Guidelines. Available at: <http://nhrc.nic.in/Documents/sec-3.pdf>. (Last visited on July 10, 2021).

²⁰ (2009) 650 ACC 507.

²¹ (2008) CrLJ 68.

²² (2006) CrLJ 2401.

²³ *Ranjitsingh Brahamjeet Singh Sharma v. State of Maharashtra*, (2005) CrLJ 2533 SC .

²⁴ (2010) 7 SCC 263. The court observed:

“Narco-analysis, brain-mapping and Lie-detector tests cannot be conducted on accused without his consent, else it would violate Article 21 of the Constitution. No individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place.”

However, the Court held that:

“The results of such scientific tests, even if carried out with the consent of the accused, can be used only for the purposes of proving discovery of fact in accordance with Section 27 of the Indian Evidence Act.”

²⁵ 2016 SCC OnLine Guj 302, decided on 3.05.2016

²⁶ *Gautam Kundu v. State of West Bengal*, (1993) SCC 418 and *Banarsi Das v. Atiku Dutta*, (2005) 4 SCC 49.

²⁷ Andre A. Mauseens, *Fingerprint Techniques*, 46 (New York, Chilton, Book Co., 1971).

²⁸ (2014) 13 SCC 574.

Forensic science is that piece without which the puzzle of a criminal investigation is incomplete. Without the appliance of forensic science, criminals can never be convicted unless an eyewitness is present. While detectives and enforcement agencies are involved within the collection of evidence, be it physical or digital, it's forensic science that deals with the analysis of these evidences in order to establish facts admissible in the court of law.²⁹ Thus, in a world devoid of forensic science, murderers, thieves, drug traffickers and rapists would be roaming scot-free.³⁰ A diverse pool of forensic scientists and forensic tools are involved in the investigation of a criminal act. For instance, forensic pathologists are skilled at determining the cause of death by performing autopsies. An autopsy helps in establishing the cause and manner of death through the examination of body fluids and tissues. Forensic scientists analyze physical evidence (fingerprints, blood, hair etc.) collected from the crime scene to identify suspects. Forensic professionals also use image modification tools to search for criminals absconding from the law for a long time. This tool enables them to digitally age a photograph to understand how the individual would look on ageing.³¹ These tools nowadays have become the need due to advancement of technology. However, there are examples of some of the tools that were used in the past as well.

The main kinds of forensic evidence are biological or DNA evidence, such as blood spatter, hair impression, fingerprints, tire tracks and weapons identification *etc.*³² Forensic DNA profiling uses the uniqueness of DNA of individuals for identification purposes in investigation. DNA evidence helps link an individual to an object or a scene of crime based on the biological components left on them.³³ Evidentiary use of DNA is always subject to controversy. Fundamental rights available in Indian Constitution under article 20 and article 21 are always used as a shield against use of DNA test as basic obedience.³⁴ The evidentiary value of DNA is always subject to controversy and doubted because its value depends upon accurate and proper collection preservation which can satisfy the court in regard to accuracy of the report. There is no specific legislation in India which specifically deals with procedure and collection of DNA evidence by investigating agencies and sometimes courts do not deny the accuracy of such evidence but due to constitutional right and public policy hesitate to base the whole case on DNA evidence.³⁵ Again use of DNA sample without the permission of Court may interfere in the right to privacy which is a fundamental right under article 21³⁶ and that will complicate the problem rather than solving it, because there is lack of proper procedural safeguard. In regard to reliability on the DNA test report the Supreme Court has made it clear that reliability on DNA test reports depends upon the quality control and quality procedure in the laboratory and support from other evidence.³⁷ The Apex Court said that the “DNA sample from the skeleton matched with the blood sample of the father of the deceased. All the sampling and testing was done by experts whose scientific knowledge and experience were not doubted in these proceedings.”³⁸ In **Raj Kumar v. State of U. P.**,³⁹ the Supreme Court observed that “the DNA report played an important role to reveal the identity of the accused involving in the rape of a minor girl and affirmed the finding of facts recorded by the court below.”

²⁹ Gaurav Aggarwal, *Smart Study Series Forensic Medicine & Toxicology* 73 (ELSEVIER A division of Reed Elsevier India Private Limited, Gurgaon Haryana), 2009).

³⁰ “Forensic Sciences and Criminology” by “Wafi Aziz Safwi” Available at: www.legalservicesindia.com (visited on February 20, 2020).

³¹ Role of Forensic Science in the Criminal Justice System Available at: <https://www.theprotector.in/role-of-forensic-science-in-the-criminal-justice-system/> (visited on February 28, 2020).

³² Krishnamurthy, Vasavi & Manoj, Reema & Pagare, Sandeep. (2011). Understanding the Basics of DNA Fingerprinting in Forensic Science. *Journal of Indian Academy of Oral Medicine and Radiology* (23), 613-616. 10.5005/jp-journals-10011-1233. Available at: https://www.researchgate.net/publication/271259379_Understanding_the_Basics_of_DNA_Fingerprinting_in_Forensic_Science (visited on: july21, 2021).

³³ Available at: <https://nicfs.gov.in/nicfs/public/pdf/Final-29.08.2019.pdf>. Last visited on 12/02/22.

³⁴ *Govind Singh v. State of M.P.*, (1975) 2 SCC148.

³⁵ “*Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh*, (2009) 14 SCC 607.

³⁶ “*K.S. Puttaswamy v. Union of India*” (2017) 10 SCC 1.

³⁷ *Anil v. State of Maharashtra* (2014) 4 SCC 69 and also in *Ranjeet Singh Paramjit Singh Sharma v. State of Maharashtra* (2005) CrLJ 2533 (three-judges bench).

³⁸ *Supra* Note 6. Also see *State of Tamil Nadu v. Nalini*, (1999) 5 SCC253, *Santosh Kumar Singh v. State through CBI*, (2010) 9 SCC 747, *Sandeep v. State of U.P.*, (2012) 6 SCC 107, *Nandlal wasudeo badwaik v. Lata badwaik* (2014) 2 SCC576, *Dipanwita Roy v. Ronobroto Roy*, (2015) 1 SCC 365

³⁹ (2014) 5 SCC353. Also see *Narayandutt Tiwari v. Rohit Shekher* (2012) 12 SCC 554, the Court observed: “The DNA profiling is a modern scientific method which has been accepted in all jurisdictions for the purposes of conclusively identifying parents. Given the accuracy and value attached to DNA profiling, this test may either confirm an identity or shatter it. It was further observed that the medical examination of blood, semen, sputum, sweat, hair samples, and finger nails by the use of modern scientific techniques in binding DNA profiling may be directed.” In *Mohd Amir Kasab v. State of Maharashtra* (2012) 9 SCC 1, the Supreme Court observed: “The DNA evidence played an important role for the identification and for the involvement of the accused in the incidence of waging war against the government of India. The DNA evidence played as one of the circumstantial evidences to prove the case.”

In the case of *Kathi David Raju v. State of A.P.*,⁴⁰ The Punjab and Haryana High Court recently held that “conducting DNA profiling of the accused under Section 53A of the Cr.P.C is a part of fair trial.”

In *Malappa @Malingaraya v. State of Karnataka*,⁴¹ the Karnataka High Court held:

“It is clear that ordering for DNA itself should not be as a matter of routine but wherein deserving cases, the Court can direct for DNA test and there is no prohibition for ordering DNA test and the same is subject to each facts and circumstances of the case.”⁴²

On the basis of above judicial pronouncement it is clear that DNA profiling has been considered by the court as evidence.

When question arose regarding the *voice sample* of accused, the court in State of *Rajasthan v. Vikramjit Singh @ Vika Virk*,⁴³ The court held that “the accused cannot deny giving voice samples only on the ground that there is no provision of voice sampling (*Voice spectrographic test*) in law.” In various judgments⁴⁴ The Apex Court has made it clear that taking a voice sample of an accused as a sample for comparing and identifying it with the tape recorded for telephonic conversation is not violative of the fundamental rights of the accused guaranteed by article 20(3) of the Indian constitution.

In regard to the need of *electronic forensic evidence* the Supreme Court expressed its view that where there is serious discrepancy in oral evidence the court has to use conclusive scientific evidence like electronic records mobile call details and other forensic evidence⁴⁵ call details of mobile is strong evidence against the accused.⁴⁶

In *Ritesh Sinha v. State of UP*,⁴⁷ the Supreme Court held that a judicial magistrate can direct an accused to provide his voice samples for investigation even without his consent. The court said that in the absence of specific powers in the Code of Criminal Procedure, inherent powers under Article 142 of the Constitution should be invoked to confer such power on the Magistrate.

The Punjab and Haryana High Court recently in *Kamal Pal and Another v. State Of Punjab*,⁴⁸ held that a judicial order to collect voice samples for Investigation purposes/comparison purposes can't be said to be violative of the right to privacy.

The Bench of Justice Avneesh Jhingan remarked:

“The infringement of Fundamental Right to Privacy cannot be raised to create a bubble to scuttle the investigation nullifying the evidence collected by merely denying that the voice of the tapped phone calls is not of the petitioners and there being no comparables.”

Indian Evidence Act under section 45 covers scientific evidence in broad domain of expert evidence.⁴⁹ However, it neither provides any specific provision for examination of expert evidence nor any specific judicial interpretation is there for guiding examination of scientific validity of such opinion evidence. Since hundred

⁴⁰ (2019) 7 SCC 769. The court held that:

“Under the provisions of Section 53-A Cr.P.C, it was imperative for the prosecution to go in for DNA test since no cogent reason had been assigned by the trial court while dismissing the application of the petitioners. It was further held that the opportunity for conducting DNA profiling of both the petitioners is a part of fair trial and was also essential for just decision in the present case.”

⁴¹ 2022 LiveLaw (Kar) 3.

⁴² *Ibid*. The court said:

“Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with the existing profiles that are already in the possession of the law enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts and further held that the taking and retention of DNA samples, which are in the nature of physical evidence does not face constitutional hurdles in the Indian context.”[Para 15]

⁴³ *Supra* Note 11.

⁴⁴ CBI v. Abdul Karim Telgi, (2005) CrLJ 2868, Mohan Singh v. State of Bihar, (2011) 75 ACC 202.

⁴⁵ *Gajraj v. state of NCT of Delhi* (2011) SCC 675. Also see *P. Gopalakrishnan v. State of Kerala* (2019) SCC 161.

⁴⁶ *State NCT of Delhi v. Shivcharan Bansal* (2020) 2 SCC 290.

⁴⁷ AIR 2019 SC 3592.

⁴⁸ *Supra* note 14.

⁴⁹ Arvind Kumar Dubey (ed.), “*The Law of Evidence*”, by Batuk Lal 98-221(Central Law Agency, Allahabad 20th edn., 2010).

percent intensity of such evidence is doubtful in several cases⁵⁰ and the admissibility of these flawed techniques have also been doubted.⁵¹ There is a lack of a strong regime to regulate forensic science laboratories and forensic medicine departments. Unavailability of proper security of forensic reports creates doubts on such reports and that they have a fair trial.

This is important to note in Indian context that in claims about matches of dented bite unscientific terms such as reasonable, is not acceptable in medical science. It is surprising that despite the fact human lenticels is not unique and true the unreliability of bite mark⁵² comparison, the Supreme Court in *Nirbhaya gang rape case*⁵³ express its view that:

“Bite mark analyses play an important role in the criminal justice system. Advanced development of technology such as laser scanning, scanning electron microscopy or cone beam computed tomography in forensic odontology is utilized to identify more details in bite marks and in the individual teeth of the bite....Bite mark evidence has other advantages in the criminal justice system that links a specific individual to the crime or victim. For a bite mark analysis, it must contain abundant information and the tooth that made the mark must be quite distinctive.”⁵⁴

On the basis of above analysis we can say that judiciary emphasized on the relevance of scientific evidence but still there is confusion about its admissibility and reliability as an evidence. It seems it is varying case to case. However, on points the courts are clear but generally not. The main reason of this uncertainty is non availability of any specific law in our country regarding reliability of scientific evidence and due this we are facing many issues and challenges so far as scientific investigation is concerned.

Issues and Challenges in Scientific Investigation

Crime rate is increasing day by day. In last decade it increased 21 %⁵⁵, nature of crime and the commission archive is also changing day by day and in fact it is becoming complex. Offenders are using modern techniques for the commission of the crime that is unknown to the police force and resulting low conviction rate⁵⁶ and Law Commission has found unscientific investigation is one of the basic reason for such poor conviction ratio and the investigation experts are supposed to increase conviction rate⁵⁷

As we know that there are different stages of crime Investigation and the same is in digital or scientific investigation which includes search, identification, acquisition, analysis and presentation. These phases create a chain and if any part of the chain is broken the reliability of evidence will be shaken. Digital evidence is sensitive and volatile in nature and improper handling can irrevocably modify it. From acquisition to analysis each phase needs to be handled by experts and there is a need to have trained hand expert investigating officers.⁵⁸

As per Schedule-7 of the Indian constitution, police is a subject which falls under the state list.⁵⁹ So each state has its own police force and their investigating agencies. There are certain investigating agencies which are governed by the central government to deal with the crime which are considered the most sensitive crime as that may affect

⁵⁰ *Rajiv Singh v. State of Bihar*, Criminal Appeal (SJ) No.1169 of 2011. Also see *H.P. v. Jai Lal*, AIR 1999 SC 3318.

⁵¹ Editorial, “Mark of a crime” *Indian Express*, February 6, (2021).

⁵² “A bite mark is known as the registration of the cutting edges of teeth on a substance caused by a jaw closing. Bite marks are as specific to a person as DNA or fingerprint analyses, similarly, no two individuals will have the exact same dentition in regards to shape, size and alignment of teeth.”
Available at: <https://www.dentalcare.com/en-us/professional-education/ce-courses/ce401/bite-marks>. (Last visited on 07/02/22).

⁵³ *Mukesh & Anr v. State for NCT of Delhi & Ors.* (2017) 6 SCC 1, The Apex Court said:

“The area of forensic odontology consists of three major fields of activity: (1) the examination and evaluation of injuries to teeth, jaws, and oral tissues from various causes; (2) the examination of bite marks with a view to the subsequent elimination or possible identification of a suspect as the originator; and (3) the examination of dental remains (whether fragmentary or complete, and including all types of dental restoration) from unknown persons or bodies for the purpose of identification.” [Para 234]

⁵⁴ *Ibid*, Para 239.

⁵⁵ “Crime in India 2019” the annual publication of National Crime Records Bureau *Available at*: <http://ncrb.gov.in/> (Last visited on April 18, 2021).

⁵⁶ *Ibid*

⁵⁷ *Law Commission of India, 239th Report* on 'Expeditious Investigation and Trial of Criminal Cases against Influential Public Personalities' (March, 2012).

⁵⁸ First Response: Computer forensic by Dr. Vinod Surana, *Available at*: <https://www.livelaw.in/law-firms/articles/computer-forensics-first-response-cyberspace-forensic-investigation-167188?infinite-scroll=1> (Last visited on July 20, 2021).

⁵⁹ Constitution of India, 1950. Entry 2, List 2, Schedule 7.

sovereignty and integrity of the country.⁶⁰ In country like India where lacs of cognizable cases are registered every year⁶¹ It is a very challenging task to deal with the crime with less number of police personnel. In such a situation scientific advancement of the police force and scientific investigation is a need of time.

There are many issues and challenges in dealing with the scientific investigation some of them is given below:

Recruitment process: Recruitment process of police force in every state is based on direct recruitment and promotional basis. Constable, Sub inspector, assistant or deputy sub inspector are recruited directly on the basis of competitive exams and some physical test/performance. However, the post of inspector, deputy inspector, assistant Superintendent of Police may be filled through promotion, and if we analyze basic qualification requirements for these posts then we will find there is no such condition that any specific knowledge in any specific field is required including science and technology for any of these posts. There is no arrangement to recruit police persons with specific knowledge in science, technology, forensic science and computer science *etc.*, so that there may be trained and experienced investigating force to deal with day to day crime at every district level.

Even in the appointment of higher authorities in the police department there is no specific requirement of scientific or forensic knowledge. They are appointed through various competitive exams and there is no specific requirement of scientific knowledge and forensic science knowledge for these competitive exams, and simple graduates may apply for such exams and if qualified may get selected.⁶² Use of modern science and techniques is need of time and if the department will lack such trained officials then scientific investigation is not possible.

In most of the states maximum police force post is filled up by constable rank police officers who perform a number of duties which requires a specific scientific knowledge like surveillance etc. The Padmanabhan Committee and 2nd Administrative reform commission⁶³ have noted that entry level qualification that is 10th or 12th in maximum states and training of constables do not qualify them for their role in police force that's why recommendation was made to increase qualification for entry level and into civil services level exam and also for better training.⁶⁴

Generally the police are blamed for investigating crimes by using traditional methods and techniques. It has been observed that improper scientific knowledge; improper handling of the scene of crime may contaminate the sample or destroy the evidentiary value. Not only this, even investigating officers may be of commerce or art background of study. There is no system at police station that an expert in particular field will do investigation in particular case, it's all depended on the availability of investigating officer rather than ability of expert investigating officer, and this is resulting in the collection of scientific evidence in unscientific manner which leads loss of evidentiary value of such evidence. Therefore, association of forensic experts with police investigation right from the beginning and their effective liaison with investigating officers is very crucial for solving the crime.⁶⁵ It is necessary that in recruitment of police officers (investigating officers) knowledge of forensic and computer should be made compulsory criteria. They must be well equipped with modern techniques of investigation.

Lack of Scientific Training: As already mentioned that day to day crime is investigated by routine police officers and they are hardly trained to deal with advanced crime committed with use of science and technology. There is a lack of proper training and experience that is required to conduct professional investigation. Lack of legal knowledge is another hurdle for investigation.

There is a need for increasing levels of awareness through intensive training in forensic science and technology. These training programs shall also include aptitude tests at various levels. This might help police personnel to get knowledge of collection of scientific and forensic evidence. It is found that now the police officer attends these

⁶⁰ Entry 2&2a, List-I, Schedule 7, Constitution of India, 1950.

⁶¹ "Crime in India 2019" the annual publication of National Crime Records Bureau. Available at: <http://ncrb.gov.in/> (Last visited on June 21, 2021).

⁶² IPS Eligibility Criteria 2021, Age Limit and Qualification for (Indian Police Service) Available at: <https://www.iaspaper.net/ips-eligibility/> (Last visited on July 22, 2021).

⁶³ 2nd Administrative reform commission, 5th report on Public order Available at: <https://darpg.gov.in/arc-reports> (Last visited on: July 25, 2021)

⁶⁴ Report titled as "The Padmanabhaiah Committee on Police Reforms- A Critical Analysis of Some Important Recommendations", Available at: http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/analysis_padmanabhaiah.pdf, p 1 (Last visited on: July 25, 2021)

⁶⁵ *Ibid.*

training programs not for professional development but for the sake of promotions.⁶⁶ These training programs should be mandatory for all police personnel for enhancing their skill for collecting scientific evidence and during training they should be involved in scientific investigation so that they can learn about it.

Lack of Scientific Infrastructure: Bureau of Police Research and Development (BPRD)⁶⁷ which was set up with a mandate to identify the need and problem of police forces and to apply science and technology in the methods and techniques used by police. BPRD has its modernization division ensures effective implementation/introduction of the modern technology/gadgetry in the Police Forces.⁶⁸ BPRD continuously conducts different training programmes for police officers and it also conducts research in different fields and also provides Assistance of Police Research programmes in States and Union Territories. But it is not sufficient to fulfill the requirements and we need to establish more training centers in different parts of the country so that police officers can be trained and equipped with modern technologies adopted in scientific investigation.

In recent years special cyber cell has been established in various districts⁶⁹ under the police department but they investigate only those cases which are reported as a cybercrime and their involvement in day-to-day crime investigation, is negligible.⁷⁰ The big issue in reference to cyber cell is that appointment in cyber cell also is not mandatorily based on specific degree in computer science, sometimes police from police stations shifted to cyber cell on different criteria and this also raises a question mark on the professional efficacy.⁷¹

Recently Lok Sabha passed the DNA technology (use and application) regulation bill 2019⁷² to help investigating agencies in solving crime and for that purpose a data bank of DNA profiling has been maintained, so that identity of criminals may be established before the court during trial.⁷³ It is important to note that use of DNA in crime Investigation requires trained and reliable investigating officer so that proper examination of crime scene may be conducted and trusted custody of sample should be assured to enhance the evidentiary value of such evidence, otherwise these DNA data will exacerbate the problem in solving the Criminal case for example false match or misinterpretation or planting of evidence may lead to the travesty of judiciary.⁷⁴ Crime Investigation will be fruitful only when the police force is secured with proper infrastructure and training.

Lack of Scientific Knowledge- Lack of forensic science knowledge and knowledge of cyber instigation is a big issue for dealing with the modern nature of crime commission. After recording the reports of the commission of the crime police has to wait for experts and till the hampering of evidence is resulted. Because of all these unwanted hurdle police force use torture to check out evidence, because in last it is considered failure of police if offender is released due to want of sufficient evidence. Taking into consideration all above issues, it may be suggested that the state must have their own specialised investigation units within the police force and the same has got support from experts as well.

⁶⁶ James Vadackumchery, *The Police, the Court, and Injustice*, 97 (APH Publishing Corporation, New Delhi, 1997).

⁶⁷ The Government of India vied Resolution No.8/136/68-P.I (Pers.I) dated 28.08.1970 formally established the Bureau of Police Research and Development (BPR&D), under the Ministry of Home Affairs giving a new orientation to then existing Police Research and Advisory Council (1966) with the primary objective of modernization of police force. Available at: https://bprd.nic.in/content/11_1_EvolutionofBPRD.aspx (Last visited on: July 20, 2021).

⁶⁸ Available at: https://bprd.nic.in/content/321_1_History.aspx. Last visited on 08/02/22. Modernization division also works in Identification of emerging technologies and orientation of work on new technologies should be encouraged so that the Police Forces can be equipped with the best and are capable to resist any threat whether in the jungle, streets or in the lab. The Modernization Division is expected to keep abreast with modernization in the application of science and technology to police work in India and abroad and study new procedures and methodologies with a view to promoting the introduction of suitable equipment and techniques in police work in India to improve its operational efficiency.

⁶⁹ Total 18 Cyber crime stations in a big state like U.P. Available at: https://uppolice.gov.in/site/writereaddata/siteContent/Cyber_Crime/202103081250073193final.pdf

⁷⁰ 'Cyber police stations and crime cells set up in each state' PTI / Jul 26, 2018, Available at: http://timesofindia.indiatimes.com/articleshow/65152730.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (visited on july,20 2021).

⁷¹ UP Police to expand cyber crime wings following spurt in online frauds, Virendra Singh Rawat | Lucknow Last Updated at October 13, 2019 00:57 IST Available At: https://www.business-standard.com/article/current-affairs/up-police-to-expand-cyber-crime-wings-following-spurt-in-online-frauds-119101200416_1.html (Last visited on July 20, 2021).

⁷² Press Information Bureau, Government of India, Ministry of Science & Technology Available at: <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1559099> (Last visited on: July 20, 2021).

⁷³ The DNA bill will cement a disturbing link between tech and policing, By Nayantara Ranganathan, Hindustan Times on 11/02/2021.

⁷⁴ Governance, DNA Technology Regulation Bill, Available at: <https://www.drishtiiias.com/daily-updates/daily-news-editorials/dna-technology-regulation-bill-1>(Last visited on July 20, 2021).

Lack of Laboratories- We don't have sufficient laboratories and because of this the laboratories are overburdened and resulting in inordinate delay in preparing the medical report and sending to investigation officers and this delay leads to delay in the submission of charges sheet, which destroy the case.⁷⁵ As per data available only 7 central, 30 state and 50 regional forensic laboratories are in India⁷⁶ which is very less as per the population and requirement of the investigation in proportion to crime commission country because these laboratories are not specifically dedicated for crime Investigation, they are involved in numerous other scientific work. There is indiscriminate reference of cases to these labs which results in high pendency of cases.

Tejbir Singh v. State,⁷⁷ the Delhi High court considering the population of the NCT of Delhi said:

“The capacity of Narco Analysis Test Facility is inadequate to meet the demands of NCT of Delhi. The State should seek to enhance the capacity to carry out the Narco Analysis tests so that there is no backlog for the said test in Delhi. Let a further status report in this regard be filed before the next date.”

All above drawbacks of investigation results in low conviction rate and shows incapacity of the police to deal with crime in expeditious manner and the most basic reason for it is that police officers are not given proper training to do scientific investigation and collect scientific evidence.

In **Prakash Singh v. Union of India,**⁷⁸ The Supreme Court Proposed that “investigating police force shall be separated from the law and order police force to ensure speedy investigation, better expertise and improved reporting with the police. The opportunity to examine the crime scene is available only once and if it is not fully exploited the wealth of information is lost forever.” However, it has not been implemented across India. This lack of separation impacts the effectiveness of investigation proceedings. The recent controversy of Sushant Singh (Bollywood Actor) death mystry is again a question mark on the efficacy of police in effective investigation. In **Raghunandan v. state of U.P.**⁷⁹ The Supreme Court observed that “the failure to send blood samples for chemical examination is clear cut violation of procedure and is of serious nature.”

The application of forensic science can only be effective if the investigating officer is well versed in science and technology and knows: How much sample is required? How is the sampling done? What is the nature of physical evidence to be collected during investigation? How is it collected and packed? *etc.* All above can only be possible if the investigating officer is given extensive training regarding importance and collection of such evidence.⁸⁰ It will be effective only when both practical and theoretical training is provided. Periodical attachment of investigating officers to forensic and computer laboratories can be very helpful.

Scope and Future Prospective

The idea of forensic science is definitely not another one in India, however its application was limited. The ideal equity of rationale and thinking will help in giving the feeling that everybody with fundamental information on the legal translation can transverse with no fear. The police force needs to keep pace with changing times.⁸¹ Modernization of the force has become inevitable especially in cyber crimes, counter-terrorism, technological reforms including modernization of the control room, fast tracking the Crime and Criminal Tracking Network and System (CCTNS), National Intelligence Grid (NATGRID) and incorporation of new technologies into policing. To counter terrorism, a holistic analysis of different facets of the information is necessary. There is a need for NATGRID which involves combining 21 sensitive databases into a single one which can be accessed by authorized central officers.

⁷⁵ IshaTyagi and Nivedita Grover, Development of Forensic Science and Criminal Prosecution-India, 2 IJSRP Vol.4 (2014).

⁷⁶ “The development, status and future of forensics in India”, Forensic Science International:Reports, Volume 3, July 2021, 100215 Available at: <https://www.sciencedirect.com/science/article/pii/S2665910721000463>.(Last visited on 12/02/22).

⁷⁷ W.P.(CRL) 428/2020 decided on Sep. 09, 2021. Available at https://www.livelaw.in/pdf_upload/16312991412442021-1-400390.pdf (Last visited on 12/02/22).

⁷⁸ (2019) 4 SCC 6.

⁷⁹ (1974) Cri.L.J. 453.

⁸⁰ N. B. Narejo, M. A. Avais, Examining the Role of Forensic Science for the Investigative-Solution of Crimes, 252 SURJ (science series) Vol. 44 (2) (2012).

⁸¹ The Apex court in *Kishore Chand v. State of H.P.*, 1990 AIR 2140, the court observed:

“It is time that the investigating agencies evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the State, i.e. Central or State Governments and the Judiciary, to keep the investigating officers abreast of the latest scientific development in the art of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution.”

In India, gradually scientific investigation is taking place in criminal justice administration. Scientific investigation now is an area in which the Government of India and state government as well are taking interest to develop scientific investigation. Union Home Minister Mr. Amit Shah has emphasized on the development of scientific investigation. In this line he recently inaugurated the National forensic science institute in Lucknow.⁸² In his opening remark he emphasized that the scientific method of Investigation is the need of the time and the government will take appropriate action for the advancement of the police system in the country. Scientific evidence has always been subject of controversy and because of this trial the court finds it difficult to give required evidentiary value to such evidence.

The DNA technology (use and application) regulation Bill, 2019 was passed by the Lok Sabha with the purpose of regulating DNA data for the use of identification and to guide law enforcement agencies in investigation. It has been argued that this will complicate the criminal investigation process because it requires proper crime scene examination, reliable and trained police officers, trusted chain of custody of samples and logical and reliable analysis. Then only it can be used as evidence in the court. If misinterpretation has been done or false matches have been established then it will lead to travesty of justice.⁸³

As we know that at crime scene fingerprint, footprint of different people may be present but it is not necessary that everyone will be involved in commission of crime and if as per the DNA data bank bill, 2019 biological information of every person is stored then it will be like biological surveillance of every people and that is against to the right of privacy which has been declared as a fundamental right by the Supreme Court of India.⁸⁴

Another area of concern in regard to scientific investigation is that scientific investigation is considered as 'opinion evidence' in Indian Evidence Act rather than 'substantive evidence'.⁸⁵ Investigating officers focus on other kinds of evidence because they feel that scientific evidence ultimately to be corroborated by other evidence. The national draft policy on criminal justice reforms has suggested that Indian evidence Act must be amended to form scientific evidence admissible as substantive evidence rather than opinion evidence and establish its probative value.⁸⁶ However approach of judiciary is changing taking into consideration the sensitivity of crime in *Krishan v. State of Haryana*,⁸⁷ the trial Court, considering the facts and circumstances of the case, more particularly relying on the FSL report, convicted the accused under section 376 and 506 IPC. In the same manner in *Anil @ Anthony Arikswamy joseph v. State of Maharastra*,⁸⁸ relying on scientific evidence including DNA profile and oral evidence, the accused was convicted and punished with death sentence and fine by the Session Judge for murder of a minor boy after subjecting him to carnal intercourse and then strangulating him to death.

The area of forensic science in India has, yet, not been fused. Many a time, neither the judge nor the lawyer nor even police appreciate fully, the advances or the extensive, promising potentialities of the science and the fusion of new technologies, methodologies and research. Multitask and multi professional nature of forensic science needs an inter-professional approach, which is, many a time, lacking.⁸⁹

The reasons for reluctance of the courts to use forensic evidence in criminal investigation are various. Mismanagement of physical evidence, including improper collection, preservation, and non collection of clue evidence also as delayed dispatch of physical evidence for scientific analysis has been criticized by courts.⁹⁰ The Law Commission in its 185th Report submitted in 2003 had proposed the use of Forensic Science and modern technology in investigations right from the commencement of the investigation and creation of a cadre of Scene of Crime Officers (**SOCO**) for the preservation of scene of crime evidence and collection of physical evidence, for better use of technology for fighting crimes.⁹¹

⁸² Avik Roy, "Amit Shah lays foundation of forensic sciences institute in Lucknow" *HindustanTimes*, August 01, 2021.

⁸³ Sobhna K Nair, "Collection of DNA samples will lead to misuse, says former Supreme Court judge

⁸⁴ *Ibid*

⁸⁵ Prof. (Dr.) B. P. Tiwari, Evidentiary Value of Expert Opinion, 23 *IJRRJ*, Vol. IV (2012).

⁸⁶ Report of the Committee on Draft National Policy on Criminal Justice, Ministry of Home Affairs, Government of India, July, 2007.

⁸⁷ (1994) SCC (4) 703.

⁸⁸ AIR 2015 SC 1198.

⁸⁹ Justice Jitendra N. Bhatt, A Profile of Forensic Science in Juristic Journey, Available at: <http://www.ebc-india.com/lawyer/articles/2003v8a4.htm> (Last visited on 28.2.2016).

⁹⁰ V. R. Dinkar, 'Forensic Scientific Evidence: Problems and Pitfalls in India', 79-84, *IJFSP* Vol. 3 (2015).

⁹¹ Available at: <https://www.brilllopedia.net/post/rise-of-cyber-crimes-the-need-for-investigation-authorities-to-become-tech-savvy>. (Last visited on 20.06.2021)

Another reason for the low rate of convictions is hostility of witnesses. What is the solution if the witness does not cooperate with law due to greed or any other reasons? Scientific proof is the best method to solve the problem. For example, a professional and scientific proof can ensure that even when witnesses turn hostile, cases are taken to their logical conclusion. Once a rape is proved by medical, chemical and DNA examinations, and through other physical and digital evidence, even the victim cannot save the accused. People can change their statements in court but scientific evidence is permanent.

Conclusion

The ultimate goal of the criminal justice system is to punish the offender and conviction of a criminal is the ultimate test of a justice system. If after years of investigations and trials the guilty are let off, it is a waste of time and energy. It is not severity but the certainty of punishment that deters people from committing crimes. At present our investigations are based mostly on oral testimonies. When the same witnesses change their version in court, cases fall flat.

One hand the criminals are using new techniques for commission of crime and on the other side our investigators are lagging much behind because they took a good amount of time to solve the case due to lack of knowledge of science and technology, shortage of skilled investigating officers and shortage of regular training workshops etc. Unless the investigating agencies will use scientific techniques of investigation as supplemental methods of detecting deception, our criminal justice system will not be able to improve the efficiency of interrogation, investigation and conviction also can't be improved.

In developed societies, enough forensic evidence is collected by the investigating team before putting the accused on trial. As a result, the conviction rate is high in such societies. In our country we need a sound legal framework for dealing with scientific investigation and there should also be uniformity in application of such laws. There is also a need to fix specific qualifications in recruitment of police personnel. It is also necessary that we have to establish more training centers in different parts of the country so that police officers can be trained and equipped with modern technologies adopted in scientific investigation.

A CRITICAL STUDY ON CYBER STALKING IN INDIA

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ABSTRACT

Cyberstalking has emerged as a significant issue in India, reflecting global trends in digital harassment. Cyberstalking is the utilization of the Internet or other electronic means to stalk or bother an individual, gathering, or association. Cyberstalking is the act of following someone using a computer or other device connected to one, which can instill terror in the victim. A relatively modern form of cybercrime is cyberstalking. This study critically examines the nature, impact, and challenges of cyberstalking within the Indian context. It explores how the unique socio-cultural landscape of India influences the prevalence and perception of cyberstalking and assesses the effectiveness of current legal frameworks and enforcement mechanisms.

This research paper also focuses on the meaning, nature, typology, and history of cyber stalking. The aim and objectives of this research paper are that there is a need for amendment of current laws specifically for gender-neutral laws and laws that add the issues of international jurisdiction. Researchers suggested that self-awareness is also needed to safeguard us from such crimes. This paper provides an overview of the current state of knowledge on cyberstalking. The enforcement and jurisdictional issues associated with cyberstalking will also be dealt with. This paper basically discussed cyber stalking crimes, legislative intervention measures, and preventative initiatives created specifically to curtail this emerging global crime.

Key words: *Cyberstalking, harassment, Internet, stalker, cybercrime*

Introduction

In the contemporary digital age, the rise of the internet and the proliferation of digital communication tools have significantly transformed the way people interact. While these advancements have brought numerous benefits, they have also introduced new challenges and threats, one of which is cyber stalking. Cyber stalking involves the use of electronic communications to persistently harass, intimidate, or threaten individuals. Unlike traditional stalking, which requires physical proximity, cyber stalking allows perpetrators to target their victims from a distance, often with greater anonymity and reach. This paper aims to provide a comprehensive understanding of cyber stalking, exploring its definitions, forms, psychological impacts, legal perspectives, and prevention strategies. As the digital world becomes increasingly intertwined with our daily lives, it brings not only unparalleled convenience and connectivity but also new forms of risk and harassment. Among these emerging threats are cyber stalking, a form of online harassment that can be just as terrifying and damaging as physical stalking, yet often goes unnoticed or underreported.

Cyber stalking involves the persistent use of electronic communications to harass, intimidate, or threaten individuals. Unlike traditional stalking, which requires physical proximity, cyber stalking can be conducted from anywhere in the world, allowing perpetrators to hide behind the anonymity of the internet while inflicting psychological harm on their victims. From incessant messages and social media harassment to online surveillance and the malicious spreading of personal information, the methods employed by cyber stalkers are varied and insidious.

Traditionally, stalking involved physical following, repeated unwanted contact, and other behaviours aimed at harassing or intimidating the victim. However, the advent of new technology has transformed and amplified this problem, giving rise to a more insidious form: cyber stalking. In the past, stalkers were often limited by geographical proximity and the need for physical presence to carry out their activities. With the rise of the internet and digital communication tools, these limitations have all but disappeared. Today, cyber stalkers can target their victims from anywhere in the world, using a variety of online platforms to harass, intimidate, and monitor them. Cyber stalking encompasses a wide range of behaviours. Stalkers use platforms like Facebook, Instagram, and Twitter to follow, message, and publicly comment on their victims' posts, often leaving threatening or derogatory remarks.

The objective of this research is not only to illuminate the grim realities of cyber stalking in India but also to propose actionable recommendations for policymakers, law enforcement agencies, and civil society. By fostering a holistic understanding of the issue, this study aspires to contribute to the development of a safer and more secure digital environment in India. Cyber stalking is a pervasive issue in India, exacerbated by the country's rapid digital transformation. This research paper critically examines the prevalence, impact, and legal landscape of cyber stalking in India. Through an analysis of case studies, legal provisions, and societal responses, the study aims to provide a comprehensive understanding of the issue and propose recommendations to enhance protection against cyber stalking.

Definition of Cyber Stalking

Cyber stalking is defined as the use of the internet, email, social media, or other electronic communication methods to repeatedly engage in threatening or harassing behaviour towards an individual. It encompasses a range of activities, including but not limited to, sending unwanted messages, spreading false information, monitoring online activities, hacking accounts, and making threats.

CHARACTERISTICS OF CYBER STALKING

- The behaviour is not a one-time occurrence but involves a series of actions aimed at the victim.
- The intent is to cause fear, distress, or harm to the victim.
- Unlike traditional stalking, cyber stalking utilizes electronic means, making it easier for stalkers to hide their identity and reach victims across geographical boundaries.
- Cyber stalkers can intrude into various aspects of the victim's life, from personal relationships to professional settings, often without the victim's knowledge.

FORMS OF CYBER STALKING

Cyber stalking can take various forms, each utilizing different digital tools and platforms to harass, intimidate, or monitor victims. The primary forms include:

Social Media Stalking: Social media platforms such as Facebook, Instagram, Twitter, and LinkedIn provide fertile ground for cyber stalkers. They exploit these platforms to send harassing messages directly texted, containing threats, insults, or inappropriate content. For the Monitor Activities, it's keeping track of the victim's posts, friends, and activities to gather personal information. Then in the matter of fake profiles, it is creating fake accounts to follow, friend, or impersonate the victim to gain further access to their personal life.

Email and Messaging Stalking: Emails and instant messaging apps like WhatsApp, Telegram, and Snapchat are also commonly used in cyber stalking. Stalkers may send unwanted emails, flooding the victim's inbox with threatening or offensive messages. Sending a barrage of unwanted emails or messages that contain threats, obscene content, or false accusations.

Online Surveillance: Cyber stalkers often resort to online surveillance to keep track of their victims' activities. Installing spyware or hacking into the victim's devices to monitor their activities, read private messages, and gather personal information. In Tracking, Using GPS or other tracking technologies to physically locate the victim or track their movements.

Revenge Porn and Doxing: These particularly malicious forms of cyber stalking involve the public dissemination of private information or intimate content. In doxing, publishing personal information (such as home address, phone number, or workplace) online without the victim's consent is often accompanied by malicious intent. But in revenge porn, sharing intimate photos or videos of the victim online without their consent, is typically as a form of retaliation or blackmail.

Impersonation: Cyber stalkers may impersonate their victims online to damage their reputations or manipulate their social circles. In the case of identity theft, using the victim's personal information to engage in fraudulent activities or gain access to sensitive information.

Cyberbullying: Although often associated with younger demographics, cyberbullying is a form of cyber stalking that involves persistent, targeted harassment. Public Shaming is also one form of cyber bullying. Posting humiliating or offensive content about the victim on public forums or social media. Even in Group Harassment, its encouraging others to join in the harassment, creating a mob mentality that amplifies the victim's distress.

Online Dating Harassment: In the context of online dating, cyber stalking can take specific forms. Determined Messaging is sending unwanted messages through dating apps or platforms after the victim has expressed disinterest. For Tracking and Surveillance, using the personal information shared during online dating interactions to track the victim outside the app. Stalking has long been a pervasive issue, characterized by unwanted and obsessive attention that can cause significant distress and fear in victims.

REASONS FOR CYBER STALKING

Cyber stalking, like other forms of stalking and harassment, can be motivated by various psychological, emotional, social, and cultural factors. In a PC, there is a large capacity for storing data in a small place. So, it's very easy to remove and transfer all the data. SecondThe second reason is that it's very easy to access. Easily, criminals or hackers access and hack the data. Now, through one click, we can get all the information. Stalkers use fake identities or names on social media; that's why it's very difficult to find out the stalker. They also destroy all the evidence that is beneficial. So, every time there is a stalker. f Evidence.

Harassment is also one of the main reasons for the Cyberstalking. The main intention of the stalker is to harass. The women are sexually harassed by the stalker many times. The stalker has or created a photo of the victim, and he threatens the victim to have sex with him; otherwise, he will upload the photo or video. The stalker has some affection for the victim; if she denies that then he will do it against the victim. If the victim refuses his proposal, then he tries to get revenge against the victim. In Germany, a victim refused to accept the stalker's proposal. So, revenge is also one kind of reason for this.¹ Even there is no specific legislation for cyberstalking. Because Two acts prevail under the offences of cyberstalking. These are IPC 1860 and IT Act 2000. But IPC deals with conventional crime. Whereas the IT Act's main objective is to deal with e-commerce. It doesn't deal with Cyber Stalking. That's why it's a lack of proper legislation.

A. Psychological Factors

Some individuals develop an unhealthy obsession or fixation with their target. This can stem from romantic interest, admiration, or a desire for control. The stalker may convince themselves that they have a special connection with the victim. Certain mental health conditions, such as delusional disorder, personality disorders, or obsessive-compulsive disorder, can contribute to stalking behaviours. These conditions may impair the stalker's judgment and increase their persistence.

B. Emotional Factors

Cyber stalking can be a form of retaliation against perceived wrongs or rejections. The stalker may seek to punish the victim for ending a relationship, rejecting advances, or causing some form of perceived harm. Jealousy and envy can drive individuals to cyber stalk. This is often seen in cases involving romantic partners or ex-partners who cannot accept the end of a relationship or are envious of the victim's new relationships or achievements.

C. Social Factors

The internet provides a degree of anonymity that emboldens individuals to engage in behaviour they might avoid in person. The accessibility of information online makes it easier for stalkers to gather details about their victims and monitor their activities. In some cases, cyber stalking may be influenced by peer pressure or group dynamics. Individuals may engage in stalking as part of group behaviour, especially in cases of online bullying or harassment within social circles.

¹ Leroy McFarlane & Paul Bocij, "Cyberstalking: The Technology of Hate", 76 *POLICE JOURNAL* 204 (2003).

D. Cultural and Societal Factors

Cultural norms and gender stereotypes can contribute to cyber stalking. In some societies, there is a sense of entitlement over women or subordinates, leading to stalking behaviours aimed at asserting dominance or control. Inadequate awareness about the seriousness of cyber stalking and insufficient legal consequences can embolden perpetrators. If stalkers perceive that they are unlikely to be caught or punished, they may be more likely to engage in such behaviour.

E. Technological Factors

The digital age has made it easier for stalkers to access personal information. Social media profiles, public records, and other online resources provide a wealth of data that can be used to track and harass victims. Stalkers can use various tools and techniques to monitor and harass their victims. This includes spyware, hacking, GPS tracking, and the use of fake profiles to gather information or make contact.

F. Personal Motivations

Some individuals engage in cyber stalking for the thrill of excitement. They may derive pleasure from the act of stalking and the power they feel over their victim. Loneliness and social isolation can drive individuals to cyber stalk as a way of seeking connection or interaction, even if it is through negative means. Understanding these motivations is essential for developing effective strategies to prevent and combat cyber stalking, providing support for victims, and ensuring that perpetrators are held accountable for their actions.

IMPACT OF CYBER STALKING

Victims of cyber stalking often experience severe psychological impacts, including anxiety, depression, and post-traumatic stress disorder (PTSD). The persistent nature of online harassment can lead to a constant state of fear and insecurity, affecting the victim's daily life and mental well-being. Cyber stalking can also have significant social consequences. Victims may withdraw from social interactions, both online and offline, to avoid further harassment. This isolation can impact their personal relationships, academic or professional performance, and overall quality of life.

A. Psychological Impact

Victims often experience heightened levels of anxiety and fear, knowing that they are being watched or harassed online. This can manifest in constant vigilance, nervousness, and a pervasive sense of dread. The persistent nature of cyber stalking can lead to depression. Victims may feel helpless and trapped, unable to escape the harassment, which can contribute to feelings of sadness, hopelessness, and loss of interest in daily activities. In severe cases, cyber stalking can lead to PTSD.

B. Emotional Impact

The relentless nature of cyber stalking can leave victims emotionally drained. Constantly dealing with harassment can lead to emotional burnout and a sense of overwhelming fatigue. A victim may withdraw from social interactions to avoid further harassment, leading to feelings of loneliness and isolation. This can exacerbate emotional distress and contribute to a sense of abandonment. Victims may feel powerless and resentful towards the stalker and the situation.

C. Social Impact

To protect themselves, victims may withdraw from social networks and online platforms, severing connections with friends and family. This social withdrawal can lead to isolation and a lack of support. Cyber stalking can strain personal relationships. The stress and distraction caused by cyber stalking can affect a victim's performance at work or school. Absenteeism, decreased productivity, and poor academic performance are common consequences.

D. Physical Impact

Anxiety and stress from cyber stalking can lead to sleep disturbances, including insomnia and nightmares. Lack of sleep can further exacerbate psychological and emotional distress. Chronic stress can lead to various health issues, such as headaches, gastrointestinal problems, and a weakened immune system. Victims may experience a decline in their overall physical health due to the constant stress.

E. Financial Impact

Victims may incur significant expenses related to legal action, hiring private investigators, or enhancing personal security measures. The psychological and emotional toll of cyber stalking can lead to decreased productivity or job loss, resulting in lost income and financial instability. Cyber stalking can lead to long-term trust issues, making it difficult for victims to form new relationships or trust others.

The emotional trauma from cyber stalking can have long-lasting effects, impacting victims' mental health and well-being for years to come. The impact of cyber stalking is profound and multifaceted, affecting victims' psychological, emotional, social, physical, and financial well-being. Increased awareness, stronger legal protections, and comprehensive support services are essential to mitigate the harmful effects of cyber stalking and ensure a safer digital environment for all.

Issues and Challenges:

The rapid expansion of the internet has revolutionized the way people communicate, share information, and interact with each other. While these advancements have brought numerous benefits, they have also facilitated new forms of harassment and abuse, including cyber stalking.

Jurisdictional Issues: The global nature of the internet complicates legal jurisdiction, making it difficult to pursue and prosecute perpetrators located in different countries. Cyber stalking, by its very nature, transcends geographical boundaries, posing significant challenges for law enforcement and legal systems worldwide. The global reach of the internet means that a perpetrator can be in one country while their victim is in another, complicating efforts to address the issue through existing legal frameworks. Cyber stalkers can easily operate from different countries, making it difficult for local law enforcement to act. Different countries have different laws regarding cyber stalking, and the lack of harmonized international legislation complicates prosecution. Victims seeking justice may face barriers when trying to initiate legal proceedings in a foreign jurisdiction.

Proof and Evidence: Proving cyberstalking presents unique challenges, as the digital nature of the crime requires specific approaches to gather and present evidence. These issues are related to proof and evidence in cyber stalking. Gathering digital evidence requires specialized technical knowledge and skills. Law enforcement agencies may lack the necessary resources or expertise in digital forensics to effectively investigate cyber stalking cases. Identifying a stalker through their IP address can be difficult if they use techniques to mask their location, such as VPNs, proxies, or Tor networks. Collecting evidence in real-time, such as screenshots of threatening messages or logs of harassing activities, is essential. Victims need to be educated on how to document and preserve this evidence properly.

Legislative Gaps: Many existing laws were created before the digital age and may not adequately address the complexities of cyber stalking. Legislative updates are needed to better protect victims and hold perpetrators accountable. Legislative gaps create significant obstacles for both victims seeking justice and law enforcement agencies attempting to prosecute offenders. In many jurisdictions, laws addressing harassment do not specifically include provisions for cyber stalking.

ROLE OF JUDICIARY IN CYBER STALKING

The Indian judiciary played a very important role in the matter of cyber stalking.

*Shreya Singhal v. Union of India*²

This is a significant judgment by the Supreme Court of India that addressed the constitutionality of Section 66A of the Information Technology Act, 2000. This case is crucial for understanding the legal landscape of freedom of speech and expression in the context of the internet and social media in India. Section 66A of the Information Technology Act, 2000, was introduced to address the issue of offensive messages sent through electronic communication. It prescribed imprisonment for up to three years and a fine. The case was triggered by the arrest of two young women, Shaheen Dhada and Rinu Srinivasan, for posting comments on Facebook criticizing the shutdown of Mumbai following the death of a political leader. Their arrest sparked widespread outrage and highlighted concerns about the misuse of Section 66A³ to curb freedom of speech. Shreya Singhal, a law student, filed a Public Interest Litigation (PIL) challenging the constitutional validity of Section 66A on the grounds that it violated the right to freedom of speech and expression guaranteed under Article 19(1)(a).⁴

The question was raised that

- whether Section 66A of the IT Act 2000, is constitutionally valid.
- Whether Section 66A infringes upon the fundamental right to freedom of speech and expression under Article 19(1)(a).
- Whether the restrictions imposed by Section 66A are reasonable and fall within the scope of Article 19(2), which allows for reasonable restrictions on free speech.

The Supreme Court, in a landmark judgment delivered on March 24, 2015, struck down Section 66A of the Information Technology Act, 2000, as unconstitutional.

Kalandi Charan Lenka v State of Orissa,⁶ this case is significant in the context of cyber-crimes, particularly regarding the interpretation of legal provisions related to online harassment and cyber stalking in India. Kalandi Charan Lenka was accused of cyber stalking and harassment through electronic means. The case involved allegations of using the Internet to intimidate, harass, and defame the victim. This case became important for understanding how the Indian legal system approaches issues of cyber stalking and online harassment. The accused, Kalandi Charan Lenka, was charged with stalking and harassment using electronic communications. The allegations involved sending offensive and threatening messages to the victim.

*Navtej Singh Johar v. Union of India*⁷ primarily addressed the decriminalization of consensual same-sex relations between adults by reading down Section 377 of the Indian Penal Code (IPC). While this case is not directly related to cyber stalking, it has significant implications for the broader legal and social environment in India, including the protection of LGBTQ+ individuals from harassment and abuse, both online and offline. The provision was challenged on the grounds that it violated the fundamental rights guaranteed under the Indian Constitution, including the right to equality, non-discrimination, and privacy.

Ritu Kohli Case: A Landmark in Cyber Stalking Law in India

The Ritu Kohli case is one of the earliest and most significant cases of cyber stalking in India. It brought to light the pressing need for legal frameworks to address crimes in cyberspace, particularly those targeting personal safety and privacy. In 2001, Ritu Kohli, a resident of Delhi, became a victim of cyber stalking when her identity was misused in a chat room. An unknown person began chatting with strangers under her name, providing her home address and phone number, and making sexually explicit and offensive remarks. This led to Ritu Kohli receiving numerous obscene calls and messages, causing significant distress and invasion of her privacy.

² W.P. (Crl) No. 167 of 2012.

³ Information Technology Act, 2000, No. 21, Act of Parliament, 2000.

⁴ Constitutional Law of India, 1950.

⁵ *Ibid.*

⁶ (2017) 66 Orissa Crim 895.

⁷ W.P. (Crl) No. 76 of 2016.

LEGAL FRAMEWORK ON CYBER STALKING IN INDIA

Cyber stalking is a serious crime that poses significant threats to individuals' privacy, security, and mental well-being. In India, the legal framework addressing cyber stalking involves various laws and provisions designed to protect victims and prosecute offenders. The primary legislation addressing cyber-crimes in India is the Information Technology Act, 2000.

Information Technology Act, 2000

The Information Technology Act, 2000⁸, is the primary legislation governing cyber-crimes in India. While the Act does not specifically mention "cyber stalking," several sections are relevant to addressing online harassment. Section 66A,⁹ which dealt with offensive messages through communication services, was struck down by the Supreme Court in 2015. However, other sections, such as 66E¹⁰ (violation of privacy) and 67 (publishing or transmitting obscene material), are relevant to cyber stalking cases.

Cyber Stalking in the Bharatiya Nyaya Sanhita¹¹ (BNS)

The Bharatiya Nyaya Sanhita (BNS) is the proposed revised version of the Indian Penal Code¹² (IPC). The draft of BNS includes modern provisions and updates existing laws to better address contemporary crimes, including cyber stalking. The IPC includes several sections that can be applied to cyber stalking.

BNS defines stalking to include repeated monitoring of a woman's internet use, email, or any other form of electronic communication. This can involve following her physical movements, attempting to contact her despite a clear indication of disinterest, or monitoring her online activities under Section 354D, Section 499 and 500,¹³ Section 507, Section 509¹⁴. These section deals with acts intended to insult the modesty of a woman. If cyber stalking involves offensive or obscene communications targeting a woman's modesty, this section can be invoked, prescribing punishment of imprisonment up to one year, a fine, or both. Clear and specific definitions of cyber stalking and related behaviours in the legal framework can help ensure precise application and avoid ambiguities.

The Bharatiya Nyaya Sanhita aims to modernize India's legal framework to better address contemporary crimes, including cyber stalking. Continuous evaluation and enhancement of these provisions, along with public awareness and improved law enforcement training, are essential to creating a safer digital environment and combating cyber stalking effectively.

Protection of Women from Domestic Violence Act, 2005¹⁵

Although primarily aimed at addressing domestic violence, this Act provides civil remedies that can be relevant in cases where cyber stalking occurs within domestic relationships. Victims can seek protection orders, residence orders, and other reliefs under this Act. There is a need for clear definitions of cyber stalking and related terms in the legal framework to ensure precise application and avoid ambiguities.

PREVENTIVE MEASURES FOR CYBER STALKING

There are some preventive measures for the cyber stalking which are under following as:

- Adjust privacy settings on social media platforms to limit who can see your posts, personal information, and contact details.

⁸ Information Technology Act, 2000, No. 21, Act of Parliament, 2000.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ THE BHARATIYA NYAYA SANHITA, 2023 NO. 45 OF 2023.

¹² Indian Penal Code, 1860, No.45, Acts of Parliament, 1860.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Protection of Women from Domestic Violence Act, 2005 Act no. 43 of 2005.

- Make sure only trusted individuals can access your profiles.
- Avoid sharing personal information such as your address, phone number, daily routines, or locations in public forums or social media posts.
- Keep sensitive information off your profiles, such as birthdates, addresses, and family details.
- Use strong, unique passwords for different accounts and change them regularly. Include a mix of letters, numbers, and special characters.
- Be cautious about accepting friend requests or messages from people you do not know. Verify the identity of individuals before engaging with them online.
- Regularly search for your name on search engines to check if any personal information or compromising content is available online.
- Install and update reliable antivirus and anti-malware software to protect your devices from malicious attacks.
- Use private browsing modes to prevent your browsing history from being tracked.
- Be aware of the laws and regulations related to cyber stalking in your country. Know your rights and the legal recourse available to you.
- Use cyber-crime helplines or hotlines to get assistance and guidance on dealing with cyber stalking.
- Keep records of all communications and incidents related to cyber stalking. Take screenshots, save emails, and log dates and times of suspicious activities.
- Block the stalker on all platforms and devices.
- Use the platform's reporting tools to report the individual for harassment or abuse.
- Review and update your privacy settings to prevent further contact.

CONCLUSION AND SUGGESTIONS

Efforts to combat cyber stalking must involve a multi-faceted approach. Public awareness campaigns and educational programs can help individuals recognize the signs of cyber stalking and take preventive measures to protect their online privacy. Tools such as privacy settings, anti-spyware software, and secure communication channels can help safeguard personal information and reduce the risk of cyber stalking. Then legal reforms can also prevent cyber stalking. Updating and strengthening laws to address the unique challenges of cyber stalking is crucial for providing effective legal recourse for victims. Providing resources such as counselling, legal assistance, and support groups can help victims cope with the impact of cyber stalking and navigate the legal system. The internet, while a powerful tool for communication and information sharing, has also become a breeding ground for new forms of harassment like cyber stalking. Understanding the dynamics of cyber stalking and implementing comprehensive strategies to combat it are essential steps toward ensuring safety and security in the digital age. We need legal reforms and legislative updates for the prevention of cyber stalking. Many legal systems need to update existing laws to address the nuances of cyber stalking more effectively. This includes defining cyber stalking clearly and providing appropriate penalties. We need new legislation. Because entirely new laws specific to cyber stalking may be necessary to provide adequate protection and recourse for victims. Developing harmonized laws and standards across countries can facilitate more effective prosecution and protection against cyber stalking. Even through establishing international treaties and agreements can help streamline cross-border investigations and legal actions.

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