New Series
Vol. XXI, No. 1 (S)

ISSN: 0974-2735

BIHAR JOURNAL OF PUBLIC ADMINISTRATION

(A Bi-Annual Refereed Research Journal of IIPA Bihar Regional Branch, Patna)
(Placed in UGC-CARE Reference List of Quality Journals, S.Sc.)

Vol. XXI | No. 1 (S) | Jan.-June, 2024

Editor
R.K. Verma

SUPPLEMENT ON JUDICIAL ADMINISTRATION & RIGHTS

Indian Institute of Public Administration

Bihar Regional Branch, Patna

Indian Institute of Public Administration
Bihar Regional Branch, Patna

Executive Council

About the IIPA, Bihar Regional Branch, Patna

On the recommendation of Paul H. Appleby, the then Prime Minister Pt Jawahar Lal Nehru established the Indian Institute of Public Administration (IIPA) on March 29, 1954 with its HQ at IP Estate, Ring Road, New Delhi- 110 002 under the supervision of DoPT, Government of India. Its main aim is to equip the public servants with knowledge, skills and behaviour required for managing the tasks of governance. Bihar Regional Branch, commenced in the year 1961, is one of the 22 regional branches in India as part of the apex body of IIPA with an objective to undertake activities in furtherance of discipline of Public Administration and good governance. The Branch has five pronged activities like - research/evaluation studies, seminar / conferences / workshops etc., training / orientation / awareness programmes, collaboration with governmental & non-governmental agencies and publication of Journal, books, Monographs etc.

Website: www.iipabiharbranch.org
E-mails: iipabihar@gmail.com; bjpa2004@gmail.com
Mob No.: 7762882579, 9473431548, 9693781950

New Series ISSN: 0974-2735

Vol. XXI, No. 1 (S) Jan.-June, 2024

BIHAR JOURNAL OF
PUBLIC ADMINISTRATION

(A Bi-annual Refereed Research Journal of IIPA Bihar Regional Branch, Patna)
(Placed in UGC-CARE Reference List of Quality Journals, Social Sciences)

Editor

Dr. R.K. Verma

SUPPLEMENT ON
JUDICIAL ADMINISTRATION & RIGHTS

INDIAN INSTITUTE OF PUBLIC ADMINISTRATION
Bihar Regional Branch
Vermas, Shiva Path, New Purendrapur, Patna 800 001

SUBSCRIPTION RATES			
INLAND	FIVE YEARS	TWO YEARS	SINGLE COPY
Institution	₹8,500	₹4,000	₹1,200
Individual	₹7,000	₹3,500	₹1,000
Students	₹6,000	₹3,500	₹1,000
Foreign (Except Nepal)			
Institutional	US $200	US $20	US $10
Individual	US $150	US $15	US $07

Correspondence for subscription and editorial should be made to the Editor Dr. R.K. Verma, Shiva Path, New Purendrapur, Patna–800 001. Contact: e-mails: <iipabihar@gmail.com>, <bjpa2004@gmail.com>, Mob. Nos. 9473431548, 7762882579. Payments may be made through Bank DD/Cheque drawn in favour of **IIPA BIHAR REGIONAL BRANCH, payable at Patna or through RTGS/NEFT – Beneficiary: IIPA BIHAR REGIONAL BRANCH**

A/C No. **000234005002918 IFSC: YESB0BSCB01 Bank: Bihar State Cooperative Bank Ltd, Branch: New Secretariat, Patna.**

Website<www.iipabiharbranch.org>

Note: Views expressed in articles/reviews/notes published in the Journal are the personal opinions of the respective authors; neither of IIPA, Bihar Regional Branch nor of the editors.

Note:* Students are require to furnish the certificate of studentship or recommendation of the head/ authorized faculty member of the institution.

From the Desk of the Chief Editor

I have immense pleasure to present before the readers the Vol. XXI, No. 1, Jan-June, 2024 of Bihar Journal of Public Administration. The readers may appreciate that the Journal is being punctually published amidst tough conditions caused by lack of proper finances, over stress of large numbers of paper submissions since its inclusion in UGC-CARE List of Quality Reference Journals and strains of management. However, I express my thanks to the learned contributors, the entire Editorial Team and the anonymous referees for carrying the venture of publication of Bihar Journal of Public Administration in regular frequency and that too by maintaining quality. I, in personal capacity as Vice Chancellor of Magadh University, Bodh-Gaya, commit myself to facilitate the regular publication of the Journal by involving institutions of higher education, falling in this part of the state. The editorial board intends to accommodate the new ideas and issues of our focus area of research. We prefer to provide space for new ideas and practices related to Public Administration and allied disciplines, especially covering Bihar.

– Prof. S.P. Shahi
Chief Editor
Vice Chancellor,
Magadh University, Bodh-Gaya

Editorial

It is a matter of immense pleasure that Bihar Journal of Public Administration has entered into the third decade of its regular publication. We are thankful to all those who have rendered support of any kind in this academic venture.

I have the pleasure to present the latest Issue of the Journal Vol. XXI, No. 1, January-June, 2024 which covers a range of subjects related to public administration, governance, e-governance, urban municipal governance, implementation of policies & schemes of development, traditional Indian wisdom, tribal concerns, etc. Some contributions are related to economic development of specific social classes, role of voluntarism in governance, health service delivery, welfare administration, and emerging pattern of party system in India. Besides, policy perspective of nuclear power and nature of state and Sino-Indian relations have also been included in the Issue.

We have received a dozen quality papers on the subjects like judiciary, protection of rights of the people, comparative study of judicial review, legal perspective of administrative discretion and new criminal laws which are being published separately as special supplement on Judiciary and Administration.

The IIPA Bihar Regional Branch and the Editorial team express thankfulness to external support from expert reviewers and the contributors. At last, though utmost care has been taken to maintain the quality, yet we shall feel obliged to have suggestions from readership for improvements in the Journal.

– Dr. R.K. Verma
Editor

Contents

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

NEW CRIMINAL LAWS : RETROSPECT AND PROSPECT

Yogendra Kumar Verma*

Abstract

We are in the phase of dynamic social changes and Legal institutions are facing great challenges to resolve the new legal problems. It is high time to take the support of new technological development, fixation of responsibility to legal instrument for fast disposal and prosecution of offender for lessening the burden of prison and providing Justice to all etc. for the administration of Justice. In this context, the three new enactments namely Bhartiya Nyaya Sanhita, 2023 in place of Indian Penal Code, 1860, Bhartiya Nagarik Suraksha Sanhita 2023 in place of Code of Criminal Procedure, 1973 and Bhartiya Sakshya Adhiniyam, 2023 in place of Indian Evidence Act, 1872 need to be examined in the light of its prospects in terms of responsiveness, equity and better suited to resolve the new social challenges. As such the present paper examines these three laws in the context its suitability in the changed socio-legal ecology. These laws will come into effect after July 2024. The present paper underlines the pros and cons of these criminal laws. It can be easily hypothesized that the laws will be beneficial in terms of reducing the burden on Jails, involvement of community in delivery of criminal-justice system, and a unique punishment i.e. community service as punishment.

Keywords: Criminal Laws, BNS, BNSS, BSA, Sedition, Terrorism, FIR, Digitization, India

* Prof. Dr. Yogendra Kumar Verma, Professor & Dean, Faculty of Law, Patna University, Patna
E-mail: dryogendrakrverma@gmail.com; Phone: 9334198524

Pre independence criminal laws were used by the British to protect their colonial interest, rule the people and country and maintain their authority and supremacy over India. There was a need of comprehensive review of old criminal law especially Indian Penal Code, Code of Criminal Procedure, Indian Evidence Act to meet needs and aspirations of the people in present situation. The main problems in present legal system were the huge pendency of cases in the Courts, a low conviction rate resulting overcrowding of prisoners in prisons, a little scope of technology in legal system, delay in investigation, inadequate use of forensic evidence amounting delayed Justice. Let us discuss the provisions of these laws.

BHARTIYA NYAYA SANHITA, 2023 (BNS)

It is evident that there is significant reordering and changes in the placement of the provisions but the contents of the provisions are to a very large extent a verbatim reproduction of Indian Penal Code. This extensive verbatim retention of Indian Penal Code provisions may create widespread administrative and legal confusion in the police and other investigating agencies, bar, different level of judiciary and prison.

But after substantive analysis of the provisions of Bhartiya Nyaya Sanhita, 2023, I identified the following issues which are the subject matter of substantive changes in this Sanhita –

- Section 4 of BNS defines punishment. Punishment includes i. Death, ii. Imprisonment for life, iii. Imprisonment – Rigorous & Simple, iv. Forfeiture of property, v. Fine, vi. Community Service. But legislature enumerated punishment for life for the following offences under Bhartiya Nyaya Sanhita - under sections 62 (attempt to commit offence), Section 64(1) Rape, Section 80(Dowry Death), Section 89(Causing miscarriage without women's consent), Section 88(Death caused due to miscarriage), Section 103(Murder), Section 105(Culpable homicide not amounting to murder), Section 105(Abetment of suicide of child or person with mental illness), Section 109(Attempt to murder) etc. and *punishment for life which shall the remainder of that person's natural life* under section 64(2) (Rape by person in authority), Section 65(1) (Rape on a women under 16 years of age), Section 65(2) Rape of women under 12 years of age), 66(Inflicting injury leading to death or persistent vegetative state due to offence of rape), Section 70 (Gang Rape), Section 71(repeat sex offender), Section 104(Murder by life convict) . The Supreme Court in *Shatrughna Baban Meshram case*, held that life imprisonment means remainder of person's life and but beside executive power to remit the punishment under Sections 432 & 433 of Cr.P.C (Now Sections 473 & 474 of BNS), As per decision of Court in *Murugan case*, observed, after awarding punishment of life sentence, it is beyond the pale of executive power of remission except power granted under Article 72 (President) and Article 161 (Governor) of the Constitution of India. It creates an ambiguity. It may be concluded that where punishment is awarded as life sentence for remainder period of life, Parliament has intention to limit the power of state in respect of commuting power of sentence to accused. It also conflict with previous legal concept that imprisonment for life means imprisonment till death of accused. But by inserting the two term "*punishment for life*" and "*punishment for life which shall the remainder of that person's natural life*", creates confusion which may cause difficulties in execution.

It is first time in Indian criminal justice system, punishment of community service has been introduced for petty offence under Section 202 – public servant unlawfully engaging in trade, sec.209 – non appearance in response to a proclamation under section 84 of BNS, sec. 226 – attempt to commit suicide to compel or restrain exercise of lawful power, sec. 303(2) – first offence of theft of property value less than Rs. 5000/-, sec. 355 – misconduct in public by a drunken person, sec. 356(2) – defamation. Various countries like Australia, Finland, New Zealand, USA, Singapore, Spain, United Kingdom, Uganda, Canada, Norway, United Arab Emirates, Malaysia have punishment of community service in their criminal justice system. It is by product of rehabilitative justice & reformative justice. It is an alternative solution of imprisonment. In Canada – Conditional services allow offenders to serve their sentence in the community in strict surveillance. In Norway – Community service through restorative justice programme and alternative sanctions aiming to reintegrate offenders into society. In United Arab Emirates – Community service system as an alternative to the short-term imprisonment. It is consensual penalty but in UAE and Malaysia, there is no requirement of consent. Useful works have to be performed free of charge.

If person is convicted, convicted person undergo the medical examination but in case of punishment of community service, there is no requirement of undergoing the convict into medical examination.

The following are the advantages of the punishment of community services -

- It reduces the economic burden of state resulting from the imposition of short-term prison sentence.
- It preserves the workforce in the society.
- This system keeps the convicted persons within family climate and ensures the cohesion of their family.
- It also preserves their livelihood and strengthens the confidence of employers in their social role as well as establishes the social peace for both the perpetrators and the victims and burying their hatred and retaliation.

- Application of community services reduces the overcrowding in prison. Overcrowding in prison affects the jail inmates with health and psychological deceases and avoid those convicts with minor crimes from mixing with prisoners with high criminal risk.

❖ BNS introduced a new chapter titled offences against women and children to deal sexual offences. With minor change in the age of women from 15 to 18 years, section 63 is renumbered in place of sec. 375. The change in the age of consent seeks to give legislative effect to the decision of the Supreme Court of India in *Independent Thought case*. Complying the decision of the Supreme Court of India in case of *Navtej Singh Johar case*, Section 377 of IPC does not find place in BNS. BNS also does not recognize sexual offence against male. It categories Gender – Men, Women & Transgender. New offence of gang rape of a women under 18 years of age introduced under section 70(2) of BNS as an aggravated offence. Punishment is upto life sentence which is more than the punishment prescribed in Protection of Children from Sexual Offences Act, 2012 (POCSO).

Section 69 criminalizes sexual intercourse that does not constitute rape. It is gender neutral law. For example, a woman having sexual intercourse with other women by making false promise of employment or promotion could be punished under this section. But Supreme court already held in case of *Naim Ahamed* that Sexual intercourse pursuant to a false promise to marry is amounting to rape.

❖ Mob Lynching - Under section 103(2) – murder and 117(4) – Grievous Hurt, by a group of five or more persons motivated by social profile of victim specially their race, caste or community, sex, place of birth, language, personal belief and any other ground, a new offence of mob lynching introduced without using the verbatim of mob lynching.

❖ Section 104 of BNS –punishment of murder by life convict with life imprisonment of death sentence. But under sec. 303 IPC, death sentence was mandatory which was held unconstitutional by SC in Mithu Vs State of Punjab.

❖ Death by negligence - Section 106(1) replaced section 304A IPC and enhance punishment two to seven years and Section 106(2) introduced aggravated form of death by negligence and escape from the scene of incident or fail to report the incident to police officer or magistrate soon after incident, will be punished for maximum period of 10 years or fine.

Organized Crime (as continuing illegal activities, including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, etc., carried out by groups of individuals acting in concert, singly or jointly, to gain financial or material benefits using violence, threats, intimidation, or other unlawful means) and petty organized crime under section 111 and 112 introduced on basis of Maharashtra /Gujrat/Andhra Pradesh/Karnataka/UP/Rajasthan/Haryana

Control of Organized Crime Act and broadened its scope as writing continuing unlawful activity means all cognizable offence and includes economic offence. BNS introduced a new offence of Petty organized crime (whoever being a member of group etc. commits petty organized crime.) gang either singly or jointly, commits any act of theft, snatching, cheating with minimum punishment of one year and maximum punishment of seven years and fine.

- ❖ Terrorist act under Section 113 is new offence introduced in BNS on the basis of Unlawful Activities Prevention Act, Terrorist and Disruptive Activities Prevention Act, Prevention of Terrorism Act. Special Acts regarding the offence of terrorism have some procedural safeguards which are not reflected in BNSS like only senior officers being allowed to investigate and mandatory sanction to be obtained from state of central govt. which played to check abuse of power.

Terrorism as an act that intends to threaten the unity, integrity and security of country, to intimidate the general public or disturb public order. The law also penalizes conspiracy, organizing or resisting in preparation of any terrorist act with prison term between 5yrs and life imprisonment and a fine of at least 5 lakh rupees.

- ❖ The offence of sedition abolished and Section 152 0f BNS criminalizes acts endangering sovereignty, unity and integrity of India with punishment of life sentence or seven years and fine. It is offence of sedition in express verbatim.
- ❖ Section of 153B re-casted as section 197 of BNS – imputations, assertions to national integration in the light of Shreya Singhal case (2015) 5 SCC 1 as well as constitutional requirements under Article 19(2). BNS removed offence of sedition but penalizes exciting or attempting to excite secession, armed rebellion or subversive activities, encouraging feelings of saparist activities or endangering sovereignty or unity and integrity of India. This offence may involve exchange of words or signs, electronic communication or use of financial means for terrorism.
- ❖ A total 3200 suggestion received and Home Ministry held 158 meetings.

BHARTIYA NAGARIK SURAKSHA SANHITA, 2023

Bhartiya Nagarik Suraksha Sanhita, 2023 – It is proposed to establish an independent director of prosecution in each district which aims to fortify prosecution system, ensuring fairness and impartiality at local level. Time framework for legal action also strengthens overall criminal justice system.

It also pursued to humanize our criminal Justice system through limiting the period of investigation, replacing outdated terminology with a more friendly language, making mandatory visit by a forensic team in case of heinous offences which ensures accuracy of criminal investigation.

It proposes to replace the Code of Criminal Procedure, 1973, which has 533 sections. The code repeals 9 provisions of the CrPC, proposes amendment to 107 provisions and introduces 9 new provisions. The successor to the Code of Criminal Procedure, 1973, seeks to expedite the justice system justice delivery by effectively tackling problems like backlog of cases in courts, low conviction rates, limited technology integration in our legal system, investigation delays, and suboptimal utilization of forensic methods. The changes bought by the act have been elaborated as under:

Designated Police Officer

Under Section 37 of the BNSS, the state government is obligated to establish a Police control room in every district and at the state level, as well as designate a police officer who will maintain the information about names and addresses of persons arrested and the nature of the offence charged.

- Identification and attachment of property of the proclaimed offender

  Under Section 86, the Court is empowered to initiate the process for identification, attachment and forfeiture of property belonging to a proclaimed person.
- Recording of search and seizure through audio-video electronic means

  The new code under Section 105 seeks to provide for the recording of search and seizure of any property, article or thing through audio-video electronic means. Audio video electronic means are also defined under the proposed code to include the use of any communication device for the purposes of video conferencing, etc.
- Attachment, forfeiture, or restoration of property derived from the commission of any offence

  Under the new code as per Section 107, in case the police or Magistrate has reason to believe that any property is derived (directly or indirectly) as a result of criminal activity, the Court can try such offence for the attachment of such property.

Request for investigation in country or outside India

Under the new code in Section 112, Criminal Courts are empowered to issue letters to a Court in another country upon request of the Investigating officer, according to which evidence may be available there, to examine orally any person supposed to be acquainted with the facts and record his statement and forward all such evidence so taken to the Court issuing such letter.

Similarly, in deference to the principle of comity of nations, Section 113 of the new code provides for a procedure to entertain a letter of request from another country for examination of any person in India and upon receipt of such letter, the central government is empowered to forward the same to the Judicial Magistrate who shall thereupon summon the person and record his statement.

Trial in Absentia

Section 356 of the new code seeks to provide for a procedure to conduct a trial and pass the judgment in absentia of a proclaimed offender. The Section starts with a non-obstante clause and prescribes that a proclaimed offender shall be deemed to waive his right to be present and tried in person, and the Court can proceed with trial in a manner as if he is present and pronounce the judgment.

- Witness Protection Scheme - section 398 inserted in complying observation of the court.

The new code makes it mandatory for every state government to prepare and notify a Witness Protection Scheme for the state to ensure the witness's protection.

Trial in video conferencing – section 251(2) – during framing of charges, judge may explain through audio video electronic means. proviso of sec 265 – witness may examine through audio video electronic means at designated place.

While harnessing the technology and approving the usage of the same during criminal trials, the new code has also sought to allow the trials, proceedings, and inquiries under the code to be conducted in an electronic mode by use of electronic communication or use of audio-video electronic means.

E-filing of FIRs and progress of the investigation to be informed to the victim by police

DIGITISATION: Section 173 of the BNSS allows for FIR registration through electronic communication which must be acknowledged within three days. Moreover, all legal proceedings, including trials and inquiries, can now be conducted electronically. Courts are now empowered to conduct various proceedings electronically, encompassing summons, warrant issuance, inquiries, witness examinations, trials in different courts, appellate procedures, and more, utilizing electronic communication or audio-video means. Additionally, Section 355 introduces an explanation to include the accused›s attendance via audio or video electronic means under subsection (2).

Section 173 explicitly validates the mandatory registration signifying the police's obligation to register information about the commission of a cognizable offence. As per Section 173 of the new code, the FIRs with respect to the commission of a cognizable offence irrespective of their jurisdiction/area where the offence is committed can be given either orally or by electronic communication to an officer in charge of a police station. The police station has to transfer the FIR to the station with the appropriate jurisdiction to conduct the investigation.

In case of electronic information, it shall be taken on record by him or being signed within three days by person giving it. Provision of section 173 information by women relating to sexual offence (64 – 79, 124 – grievous hurt by use of acid) against women shall be recorded by a women police office or any police officer. In case of disabled or mentally retarded women, it shall be videographed. Information of cognizable offence for which punishment is three years or more but less than seven years, officer in charge with prior permission of Deputy Superintendent of Police shall proceed to conduct enquiry within 14 days or proceed for investigation. In case of refusal to record FIR by officer in charge, information in writing may send by post to Superintendent of Police and SP may investigate himself or direct to other office for investigation failing which aggrieved may make application to magistrate.

After completion of the enquiry, the police shall proceed with investigation when there exists a *prima facie.*

Recording of confession and statement under section 183 (164 CrPC) Proviso of section 183(1), confession or statement may be recorded by audio video electronic means by the magistrate whether they having the jurisdiction or not. Under proviso of Section 183(6)(a), In case of sexual offences against women under section 64 to 79 0r 124, statement shall be recorded by a women magistrate or male magistrate in presence of women. Offence punishable with 10 years or more or with life imprisonment or death sentence, magistrate shall record the statement of witness brought before him by police officer. In case of disabled person or mentally retarded, statement shall be recorded in audio video electronic means.

Section 193(3)(ii) mandates the police officer to inform the informant or victim of the progress of the investigation within 90 days.

Specific timelines have been prescribed for time-bound investigation & pronouncement of judgements

The new code mandates the police officer to maintain a diary of proceedings setting forth the time the information reached him and the time he began and closed his investigation. Under Section 193, the new code also mandates every investigation to be completed without unnecessary delay and investigation for offences against women and children, i.e., rape, gang rape and under POCSO Act to be completed within 2 months from the date on which the police recorded the information.

The new code also mandates the Court under Section 258 to pronounce judgment within 30 days from the date of completion of arguments, which can be extended to 60 days for specific reasons.

- Section 230 of the BNSS mandates providing copies of police reports and documents to the accused and victim within 14 days from the date of the accused›s production or appearance.
- Section 232 provides that Committal Proceedings shall be completed within a period of 90 days from the date of taking cognizance, and such period may be extended by the Magistrate for a period not exceeding 180 days for the reasons to be recorded in writing .
- Section 250 allows the accused to file for Discharge within 60 days from the date of committal.
- Section 263 provides that charge against the accused must be framed within a period of 60 days from the date of first hearing on charge.
- Section 346 provides for Inquiries or trials to proceed from day-to-day until all attending witnesses have been examined. The said section also limits the number of adjournment necessary that may be sought to a maximum of 2 per party.

Clarification with respect to the Police Custody period

The new code also provides for significant clarification regarding the police custody period. Section 187(2) of the proposed new criminal code, which mirrors the provision of Section 167(2) of CrPC, seeks to clarify that the 15-day term of the policy custody period can be either in whole or in part.

No sanction to prosecute public servants is required in offences, including sexual offence trafficking

Proviso to Section 218 has done away with the requirement to obtain sanction for prosecuting a public servant for offences of rape and trafficking.

- FORENSIC INVESTIGATION: As per Section 176 of the BNSS, offenses carrying a minimum punishment of seven years imprisonment necessitate forensic investigation. In these instances, forensic experts are required to visit crime scenes for evidence collection, documenting the process using electronic devices like mobile phones. If a state lacks forensic facilities, it must seek and utilize such services from another state. These experts are responsible for both evidence collection at crime scenes and documenting their procedures.
- FLEXIBLE POLICE CUSTODY: Section 187 of the BNSS introduces a provision allowing up to 15 days of police custody, which can be utilized intermittently within the initial 40 or 60 days of the total 60 or 90 days of judicial custody respectively. Traditionally, the Constitution and CrPC restrict detention in

police custody beyond 24 hours, however, Magistrates hold the authority to extend this to 15 days if the investigation requires more time. Further extensions in judicial custody can occur if deemed necessary, yet the cumulative detention cannot exceed 60 or 90 days, depending on the offense. The BNSS modifies this procedure by allowing the 15-day police custody to be authorized wholly or partially at any point within the initial 40 or 60 days of the overall 60 or 90 days period respectively.

- MEDICAL EXAMINATION: While the CrPC mandates the medical examination of the accused in specific cases, including rape, carried out by a registered medical practitioner upon the request of a Sub-Inspector level police officer, the BNSS expands this authority to any police officer irrespective of their level to request such an examination.
- SIGNATURES AND FINGER IMPRESSIONS: The CrPC authorizes Magistrates to demand specimen signatures or handwriting from individuals. Section 349 of the BNSS broadens this scope and further embowers the magistrate to demand collection of finger impressions and voice samples too. This provision extends to individuals who have not been arrested under any investigation.
- SCOPE OF PLEA BARGAINING:- The BNSS retains the provision for plea bargaining under section 289 to 300. This limits plea bargaining in India to sentence bargaining, that is getting a lighter sentence in exchange for the accused's guilty plea. The BNSS also limits the time for filing for plea bargaining to be filed by the accused within 30 days from the date of framing of charge.
- SEIZURE OF IMMOVABLE PROPERTY: The BNSS broadens the scope of the CrPC's police powers in property seizure. While the CrPC initially allowed the seizure of movable properties suspected to be stolen or found under suspicious circumstances, the BNSS extends this authority to include immovable properties as well.

BHARTIYA SAKSHYA ADHINIYAM, 2023

Bhartiya Sakshya Adhiniyam, 2023 also recognize the pivotal role of technological development and included electronic evidence as any information generated or transmitted by any device or system capable of being stored or retrieved encompassing a wide range of digital data as giving the authenticity and integrity with admissibility of DNA evidence and acceptance of expert opinion.

Electronic record or digital record have same legal effect as paper records. It expands electronic records to include information stored in semiconductor memory or any communication device.

It considers any information given electronically as oral evidence. It also includes secondary evidence oral and written admissions as well as the testimony of a person who has examined the document and is skilled in the examination of documents.

The Bharatiya Sakshya Adhiniyam replaced the Indian Evidence Act, 1872 and has 170 provisions. It does not consist many material changes to the Indian Evidence Act and seeks to streamline electronic evidence. The key highlights of the Adhiniyam are as follows:

Evidence can be given electronically

It seeks to elaborate the definition of the evidence. As per Section 2(1)(e), the evidence includes any statement or information given electronically, and this will permit the appearance of witnesses, accused, experts and victims through electronic means before the Court for the recording of their evidence.

Secondary evidence

It expands the scope of secondary evidence. The BSA under Section 58 allows oral admissions, written admissions, and evidence of a person who has examined the document to be produced as secondary evidence.

Streamlining the electronic evidence

The new BSA introduces a new schedule to make electronic evidence certificates more meaningful and provide for the original record's hash value. The definition of the word document is also expanded to include the electronic and digital records as documents under Section 2(1)(d).

The new BSA also clarifies under Section 61 that electronic records or digital records will have the same legal effect, validity, and enforceability and can be proved just like any other documents either by way of "primary evidence" or "secondary evidence".

Facts of which the Court can take judicial notice

Finally, the much-awaited change in Section 57 of the IEA (which provides for specific facts of which the Court can take judicial notice) has been proposed through Section 52 of the new BSA. Section 57, which was drafted during the British Raj, mainly enlists such facts which pertain to the parliament of the U.K. Rehauling the provision, the new code clearly and coherently enlists such facts about India of which the Court can take judicial notice.

CONCLUSION

All the above three new laws are now referred to the parliamentary standing committee for further discussion and analysis. There cannot be any dispute about the necessity of modernising the criminal justice system to serve the needs of the populace better and administer justice, as well as the need to remodel and rehaul (repair) our criminal laws in India in light of social advancement and new social trends. The three new laws also appear to strengthen efforts to make it easier to secure justice, particularly in cases involving crimes against women and children, mob violence, lynching, and other crimes that weren't previously covered by specific statutes. However, the ground reality of the laws will be revealed with the passage of time once they are brought into effect.

These three legislations have been based on three fundamental principles of our constitution – freedom of individual, human rights and principle of equal treatment for all. It steps towards humanizing our legal system.

ENDNOTES

1. ShatrughnaBabanMeshram Vs State of Maharastra, https://indiankanoon.org/doc/17904216/ retrieved at 24/05/2024
2. Union of India Vs Sriharan alias Murugan, https://indiankanoon.org/doc/50602236/ retrieved at 24/05/2024
3. Independent Thought Vs UOI (2017) 10 SCC 800
4. Navtej Singh Johar Vs UOI (2008) 10 SCC 1
5. Naim Ahamed Vs NCT of Delhi 2023 SCC online SC 89

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

ADMINISTRATIVE DISCRETION AND THE LAW: LIMITS AND CHALLENGES

Rishikesh Singh Faujdar* and Rumi Dhar**

Abstract

The term 'Discretion' carries different connotations in different walks of life. Discretion involves choosing from the different available options without regard to any predefined criterion, regardless of how whimsical that choice may be. A person who writes a will has complete control over how his property is distributed, no matter how arbitrary or whimsical it may be. But discretion in administrative decisions involves restrictions of legal provisions, rule of law and appropriate reason. Discretion in this sense means choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful, but legal and regular. The present paper attempts to analyse the 'Administrative Discretion' in the contexts of its legal, constitutional, rule of law and set administrative principles by examining various interpretations and decisions by law courts as well as judicial experts and highlight the challenges therein.

Keywords: Discretion, Administrative Discretion, Constitution, Courts, India

INTRODUCTION

Generally, discretion involves choosing from the different available options without regard to any dependably, regardless of how imaginative that choice may be. A person who writes a will has complete control over how his property is distributed, no matter how arbitrary or whimsical it may be. When the term discretion is qualified

* Dr. Rishikesh Singh Faujdar, Assistant Professor, Department of Law, Nagaland University, Nagaland, INDIA, E-mail: rishikesh.faujdar@nagalanduniversity.ac.in, Mobile: +91-9518264530.

** Dr. Rumi Dhar, Assistant Professor, Department of Law, Nagaland University, Nagaland, INDIA, E-mail: rumidhar@nagalanduniversity.ac.in; Mobile: +91-9435173521.

by the word 'administrative,' however, it has a slightly different connotation. In this context, discretion involves choosing among the different available options while adhering to the standards of reason and justice rather than personal inclinations. This exercise must be legal and consistent, not arbitrary, vague, or fantastic (Sharp v. Wakefield, (1891) AC 173). True, in any intensive type of government, officials must exercise some discretion in order. It is required not just for the individualization of administrative power, but also because it is difficult to put down a rule for every eventuality in the complicated art of modern government. However, it is also true that discretion is a valuable asset.

It is more detrimental of liberty than any other innovation of man. As a result, there has always been a tension between the administration's claim to absolute discretion and the subjects' claim to a reasonable exercise of it. Discretionary authority is not inherently evil, but it does leave a lot of possibility for abuse. Therefore, the remedy lies to tightening the procedure and not in the abolishing the power itself.

When discretion is exercised on a case-by-case basis, these broad generalisations are narrowed to more specific moulds, but the margin of oscillation remains. As a result, the importance of judicial oversight of abuses of administrative discretion cannot be overstated (Freud: 1028).

Administrative Discretion: The Concept

How is the scope of discretion determined? It is determined by the statutory provision that contains the grant of discretion. *Liversidge v. Anderson,* a wartime case, is an example of how the scope of discretion is judicially determined. Regulation 18-B, the United Kingdom's defence (general) regulation Act 1939 provided that the secretary of state should detain a person if she had 'reasonable cause to believe' that the person was of hostile origin. A majority of the Lord held that the home secretary's determination was final and that the court could not go into the reasonableness of the cause that led to his satisfaction.

According to **Lord Atkin**, in his dissent, admonished his brother judges for being more executive-minded than the executive itself. He said that it was the duty of the court to make sure that the home secretary acted on a reasonable cause.

Sir Edward Coke said that discretion is knowledge to distinguish between falsity and truth which means that right and wrong, without resorting to any personal reasons. In case of Susannah Sharp v. Wakefirld, by lord Halsbury opined that when something is left to administrative discretion, it confined that it has to be done according to the principles of justice with reason and not on basis of the personal opinion of the authority concerned.

> "…This decision of the majority was received with severe criticism by the several Law Review writers. In the later case the Privy Council observed that Liversidge was to be restricted to cases of emergency. The courts in Enland have since then undertaken a more critical review of the exercise of administrative discretion.

In India, The Supreme Court of India followed the majority decision in *Liversidge* in *A.K Gopalan* v. *Madras* to hold that detaining authority's satisfaction that a person needed to be detained preventively was not open to judicial review. The court salvaged personal liberty to some extent by holding that the grounds of detention must be specific and elaborate enough to enable the detenue to make a representation against his detention.

In another case, it was held that the statutory power to issues licence for holding the fair carried with it the power to fix the days for holding such fairs. The Supreme Court observed: "it is well accepted that conferral of statutory power on those local authorities must be construed as impliedly authorising everything which could fairly and reasonably be regarded as incidental or consequential to the power itself."

It can be stated that with reference to administrative discretion, that the authority when question ha to take decisions not only on the basis that evidence and is to be also considered the policy and expediency.

DISCRETION AS IN THE INDIAN CONSTITUTION

The Administrative discretion may be conferred by the Constitution itself. We shall see how discretion conferred on various constitutional authorities by the Constitution is reviewed. The Constitution confers discretionary power on the President and Governors under the various provisions. Normally, the exercise of such discretion by the President or Governors was supposed to be controlled through the political process. The President acts on the aid and advice of the council of ministers (Art 74 of Indian Constitution) and the council of ministers is responsible to the House (Art 75(3). The exercise power by the President or governors is, therefore, subject to the political process. Therefore, for long time, courts hesitated to bring them within the purview of judicial review. However, with the weakening of the political checks due to shift in power from Parliament to the government, courts have brought the exercise of such constitutional discretion within the purview of judicial review. Where political checks are not adequate, issues of abuse of such discretion are raised in courts and legal checks have to operate. The provisions conferring such discretion on the President/ governors are:

i. The ordinance making power has been given under articles 123 and 213;
ii. The power to grant pardoning or remission of sentences to persons who convicted of offences by humble courts of law as given under article 72 and 161 of the Constitution of India;

iii. The Power of president to declaration of emergency under article 352 and;
iv. The power of President to impose to impose "President Rule in state" under article 356 of Constitution of India.

COMPARATIVE ANALYSIS OF ADMINISTRATIVE DISCRETION

In England, where Parliament is supreme and can confer any amount of discretion on the administrative authority, the courts have always held that the concept of 'unfettered discretion' is a constitutional blasphemy. Besides requiring that the discretion must be exercise in conformity with the general policy of the Act and for proper purpose, courts insist on its 'reasonable exercise. Thus the judicial control of administrative discretion in England, USA and India converges on the same point despite divergent constitutional structure.

In USA, besides the judicial review of administrative discretion which is available in 'due process clause' and the general grant of constitutional judicial power, the administrative Procedure Act, 1946, in Section 10, provides that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. This entail that if administrative discretion is exercise arbitrarily or capriciously, the courts would intervene. Section 10, also provides for a dangerous exception to the rule of judicial review in cases "…where agency action is by law committed to agency discretion". In USA, judicial activism has entered the area of administrative discretion also and courts not only substitute their discretion to the discretion of administrative authority but sometimes exercise discretion which is vested in an administrative authority.

In France, the administrative courts exercise power of judicial review over administrative action if the administrative authority abuses its discretionary power. The term 'abuse of power' includes in England and arbitrary and capricious exercise of power includes in USA. From the above analysis it becomes clear that though some discretion is necessary to keep the giant wheels of administration moving in this age of an intensive form of government, if the power is misused the arms of the court are long enough to reach it…"

JUDICIAL APPROACH OF ADMINISTRATIVE DISCRETION IN INDIA

Though, the Indian courts have been developed some 'effective parameters' for appropriate exercise of the discretion, the trajectory of judicial evolution or behaviour remains sluggish, diverse, and residual, lacking the American courts activism. Control is exercised at two stages in the judicial control mechanism of administrative direction:

1. Control at the stage of delegation of discretion;
2. Control at the stage of exercise of discretion.

The control of the stage of delegation of discretion: The court exercises control over the delegation of discretionary power to the administration by determining the legitimacy of the statute under which such power is conferred in light of the Indian Constitution's Part III's fundamental rights. As a result, if a law gives any administrative authority broad discretionary powers, it may be considered ultra vires Article 14, Article 19, and other constitutional provisions.

Article 14 vs. Administrative Discretion

*State of West Bengal v. Anwar Ali Sarkar (*AIR 1952 SC 75.*)* - "in this case, in order to speed up the trial for certain offences, Section 5 (1) of the west Bengal special Court Act, 1950 conferred discretion on the State Government to refer any offence for trial by the special Court. Since the procedure before the special court was stringent in comparison with that for normal trail, the respondents asserted its unconstitutionality on the ground that it violates the equality clause in Article 14. The court held the law invalid on the ground that the use of vague expressions like 'speedier trial' confers a wide discretion on the government and can be a basis of unreasonable classification."

State of Punjab v. Khem Chand "…in this case the truck of Sri Khan Chand was requisitioned by the District Magistrate, Rohtak for famine relief work. He challenged the constitutionality of the East Punjab Requisition of Movable Property Act, 1947, under which the action was taken, on the ground that it violates the provisions of Article 14 of the Constitution. The court, upholding the contention held that the Act confers wide discretionary power upon authorities by not laying down the guidance for requisitioning movable property. Even the words "public purpose" are not used. Therefore, arbitrariness and power to discriminate are writ large on the face of the Act and fall within the mischief which Article 14 seeks to prevent. It would be wrong to assume an element of judicial arrogance in the judicial behaviour striking down the statute…"

Article 19 vs. Administrative Discretion:

Six liberties are listed in Article 19 [the freedoms to acquire, keep, and dispose of property (A19 (f)) were removed by the Constitution (Forty-fourth Amendment) Act]. These liberties are not unrestricted, and they are subject to reasonable limitations. The courts have consistently held that giving administrative authorities broad discretionary power to restrict these freedoms is inappropriate.

1. Control at the point where discretion is exercised, i.e. administrative action

In India, the courts have devised a number of formulations to regulate the use of administrative discretion, which can be divided into two categories:

a. That the authority has abused its discretion by not exercising it appropriately;
b. That the authority is judged to have done nothing with its discretion – 'non-exercise'

That the authority has not exercise its discretion properly –'abuse of discretion'.

"…That the authority has not exercised its discretion properly– "abuse of discretion". – This is an all-embracing formulation developed by courts in India to control the exercise of discretion by the administrative authority. When discretionary power is conferred on an administrative authority, it must be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of the power. Improper exercise of discretion includes everything which English courts include in 'unreasonable' exercise of discretion and American courts include in 'arbitrary and capricious' exercise of discretion. Improper exercise of discretion includes such things as 'taking irrelevant considerations into account', 'acting for improper purpose', 'asking wrong questions', 'acting in bad faith', 'neglecting to take into consideration relevant factors', 'acting unreasonably' etc…"

(1) *Mala Fides*- 'Mala fides or bad faith means dishonest intention or corrupt motive'. Even though it may be difficult to determine whether or not the authority has exceeded its powers in a particular case because of the broad terms in which the statute in question may have conferred power on it, the administration action may, nevertheless, be declared bad if the motivation behind the action is not honest. At times, the courts use the phrase "mala fides" in the broad sense of any improper exercise or abuse of power. In *Jaichand v. State of West Bengal*, the Supreme Court observed that mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended."

(2) *Improper purposes*- If a statute grants authority for one purpose, its use for another is not considered a valid exercise of those powers, and the authority may be revoked. The cases of exercise of discretionary power from improper purposes have increased in modern times because conferment of broad discretionary power has become usual tendency. The orders based on improper purpose were quashed first in the cases concerning the exercise of powers of compulsory acquisition in England. So where the power is exercised for a purpose different from that specified in the statute, the court will declare the exercise of the power as ultra vires. Where the land is acquired by Municipal Corporation ostensibly for a public purpose but in fact to enable another body

to acquire it through the medium of corporation for some other purpose, the acquisition order would be quashed by the court. Similarly, where Municipal Corporation refused to approve the construction of buildings with a view to pressurizing the petitioner to provide drainage for the adjoining building, and where the construction scheme of the petitioner does not contravene.

(3) *Irrelevant considerations.* – "A discretionary power must be exercised on relevant and not on irrelevant or extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which it is conferred. If the authority concerned plays attention to, or takes into account wholly irrelevant or extraneous circumstances, events or matters then the administrative action is ultra vires and will be quashed. Thus where an administrative order is issued on formal grounds or considerations which are irrelevant, it will quashed. The exercise of discretionary power should not be influenced by considerations that cannot be lawfully taken into account. The determination of the considerations which are relevant, and those which are irrelevant, is a matter of inference from the general terms of the statute."

The decision of the House of the *Lords in Padfield v. Minister of Agriculture*, "lays down the parameters of judicial control of administrative discretion in England. In this case under the statutory mil-marketing scheme, the prices paid to milk producers in different areas are fixed by the Milk Marketing Board which consists of representatives of the producers. The producers near the area of London complained that though they were in proximity of the London market, yet the price paid did not reflect the higher value of their milk, and requested the minister to refer the matter to the Statutory Committee for Complaints. To direct or not to direct a complaint to the committee was the sole discretion of the minister. The minister in exercise of his unfettered discretion refused to direct the complaint. One of the reasons given by the ministry was that minister would be in a difficult political position if, despite the committee's acceptance of the complaint, the minister should take no action. The House of Lords held that the minister's reasons were unsatisfactory and his decision was unreasonable. The purpose of the Act was that every genuine complaint must be forwarded to the committee and anything contrary to this would frustrate that purpose" (1968 SC 997).

In *Ram Manohar Lohia v. Bihar (*AIR 1966 SC 740) "the petitioner was detained under the Defence of India Rules, 1962 to prevent him from acting in a manner prejudicial to the maintenance of "law and order", whereas the rules permitted detention to prevent subversion of "public order". The court struck down the order as, in its opinion, the two concepts were not the same, "law order" being wider than "public order".

(1) Unreasonableness- "At times the statute shall be require the authority to act reasonably. The courts have also stated that the authority should consider the question fairly and reasonably before taking action. The term "unreasonable" means more than one thing. It may embody a host of grounds mentioned already, as that the authority has acted on irrelevant or extraneous consideration or for an improper purpose, or mala fide, etc. Viewed thus, unreasonableness does not furnish an independent ground of judicial control of administrative powers apart from the grounds already mentioned. The term may include even those cases where the authority has acted according to law but in wrong manner and where it has acted according to law and in a right manner but on wrong grounds. Sometimes statutes itself provides for reasonable exercise of the discretionary power. Under such conditions the authority concerned had to act reasonably. And, the court will interfere with the order where it has not been passed "Unreasonableness" may also mean that even though the authority has acted according to law in the sense that it has not acted on irrelevant grounds or exercised power for an improper purpose," yet it has given more weight to some factors than they deserved as compared with other factors. Interference on this basis necessitates delving into the relative importance of many considerations and their balancing, thus substituting the judiciary's discretion for the executive's. Normally, courts do not have such broad powers to intervene in the exercise of administrative discretion.

That the authority has deemed not to have the exercise its discretion at all- "non-application of mind".

When an authority is given discretion, it is expected to exercise it by applying its mind to the facts of the case at hand; thus, when the authority abdicates its power, for example, by acting on dictation or sub-delegating it, or by acting mechanically without due care, or by placing restrictions on the exercise of its power, the action is bad. In such a circumstance, or failing to evaluate the case before it.

GROUNDS FOR ATTRIBUTING TO EXERCISE THE ADMINISTRATIVE DISCRETION

The exercise of 'administrative discretion' even, if given by a valid statute or by the Constitution may be challenged on the following grounds (Sathe: 2010):

i. It has been exercised beyond the scope of the power given by the law, so that it is to be ultra vires under the law ;
ii. It has been exercised by the authority other than the one in whom it had vested;
iii. It could be exercised without 'application of mind' or on irrelevant considerations or without taking into account the significant considerations ;
iv. It have been exercised arbitrarily or unreasonably or disproportionately ;

v. When, there has been mala fide intent ; or
vi. When, it have been resulted in belying the 'legitimate expectations' raised by previous administrative policy or practice.

CONCLUDING REMARKS

It can be concluded that, it has long been established that governmental authorities 'discretionary powers' must be backed up by policy, standards, procedural safeguards, or guidelines, or the exercise of discretion and delegation may be annulled by the courts. The courts have been also insisted that while exercise of discretion as the authority must be also framed rules for proper exercising the concept of the discretion. With the area of 'administrative discretion' the courts had tried to fly highest flag of the 'Rule of Law' that aims to progressive diminution of arbitrariness while the exercise of public power.

Finally, the term rule of law in contemporary scenario in welfare state stable balance need to be achieved between state administrative discretion to deliberate upon the executive and fundamental rights and freedoms to people of the nation. Only then can it be imagined that India would develop into the ideal democratic republic that the Indian Constitution envisions.

REFERENCES

Freud, Ernst (1928), "Administrative Power over Person Property, Franklin Printing House, London

Jain, M.P. (1958-59): "Administrative Discretion and Fundamental Rights", Journal of Indian Law Institute, Vol. I pp. 247-8.

Jain. M.P & Jain. S.N (2007), Principles of Administrative Law, (Nagpur: Wadhwa, 6th Ed.

Massey. I.P (2008), Administrative Law, Eastern Book Company, 7th Ed.

Sathe, S.P (2010), Administrative Law, 7th edn., Fifth Reprint, Lexix Nexis, London, Delhi.

ENDNOTES

1. Justice Douglasin U.S. v. Wunderlich, 243 US 98.
2. (1942) AC 206.
3. Retrieved from https://blog.ipleaders.in/reasonable-restrictions-article-19-administrative-discretion/ last visited on June 17, 2023
4. Nakkun Ali v. Jayarate (1951) AC 66.
5. (1974) 1 SCC 534
6. Khargram Panchayat Samiti vs. West Bengal (1987) 3 SCC 82, 87.
7. AIR 1974 SC 543. Also see Jain (1958-59) pp. 247-8.

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

TRIAL BY MEDIA: A QUESTION ON CONSTITUTIONAL SUPREMACY IN INDIA

Bishwa Kallyan Dash* and Swati Mohapatra**

Abstract

In recent years, the phenomenon of "Trial by Media" in India has emerged as a pressing concern, raising profound impact on judicial administration and legal questions that challenge the delicate balance between the right to free speech and the right to a fair trial. The term "Trial by Media" refers to the prejudicial impact of media coverage on ongoing legal proceedings, often resulting in the public forming opinions about the guilt or innocence of the accused before the courts can render a verdict. Some of the key legal issues involves include the potential subversion of the presumption of innocence, the risk of witness contamination, and the challenges posed to the impartiality of the judiciary. Addressing the legal complexities of trial by media in India necessitates a comprehensive re-evaluation of existing legal frameworks, along with a nuanced understanding of the delicate equilibrium between the media's right to inform and the individual's right to a fair trial. This requires an examination of the landmark cases that have grappled with the ethical and legal ramifications of media trials, shaping the contours of jurisprudence in India. Therefore, this paper is an attempt at the multifaceted dimensions of this issue, shedding light on the legal intricacies surrounding media trials within the Indian legal framework. This also would try to scrutinize the constitutional implications of such trials, delving into the clash between the media's right to freedom of expression and an individual's right to a fair and impartial trial.

Keywords: Trial by Media, Freedom of expression, reasonable restriction etc.

* Dr. Bishwa Kallyan Dash, Assistant Professor at School of Law Forensic Justice & Policy Studies; National Forensic Sciences University- Gandhinagar, E-mail: bishwakdash@gmail.com

** Ms. Swati Mohapatra, Assistant Professor at School of Law, KIIT University- Bhubaneswar, E-mail: swati.mohapatra@kls.ac.in.

INTRODUCTION

In the complex tapestry of India's legal landscape, the phenomenon of "*Media Trial*" has emerged as a potent force, shaping public discourse and influencing perceptions of justice. The term encapsulates the pervasive influence of the media in disseminating information, often with far-reaching consequences for individuals entangled in legal proceedings. As a dynamic and evolving aspect of the media's role in society, media trials in India raise profound questions about the delicate balance between the right to a fair trial and the right to freedom of expression. Though, in the Indian context the Media trial is a newer phenomenon, yet exploring its impact on the judicial process, public opinion, and the broader implications for the administration of justice in the world's largest democracy in of high legal importance. From high-profile criminal cases to issues of national significance, the lens of the media plays a pivotal role in shaping narratives, creating a nuanced intersection between the fourth estate and the pillars of democracy. As we navigate this intricate terrain, it becomes imperative to dissect the ethical, legal, and societal dimensions of media trials, examining the challenges they pose to the foundational principles of justice and the safeguards necessary to ensure a fair and impartial legal system. Over and above, the rise of contemporary technology has led to the media spotlighting crimes, occasionally driven by the hidden agenda of garnering popularity among viewers or, alternatively, with the intention of disseminating truthful information about misconduct. The notion that media restraint exists in modern society is merely illusory, and it cannot be argued that this concept contributes in any way to the administration of justice.

In India, Freedom of Press though not guaranteed as a separate right is nevertheless taken to be an intricate part of Freedom of expression as guaranteed by Art.19(1)(a) of the Constitution[1]. What is popularly known as the Freedom of Press is in essence the Freedom of expression of every citizen (Basu: 2002). And most *unfortunately* this right also includes the right of citizen or press to lay down the sentiments he/she pleases before the public[2]. It wouldn't be called unfortunate if a citizen can lay down his/her sentiments before public as those indicate his choices, his freedom. Rather it would be termed unfortunate because by virtue of this right the Media can also lay down its *opinion or sentiment before public*, and not just information. Media Being considered the Fourth estate or the Fourth Pillar of Democracy ought to play the role of an unbiased informant. Its role ought to be '*to give information and not influence*'. However when opinions come into picture so does bias of the media therefore unfairly prejudicing the mindset of gullible citizens. While the media may exercise freedom of expression this right cannot threaten another person's right to be presumed innocent until proven otherwise. In most cases media reports are filled with bias and without any appreciable evidence they come to the conclusion regarding the guilt of a person. It is the duty of the court to determine the guilt of a person and the courts do so very efficiently however the media's requirement of 'standard of proof is very less'.

If media exercises an unrestricted or rather unregulated freedom in publishing information about a criminal case and prejudices the mind of the public and those who are to adjudicate on the guilt of the accused and if it projects a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused (Law Commission of India: 2006). If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the "administration of justice", calling for proceedings for contempt of court against the media(. Due to use of such tactics by media other rights such as privacy rights of individuals may also be hampered to a great extent. Journalists are also significant contributors to the further trial by media. The Delhi High Court in *Mother Dairy Foods & Processing Ltd v. Zee Telefilms* stated that while journalists are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of "*accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people*" (AIR 2005 Delhi 195). The ramifications if such acts by the media results in the gross violation of the fundamental rights of not only the victims but also the suspects and suppresses the morale of law enforcement agencies. The suspects are judged guilty by the media during the pendency of the case and this goes against the very premise of our criminal jurisprudence of "accused being innocent until proven guilty". Unwarranted intrusion in the free trial process is not only a violation of fundamental rights of the accused by the media but it also transgresses the Contempt of Court Act, 1971.

The primary aspect of contempt of court law is that, the media must be cautious in matters that involves the publication of news and comments concerning cases that are "pending" before a court. This caution is necessary to prevent a scenario of a "trial by a newspaper" or "trial by publicity," which could overshadow the court's role in administering justice (Basu: op cit). The clash between the principles of a free press and the right to a fair trial has resulted in a complex dilemma, given the substantial public interest in both aspects. The necessity for press freedom is grounded in its role in providing the public with information and perspectives related to matters of public interest, which the public has a legitimate right to be aware of in a modern democratic state. In the case of *A.G. v. Times Newspaper*[3], the court emphasized that informed public participation in decisions affecting their lives requires access to relevant facts and arguments, often facilitated by investigative journalism through the press. This press freedom is derived from the public's right in a democracy to stay informed about issues that impact them (Seerwal: 1996).

This type of journalism operates on the premise that without the active involvement of the media, some of the most egregious crimes might remain undisclosed. The press, by discovering and bringing to light crucial facts, plays a significant role in ensuring that criminals are brought to justice. However, the right of the public to be informed and the press's freedom to disseminate information are confined to matters of public interest. It is noteworthy that the term "public interest" lacks a fixed definition and may evolve with the expansion of media laws and the proliferation of issues affecting people's lives[4].

Some authors like Craig Burgess (2007) argue vehemently that '*even publishing a suspect's name before charges are brought threatens a fair trial and therefore freedom of speech need to be curtailed in order to administer justice*'. And one does find merit in his arguments if we look at the case of Richard Jewell, a police officer who discovered a bomb in the Centennial Olympic Park in 1996 and helped in saving thousands of lives. Initially he was hailed as a hero however later the Atlanta Journal Constitution on July 30, 1996 revealed that he was treated as a suspect and this turned around his entire world. For the next few weeks he was made a scapegoat by the media and the media actually was so convinced of his guilt that it succeeded in convincing the world of his guilt, until the real bomber was discovered (Myers: 2005). This case shows us how the media can turn things 'ugly', the level of pressure (even prejudice) on the investigating agency in such cases is so high and his right to be treated innocent is definitely infringed in such cases (Freeman: 1996). Shouldn't the *presumption of innocence* principle be followed strictly even by the media, and is the absence to do the same not a case of violation of that person's right? Study shows that jurors exposed to negative pre-trial publicity are significantly more likely to judge a defendant guilty compared to jurors exposed to no negative pre-trial publicity (Stabley et al: 1999).

TRIAL BY MEDIA AND CRIMINAL JUSTICE SYSTEM

The Criminal Justice system is based upon the 'presumption of innocence' principle. However it is quite possible that a judge might be influenced by the publicity attached to a case. But this cannot in any way be the reason for diluting the emphasis on the essentials of a fair trial[5]. A trial by media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice. *A Judge is to guard himself against such pressure*[6].

The right to a fair trial in Australia is not only embedded in the common law, but is also considered a fundamental human right.[7] The law of contempt of court aims to protect the public interest in the proper administration of justice (Walker: 2000). Sub-judice contempt prohibits the publication of prejudicial information about a case which is currently being heard or is pending hearing in a court.[8] To be considered 'prejudicial' the publication must have a 'real and definite tendency', as a 'matter of practical reality' to 'preclude or prejudice the fair and effective administration of justice in the relevant trial.' The subjudice rule assumes that 'if jurors and witnesses are exposed to media material about a trial that is not part of the evidence presented, tested and argued in court, they may be hindered from reaching an impartial and proper verdict'[9]. This assumption stems from the premise that the media has a very powerful.

CASE STUDY

The various judgments rendered by the Supreme Court of India should be given paramount importance for gaining a comprehensive understanding of the legal framework surrounding media trials in the country. These judgments serve as legal precedents that elucidate the nuanced principles, doctrines, and constitutional considerations that shape the landscape of media trials. Through a careful analysis of these judgments, legal scholars, practitioners, and the broader public can glean insights into the delicate balance that the judiciary aims to maintain between the constitutionally guaranteed freedom of the press and an individual's right to a fair trial. Supreme Court decisions not only sheds light in interpreting the existing laws but also contribute to the evolving jurisprudence that addresses the ethical and legal challenges posed by media trials. Consequently, the study of Supreme Court judgments becomes indispensable in navigating the intricate legal landscape surrounding media trials in India, offering valuable guidance for legal practitioners, scholars, and policymakers seeking to uphold the principles of justice and press freedom.

Top of Form

1. **Siddharth Vashisht Manu Sharma v. State (2006):** Manu Sharma, accused in the high-profile Jessica Lal murder case, faced intense media scrutiny. The media's role in influencing public opinion was a critical aspect of the trial. The case underscored the challenges of balancing media coverage with the right to a fair trial, raising questions about potential jury bias and the need for ethical reporting.
2. **Aarushi Talwar Double Murder Case (2013):** The media extensively covered the trial of the parents accused of murdering their daughter Aarushi and domestic help Hemraj. The case highlighted the media's potential to sensationalize, impacting the public perception of the accused. The legal process faced challenges in maintaining a fair trial amidst media speculation.
3. **Nirbhaya Gang Rape Case (2012):** The brutal gang rape and murder case sparked nationwide outrage, with media coverage playing a pivotal role in

bringing attention to the issue. While the media served as a catalyst for social change, there were concerns about influencing the trial. The case raised debates on responsible reporting during sensitive legal proceedings.

4. **Salman Khan Hit-and-Run Case (2015):** The media extensively covered the trial of Bollywood actor Salman Khan, accused of a hit-and-run incident. The case highlighted the intersection of celebrity trials and media sensationalism, raising questions about the potential impact on the court's impartiality.
5. **Sohrabuddin Sheikh Encounter Case (2013):** The media covered the trial of police officers accused in the fake encounter killing of Sohrabuddin Sheikh. The case underscored the role of the media in exposing alleged extrajudicial actions, but concerns were raised about prejudicial reporting influencing the legal proceedings.
6. **INX Media Case (P Chidambaram vs Central Bureau Of Investigation) (2019):** The media extensively covered the legal proceedings involving prominent figures accused of financial irregularities in the INX Media case. The case raised issues of balancing the right to fair trial with the media's responsibility to inform, especially in matters of financial impropriety involving public figures.
7. **Tarun Tejpal Sexual Assault Case (2013):** The media reported on the trial of Tarun Tejpal, a prominent journalist accused of sexual assault. The case highlighted the challenges of media trials in cases of sexual offenses, emphasizing the delicate balance between reporting on such matters and ensuring a fair legal process.

These cases collectively underscore the nuanced relationship between media coverage and the administration of justice in India, raising crucial questions about the ethical boundaries of reporting during legal proceedings. Top of Form

The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view based upon conjectures and hypothesis and not on the legal evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. Only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding.

But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.[10]

CONCLUSION

Much ink has been spilled on both sides of the Atlantic about the values served by an unrestrained exercise of freedom of the press. However, critics have pointed out that, in the realities of modern society, the dissemination of the news is part of an industrial process, which is commonly driven by business concerns and which should be regulated like any other commercial activity. The attitudes toward media freedom to cover and report judicial proceedings are similarly ambivalent. On the one hand, it is celebrated as a "handmaiden of effective judicial administration... [since the press] does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." On the other, it is increasingly depicted as a profitable playground of a commercially motivated media industry that "capitalize[s] on the public's apparently insatiable appetite for all things sensational". These two perspectives are not necessarily incompatible. It is the task of the law to prevent a socially valuable activity-such as informing the public about the workings of the justice process-from being transformed by market pressures into a "power without responsibility.' 1 78 The techniques available vary widely in intensity and character, and it should be clear that no "optimal" mix of preventive, repressive, or neutralizing measures can be singled out as a conceptual exercise."' Experience teaches us that solutions to legal problems are less the results of rational planning than the byproducts of a complex web of historical, cultural, and social factors. This article has contrasted three models for the regulation of court-related speech: the American neutralizing approach, the English protective model, and the Continental preventive stance. Different from the Anglo American approach and consistent with the non-adversarial model of criminal procedure, civil-law systems seem to be *relatively* less concerned with the impact of media freedom to report and cover judicial proceedings on trial fairness. By contrast, civil-law systems pay greater attention to safeguard the dignitarian and reputational interests of trial participants. Most of the techniques adopted and described here-general penal sanctions, private-law remedies, professional rules of conduct-are, at their core, aimed at preventing an uncontrolled imposition of ancillary reputational sanctions by the court of public opinion. The recent trend toward the extension of the presumption of innocence to the "horizontal" relationships between the defendant and the media clearly mirrors such an attitude. It might be argued that this model reflects a strong individualistic position and undervalues the watchdog function of the press, making a transatlantic dialogue impossible. But one should always be skeptical of absolute generalizations about legal systems. Model-building in comparative law is always a study of *relative* differences.' To assume that the American model is not concerned with privacy and dignity while the Continental approach always sacrifices free press in the name of a suspect's personality right would be nonsensical, though European systems are more inclined than the United States to accept interference with freedom of expression aimed at protecting the fairness of trials (English law) or dignitarian interests (Continental law), or both. As India grapples with the complexities of media trials, there is a growing recognition of the need for guidelines that ensure responsible journalism. The legal trend suggests a heightened awareness of the potential ramifications of media influence on the administration of justice. Striking a balance that upholds the principles of a free press while safeguarding the right to a fair trial remains a critical challenge, requiring ongoing dialogue between the legal system, media entities, and society at large. The future trajectory will likely involve a more robust legal framework that addresses emerging challenges in the ever-evolving landscape of media and its impact on the dispensation of justice in India. Therefore, the following may be a possible matters of solution that the state must look at i.e. Clear Ethical Guidelines, Prevent Prejudicial Reporting, Media Literacy Programs, Training for Legal Correspondents, Stricter Enforcement of Contempt Laws, Media Self-Regulation, Public Information Platforms, Balanced Coverage Requirements, Periodic Review of Media Laws, Collaboration between Legal and Media Fraternity.

REFERENCES

Basu, Durga Das (2002), Law of the Press, Lexix Nexis, Butterworth, 4th Edition

Burgess, Craig. (2007). Can 'Dr Death' receive a fair trial?. QUT Law Review. 7. 10.5204/qutlr.v7i1.151.

Freeman, Scott (2005) 'Presumed Guilty', Atlanta Magazine, December 1996

Law Commission of India (2006), 200th Report on Trial by Media: Free Speech and Fair Trial under Code of Criminal Procedure, 1973, Law Commission, New Delhi, August.

Myers, Thomas J (2005). From Hero To Scapegoat: The Myth Of The Scapegoat In Newspaper Coverage Of Richard Jewell As Bombing Suspect – A Textual Analysis, Miami University thesis,2005.

Seerwal, H M (1996), Constitutional Law of India, Universal Law Publishing Co Pvt Ltd (New Delhi, 4th ed, Vol. 3, 1996).

Steblay, N Mehrkens, Besirevic, J. Fulero, S M and B Jimenez-Lorente, B. (1999), 'The Effects of Pre-trial Publicity on Juror Verdicts: A Meta-Analytic Review' (1999) 23(2) *Law and Human Behavior,* 219.

Walker, Sally (2000). Media Law: Commentary , and Materials, LBC Case Books, Delhi at 528.

ENDNOTES

1 See Express Newspapers v. Union of India 1958 SC 578(614).

2 (1765) IV B1 Com 152.

3 (1973) 3 All ER 54 (77) HL

4 Maneka Gandhi v Union of India 1978 AIR 597, 1978 SCR (2) 621.

5 Anukul Chandra Pradhan v. Union of India, 1996(6) SCC 354.

6 State of Maharashtra v. Rajendra Jawanmal Gandhi : 1997 (8) SCC 386.

7 The right to a fair trial was deemed to be embedded within the common law in R v Macfarlane: Ex parte 0'Flanagan & O'Kelly (1923) 32 CLR 518 at 541-542 (Isaacs J). The High Court recently discerned an implied constitutional right of fair trial within the Commonwealth Constitution, at least in relation to Federal offences. See Dietrich v R (1992) 177 CLR 292, 326 (Deane J), 362-363 (Gaudron J). The right to a fair trial is said to be a fundamental human right, Mason P, above n4 at 688. See also Universal Declaration of Human Rights, Art 10; International Covenant on Civil and Political Rights, Art 14.

8 Janes v Robinson (1963) 109 CLR 593; Civil Aviation Authority, v Australian Broadcasting Corp(1995) 39 NSWLR 540.

9 Felicity Robinson 'No, No! Sentence First - Verdict Afterwards': Freedom Of The Press And Contempt By publication In Attorney-General for The State Of New South Wales V X. 23 Sydney L. Rev. 261 2001.

10 Mohammed Ajmal Mohammad Amir Kasab V .State of Maharashtra AIR2012SC3565.

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

GENDER CONCERN IN APPOINTMENT OF JUDGES IN SUPERIOR JUDICIARY: A CASE OF PATNA HIGH COURT

Trapti Agrawal* and Narendra Bahadur Singh**

Abstract

Diversity is an inherent characteristic of any democratic nation. In a democratic nation like India, the judiciary does not reflect the country's diversity. In India, the number of women judges in the Supreme Court and the State High Courts is negligible compared to the number of male judges. The main reason is that neither the government nor the judiciary is paying any special attention to this so that the number of women in the court can be increased. Women judges and lawyers face structural barriers such as gender stereotypes, discrimination, harassment, and inadequate institutional and structural support. Through critical examination of various feminist perspectives, we expose the systemic and implicit biases that lead to a disproportionately low number of female judges. In this article, an attempt has been made by the authors to tell what the total number of women is in the higher judiciary in India till now, especially in the State of Bihar, and how the number of women in the judiciary can be increased so that the ratio of women can increase. They should be equal to men. The authors have also tried to show how justice is affected due to insufficient women judges in the higher judiciary.

Keywords: Gender Diversity, Gender Stereotypes, Judicial Appointments, Women Judges, Equality

* Trapti Aggarwal, Research Scholar, School of Law, Galgotias University, Greater Noida, U.P., E-mail: traptiaggarwal1986@gmail.com; Mob.: +91-9958646902.

** Prof. (Dr.) Narendra Bahadur Singh, School of Law, Galgotias University, Greater Noida, U.P., E-mail: narendra.bahadur@galgotiasuniversity.edu.in; Mob.: 9838401857.

INTRODUCTION

Indian Constitution provides equality before the law and equal protection of laws. The Constitution prohibits discrimination on the basis of religion, race, caste, sex, etc. Gender justice is a basic principle of the Constitution.[1] It prohibits bias.[2] The constitution protects from formal inequality. But informal inequality is going on. Hon'ble Justice Indira Banerjee said that equality of women's status is more in books than in actual practice.[3] She emphasized converting dreams into reality.

The Madhya Pradesh High Court in *Vikram* v. *State of M.P.*[4] ordered the accused of sexual harassment to tie 'Rakhi' in the hand of the victim. On this condition, the Court released the accused on bail. Against this judgment, Madhya Pradesh went to the Supreme Court. During the hearing of the appeal, Attorney General Shri K.K. Venugopal raised the issue of gender sensitization and representation of women in the higher judiciary on December 02, 2020. He said that out of 34 judges, there were only two women judges in the Supreme Court. He further said that out of a total 1079 sanctioned posts in High Courts, only 78 women judges were working in various high courts.[5] The Supreme Court's Collegium should take the initiative for this. Former Chief Justice of India N.V. Ramana said that women should demand 50% reservation as a matter of right rather than as a charity.[6]

Generally, additional judges are appointed as a permanent judge. But Justice Pushpa Virendra Ganediwala was not appointed as a permanent judge. She was an Additional Judge in the Bombay High Court. She decided on a 'skin-to-skin touch' judgment on January 19, 2021.[7] The Supreme Court Collegium approved his name on January 20, 2021.[8] Later on, this judgment was vehemently criticized on the ground of ignorance of gender sensitization. The Supreme Court overruled this judgment on November 18, 2021.[9] The Supreme Court withdrew its recommendation for her name as a permanent judge, considering gender sensitization. She resigned one day before completing her tenure, i.e. February 12, 2022.[10]

Section 377 has been partially declared unconstitutional.[11] Even the mindset of the public and government had not changed for LGBT communities. Controversy regarding the appointment of Saurabh Kirpal is another aspect of gender sensitization. Collegium of the Supreme Court recommended the name of Saurabh Kirpal, who is openly gay person, on November 11, 2021[12]. Central Government raised objections. The Collegium clarified all these objections and again recommended for appointment on January 18, 2023.[13] His appointment is still pending. Single transgender had neither been in the Supreme Court nor the High Court until now.

The Patna High Court completed its 100 years. The researcher was highly interested to know the status of women judges in this reputed High Court. So, she filed RTI to the High Court for supply of information under the RTI Act, 2005 and received information. As per information received from RTI,[14] only eight women had been appointed since the establishment of the Patna High Court.[15] This shows a pathetic representation of women in this High Court.

REPRESENTATION OF WOMEN IN HIGHER JUDICIARY: POST-INDEPENDENCE

Incumbent Minister of Law and Justice Shri Kiren Rijiju replied to the unstarred question of Shri V.K. Sreekandan in Lok Sabha on April 01, 2022.[16] He said that there was no reservation for women in the appointment of judges in the Indian Constitution. He further said that Government could act only on the recommendation of the Collegium. The Government had requested that the Collegium consider diversity at the time of recommendation for appointing judges. He informed the Lok Sabha that the Collegium recommended 37 names of women. Out of these, 27 women judges were appointed, and the remaining 12 cases were under process.

Even so, there exists a lack of empathy with regard to the differential societal burden on women owing to conventional understanding of their roles in marriage and motherhood, which, in turn, primarily contributes to their insufficient representation in the Indian judiciary.[17]

SUPREME COURT

The Indian Judiciary has a proud and long history among the country's most prestigious institutions. In independent India, the Supreme Court was established on 28 January 1950. Since then, the Supreme Court has instilled a sense of trust and hope in the people for its work. Unfortunately, from 1950 to 1989, no woman was appointed as a judge in the Supreme Court of India.

In the 73-year history of the Supreme Court of India, there have been 270 judges, of which only 11 have been women judges. There was the highest representation of women in the Supreme Court in the history of the Supreme Court from August 31, 2021 to September 23, 2022. During this period, four women judges[18] out of 34 judges were working in the Supreme Court. Three women out of 34 judges are working on October 6, 2023.[19] Till now, no woman Chief Justice has been appointed to the Supreme Court. If seniority order is considered, Justice B.V. Nagarathna will be the first Chief Justice of India, whose tenure as Chief Justice will be only 36 days.[20] It is very unfortunate that any woman does not belong to the suppressed class.[21]

Figure 1 shows that from 1950 to 2023, the number of women judges in the Supreme Court of India was only 4%, while 96% male judges were appointed during this period. Information is available on the official website of the Supreme Court.

Eleven women judges appointed in the Supreme Court are the following-

Sr. No.	*Name of women judges*	*Date of Appointment*
1	Justice Fatima Bibi	October 06, 1989
2	Justice Sujata V Manohar	November 08, 1994
3	Justice Ruma Pal	January 28, 2000
4	Justice Gyan Sudha Mishra	April 30, 2010
5	Justice Ranjana Prakash Desai	September 13, 2011
6	Justice R. Banumathi	August 13, 2014
7	Justice Indu Malhotra	April 27, 2018
8	Justice Indira Banerjee	August 07, 2018
9	Justice Hima Kohli	August 31, 2021
10	Justice B.V. Nagarathna	August 31, 2021
11	Justice Bela M. Trivedi	August 31, 2021

The above Figure 2 depicts the number of women judges in the Supreme Court every ten years. For the first ten years (1950-60), the number of women judges in the Supreme Court was zero. It continued till 1980. After that, from (1980-90), the number of women judges in the Supreme Court increased to one; after that, from (1990-2000), the number of women judges increased to two and from (2001-2010), the number of women judges was one. From 2011 to 2020, its number was four. Three women judges were appointed in 2021. It can be said that women have been victims of inequality over the years as judges in the higher judiciary. But Collegium and Government is trying to rectify this. Out of eleven, six women judges were appointed during Modi's regime.

HIGH COURT

There are 25 High Courts in India, functioning in different states. The total sanctioned strength in the High Courts of all the States of India is 1,114, but the total number of serving Additional & permanent judges are 766. Among them, 104 women judges are working. Out of one hundred four, one woman judge, i.e. Hon'ble Mrs Justice Sunita Agarwal, is chief justice of the Gujarat High Court. In this way, nearly 14% women judges are working on October 08, 2023. All data have been collected from the official website of the Department of Justice.[22]

Figure number 3 above shows the number of women judges serving in the High Court in different States of India. The maximum number of working women judges is in the Punjab & Haryana High Court and Madras High Court, which are 12. At the same time, the Bombay High Court is in second place, where the number of working women judges is 10. On the other hand, there are many High Courts where number of women judges is zero, for example, Patna High Court, Uttarakhand High Court, Tripura High Court, Meghalaya High Court and Manipur High Court.

PATNA HIGH COURT

The Patna High Court is the highest court of Bihar. The proclamation for establishment was done in 1912 and started functioning on February 03, 1916 with one Chief Justice and six other judges.[23] This Court is located in Patna, the administrative capital of Bihar, India. Orissa was created as a separate province in 1937. But the Patna High Court exercised its jurisdiction till the establishment of Orissa High Court i.e. till July 26, 1948.

On 15 November 2000, the erstwhile state of Bihar was divided, and a new state came into existence named Jharkhand. The total number of judges in the High Court of this newly created state of Jharkhand was 13.

The approved judge strength in the Patna High Court is 53. Out of 53, 40 posts are for permanent judge, and 13 posts are for Additional Judge. Currently, 32 permanent judges are working. [24] It is ironic that the Patna High Court completed more than 100 years. We are celebrating Amrit Mahotsav. We are talking about equality and equal opportunity. But the participation of women judges in the Patna High Court is pathetic. The RTI filed by the researcher discloses that only eight women had been appointed since the establishment of the Patna High Court.[25] Till 43 years of independence passed, no woman became a judge in Patna High Court. Justice Smt. Indu Prabha Singh was appointed as the first woman judge in Patna High Court on July 10, 1990. Since 1990, only eight women judges have been appointed in the Patna High Court. No woman has yet taken charge or been appointed as the Chief Justice of Patna High Court.

These eight women are –

S. No.	*Name of women judges*	*Period*
1	Hon'ble Justice Smt. Indu Prabha Singh	1990 - 2007
2	Hon'ble Justice Smt. Gyan Sudha Mishra	1994 – 2014
3	Hon'ble Justice Smt. Mridula Mishra	2004 – 2011
4	Hon'ble Justice Smt.Rekha Kumari	2005 – 2008
5	Hon'ble Justice Smt. Sheema Ali Khan	2006 – 2013
6	Hon'ble Justice Smt. Anjana Prakash	2009 – 2016
7	Hon'ble Justice Smt. Anjana Mishra	2014 – 2020
8	Hon'ble Justice Smt. Nilu Agrawal	2015 - 2019

The total number of judges appointed in Patna High Court has been 327, of which the number of women is eight. This can be understood through the chart given below.

From the above figure four, it can be understood that the total number of judges appointed in Patna High Court is 327, out of which 319 are male and eight female judges. Approximately two % of women judges have been appointed in the Patna High Court. Looking at this, it can be inferred that gender disparity is being done to women in the judiciary, the compensation for which is irreparable. At present, there is no woman judge present in the Patna High Court.

DEMAND FOR WOMEN'S RESERVATION

Many efforts have been made to engage women in matters of women. Women police officers will register FIR if sexual offences had been committed against women.[26] Women judges will try rape offences.[27] Many States provide reservations to women in lower judiciary[28] and public prosecution exams. It is presumed that one female can understand the problem of other women properly. Currently, 15% & 13% women are members of Lok Sabha and Rajya Sabha currently. It was considered that women must be given more representation. So, the Parliament enacted the Constitution (One Hundred and Sixth Amendment) Act, 2023 to give reservations for women in Lok Sabha and Vidhan Sabha.[29] Attorney General Shri K.K. Venugopal and former Chief Justice of India N.V. Ramana[30] also demanded that reservations for women in higher judiciary must also be given up to 50%. The time has come to give reservations to women in higher judiciary also.

The Standing Committee, in its 84th Report, recommended raising the strength of women in the higher judiciary up to 50%.[31] The Standing Committee, in its 96th Report, recommended that suitable measures should be taken so that more and more women judges in Higher Judiciary can be included.[32] This committee reiterated the implementation of the 84th Report of the Standing Committee.

Mostly, judges in higher judiciary come from upper castes. Near 79% judges in all high courts from 2018 to 2022 came from the upper elite caste.[33] Then, Minister of Law and Justice Shri Kiren Rijiju demanded representation of SC, ST and OBC from the Collegium 2022.[34] So, reservation for women of SC, ST and OBC communities must be given within the reservation. It means there must be provision for reservation within the reservation.

Indian Constitution does not provide reservation for women in Higher Judiciary. But this is not a good defence. Reservations for OBC and EWS were provided by the Constitutional Amendment in many fields. There is a need for a constitutional amendment to provide reservation in higher judiciary.

DEARTH OF WOMEN JUDGES AFFECTS JUSTICE

The status of women in the higher judiciary in India has improved in recent years, but there is still room for improvement. In recent, of the 766 judges across all high courts, only 104 (14%) are women. Due to the lack of women judges in the Indian High Court, women's right to equality is being violated, and the right to hear crimes against women by women is also being violated, which we can understand as follows -

BALANCED AND SYMPATHETIC APPROACH

Improving women's representation in the judiciary can go a long way towards a more balanced and empathetic approach in cases related to sexual violence. The issue of gender sensitivity has been raised several times, especially in cases where male judges failed to show empathy towards female victims. All males comprising of Hon'ble Justice Pinaki Chandra Ghosh & Hon'ble Justice Amitava Roy in *Raja v. State of Karnataka*[35] impliedly attributed the victim being accustomed to sexual intercourse. The accused were acquitted. Having a similar factual scenario, the division bench comprising Justice Indira Banerjee and Justice R. Banumathi in *State* v. *Pankaj Chaudhary*[36] held that a woman of easy virtue has the right to refuse sexual intercourse and being habituated to sexual intercourse cannot infer victim as of loose moral character. The Hon'ble Mrs. Justice Shircy V. in *Rahul P.R. and Anr.* v. *State of Kerala & Anr.*[37] rejected the petition and wrote solid reasons for non-quashing of proceeding on the ground of compromise in rape cases.

FAIRNESS AND EQUALITY

Women's representation in the judiciary helps ensure that the perspectives and experiences of all members of society are considered when making decisions, which can lead to more fair and just outcomes.

Controversy regarding the alleged sexual harassment case against former chief justice Ranjan Gogoi raised eyebrow. Many jurists criticized the manner of closing the case against him. Justice Patnaik was appointed in April, 2019 to conduct an inquiry of this case. Gogoi accepted that he committed wrong in sitting bench during the hearing of the infamous case against him with Justice Arun Misra and Justice Khanna on April 20, 2019. He said that he did not sit further.[38] It was very unfortunate that there was a violation of the principle of natural justice, i.e., no one can be judge of his own case. CJI had the power to form bench. Had women CJI been there, the decision would have been different.

Full Bench comprising of all three male judges, i.e. Justice S.K. Kaul, Justice A.S. Bopanna and Justice V. Ramasubramanian, closed suo motu proceeding in *In re, Matter of Great Public Importance Touching upon the Independence of Judiciary*,[39] citing A.S. Patnaik Committee's Inquiry Report. Justice Kaul said that there was a likelihood of hatching a conspiracy, and there was no possibility of recovering electronic evidence after two years. The allegation of sexual harassment by an employee against CJI was dismissed by all-male judges. Justice Chelameswar criticized this and said that no one is above the law. Justice Indira Banerjee was part of the Inquiry Committee. She said in an interview after her retirement that she did not inquire whether harassment had been committed or not. She inquired whether the allegation was sufficient for removal from the post of CJI.[40] If a woman judge had decided this case, the judgment would have been different.

GENDER BIAS

Women in the judiciary may face unconscious bias and discrimination from colleagues, clients, and other legal community members. This can make it difficult for them to be taken seriously and may hinder their progress in their career. Gender bias is the main reason for the lack of representation of women in the judiciary.[41] 13 women judges out of 19 judges accepted that gender bias is part of the appointment process.[42]

Male judges of the Supreme Court played a vital role in the development of the rights of women. But some judgments cannot be ignored. The decision of bench consisting of two male judges in the *Mathura Rape Case*[43] cannot be ignored. There was a total matter of gender bias. In *Bhanwari Devi Rape case,*[44] male Session & District Judge Jagpal acquitted the accused on November 15, 1995 and gave many absurd reasoning. He said that upper caste males, including Brahmin, cannot commit rape of lower caste women.[45] Village Head cannot commit rape. Nephew and uncle cannot commit rape with the same woman.[46] The public movement started against this judgment. This case is still pending in the High Court.[47]

Total number of working permanent judges in high courts are 623. Out of 623 judges, 447 judges, i.e., 72% come from bar. Law graduate girls were hesitating to start practice in courts. Justice Markandey Katju, in his book, wrote that when he started his practice in 1970, only one woman advocate was regularly going to court. After marriage, she stopped going to court. The practice had gender tags associated. He further wrote that now, the participation of women is satisfactory. There is a need to make bars and benches women-friendly. So that, more women advocates are appointed as a judge in the higher judiciary, it will encourage other women to come into this field.[48]

CONCLUSION

The low representation of women in the Indian higher judiciary reflects the widespread gender inequality in various professional fields. Active measures are needed to encourage and facilitate the entry of more women into the legal profession and the judiciary. Steps such as gender-neutral selection processes, mentorship programs and creating supportive work environments can help ensure that talented women have equal opportunities to ascend to the highest ranks of the judiciary.

Gender diversity in the higher judiciary is not just a matter of numbers. It's about embracing diverse perspectives, experiences, and insights. A more inclusive bench can enrich the quality of judicial decisions and strengthen public confidence in the justice system. It can strengthen the confidence and inspire women to seek equality and access to higher education in the judiciary. So that the concept of crimes committed against women being heard by women only can be realized in the higher judiciary. Any woman can speak or express her views fearlessly before a female judge. If the judiciary is seen as a bastion of elitism, exclusivity, and privilege, it will not be trusted. Therefore, the presence of women is essential for the judiciary's legitimacy.

ENDNOTES & REFERENCES

1. *Ms. Githa Hariharan & Anr.* v. *Reserve Bank of India & Anr.* (1999) 2 SCC 228.
2. *Ibid.*
3. Srishti Ojha, 'Equality of Women's Status More in Books than in Actual Practice: Justice Indira Banerjee', LiveLaw, March 10, 2022. *Available at:* https://www.livelaw.in/top-stories/equality-of-womens-status-more-in-books-than-in-actual-practice-justice-indira-banerjee-193881?infinitescroll=1 (Visited on September 07, 2023).
4. 2020 SCC OnLine MP 3171. Date of the judgment: July 30, 2020.
5. Ananthakrishnan G, Improve representation of women in the judiciary, sensitize judges: AG to SC, The Indian Express, December 03, 2020. *Available at*: https://indianexpress.com/article/india/improve-representation-of-women-in-judiciary-sensitise-judges-ag-to-sc-7079925/ (Visited on July 07, 2023).
6. Shrutika Pandey, Women Should Demand 50% Reservation In The Judiciary, Not As Charity But As A Matter Of Right: CJI Ramana, September 26, 2021. *Available at*: https://www.livelaw.in/top-stories/women-demand-50-reservation-for-woman-in-the-judiciary-not-as-charity-but-as-a-matter-of-right-cji-nv-ramana-182495 (Visited on July 04, 2023).
7. *Satish* v. *State of Maharashtra* (2021) SCC Online Bom. 72.
8. *Available at:* https://main.sci.gov.in/pdf/Collegium/21012021_052740.pdf (Visited on October 6, 2023).
9. *Attorney General for India and Ors.* v. *Satish and Another* (2022) 5 SCC 545.
10. Vijay Hansaria, 'Appointment of Supreme Court and High Court Judges: Need for a Fresh Look' 8 *SCC J* p.68 (2022). *Available at*: https://www.scconline.com/blog/post/2022/10/26/appointment-of-supreme-court-and-high-court-judges-need-for-a-fresh-look/ (Visited on October 6, 2023).

11. *Navtej Singh Johar & Ors.* v. *Union of India Thr. Secretary Ministry of Law and Justice,* (2018) 10 SCC 1. Date of the judgment: September 6, 2018.
12. *Available at:* https://main.sci.gov.in/pdf/Collegium/15112021_150025.pdf (Visited on September 09, 2023).
13. *Available at:* https://main.sci.gov.in/pdf/Collegium/19012023_105547.pdf (Visited on September 09, 2023).
14. RTI, Patna High Court,Patna application no. 202300007701, (P.H.C.Sch.II-E-5) Form No. F55509, I.C./382/2023 Date: August 22, 2023. *Available at:* https://patnahighcourt.gov.in/ERTI/USR/ViewDisposalDoc.aspx?ApplicationNo=MjAyMzAwMDA3NzAx-hgWe6c2bVWY%3d&DOC=FileUploadDisposalDocument (Visited on October 12, 2023).
15. The PIO, The Patna High Court, LC./382/2023, Dated August 22, 2023.
16. Unstarred Question No. 4970 To Be Answered On Friday, 01.04.2022. *Available at*: https://www.livelaw.in/pdf_upload/law-ministrysc-collegium-413831.pdf (Visited on September 08, 2023).
17. Ritika Kanwar, 'The Rare Birds: Dearth of Female Representation in Indian Judiciary' p.38, Institute of Legal Education. *Available at*: https://book.iledu.in/wp-content/uploads/2023/09/04.pdf (Visited on September 08, 2023).
18. Hon'ble Ms. Justice Indira Banerjee, Hon'ble Ms. Justice Hima Kohli, Hon'ble Mrs. Justice B.V. Nagarathna, and Hon'ble Ms. Justice Bela M. Trivedi.
19. Hon'ble Ms. Justice Hima Kohli, Hon'ble Mrs. Justice B.V. Nagarathna, and Hon'ble Ms. Justice Bela M. Trivedi.
20. *Available at:* https://www.scobserver.in/journal/4-of-supreme-court-judges-of-all-time-are-women/(visited on 2/10/2023)
21. Bhadra Sinha, Supreme Court's 9 new judges - 3 women, 1 OBC, 1 SC and from 9 different states, The Print, August 27, 2021. Available at: https://theprint.in/judiciary/supreme-courts-9-new-judges-3-women-1-obc-1-sc-and-from-9-different-states/722749/ (Visited on August 04, 2023).
22. *Available at:* https://doj.gov.in/list-of-high-court-judges/ (Visited on October 08, 2023).
23. Sandeep Bhupatiraju, Daniel L.Chen, Shareen Joshi, Peter Neis ,"Who is in Justice? Caste Religion and Gender in the Courts of Bihar over a Decade", *Economic Development & Institutions,* February 2021.
24. *Available at:* https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2023/10/202310031570786295.pdf (Visited on October 7, 2023).
25. The PIO, The Patna High Court, LC./382/2023, Dated August 22, 2023.
26. The Code of Criminal Procedure, 1973, Section 154 (1), Provided that & Provided further that.
27. *Id.* Section 26.
28. Bihar (35 percent), Andhra Pradesh (33.33) Odisha (33.33), Telangana (33.33), Assam

    (30 percent), Rajasthan (30 percent), Tamil Nadu (30 percent), Karnataka (30 percent), Uttrakhand

    (30), Uttar Pradesh (20 percent) and Jharkhand (5 percent) have introduced reservation for women in subordinate judiciary. Rajya Sabha, Department Related Standing Committee, 96th Report, 'Demands for Grants (2018-19) of the Ministry of Law and Justice' para 6.9. *Available at:* https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/18/104/96_2018_6_17.pdf?source=rajyasabha (Visited on October 07, 2023).
29. *Available at*: https://egazette.gov.in/WriteReadData/2023/249053.pdf (Visited on October 07, 2023).

30. Shrutika Pandey, Women Should Demand 50% Reservation In The Judiciary, Not As Charity But As A Matter Of Right: CJI Ramana, September 26, 2021. *Available at*: https://www.livelaw.in/top-stories/women-demand-50-reservation-for-woman-in-the-judiciary-not-as-charity-but-as-a-matter-of-right-cji-nv-ramana-182495 (Visited on July 04, 2023).
31. Rajya Sabha, Department Related Standing Committee, 84th Report, 'Demands for Grants (2016-17) of the Ministry of Law and Justice', para 6.64. *Available at: https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/18/18/84_2018_10_12.pdf?source=rajyasabha* (Visited on October 07, 2023).
32. Rajya Sabha, Department Related Standing Committee, 96th Report, 'Demands for Grants (2018-19) of the Ministry of Law and Justice' para 6.9. *Available at:* https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/18/104/96_2018_6_17.pdf?source=rajyasabha (Visited on October 07, 2023).
33. Anaksha, Inclusive Judiciary: A Manifestation or Reality, 2023 SCC OnLine Blog OpEd 86.
34. Unstarred Question No. 4970 To Be Answered On Friday, 01.04.2022. *Available at*: https://www.livelaw.in/pdf_upload/law-ministrysc-collegium-413831.pdf (Visited on September 08, 2023).
35. (2016) 10 SCC 506. Date of the judgment: October 04, 2014.
36. (2019) 11 SCC 570.
37. 2021 SCC OnLine Ker 3348. Date of the judgment: on August 26, 2021. *Available at*: https://www.livelaw.in/pdf_upload/rahul-pr-anr-v-state-of-kerala-401235.pdf (Visited on July 26, 2022).
38. Ranjan Gogoi, 'Justice for the Judge: An Autobiography' p. 158, (Rupa, Delhi, 2021).
39. 2021 SCC OnLine SC 240. Date of the judgment: February 18, 2021.
40. Scroll Staff, 'CJI Gogoi sexual harassment case report should have been made public, says retired SC judge' Scroll, September 28, 2022. *Available at*: https://scroll.in/latest/1033892/cji-gogoi-sexual-harassment-case-report-should-have-been-made-public-says-retired-sc-judge (Visited on October 07, 2023).
41. Aishwarya Chouhan, 'Structural and Discretionary Bias: Appointment of Women Judges in India' XXI, GJGL, p. 725. *Available at:* https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2020/08/Structural-and-Discretionary-Bias_Appointment-of-Female-Judges-in-India.pdf
42. *Id.*p. 751.
43. *Tukaram & Anr.* v. *State of Maharashtra.* AIR 1979 SC 185. Date of Judgment: September 15, 1978.
44. She was a social worker. She was a resident of Bhateri Village, Rajasthan. She was employed by the government to create social evils, including child brides. Five persons attacked her husband and her on September 22, 1992. They assaulted and committed rape.
45. Kanchan Mathur, Challenging the Collusion of Caste, Class and Patriarchy Embodied in the State, Ambedkar University Delhi, Chapter 4, P. 74. *Available at:* https://aud.ac.in/uploads/1/admission/admissions2019/M%20Phil%20Reading%202-compressed.pdf
46. Geeta Pandey, Bhanwari Devi: The rape that led to India's sexual harassment law, *BBC,* March 17, 2017. *Available at:* https://www.bbc.com/news/world-asia-india-39265653 (Visited on October 10, 2023).
47. *Available at*: https://www.youtube.com/watch?v=y70zQ5PVPJA (Visited on October 10, 2023).
48. Markandey Katju, *Whither Indian Judiciary* 188, Bloomsbury Publishing India Pvt. Ltd. New Delhi (2018).

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

ROLE OF TECHNOLOGY IN JUDICIAL ADMINISTRATION DURING COVID-19 PANDEMIC

Anoop Kumar* and Komal Dahiya**

Abstract

COVID-19, one of the worst crisis in the human history, has affected not only the soci-economic and political set up globally but had created a vacuum in the justice delivery system across the world. Given that norms of social distancing and lockdowns have adversely affected the quest for justice, especially in the countries like India, the huge pendency of cases has added fuel to fire. Indian superior judiciary Supreme Court and High Courts resorted to online hearing and issuing guidelines for the purpose during the pandemic. In this regard, the role of the honorable high courts and the Supreme Court cannot be ignored, inasmuch as they came out with detailed guidelines for promoting access to justice during pandemic like video-conferencing, e-Lok Adalats, etc. The present paper seeks to study and analyse the role of technological interventions in promoting access to justice during COVID-19 pandemic.

Keywords: Administration of Justice, Access to Justice, Technology, Video-conferencing, COVID-19 Pandemic, India

INTRODUCTION

In the quest for equality, fairness and protection of rights of people, the term "justice" has achieved a special significance for the post 20th century world. Value of justice is more than that of fo od for a hungry person or treasure for an indigent. Therefore, it is the dream of justice that every nation wants to fulfill. Thus, even

* Anoop Kumar, District Prosecution Office, District Court, Buxar and Ph.D Scholar, School of Law, Bennett University, Greater Noida (UP)

** Dr. Komal Dahiya, Associate Professor, School of Law Bennett University, Greater NOIDA (UP) E-mail: anoopuni4u@gmail.com; Mob: 7668849649

though the ambit and object of justice may differ in the Constitutions of the world, the significance of the term has never been overlooked by them. Further, the justice finds special place even at the international platform inasmuch as the Sustainable Development Goal 16 seeks to provide access to justice for all.

In the wake of the mandatory social isolation measures the justice systems and legal aid agencies across the world have been motivated to invest in the use of technology in order to avoid face-to-face contact (Global Access to Justice Project, n.d.). Various supportive technologies have been adopted by courts, which facilitate video conferencing as well as exchange of documentation through web-based platforms such as *Teams, Skype, Zoom, Google Hangouts* and *WebEx* (Sourdin, Li, & McNamara, n.d.). Given that in the early March of 2020, the Ministry of Home Affairs (MHA), Indian Government declared Covid-19 as a "notified disaster", there has been a severe impact on the justice delivery system. However, to cope with the gap in access to justice, the governments across the world have opted for technological interventions such as e-Courts, Online Dispute Resolution (ODR), virtual courts etc.

The honorable Supreme Court has recognized the role of technology in strengthening justice system in the case of *Swapnil Tripathi* v. Supreme Court of India ((2018) 10 SCC 628). Further, in the landmark case of *Re. Guidelines for Court Functioning Through Video Conferencing During. Covid-19 Pandemic (*(2020) 6 SCC 686) it observed that:

> "Modern technology has enabled courts to enhance the quality and effectiveness of the administration of justice. Technology has facilitated advances in speed, accessibility and connectivity which enable the dispensation of justice to take place in diverse settings and situations without compromising the core legal principles of adjudication" ((2018) 10 SCC 628).

ACCESS TO JUSTICE: DEFINITION AND RECOGNITION

In the opinion of the United Nations (n.d.) the term "access to justice" signifies "a basic principle of the rule of law". Neglect of such principle may entail not only suppression of the voice of people, but it may lead to their inability to exercise their rights, to deal with discrimination or hold decision-making authorities accountable. Merely, enacting provisions for ensuring justice is not enough and goes in vain in absence of the means to provide access to it. Therefore, accessing justice stems from the concept of justice itself. Every right must be followed by its protection is enshrined in the Latin maxim *Ubi jus, ibi remedium*. The same has been emphasized very early in *Ashby v. White* (92 Eng. Rep. 126, 1703), wherein it was rightly observed by the Chief Justice of the King's Bench that imagination of a right without remedy is a vain thing.

The Magna Carta of 1215 also ensured access to independent and impartial justice (Rule of Law Institute of Australia, n.d.). Apart from it, articles 8 and 10 of the Universal Declaration of Rights (UDHR) recognizes following rights pertaining to 'access to justice':

> "Art.8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.
>
> Art.10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations, and of any criminal charge against him."

Protection to the right of access to justice is not of recent origin. It has been recognized in *Raymond v. Honey* (1983 AC 1). In some of the other notable verdicts such as *R v. Secretary of State for Home Dept., ex p Leech* (1993 [4] All ER 539), the Court recognized the right of citizen to "unimpeded access to a court". Other such judgments are *Re: Llewelyn Evans (*AIR 1926 Bom 551) and *Delcourt v. Belgium (*1970 ECHR 1).

The protection of the right to accessing justice has also been recognized in India. Prior to the Independence, in cases like *P.K. Tare v. Emperor* (AIR 1943 Nagpur 26). In order to extend the protection to this right, the honorable Supreme Court in its various decisions such as *Hussainara Khatoon v. State of Bihar* (1979 AIR 1369), *Katar Singh v. State of Punjab* (1994 SCC (3) 569), *Suk Das v. Union Territory of Arunachal Pradesh* ((1986) 2 SCC 401), *M.H. Hoskot v. State of Maharashtra* ((1978) 3 SCC 544), *Abdul Rahman Antulay v. R.S. Nayak* (1988 AIR 1531), *Sheela Barse v. Union of India* ((1988) 4 SCC 226), *L. Chandra Kumar v. Union of India* ((1997) 3 SCC 261), *Tamilnad Mercantile Bank Shareholders Welfare Association v. S.C. Sekar and Others* ((2009) 2 SCC 784), *Imtiyaz Ahmad v. State of Uttar Pradesh & Ors.* ((2012) 2 SCC 688), *Brij Mohan Lal v. Union of India and Ors* ((2012) 6 SCC 502), has recognized this right as an essential aspect of Article 21 of Indian Constitution. In a recent landmark judgment of *Anita Kushwaha v. Pushap Sudan* (AIR.2016.SC), the Supreme Court has reaffirmed that access to justice is an essential aspect of the fundamental rights enshrined in Articles 14 and 21 of the Indian Constitution. The Court recognised access to justice as a "part and parcel of right to life in India and in all civilized societies around the globe" (AIR.2016.SC).

ACCESS TO JUSTICE DURING COVID-19

The problem of accessing justice system existed prior to the COVID-19 pandemic. It can be gathered from the report *Global Insights on Access to Justice 2019: Findings from the World Justice Project General Population Poll in 101 Countries* (World Justice Project, 2019). The report revealed that less than one-third people, who had faced a legal problem, sought any form of advice for better understanding or resolving their problems (World Justice Project, 2019). To add fuel to fire, even fewer (17%) of them took recourse to an authority or third party for mediation or adjudication of their problems (World Justice Project, 2019). The peculiar reality of the functioning of justice system during the pandemic has been variance experienced by some parts of the justice system inasmuch as some of them experienced an increase in workload, whilst others saw a reduction in demand (Sourdin, Li, & McNamara, n.d.). The need for reduction of prison population led to surge in stress on the criminal justice sector to reconsider bail and remand arrangements (Cooper, 2020).

Globally, the problems of dramatic surge in violations of rights of women, children and other marginalized groups due to measures requiring people to remain confined to their homes have been highlighted by various reports (UN Women, 2020). The states have responded to the pandemic by resorting to measures such as closure of Courts, reduction, or adjustment in their operations. In the country like USA, the COVID-19 pandemic has exposed structural inadequacies in the civil justice system on one hand and it has also nearly crippled the criminal justice system, as every stage of law enforcement involves close physical interaction on the other (Access to Justice in the Age of COVID-19, n.d.).

INDIA DURING PANDEMIC

A research revealed that Indian justice system suffered to plug the gap in access to justice due owing to 'lockdown', lack of sustainable support system for law enforcement, availability of online infrastructure, etc. It resulted into selection of urgent matters for online hearing by courts that added to the pendency of cases. However, the Bar Council of India expressed concern, noting that only a small percentage of cases categorized as urgent were scheduled for virtual hearings. While courts transitioned to virtual proceedings, challenges such as low digital literacy, poor connectivity, power outages, and technical glitches hindered their effectiveness. Despite constitutional provisions for free legal aid under Article 39A, the pandemic's economic impact resulted in insufficient state funding, hindering access to justice for marginalized communities.

Notwithstanding, the technology could have leveraged to a great extent in terms of online procedures to file cases, granting legal recognition of electronic evidence or evidence presented by electronic means will help courts to conduct trials easily (now the new law BNSS recognizes the electronic evidences) and electronic case file and evidence management systems could be established.

Some of the global practices can be studied in this section. The practices discussed here include the initiatives taken by the countries like the USA, the UK and other OECD nations.

Countries.	*Mode of using technology used for justice*
Ireland	*Pexip* video conferencing session allowed joining the sessions from other video streaming services including *Skype, Zoom, Cisco* and *Teams*, irrespective of the app used by the participants (The Law Society of Ireland, n.d.). In some regular trials, depending upon suitability, the courts enabled video-link appearances from prisons for people in custody.
Argentina	The *Webex* platform for hearings without any need to download any software while remaining secure (The Law Society of Ireland, n.d.).
Chile and **Malaysia**	Live broadcast of online trials, thereby ensuring public access to hearings (The Law Society of Ireland, n.d.).
Mexico	The Supreme Court of Justice resorted to technological tools to in order to provide justice to Constitutional issues (The Law Society of Ireland, n.d.). Electronic platforms used to notify all rulings. Remote investigations have been started by the Office of the Prosecutor General, in which email and telephone are used to obtain useful information for investigations and VPN being used to enter the institutional system remotely.
Qatar	eCourt, electronic case management system, through which access has been provided to case parties as well as the judicial staff (The Peninsula, 2020).
The United Arab Emirates	Electronic case management system and online courts (The Law Society of Ireland, n.d.).
Dubai	Microsoft Teams for hearing, allowing parties to be heard via videoconference (Sourdin, Li, & McNamara, n.d.).
Poland	Electronic platform ePUAP (Ministry of Justice, Poland, n.d.).
Canada and **Mexico**	Zoom platform used for employment and civil mediations (Office of the Prosecutor General of the Republic of Mexico, n.d.; Rose, n.d.).
China	The ‘virtual courts’ in China engage in ‘e-litigation’ procedures, wherein the entire litigation process from ‘filing to ruling and mediation’ is conducted online (The Law Society of Ireland, n.d.).

Indian Scenario. In the Indian context, even before the pandemic, the legislators have tried to keep technology in loop while keeping in mind the access to justice. Some of the methods include amendment to the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 etc, to include the relevant provisions of the Information Technology Act, 2000.

Additionally, the Indian judiciary has integrated Information and Communication Technology systems through the e-Courts Integrated Mission Mode Project (e-Courts Project), which is a component of the National eGovernance Plan (NeGP).

The e-Committee and e-Courts. The e-Committee, Supreme Court of India is the governing body which oversees the e-Courts Project (e-Committee, Supreme Court of India, n.d.). The e-Courts Project is a nationwide initiative aimed at modernizing the judicial system of India by leveraging Information and Communication Technology (ICT) in courts (e-Committee, Supreme Court of India, n.d.). This project is overseen and financed by the Department of Justice, Ministry of Law and Justice, Government of India. One of its aims is to develop, install and implement efficient justice delivery systems in courts. One of the significant achievements of e-Courts Project is the creation of the National Judicial Data Grid (NJDG), containing data of 1360 million pending and disposed cases from district and taluka courts (e-Committee, Supreme Court of India, n.d.).

The Inter-operable Criminal Justice System (ICJS). ICJS, an initiative of the e-Committee, facilitates the smooth exchange of data and information among various components of the criminal justice system, including courts, law enforcement agencies, correctional facilities, and forensic science laboratories (e-Committee, Supreme Court of India, n.d.).

Progress of e-Courts during Covid-19. Following significant information reveal the progress of e-Courts during the pandemic:

1. **Rules of Video conferencing:** By end of 2021, 22 high courts out of 28 have implemented the Rules of Video conferencing. In district courts of 23 high courts, the Rules of Video Conferencing have been implemented (e-Committee Newsletter, 2021).
2. **ICJS:** By end of 2021, 21 high courts have implemented ICJS (e-Committee Newsletter, 2021).
3. **e-Sewa Kendra**: 25 high courts have implemented e-Sewa Kendras in High Court and 22 have implemented in district courts. There are 451 functioning e-Sewa Kendras in District Courts (e-Committee Newsletter, 2021).
4. **Hearing through video conferencing:** Following the Covid lockdown, District courts handled 1,68,47,529 cases, and High Courts dealt with 76,62,243 cases by the end of November 2022, exclusively through video conferencing. Till the beginning of September, 2022, the Supreme Court heard 2,97,435 hearings (Department of Justice, n.d.).

SIGNIFICANT SUPREME COURT JUDGMENTS ON USE OF TECHNOLOGY.

The utilization of technology received judicial acknowledgment in the precedent set by the Supreme Court of India in the case of State of Maharashtra v. Praful Desai ((2003) 4 SCC 601). The court ruled that the term 'evidence' encompasses electronic evidence and that video conferencing can be employed to record evidence.

In the case of Youth Bar Association of India v. Union of India ((2016) 9 SCC 473), the Supreme Court directed that FIRs must be uploaded to the police website or the official website of the State Government within twenty-four hours of registration. This initiative aims to facilitate individuals, including the accused and their associates, in filing necessary applications to address their grievances.

In Swapnil Tripathi v. Supreme Court of India ((2018) 10 SCC 628), the Supreme Court mandated live streaming for cases considered of constitutional and national importance, with specific exemptions for matters involving juveniles, sexual assault, matrimonial issues, or those undergoing final hearings before the Constitution Bench.

Considering the cry for justice in pandemic, the guidelines passed by the SC in *In Re: Guidelines for Court Functioning Through Video Conferencing During COVID-19 Pandemic* (2020 SCC OnLine SC 355) hold crucial value**.** Taking note of the rising pendency of cases and inability of masses to physically access the justice system, the honorable Supreme Court while exercising its power under Article 142 of the Constitution, issued a slew of guidelines:

a. The Supreme Court of India and all High Courts were authorized to adopt measures ensuring the efficient functioning of the judicial system through video conferencing technologies.
b. Each High Court was empowered to determine suitable modalities for the temporary transition to video conferencing technologies, considering the unique aspects of the judicial system in their respective states and the evolving public health situation.
c. Courts were required to maintain a helpline to address complaints regarding the quality or audibility of the video feed during or immediately after proceedings. Grievances not communicated within the specified timeframe would not be entertained.
d. District Courts in each State were directed to follow the mode of video conferencing prescribed by the respective High Courts.
e. Courts were obligated to notify and provide video conferencing facilities to litigants without access to such technology.
f. In certain cases, courts could appoint an amicus curiae and provide video conferencing facilities to advocates if necessary.
g. Until specific rules were formulated by the High Courts, video conferencing would mainly be used for hearing arguments, whether at the trial or appellate stage.
h. Evidence would be recorded via video conferencing only with the mutual consent of both parties. If necessary to record evidence in a courtroom, the

presiding officer would ensure appropriate physical distancing measures were maintained.

CRITICAL ANALYSIS OF TECHNOLOGICAL INTERVENTIONS

The post-Covid lockdown compelled the courts to switch to virtual hearings. This had, to a great extent, met the aspirations of people to have access to justice system. However, this transition was not fair for all.

Even in the country like USA, for people living in the areas devoid of any broadband access, computers, or smart phones, the shift to an almost entirely virtual justice delivery system left them without access to vital resources and proceedings. Also, in the matters of criminal proceedings, virtual court appearances and meetings failed at effective representation of clients (Justice.gov, n.d.).

Remote proceeding were not found to be suitable for those involving an assessment of credibility, asylum or benefits appeals, and those disputes that involved the discussion of sensitive issues in live evidence, such as family and criminal cases (Sourdin, Li, & McNamara, n.d.).

According to a research on the effects of introducing videoconferencing trials, conducting hearings through videoconferencing can generate disengagement of participants, thereby by making them less likely to seek legal advice (Eagly, 2015). In cases involving children, who may not fully understand the seriousness of a trial proceeding, conducted through a video conference, this may have an adverse impact (Standing Committee for Youth Justice, 2018).

Following are the other loopholes that need to be plugged in order to ensure efficient delivery of justice through technology:

1. **Digital divide.** A major chunk of people lack access to Internet connection, adequate hardware devices or sufficient IT knowledge for using these tools, thereby preventing them from participating in trial (UNCTAD, 2020).
2. **Capacity of justice institutions.** Several courts and dispute resolution centres across the world face technological barriers. Therefore they fail in providing justice services digitally. One such example is that of Colombia, many Arbitration and Conciliation centreps lacked capacity to provide justice services through the use of digital tools that compelled them to suspend deadlines in their procedures (Ministry of Justice and Law, Colombia, 2020).
3. **Quality of representation.** Long-distance proceedings may negatively impact effective relationships and preparation meetings between client and his or her lawyers (Gibbs, 2017). It has been found that clients are more reluctant to share information with their lawyers in online meetings (Burton, 2018).

CONCLUSION

The COVID-19 had a huge impact on health and economy globally. It also nearly shut the doors of justice system for masses. In this light, the role of technological interventions cannot be underestimated in fulfilling the aspirations of justice of the masses across the world. Though the technological interventions have provided a bridge between quest for justice and its delivery, the factors such as digital divide, suitability of cases, inadequate infrastructure mar the effectiveness of the technological interventions made during the pandemic. Despite the hurdles that pose challenge to technological interventions, the virtual hearings and e-courts are the future of justice. In the coming decades, access to justice will be transformed into 'access to e-justice'.

REFERENCES

Cooper, A. Coronavirus prompts surge in number of people seeking bail. *The Age*https://www.theage.com.au/national/victoria/coronavirus-prompts-surge-in-number-of-people-seeking-bail-20200508-p54r4g.html. Accessed on 23-12-2023

Access to Justice in the Age of COVID-19, Accessed on 23-12-2023 from https://www.justice.gov/ag/page/file/1445356/download

Access to Justice, United Nations and the Rule of Law, Retrieved on 23-12-2023 from https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

Administrative Conference of the United States, Virtual hearings in agency adjudication. Retrieved on 20-11-2023 from

https://www.acus.gov/recommendation/virtual-hearings-agency-adjudication

American Bar Association. *COVID-19 resources for communities*, https://www.americanbar.org/groups/ domestic_violence/Initiatives/covid-19/. Technical Assistance Provider Resource Center. *Resources*.

Burton, M (2018), "Justice on the line? A comparison of telephone and face-to-face advice in social welfare legal aid", Journal of Social Welfare and Family Law 40, pp. 195-215.

Criminal Justice Chief Inspectors, *Impact of the pandemic on the Criminal Justice System*, https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2021/01/2021-01-13-State-of-nation.pdf

e-Committee Newsletter, December 2021, Retrieved on 20-11-2022 from https://cdnbbsr.s3waas.gov.in/s388ef51f0bf911e452e8dbb 1d807a81ab/ uploads/2022/04/2022040552.pdf

Eagly, I. (2015), "Remote Adjudication in Immigration", *Northwestern University Law Review* Vol 109, No. 4, p. 13, http://escholarship.org/uc/item/5p1044zc.

Gibbs, P. (2017), *Defendants on video – conveyor belt justice or a revolution in access?*, Justice Transform,

https://www.barrowcadbury.org.uk/wpcontent/ uploads/2017/10/TJ_Disconnected.pdf

Global Access to Justice Project, Impacts of COVID-19 on Justice Systems, https://globalaccesstojustice.com/ impacts-of-covid-19/#overview

Ministry of Justice and Law, Colombia (2020), *Decree n. 460 of March 22 2020,* https://www.minjusticia.gov.co/Portals/0/Normatividad1/ActosAdministrativos/Decretos/2020/DECRETO%20460%20DEL%2022%20DE%20MARZO%20DE%202020.pdf Retrieved on 12-10-2021

Ministry of Justice, 'Joint letter from Lord Chief Justice of England and Wales, Senior President of Tribunals and Lord Chancellor and Secretary of State for Justice', https://www.judiciary.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf

Ministry of Justice, Poland, Implications of the COVID-19 crisis for legal needs (Poland Contribution to OECD's OPSI Call for Evidence).

National Council of Juvenile and Family Court Judges. Retrieved on 23-10-2021 from https://ta2ta.org/resources-and-information-on-covid-19-response/attorneys.html

National Science Foundation, *Award Abstract RAPID: Procedural Changes in State Courts During COVID-19*.

https://www.nsf.gov/awardsearch/showAward? AWD_ID=2028981&HistoricalAwards=false

National Science Foundation, *Award Abstract SCC-PG: Just Connect Us: A Community-Oriented Civil Justice Data Commons*

https://www.nsf.gov/awardsearch/showAward?AWD_ID=1952067&HistoricalAwards

OECD, *Access to justice and the COVID-19 pandemic: Compendium of Country Practices,* https://www.oecd.org/governance/global-roundtables-access-to-justice/ access-to-justice-compendium-of-country-practices.pdf

Rose, *M, Mediation by Zoom addresses social distancing, shuttered courtrooms*, https://www.thelawyersdaily.ca/articles/18393/mediation-by-zoom-addresses-social-distancingshuttered-courtrooms?category=access-to-justice Retrieved on 23-10-2021

Select Committee on the Constitution COVID-19 and the Courts, https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/25702.htm

Singh, Amartya Sahastranshu and Atika Chaturvedi, *COVID-19's Unseen Impact: How Access to Justice in India is Suffering,* Retrieved on 23-10-2021 from http://www.fletcherforum.org/the-rostrum/2021/8/25/covid-19s-unseen-impact-how-access-to-justice-in-india-is-suffering

Social Security Administration, *SSA online video hearings during COVID-19*, from https://www.ssa.gov/appeals/hearing_video.html

Standing Committee for Youth Justice (2018), They just don't understand what's happened or why: A report on child defendants and video links, *Standing Committee for Youth Justice*, http://scyj.org.uk/wpcontent/uploads/2018/04/SCYJFINAL.pdf

Tania Sourdin, Bin Li, and Donna Marie McNamara, *Court innovations and access to justice in times of crisis,*

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/#!po=15.4412

The Law Society of Ireland, *Remote hearings update*, https://www.lawsociety.ie/Solicitors/Practising/covid-19-support/courts-and-justice-agencyupdates/remote-hearings-update/#.XqXIf6YUm3A.

U.S. Department of Justice. *Contact the Department of Justice to report a civil rights violation*. https://civilrights.justice.gov/report/

UN Women, *UN Secretary-General's Policy Brief: The Impact of COVID-19 on Women*, https://www.unwomen.org/en/digital-library/publications/2020/04/policy-brief-the-impact-of-covid-19-on-women

UNCTAD (2020), *The Covid-19 Crisis: Accentuating the need to bridge the digital divide*, https://unctad.org/en/PublicationsLibrary/dtlinf2020d1_en.pdf.

UNODC, *Ensuring Access to Justice in the Context of COVID-19*, https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf

World Justice Project, https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019.

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

JUDICIAL REVIEW: A COMPARATIVE ANALYSIS OF INDIA AND THE USA

Rekha Ranjan Prasad*

Abstract

Judicial review has acquired significant place in a democratic country, especially when the executive (elected governments) cross the line of set constitutional principles. At global level, the role of judicial review has been significant in maintaining check and balance, so is in India and USA. The present paper intends to analyse the similarities and differences in the practice and importance of judicial review in these two countries. The study has delved into the historical roots, constitutional provisions and current practices of judicial review in both the countries. By examining the views of various jurists and analysing the relevant provisions of the Indian Constitution and landmark judicial decisions, this study seeks to explore the effects of judicial review in governance. Further, various doctrines applied in judicial review e.g. Doctrine of Severability, Doctrine of Eclipse, Doctrine of Prospective Over-ruling have been examined comparatively.

Keywords: Judicial Review, Rule of Law, Severability, Prospective Over-Ruling, India, USA

INTRODUCTION

In most of the countries with written constitutions, there prevails the doctrine of judicial review. It means that the constitution is the supreme law of the land and any law inconsistent there with is void. The courts perform the role of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as

* Rekha Ranjan Prasad LL.M. Research Scholar at Amity Institute of Advanced Legal Studies, Amity University, Noida;
E-mail: rekharanjanprasad@gmail.com; Phone.: +91-9871301269

unconstitutional and hence void. "This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an authoritative, independent, and impartial arbiter of constitutional issues and that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution."[1]

With **Lord Coke's** ruling in the ***Dr. Bonham v. Cambridge University case*** in England in 1610, the idea of judicial review was introduced.[2] The concept achieved full-fledged recognition in the decision of the U.S. Supreme Court in "***Marbury vs. Madison***"[3]. The Indian constitution expressly vests this power in the India Supreme Court under Art 32 and to the various High courts under Art 226 and 227 Although there isn't a formal provision for judicial review in the USA, it can be inferred that the US Supreme Court has the power to review decisions by virtue of Article III and Article IV of the US Constitution".

The Indian constitution established an independent judiciary to decide the constitutionality of an executive action or a law. In this article the author in order to compare the two systems, the author has conducted study on the basis of the following components:

1. Judicial Review of Legislative Actions.
2. Judicial Review of Executive or Administrative Actions.
3. Judicial Review of constitutional Amendments.
4. Judicial Review of Judicial Actions.

JUDICIAL REVIEW IN INDIA

Compared to its English equivalent, the Indian Parliament cannot exercise independent legislative authority. This is the reason why our constitutional system exists wonderfully adopt the middle path between the American system of judicial supremacy and the English principles of parliamentary supremacy. Judicial Review is one of the cardinal features of Indian constitutional system. The Preamble of the Indian Constitution has promised equality and justice to all citizens of India and have the laws of India are liable to be tested judicially.[4]

"The most prominent object of Judicial Review is to assure that the authority doesn't misuse its power and the individual receives just and fair treatment. The perceived notion of judicial review is to justify some alleged right of one parties to action and therefore granting relief to the discontent party by declaring an enactment void, if in law it's null and void. But its real purpose is commodity advanced i.e., no enactment which is repugnant to the Constitution should be made enforceable by the Court of Law"[5].

In India, the core idea of judicial review is the rule of law. While judicial review was unattainable, the Government of India Act, 1858, and the Indian Council Act, 1861, limited the Governor General in Council's capacity to circumvent laws. The idea of Judicial Review was originally acknowledged and introduced in India in 1877 with the ***Emperor v. Burah*** [6]case- "the court ruled that the party who perceived injustice had the right to challenge the constitutionality of the legislation that the Governor General Council implemented outside the authority delegated to him by the Imperial Parliament. In this case the High court and Privy Council adopted the view that Indian courts had power of Judicial Review with some extents. In this case the High court and Privy Council adopted the view that Indian courts had power of Judicial Review with some extents". Lord Haldane in**, *Secretary of State v. Moment***[7], clarified that the Government of India cannot by legislation take down the right of the Indian subject awarded by the Parliament Act i.e.- Government of India Act 1858".

The Judicial Review provisions were effectively included by the Indian Constitution makers to preserve the principle of federalism and to protect the fundamental rights guaranteed as a useful weapon for equality, liberty, and independence. According to Patanjali Shastri, J., ***State of Madras v. V.G. Rao***, clearly ruled that Judicial Review has constitutional system, and a power has been invested in the High Court and the Supreme Court to determine about the constitutional validity of the provision of the laws. The Constitution of India explicitly establishes the doctrine of Judicial Review in several Articles, connate as 13, 32, 131, 136, 143, 226 and 246.Art. 13(2) states the State shall not make any law which takes down or abridges the right conferred by this part and any law made in contraventions of this clause shall, to the extent of the violation, be invalid .

The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the Constitution. The courts in India are thus under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision. The courts serve as guiding lights on the qui vive in terms of the Constitution.

The doctrines of supremacy of the constitution and judicial review has been expounded very forcefully by BHAGWATI, J., as follows in ***Rajasthan v. Union of India:***[8] "It is necessary to assert in the clearest terms particularly in the context of recent history, that the constitution is *supreme* lex, the permanent law of the land, and there is no department or branch of government above or beyond it. Every organ of government, *be it the executive or the legislature or the judiciary,* derives its authority from the constitution and it has to act within the limits of its authority. No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the constitution or whether its action is within the confines of such power laid down by the constitution. This

Court is the ultimate interpreter of the constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits."

The various doctrines have been formulated by the Apex Court as the base of judicial review:

Doctrine of Severability

"Article 13 of the Indian Constitution, the words "to the extent of violation" are the basis of Doctrine of Severability. This doctrine enumerates that the court can separate the inconsistent part unconstitutional of the impugned legislation from the rest of its legislation. Other parts as of the legislation shall remain operational, if that is possible."

In "***A.K. Gopalan v. State of Madras***[9] section 14 of the Prevention Detention Act was set up out to be in violation of Composition 14 of the Constitution. It was held by the Supreme Court that it's Section 14 of the Act which is to be struck down not the Act as a whole. It was also held that the deletion of Section 14 of the Act won't alter the object of the Act and hence it's severable. The Supreme Court by applying the doctrine of severability abolished the impugned law".

Doctrine of Eclipse

This Doctrine applies to the case of a pre constitution law. Under Composition 13 (1), all Pre Constitution laws which are inconsistent to Part III of the Constitution get unenforceable and unconstitutional after the enactment of the Constitution. They are eclipsed on account of Article 13 and lose their validity. This is called Doctrine of Eclipse.

In ***Bhikaji Narain Dharkras vs. State of M.P***[10] "an existing State law authorized the State Govt to exclude all the private motor transport operators from the field of transport business. After these parts of this law became void on the commencement of the constitution as it infringed the provisions of Art. 19(1)(g) and could not be justified under the provisions of Art.19(6) of the constitution. First Amendment Act, 1951 amended the Art. 19(6) and due to this Amendment permitted the Government to monopolize any business. The Supreme Court held that after the Amendment of clause (6) of Art. 19, the constitutional impediment was removed and the impugned Act ceased to be unconstitutional and became operative and enforceable."

Doctrine of Prospective Overruling

Prospective overruling, in its most basic sense, means interpreting a previous ruling to fit the demands of the present without imposing any obligations on the parties involved in the original case or those parties bound by the precedent. When this theory is applied, a prior precedent is overruled, but its impact is restricted to cases going forward, and all decisions that came before it are still governed by the earlier precedent. Put more simply, it indicates that the court is establishing a new statute that will apply going forward.

In India, this theory was set forth in the "***Golak Nath v. State of Punjab*** case the court in this instance reversed the rulings made in ***Sajjan Singh*** and ***Shankari Prasad's*** [11] cases and propounded the Doctrine of Prospective Overruling. The Judges of Supreme Court of India laid down their view on this doctrine in a very significant way, stating the doctrine of prospective overruling is a contemporary doctrine suitable for a fast-moving society and Court further held that this decision would have only prospective operation and thus, the first, fourth and nineteenth amendments will continue to be valid".

Judicial Review of Legislation

Article(245) and(246) of the Indian constitution vests legislative powers to Parliament and State legislatives. Article 245 (1) provides subject to the provisions of the constitution, the parliament may make any laws for the whole and any part of the territory of India and a State Legislature may make a law for whole of the state and any part thereof. The phrase "subject to the provisions of the constitution" places restrictions on the ability of the State Legislature and Parliament to enact laws. In India, judicial reviews of legislative activities are summed up in these terms. It guarantees that laws must adhere to the restrictions laid by constitutional provisions. These expressions give the courts the power to assess the lawfulness of legislation. The Supreme Court provides us with some material observances about the legislative actions of State and Parliament through its judicial rulings. The Supreme Court have supreme power under Art. 141 which incorporates "***Doctrine of Precedent"*** to implement its own view regarding any conflicted issue and it's also have binding force.

In, ***SP Sampat Kumar v. Union of India***[12], "the Constitutional validity of Administrative Tribunal Act, 1985, was challenged on the ground that that the impugned Act by excluding the jurisdiction of High Courts under Art. 226 and 227 in service matters had destroyed the judicial review which was an integral point of the constitution. The Supreme Court held that though the Act has barred the judicial review exercised by the High Courts in service matters, but it has not barred it wholly as the authority of the Supreme Court under Art. 32 and 136 is still there. In addition it was ruled that a law passed under Art. 323-A providing for the exclusion of the jurisdiction of the High Courts must provide an effective alternative institutional mechanism of authority of judicial review". The judicial review which is an essential feature of the constitution can be taken away from the area only if an alternative effective institutional mechanism or authority is provided.

In ***L Chandra v. Union of India***[13] "clause 2(d) of Art. 323-A and clause 3(d) of Art. 323-B were challenged on the ground they restricted the High Courts' jurisdiction over cases involving service matter". These provisions are unconstitutional to the point that they exclude the jurisdiction of the High Courts and Supreme Courts under Art. 226/227 and 32 of the Constitution, as they damage the power of judicial review, proclaimed the Constitutional Bench in a unanimous ruling. The power of judicial review over Legislative Actions vested in the High Courts and Supreme Court under Art. 226/227 and Art.32 is an integral part and it also formed part of its basic structure.

The petitioner in ***I.R. Coelho v. State of Tamil Nadu***[14] "contested many Central and State statutes, including the Tamil Nadu Reservation Act, that were included in the Ninth Schedule. The court stated that the validity of any law included in the Ninth Schedule after the date of Keshvananda Bharati's case judgment was upheld by the Supreme Court and that it would not be open to challenge it again. However, if a law is found to be a violation of fundamental rights and is incorporated in the Ninth Schedule after the date of Keshvananda Bharati's case judgment, such a violation shall be open to challenge on the grounds that it destroys the basic structure of constitution".

Judicial Review of Administrative Actions

The aim of judicial review of administrative action is to protect the public against power abuse by any government. "The legislature imposes the responsibility that such discretion be exercised honestly, properly, and reasonably when it imposes discretion on a court of law or an administrative authority."[15]

The power of Judicial Review of the courts also extends to administrative or executive actions. There are two main conditions in which court shall interfere-failure to exercise discretion and abuse of discretion. Apart from the two mentioned conditions the Judicial Review of administrative action can be exercised on the following grounds:

- Illegality
- Irrationality
- Procedural impropriety
- Proportionality
- Unreasonableness

The court in ***Ajai Hasia vs Khalid Mujib***[16] "struck down the rule prescribing allocation of high percentage of marks for oral interview for securing admission in Reginal Engineering college on the grounds that it was arbitrary, unreasonable and violative of Art 14".

Judicial Review of Constitutional Amendments

Constitution amendments is very stringent. The only body with the authority to change the constitution is the Parliament; fundamental changes cannot be made. As the guardian of the Fundamental Rights, the Supreme Court must carefully examine whether the mentioned amendments are lawful. Regarding the amenability of Fundamental Rights under Art. 368, there was a disagreement between the Supreme Court and the Parliament.

The matter was eventually decided through plethora of cases beginning with ***Shankari Prasad v. Union of India***[17], "the first case on amenability of the constitution in this case the validity of the Constitution (1st Amendment) Act, 1951, relating to Right to Property guaranteed by Art. 31 was challenged. The Supreme Court ruled amending the constitution includes amending the fundamental rights. Therefore, even if the amendment to the constitution affects fundamental rights, it will still be valid". The constitutional validity of the Constitution (17th Amendment) Act, 1964 was contested in ***Sajjan Singh v. Rajasthan***[18] "in this case the court upheld ***Shankari Prasad's*** ruling, holding that amendments to the constitution were outside the jurisdiction of the Judicial Review. Hence, the validity of the Constitution (17th Amendment) Act, 1964 was upheld". However, in ***Golak Nath v. State of Punjab***[19], "where the validity of 17th amendment act was challenged, the court overruled its decision in ***Shankari Prasad case."*** In this case the court observed an amendment is a 'law' within the meaning of Art. 13(2) which included every kind of law; Both statutory and constitutional law are applicable, therefore a constitutional amendment that violates Article 13(2) will be deemed unconstitutional. The court observed that the parliament's amending power derives from Article 245 read along with List 1 Entry 97 of the Constitution, not from Article 368, which only prescribes the procedure for amending the constitution.[20]

The minority view of five out of eleven judges was that the word 'law' in Art. 13(2) refers to only ordinary law and not a constitutional amendment and hence ***Shankari Prasad and Sajjan Singh*** "case have been rightly decided. According to these cases, Article 368 dealt with not only the procedure of amending the constitution but also contained the power to amend the constitution".[21]

Once again the Supreme Court was formally asked to evaluate the constitutionality of the twenty-fourth, twenty-fifth, and twenty-ninth amendments in the landmark case ***Keshavananda Bharati v. State of Kerala***[22] case, popularly called as the "Fundamental Rights Case" in this case the petitioner had challenged the validity of Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the Twenty Ninth Amendment Act. The petitioner challenged the validity of twenty fourth, twenty fifth, and twenty ninth amendment to the Constitution and further the question was involved as to what extent the amending power has been conferred by Article 368 of the Constitution? The Supreme Court overruled the ***Golak Nath's case*** and "held that "*Under Art. 368 Parliament can amend the fundamental rights but cannot take or abridge the Basic Structure of the Constitution*". This judgment propounded the "*Theory of Basic Structure: A Limitation on Amending Power.*" It was formulated by the Supreme Court through Doctrine of Judicial Review.

Additionally, Furthermore, a modification was made in ***Indira Nehru Gandhi v. Raj Narayan*** [23] "to confirm the then-prime minister's election, which the Allahabad High Court had declared unlawful, with retrospective effect. The 39th Amendment's challenging provision, which was included in Art. 329-A to authorize the election with retroactive effect, was struck down by the Supreme Court. Khanna J. struck down the clause on the ground that it violated the free and fair election which was an essential postulate of democracy which in turn was a basic structure of the constitution".

And in ***Minerva mills v Union of India***[24] "the constitutional validity of clauses (4) and (5) of Art. 368, introduced 42nd Amendment was challenged. The court struck down the said provisions on the basis that it destroyed the basic feature of the constitution".

In "***Navtej Singh Johar vs. UOI*** [25]a five-judge Bench of the Supreme Court "unanimously struck down Section 377 of the Indian Penal Code, 1860 to the extent that it criminalised same-sex relations between consenting adults. In doing so the court overruled its decision in ***Suresh Kumar Koushal & An vs Naz Foundation & Ors.***[26] wherein the court had upheld the constitutionality of the said law".

The above cases touched upon weighty issues like civil rights, political rights, personal liberty, freedom of speech and the nature of federalism. Several decisions were viewed as litmus test for independence of court and Democracy

Judicial Review Vs Judicial Action

Judicial Review of Judicial Action. It can be stated that the Indian Supreme Court undertakes the Judicial Review of Judicial action by virtue of exercising its appellate jurisdiction. The Supreme court is the highest court of appeal and hence while exercising its appellate jurisdiction it undertakes Judicial Review. The Supreme court exercises the power of appellate jurisdiction by virtue of Article 132(1), 133(1) or 134 of the Constitution in regard of any judgement, decree or final order of a

High Court in both civil and criminal cases, concerning substantial questions of law as to the interpretation of the Constitution. he provision for Special Leave Petition under Article 136 confers the court with wide powers of appellate jurisdiction. In ***Shafin Jahan v. Ashokan K.M***[27]**.** the Supreme court overturned the decision of the Kerala High Court annulling the marriage of a young woman. The Supreme court observed that the High Court had wrongly exercised its Habeas Corpus jurisdiction, its *parens patriae* jurisdiction and transgressed on constitutional rights. The court exercises the power of Judicial Review through its constitutional bench whereby it can overrule the judgements given by a smaller bench of Supreme Court.

JUDICIAL REVIEW IN THE USA

"The American Constitution, which is written and federal democratic in spirit, is based on the Due process of law and the individual liberty is protected". "Judicial review is the idea, fundamental to the U.S. system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the Constitution."[28] "The text of the Constitution does not contain a specific provision for the power of judicial review. Rather, the power to declare laws unconstitutional has been deemed an implied power, derived from Article III and Article VI of the U.S. Constitution."[29]

Even though it was first asserted in ***Marbury v. Madison***[30] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters,[31] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[32]

Article III, Section 1

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office".[33]

The concept of Judicial Review constitutes especial acknowledgment in the 1803 milestone case "***Marbury v. Madison"*** in which "the Supreme Court declared the Section 13 of the Judiciary Act of 1789 as unconstitutional. Prior to this case the Supreme Court did not declare any act of the congress unconstitutional with complete judicial authority".[34] As a result, this case substantiated the Supreme Court's Judicial Review's jurisdiction to determine what legislative action to take prior to this ruling, the Supreme Court of the United States did not, in all its aspects, find any congressional action to be illegal. This case provides the foundation of power of judicial review to the Supreme Court to determine the validity of any legislative action of Congress. There was tremendous expansion of judicial review after Madbury's judgment. It strengthened the defence of individual freedoms and civic liberties. Several pertinent decisions include the following ones.: In ***McCulloch v. Maryland***[35] "there was a dispute regarding the powers of Federal law and State law. A bank was established by Federal law named Bank of America in the State of Maryland. Thereafter State of Maryland passed a tax legislation which imposes the tax on bank in relation to relative transaction. This was challenged on the ground that can State law impose tax on bank which was established by Federal law? It was held by the Court that State cannot impose tax on Union authority. Court created immunity to the National Govt. According to this judgment US Supreme court formulated the doctrine of Immunity of Instrumentalities."

Judicial Review of Legislative Action

The period of New Deal witnessed several enactments to be struck down as unconstitutional by the Supreme Court. In ***U.S. v. Butler***[36] the court "held the Agricultural Adjustment Act as invalid." In the year 1990 the Gun-Free Schools Zone Act was enacted by the congress to prevent the possession of arms within limits of the school. This Act was declared unconstitutional in ***Lopez v. U.S***.[37] "wherein the court held that federal law was unconstitutional extension of the legislative power to regulate the interstate commerce as set up under the U.S. Constitution. More lately the constitutionality of The Patient Protection and Affordable Care Act, also known as Obamacare, was in question. The court by a majority of 5- 4 held the Act to be constitutional.[38] The State Acts as well as the State Constitutions are also subject to the Judicial Review of the High courts and Supreme Courts." In ***Romer v Evans***[39] "the U.S. Supreme court was approached regarding the constitutional validity of amendment made to the Colorado Constitution. By virtue of this amendment there was prohibition of any governmental preferential treatment based on sexual orientation. The court held this amendment of being violative of the Fourteenth Amendment to the U.S. Constitution. The state statutes have also been subjected to the Judicial Review of the Supreme Court".

Judicial Review of Administrative Actions

The process by which courts re-examine the actions of the legislative, administrative, and executive branches of government is known as judicial review. It also establishes if similar acts are compliant with the nation's constitution. The function of judicial review of department action is to determine:

- The authority of the agency.
- Compliance by the agency with appropriate procedural requirements;
- Whether an agency action is arbitrary, capricious or an abuse of discretion.[40]

The court in "***Heyburn's case***[41] held that the congress could not require the courts to give advisory opinions to the executive". In "***Youngston v. Sawyer***[42] the U.S. Supreme Court held that this executive action was unconstitutional. The court examined a case where the GPS devices were installed in the cars of suspects to obtain evidence for conviction. In doing so the officials did not obtain search warrant. The court held the searches as unconstitutional under the Fourth Amendment Act."[43]

Judicial Review of Constitutional Amendment

The Constitution has created the Supreme Court and every other federal court, and it always has. As a result, no court has ever heard an argument that it is invalid. Although observers have often noted this, the federal courts have never professed to rule on the constitutionality of the original Constitution or any portion of it, nor have they acknowledged that it was a product of revolution. These cases are "*Hollingsworth v. Virginia. 3 Dall. 378 (1798) (11th amendment); National Prohibition cases 252 U.S. 350 (1920) (18th amendment)*; *Dillon v. Gloss 256 US 368 (1921) (18th Amendment); United States v. Sprague 282 U.S. 716 (1931) (the 18th Amendment); Hawke v. Smith 253 U.S. 231, 232 (1920) (19th amendment)*; and *Leser v. Garnett* 2***58 U.S. 130 (1922)*** (19th amendment)***".***[44] **"**Even though the court upheld the validity of the amendments, it did not refuse the exercise of Judicial Review". It was in "*Coleman v. Miller*[45] that the court held that constitutional amendments to be political question and hence unreviewable".[46]

Judicial Review of the Judicial Action

The Judicial Review is also administered on the judiciary. In the "***Scottsboro Boys Case***[47], the U.S. Supreme Court held that the trial court's denial of right to competent council of one's choice resulted in violation of the due process under the fourteenth Amendment Act". In "*Sheppard v. Maxwell*[48] the U.S. Supreme Court has held that fair trial was denied to the defendant when there was circus like atmosphere in the court thereby violation of sixth Amendment. The court in a recent case has interpreted that the plea bargain made or rejected without the assistance of a counsel is violative of the sixth amendment to the constitution."[49] . All these cases mean the authority of the court to exercise Judicial Review over each branch of the government.

CONCLUSION

In the USA, there is a precise division of power between the organs of the is not stringent, as India is a parliamentary system. Though, both the countries have an independent judiciary empowered with the power of judicial review. The comparative study of judicial review in USA and India shows certain resemblances and differences. It's observed that the power of Judicial Review of legislative acts as well as executive acts exists in both countries.[50]

The differences of power Judicial Review exists on the ground of 'judicial review of constitutional amendments, Judicial review of judicial action, judicial review of Administrative action, and judicial review of legislative action'. It is seen while the Supreme Court of India is vested with the powers of reviewing the constitutional amendments, the same is missing under the U.S. constitution. The U.S. Supreme Court cannot, thus, review amendments made to the constitution. It is also observed that the compass of Judicial review is wider under the U.S. constitution as compared to that of Indian constitution'. This is because of two reasons- under the Indian on situation the fundamental rights have riders and limitations. The constitution-makers adopted this system as they felt that the courts might find it difficult to work out the limits on the Fundamental Rights so it is better to be laid down in the Constitution itself. Constitution- makers also perceived that the judiciary shouldn't be raised to the status of the 'super-legislature. Whatever the justification for the methodology adopted by the constitution- makers, the inevitable result of this has been restricted to various range of judicial review in India. Our founding fathers felt that our system cannot afford similar judicial interventions as has been given in US system.

ENDNOTES

1. M P Jain, Indian Constitutional Law (8th Edition, LexisNexis 2018)
2. (1610) 8 Co Rep 114
3. 5 U.S. 137 (1803).
4. https://ijassonline.in/HTML_Papers/International%20Journal%20of%20Advances%20in%20Social%20Sciences__PID__2021-9-2-4.html
5. Justices C K Thakkar, A Pasayat and C D Jha, Review of Legislative Acts, 116(2d ed. Lexis Nexis Butterworths Wadhwa, 2009).
6. Emperor v. Burah, (1877) 3 ILR 63 (Cal).
7. Secretary of State v. Moment, (1913) 40 ILR 391 (Cal).
8. Rajasthan v UOI, AIR 1977 SC 1361 : (1977) 3 SCC 592.
10. A.K. Gopalan v. State of Madras, (1950) SC 27 (India)
11. 1955 AIR 781, 1955 SCR (2) 589
12. Shankari Prasad v. Union of India, AIR 1951 S.C. 455 (India).
13. SP Sampat Kumar v. Union of India, (1987) 1 S.C.C. 124 (India).

14. L Chandra v. Union of India, A.I.R. 1997 S.C. 1125 (India).
15. I.R. Coelho v. State of Tamil Nadu, A.I.R. 2007 S.C. 861 (India).
16. De Smith, Judicial Review of Administrative Action (1995) 296-99, CK TAKWANI, Lectures on Administrative Law 276 (4th ed., Eastern Book Company 2008).
17. A.I.R 1981 SC 487.
18. A.I.R. 1951 S.C. 455.
19. A.I.R. 1965 S.C. 845.
20. A.I.R. 1967 S.C. 1643.
21. MP SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA 999 (11th ed., Eastern Book Company 2008).
22. DR. J.N. PANDEY, THE CONSTITUTIONAL LAW OF INDIA (49th ed., Central Law Agency 2012).
23. Keshavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India).
24. Indira Nehru Gandhi v. Raj Narayan, AIR 1980 S.C. 1789 (India).
25. Minerva Mills v. Union of India, A.I.R. 1975 S.C. 2299 (India).
26. (2018) 1 S.C.C. 79.1
27. (2014) 1 S.C.C. 1.
28. (2018) 16 S.C.C. 368.
29. https://www.law.cornell.edu/wex/judicial_review
30. (Cornell Law School, 2024)
31. 5 U.S. (1 Cr.) 137 (1803). A state act was held inconsistent with a treaty in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
32. J. Goebel, supra at 60–95.
33. Id. at 96–142.
34. https://constitution.congress.gov/browse/essay/artIII-S1-2/ALDE_00013513/
35. http://cdn.loc.gov/service/ll/usrep/usrep005/usrep005137/usrep005137.pdf
36. McCulloch v. Maryland, 4 Wheaton 316, 32 (1819).
37. 297 U.S. 1 (1936).
38. Lopez v. U.S., 514 U.S. 549 (1995).
39. Physician Hospitals of America v. Sebelius, No. 11-40631 (5th Cir., Aug. 16, 2012).
40. 517 U.S. 620 (1996).
41. Arrow Int'l v. Spire Biomedical, 443 F. Supp. 2d 182 (D. Mass. 2006
42. Hayburn's Case, 2 U.S. 409 (1792).
43. Youngston v. Sawyer, 343 U.S. 579 (1952).
44. U.S. v. Jones, 565 U.S. 400 (2012).
45. Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process 97 Harvard law Review 403-404 (1983).
46. 307 U.S. 433; 59 S.Ct. 972.
47. Marty Haddad, Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern? 42 Wayne Taw Review 1692 (Spring 1996).
48. Powell v. Alabama, 287 U.S. 45 (1932).
49. 384 U.S. 333 (1966).

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

PUBLIC POLICY AND CHALLENGES IN ENFORCING ARBITRAL AWARDS IN INDIA

Priyanka Shrivastava*, J.P. Yadav, and Subir K. Bhatnagar*****

Abstract

Arbitral award acquires significant place in judicial administration. The principle of the institution of arbitration will be defeated, if the successful party's right of arbitral award is not acknowledged and enforced, in circumstances wherein the unsuccessful party denied to comply with it. It is therefore necessary that parties to an agreement follow all the due process of entering into an agreement, to prevent unpredicted and unredeemable circumstances. In the absence of any agreement between the parties as to the applicable law, the arbitral tribunal shall apply the laws that it considers to be appropriate and relevant to the dispute. The present article intends to bring together major aspects related to an arbitral award, so that parties to an agreement can be more careful in their associates. In this article, types of award, legal requirements of an award, enforcement of an arbitral award, issue of public policy, implementation and other related challenges are discussed.

Keywords: Arbitral Award, Arbitration, Arbitrator, Public Policy, Court, Jurisdiction

INTRODUCTION

A decision of an Arbitral Tribunal is termed as "Arbitral Award". An arbitral award includes interim awards. Arbitrator can decide the dispute "in justice and in good

* Ms. Priyanka Shrivastava, Ph.D. Research Scholar, Amity Law School, Amity University, Lucknow Campus (U.P.), E-mail: priyanka14_sept@yahoo.co.in

** Prof .(Dr.) J.P. Yadav, Director, Amity Law School, Amity University, Lucknow Campus (U.P.), E-mail: jpyadav@lko.amity.edu

***Prof. Subir K. Bhatnagar, Former Vice Chancellor, RMLNLU, Lucknow, E-mail: skbhatnagar_law@yahoo.com

faith" only if both the parties expressly authorize him to do so.[1] The decision of Arbitral Tribunal will be by majority.[2] The Arbitral Award shall be in writing and signed by all the members of the tribunal. It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.[3] The Award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration). Whereby proceeding has terminated without determination of issue or claim in arbitral proceeding, cannot be termed as an award.[4] A copy of the award should be given to each party. Arbitral Tribunals can also make interim awards.

Making of arbitral award is the last stage in the arbitral proceedings. The decision taken by the majority of the members of the tribunal will be expressed in the form of the award.[5] The tribunal can render the interim award[6] provided, if the tribunal deems it necessary, otherwise, the tribunal may render directly the final award.[7] The act permits the arbitral tribunal to encourage the parties to arrive at a settlement and if the parties have agreed for a settlement then, the same can be incorporated in the award by the arbitral tribunal.[8]

The designated law or legal system applying to the substance of the dispute is to be construed, unless expressly agreed otherwise, as referring to the substantive law of that country and not its conflict of laws rule.[9] In the process of domestic arbitrations in India, the applicable law is the law of India. This is a mandatory requirement under the Indian Arbitration Act and cannot be contracted out of by the parties.[10] For international arbitrations with a seat in India, the arbitral tribunal shall follow the laws the parties have agreed to apply to the substance of their dispute.[11]

If the parties expressly agree, the arbitral tribunal may make a determination in light of fairness, equity and justice as opposed to the strict rule of law.[12] Furthermore, the arbitral tribunal may decide the applicable law by using the terms of any contract between the parties, taking into account the usages and trade practices applicable to that contract.[13] It is understood that such terms and usages are not in conflict with the mandate of the Indian Arbitration Act, India's public policy and the law applicable to the substance of the dispute.

Legal Validity

The validity of an arbitral award depends on many factors. The interpretation of law governing arbitration, especially international arbitration assumes great importance in determining the validity of an arbitral award. Often the arbitrators find it very difficult to come up with an interpretation of law in accordance with the intention of the parties. A common standard cannot be adopted in all cases because that may go against the interest of parties. So the element of fairness depends on the facts and circumstances of each and every case.[14] Legal validity of an arbitral award mainly depends on the correctness of the substantive law applied to the arbitration, venue chosen for conducting arbitration proceedings, interpretation of contract between parties etc.[15]

Reasoned or Speaking Award

The Supreme Court in the case of *Jajodea (Overseas) Pvt. Ltd. Vs. IDC of Orissa Ltd*.,[16] settled the legal position that a speaking or reasoned award is one which discusses or sets out the reasons which led the Arbitrator to make the award. Setting out the conclusions upon the questions of issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. A similar observation was made by the Court in the case of *Union of India Vs. Hindustan Motors Ltd*.,[17] wherein the Supreme Court stated that there is no elaborate discussion does not mean that the reasons have not been articulated. The rational basis of the award is revealed in the narration. In our opinion it is a speaking award, and not a silent award, though it speaks in few words. We must therefore proceed on this footing.

ENFORCEMENT OF AN ARBITRAL AWARD

Enforcement means the using the legal measures to push the party who is made liable in the arbitral proceedings, to carry out the award. The purpose of enforcement is to act as a sword in that the successful party requests the assistance of the court to enforce the award by exercising its power and applying legal sanction should the other party fail or refuse to comply voluntarily.[18] Enforcement is normally a judicial process which either follows or is simultaneous to recognition and gives effect to the mandate of the award.

An award becomes final it prevents the successful party from subsequently raising a claim on which he has succeeded. Thus, Section 35[19] provides that an arbitral award shall be final and binding on the parties and persons, claiming under them respectively. An award can be challenged under section 34 of the Act, or else it is final and becomes decree of court under section 35 and no objection of jurisdiction on ground of no arbitration agreement can be raised in execution.[20]

Pre-Requisite Conditions for Enforcement

- ***Appropriate Court***- India is a large jurisdiction identification of the relevant court is important. For the purposes of the Act "court" means the Principal Civil Court having original jurisdiction to decide the question forming the subject matter of the arbitration, if the same were a subject matter of a suit. The aggrieved party can bring the application to set aside the award before the

Court where the successful party has its office or where the cause of action in whole or in part arose or where the arbitration took place.

- ***Stamping of the Arbitral Award***- The Arbitration Act does not mention of stamping or registration of an Award. However stamping is required under the provisions of the *Indian Stamp Act, 1899*. Section 35 of the said Act states the documents which are required to be stamped, if inadequately stamped (or not stamped) will not be admissible as evidence "for any purpose". Though the Indian Stamp Act is a Central Legislation, various States have prescribed their own schedule of applicable stamp duties. Hence stamp duties vary from State to State.
- ***Registration***- This again is not provided for under the Arbitration Act. The Registration Act, 1908 provides that if any non-testamentary document "purports or operates to create, declare, assign limit or extinguish and, any title, right or interest" in any immovable property, the same is required to be registered and if it is not, it is invalid.

SCOPE AND PURPOSE

The scope of section 34 of Arbitration and Conciliation Act 1996 is limited to the stipulations contained in section 34(2) of the Act. The expression "recourse to a court against an arbitral award" appearing in section 34(1)[21] of the 1996 Act cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award.[22]

The jurisdiction of court to interfere with an award of the arbitrator is always statutory. Section 34 is of mandatory nature, and an award can be set aside only on the court finding the existence of the grounds enumerated therein and in no other way. The words in section 34(2) that an Arbitral award can be set aside by the court only if are imperative and take away the jurisdiction of the court to set aside an award on the ground other than those specified in the section.

The court is not expected to sit in appeal over the finding of the Arbitral Tribunal or to re-appreciate evidence as appellate court. The observation of Supreme Court in the case of *P. R. S. Stockbroker ltd. v. B. H. H. Security Private Ltd*. is opposite in this regard.

PRINCIPLE OF SEVERABILITY

The court while setting aside an arbitration award under section 34(2) of the Act can apply principle of severability to the awards which are severable. It is well settled that technical objections and grounds cannot be permitted to impede the cause of interest of justice. The court would mould procedure to ensure substantial justice to all parties concerned.[23] Hence, bad part of award can be severed from good part and bad part can set aside. It is not necessary to set aside entire award. Where however bad part of award is so intermingled and interdependent upon the good part of award that is not possible to sever the award in such cases it may not be possible to set aside the award partially and whole award has to be set aside.[24]

The Delhi High Court recently examined the issue of partial setting aside of arbitral awards in the case of ***National Highway Authority of India (NHAI) v. Trichy Thanjavur Expressway Ltd***.[25] This case explores the issue raised regarding courts' powers under Section 34 of the Indian Arbitration and Conciliation Act, 1996, and the controversies surrounding partial setting aside and modification of arbitral awards. The High Court's judgment acknowledged the balance between minimal court intervention and the need for corrective measures, while distinguishing between partial setting aside and modification of awards.

The chief issue revolved around whether courts have the power to partially set aside arbitral awards under Section 34 of the Act and whether such partial setting aside amounts to modification. The Delhi High Court's judgment **acknowledged the legislative intent for minimal court intervention** in arbitration matters. It **upheld the power of courts to partially set aside arbitral awards under Section 34(4)**, recognizing that an award may consist of separate and distinct components. However, it clarified that this power does not extend to modifying the award's substance.

The court's analysis described from precedents and legislative intent:

- The court acknowledged the shift in legislative policy towards minimal court intervention in arbitration.
- It highlighted the balance between the need for corrective measures and the restriction on courts' modification powers under Section 34.
- The court interpreted the Proviso to Section 34(2)(a)(iii), recognizing that an award could be partially set aside when certain claims are distinct and severable.
- The court clarified that Section 34(4) allows courts to invoke curative and remedial measures to rectify defects in the award without modifying its essence.
- It emphasized that Section 34(4) does not empower courts to review findings or reconsider conclusions already recorded in the award.

ASSESSING THE ISSUES AND CHALLENGES IN EXECUTING THE AWARD

The delays and pendency of cases particularly, results in the hearings and rulings in these appeals usually taking unusual time to end the disputes for the parties. The 2015 Amendment to the Arbitration Act provided certain reliefs to the award holder in this regard by doing away with the concept of automatic stay on arbitral awards once an application under Section 34 has been filed by the challenger. The

2015 Amendment Act added subsection (2) to Section 36 of the Arbitration Act which stipulated that the filing of an application under Section 34 of the Arbitration Act shall not by itself render the arbitral award unenforceable unless the requisite Court grants a stay on the operation of the arbitral award for reasons to be recorded in writing.

The ultimate result is that decree holder doesn't receive any benefit of the award till the challenge mechanism is over and that takes years. There is of course the additional risk of the losing party not paying up even after the challenge process is over. The biggest challenge for the arbitral enforcement mechanism is its linkage with the Court process herein and the shortcomings of such process.

ISSUE OF PUBLIC POLICY UNDER LAW OF ARBITRATION

Domestic public policy consists of principles of morality and justice that are reflected in the constitution or other legal sources of a country. On the other hand, international public policy is a reflection of the justice seeking sentiment of a society and is a collection of values of a country and their violation cannot be tolerated by the society even in international affairs. Only a few countries have explicitly adopted the concept of international public policy in relation to enforcement cases. There is a growing trend of courts of various member states moving towards a restrictive and narrow interpretation of public policy and applying the concept of international public policy.

Defining 'Public Policy'

Generally, the concept of 'public policy' is described as a structure of laws, regulatory mechanisms, the line of action, and priorities relating to a matter propagated by the law-making entity.[26] The Supreme Court has held that the public policy is not the policy of a particular government.[27] Public policy implies something which is concerned with the interest and welfare of the public. The notions of interest and welfare of public have changed over a period of time, and it has resulted in a change in the concept of public policy as well. The courts are considering the transactions in favour of a public policy which was earlier considered as opposed to the public policy. In international commercial arbitration, the notion of public policy has been categorised as- *domestic public policy, transnational public policy* and *international public policy*.

Domestic Public Policy

In a domestic arbitration, the court enforcing the arbitral award is required to consider the notions of the *national public policy*. The court enforcing a domestic arbitral award, while reviewing, has to check as to whether the same is opposed to the local requirements of justice and morality. This is because of the fact that the underlying transaction is concerned with only one nation. Usually, the *'domestic public policy'* refers to such conception where the legality of a contractual relation will be impaired.

International Public Policy

The 'international public policy' of a country may be same as the 'domestic public policy' or it may be distinct from the domestic public policy.[28] Generally, the enforcement courts enquire about the- international public policy when the arbitration proceedings involve parties from different countries. The application of notions of domestic public policy of a country in an international perspective can be referred to as an international public policy. In a manner, it is expansion of the rules of the domestic public policy. In international commercial arbitration, a court enforcing the award is needed to consider the public policy of interested nations and the special needs of international commerce apart from considering its own public policy. Usually, in many jurisdictions during the enforcement of foreign arbitral awards, the notion of international public policy is considered and employed.[29] Nevertheless, the annulment of arbitral awards on the basis of violation of international public policy is very difficult.

Transnational Public Policy

'Transnational public policy' refers to the international accord on the standards of public policy rules that must provide limitations and pertain to international commercial transactions. If the scope of arbitration is international, and it is dependent on *lex mercatoria*, the enforcing courts must consider the transnational public policy. The *lex mercatoria* is a governing law that has no direct connection to any national law but represents a combination of rules of law which are common to all or most of the States engaged in international trade. Usually, once the parties are unsuccessful in choosing the governing law of arbitration, they *select lex mercatoria* so that they can avoid the international award from being subjected to adverse foreign laws. It differentiates 'international public policy' from the 'transnational public policy.' The court reviewing the international award has to take into account the public policy of all concerned States.[30] The *transnational public policy* must be valued as international obligations of the States as it contains principles originating from the international community of States.

JUDICIAL INTERPRETATION OF PUBLIC POLICY IN INDIA

In *Gherulal Parakh v. Mahadeodas*[31] the Apex Court stated that Law Lords define the concept of public policy and lay down the limits of its application in the modern times. The rules of public policy are well-settled and the function of the courts is only to expound them and apply them to changing situations. The Indian Supreme Court in *Renusagar Power Co Ltd v General Electric Co.*[32], also interpreted public policy restrictively and held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase "public policy" must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to-

(a) Fundamental policy of Indian law,
(b) The interests of India and
(c) Justice and morality

- **Substantive public policy**- Substantive public policy comprises of the mandatory and fundamental laws of a state, public order and morality, and national interest. It deals with irregularities concerning the subject matter of the award and its compatibility with the fundamental norms and principles of the state enforcing the award. A fundamental law is one that is of such importance to the domestic regulation of a state that the state deems it irrelevant whether it was a law governing the dispute. In India, several of the aforementioned grounds of substantive public policy have been made applicable. Courts have often rejected the enforcement of awards on the basis of their "patent illegality", i.e., because these awards were in violation of a mandatory norm in India. The Amendment Act has clarified that only domestic awards may be set aside on the basis. Even the ground of public morality finds its place in Indian jurisprudence, and has been included as one of the statutory meanings in case of both domestic and foreign awards.
- **Procedural public policy**- Procedural public policy deals with infinities in the rules governing arbitration and comprises of matters such as fraud and corruption, due process, res judicata, and annulment at the venue of arbitration. Courts have found a violation of public policy in cases where they considered that the right to be heard had been breached. The category of fraud and corruption has been subject to a lot of debate, owing to its ambiguous contours. While some States treat bribery and corruption as grave wrongs, others see it as a matter of executive failing. Despite this, there is a general consensus that awards based entirely on fraud must not be enforceable. The point where most jurisdictions differ is whether or not this fraud must be proven as having had an impact on the fairness of the proceedings. The Supreme Court has observed that the infringement of law alone will not draw the barrier of 'public policy' given that the public policy covers up area not covered by the words and the law of India.

MISERY OF UNCONDITIONAL STAY ON ENFORCEMENT OF CHALLENGED DOMESTIC AWARDS

The Arbitration and Conciliation (Amendment) Act, 2021 is the fourth major change made in the Indian Arbitration Regime in the last seven years. With amendments being made this frequently, one would expect them to iron out the ambiguities and make the arbitral process smooth. The chief offender in this regard is the fresh introduction of the 'fraud or corruption' standard allowing unconditional stay on the ever so difficult and exacting, enforcement of domestic awards pending challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

The 2021 Amendment Act, introduced two key changes in Part I of the Act.[33] Firstly, it retrospectively amended Section 36 of the Act and introduced 'fraud or corruption' as a standard to seek unconditional stay on the enforcement of domestic awards. Secondly, it deleted Schedule VIII of the Act which prescribed certain eligibility criteria for being an arbitrator. This part of the chapter aims to elaborate on the constant back and forth in legislative amendments concerning the enforcement of arbitral awards in India, and to demonstrate that the uncertainties in this regard are far from over. Crucially, the 2021 Amendment Act also fails to explain the material which the court may refer to while deciding whether there exists a ***prima facie*** case of fraud or corruption.

Does the court restrict itself only to the material available on record like an enquiry under Section 34 of the Act or can it go beyond the matters on record and look into additional evidence / records. It remains to be seen how the courts would interpret the introduction of fraud and corruption as grounds to allow unconditional stay. The immediate repercussion of the 2021 Amendment Act and its retrospective assent to unconditional stays on all Section 34 proceedings appears to be disordered. The victim of this would also be the India's dream of becoming an arbitration friendly jurisdiction.

CONCLUSION

Today the countries have devised the alternate means and ways of resolving their disputes. Traditional method is to get the matter resolved with the help of the judicial settlement in the Court of law by litigating, where one party files suit against another. The proceeding are very formal in nature and are governed by such rules and procedure, which are established by the legislature. ADR are usually preferred by the parties to resolve their disputes because they are perceived to be greatly flexible, considered to have costs below those of traditional litigation, and speedy resolution of disputes, as among some of the added advantages. Sec. 34 of the 1996 Act plays a role in both domestic award and international award of an international arbitration whose proceeding was held in India. In this case, the apex court held that the principle expounded in Associate Builders is no longer a correct one for interpenetration of public policy in India.

Internationally, however, the tendency is towards restricting the power, in order to prevent its abuse by a reluctant party. Indian law, too, should move in this direction, without compromising the rights of the parties to have an effective judicial control. This can be achieved by limiting the grounds for setting aside an award. Particularly, the ground of failure to apply the applicable law to the dispute should be removed, as it unnecessarily opens the way for the substantive review of awards.

The Arbitration Act, 1996 recognizes recourse to foreign arbitration. From the research done on the various aspects of the chapter, it is foremost significant to advert that the notable features of the Arbitration and Conciliation Act 1996 are that it is to minimize judicial intervention and reduces the grounds of challenge to the award. The object of the Act is to ensure speedy decision of the disputes between the parties, which has been well settled in very many case laws in India and foreign Countries. The emphasis has been to accord primacy to resolution of disputes through arbitration and to reduce the intervention of the courts in such proceedings. The object of the Arbitration and Conciliation Act, 1996 is expedition.

ENDNOTES

1. Section 28(2) of the 1996 Act
2. Section 29 of the Act
3. Section 31(3) of the Act
4. Pandit Munsi Ram and Associates v. Union of India 2015 (2) Arb. LR 40
5. Section 29 of the Act
6. Section 31 (6) of the Act
7. Sections 35, 30 and 32 of the Act
8. Section 30 of the Act
9. S.28(1)(b)(ii) of the 1996 Act
10. S 28(1)(a) of the 1996 Act
11. S 28(1)(b)(i) of the 1996 Act
12. S.28(2) of the 1996 Act
13. S.28(3) of the 1996 Act
14. In K.K. Modi v. K.N. Modi, (1998) 3 SCC 573, the Supreme Court reiterated that the arbitral tribunal will have to determine the rights of the parties in an impartial and judicious manner, because the tribunal owes an equal obligation of fairness towards both sides.
15. Thawandas Pherumal v. Union of India, A.I.R. 1955 S.C. 468 -The arbitrator is required to make an award in accordance with the law. In the absence of reasons stated in the award, it is not possible to find out whether an award has been passed in accordance with law. The reasons stated should be proper and adequate. To give reasons which are inadequate is an error of law. At the same time it is to be noted that the arbitral tribunal is not required to

give a detailed judgment, held in the case of Indian Oil Corporation v. Indian Carbon Ltd., (A.I.R. 1988 S.C.1340)

16. 1993(1)Arb LR 334
17. (1987) 3 SCC 458
18. Julian D. M, Tefan M Kroll (2007). 'Comparative International Commercial Arbitration'. New Delhi, Kluwer Law Publication
19. Section 35- Finality of arbitral awards.

    Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.
20. R. K. Textiles v. Sulabh Textiles Ltd., 2003(1) Arb LR 303 Bombay
21. Section 34: Application for setting aside arbitral award-

    S.34 (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
22. Gayatri Balaswamy v. ISG Novasoft technology 2015(1) Arb. LR 354 (Madras)
23. Angle Infrastructure Pvt. Ltd. v. Ashok Manchanda, 2016(2) Arb. LR 394 (Delhi)
24. R. S. Jiwani v. Ircon International ltd. 2010 (3) RCR 147
25. 2023 SCC OnLine Del 5183
26. T. K Biswas (2014). "Introduction to Arbitration in India: The Role of the Judiciary". Kluwer Law International (pp. 258).
27. Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly [1986] AIR 1571 (SC).
28. K. M Curtin. (1997). "Redefining Public Policy in International Arbitration of Mandatory National Laws". Defense Counsel Journal (pp. 271-281).
27. Mitsubishi Motors Corp. v. Soler Chrysler Inc. (1985) 473 U.S. 614, 629.
28. M.A. Buchanan (1988). "Public Policy and International Commercial Arbitration". American Business Law Journal (pp. 511, 514).
29. [1959] AIR 781 (SC)
30. AIR 1994 SC 860
31. Part I of the Act concerns itself with only India seated domestic and International Commercial Arbitration

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

RIGHT TO BE FORGOTTEN: BALANCING RIGHT TO ACCESS PUBLIC INFORMATION AND APPLICABILITY IN INDIAN CRIMINAL JUSTICE SYSTEM

Shubham Srivastava*, and Shreya Dixit**

Abstract

Right to privacy is a fundamental right under Article 21 of the supreme law of the land and right to be forgotten is a part of Privacy on one hand and right to access public information is a part of Article 19 (1) of the Constitution of India on the other. Though Right to be Forgotten is a recognized right in international regime, it is only recently, the Indian Judiciary has started recognizing it. However, the main problem with such recognition is that the courts are interpreting it as a part of right to privacy which itself is an ancillary right rooting from right to life under Article 21. In addition to that, parliament, or any other regional legislature has yet to pass any law in this regard whereas a number of high courts have affirmed the third level right. The aim of this paper is to suggest the balancing nature of the law that should brought by the legislature to replace this judicial construct and balancing it with right to public information through judicial interpretation using the test of proportionality in the existing legal frame work in Indian Criminal Justice System. The paper intends to examine the various dimensions affecting the right to be forgotten and proposing the pros and cons of the same so as to justify the present status of the Right to be Forgotten. It also precisely examined the various criticisms and the grey areas of Right to be Forgotten in order to propose the requirement of a statute to maintain a balance between safeguarding individual's right to privacy and public's right to be informed.

Keywords: Right to privacy, fundamental right, right to be forgotten, criminal justice system, Article 21

* Shubham Srivastava, Assistant Professor, School of Criminal Law and Military law, Rashtriya Raksha University, Lavad, Ta. Dehgam, 8 Gandhi Nagar, Agra — 282003;
E-mail: 55ashu55@gmail.com Mob: 9760917800

** Shreya Dixit, Senior consultant at KPMG, 10, 8th floor, Tower B. DLF, Cyber city Phase-II, Dwarka, New Delhi; E-mail: shreya.dixit2010@gmail.com; Mob: 95823 51469

INTRODUCTION

The Right to be Forgotten refers to the capability of an individuals to redact, limit, delete, erase or correct the disclosure of private information on the cyber sphere that is deceptive, irrelevant or such information that is no longer necessary to exist in such cyber space. Such disclosure may or may not be the result of unlawful processing by the data fiduciary.

The right gives citizen remedy against data fiduciary if it believes that certain processing is unfairly disclosing private information of the same. However, the problem emerges when there is a disagreement over whether the disclosure's objective has been met or whether it is still required. A balancing test is required to determine whether the benefit of ending the disclosure outweighs the benefit of continuing it. While enforcing such "Right to be Forgotten" into data protection regime in India, a significant issue shall be addressed first, that it contravenes right to publication that may involve subjects of public concern, and whether or not publication is "essential" will depend on the scope of that concern.

There is no doubt that the "Right to be Forgotten" shall be enforced However, this right must be conferred only after a meticulous balancing of the rights to freedom of expression and privacy. Further that, incorporation of "Right to be Forgotten" will have a disadvantageous influence on individual's capability to access data in the cyber space.

For the foremost time, right to be Forgotten was codified by EU in its General Data Protection Regulation along with Right to Erasure. It is found in Article 17(2) of GDPR. It states that, "the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay"[2].

In India, the need to have a robust Data Protection Regime was addressed in the case of Justice K. S. Puttaswamy v UOI[3], it was held that "Right to be Forgotten" is an integral facet of "Right to Privacy" but such right shall be exercised perniciously as it should not restrict "Right to Freedom of Speech and Expression and access to public data. Further, Justice B.N. Srikrishna formed a committee of experts and a law report titled "A Free and Fair Digital Economy Protecting Privacy, Empowering Indians" recommended to incorporate right to be forgotten into Data Protection Legal Regime in India[4].

The Personal Data Protection Bill, 2019 incorporated right to be forgotten that states that the right to be forgotten shall not be available when it overrides the right to freedom of speech and expression as well as right to access information of other citizens. On the other hand, EU has much wider Data Protection legal framework. Subsequently, the "Right to be Forgotten" in certain cases might overlap with the other rights to free speech and information; it would be a grim issue for the Judiciary to strike a balance between these rights. The authors endeavor to interpret judicial pronouncements and why its application is quintessential in criminal justice system of India and further suggests/recommends that there should be balance between right to be forgotten and right to access public information, the test of proportionality should be taken into consideration and should be judged according to facts and circumstances of case in hand as such there should be no straight jacket formula for the same.

RIGHT TO BE FORGOTTEN- JUDICIAL INTERPRETATION

Major issue which needs to be addressed is "whether an accused has the right to seek for erasure or redaction of his personal records from public domain on being acquitted from all charges by order of a competent court having jurisdiction to conduct trial?".

Secondly, whether "Right to Be Forgotten" can be traced under the facet of "Right to Privacy" which is an intrinsic part of Article 21 of the Constitution as held in the landmark judgement of ***K.S. Puttaswamy (9 Judge) v. UOI***[5]

When a judgement of acquittal is delivered, the accused have a right to reputation which is an inherent part of Article 21; further, it offers the accused the crucial right to have his personal information automatically expunged from all records, particularly those in the public domain.

It becomes imperative to understand the objective behind granting such right to an accused person. When an order of acquittal is delivered, it means that the accused has been tried, has undergone trial and after proper evaluation and examination of evidence he has been acquitted of all charges. In those circumstances, he possesses the right to get his personal identity removed from all criminal records, which he wants this world to forget.

The High Court of Madras in the case of Karthick Theodore v. Madras High Court[6], buoyed the interpretation that "*a person is entitled to have their name redacted from the judgments or orders that are accessible through search engines and are existing in the public domain*[7]"

The High Court also emphasized upon a wider interpretation of "Right to Privacy", "Right to Reputation" and "Right to live with Dignity" and further, in such circumstances, it is upon the court's obligation to come to rescue for protection of accused's right until the legislature enacts the Personal Data Protection Bill.

But, enacting such law as to "Right to be Forgotten", there are certain ramifications that are mentioned below:

Process of Banishing Personal Data

If the accused is granted the right to be forgotten then, it is to be granted at the end the order/judgement. Thus, the court is observing at the final outcome of the criminal procedure which gets published. By that period/duration the personal data of the accused would be deep rooted in the public domain that it would be difficult to eliminate. Further, at every level/stage of criminal litigation, the publication of orders will be done and none of them would be touched, but only the end product of the procedure. The purpose of eliminating seems to be defeating as till that period, enough harm to reputation would be caused.

It should be further noted that only "*Juvenile Justice [Care and Protection of Children] Act, 2015 provide for obliteration in toto of the ENTIRE CRIMINAL RECORD which eventually eliminates the person from their identity as an accused*".

CONTRAVENING THE PRINCIPLE OF OPEN JUSTICE

In the case of Swapil v. Supreme Court of India[8], D.Y. Chandrachud, J., identified that in India the ***"Principle of Open Justice"*** is a rudimentary tenet of *"Rule of Law"*. The principle is not one-dimensional and involves a variety of perceptions. Some are as mentioned below:

"The entitlement of an interested person to attend court as a spectator, the promotion of full, fair and accurate reporting of court proceedings, the duty of judges to give reasoned decisions. public access to judgements of court"[9].

IN CONFLICT WITH THE RIGHT TO INFORMATION

The Supreme Court laid down certain principles in the case of "***R. Rajagopal v. State of Tamil Nadu[10]"*** that were acknowledged by the 9 -Judge bench in K.S. Puttuswamy's Case. It was reiterated that the judgements of courts being public record, the "Right to Privacy" cannot exist in that sphere. It was further noted that,

"Such a right cannot be practiced where the information/data is necessary, for exercising right to freedom of expression and information, for compliance with legal obligation, for the performance of a task carried out in public interest, on the grounds of public interest in the area of public health, for achieving purposes in the public interest, scientific or historical research purposes, or for the establishment, exercise or defense of legal claims"

Such justifications are reasonable enough to restrict the practice of "Right to be Forgotten" and In the realm of justice administration, such a right cannot exist.

It has been also acknowledged that an order/judgement of court cannot violate the fundamental right of any citizen. Writ of any kind cannot be issued against any order/judgement of the court claiming relief of redacting, delimiting any personal data of a person. This is a well-settled law that a judicial order of a court cannot violate fundamental rights as held in the case of Naresh kumar Mirajkar v. State of Maharashtra[11]

SANCTITY OF AN ORIGINAL ORDER

Article 215 of the Constitution designates the High Court as a court of record, enabling it to keep the original record in perpetuity. As a result, an original record's inviolability can only be altered or handled with in accordance with the law.

It is imperative to note that Delhi High Court, despite all such ramifications came to the rescue of the Accused after being acquitted by a competent court of jurisdiction to try the matter in order to protect his right to privacy, as it granted an interim relief of eliminating his personal data from Online data base platform India Kanoon. The court in the case of Jorawar Singh Mundi v. UOI[12] granted interim relief to block the judgement from being accessed by using search engines.

The objective behind such order was to protect the right of the accused as He was at an immediate disadvantage because the court's decision could be found on a google search by any potential employer who wanted to examine his record before hiring him. Hence, he was not able to get a decent employment, despite having good academic record.

The court reasoned that because of the irreversible harm that could be done to the Accused's social life and career aspirations, the case should be dismissed. Hence, he is entitled to interim relief.

The court referred the judgement delivered by the Orrisa High Court in the case of ***"Subhranshu Rout v. State of Orissa"***[13] that raised the issues regarding "Right to be Forgotten". The court addressed that *"as there is no statute in India which provides for the right to be forgotten/ getting personal data erased from the server of the social media platforms"* in perpetuity, it referred to the foreign case law ***of "Google Spain SL v. Agency Espanola De Protection de Datos"***[14], where in the European Court of Justice held that citizens have the right to request that commercial search engines, such as Google (gathers personal information for profit) should remove links to private information when asked, provided that the information is no longer relevant. The court put "Right to Privacy" on a higher pedestal than the economic interest of the commercial firm and it further went to the point that it would even outweigh the public interest in information availability.

The court further referred to

> "The recommendations of the Justice B.N. Srikrishna Committee, which had included the right to be forgotten, which refers to the ability of an individual to

> redact, amend, remove, delete or correct the disclosure of the personal information on the internet that is irrelevant and no longer necessary as a statutory right in Personal Data Protection Bill, 2019"

In conclusion, the judiciary in majority cases does not favor the right to be forgotten in the absence of any statute. This leads to flaws in our criminal justice system, as we have yet to reach a point where courts can issue orders for the redaction of an accused person's identity based on particular criteria established by rules or regulations.

APPLICABILITY OF THE RIGHT OT BE FORGOTTEN IN CRIMINAL JUSTICE SYSTEM

Today's world is completely in the grips of social media. Everyone evaluates a person's background by searching on social media applications or even by way of a simple google search and gathering information. Even though, there is no guarantee, that the information provided on google is authentic or not, yet many people base their first impressions on the data collected by this and it may make or break the characteristics of such person. This is why, everyone tries to portray themselves in the best possible way on the social media. This is a new challenge for the world and already everyone is struggling to face this harbinger of more complexities that await humanity. [15]

Howard Becker, American sociologist helped in the flourishing of the 'Label theory' during the mid-1960s. According to the label theory, people tend to identify themselves as how the society labels them and behave accordingly. Label theory is most commonly is identified with crimes and criminals as labelling someone deviant unlawfully can be a cause for misconduct. For example, calling someone a 'criminal' can lead to others treating him more negatively than required and thereby causing the individual to act out. Another key aspect of the labelling theory it has been observed that many offenders do internalize their label as "criminals" and thus creates a criminal career out of the reactions of the society. In many examples we have seen, when a person commits a petty theft and is caught by the police, the society calls him "*chor*" "*daaku*" and other criminal connotations and such labelling by the society has led to him conforming to career criminality in the future. [16]

In contemporary criminal justice, stigmatization is highly prevalent and is present in all sociological and psychological aspects. Once a person has been accused of a crime, the society is very quick to label him with all sorts of names and calls even before the court of law passes its judgment. Psychologists say that such stigmatization has led to a significant rise in the criminal behavior. Thus, the means and processes of societal control and ensuring a law- abiding behavior among people may have an unintended and ironic consequence of accomplishing the very opposite and led to an increase in criminal behavior among the people. [17]

Right to be Forgotten to a Convicted Criminal

The right to be forgotten is based on the right of the convicted criminals that have served their sentences and been adequately rehabilitated or reformed to refuse to reveal the facts and all details of their conviction and detention. Unlike many other countries, this right is new in India and has not yet been confirmed by the apex court. Countries like China and several others have established the policies regarding the sealing of criminal records of juveniles and minors.

The right to be forgotten to a criminal convicted would entail firstly, the sealing of all criminal records from the access of the general public at the request of the offender. Another aspect of this, would be the complete removal of all information of the convicted felon from the records. This information would also include fingerprints, DNA, lip prints and other forensic evidences as well. The removal of offender's records would mean the ultimate realization of the right to be forgotten. In fact, the Article 770 of the Criminal procedure code of French Republic has stated that "if after a judgment has been passed regarding a minor or age 18 years and the minor has been re-educated, then after the expiry of 3 years from the date of such judgment, and the minor has reached the majority, the records of such minor may be completely removed either at the application of the minor or by the Public Prosecutor or by the court suo moto. Such complete removal would also mean that the offender can start afresh with no relation to his past actions. Thirdly, the right to be forgotten would also include the removal of data from all press releases, articles, news reports, etc. [18]

The Right to be Forgotten of the victim

This right to be forgotten can also be extended to the victim as well. Section 228A of the Indian penal Code, 1860 (hereinafter referred to as "IPC") specifically deals with the disclosure of the identity of the victim. It provides punishment for those whoever prints or publishes the identity or other details of victims under the section 376, 376A, 376B, 376 and 376D (Section 228A(1) of IPC); except unless either the court has given an order in writing or the victim has authorized or where the victim is dead, minor, or of unsound mind, then with the authorization of the next of kin (Section 228A(2) of IPC). [19]

Right to be forgotten of the victim would enable provide other victims to request for the removal of their records from the news reports and articles. This right should be given because sometimes the information provided by the media and other new reports can sometimes blow out of proportion and can destroy the reputation of the victim as well. Therefore, this right can enable to pacify any possible negativity such as revenge or antagonism. It would provide for damage control and help the victim to heal and try to resume to normalcy. [20]

The Right of the Innocent/ Acquitted

The innocent or the acquitted here may include all categories, such as those who were wrongly accused of a crime or labelled as criminals by mistake of judicial authorities or recorded with the wrong crime. It is claimed that such people who have been wrongly associated with the criminal case should be allowed to get their details removed from the internet and other records to avoid any wrong implications, the impact on their personal life and reputation in the society.[21] In recent judgment, the Madras High court, a Single Judge bench of Mr. Justice N. Anand Venkatesh held that right to be forgotten is a new right and should be included in Article 21 (Right To life and dignity) of the Constitution of India. Here, the petitioner was acquitted by the honorable high court and thus he pleaded for retraction of all his details in lieu of the Right to be forgotten. [22]

CRITICISMS AND SUGGESTIONS

In our opinion, there are primarily 4 criticisms surrounding this new Right to be Forgotten and why the decision of the High court of Madras is flawed.[23]

Firstly, the Right to be Forgotten laid down by the court only focuses on the rights of the person seeking such right and not the corresponding interests or rights of others. For example, the fundamental right of Article 19(1)(g) that gives the right to practice any profession, or to carry on any occupation, trade or business which would include the right of the journalists and news reporters to cover news reportage. These competing rights are not yet addressed or balanced by the court.

Secondly, it is imperative that the courts maintain transparency and the general public or citizens to have the "access to information". This enables them to exercise their right to freedom and speech (Article 19 of the Indian Constitution). For example, what about a recruiter who wishes to hire a person in his/her company, isn't it his competing right to know the past and present of such person who he is letting in, in his company/firm? Such questions are not yet being answered.

Thirdly, it is common knowledge that all criminal proceedings are public record. This means that all public officials and citizens have a right to know if an accused has been tried in the court of law. This is primarily important in cases where the offence is of a serious nature, for example, rape, murder, other sexual offences or offences that inflict any bodily harm etc.,

Fourthly, it has been provided in the judgment of Justice KS Puttaswamy v. Union of India[24] ***that right to privacy will not have "horizontal application***", that is to say this right cannot be exercised against anyone other than public officials or the 'state'. Therefore, assuming but not admitting that the right to be forgotten exists, the High Court cannot order private entities to enforce this right as part of the right to privacy. Furthermore, even though the High Court's writ jurisdiction under Article 226 has a wider ambit than that of the Supreme Court's power under Article 32, yet the High Court cannot enforce such fundamental rights against non-State entities that do not perform a 'public function'.

Lastly, it is evident that India has neither signed any international treaty nor has any customary law that could impose such compulsions on the State to provide an individual with such right of erasure of data or right to be forgotten, especially against private/ non-state entities.[25]

CONCLUSION

In lieu of all the arguments in favor and against the enforcement of the Right to be forgotten in our country, Authors are of the opinion that the court needs to strike a balance between the individual's right to privacy and the public's right to access information in context of Right to be Forgotten. While, the jurisprudential essence on which this right lie is noble and may have positive results in the criminal justice and would provide a fair chance to every individual to re-build their life from the start thereby taking a step forward in the restorative justice of the individual, yet it cannot be argued that still there are several questions of the critiques that are left unanswered. Therefore, striking a balance between this and ensuring interest and rights of both the public and the individual is secured.

REFERENCES

2 GDPR.eu. 2021. 'Everything you need to know about the "Right to be forgotten' - GDPR.eu. <https://gdpr.eu/right-to-be-forgotten/> accessed 31 October 2021

3 *Justice K. S. Puttaswamy v UOI*, [2017] 10 SCC 1

4 Meity.gov.in. 2021. <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf> accessed 31 October 2021

5 *K.S. Puttaswamy (9 Judge) v. UOI*, [2017] 10 SCC 1

6 *Karthick Theodore v. Madras High Court*, [2021] SCC OnLine Mad 2755

7 *Id*

8 *Swapil v. Supreme Court of India*, [2018] 10 SCC 639

9 Sharma, D. and Sharma, D., 2021, 'Right to be forgotten Archives | SCC Blog. [online] SCC Blog'

<https://www.scconline.com/blog/post/tag/right-to-be-forgotten/> accessed 31 October 2021

10 *R. Rajagopal v. State of Tamil Nadu*, [1994] 6 SCC 632

11 *Naresh kumar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1

12 *Jorawar Singh Mundi v. UOI*, [2021] SCC Online Del 2306

13 *Subhranshu Rout v. State of Orissa*, [2020] SCC Online Ori 878

14 *Google Spain SL v. Agency Espanola De Protection de Datos*, (AEPD), C-131/12 [2014] QB 1022

15 W.P.(MD). No.12015 of 2021

16 Roger Hopkins Burke, 'An Introduction to Criminological Theory', (Lawman Private Limited,2001), 143

17 Time Newburn, Criminology, (Willan Publishing, 1st ed. 2007), 217

18 Zheng Xi, 'Return of a forgotten right: Application of the right to be forgotten in criminal justice')7 November,2019,<https://www.heraldopenaccess.us/openaccess/return-of-a-forgotten-right-application-of-the- right-to-be-forgotten-in-criminal-justice>.

19 The Indian Penal Code, Section 228A.

20 Jurist Legal news and commentary, 'India court notes right to be forgotten for those acquitted of crimes as new fundamental right', 17 July,2021, <https://www.jurist.org/news/2021/07/india-court-notes-right-to-be-forgotten- for-those-acquitted-of-crimes-as-new-fundamental-right/.>

21 Zheng Xi, 'Return of a forgotten right: Application of the right to be forgotten in criminal justice')7 November,2019, <https://www.heraldopenaccess.us/openaccess/return-of-a-forgotten-right-application-of-the- right-to-be-forgotten-in-criminal-justice>.

22 *Karthick Theodore v. Madras High Court*, [2021] SCC OnLine Mad 27

23 Anjujay Shrivastava, 'MadrasHigh Courtorderon'righttobe forgotten': Analysisand critique' July31,2021, <https://thedailyguardian.com/madras-high-court-order-on-right-to-be-forgotten-analysis-and-critique/.>

24 Justice KS Puttaswamy v. Union of India, [2017]10SCC1

25 Anjujay Shrivastava, 'MadrasHigh Courtorderon'righttobe forgotten': Analysisand critique' July31,2021, <https://thedailyguardian.com/madras-high-court-order-on-right-to-be-forgotten-analysis-and-critique/.>

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

ENSURING RIGHT TO PRIVACY IN INDIA

Prity Singh* and Mani Kumar Meena**

Abstract

Right to life and privacy acquires prime position among the fundamental rights granted by Indian Constitution. Judicial administration in ensuring it, thus, becomes an urgent imperative to be discussed. Right to privacy gives freedom of individual dignity. But it has been witnessed that individual privacy has become vulnerable to encroachment in various ways in this age of technological revolution. Thus, it makes an urgent imperative to examine the effectiveness of constitutional provisions and concerned laws. In this context, the present paper intends to assess the conceptual aspects of right to privacy, constitutional provisions, concerned laws, jurisprudence and judicial administration. In addition to this, it encompasses the discussion on the contrasting India's situation with that of other countries in this regard as well as issues and challenges surrounding its execution.

Keywords: Right to Privacy, Dignity, Laws, judicial pronouncement, Search & Seizers, fundamental right

INTRODUCTION

Every citizen has some secrets that he would prefer to keep private for fear that doing so might disrupt their lives and result in things like financial loss, defamation, mental anguish, etc. A person should be protected if they are operating within the bounds of the law. There are situations where a person's actions may be legal but violate moral and social norms; in such cases, the person's protection from legal

* Prity Singh, Research Scholar at Jaipur School of Law, Maharaj Vinayak Global University, Jaipur; E-mail: pritysmeena@gmail.com

** Dr. Mani Kumar Meena, Associate Professor at Jaipur School of Law, Maharaj Vinayak Global University, Jaipur

action depends on the local judicial system. Thus, the right to privacy is becoming increasingly valuable and well-known as a result of the Supreme Court's decision to recognize it as a basic right in the Justice K.S. Puttaswamy case. It is impossible to overestimate the importance of the right to privacy because everyone appreciates their privacy. Thinkers like Aristotle and Blackstone clarify the privacy in the ambit of personal wrong and public wrong on the basis of its range of impact.

The Greeks were the first to identify the relationship that exists between a person and a state, as well as to provide an outline of how that relationship is shaped. A person's right to privacy is something they are born with. A person's body and mind can remain autonomous when they are in privacy. This paper examines the evolution of the concept of privacy and its inclusion in the Indian Constitution as a fundamental right. It also discusses the changes in the understanding and application of the right to privacy concerning technological developments in India. Autonomy is the capacity of an individual to make decisions on important matters concerning their life.

RIGHT TO PRIVACY: THE PERCEPTIONS

Globally speaking, the global leaders through UN expressed concern of right to privacy. Article 12 of the Universal Declaration of Human Rights 1948 includes right to privacy as one of the most important human rights and reads, "No one shall be the target of arbitrary attacks on his honor or reputation, or of meddling with his family, home, or privacy." Everyone is entitled to legal protection from the intrusions or assaults. The state parties agreed to ensure the legal provisions to protect the right to privacy of their respective citizens. Article 8 of the European Convention of Human Rights set out, "Everyone has the right to respect for his private and family life, his home, and his correspondence". The European Convention further outlined the restricted expectations for rigorous enforcement and privacy protection in the interest of public safety, national security, the nation's economy, the preservation of morality or health, or the defense of other people's rights and freedoms.

Here it becomes pertinent to underline the perception of our founding fathers on right to privacy which can be reflected through Constituent Assembly Debates (CAD). In the debates some members opposed it in the name of hindrance in police investigation and civil procedures and some strongly advocated its inclusion in fundamental rights. On April 30, 1947, Somnath Lahiri proposed that the right to privacy in communication be acknowledged as a basic freedom. Nevertheless, his suggestion was not adopted. A year later, Kazi Syed Karimuddin suggested adding the right of the people to be free from arbitrary searches and seizures of their person, place of residence, documents, and possessions to Article 20 (Draft Article 14) of the Constitution. The right to privacy was not successfully included in attempts to make it a fundamental right in the Constitution. Though the Constituent Assembly was not a seminar on the right to privacy and its amplitude, the suggested addition (which was eventually dropped) was in two specific areas, notably searches and seizures. A detailed reading of the Debates reveals that the Assembly only addressed the question of whether an express provision ensuring the right to privacy should be included in the particular context of "searches" and "secrecy" of correspondence. However, during the discussions, the broader implications of the right to privacy were not adequately explored. There was no discussion of whether the various aspects of the right to privacy fall under Article 21's concept of "liberty". This does not imply that the Constituent Assembly deliberately chose to reject the idea that the right to privacy is an essential part of the freedoms and liberty that are safeguarded by fundamental rights. Since the assembly opposed the right to privacy's inclusion, Part III of the constitution does not contain a specific clause addressing the matter.

EVOLUTION IN INDIA

We have discussed above that India was a founder member of UNO thereby state party of UDHR. Which has recognized the right privacy as basic right. Hence, in legal terms, the right to privacy originated in India since then. Later, in CA, although the members supported it as basic right, yet it was not explicitly inserted in the Constitution. Another agreement for the defense of human rights is the International Covenant on Civil and Political Rights, which was adopted by the UN in 1966 (ICCPR 1966). It has also been agreed that the right to privacy is an essential one. As a signatory to the aforementioned international accords, India had obligation to protect the right to privacy of its citizens. However, despite signatory of various international bodies, it has not been able to enact laws safeguarding the right to privacy. The Indian judiciary has recognized people's rights to privacy as civil rights (common law rights) under tort laws and as a fundamental right under constitutional law, which includes the freedoms of speech, expression, and movement, to protect and uphold these rights in the absence of legislation. It has been included in Article 21 as a result of several rulings made by the Supreme Court. Privacy is thus a basic right under public law. The constitutional courts have the authority to remedy its violation through their writ jurisdiction. Thus, Article 21 of the Indian Constitution grants the right to privacy to both citizens and non-citizens through a variety of court rulings and interpretations.

In 1954 itself, the Supreme Court was compelled to take up the privacy case in the MP Sharma v. Satish Chandra case and decided in favor of search and seizure procedures when weighed against privacy. In Kharak Singh v. State of UP (1962), the Court examined the police's capacity to keep an eye on history sheets (AIR 1963 SC 1295). The Court ruled in favor of the police, holding that there is no fundamental guarantee of the right to privacy. In the year 1975 marked a turning point for the right to privacy. The compelling state interest test was first adopted by the Supreme Court in the Gobind v. State of MP & ANR [1975 SCC(2) 148] decision, drawing on American jurisprudence. The court ruled that an individual's right to privacy would have to yield to a more expansive governmental interest, the substance of which must be compelling. Over time, the privacy sphere has broadened to encompass sensitive personal data, including biometrics and medical records. Again the Supreme Court of India categorically ruled in the telephone tapping cases of PUCL v. Union of India2 in 1997 people had a right to privacy over the information they communicated over the phone. As a result, it can be seen from several decisions that while the right to privacy was acknowledged, its exceptions were also given appropriate consideration.

PRIVACY VS AADHAR CARD

Aadhar card has been in heated debate since 2010, on the apprehension of leakage of personal data and it was alleged that Aadhar will make it vulnerable to violation of right to privacy. The issue was brought to the Supreme Court which in September 2013 limited its use only for LPG subsidies and the public distribution system. However, it changed its order in October 2015 and stated that no one should be denied access to any service in the absence of Aadhaar. Aadhaar can be used to deliver services like the Mahatma Gandhi National Rural Employment Guarantee Act (MNREGA), Pradhan Mantri Jan-Dhan Yojana, and pension and provident fund schemes, among others.

Governments are authorized by law to keep an eye on the whereabouts of specific groups of people through the use of tools including phone tapping, message decryption, search and seizure powers, and correspondence inspection. In the computer industry, surveillance is also carried out with CCTV cameras, which examine an individual's emails and internet activity. The Indian Telegraph Act of 1885, the Information Technology Act of 2000, and the Telegraph (Amendment) Rules of 2007 grant the government the authority to impose surveillance orders. The section 5 of the Indian Telegraph Act permits the federal or state governments to authorize the interception of communications where it is necessary to protect the public safety or in the event of an emergency. The government is authorized to issue intercepting orders for several reasons, such as safeguarding public order, national security, India's sovereignty and integrity, amicable relations with the state, stopping criminal activity, etc. The Central Government's Secretary of Home Affairs and the State Government's Head in-Charge of the Home Department are authorized to direct any agency within their respective jurisdictions to intercept communications, per Rule 419A of the Telegraph (Amendment) Rules, 2007. Under unavoidable circumstances, this authority may be used by the Officer of the

Home Department of the federal government or the state government, not lower than the rank of Joint Secretary.

Under Section 69 of the Information Technology Act, of 2000, the federal government and state governments may make orders for the monitoring, interception, and decryption of any information sent, received, or stored in any computer resource.

WOMEN'S REPRODUCTIVE CHOICES

A three-judge Supreme Court bench pleaded to decide the extent of "woman's right to make reproductive choices" in the case of Suchita Srivastava v. Chandigarh Administration. The bench pleaded to consider the right to privacy as a crucial component of the right to personal liberty. The court stated that it was critical to acknowledge that a woman can use her reproductive choices to both procreate and not procreate stating that it was important to preserve a woman's right to privacy, dignity, and physical integrity. Such a right inevitably encompasses the prohibition against reproduction. The constitutional courts in this nation carefully examine the state's interference in an individual's decision-making process.

Since India is a secular, free democratic nation, everyone who reaches the majority has the freedom to coexist with anybody. In the present case, the Allahabad High Court decided that an individual who became eighteen years old, as defined by Section 3 of the Indian Majority Act, 1875, become entitled to live with anyone. Even the parents could not stop him/her from doing so. The Court concluded that our Constitution gave individual liberty the greatest priority under Article 21. Recently, Hon'ble Justice S.N. Dhingra of the Delhi High Court defined the term as "a walk in and walk out" relationship, meaning that neither party is required to stay in the relationship. The Court decided that those who chose to live together could not claim infidelity or immortality. In the present instance, the woman, a divorcee with a kid, had a five-year relationship with the petitioner, a married solicitor located in London. To stop him from taking a plane to London, she filed a formal complaint against his property. FIR was quashed by the Court.

IS PRIVACY AN ABSOLUTE RIGHT?

The right to privacy is not inalienable, as other fundamental rights are, and it may be restricted in certain circumstances. There are two situations in which the right to privacy is not guaranteed: first, there are legitimate limitations on the use of this fundamental right, such as those related to the national interest or situations in which India's sovereignty, public order, morality, or decency are at risk, as well as situations involving contempt of court, incitement of criminal activity, or other legitimate restrictions listed in Article 19 of the Indian Constitution. The right to privacy can also be subordinated when it conflicts with another fundamental right that serves the public interest. This was the case in Mr. X v. Hospital Z (1998), where the petitioner's right to privacy was denied because protecting his fiancé's health was deemed more important than protecting his right to privacy. The proportionality test was established by Justice D. Y. Chandrachud in the Puttaswamy Judgement (2017). It meant that the amount of privacy violated should commensurate with the necessity of the interference. The test specifies the requirements that must be met for an exception to the right to privacy to be valid:

- The law has to approve of this kind of involvement, and there needs to be a proper legal process for it. Just, equitable, and reasonable laws and processes must exist, free from blatant arbitrariness.
- The method, nature, and quality of the interference must be proportionate to the needs, goals, and purposes that the law seeks to serve.
- The law should be supported by a genuine and reasonable state's interest to prevent needless state involvement.

ARTICLE 21 AND JUDICIAL VIEWS ON RIGHT TO PRIVACY

The fundamental principle of the Indian Constitution is found in Article 21. It protects everyone living in India, citizens or not, from losing their right to life and personal freedom. Because life is necessary to enjoy other rights like freedom, equality, or religion, it is the cornerstone of all other rights guaranteed by the Constitution. The right to health, the right to a clean environment, the right to a calm place to sleep, the right to a means of subsistence, the right to free legal assistance and a prompt trial, and the right to privacy are all included in the Article 21. In the 1963 ruling in Kharak Singh v. State of Uttar Pradesh, the Supreme Court defined the right to life as the capacity to fully enjoy life, including the use of all of one's bodily limbs and talents. It requires being able to access everything that adds value to life. It is impossible to say that one is living his life while someone is always observing him, even in circumstances in which there are no physical restrictions. The ruling in Maneka Gandhi v. Union of India (1978) by the Supreme Court has broadened the definition of liberty. Any law that limits someone's freedom must be backed by an impartial, fair, and logical legislative process. In K.S. Puttaswamy v. Union of India (2017), the Supreme Court, in summary, affirmed the right to privacy as a fundamental element of the right to life and personal liberty.

OTHER INDIAN LAWS AND RIGHT TO PRIVACY

Several laws made in 21st century have come in contradiction of right to privacy, such as IT Act, 2000, Bharatiye Nayay Sanhita, (BNS) 2023, Bhartiye Nagrik Suraksha Sanhita, (BNSS) 2023, Bhartiye Sakshya Adhiniyam, (BSA), 2023.

Parts of the Information Technology Act of 2000 deal with privacy, even if its primary purpose is to give legal status to transactions conducted through electronic data interchange and other electronic communication methods. For example, Section 43A provides a right to damages for data protection breaches. The Indian Penal Code 1860, now converted as Bhartiye Nayay Sanhita 2023, makes private related offenses like Voyeurism (Section 354 of IPC now section 77 of BNS, 2023, Stalking (Section 354 of IPC now 78 of BNS, 2023), Disclosure of the Identity of the Victim of Certain Offenses (Section 228A of IPC now 72 of BNS), and so forth illegal. Criminal procedure in India is governed by the Code of Criminal Procedure, 1973 (CrPC), which includes provisions about privacy as per Section 91 of CrPC now Section 94 of BNSS 2023, which permits the police and courts to order the production of documents or other items. The Indian Evidence Act 1872 (now BSA, 2023) contains several privacy-related measures. For example, a spouse is not required by Section 122 IEA now Section 128 of BSA, 2023 to reveal communications that a married person made to them during their marriage. Comparably, Section 126 now Section 132 of Bharatiya Sakshya Adhiniyam, 2023 safeguards the privacy of business correspondence between an attorney and his client.

A COMPARISON WITH OTHER COUNTRIES

Although the right to privacy is not expressly mentioned in the US Constitution, the Supreme Court has construed many amendments to declare that the right exists on several occasions. Specifically, the purpose of the 1974 Privacy Act was to shield Americans from any federal entity that would arbitrarily use their records. It has been inferred from various amendments, such as the Fourth Amendment (protection against unreasonable searches and seizures) and the Fifth Amendment (protection against self-incrimination). The concept of privacy has evolved through landmark cases like **Griswold v. Connecticut (1965)** and **Roe v. Wade (1973)**, which recognized privacy rights in specific contexts like marital relations and reproductive choices. The U.S. legal system offers extensive protections for privacy through federal and state laws, including the Health Insurance Portability and Accountability Act (HIPAA) for health information and the Electronic Communications Privacy Act (ECPA) for electronic communications.

In the European Union, the right to privacy is explicitly recognized and protected under the European Convention on Human Rights (ECHR), particularly under Article 8, which safeguards the right to respect private and family life, home, and correspondence. The EU's General Data Protection Regulation (GDPR) further strengthens protections for personal data and privacy rights. EU member states have robust privacy laws harmonized under the GDPR, which sets standards for data protection, consent requirements, and individual rights regarding personal data.

Canada's privacy law was first implemented in 1977 as a component of the Canadian Human Rights Act, and it has since changed. The law was first proposed as a way to secure data. A constraint on the Government's access to and disclosure of personal data was added to the law in 1983. The recent revision to the privacy laws occurred in 2012 when the Canadian government declared that the right to personal privacy was recognized by the Common Law as a "tort of intrusion upon seclusion". Canada's Charter of Rights and Freedoms includes protection against unreasonable search and seizure under Section 8, which has been interpreted to encompass a right to privacy. Canadian courts have also recognized privacy rights in various contexts through common law developments. Canada has federal and provincial privacy legislation, such as the Personal Information Protection and Electronic Documents Act (PIPEDA), which regulates the collection, use, and disclosure of personal information by private-sector organizations.

Sweden is among the first nations in the world to adopt a comprehensive statute on internet privacy regulations, even though it was among the first to demand its residents to use their identity numbers for all interactions with the government. The protection of personal data on computers was safeguarded by the Data Act of 1973. The Swedish constitution also guarantees the right to the protection of personal data. Union européenne The European Union regulated the processing of personal data within its borders in 1995 with the adoption of the Data Protection Directive. Subject to specific limitations, Article 8 of the European Convention on Human Rights (ECHR) guarantees the right to privacy and family life protection.

EPILOGUE

The evolution of the right to privacy in India represents a significant journey marked by judicial interpretation, landmark rulings, and legislative responses that have shaped its legal landscape. From its implicit recognition under Article 21 of the Constitution under which the Supreme Court definitively declared privacy as a fundamental right, India has navigated complex legal terrain to safeguard personal autonomy, dignity, and freedom from unwarranted state and private interference.

The Puttaswamy judgment not only affirmed privacy as intrinsic to individual liberty but also articulated nuanced principles that resonate globally. These include the recognition of privacy as a composite right, encompassing aspects such as bodily integrity, informational privacy, autonomy over personal choices, and protection against surveillance and data breaches. This holistic approach acknowledges the multidimensional nature of privacy in contemporary society, where technological advancements constantly challenge traditional notions of personal space and autonomy.

Legislatively, India has responded with measures such as amendments to the Information Technology Act, of 2000, and the establishment of the Personal Data Protection Bill. These seek to harmonize privacy protections with global standards, ensuring robust safeguards for personal data while balancing innovation and economic imperatives. The Personal Data Protection Bill, modeled on principles of consent, data minimization, and accountability, reflects India's commitment to aligning its legal framework with international norms, particularly the General Data Protection Regulation (GDPR) of the European Union. However, challenges persist. The implementation gap between legal pronouncements and ground realities, especially concerning state surveillance, data breaches, and digital literacy, underscores the need for continuous vigilance and adaptation. Judicial activism and public advocacy remain crucial in holding stakeholders accountable and ensuring that privacy rights translate from principles into effective protections for all citizens, irrespective of socioeconomic status or digital literacy.

REFERENCES

1. Rao, B. Shiva (1967), The Framing of India's Constitution (New Delhi: Universal Law Publishing House).
2. 26 "Article 21- Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law"
3. Goya, Ravinder Kumar Gaurav (2016), The Right to Privacy in India: Concept and Evolution, Lighting House, Delhi, January
4. Ibid.
5. PUCL vs Union of India AIR 1997 SC 568 / (1997) 1 SSC 3 Governance Now dated July 1-15, 2016. 2 PUCL vs Union of India AIR 1997 SC 568 / (1997) 1 SSC 3 Governance Now dated July 1-15, 2016
6. Goya, Ravinder Kumar Gaurav (2016), The Right to Privacy in India: Concept and Evolution, Lighting House, Delhi, January
7. Srivastava v. Chandigarh Administration, AIR 2010 SC 235.
8. B.K. Parthasarathi v. State of Andhra Pradesh, AIR 2000 AP 156.
9. Jyoti v. State of U.P., AIR 2004 All. 45.
10. Indra Sharma v. K.V. Sarma, AIR 2014 SC 309.
11. Indian Express dated 24.08.2017.

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

AN IMPRESSIONISTIC NOTE ON ADMINISTRATION OF STATE PUBLIC UNIVERSITIES IN BIHAR: SOME IMPORTANT ISSUES

Pravin Kumar*

Abstract

Institutions of higher education in Bihar have been under the radar of critics for its discouraging performance. These institutions in Bihar had earned glory during the decades from 1960s to 1980s. But their performance began to deteriorate gradually since then, evident from the lower ranking of universities/colleges of Bihar in comparison to that of all India. The situation irks a person in the helm of administration of institutions of higher education in Bihar to assess the problems and explore the solutions. As such, the present note underlines the issues, challenges and prospects of reforms in these institutions in Bihar, particularly, in the context of administrative mechanism, maintaining punctuality of academic sessions, quality of teaching and research students' progression and support and academic environment of campus in universities/colleges.

Keywords: University, Colleges, Administration, Students, Faculty, Bihar

INTRODUCTION

Sound higher education is the key to overall development of a nation or a state or a society. Because, only this sector can produce skilled and knowledgeable human resources. There are various indicators to gauge the standard of higher education such as Gross Enrollment Ratio, adequate number of institutions and faculties, excellence in teaching and research, punctuality in course sessions, students support system and internal critical management (including administration and financial discipline) and of course producing quality leadership. Let us first view the people's

* Prof. (Dr.) Pravin Kumar, Professor of Geography and Principal, A. N. College (NAAC Grade A+ and CPE), Patna, a constituent unit of Patliputra University, Patna

access to higher education in Bihar. The government statistics reveals that only 1 percent of total population of Bihar has access to higher education. As per statistics in 2013 there were one college in a radius of 1502 kms and one university for 50 lakhs of population. Gross Enrolment Ratio (GER) was 11 percent and 3 percent in SC category. Thanks to the efforts of Nitish Kumar led present government of Bihar for making substantial improvement in GER and availability of universities and colleges. As per All India Survey on Higher Education (AISHE) 2021-22 released by the Union Education Ministry, the GER has gone up to 17.5 percent (GoI: 2022). The number of universities and colleges in the state has gone up substantially evident from the fact that Bihar has now gone up to 20 state universities from twelve at the beginning of the 21st century. All together state has 4 Central Universities, 8 Institutes of National Importance, 2 Deemed Universities, and 1 Bihar Engineering University. 1 Bihar University of Health Science, 20 state universities, 2 centrally funded eminent institutes, and 7 private universities. However, state universities in Bihar are lagging in both number and quality behind national average. The national average of GER is 27.1 percent, 46% increase in universities and 3% percent increase in colleges from 2012-13 to 2023. Thanks to Nitish led government of Bihar that improved the number of higher education institutions better than national average. But the irony is that quality wise Bihar lags behind India. So far ranking of state universities in Bihar is concerned is discouraging. None of these universities find place in 150 rank in India (UNIRANK: 2024). This situation makes it an urgent imperative to look into the administrative aspects of universities in the state.

A BRIEF HISTORY

Beginning with modern times, Bihar witnessed higher educational institutions during British rule in late 19th century. Establishment of Patna College under Calcutta University was established in January 1863 and served the higher education of Bihar till 1917 when much awaited Patna University was established. Between 1917 and 1940, series of institutions, including that of Patna Women's College (1940) were established to spread the knowledge of both professional and general education. (Anand: n.d.). The re-orientation of university system was undertaken after independence evident from the fact that Patna University was transformed by PU Act 1951 (by replacing PU Act 1917) into a teaching and residential university (the University earlier conducted secondary level examinations) and enjoyed autonomy (non-interference of government in the routine affairs) facilities from the government. Such provisions facilitated the University to earn reputation not only on national screen but outside country also. With beginning of 1960s, universities were established namely Magadh, Bihar, Ranchi and Bhagalpur. Later a number of universities were made by bifurcating these universities from time to time.

What a significant change took place in university system, was politicisation of campuses since 1967 Assembly elections when students unions joined mass demonstrations, aligned with political parties. Students began to boycotting classes and agitating against university administration on one pretext or other. Across Bihar there were clashes between students seeking to shut down universities and colleges. Students unions began to aligned with different parties. Teachers also started involving full time in the politics. This did not hamper only academic environment but several other administrative problems grew up in the university system. The politics of Mandal-Mandir politics did also work as divisive forces among students. The different political regimes after 1990, state began to become reluctant in taking up the responsibility on educational affairs. But after 2005 the government of state began paying attention in improvement of institutions of higher education. Two important landmarks can be seen since then – first, the office of the Chancellor of universities took initiatives for ensuring teachers' attendance and second, since 2012 Rashtriye Uchch Siksha Abhiyan was introduced by Central Government and grading of universities and colleges by NAAC were accelerated.

ISSUES IN UNIVERSITY ADMINISTRATION

The major areas of university administration are – a) Management of the university office like, maintaining discipline & work culture, financial management and maintenance of records, maintaining MIS and infrastructure b) coordination between academic and administrative branches through monitoring the campus activities (including that of colleges), c) management of admission, examination, publication of results and issuance of certificates d) interaction and liaison with community, government, corporate and other stakeholders and one more aspect added now is e) managing social media.

A University has many units that manage and execute the university affairs. Such as, roles of faculty and administration differs but they have to perform in the best interest of the students. The academic aspects are related to faculty while administrative wing serves the students with issuing certificates, development of campus and other development work. Some administrative responsibilities are assigned to faculty members such as Dean Students' Welfare, Examination Controller, Proctor, Inspector of Colleges and Principals of the Colleges etc. Both the units require to work hand in hand to achieve the objectives of the university.

The university undertakes the education and vocational preparations for enabling students to be absorbed in society. For this the university authorities need to interact with corporate sector for placement of students. Besides, the administrative leadership in the universities require abilities, commitment and autonomy, free from political and government interference. With recent years bringing new obstacles to the field, colleges need talented, educated administrators who understand how policy, history, and finance, combined with a focus on student development, can come together to uphold the mission of higher education. In recent years the autonomy of the universities are encroached by state government. The reasons behind government interference are mainly due to over dependence of universities on government for finances and lack of work culture among faculty.

Ghose (2020) enumerates various critical areas in higher education in Bihar. Most important is shortage of faculty in the universities. In most of the colleges and Universities lack of highly qualified teaching faculties, and insufficient research facilities has encouraged the students to opt to study in other States. In many colleges, one or two lecturers are covering students. Shortage of teachers hampers the development of expertise of faculty in the subjects. The temporary arrangement of Guest Faculty cannot be alternative of the regular faculty. One cannot expect them to deliver the best as they are low paid and insecure. The decentralised recruitment process was faulty and compromised with quality of teachers. However, in last few years Bihar Government has accelerated the process of recruitment of faculty through University Service Commission.

The poor performance of state universities owes to lack of research aptitude among teachers. A bibliometric study reveals that 10 state universities of Bihar have produced 776 quality research papers in ten years from 2009 to 2019. This reveals that all the faculties (science, social science, commerce, law, etc.) of ten universities produce 77.6 quality papers per year. The study further finds that out of the total 34 percent was published by Bihar Agriculture University alone (Tiwari, Kumar & Chauhan: 2020). This indicates that it is required to pay special attention for development of quality research in the universities for which the university administration should provide adequate infrastructure, opportunities and finances to the teachers for research work and encourage them to go for fund raising from government bodies and private sector.

Most of the colleges in Bihar are filled by the rural hinterland and suburban poor localities. Students from these localities avoid classes during season of agricultural activities and festivals. Further, they find bleak chances of placement or employment opportunities, hence they become reluctant to attend classrooms. Perhaps for this reason students prefer to obtain degree from distance education or open system. So far attending the online classes is concerned, they lack adequate ICT gadgets to attend online classes at their disposal.

CONCLUSION

The whole gamut of discussion suggests that universities and colleges should have quality leadership, autonomy, financial independence, better financial management, better research facilities, student-centric administration, centre of decision at centre of action etc. There is urgent need to develop curriculum in a way that may create scope for harnessing the local resources. There is need of further exploration in shaping the curriculum according to the needs and locally available resources. The National Education Policy 2020 opens the vistas for providing greater flexibility to students in subject selection.

REFERENCES

Anand, Smita (n.d.) Journey of Education in Bihar (Chapter 4), Gokhle Institute of Politics and Economics retrieved on 13-04-2024 from <https://dspace.gipe.ac.in>

Ghose, Debiani (2020), Higher Education in Bihar: Issues and Challenges, retrieved on 13 April, 2024 from https://www.researchgate.net/publication/343193457, July 2020

Government of India (2023) All India Higher Education Survey (AIHES) & Status of Higher Education in India 2023, Ministry of Education, New Delhi retrieved on 12-05-2024 https://educationforallinindia.com/aihes-status-of-higher-education-india/

S.F. Macintyre (2010), International Encyclopaedia of Education, (third edition) Researchgate

Tiwari, S, Kumar, A and Chauhan, A.K. (2020), "Research Output of State Public Universities of Bihar: A Bibliometric Analysis, Bihar Journal of Public Administration, Vol. XVIII no.2 July-Dec, pp 699-709

UNIRANK (2024) Top Universities in Bihar 2024 Bihar University Ranking, retrieved on 12-05-2024 from https://www.4icu.org/in/bihar/

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

LEGAL PROTECTION AGAINST CUSTODIAL TORTURE & DEATH IN INDIA: JUSTIFICATION OF PRESUMPTION OF INNOCENCE

Pinki*

Abstract

Although there are many constitutional and statutory provisions in place to protect the liberty and life of all persons, incidents of torture and death in police custody seem to be a common occurrence. There is no doubt that these are the most heinous crimes committed by persons, who claim to be the protectors of people. What is distressing is that the incidents of torture and death take place under the shield of uniforms and authority, within the four walls of a police station or in the lock-up, where the victims are helpless and there is no direct evidence of such crimes. Generally, it is difficult in cases of torture in custody and custodial death to secure evidence against policemen responsible since they are in charge of police station records which they do not find difficult to manipulate. As such the present paper examines the situation in the light of law and practices.

Keywords: Custodial torture, Custodial death, Burdon of proof, Presumption of Innocence, Protection against Torture

INTRODUCTION

Despite the Stern provisions under the Indian criminal justice system, the offences against prisoners are abnormally increasing whether they are convicted or under trial. The most controversial problem in the criminal justice system is the activity of law enforcement officers. The Police are the law implementing agency of the state and they have to arrest the accused for maintaining peace in the state and its smooth functioning in which the rights of the citizens can be curtailed. Although

* Pinki, Research Scholar (SRF), Department of Law, Guru Nanak Dev University, Amritsar (Punjab); E-mail: misspinki441@gmail.com; Mob: 07535816532

the law restrains police officers from exercising the power unnecessarily, it has been observed that some police officers misuse the power to make arbitrary arrests without any reason, in many cases, the police take arbitrary action without hearing any side. Custodial torture including custodial death remain a normal phenomenon.

Numerous cases have been reported, wherein the police resort to third-grade treatment in a very shameful manner to the accused during police interrogation inside the prison. They are subject to maltreatment meted out to them in custody. The accused, sometimes, are brutally beaten and sexually exploited in police lockups and jails. Such treatment has impact on not only body of accused but inflict mental agony on them. As such the accused bear the social, economic, mental, and physical harassment for ages hence needless to say in custody they are not treated in a dignified manner (Swamy: 2013). Despite having legal rights, the accused of poor and weaker sections face the police maltreatment in custody. On the contrary, accused of affluent sections of society or powerful persons are given privileged treatment. Nevertheless, custodial maltreatment is equal to denial of justice. In D. K. Basu's case, the Supreme Court held that torture by police struck a blow at the rule of law. Custodial violence has been held to be a calculated assault on human dignity, perhaps one of the worst crimes in a civilized society governed by rule of law (Singh: 2017).

NATURE OF TORTURE

Custodial torture is the deliberate infliction of severe pain or suffering on a person for forced confession, interrogation for information, and intimidation. However, in several cases, torture and custodial death are seriously unbelievable phenomena. Police has legal obligation to maintain the accused in safer custody for proper justice. It is not the normal duty of the investigator to torture the accused in custody under the guise of extracting the truth. Unfortunately, the statistics on custodial torture are probably the most unreliable in comparison to the other crime statistics. Many such incidents are not reported. If someone from the lower or underprivileged sections of society dare to complain about the torture, the police increase the intensity of torture. In rare instances, the police register, FIR against the guilty police personnel. Sometimes public protests against the torture lead to the suspension of the guilty police officers for a short period but not punished. Sometimes the accused do not dare to lodge cases against the responsible police officers or custodial officers out of fear. The case of Khatri v. State of Bihar [1] arose from an unfortunate and brutal incident of police atrocities, whereby pouring acid into the eyes of 33 prisoners who were awaiting trial in Bihar, police officers blinded them. This is also known as the Bhagalpur blinding case. The incident shook the conscience of the country and the matter was also discussed in the Parliament. Some of the prisoners were granted bail, whereas the others were kept in their dreadful conditions without being remanded. It was also discovered that judges of District and Sessions Court didn't check the supposed Bhagalpur jail for even more than a year. This was condemned by human rights activists and multiple writ petitions were filed in the Supreme Court. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not released from jail.

CUSTODIAL DEATHS

When a person dies in the custody of law enforcement officers the death is called custodial death, torture and negligence are the two main causes of custodial death but it can be due to various reasons. Many times, a prisoner is tortured and neglected so much in police custody that he eventually dies. Custodial death is often declared suicide. In the financial year 2021–22, the National Human Rights Commission of India reported 2152 deaths had occurred in judicial custody and 155 deaths had occurred in police custody till 28 February 2022. In the last five years, As per NHRC data shared by MHA, there were 1840 judicial deaths across the country in 2020-21, 1584 in 2019-20, 1797 in 2018-19, 1636 in 2017-18 and 1616 in 2016-17.[2] A total of 669 cases of death in police custody were registered across the country in the last five years from April 1, 2017, to March 31, 2022, Ministry of Home Affairs (MHA) told the Rajya Sabha. Union Minister of State for Home Nityanand Rai said a total of 175 cases of deaths in police custody were reported during 2021- 2022, 100 in 2020-2021, 112 in 2019-2021, 136 in 2018-2019 and 146 in 2017-2018.[3] It is clear from these figures that cases of custodial death have not ended even though only the number of cases decreased or increased.

There are many cases related to custodial deaths. Rajan, a final year student of the Regional Engineering College, Calicut, who was a merit scholarship holder, and an artist of stage and radio singer. P. Rajan was arrested by Calicut police during the emergency on March 1, 1976. His father filed a writ petition in the Kerala High Court, and the court issued a habeas corpus writ. He has not been heard of since and he was killed in police custody. In the famous case Nilabati Behera v. State of Orissa, the son of Nilabati, Suman Behera was arrested at 8 a.m. on December 1, 1987, for an investigation involving in the offence of theft and he was detained at the police outpost. The dead body of Suman Behera was found on nearby train tracks on next day, with handcuff. Suman Behera's many injuries contributed to his untimely death. On 18 December 1996, the Supreme Court of India gave the verdict in D. K. Basu vs. State of West Bengal. The Public Interest Litigation (PIL) had started as a result of a letter sent by D. K. Basu, a former Calcutta High Court judge and then executive chairman of Legal Aid Services of West Bengal, to the Chief Justice of India (CJI) on 26 August 1986. The letter requested the CJI to examine the issue of frequent custodial deaths, form guidelines to be followed during arrest and formulate compensation to be provided to the victims/families in case of custodial torture or death. In the 1996 verdict, the court suggested 11 guidelines which covered arresting procedures and compensation in case of death of the detainee.4 The Supreme Court observed that custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law. Justice Anand, who delivered the said judgment held that, 'custodial torture' is a naked violation of human dignity. Custodial deaths and any form of torture or cruel, inhuman or degrading treatment would fall within the violation of Article 21 of the Constitution, whether they occur during an investigation, interrogation or otherwise (Mishra: 2022). P. Jeyaraj and his son Bennicks were arrested by Sathankulam police on 19 June 2020 for allegedly keeping their cellphone store open past the Covid-19 lockdown timings. They were tortured in custody. Bennicks died on 22 June 2020 and P. Jeyaraj on 23 June 2020.

PROTECTION AGAINST TORTURE: GLOBAL

The international guidelines could not be much effective. According to Article 5 of the Universal Declaration of Human Right, 1948, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Similarly, Article 3 of the European Convention for the Protection of Human Rights provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Further, Article 7 of the International Covenant on Civil and Political Rights, 1966 provides the same protection that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Clause (2) of Article 5 of the American Convention on Human Rights also provides that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. In addition, Article 5 of the African Charter on Human Rights and Peoples' Rights, 1981, provides that all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the United Nations Convention Against Torture (UNCAT)) is an international human rights treaty under the review of the United Nations that aims to prevent torture and other acts of cruel, inhuman, or degrading treatment or punishment around the world. Article 2 of the Convention requires member states to take effective measures to prevent torture in any territory under their jurisdiction, and forbids member states to transport people to any country where there is reason to believe they will be tortured. The convention was adopted by the United Nations General Assembly on 10 December, 1984 and ratification by the 20th state party; it came into force on June 26, 1987. Article 1 of the UNCAT provides a definition of torture. Article 4 of the UNCAT seeks to ensure that countries prevent the use of torture and ensure that torture is a criminal offence. According to Articles 13 and 14 of UNCAT each state party shall ensure that victims who have been subjected to torture have the right to complain and their case is promptly and impartially examined by competent authorities. The complainant and witnesses must protect against all ill-treatment or intimidation. The victim has a right to a fair trial and adequate compensation, including as much rehabilitation as possible.

LEGAL PROTECTION AGAINST TORTURE: INDIA

Article 14 of the Constitution of India declares that the state not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 14 prohibits the implementation of laws by the State that are unjust and discriminatory. The law allows discrimination between people on reasonable grounds, so the right to equality means to be treated equally in similar circumstances. Article 20, provides three types of safeguards to the accused:

1. Protection against ex-post facto laws
2. Protection against Double Jeopardy
3. Privilege against self-incrimination

Article 21 declares that No person shall be deprived of his life or personal liberty except according to procedure established by law. After the decision in Maneka Gandhi's case[5], Article 21 protects the right to life and personal liberty not only from the Executive action but from the Legislative action also. A person can be deprived of his life and personal liberty if two conditions are complied with, first, there must be a law and secondly, there must be a procedure prescribed by that law, provided that the procedure is just, fair and reasonable. The Supreme Court has provided different rights in various cases under this Article.

The person arrested has a fundamental right to know the reasons for his arrest and the right of an accused to engage an advocate (with free legal aid) has been accepted in the Article 22 of the Constitution as well as in the Criminal Procedure Code. The right of an accused to be produced before the Magistrate within 24 hours of his arrest has been accepted in both, the Constitution of India and the Criminal Procedure Code. Article 32 which provides for Constitutional remedies is itself a fundamental right.

According to section 24 of Indian Evidence Act, 1872 (IEA), A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person. According to criminal procedure code, 1973, no police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of IEA. Sections 330, 331 and 348 of the Indian Penal Code 1860 declare custodial torture and illegal detention punishable to extract confession. Sections 25 and 26 of IEA declare that no confession made to a police officer and no confession made by any person whilst he is in the custody of a police officer unless it is made in the immediate presence of a Magistrate shall be proved as against a person accused of any offence.

Although India signed the United Nations Convention against Torture on October 14, 1997 its ratification still remains. On May 6, 2010, the Lok Sabha passed the Prevention of Torture Bill, 2010. However, the Rajya Sabha referred the bill to a select committee as it was felt that the bill was not up to the standards of the United Nations Convention against Torture. The revised bill lapsed when the 15th Lok Sabha was dissolved on May 18, 2014.6 The Law Commission of India (Chairperson: Dr. Justice B. S. Chauhan) submitted its report on "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through legislation" to the Ministry of Law and Justice on October 30, 2017. The Law Commission in July 2017 submitted a draft Prevention of Torture Bill, 2017, but any bill has not been passed by the Indian government till now. India does not have anti-torture legislation and has yet to criminalize custodial violence and action against blameworthy officials remains pure imagination.

PRESUMPTION OF INNOCENCE

In a majority of countries, the well-established principle of the criminal justice system is that a person is innocent until proven guilty. The burden of proof lies on the prosecution; the prosecution must prove every fact essential to constitute the offense with which the accused is charged. The court may convict the accused only when satisfied beyond a reasonable doubt that the accused is guilty. The benefit of reasonable doubt is always given to the accused, because suspicion however strong can never take the place of proof. This is called an adversarial system, as opposed to an inquisitorial system. In an inquisitorial system, the accused is presumed to be guilty and is required to prove his innocence.[7] There is no provision in the Indian Constitution relating to the concept of presumption of innocence. It is a fundamental principle of the criminal justice system in India. This presumption is impliedly recognized under the Indian Evidence Act, 1872. However, there are some exceptions to this rule.

If the court after perusing the evidence or witnesses of both the parties, finds that the accused has not committed the offence then the accused shall be presumed innocent and he shall be acquitted. The prosecution has to prove that the accused is guilty. The accused has not to prove his innocence. If the accused proves this much that he had not committed a crime, he can get an acquittal in the case even if he did commit a crime. However, the accused can be convicted if any evidence and any competent witness are against him even if he has not committed such a crime. The Supreme Court in Gouri Shankar Sharma v. State of U.P.[8] observed that it is generally difficult in cases of death in police custody to secure evidence against policemen responsible for resorting to third-degree methods since they are in charge of police station records, which they do not find difficult to manipulate. It is only in a few cases that some direct evidence is available. The Supreme Court has acknowledged in many cases that it is very difficult to get evidence of the misdeeds of police personnel and jail officers because they are powerful and intelligent hence it is not a big deal for them to destroy the evidence.

CONCLUSION

Repetition of harassment in custody and death are seen often, and the uncivilized acts of torture in custody have been becoming normal so the public takes it very easy. However, many countries have abolished the use of torture in the criminal justice system, but torture continues to be used throughout the world. Despite the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of all persons, the growing incidence of torture and deaths in police custody is a disturbing factor. Torture in police custody is not only physical, mental and economic rather, the prisoners are also brutally sexually exploited in police lockups and jails. Cases are either not registered against the police and jail officers or even if registered the victims do not get justice because due to lack of evidence and influence of power such criminals are acquitted.

Prevention of Torture Act should be implemented immediately, in which there is a provision for appropriate punishment for criminals by making torture and death in custody a crime In respect of cases of custodial torture and death, an inquisitorial system should be implemented whereby the burden of proof should be on the accused of the offence to prove his innocence.

REFERENCES

Misra, S. N. (2020) *The Indian Penal Code,* Central Law Publication, 22nd Edition 2020 Reprint 2022 pp. 58-59

Singh, Yogender (2017) *Rights of Prisoner in India: Constitutional Aspect*, M.D.U. Law Journal Vol. XVIII, 2017 p. 133

Swamy,N. Maheshwara (2013) *Criminology and Criminal Justice System*, Asia Law House Hyderabad, , p. 305

ENDNOTES

1 Khatri v. State of Bihar 1981 SCR (2) 408

2 Available at: *https://nhrc.nic.in/sites/default/files/2022-3-23.pdf*(visited on April 5, 2024 at 9:10 pm)

3 Available at: *https://nhrc.nic.in/sites/default/files/2023-2-09.pdf*(visited on April 5, 2024 at 9:40 pm)

4 Available at: https://en.wikipedia.org/wiki/Custodial_deaths_in_India(visited on March 5, 2024 at 9:40 pm)

5 Maneka Gandhi v. Union of India, AIR 1978 SC 1025

6 Available at: *https://en.wikipedia.org/wiki/Custodial_deaths_in_India* (visited on February 23, 2024 at 9:40 pm)

7 Swamy, N. Maheshwara (2013), *Criminology and Criminal Justice System*, Asia Law House Hyderabad, 2013, p. 275

8 Gouri Shankar Sharma v. State of U.P., 1990 AIR 709

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

JUSTICE DELIVERY TO CHILDREN IN INDIA: A STUDY IN THE CONTEXT OF THEIR RIGHTS

Arun Kumar*, J.S.P. Srivastava and K.B. Asthana*****

Abstract

It has been globally recognised that children are the precious resource and future of a society and they must have opportunities to develop their personality. International bodies have articulated their rights and state parties have agreed to ensure their rights in their respective countries. On the contrary, it is matter of grave concern that rights of children in India are being ignored evident from the fact that they are subject to poor health, education and economic conditions. No doubt laws and programmes for ensuring their rights as enshrined by international bodies and adopted by national governments, but the desired goal is yet to be achieved. This makes an urgent imperative to examine the concerned laws, judicial measures and their implementation. It intends to diagnose the problems in the laws and suggest remedies. As such the present paper attempts to pinpoint the position of children and address the issues like disparities, child abuse, effective implementation of laws and aspects of Protection of Children against Sexual Offences Act 2011.

Keywords: Child Rights, Laws in Protection, Situation of Child Rights, International Conventions, UNO, India

* Arun Kumar, Research Scholar, Faculty of Legal Studies, Motherhood University Roorkee, Uttrakhand, India; E-mail: arunlaw73@gmail.com.

** Dr. J.S.P. Srivastava Professor & Dean at Faculty of Legal Studies, Motherhood University Roorkee, Uttrakhand, India; E-mail: jaishankerprasadsrivastava@gmail.com

*** Dr. K.B. Asthana Professor & Dean at Maharishi Law School, Maharishi University of Information Technology, Noida, Uttar Pradesh.

INTRODUCTION

Children are a country's most precious resource because they are its future. Many youngsters grow up in impoverished households. If they are denied the basic facilities, opportunities, better health and education services and freedom, we cannot hope for a credible India. Further, if they are put in hazardous conditions, exploitative environment and deprivation, they cannot emerge as sound citizens. In fact, children in India are subject of many types of abuse, violence, and harassment. UNICEF report depicts that children from rural areas, slums and urban poor families, scheduled castes, tribal communities and other disadvantaged populations suffer from multiple deprivations related to poverty, malnutrition, access to quality health services, child marriage, poor school attendance, low learning outcomes, lack of sanitation facilities, hygiene, and access to improved water. India has the largest adolescent population in the world, 253 million, and every fifth person is between 10 to 19 years. India stands to benefit socially, politically and economically if this large number of adolescents are safe, healthy, educated and equipped with information and life skills to support the country's continued development. Adolescent girls are especially vulnerable to poor nutritional status, early marriage and childbearing, affecting their ability to live empowered, healthy lives, which in-turn affects the next generation. Ironically, India ranks fourth (after Bangladesh, Nepal and Afghanistan) among the eight South Asian countries in terms of child marriage prevalence. However, some improvement in recent past has taken place India's growth over the last two decades has contributed phenomenally to global human development. Extreme poverty in India reduced to 21 per cent, infant mortality has more than halved, some 80 per cent of women now deliver in a health facility and two million fewer children are out-of-school (UNICEF: 2020). While the 'education for all' is still elusive, the concept of play and leisure is elusive as well for a large section of children driven by poverty and forced to work and earn. The first fallout of poverty on the children is in the form of child labour. Figures show that the states of Maharashtra and Gujarat from the medium HDI group show the highest incidence of child labour. Needless to say that unfortunately none of the Indian states, not even Kerala, is devoid of children earning for subsistence (Roy: 2015).

CILDREN'S RIGHTS

Right to development is described as the right of every child to education, play, leisure, cultural activities, access to information and freedom of thought, conscience and religion. While poverty and unavailability of good schools explain the child labour supply side, growth of low paying informal economy rather than higher paying formal economy-called organized economy in India-is amongst the causes of the violation of child rights.

Let us have an idea of evolution of child rights. In the 19th century, the idea of special protection for children emerged in France. Laws for the protection of children in their workplace were started in 1841. Children's protection starts in the field of the medical, social, and judicial spheres during the 20th century (Lakshay Manchanda & Bhavesh Kaul, 2021). Since 1919 the International Community League of Nations (later the UN) has started to give some kind of importance to that concept and elaborates a committee for child protection. The declarations of rights of children were adopted on September 16, 1924, by the League of Nations this was the first international treaty concerning children's rights (NHRC, 1989). The declaration came into force by the efforts of Eglantyne Jebb a British social reformer and the founder of Save the Children in 1923. Jebb believed that the rights of children should be protected and enforced and enumerated the rights: opportunity to material and spiritual development, food security and shelter even to orphans and destitute, priority of relief during disasters, protection from exploitation and ensured education. The major concern was expressed after World War II and a U N Children's Emergency Fund (UNICEF) was created in 1947. Children's rights were included in UDHR, 1948. The UN General Assembly declared child rights on November 20, 1954 and by 1990 Children's Conventions were started. Later in 2003 the UNICEF enumerated four basic rights for children namely, right to life and care in family, right to dignity, right to develop and right to participation. Among these rights 'right to development' need to be clarified. It encompasses health and nutrition, education, protection from violence, opportunity to play and recreation and right to identity. Further right to participation covers freedom of expression, say in decision making, access to information and opportunity to advocacy.

LAWS IN INDIA AND CHILD RIGHTS

Children's Rights in Indian Constitution

The Constitution provides a foundational framework for protecting children's rights indirectly through fundamental rights (such as the right to equality, right to life, and right to education) and directive principles of state policy (which mandate the state to provide for children's welfare and opportunities for development). Some important articles of the constitution for the protection and promotion of child rights are as discussed herewith.

Article 14 ensures equality irrespective of age, sex, place of birth etc. covering children This Article safeguards children's rights so that their innocence and dignity are not violated. In Indian society, vulnerable children are more likely to experience inequitable treatment. Article 15 (3) says nothing in this Article shall prevent the State from making any special provision for women and children. It is made that “special provision” does not imply inequitable treatment but is instead a measure put in place for the welfare and growth of Indian children like special facilities in cases of disability, clean water, nutritious food, and a clean environment for healthy living, protection from crime against them, right to defend in a police investigation, protection from drugs and intoxication, complain against child abuse and protection from child labour.

According to Article 21(A) of the Indian Constitution, children from 6 to 14 years old are given the right to compulsory free education. In Article 39F of the Indian Constitution, children are given the right to opportunities to live and develop in a free and dignified manner. The Constitution has given children the right to be protected from moral and physical abuse from childhood to youth.

By that Article 24, no child below 14 years of age is employed for work in any factory or mine where they are involved in other dangerous jobs. Construction work or the railroad may be subject to hazardous conditions. Unharmful work is not prohibited under this article. The article outlines the laws that govern and forbid child labor in India. Child labor is described as work that endangers children’s ability to develop physically and mentally and robs them of their youth, potential, and dignity. With such a vast population, according to UNICEF, India has a high rate of child labor. India passed various constitutional provisions and anti-child labor regulations after becoming independent from colonial authority.

Under Directive Principles of State Policy, Article 39(e)- states that, “the health and strength of workers, men and women, and the tender age of children are not forced by economic necessity to enter avocation unsuited to their age or strength. Child Labour is one of the social evil that is forced by economic necessity; it is the responsibility of the state to ensure that no child is subjected to any physical or mental abuse”. Further Article 39 [1](f)- states that, “children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood and youth are protected against exploitation and moral and material abandonment. This provision also protects childhood and provides opportunities and facilities to grow with the safe explosion”. According to Article 45 - Children under the age of six who are in early care and education are covered by this program. The State shall endeavor to provide early childhood care and education for all children until they reach the age of six years by this provision. By this Act of the Indian Constitution, the state is in charge of the child’s development as well as its protection. The government is responsible for providing a secure environment for children to grow up in, free from outside danger. After that, the state must give children free and required education, regardless of the child’s circumstances, even if their parents are not protecting them or are denying them their rights. The State has to take strict measures for the well-being of the child. It is a fact that the observance of these rights is very rare. Most of their violations are visible. Although a complaint can be made against this violation, If child rights are being violated in front of you too, then you can complain in writing to the chairman of the National Child Commission. (MEA, The Constitution Of India)

Other Laws

In India, several laws and policies to enforce the UN resolutions and principles have been adopted for the protection of children's rights. Those are discussed hereunder.

National Policy for Children 1974*:* Children were declared as the nation's 'supremely important asset' in the National Policy for Children, 1974. The Government of India contributed its commitment to safeguarding the rights of its children by ratifying international conventions and treaties. This policy recognized that children should be an important part of the national plans for the growth of human resources, so that children may grow up into robust citizens, physically fit and mentally healthy**. National Charter for Children 2003*:*** The National Charter for Children was established by the government in 2003 and 2004 to reaffirm its dedication to the cause of children and ensure that no child goes without food, is illiterate, or is unwell. This charter was based on the National Policy for Children of 1974, which took into account the rights of children up to the age of 14. **National Plan of Action for Children*:*** The National Plan of Action for Children was introduced by the Indian government in 2011, reiterating its dedication to children's welfare. The plan's main goal was to guarantee all children's rights up to the age of 18 so they may realize their potential and grow up to be healthy and productive citizens by creating an environment that would be favorable to their survival, growth, development, and protection. In this agreement, a person under the age of 18 is referred to as a "child."

Child Labour Act, 2016: This law was brought about 36 years ago, in the year 1986. The provisions of this law are as follows: Children under the age of 14 cannot be employed in any work that is not good for their health. A juvenile between the ages of 15 and 18 can be employed in a factory only if he has a fitness certificate. Children can be made to work only for four and a half hours. Children cannot be asked to work at night. The Child Labour Act, 1986, was amended in 2016. Under this, it was considered a crime to make children under 14 years of age do physical work like labor. However, it was considered legal for children up to the age of 14 to work in family enterprises. At the same time, working in areas declared dangerous was prohibited for teenagers between 14 and 18 years of age. Friends now come punishment. Provision has been made for a fine of Rs 20,000 to Rs 50,000 or imprisonment of 6 months to 3 years, or both if caught for the first time on charges of child labor. At the same time, on being caught for the second time, a provision of imprisonment from one year to three years was made.

The Juvenile Justice (Care and Protection of Children) Act, 2000: This Act deals with juveniles in conflict with the law and children in need of care and protection, by providing proper care, protection, and treatment fulfilling their developmental needs, and adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children, and for the ultimate rehabilitation through various institutions established under the Act.

The Prohibition of Child Marriage Act, 2006: This Act came into force on November 1, 2007, about 13 years ago. It was brought in place of the Restraint of Child Marriage Act, of 1929. The purpose of this act is to stop the practice of child marriage.

The Right of Children to Free and Compulsory Education Act, 2009: In 2002, Article 21(a) of the Constitution was included as a fundamental right by the 86th Amendment to the Constitution. Friends, let us tell you that this arrangement was made to provide free compulsory education to all children from 6 years to 14 years.

The Protection of Children from Sexual Offences Act, 2012: This act was made for the protection of children from sexual crimes. This law protects children against serious crimes like sexual abuse and pornography. Under this law, different punishments have been prescribed for different crimes. Apart from this, under this law applicable across the country, all crimes are heard in a special court in the presence of the child's parents in front of the camera.

IMPLEMENTATION OF LAWS AND GOVERNMENT BODIES

Governmental bodies and institutions play crucial roles in safeguarding and promoting children's rights across various domains. These bodies are instrumental in implementing policies, monitoring compliance with laws, and advocating for the welfare and development of children. Here are some key government bodies dedicated to the protection of children's rights in India:

i. **National Commission for Protection of Child Rights (NCPCR)-** Established under the Commissions for Protection of Child Rights (CPCR) Act, 2005, the NCPCR is a statutory body responsible for ensuring that all laws, policies, programs, and administrative mechanisms are in place to protect children's rights as per the United Nations Convention on the Rights of the Child (UNCRC). The NCPCR monitors and reviews child rights issues, investigates complaints, conducts inquiries, and advises the government on policies related to children.

ii. **State Commissions for Protection of Child Rights (SCPCRs)-** Modeled after the NCPCR, each state in India has its own State Commission for Protection of Child Rights. These commissions work at the state level to promote and protect children's rights, monitor child-related laws and policies, conduct inquiries into violations, and recommend measures for the welfare of children in their respective states.

iii. **Ministry of Women and Child Development (MWCD)**- The MWCD is the primary government ministry responsible for formulating policies and programs for the welfare and development of women and children in India. It oversees the implementation of laws related to children, such as the Juvenile Justice (Care and Protection of Children) Act, the Protection of Children from Sexual Offences (POCSO) Act, and the Child Labour (Prohibition and Regulation) Act. The ministry also administers schemes like the Integrated Child Development Services (ICDS), which provides nutrition, healthcare, and early childhood education to young children.

iv. **National Institute of Public Cooperation and Child Development (NIPCCD)**- NIPCCD functions as a premier organization for promoting child rights and welfare through research, training, advocacy, and documentation. It conducts studies and evaluations on child development issues, provides training to professionals working in child-related sectors, and supports the government in policy formulation and implementation.

v. **Central Adoption Resource Authority (CARA)**- CARA operates under the MWCD and serves as the nodal agency for the adoption of Indian children and the regulation of adoption agencies in India. It ensures that adoption procedures comply with the Hague Adoption Convention and other relevant laws, with a focus on the best interests of the child.

CONCLUSION

The rights of children in India have evolved significantly over the years, guided by both domestic legislation and international frameworks such as the United Nations Convention on the Rights of the Child (UNCRC). These rights are fundamental to ensuring that every child in India has the opportunity to grow, learn, and thrive in a safe and nurturing environment. Key legislative measures such as the Juvenile Justice Act, Protection of Children from Sexual Offences Act, and the Right to Education Act underscore India's commitment to protecting children from exploitation, abuse, and neglect while promoting their holistic development. The establishment of dedicated bodies like the National Commission for Protection of Child Rights (NCPCR) and State Commissions further demonstrates the government's proactive stance in safeguarding children's rights and ensuring accountability.

Despite these advancements, challenges remain in effectively implementing and enforcing child protection laws, particularly in remote and marginalized communities. Issues such as child labor, trafficking, malnutrition, and access to quality education continue to pose significant barriers to children's well-being Moving forward, continued efforts are needed to strengthen child protection mechanisms, enhance access to essential services, and promote awareness about children's rights at all levels of society. Collaboration among government agencies, civil society organizations, and communities is essential to address these challenges comprehensively and create an enabling environment where every child in India can realize their full potential. By upholding children's rights as paramount and prioritizing their welfare in policy and practice, India can pave the way for a future where all children grow up healthy, educated, protected, and empowered to contribute positively to society.

REFERENCES

Bajpai, A. (2008). Child Rights in India: Law Policy and Practice. Oxford University Press. New Delhi.

Chopra, G. (2015). Child Abuse in India: The Battered Child. In Child Rights in India. New Delhi. Springer India. 165–82.

Desai, M. (2012). Child Protection Rights, in Encyclopaedia of Social Work in India, New Royal Book Company, Lucknow.

Dorman, P. (2001). Child labor in the developed economies. Geneva: ILO-IPEC working paper.

Jaiswal, P. (2000). Child labor, a sociological study. New Delhi. Shipra Publications.

Kumar, B.(2000). Problems of working children. New Delhi: A.P.H Publishing Corporation.

Lakshay, M. & Bhavesh, K. (2021). Every Child Is Unique; They Simply Unwrap Their Gifts at Random Stages, International Journal of Advanced Legal Research, 1 (3), 2582-7340.

Prateek R.(2015), Situation of Children And Child Rights In India, A Desk Review (Butterflies).

Roy, Prateep (2015), Situation of Children and Child Rights in India, Butterflies, New Delhi

UNICEF (2020), Children in India, UNICEF, retrieved on 22-10-2021 from https://www.unicef.org/india/children-in-india

Wells, Karen. (2008). Child Saving or Child Rights. Journal of Children and Media 2(3) 235–50.

WEBSITES

https://nhrc.nic.in/sites/default/files/childrights.pdf

https://www.mea.gov.in/Images /pdf1/Part4.pdf

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

IMPLEMENTATION OF FOOD SECURITY ACT: AN ANALYSIS OF ITS DYNAMICS AND SOCIO-ECONOMIC IMPACT

Pooja Paswan*

Abstract

Ensuring food and nutrition to its citizen is the prime responsibility of state. Governments have been taking steps in this regard. But the paradigm of public distribution of food has been shifting over the periods and a landmark shift took place with Amrataya Sen's pleading for entitlement of all even poor and destitute over food. Gradually the idea cropped up into the idea of food security and Government of Indiaof adopted by law known as Food Security Act 2013 (FSA). As such, the present paper underlines the related government schemes and their prospects in socio-economic improvement of the weaker sections. It also attempts to highlight the aspects of implementation for further enquiry. Thus it provides a comprehensive overview of India's food security policy landscape, offering insights into present challenges, and the evolving strategies employed by the government to address the intricate web of issues surrounding the availability, accessibility, and affordability of nutritious food for its vast and diverse population.

Keywords: FSA, Food entitlement, Nutrition, Maternal, Children, MDM, NMSA, India

INTRODUCTION

Food security remains a critical challenge for India, a nation with a burgeoning population and diverse agricultural landscape. This article delves into the multifaceted dimensions of food security in India, examining the intricate interplay of socio-economic factors, agricultural practices, and government policies. A comprehensive understanding of the existing scenario provides a foundation

* Dr. Pooja Paswan, Assistant Professor, Department of Political Science, Jamia Millia Islamia, New Delhi 110025; E-mail: ppaswan@jmi.ac.in; Mob: 9818328173

for evaluating the efficacy of governmental initiatives in ensuring food security. In the context of a rapidly growing population, dynamic agricultural landscapes, and socio-economic diversity, India grapples with the multifaceted challenge of ensuring food security for its citizens. At the intersection of global food demand, climate variability, and domestic agricultural practices, the formulation and implementation of effective food security policies have become imperative for the nation's sustainable development.

FOOD SECURITY ACT 2013: THE PARADIGM SHIFT

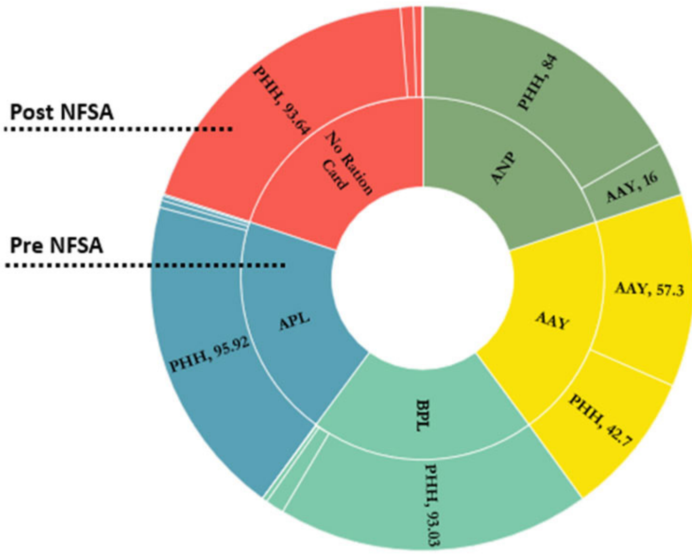
The National Food Security Act (NFSA) of 2013 stands as a monumental legislative stride in India's commitment to eradicating hunger and malnutrition. Enacted with the vision of providing a safety net to the vulnerable sections of society, this landmark legislation brought forth a radical shift from welfare-based approaches to a rights-based framework, elevating access to food from a mere privilege to a legal entitlement. A pivotal milestone in India's commitment to ensuring food security was the enactment of the National Food Security Act in 2013. This legislation marked a paradigm shift by legally entitling a significant proportion of the population to subsidized food grains through the Public Distribution System (PDS). The legal framework laid the foundation for a more inclusive and rights-based approach to addressing hunger and malnutrition. NFSA was envisioned as a response to persistent challenges of food insecurity and the imperative to address nutritional deficiencies, the NFSA emerged as a comprehensive legislative framework. It aimed not only to ensure the availability of food but also to guarantee its accessibility and affordability to a significant proportion of the population.

ENTITLEMENT TO SUBSIDIZED FOOD GRAINS

At the heart of the NFSA is the provision of legal entitlement to subsidized food grains through the Public Distribution System (PDS). The Act categorically identifies priority households and eligible individuals, legally binding the government to provide a specified quantity of food grains at subsidized prices. This approach sought to empower individuals by recognizing their right to food as a legal entitlement, thereby fostering a more inclusive and rights-based approach to addressing hunger. The NFSA introduced a novel system for the identification of beneficiaries, moving away from traditional methods that often resulted in exclusion errors. The Act mandated the use of transparent and technology-driven processes to identify eligible households, minimizing the chances of wrongful exclusions and ensuring that the benefits reached those who needed them the most.

MATERNAL AND CHILD NUTRITION

Recognizing the critical importance of maternal and child nutrition, the NFSA incorporates specific provisions targeting pregnant women, lactating mothers, and children below the age of 14. These vulnerable groups are entitled to nutritious food, including take-home rations and hot cooked meals, through various schemes such as the Integrated Child Development Services (ICDS) and the Midday Meal Scheme. The Act reinforced the role of the Public Distribution System as a primary vehicle for the delivery of food grains to beneficiaries. It mandated the state governments to reform and strengthen the PDS, ensuring efficient and transparent distribution. The legal entitlement, coupled with reforms in PDS, aimed to eliminate leakages, corruption, and inefficiencies that had plagued the system in the past. The NFSA places specific obligations on the state, obligating it to take measures to progressively realize the right to food.



[1]

Transition of ration cardholders from pre- to post-NFSA card categories

MIDDAY MEAL SCHEME (MDM)

The Midday Meal Scheme in schools became another cornerstone in India's food security initiatives. The Mid-Day Meal Scheme (MDMS) is a crucial initiative in India aimed at improving food security and nutritional levels among school children. Envisioned as a national program, it was first introduced in the state of Tamil Nadu in 1925 and later expanded across the country in various forms. The

1 https://www.ideasforindia.in/topics/poverty-inequality/pds-national-food-security-act-and-covid-19.html

primary objective is to provide nutritious meals to school children, fostering better health and encouraging regular school attendance. This scheme plays a pivotal role in addressing the dual challenge of malnutrition and lack of access to education, contributing significantly to the overall development of the nation. The roots of the Mid-Day Meal Scheme can be traced back to the pre-independence era when visionary leaders recognized the need to combat malnutrition among children. Over the years, the program has undergone several modifications and expansions. The turning point was in 1995 when the scheme was revamped and received a significant boost with the introduction of the National Programme of Nutritional Support to Primary Education (NP-NSPE). Since then, the MDMS has evolved into one of the world's largest school feeding programs, reaching millions of children across the country. This not only addressed the nutritional needs of school-going children but also contributed to increased attendance and enhanced educational outcomes. Subsequent policies, including the Pradhan Mantri Krishi Sinchayee Yojana (PMKSY) and the National Agriculture Market (e-NAM), reflected the government's commitment to modernize agriculture and ensure a fair market for farmers.

FOOD SECURITY IMPACT

The Mid-Day Meal Scheme not only addresses immediate nutritional needs but also contributes to the broader goal of food security in India. By providing a regular and nutritious meal to school children, the program helps alleviate hunger and malnutrition, particularly in vulnerable communities. Moreover, the scheme creates a demand for locally produced food items, thereby supporting local farmers and enhancing the economic stability of rural areas. This multi-faceted approach not only nourishes the younger generation but also strengthens the agricultural backbone of the nation, promoting sustainable food security. Beyond its impact on nutrition and food security, the MDMS has far-reaching implications for education. The provision of a mid-day meal acts as a powerful incentive for children, especially those from economically disadvantaged backgrounds, to attend school regularly. Improved attendance rates, in turn, contribute to better educational outcomes and a reduction in the dropout rate. The scheme, therefore, serves as a catalyst for breaking the cycle of poverty by empowering children through education and nutrition. The actual position should be assessed separately.

THE ROLE OF GOVERNMENT AGENCIES, RETAIL FAIR PRICE DISTRIBUTORS AND COMMUNITY

Government initiatives, such as the Midday Meal Scheme, have been instrumental in addressing the nutrition needs of school-going children while simultaneously incentivizing education. The introduction of the Pradhan Mantri Krishi Sinchayee Yojana (PMKSY) reflects a concerted effort to enhance water use efficiency in agriculture, thereby ensuring a more resilient and sustainable food production system. Technological interventions, including the National Agriculture Market (e-NAM), have been pivotal in connecting farmers with a broader market, fostering economic growth in the agricultural sector.

The effective implementation of food security policies, such as the Food Security Act (FSA), involves a coordinated mechanism where government agencies, retail fair price distributors, and the community each play critical roles. They establish the framework for food distribution systems, monitor the quality and quantity of food supplies, and address logistical challenges to ensure timely delivery. The community, including local bodies, self-help groups, and individual beneficiaries, also has a significant role. Community participation ensures transparency and accountability in the distribution process. Local bodies can facilitate the identification of beneficiaries and help in grievance redressal mechanisms. Self-help groups and community organizations often assist in spreading awareness about food security entitlements and monitoring the performance of fair price shops. Engaging the community fosters a sense of ownership and responsibility towards the effective implementation of food security measures.

NATIONAL MISSION ON SUSTAINABLE AGRICULTURE (NMSA)

The National Mission on Sustainable Agriculture (NMSA) is a comprehensive initiative launched by the Government of India to address the challenges faced by the agricultural sector, promoting sustainability, resilience, and increased productivity. Launched in 2010, the mission recognizes the need for a holistic approach to agriculture that integrates environmental, economic, and social dimensions. NMSA aims to transform Indian agriculture into a more sustainable and climate-resilient system, ensuring long-term food security and enhancing the livelihoods of farmers across the country. The NMSA is designed with a set of specific objectives that align with the principles of sustainable agriculture. These objectives include the promotion of resource-use efficiency, reducing the impact of agriculture on climate change, and fostering the adoption of innovative and eco-friendly farming practices. The mission focuses on enhancing water use efficiency, promoting soil health management, and encouraging the use of organic inputs. The NMSA encompasses various components and strategies to achieve its overarching goals. The mission also emphasizes the importance of organic farming and the development of climate-resilient crop varieties. One of the pillars of NMSA is the integration of cutting-edge technologies to optimize agricultural practices. The mission promotes the use of modern technologies, including precision farming, remote sensing, and satellite imagery, to provide farmers with real-time information on weather patterns, soil conditions, and crop health. These tools empower farmers to make informed decisions, improve resource efficiency, and mitigate the risks associated with climate variability. The issue requires urgent attention.

SOCIO-ECONOMIC IMPACT OF THE FOOD SECURITY ACT (FSA)

The National Food Security Act (FSA) of 2013 has had profound socio-economic implications in India. Aimed at providing subsidized food grains to approximately two-thirds of the population, the FSA ensures that vulnerable sections of society have access to basic nutrition. One of the most notable impacts of the FSA has been the reduction in poverty and hunger. The World Bank's data indicates that food security interventions like the FSA contribute to a decrease in the poverty headcount ratio . By alleviating the immediate burden of food costs, the FSA allows families to allocate their limited resources to other essential needs, such as healthcare and education. The National Family Health Survey (NFHS) shows improvements in nutritional outcomes, with a decline in the prevalence of underweight and stunted children, reflecting the positive effects of better food security.

ECONOMIC STABILITY FOR VULNERABLE POPULATIONS

The economic stability provided by the FSA extends beyond mere food security. By ensuring a steady supply of affordable food grains, the FSA helps stabilize the incomes of the poorest households. According to a study by the International Food Policy Research Institute (IFPRI), households benefiting from the FSA save up to 20% of their monthly income on food expenditures (IIPA BIHAR-2). This financial relief can lead to increased spending on other goods and services, stimulating local economies and promoting broader economic growth.

SUPPORT TO AGRICULTURAL SECTOR

The FSA also has implications for the agricultural sector. The government's procurement of food grains to support the FSA ensures a stable market for farmers, thereby offering them assured prices for their produce. Data from the Food Corporation of India (FCI) indicates that the annual procurement of rice and wheat under the FSA has consistently supported farmers' incomes and rural livelihoods. This procurement system helps maintain agricultural production levels, ensuring food availability and price stability in the broader market.

CHALLENGES AND FUTURE DIRECTIONS

Despite its successes, the FSA faces challenges, including inefficiencies in the Public Distribution System (PDS), leakage of food grains, and the need for better targeting of beneficiaries. The Comptroller and Auditor General (CAG) of India has reported that about 10-15% of food grains do not reach the intended beneficiaries due to these inefficiencies. Addressing these issues through technological interventions like biometric authentication and improved supply chain management can enhance the effectiveness of the FSA. Future policies should focus on refining these mechanisms to ensure that the socio-economic benefits of the FSA are maximized and reach all eligible individuals.

In navigating the complex tapestry of food security in India, it is evident that these policies are integral components of a dynamic and evolving strategy. Their success lies not merely in addressing immediate nutritional needs but also in catalyzing transformative changes in societal structures, particularly in education and poverty reduction. As India progresses, a scholarly approach to these initiatives involves a continuous feedback loop, incorporating research findings into policy refinements. The future of food security in India hinges on sustained commitment, interdisciplinary collaboration, and the adept navigation of emerging challenges, with NFSA and the Mid-Day Meal Scheme standing as testament to the nation's dedication to forging a resilient and food-secure future for all its citizens.

SELECT READINGS

Kumar, A., Suar, D., & Sahoo, B. K. (2023). Why has Food Insecurity Occurred During the COVID-19, and is There a Way Out?. *National Academy Science Letters*, 1-4.

Santra, S. HOW FAIR ARE FAIR PRICE SHOPS? UNDERSTANDING NFSA BENEFICIARIES'POINT OF VIEW IN SIKKIM.

Tanksale, A., & Jha, J. K. (2015). Implementing national food security act in India: issues and challenges. *British Food Journal*, *117*(4), 1315-1335.

Puri, R. (2022). India's National Food Security Act (NFSA): Early Experiences. *Food Governance in India*, 1-18.

Chakraborty, S., & Sarmah, S. P. (2019). India 2025: the public distribution system and national food security act 2013. *Development in Practice*, *29*(2), 230-249.

Sengupta, P., & Mukhopadhyay, K. (2016). Economic and environmental impact of national food security act of India. *Agricultural and Food economics*, *4*, 1-23.

Bezbaruah, M. P. (2013). Food security: issues and policy options-a discussion in light of India's national food security Act. *Space and Culture, India*, *1*(2), 3-11.

Bathla, S., Bhattacharya, P., & D'souza, A. (2015). India's National Food Security Act 2013: Food Distribution through Revamped Public Distribution System or Food Stamps and Cash Transfers?. *Agricultural Economics Research Review*, *28*(1), 39-55.

Drèze, J., Gupta, P., Khera, R., & Pimenta, I. (2018). Casting the Net: India's Public Distribution System after the Food Security Act. *Available at SSRN 3177691*.

Kodan, A. S., & Chhikara, K. S. (2013). Food security in India: An overview. *International Journal of Social Sciences*, *2*(1), 1-10.

Dev, S. M., & Sharma, A. N. (2010). Food security in India: Performance, challenges and policies.

Debnath, D., Babu, S., Ghosh, P., & Helmar, M. (2018). The impact of India's food security policy on domestic and international rice market. *Journal of Policy Modeling*, *40*(2), 265-283.

BJPA ISSN: 0974-2735
Vol. XXI, No. 1 (S), Jan.-June, 2024

ROLE OF POLITICAL PARTIES IN EMPOWERING DALITS

Prabha Kumar*

Abstract

Amelioration of Dalits who, generally fall in the category of Scheduled Castes and Scheduled Tribes India, has proved to be a hard nut to crack. They have been subject to subjugation, deprivation and oppression through ages by institutionalised methods. It is alleged that the main reason behind it is lack of political will as the power structure has almost been controlled by the affluent sections of society. With the introduction of democracy in India, the political parties encircled them for support and resorted to make politico-legal arrangements, affirmative action and launching various welfare programmes to woo them. No doubt, some improvements in their conditions are witnessed, but the situation still remain grim for them as evident from recently held caste survey in Bihar. 42 percent of Dalits still lead miserable life. This makes an urgent imperative to examine the attitude and role of political parties in motivating and empowering them. This has been assessed by examining the ideology and actions of the political parties. Based on secondary sources of data, the present paper finds that the political parties facilitated some elites from SCs/STs into power structure, leaving apart the masses of these categories.

Keywords: Dalits, SCs/STs, Political Parties, Vote Bank, Party-politics, India

INTRODUCTION

Dr. Ambedkar and Dr. Lohia strongly argued that caste system in India has been the basis of discrimination among citizens. At the time of independence, academic theorists and constitutional experts expected that the institutions of democratic

* Dr. Prabha Kumar, Assistant Professor, Department of Political Science, A.N. College, Patliputra University, Patna; E-mail: pkumar2568@gmail.com

government, the idea of modern citizenship and economic progress would exert a destructive influence on the traditional structure of caste. But the caste system has not only persisted but became the basis of politics. Some political parties emerged as champions of caste groups viz. BSP in UP championed the cause of dalits whereas SP, RJD and JDU survived for decades as champion of OBCs. On the other hand, electoral politics made the caste system more rigid (Srinivas: 1962). In other words, caste has become an important factor in the functioning of democratic institutions. While giving importance to caste, as the most crucial factor in the political process of the country, Rudolph and Rudolph (1967:97-98) argued that the importance of caste was unlikely to decline because the need for mediating collective and adaptive structures based on birth and integrated by primary group sentiments and interests transcends the imperative of modernity in politics and society. Following a similar line, Kaviraj argues "Since elections required aggression of perceived interest and the format of perception of identity was deeply traditional, appeals to caste or occasionally religious identities were more effective in the short term. It is evident that politicians wished to win elections before they modernised their country and to win elections, politicians manipulated the existence of traditional identities in actual electoral practices." (Kaviraj 1997:8). It has also been argued that caste-politics phenomenon has positive impact of democracy. Kothari asserts, "Caste can be oppressive but it can also provide a basis for struggle against oppression." (Kothari, 1970:4-5) He argues that caste far from being an impediment to the creation of a democratic political order, was a structure through which politics must strive to organize. (Kothari 1970:225). In the light of above discussion, the present paper examines the trend of political parties in empowering the Dalits and its impact on them.

CASTE BASED DISCRIMINATION AND POLITICS

Discrimination and exclusion based on caste, ethnicity, gender, race, etc continue to violate human rights in the present world. The Dalits in India are also socially deprived, economically dependent, politically marginalised, and culturally ostracised. However, it is wrong to say that the problem of the dalits is a social problem rather it is fundamentally a political problem (Ambedkar :1946). This was exactly why he always urged Dalits to channelize their energies towards seeking political power. Ambedkar said, "Nobody can remove your grievances as well as you can and you cannot remove them unless you get political power in your hands (Desai: 948). Dalits are not located in one geographical region, they are dense in certain regions, and limited in others. Irrespective of their physical locations, they are at the lowest ebb of the Hindu social hierarchy and faces similar problem all over the country. In a society which has denied the Dalits their rightful place, the state proves to be the main source of rescue and support. hence, State has emerged as one of the great patrons in the uplift of Dalits and the downtrodden since independence. Aspirations of scheduled castes can be realised by the State through Political Parties. On the contrary, political parties preferred their electoral prospects over amelioration of dalits and bringing them in the mainstream of society. They generally fail in political mobilizing the people or in tackling different Dalit concerns. However, recently, there is a growing tendency among Dalit masses to organize and transform themselves into politically empowered people. The emerging concept of Dalit communitarian politics is a positive sign of their growing political consolidation.

In this context, Yogendra Yadav asserts that the democratic system enjoys greater legitimacy today than in the past. The poor and the deprived defend democracy more vigorously than the elite. (Yadav;1999) In fact, it is very difficult to say what this democracy means for the poor and the oppressed. As Nirja Gopal Jayal argues that political equality is severely restricted by inequalities that exclude many from having equal opportunities (Jayal, 2001:23). Kaviraj (2000) recognises the contributions made by democracy to the caste system, a process which he calls the "democratisation of caste". The electoral politics for him has resulted in a "democracy" of caste groups in place of a "hierarchy". But even after 7 decades of independence, a large portion of the Dalit masses continue to suffer due to the continued practice of the two-class system – the most obvious sign of this oppression. Indeed, it is not just the uneducated and poor Dalits who are affected by the wider problem, even educated, and employed Dalits who have benefited from positive discrimination policies have been victims of caste-based discrimination and segregation. (Gundimeda, 2016:17) In other words, class mobility has not helped the stigmatized social identity. This reality forms the basis of the Dalit struggle for recognition, equality, and political power. (Ibid:17)

POLITICO-LEGAL ARRANGEMENTS AND EMPOWERMENT OF DALITS

The Indian government after independence initiated constitutional as well as legal steps to lessen the problems caused by the rigid caste system in Indian society. The Indian constitution provides a framework with 3 strategies to improve the situation of scheduled castes and scheduled tribes –

1. Protective arrangements to enforce equality and to eliminate established practices that perpetuate inequalities like the Untouchability Practices Act, of 1955.
2. Compensatory discrimination popularly referred to as a reservation provides positive preferential treatment in the allotment of jobs and access to higher education to accelerate the integration of SCs and STs with mainstream society.

3. Development – It refers to the resources and benefits provided by the government to bridge the wide gap in social and economic conditions between the SCs and STs and other communities.

It was believed that the position of Dalits in society would improve and they would be regarded as equal partners in nation-building tasks due to the power and prestige bestowed upon them. But even today the Dalit community may not appear to be better off even in absolute terms notwithstanding the visible advancement for some. The syndrome of feeling of helplessness, apathy and passivity among the poor and deprived Dalit people can be described as the culture of poverty which is malice that does not allow them to do anything to get rid of their misery. Their ability to influence public decisions represents the other phase of empowerment; it refers to the ability to forge a durable and effective political alliance powerful enough to win friends and influence public decisions. (Yadav, 2010:143) It is in this context that it must be realised that political parties can play a very important role by submerging internal divisions among the Dalits and weaving them together into a strong, purposeful, and determined political force.

DALIT AND PARTY POLITICS

It is significant to assess as to how different political parties behave in mobilising and empowering dalits.

Indian National Congress: In the post-Ambedkar period, Dalits had been an important constituency for the Congress party and they were crucial for its political fortune in the coming decades. The Congress party, in fact, managed to turn Dalits into its vote bank because of its commitment to a plan of action on untouchability and poverty. (Mendelshon and Vicziany, 1998:2014) The Congress Party managed to co-opt the Dalit leadership into its fold like Jagjivan Ram. Dalits who were absorbed in the governance used to follow the agenda and goals of the Party rather than highlight the misery of Dalits and work for their empowerment. They never argued against their respective parties or against the upper caste-based leadership. Through Zamindari Abolition Act, Land Reforms Act, and several Dalit-based policies especially between 1971 and 1977, the Congress succeeded in gaining the confidence of Dalits to the extent that it could secure three-quarters of the reserved seats in any general elections. Yet, beyond small measures such as housing sites and wells, the Congress' measures did not benefit the larger Dalit population. Moreover, the co-option of the Dalit leadership into the Congress Party effectively destroyed the space for the emergence of strong and independent Dalit leadership in post-independent India, at least for the 3 decades following independence. (Gundimeda, 2016:76) Dalit MPs and MLAs in the Congress Party, having no support base within the community, found their hands tied in so far addressing the causes of their community, because they were not elected exclusively by Dalit voters, but by voters from all castes and communities. They did not represent their people to the party and the government but represented the party in power to the people. Strictly speaking, the Congress party's special relationship with the Dalits did not lead to many fundamental changes at the grassroots level. The succeeding Congress governments have been at the forefront in taking advantage of the Dalit political reservation both in the states and in the Parliament, but they have not used their powers for the emancipation of the Dalits from their appalling socio-economic conditions.

Bhartiya Janta Party (BJP):

BJP, generally labelled as anti-Dalits, could not mobilise Dalits in their voter base till the recent past. It has very few leaders belonging to the Dalit community in the major states of India. Recently, BJP has in fact evolved a unique strategy for gaining legitimacy among Dalits by aligning with regional Dalit-led Political parties. Due to its deliberately planned strategies, like, attending the caste meeting of different lower castes, celebrating the 125th Birth Anniversary of B R Ambedkar in 2016 and successfully splitting the Dalit votes, the BJP has succeeded in appeasing Dalits to a considerable extent and the UP-Assembly Election results of 2017 is the testimony to the fact. Out of 85 reserved seats in UP assembly elections held in 2017, BJP won 69. One way of looking at this is that the BJP wants to make people and especially Dalits believe that it will carry out programs and policies for their welfare. But at the same time, it also appears that they do not intend to devolve actual power to the lower caste. Even in states where the BJP is in power, they consciously avoid projecting any Dalit leader from within the rank. Therefore, it becomes clear that the rise of Modi and the BJP is due to the utilization of the previously existing strategy of forward caste parties like Congress of consolidating backward caste votes. There is nothing new in this and one needs not to be surprised by better politicians playing the game better. The BJP through a variety of creative strategies and tactics, ranging from the promise of development, welfare programmes cultural inclusion and nationalism to religion, has been able to fill the void created by the decline of BSP, and charted an impressive win in 2022 Assembly elections in UP and obtained the support of many SC reserve seats.

Communist Parties:

The communist parties like CPI and CPM, though claiming to be representing Dalit interests always talk of equality but deny Dalits top posts in the decision-making bodies of the party. Not concerned with the real development of the Dalits, they have followed anarchist ideologies to get into power and keep hold of it. CPI(M) known for agitation for the class struggle and uplifting of Dalits, has no proper representation of Dalits or women. The actual problem with organised left in India is its intellectual lot, who have always studied hunger without even experiencing it and studied the history of oppression without being affected by it. In fact, they have not made any significant contribution to the betterment of the lives of the Dalits, as they claim to have been representing.

Dalit Political Parties: Dalit political parties include the Republican Party of India (RPI), Bahujan Samaj Party (BSP), Viduthalai Chiruthaigal Katchi (VCK), Lok Janshakti Party (LJP), etc. The RPI, active in Maharashtra has its roots in the Scheduled Caste Federation led by B R Ambedkar. The electoral success of the RPI, however, was short-lived and it could not win in any election after the 1967 assembly elections and thus never became, as initially hoped either the political platform for the oppressed masses or an alternative to the Congress. (Gundimeda, 2016:64) The RPI's activities came to be restricted because of its identification with the Jatavs, a fact which helped Congress wean away other scheduled castes from the RPI's influence. (Hasan, 1989:119)

Bahujan Samaj Party: Inspired by the philosophy of B R Ambedkar and Jyotibha Phule, Bahujan Samaj Party was founded by Kashiram in 1984 who named his protégée Mayawati as his successor in 2001. If the BSP was an instant success among the lower castes, it was because of its strategies of mobilization and criticism levelled against the caste-based social system. The two main strategies adopted by BSP that played a pivotal role in mobilizing Dalits and other marginalised sections were – the use of the print media and the Dalit Mela. The BSP succeeded in bringing the hitherto divided Dalit caste under its umbrella. Despite not getting success, in its earlier phase of electoral politics, the BSP began to win a good number of seats in both the state assemblies and Parliament from 1995 onwards which enabled it to form a government in UP four times. But the pertinent question is – how did the party empower Dalits after coming to power? The main goals of BSP were to horizontalize the vertical social order and democratise the undemocratic political order. (Gundimeda, 2016:118) But in the late 1990s, it began to transform itself from an exclusive Dalit-based party to a sarv-jan-based party which led to its success in the 2007 Assembly Election. But its electoral victory could not culminate party as an agency of social transformation. In fact, the BSP's rule has been the subject of intense criticism from different quarters. Moreover, the development programs that were undertaken by the BSP government in the name of Dalits could not benefit large sections of the Dalit population. Finally, Dalits who had constituted the BSP's solid support base since its inception, deserted the party in the assembly elections of 2012, 2017 and 2022 and Lok Sabha elections of 2014 and 2019 tilting the balance in favour of other political parties. However, it is important to acknowledge that the BSP has, to a great extent fulfilled its original promise of providing Dalit identity and self-respect and contributed to the social deepening of democracy in India. Having obtained a measure of political consciousness and self-confidence to challenge the upper castes, a significant section of Dalits, mostly the non-jatavs, are in search of a political party that can offer them economic betterment and are also attracted to the idea of inclusion within the larger Hindu identity. We believe that the Dalit movement in UP has entered a post-BSP phase, a development, which need not be seen in a negative light, as much has been achieved. (Pai and Kumar:2023). So, Dalits are appearing to be more mature and confident of making their own social, political, and electoral choice and moving towards different parties depending on the situation. Like other caste groups, Dalits too are now exercising their options. Despite the decline of the BSP we are witnessing multiple forms of Dalit assertion in UP like the Bhim Army.

FINDINGS AND CONCLUSION

Today the political potency of Dalits is undoubtedly increasing. There is an unprecedented politicization of caste taking place which has significantly taken the form of both segmentation and mobilization of Dalits. But instead of emancipating them, the political leaders, and political parties with an eye on general elections try to appease and woo the Dalit voters for electoral gains. Given some important posts in the organizational hierarchy during election time, Dalit members of these parties are generally kept away from the decision-making process. Within the mainstream political parties, the leadership has been even until recently drawn from the upper caste with a few exceptions. Neither the Congress nor the BJP has a single Dalit leader who can boast of a substantial following. So, there is an absence of effective and independent representation of Dalits in the party organizations as well as within the government of the day. Dalit leaders are not given proper recognition by these political parties and are also discriminated against in the distribution of portfolios as they are hardly assigned key posts in the cabinet. Even Dalit leaders themselves are not found to be committed to the interest of their communities. Once they get good assignments, they start neglecting the interests of their own communities. The political parties are reluctant to nominate Dalit candidates from general constituencies. Dalit parties also follow the same practice. Dalit political parties also lack proper strategies and policies to exert influence over their communities. Dalit parties like BSP have failed to secure a majority of the seats even in reserved constituencies

Despite political empowerment, special attention and preferential treatment, the Dalit masses are still struggling for their survival. The government and political parties have failed to improve their lot. But the Dalit leaders, their families and close followers have prospered and amassed a lot of wealth. The creamy layers among Dalits who command muscle or money or political power only avail the benefits of reservation. For most Dalits, the reservation does not serve any purpose. Political parties are busy in appeasing the voters through short-term measures rather than working for their substantial empowerment. However, the political tussle among parties paved way for emergence leadership from among Dalits

It is observed that Dalits are nowadays striving to organize themselves to become politically more empowered. To conclude, the emancipation and uplift of Dalits, the marginalised section of society, is a humanitarian obligation of all political parties.

REFERENCES

Ambedkar, B. R. (1946). '*What Congress and Gandhi Have Done to the Untouchables?*' in Vasant Moon (Comp), Dr Babasaheb Ambedkar Writings and Speeches, Volume 9, Bombay: The Education Department, Government of Maharashtra.

Desai, A.R. (1948). *Social Background of Indian Nationalism*. Bombay. Popular Prakashan.

Gundimeda, S. (2016). *Dalit Politics in Contemporary India.* New York. Routledge.

Hasan, Z. (1998) *Quest for Power: Oppositional Movements and Post Congress Politics in Uttar Pradesh*. New Delhi.Oxford University Press.

Jayal, N. G.(ed).(2001). *Democracy in India.* New Delhi. Oxford University Press.

Kaviraj, S. (1997). *Politics in India.* New Delhi.Oxford University Press.

Kaviraj, S. (2001). '*Democracy and Social Inequality',* in Frankel, R. Francine et al. (eds) , *Transforming India: Social and Political Dynamics of Democracy,* pp. 89-119. New Delhi. Oxford University Press.

Kothari, R (ed).(1970). *Caste in Indian Politics*. New Delhi. Orient Longman.

Mendelsohn, O. and Marika . (1998). *The Untouchables: Subordination, Poverty, and the State in Modern India*. Cambridge. Cambridge University Press.

Pai,S. (2003). *Deprivation and Development in UP: The Economic Agenda of the BSP. Man, and Development*, 25 (1).35-54.

Pai S.and Kumar S.(2023). *Maya Modi Azad, Dalit Politics in The Time of Hindutva*, Gurugram, Haryana, Harper Collins Publishers India.

Rudolph, L.I. and Susanne, H.R. (1967). *The Modernity of Tradition: Political Development in India.* New Delhi. Orient Longman.

Sheth, D.L. 2000. '*Caste and the Secularisation Process in India*', in Ronald, de Souza Peter (ed.), Contemporary India: Transitions. New Delhi: Sage.

Srinivas, M. N. (1970). *Caste in Modern India and Other Essays*. London. Asia Publishing House.

Yadav, M. (2010). *Rise of Dalits.* New Delhi.Omega Publications.

Yadav, Y. (1999). '*The Maturing of Indian Democracy,* India Today.31 August.

Glimpses of Activities of IIPA, Bihar Regional Branch

Delegation of IIPA Bihar Regional Branch led by the Editor meets HE the Governor of Bihar

Presenting the Previous Issue of BJPA to HE the Governor of Bihar

BIHAR JOURNAL OF PUBLIC ADMINISTRATION

(ISSN: 0974 - 2735)

UGC-CARE Reference List of Journals at Sl. No. 51 in Social Sciences

Priority Areas

The Journal is intended to serve as a forum for discussion and exposition of various forms of public administrative systems of the world and in various aspects like administrative structures, functions, reform processes, relationship of Public Administration with politics, people, society and economy. Burning issues intersecting governance, administration and management, distribution and dispersal of power, local bodies and such other subjects preferring a reference to Bihar and behavioural dimensions of these aspects cannot be ignored by this Journal. Certainly the Journal does not seek to be a vehicle for comments either of a political party, a pressure group or an association. However, it will render cooperation to and collaborate with any institution of higher education and administration in furtherance of the objectives of Indian Institute of Public Administration and furtherance of good governance in Bihar.

Guidelines for Submission

Contributions for the Journal are invited from the persons belonging to every walk of life having interest in Public Administration, democratic institutions and development process. Contributors are requested to send their article/research papers, research notes, book reviews etc. typed in MSW format using New Times Roman 12 point font (on A4 size paper) with 1.5 space in the soft copy only addressed to the Editor, on the following email address:

bjpa2004@gmail.com

The contributions received by April shall generally be considered for Jan-June issue and those received by October shall be considered for July-December issue. The contributors are also supposed to furnish the duly filled in 'Authors' Declaration' format (in soft copy), available on the website - <www.iipabiharbranch.org> click Journals Tab.

The length of the research paper for submission should normally be between 3000 and 5000 words; however, the special papers by reputed authors will have no such restrictions. Contributors are requested to apply universal reference pattern, preferably MLA/APA in text referencing supported with bibliography at the end and 'end-notes' if any.

There is a section of 'book reviews, research notes and impressionistic notes' which should be of the length of around 1000 words. The senior bureaucrats may also send their experiences of public administration.

– Editor

Note: The papers are published only after passing the muster of the referees. Editorial Board will have right to accept/reject a contribution without assigning any reason. The address for correspondence : Dr R K Verma, Editor, BJPA, Shiva Path, (Dopulwa), New Prendrapur, Patna - PIN: 800 001 Mob.: 7762882579

Printed by: Victorious Publishers (India), D-5 G/F, Ground Floor, Pandav Nagar, Near Shanti Nursing Home, (In Front of Mother Dairy), New Delhi-110092; Email: victoriouspublishers12@gmail.com; Mob.: +91 8826941497