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ENSURING JUSTICE TO VICTIMS THROUGH RESTORATIVE JUSTICE STRATEGIES: SOME UNDERPINNINGS

*Anju Vali Tikoo & Sonia Pandey**

"Justice requires that we work to restore those who have been injured"[1]

Abstract

Even the best of judicial decisions through the criminal justice system based on retributive philosophy may not give solace and a sense of complete justice to the victim of crime owing to his near exclusion in the criminal justice dispensation process.

Without any effective participation in the entire trial process, the victim is expected to believe that the judgment delivered by the Court of law has done justice. The traumatizing impact of crime leaves the victim shattered. Shock, anger, grief, loss, uncertainty, fear, worry, low self-esteem etc. are experienced by the victim on daily basis, in the retributive criminal justice system which further deteriorates the mental health and psychological well-being of the victims of crime.

Restorative Justice Strategies on the other hand through effective victim participation give a sense of inclusion to the victim in the administration of criminal justice. Most importantly their participation can help them overcome their emotions of helplessness, powerlessness thereby assuaging their lowered self-esteem which is crucial for their therapeutic healing and psychological well-being. This ensures the smooth reintegration of both the crime accused and crime victims into their society and foster them as a resilient and constructive individual in the community.

Keywords: *Restorative Justice, Emotions, Crimnology, Victim Participation*

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1 Anonymous.

VII. Conclusion

I. Introduction

THE PURPOSE of justice delivery mechanism is generally considered in the sense of social, political or economic justice[2] wherein the psychological wellbeing of the victim is never an initial consideration unless there is a vivid manifestation of its disequilibrium. And we continue to live under a mistaken impression that justice to the victim of crime has been delivered. However, the reality is even when the physical wounds have healed the psychological wounds of the victims of crime persist. They suffer intense fear, shock, and trauma, followed by varied emotions like anger, anxiety, depression, social isolation, and helplessness. Survivors of prolonged, repeated victimization, may develop severe mental health problems. To add more to their adversity, criminal justice system plays a contributory role. Thus, it is pertinent that delivering justice is not only to be understood as punishing the perpetrator but rather restoring back the victim in every possible way and the most important way is to ensure the psychological health and well being of the victim(s) of crime and by providing them with psychological justice. But ironically "the mental health impacts of crime are an underappreciated cost of crime in society."[3]

It is the contribution of Bentham[4] and Beccaria[5] as pioneers of Classical School of criminology that identifies every human being as a *free willed* individual driven by hedonistic instincts of pleasure versus pain.[6] Hence every crime necessarily has to be met with a punishment that is deterrent as well as proportional to the severity of crime.

Why do we punish? Since ages the humankind is baffled by this question as we do not have any empirically tested singular reason justifying the punishment. Despite the three main ideologies viz retributive, deterrent, reformation underlying punishment, we cannot universally justify the reason for punishment in all instances. Analysing the purpose of punishment in the traditional criminal justice system,[7]

2 *See* R W M Dias, *Jurisprudence* 65 (Lexis Nexis Publication, New Delhi, 5th edn, 2013).

3 Mental Health and Crime Perspectives in Crime: How does local crime affect mental health?, *available at*: https://pinkerton.com/our-insights/blog/mental-health-and-crime (last visited on May 9, 2023).

4 Jeremy Bentham (1748-1832), A Utilitarian and reformer of Classical school of criminology.

5 Cesare Beccaria (1738-1794), Father of Classical criminology.

6 The Classical School of Criminology, *available at*: https://www.lawteacher.net/free-law-essays/criminology/the-classical-school-of-criminological.php (last visited on July 15, 2023).

7 Hereinafter "**CJS**".

one can easily understand that punishment is used as a tool in shaming the wrongdoer publicly with the hope that the very threat of being shamed would work as a deterrent. The fear of humiliation or embarrassment restrains people from indulging in wrongful conduct. But ironically this concept of deterrence does not repair the harm caused to the victim in any which way and least of all repairing the psychological harm.

Restorative justice on the other hand focuses on the reparation of harm done by the wrongdoer and restoring the balance of relations in any given society. According to John Braithwaite,[8] the chief proponent of modern restorative justice approach "restorative justice is all about restoring offenders, restoring victims and restoring societies" in contradistinction to traditional criminal justice administration with a focus on punishing the criminal by way of retribution coupled with deterrence.

Brief Historical Background

Restorative justice has been an integral part of all indigenous human civilisations. Be that traditional Hindu society in 600-2000 B.C, 'ancient Buddhist Taoist and Confucian traditions' or the 'public assemblies of the Germanic people', they all bear testimony to the interpersonal methods of conflict resolution. It has been witnessed that Restorative Justice made its way even in cases of homicide in certain ancient civilisations like Arabs, Greeks and Romans.

The period from 11th to 19th century the emergence of political state and rising of Monarchy resulted in the king appropriating the power of dispute resolution to himself, prosecuting, and punishing the offender in place of negotiated settlement on behalf of the victim and society too. Slowly and gradually the interpersonal conflict resolution transformed into a third-party conflict resolution by the State.

Disillusioned with the conventional CJS on account of huge pendency of cases, long and persecuting delayed trials coupled with total exclusion of the victim from the entire criminal justice administration has witnessed a revival of interest in restorative justice practices across the globe which also can be effective in maintaining the psychological health of the victims of crime through its strategies. Studies have shown that restorative justice strategies have physical and psychological health benefits.[9]

II. Restorative Justice: Meaning and Scope

8 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989).

9 Restorative justice's impact on participant health, *available at*: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rstrtv-nhlth/index-en.aspx (last visited on July 9, 2023).

Restorative justice is an age-old value reflecting justice, accountability, and restoration. The believers in restorative justice suggest that restorative justice practices are much more beneficial than traditional punitive approaches in addressing the claims of victims of crimes who otherwise invariably are a non-entity and forgotten lot in criminal justice delivery system. Restorative justice strategies like mediation, victim support and advocacy, restitution, compensation, victim offender conferencing, victim empathy, community policing etc. give opportunities to the offender to make amends, apologize, gain acceptance by willing to repair harm and get reintegrated in the society unlike the punitive approach of fine, reprimand, penalize, incarcerate, detain, suspend, expel which results in labeling the wrongdoer(s) and

thereby excluding them from reconciliation.

Figure 1: **Restorative Justice Stakeholders and Practices**[10]

Reintegration involves separating the wrongful act from the actor and disapproving the deed while intrinsically recognizing the worth of human being. This is precisely what Mahatma Gandhi' famous adage "hate the sin, not the sinner" also exhorts!

The UN Handbook on Restorative Justice Programs specifies underlying

10 McCold and Wachtel's restorative justice typology, *available at*: https://www.researchgate.net/figure/McCold-and-Wachtels-restorative-justice-typology-Source-McCold-and-Wachtel-2003-3_fig1_257681396 (last visited on June 8, 2023).

assumptions[11] of restorative justice tools:

(i) A victim suffers some harm after a crime , the response to the crime should be such which repairs that harm;

(ii) The one who has committed the crime should be made to understand that his/her conduct is unacceptable and his behavior has caused harm not only to the victim but also the community;

(iii) The perpetrator should accept the responsibility for committing the crime;

(iv) The victim's opinion needs to be taken into consideration to decide the ways in which the offender can repair the harm caused to victim; and

(v) This process involves the contribution from the community as well.

There are primarily three conceptions[12] about restorative justice:

a. *Encounter conception*: It is based on the concept where the stakeholders of a crime meet and discuss about it. Where they try to find out the way forward to repair the harm caused. People associated with this approach often suggest that Restorative practices can be brought forth and used even when we are not dealing with a crime situation. For instance: conflict with neighbours' or any domestic day to day conflict.

b. *Reparative conception*: In this concept the idea is to focus on repairing the harm caused by crime. The groups associated with this concept consider this to be the best thing to do as repairing the harm caused is the most important thing to maintain a spirit of collective collegiality within the community.

c. *Transformative conception*: This particular concept focusses on underlying cause of crime. It is also individualistic in its approach as it looks for individual injustice. The idea is to find out the root cause so that every stake holder can identify/accept responsibility. It is wider in its approach than the above mentioned concepts. It highlights on the significance of internal spiritual transformation along with external societal transformation.

Thus, by understanding and utilizing the above-mentioned concepts and principles, restorative justice seeks the four 'Rs' viz Repair, Restore, Reconcile, and Reintegrate[13] as its key objectives.

11 United Nations Office of Drugs and Crime; Handbook on Restorative Justice Programs, *available at*: https://digitallibrary.un.org/record/617572?ln=en (last visited on July 19, 2023).

12 Lucio Sia, "Restorative Justice: International Perspective" *Cambridge: Faculty of Education, Seminar* 4 (2010), *available at*:https://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminartwo/SiaLucio.pdf (last visited on July 10, 2023).

13 Stuart Henry and Scott A. Lukas (ed.), *Recent Developments in Criminological Theory Toward Disciplinary Diversity and Theoretical Integration* (Routledge, 2009).

III. Punishment for Ensuring Social Discipline

Restorative Justice can be further understood by using the 'Social Discipline Window that reflects the interplay of control and support model developed by Terry O'Connell.[14] The purpose of punishment is to socially discipline people in accordance with the standardised aspirations of the group. The compliance to norms can be brought about through various methods. A punitive –permissive continuum to discipline people can be more comprehensively understood by analysing the interplay of two significant variables, i.e., control and support. The following [illegible] group.

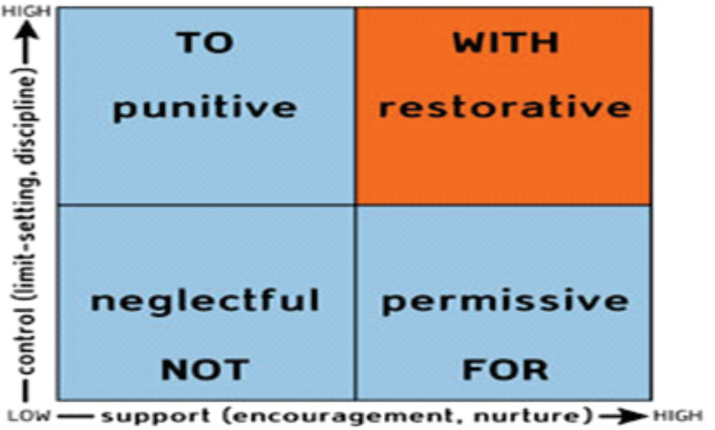

***Figure 2*:** The Social Discipline Window[15]

a. *Punitive*- As the above diagram shows is that disciplining method where the support which is provided is less but the control mechanisms are highest. So their leadership is authoritarian as primarily their objective is to do things TO people.

b. *Permissive*- A disciplining method where providing support is higher in comparison to control or there is least control. This leadership style is generally paternalistic in nature. These are the people who do things FOR people.

c. *Neglectful*- A disciplining or leadership style where there is no response to wrong doing. There is neither control nor support. There is a big NOT

14 *Id.* at 153-154.

15 Source of Image, *available at*: https://dev.iirp.edu/media/SocDiscWindowRio.jpg (last visited on March 11, 2023).

doing anything to the people here. These kinds of leaders are very much irresponsible in their approach.

d. *Restorative*- This is a leadership or disciplining style which we are looking at and is being emphasized. This a style where we find high control along with high support. This leadership style is positive in characteristics and authoritative in nature. Here the things are done WITH people so that people are engaged and empowered by having their say and effective participation.

Of late the value of restorative practices is being realised in various other fields of human activity e.g., education, parenting, counseling, organizational leadership involving management and motivation of human beings and the need of social disciplining for ensuring cohesive co-existence. There can be a vast range of restorative justice practices from being most informal to being formal, structured, and more impactful.

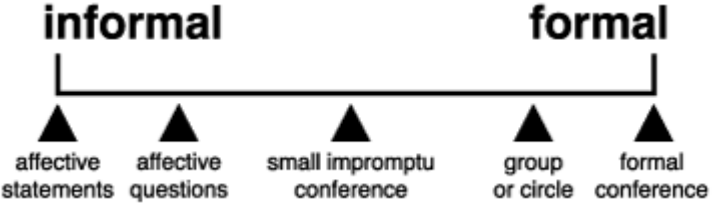

Figure 3: Restorative Justice Continuum[16]

Some of these are:[17]

1. Victim/offender conferences in criminal justice context
2. Disciplinary problem-solving policy initiatives in disputes between citizens
3. Conflict resolution workshops in organizational context
4. Team building sessions in occupational settings
5. Marital advice and counseling services
6. Parental guidance and admonishment of their misbehaving children.
7. Apologizing for offensive or otherwise hurtful remarks in institutional and other settings.

16 Source of Image, *available at*: https://www.iirp.edu/images/rp-continuum-375w.png (last visited on May 11, 2023).)

17 B.B. Pande, "Restorative Justice Indicators, Criminal Justice and Human Rights" 15 *Journal of the National Human Rights Commission* 203 (2016).

IV. Restorative Approaches to Cross Cultures: International Scenario

Restorative approach to criminal justice administration is in practice across the globe. Many cultures have informally embedded some aspects of restorative justice in their dispute resolution mechanisms. For instance, informal participation in sentencing procedures has been a way of Australian and Canadian indigenous peoples' ways of life for decades.[18] This practice is largely informal and community based. Some of the countries adopted and modified the approach to suit their unique justice dispensation systems. Over the years strategies like 'victim offender mediation,' 'community family group conferencing,' 'peacemaking committees,' 'sentencing circles' have already been recognized as time tested processes furthering restoration perspectives. A brief outline about some of the restorative justice strategies being adopted by various countries is given below:

a. *New Zealand*: There is what is a "Community and Family Group Conferencing" model adopted into national legislation and applied to the youth justice process in New Zealand started from 1989. The majority of cases are handled by the police through restorative caution, by police-directed, court family group conferencing[19] or police diversion schemes. Which is an alternate means of dealing with some offender and offences in court.[20] It is based on the dispute resolution traditions of the Maori community being first of its kind in resolving dispute through restorative mechanism. Because of its effectiveness, this model is now widely used in modified forms[21] in South Australia, South Africa, Ireland, Lesotho, as well as in U.S. cities in Minnesota, Pennsylvania and Montana.

b. *United States*: Further, the US modified form of family group conferencing is the victim-offender mediation. It applies to other States within the US. There are considerable restorative justice activities in the US, being one of the earliest initiators of victim-offender mediation. Even though most victim-offender mediation is concerned with minor offences, there is increasing interest in very serious and violent cases, such as drunk driving, serious

18 Lucio Sia, *supra* note 12.

19 Umbreit Bazemore, *et al.*, "The Impact of Victim-Offender Mediation: A Cross-National Perspective" 17(3) *Conflict Resolution Quarterly* (2000).

20 Adult diversion scheme - Police Manual chapter, *available at*: https://www.police.govt.nz/about-us/publication/adult-diversion-scheme-police-manual-chapter (last visited on July 23, 2023).

21 David B. Wilson, Iain Brennan, and Ajima Olagherehttps, "Police-initiated diversion for youth to prevent future delinquent behavior: a systematic review" 14(1) Campbell Systematic Reviews (2018).

injury and death' rape, manslaughter, and murder. Mark Umbreit in Minnesota, David Doerfler in Texas and David Gustafson in Canada have pioneered this type of work, now known as Victim Offender Dialogue (VOD).[22]

c. *Australia*: Australia follows Conferencing model. The conferencing idea was borrowed from New Zealand but applied with modifications. It was introduced into the Australian juvenile and criminal justice systems in the early 1990s. A year later in 1991 the police were the first to try out conferencing in the town of Wagga, New South Wales. The 'Wagga Model' helped all the stakeholders in a crime to resolve feelings and needs after a crime incident. Having turned out a success, police in other states observed and replicated same in their respective states.

d. *Canada*: The first recorded victim-offender mediation and reparation service in recent times in the western hemisphere took place in Ontario Canada in 1974.[23] There were two accused who committed vandalism and in the first of its kind they met their victims for getting into a restitution agreement. In the year of 1970 there were voices from different stake holders in the CJS like-prisoners, lawyers and academicians. They wanted to protect the right of the accused, to reduce incarceration and also to bring in reforms within the institution.[24] Around this time, Canada developed the well-known 'Mennonite initiative'. Since that date, restorative justice programmes have grown steadily, including small and large schemes.[25] Participants in this restorative approach are assisted to understand why they behave the way they do and are provided problem-solving skills that strengthen the mas they learn to independently fix their mistakes, repair relationships, and return to balance. It is a well-known fact that when there is self-discipline it improves the personality and emotional state of mind and also make the relationship stronger. Further it helps to nurture an increased sense of achievement.[26]

e. *United Kingdom*: In England and Wales, there is the Youth Offenders Panels which is a widely-used method. Their restorative feature is the "referral

22 Umbreit Bazemore, *supra* note 19.

23 The Effects of Restorative Justice Programming: A Review of the Empirical, *available at*: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p2.html (last visited on July 20, 2023).

24 *Ibid.*

25 Umbreit Bazemore, *supra* note 19.

26 Lucio Sia, *supra* note 12.

order". How does it work? First time and young offender between the ages of 10-17[27] are referred to youth offender panels.[28] This is an organized panel. In this panel the victim is asked to come forward and present his or her say and meet the offender and highlight upon how they feel about the committed crime. Also, to present views on what could be done to repair the harm caused to them. However whether the opinion of the victims will be taken into consideration or not is finally decided by the Court.[29]

f. *Czech Republic*: Czech Republic has a well-developed Victim-Offender Mediation programmes. One of the first instances of Restorative practices can be found here in this country and in its ancient civilization.[30]

g. *Nigeria*: In Nigeria the offending party is usually persuaded to tender apologies, return whatever was forcefully taken away or repair any damaged property. The result is that there is relative peace among the people and their leaders. Incidents of invasion and hostilities are brought to the barest minimum.[31]

h. *Uganda*: In the East-African state of Uganda, the local council courts are vested with powers to grant remedies such as compensation, restitution, reconciliation, or apology, as well as more coercive measures. A highly respected organ is in place to ensure amicable compliance with the remedies granted by the courts.[32]

i. *Philippines*: The practice in the Philippines is equally interesting. There what is called the Barangay justice system consists of a locally elected Barangay captain and a "peacekeeping committee" hearing cases involving conflicts between residents. There is a mediation session that is facilitated by the captain or another member of the committee. Agreements reached through this process are legally binding and are recognized by other and higher conventional courts.[33]

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27 They were appearing before court for the first time.

28 Unless their offence is so serious as to require custody.

29 Lucio Sia, *supra* note 12.

30 *Ibid.*

31 Cynado Ezeogidi, "Resuscitating the Age Grade Associations and Women Guilds in Igbo Land for Effective Conflict Management Mechanism and Resolution" *SSRN Electronic Journal* (May, 2020).

32 Uganda, *available at*: https://ulii.org/ug/legislation/act/2015/2006-22 (last visited on July 11, 2023).

33 About Philippines, *available at:* http://www.lawjournals.org/download/115/3-2-31-301.pdf (last visited on June 10, 2023).

V. Indian Experience with Restorative Practices

Indian history and culture are full of illustrations reflecting compassion, pity, forgiveness etc in dispute resolution mechanisms. Our indigenous system was primarily based on *restorative approach* until the Britishers established their empire and took the control of criminal justice in their hands based on adversarial approach to protect their colonial interests. The surrender and rehabilitation of dacoits from Chambal Valley by Vinoba Bhave and Jai Prakash Narain is illustrative of restorative practice in Indian scenario. Even today the aboriginal tribes and tribals in remote and interior areas resolve their conflicts through conciliation.

Twentieth century India has witnessed huge changes of far reaching implications with reference to criminal justice administration. Article 21 of the Constitution dealing with 'right to life' has become the fountain of human rights jurisprudence through judicial activism of the Supreme Court of India. Through a catena of decisions dealing with abuse of power resulting in victimization of individuals the apex court has established 'right to compensation' for violation of Fundamental human rights.[34] From *Rudul Shah*, *M. H. Hoskot, Nilabati Behera*, *Chandrima Das* to *Bodhisattva Gautam*, *Dr. Jacob George*, *Laxmii*, *Ankush Gaekwad*, *Parivartan Kendra* the court has recognized right to compensation not only in cases of abuse of power in the form of incarceration without trial, custodial violence , custodial death but also of victims of crime.

There are express legislative provisions that reflect restorative justice orientation. The Criminal Procedure Code, 1973, is a comprehensive code laying down elaborate procedures for criminal justice dispensation. A well-crafted Criminal Code supplemented with various procedural minutiae like compounding of offences, plea-bargaining, compensation, appeals, probation, Juvenile Justice (care and protection) Act, 2015, Legal Services Authority Act 1987 etc.

VI. Restorative Justice: Rhetoric Versus Reality

No Consensus on Definition

The problem related to definition is the "vexed problem," as Daly notes.[35] Although this concept has attracted the attention of criminal justice practitioners and criminologists for decades but it has not been easy to define the same owing to its usage as the omnibus term to describe various innovations in criminal justice. Diverse

34 J.L. Kaul and Anju Vali Tikoo "Revisiting Award of Compensation for the violation of Fundamental Rights: The Indian Judicial Experience" *Journal of the Constitutional and Parliamentary Studies* (2009).

35 William R. Wood and Masahiro Suzuki, "Four Challenges in the Future of Restorative Justice" 11(1) *Victims & Offenders* (2016).

practices including victim–offender mediation, family group conferences, restorative conferences, restorative cautions, sentencing circles, and community reparation boards have made it difficult to reach a consensus about its definition.[36] This has resulted in "significant confusion, obfuscation, and contestation."[37] For some scholars it is a concept loaded with set of values, philosophy and for others, it's a specific practice or procedure. So, a simple solution can be as highlighted by Johnstone that rather than viewing it as a technique for controlling crime, it should be seen as a practice incorporating values and philosophy. The way forward is to build a concrete idea related to value and ethics which is common to all organizational settings with a scope of modification according to the institutional requirements for their effective functioning and vindicating justice. Although one-size-fit model will not be suited for all problems. But the ever-expanding hybridization of the concept must be checked; else it would be reduced to a meaningless word.[38] The definition given by Daly[39] has been considered to be one of the best definitions which include empirical perspective in Restorative justice and consider Restorative justice as both practice and value.[40]

Collaboration among Participants and Professionals

A unique element of restorative justice practices is that they empower lay people- victims, offenders, families, friends, and community members- to actively participate in some kind of deliberative forum.[41] This encounter can go either way. It may increase the pain and conflict of the victim and terrorize the victim further and it

36 David B. Wilson, *et.al.*, "Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis" National Criminal Justice Reference Service, *available at*: https://www.ncjrs.gov/pdffiles1/ojjdp/grants/250872.pdf (last visited on April 14, 2023).

37 Doolin 2007; Mc Cold 1998; Johnstone and Van Ness 2007, *available at*: https://www.researchgate.net/publication/316885806_Restorative_justice_in_the_21st_century_making_emotions_mainstream (last visited on July 10, 2023).

38 *Supra* note 35.

39 Meredith Rossner, "Restorative justice in the 21st century: making emotions mainstream", *available at*: https://www.researchgate.net/publication/316885806_Restorative_justice_in_the_21st_century_making_emotions_mainstream (last visited on July 10, 2023).

40 "Restorative justice is a contemporary justice mechanism to address crime, disputes, and bounded community conflict. The mechanism is a meeting (or several meetings) of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process, pre-arrest, diversion from court, pre-sentence, and post-sentence, as well as for offending or conflicts not reported to the police. Specific practices will vary, depending on context, but are guided by rules and procedures that align with what is appropriate in the context of the crime, dispute, or bounded conflict (Daly 2016: 14)."

41 David B. Wilson, *supra* note 36.

42 David B. Wilson, *supra* note 36.

can also lead to accused feeling more confident about his deeds as he gets to encounter the victim as it doesn't happen this directly in widely practiced criminal justice delivery system. However, it can also recede the pain of victim and let the offender realize his mistakes and start a dialogue in between. Whatever is the case, it does involve facilitator and professionals to great extent to make this encounter successful. "Restorative justice processes can include roles for facilitators, service providers, social workers, probation officers, and police. Professionals also participate 'outside the circle' with a complex web of criminal justice staff supporting the integration of restorative justice into the courts or other institutions. Professionals serve a vital role in meeting the needs of lay participants, but that effective collaboration requires a clear delineation of roles and tasks as well as an explicit set of shared goals (Dzur 2008; Rossner and Bruce, 2016)".[42] Lack of effective collaboration and specification of roles and functions and ambiguity in shared goals lead to causing more harm to the lay participants rather than repairing the harm more particularly in the context of victim and it can further traumatize the victim. So, an effective cooperation and collaboration should be the very first rule of ensuring Restorative justice delivery system.

Narratives and Management of Emotions

Restorative justice delivery system involves in its practice use of narratives so that the lay participants can start the communication and have at their disposal both sides of the story. So, one is "narrative of harm", stated by the victim and another is "narrative of accountability" stated by the offender. These narratives, which are facilitated by professionals, give rise to range of emotions starting from anger, fear, pain, shock, disgust, anxiety, shame, guilt, remorse to hope etc.[43] Managing these flooding of emotions is not an easy task and require expertise and involvement of experts like psychologists and councilors and the unconditional support of family members. Are we aware about these requirements? If at all the next question is how they can be made available readily and effectively. For this we require an effective strategic planning and intensive financial investment. We already (In India) lack requisite number of psychologists and councilors for medical attention. Their availability in the above-mentioned process in terms of shared goals seems unthought-of by Government.

Shaming a Misnomer or Negative Approach in the Optimism of Restorative Justice Mechanism

Restorative justice works on the basis of several theories like Shame theories, procedural justice theories and interaction ritual theory. While putting out narratives

43 Meredith Rossner, *supra* note 39.

as mentioned earlier a lot of emotions are encountered with, shame is one of the central most emotion through which the offender realizes his guilty conduct. However, feeling shame depends upon perceiving that others disapprove of you or your behavior. Does shame change or deter behavior? For people who care about how others view them, shame can deter behavior that incurred such sanction. A form of punishment, shame is an aversive emotion that most people will try to avoid.[44] When shame is internalized and becomes pervasive and enduring, a person can be at risk for developing unhealthy conditions such as depression or social anxiety disorder the fear of being scrutinized and the avoidance of social events that evoke such fear. Depression and social anxiety disorder are among the most prevalent psychological disorders and are associated with higher risk of developing additional psychological problems. This can lead to failure of reintegrative philosophy related to shaming. Inadequate, inferior, useless, regret these are the feelings of shame. It is a painful and toxic emotion. An emotion which lies at the root of low self-esteem. Many scholars and psychologists believe that shame is the origin of dysfunction in families and all reckless behavior are reactions to it.[45] By adopting this approach we are in a way putting the problem back to its origin point without resolving the real issues. Which makes reintegrative shaming theory less plausible.

Restorative Justice and Social and Political Fabric

From Global experiences and after understanding the genesis of restorative justice its quite clear that Restorative Justice works well and can be effectively implemented in a vibrant democracy a tolerant society. Its success depends on the viability of a good governance and democratic set up. It has been always witnessed that lack of political will, non-availability of an effective legislation and non-conducive current socio-cultural dynamics has always shelved the best possible ideologies and practices related to it. The lack of conducive socio- cultural fabric as well as bend of legislature, executive and judiciary towards a retributive approach has failed in creating a favourable environment for restorative justice delivery mechanism. In the land of Ghandhi ji who firmly believed into the ideology of an eye for an eye will make the whole world blind. The concept of restorative justice is not able to gain a fertile ground to grow and has been reduced into a piecemeal approach. Recent past has shown on many instances how intolerant and insensitive we have

44 Why Shaming Doesn't Work, *available at:* https://www.psychologytoday.com/us/blog/longing-nostalgia/201705/why-shaming-doesnt-work (last visited on June 13, 2023).

45 The Negative Impacts of Shame and How to Overcome Them, *available at:* http://www.drkellyhb.com/part-ii-the-negative-impacts-of-shame-and-how-to-overcome-them/ (last visited on June 13, 2023).

grown as a society. Definitely this is not the right time for such an ideology to flourish.

Other Challenges

There are other challenges which require an in-depth discussion. Challenges like whether Restorative justice is an alternative of Retributive or punitive justice system, whether it should be an alternative or supplementary to prosecution, it's utility in case of prisoners serving longer sentences, its use in case of sexual violence and family violence, its use in case of offences against women and child abuse etc. However, the limitations related to the paper do not allow to discuss further.

VII. Conclusion

It's time that law and criminal justice system should not only be seen as an instrumentality for punishment but rather as a social force for healing the victim and repairing the harm when delivering justice and following the due process.[46] It was only in 2015 when 195 member states of UN committed to achieve the 17 sustainable development Goals 2030 to change the world for better. These Global Goals are to be achieved through integrated measures. One of the Goals of SDG 2030 is Goal No. 3 which aims at ensuring healthy lives and promoting well-being for all at all ages. This health and well-being for all includes both physical and mental health of each and every person which includes the victims of crime**.** The historical past in the field of criminology suggests that mental health has been a neglected subject matter since ages, and whatever development has been there is not proportional to what is required. In India the Mental Health Care Act, 2017[47] was enforced in the year 2018 to provide for mental healthcare and services for persons with mental illness 'who have substantial disorder and whose functioning is grossly impaired' and to protect, promote and fulfill the rights of such mentally ill persons during delivery of mental healthcare services and for matters connected therewith or incidental thereto.[48] The Indian Parliament went to the extent of replacing the word "mental illness" by "severe stress", in 2016 after a lot of deliberations which was included in the MHCA 2017 while decriminalizing the attempt to die by suicide and eventually reducing the stress of the victim.

But the harsh reality is that neither MHCA, 2017 nor any other Statue deals particularly with the concern of the mental health of the victim of crime or their psychological

46 David B. Wexler, "Therapeutic Jurisprudence: An Overview", *available at*: https://www.researchgate.net/publication/228244466 (last visited on June 15, 2023).

47 Hereinafter "**MHCA, 2017**".

48 Laxmi Naresh Vadlamani and Mahesh Gowda, "Practical implications of Mental Healthcare Act 2017: Suicide and suicide attempt" 61(4) *Indian Journal of Psychiatry* (2019).

well-being when they have encountered a particular crime. Studies world over has shown how different kind of crimes impact the physical and mental health or the psychological well-being of the victims[49] and their condition is worsened by the procedural technicalities and lack of healing touch.

The system works in **a** manner which perpetuates the pain of victim and deepens the mental ill health. Mostly the justice is delayed, and then the victim is expected to accept this justice, delivered by a system without the victim's effective participation, which again raises a question that its justice for whom? Restorative Justice Delivery mechanism can be an answer to this question as its build on the foundation of an effective victim participation and ensures that the voices of the victims are to be heard. Restorative justice delivery mechanism can be the first step towards ensuring the mental health and well-being in the Criminal Justice System, of the Criminal Justice System and for Criminal Justice System. Victim participation makes victim feel they are an important part in the case; they are not like any other witness. It also fulfils the adage that justice is not only to be done rather seen to be done so the participation of victim makes them feel that the trial is fairer and that their procedural justice needs and interests are being protected or at least listened to. As they will have an input before a decision is made. Most importantly their participation can help them overcome their feelings of helplessness, powerlessness which can assuage their lowered self-esteem which is so important for their therapeutic healing. This will lead to their mental health and well-being and foster them as a resilient and restorative individual in the society which will provide them "*psychological justice*". This is the first step towards a resilient, restorative**,** and healthy society and world. To ensure that the mental health policies, and other statutes need to recognize the issue of psychological well-being of the victims of crime and specifically start working in that direction in the Criminal Justice system.

49 Louise M. Howard, et.al., "Intimate partner violence and mental health: lessons from the COVID19 pandemic" 21(2) *World Psychiatry* (2022).

RIGHT TO HEALTH DURING COVID-19 PANDEMIC: RELEVANCE OF THE HUMAN RIGHTS-BASED APPROACH

Kshitij Kumar Singh[*]

Abstract

The COVID-19 pandemic raised the importance of the right to health in identifying and addressing the specific needs of the vulnerable groups who faced the severe impact of the pandemic. Though recognised through numerous international human rights instruments and national laws, the right to health has not been fully realised because it has often been overlooked in policy implementation, and its economic, social and cultural determinants have yet to receive due appreciation. The interdependence of the right to health on other human rights necessitates a holistic approach to health policies. However, COVID-19 placed the right to health in a conflicting position with other human rights as the health emergency invites public health interventions in the form of restrictions on these rights. A human rights approach to these interventions can keep them lawful, necessary and proportionate. The human rights approach to global health can bring transparency, accountability and global solidarity to address health inequities. Right to health in India also passed through a transition phase, giving rise to the analysis of its legal status and policy implications.

Keywords: *Right to Health, Human Rights, COVID-19, Global Solidarity*

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I. Introduction

THE COVID-19 pandemic reinstated the long-forgotten right, the right to health, which has been recognised for a long time but often missed out from the discussion of regular policy making. As a human right, the right to health has been overlooked in setting the right-based regime, and less emphasis has been given to it compared to civil and political rights. Given its dependency on state resources and a constant push of neoliberalism in policy making, the right to health has taken a back seat. COVID-19 has shaken this approach and led us to rethink and revisit human rights jurisprudence of health, its nature and scope. 'Health' is a multifarious concept involving other important economic, social and cultural constructs. Understanding the economic, social and cultural determinants of the right to health is essential to appreciate its nature, scope, and contemporary relevance. Human rights being the world's common language may highlight the voice of the marginalised, and it becomes relevant as COVID-19 severely affects vulnerable groups by aggravating their disadvantageous position in society. COVID-19 as a health emergency necessitates some restriction on the rights of the people, and it may be justified given the health concerns and necessary measures. However, the proportion and necessity of these restrictions must be guided by proportionality, accountability and transparency. Lockdown, isolation and quarantine being necessary measures must not lead to the forced plight of migrant labourers. India has encountered situations demanding adequate protection of right to health during crises by addressing other necessary human rights, such as right to privacy, critical health information and access to healthcare. Against this backdrop, the present article explores the edifice of right to health during COVID-19 and its interrelation with other human rights. It also inquires to what extent the public health interventions conforms to basic human rights while stressing the need to inculcate a human rights approach in the national, regional and international health policies.

II. Right to Health as a Human Right

The right to health has long been recognised in international human rights instruments; however, it has yet to be fully realised, given its dependence on multiple determinants.[1] WHO defines health as "a state of complete physical, mental and

1 Dainius Puras, Judith Bueno de Mesquita *et al.*, "The right to health must guide responses to COVID-19" 395 (10241) *The Lancet* 1888-1890 (June, 20, 2020), *available at*: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31255-1/fulltext (last visited on July 18, 2023).

social well-being and not merely the absence of disease or infirmity"[2]. Access to health includes both physical and mental healthcare services and medicines. The economic, social, cultural and biological determinants play a crucial role in realising the right to health. These determinants include "food, housing, access to safe water and sanitation, safe and healthy working conditions; a healthy environment; socio-economic status; cultural paradigms; and one's age, sex, and health status"[3]. Concerning health crises, the Committee on Economic Social and Cultural Rights (CESCR) categorically emphasises that "steps should be taken to fully realise right to health in crises' crisis setting[s], where resources are limited, and there are surging needs for urgent health care"[4].

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"[5]. Article 12 has its origin in Article 25 (1) of the Universal Declaration of Human Rights (UDHR), 1948, which recognises:[6]

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2 Dunja Mijatovic, "Learning from the pandemic to better fulfil the right to health", The Commissioner's Human Rights Comments, Council of Europe Portal, 23/04/2020, *available at*: https://www.coe.int/en/web/commissioner/-/learning-from-the-pandemic-to-better-fulfil-the-right-to-health (last visited July 22, 2023).

3 Ingrid Nifosi-Sutton, "Realising the Right to Health during the COVID-19 Pandemic-An Antidote to the Pandemic and the Catalyst for Fulfilling a Long-Neglected Social Right" 3(1)*Yearbook of the International Disaster Law Online* 126-153 (February 21, 2022), *available at*: https://brill.com/view/journals/yido/3/1/article-p126_5.xml?language=en (last visited on July 22, 2023).

4 *Ibid.*

5 *See* The International Covenant on Economic, Social and Cultural Rights 1966, art. 12.

6 See The Universal Declaration of Human Rights, 1948, art. 25 (1).

Other international and regional human rights instruments focussing on vulnerable groups have also recognised and referred to the right to health.[7]

III. Right to Health and other Human Rights: Mutual Interdependence and Interrelation

COVID-19 has reconfirmed the interdependence of human rights in line with the statement made in para 5 of the Vienna Declaration and Programme of Action 1993, which recognises that "[a]ll human rights are universal, indivisible and interdependent and interrelated"[8]. Given the interdependence of the right to health on the realisation of other human rights, the former also needs to be protected by examining the economic and social determinants of health, including "the right to work, social security, housing, food, water and sanitation."[9]

Effective enforcement of the right to health relies heavily on health governance. It is only possible if a human rights-based approach finds an appropriate place in governance, particularly in crises. By employing this approach to the pandemic, governments set the priority of "protecting the most vulnerable people in society through transparent policymaking and public participation"[10]. Apart from other individual liberties, "the right to health obliges states to ensure available, accessible, acceptable and good quality health responses to prevent and treat COVID-19"[11]. Evidence suggests that human rights-based policies strengthen public health and necessitate better coordination between siloed human rights communities.[12] In addition, the right to health must align with health justice by recognising and

7 Refer to Article 5 (e) (iv) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Articles 11(1) (f) and 12 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (UNCEDAW); Article 24 of the 1989 UN Convention on the Rights of the Child (UNCRC); and Article 25 of the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD). Article 11 of the 1996 Revised European Social Charter (RESC); Article 16 of the 1981 African Charter on Human and Peoples' Rights; Article 14 of the 1990 African Charter on the Rights and Welfare of the Child (ACRWC); and Article 10 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); *Ibid.*

8 *See* Vienna Declaration and Programme of Action, 1993, *available at*: https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action (last visited on July 22, 2023).

9 Sharifah Sekalala, Lisa Forman *et al.*, "Health and human rights are extricably linked in the COVID-19 response" 5 (9) *BMJ Global Health* e003359, *available at*: https://gh.bmj.com/content/5/9/e003359.info (last visited on July 20, 2022).

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

addressing the urgent needs and specific concerns of the most affected/infected vulnerable groups by the pandemic.[13]

IV. Challenges to Right to Health: Impact of Neoliberalism and the Need for Decolonisation of Global Health

The waves of neoliberalism have led to increasingly reduced health spending by governments and encouraged "the growing deregulation, privatisation, and commodification of health care like other social sectors"[14]. The role of private sector and non-governmental organisations in the health sector cannot be ignored, but health is a crucial subject that demands a more responsible role from the government in its regulation and governance. The theoretical premise of the right to health met with the actual reality during COVID-19 and highlighted the need to adopt a holistic approach to the right to health, emphasising the critical role of governments.[15] COVID-19 also raised a demand to decolonise global health and governance as the inequities are deeply rooted in the basic structure of health governance, which needs a review in light of the prevailing vulnerabilities.[16] Given the relatively fragmented health, insurance and research sectors, low and middle-income countries (LMICs) have been facing more severe implications of the pandemic. Women face distinct health challenges that necessitates a gender-responsive approach to health by increasing their participation in clinical trials and ensuring them the proper doses against the possible side effects of the medicine.[17]

Moreover, the rollout of universal health coverage during COVID-19 also indicates the increase in the vulnerable groups, where the individuals deprived of insurance coverage face much heat.[18] News reports reflected the cases of bias, racism and xenophobia during COVID-19, e.g. discrimination against Asian people was on the rise in the US and other countries.[19] In the above context, a human rights

13 *Ibid.*

14 Lisa Forman, "The Evolution of the Right to Health in the Shadow of COVID-19" 22(1) *Health and Human Rights Journal* 375-378 (June 2022), *available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348415/ (last visited on July 20, 2023).

15 *Ibid.*

16 *Ibid.*

17 *Supra* note 2.

18 *Supra* note 14.

19 "Human Rights Dimensions of COVID-19 Response" *Human Rights Watch* March 19, 2020 12:01AM EDT, *available at*: https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response (last visited on July 20, 2022).

approach to the pandemic helps policymakers to design policies centred on marginalised groups of society by recognising their specific demands.[20]

V. Implications of COVID-19 Pandemic on Right to Health: Harmonising Right to Health with other Human Rights

COVID-19 has been a constant reminder of prioritising the right to health and reinforcing and accelerating efforts to implement it. However, the right to health passed through a transition phase during the pandemic and received mixed reactions from the governments and other stakeholders. Though there have been some signs of solidarity among and within nations and a proactive role of international organisations in building trust, accountability and transparency in health governance, the situation still needs improvement.

The Right to Vaccines: A Component of the Right to Health

Recognising the right to vaccine as an integral component of right to health, CESCR stated that "the right to access a safe and effective COVID-19 vaccine is part of the contour of the right to health in so far as the right to health includes 'access to immunisation programs against the major infectious diseases'"[21]. It gives an inference that "the States are obliged also to ensure universal and equitable access to treatment for COVID-19"; and the treatment also includes "early detection, personal protective equipment for healthcare workers and other front-line staff, diagnostic tests, ventilators, and oxygen"[22]. The CESCR categorically emphasised the non-discriminatory access to the COVID-19 vaccine.[23] However, the promises made during the initial stages of the pandemic met with disappointment soon when in "the Fall of 2020, rich countries signed agreements with pharmaceutical companies to obtain preferential access to COVID-19 vaccines to the detriment of developing countries. By the end of May 2021, not enough vaccines had been produced, and those already produced or ordered had been administered in high-income countries"[24]. It is termed vaccine nationalism, which essentially went against the principle of global solidarity in providing equitable access to medicine.

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20 Saphia A., Alexander J. Zapf *et al*., "Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19" 23 (2) *Health and Human Rights* 173-186 (Dec, 2021), *available at*: https://www.hhrjournal.org/2021/10/ensuring-rights-while-protecting-health-the-importance-of-using-a-human-rights-approach-in-implementing-public-health-responses-to-covid-19/ (last visited on July 20, 2023).

21 *Supra* note 3.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

Public Health Interventions and Human Rights

The COVID-19 pandemic placed human rights in a conflicting position, where policymakers must harmonise and fine-tune them without compromising their essence. COVID-19 requires public health interventions or restrictions on several human rights, e.g. freedom of movement and right to privacy, due to preventive measures such as lockdowns and public health surveillance. However, many public health interventions were practised discriminatorily by restricting "the social, economic, and cultural rights of specific populations, such as refugees and migrants, who were particularly vulnerable to movement restrictions."[25] Public health interventions in the form of limitations on human rights can be justified based on the principles of necessity, proportionality and non-arbitrariness.[26] Siracusa Principles adopted by the UN Economic and Social Council in 1984 provides that "any measures taken to protect the population that limit people's rights and freedoms must be lawful, necessary and proportionate"[27]. Article 14 of the ICESCR emphasised that states may justify their act by "demonstrat[ing] that restrictive measures are necessary to curb the spread of infectious diseases so as to ultimately promote the rights and freedoms of individuals."[28]

Right to Critical Health Information Against Misinformation

During COVID-19, one of the essential human rights in contention was the right to information, including seeking, receiving and imparting information of all kinds, regardless of frontiers. The right to information has been recognised as a component of freedom of expression in many jurisdictions, and governments are duty bound to provide critical health information to its citizens. The CESCR regards it as a "core obligation" providing "education and access to information concerning the main health problems in the community, including methods of preventing and controlling them."[29] However, during the COVID-19, in several instances, many countries allegedly compromised critical information. Nevertheless, few countries prioritised "open communication and transparent reporting on the number of cases and holding daily press briefings by health officials and public service announcements to counter misinformation."[30]

25 *Supra* note 20.

26 *Supra* note 9.

27 *Supra* note 19.

28 *Supra* note 20.

29 *Supra* note 19.

30 *Ibid.*

Personal Health Data: Right to Privacy and Confidentiality

During COVID-19, the government accumulated personal health data, and the appropriate use and handling of this data has remained one of the challenging issues. A human rights-based legal approach may help govern personal health data by considering the right to privacy and confidentiality. COVID-19 raised the demand for privacy legislation to secure and respect individuals' right to privacy with a well-informed approach. The need for such legislation was triggered by the onset of contract tracing during the pandemic and government agencies' handling of sensitive personal information. The risks of data manipulation and mishandling of the same create a direct threat to individual liberty as "there are very serious privacy implications of the corona disease which can be worse than the disease itself."[31] Patient confidentiality and the quality of vaccines are other vital issues that need special attention from policymakers. The administration of vaccines and treatment should conform to consent protocols and quality standards and be medically appropriate.[32]

Sharing of Scientific Information and Technical Know

Sharing scientific data, information, and technical know-how has been another crucial issue during the pandemic. We need to recognise and appreciate the varying priorities of different countries:[33]

> For higher-income countries, a high priority is to facilitate open and cooperative sharing of scientific information, including pathogen samples and genomic sequencing data. For lower-income countries, the priority is to ensure affordable access and sharing of the benefits of scientific research. Forging consensus among these disparate priorities will be the greatest challenge.

It necessitates, therefore, that "the negotiators develop specific, measurable metrics that directly impact equity"[34]. A human rights-based approach to the pandemic

31 Mohamad Ayub Dar & Shahnawaz Ahmad Wani, "COVID-19, Personal Data Protection and Privacy in India" 15 *Asian Bioethics Review* 125-140 (2023), *available at*: https://link.springer.com/article/10.1007/s41649-022-00227-0 (last visited on July, 2023).

32 *Supra* note 3.

33 Lawrence O. Gostin, Kevin A. Klock *et al*., "Advancing Equity in the Pandemic Treaty" *Health Affairs Forefront*, *available at*: https://www.healthaffairs.org/content/forefront/advancing-equity-pandemic-treaty (last visited on July 22, 2023).

34 Georges C. Benjamin, "Ensuring health equity during the COVID-19 pandemic: the role of public health infrastructure" 44 *Pan American Journal of Public Health* e-70, *available at*: https://www.paho.org/journal/en/articles/ensuring-health-equity-during-covid-19-pandemic-role-public-health-infrastructure (last visited on July 22, 2023).

may help recognise and address vulnerable groups' peculiar needs among and within countries.

Trust Deficit in the Public Health System and Fall in Health Insurance

Governments faced trust issues during COVID-19, and the trust deficit in the government hospitals added fuel to the fire, there exists "less trust of the people in the public hospitals given the lack of healthcare facilities and consequently decline in operations given the apprehension of contracting COVID-19 infection had highlighted the weakness of the public health policy."[35] Another serious implication of COVID-19 was the employment cut that resulted in the loss of employer-sponsored insurance to employees, shrinking the insurance coverage against the push for universal health coverage (e.g. In the United States, there was a sudden surge in unemployment during the pandemic that led to the fall in employer-sponsored insurance).[36]

VI. Global Solidarity and International Cooperation

Global solidarity with an appeal to international cooperation may help integrate efforts to realise human rights, including the right to health. International Health Regulations, 2005 casts a duty on states to assist other states in preventing disease.[37] After the outbreak of the COVID-19 pandemic, the principle of global solidarity has been emphasised, and the issue of human rights and international solidarity has been gaining momentum in the United Nations.[38] During COVID-19, WHO took numerous initiatives to facilitate international cooperation and global solidarity. One of the essential initiatives aligned with global governance could be found in "the UN Framework for the Immediate Socio-economic Response to COVID-19". It may help develop, distribute and access people's vaccines. A consistent engagement with the UN human rights system may bring transparency and accountability in global health governance. Here, the right to health can be instrumental in providing a right-based framework for COVID-19 response and

35 Priya Gauttam, Nitesh Patel *et al*., "Public Health Policy of India and COVID-19: Diagnosis and Prognosis of the Combating Response" 13(6) *Sustainability* 3415 (2021), *available at*: https://www.mdpi.com/2071-1050/13/6/3415 (last visited on July 22, 2023).

36 David Blumenthal, Elizabeth J. Fowler *et al*., "Covid-19-Implications for the Health Care System" 383 *The New England Journal of Medicine* 1483-1488, *available at*: https://www.nejm.org/doi/full/10.1056/nejmsb2021088 (last visited on July 22, 2023).

37 *Supra* note 9.

38 *See* Obiora Chinedu Okafor, "The Revised draft Declaration on Human Rights and International Solidarity: report of the Independent Expert on Human Rights and International Solidarity", *available at*: https://digitallibrary.un.org/record/4011942#record-files-collapse-header (last visited on July 22, 2023).

help realise "the right to the highest attainable standard of physical and mental health".[39] Furthermore, international human rights law points towards the global community's collective responsibility concerning infectious disease outbreaks.[40]

After realising that all nationals are equally vulnerable to the pandemic, many wealthy countries tender their support to LMICs through "the UN's COVID-19 Global Humanitarian Response Plan, the UN Framework for the Immediate Socio-Economic Response to COVID-19 and the WHO COVID-19 Solidarity Response Fund"[41]. Moreover, the International Monetary Fund, working with WHO, has offered to suspend debt collection to support global health. WHO's initiative COVID-19 Technology Access Pool (C-TAP) was a voluntary intellectual property pool for sharing COVID-19-related technologies and knowledge; "LMICs rallied behind a People's Vaccine' to ensure that prospective vaccines will be accessible to all."[42] However, the signs of international cooperation during the pandemic have remained mixed, encouraging and discouraging. In the initial stage of the COVID-19 outbreak, "Italy's call for help met with global silence", though gradually, countries came forward for cooperation. Many countries contributed to "the COVID-19 Solidarity Response Fund", but the United States withdrew from WHO funding. Political divisions and distrust have marred international cooperation; even international organisations such as the WHO faced allegations of distrust, non-transparency and bias.[43] Two key instruments dealing with the pandemic response, "the 2005 International Health Regulations" and "the 2011 Pandemic Influenza Preparedness Framework", do not propose a right-based approach that would more effectively protect the right to health in the times of health emergencies.[44] This paucity leads to a demand "for the firm grounding of pandemic preparedness plans in human rights principles"; and many believe we would have tackled the death toll if we had strong rights-based provisions in our preparedness plan.[45]

COVID-19 necessitates the adoption of a holistic approach to international cooperation as explained by the CESCR that international cooperation means "sharing medical equipment and best practices to combat the virus, sharing

39 *Supra* note 1.

40 Lisa Montel, Anuj Kapilashrami *et al.*, "The Right to Health in Times of Pandemic-What can we learn from UK's Response to the COVID-19 Outbreak" 22(2) *Health and Human Rights Journal* 227-241 (Dec, 2020), *available at*: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7762905/ (last visited on July 18, 2023).

41 *Supra* note 9.

42 *Ibid.*

43 *Supra* note 40.

44 *Ibid.*

45 *Ibid.*

knowledge for the development of a vaccine, and engaging in joint action to minimise the economic and social impacts of the public health crisis"[46]. States are under obligation to provide international assistance and collaboration in providing access to food, essential supplies and testing and medical support.[47]

VII. Right to Health During the Pandemic in India

In India, the right to health though not explicitly recognised as a fundamental right, the judiciary has recognised it as "an integral component of the right to life"[48]. It is protected under the various provisions of the Directive Principles of State Policy.[49] In India, health is in the state list, governed by states and sometimes states face financial constraints. Keeping this view, a High-Level Group on the health sector constituted under the 15th Financial Commission "recommended that the right to health be declared a fundamental right. It also put forward a recommendation to shift the subject of health from the State List to the Concurrent List". However, the policy commission, NITI Aayog, in its report while recognising that India had an unequal public health system due to restricted technical expertise and financial constraints, expressed its concern that "if the subject of health was moved to the Concurrent List, it would lead to excessive bureaucracy, red tape and institutional constraints"[50]. The State of Rajasthan has moved the Right to Health Bill, 2022, to ensure its residents' right to health and access to healthcare, providing free healthcare service at any clinical establishment. It proposes to set up health authorities at the state and district level. However, critics suspect that implementing the right to health under the Bill would increase the state's financial obligation and also give rise to serious privacy concerns.[51]

India witnessed institutional interventions to respond to the COVID-19 pandemic as the National Human Rights Commission (NHRC) constituted a "Committee

46 *Ibid.*

47 *Supra* note 9.

48 *See* Robin David, "Pandemic has shown why India needs the Right to Health" *Times News Network*, August 22, 2021, 10:14 IST, *available at*: https://timesofindia.indiatimes.com/india/pandemic-has-shown-why-india-needs-the-right-to-health/articleshow/85516031.cms (last visited on July 22, 2023).

49 *See* Nishant Sirohi, "Declaring the right to health a fundamental right" Health Express, *Observer Research Foundation*, July 14, 2020, *available at*: https://www.orfonline.org/expert-speak/declaring-the-right-to-health-a-fundamental-right/ (last visited on July 22, 2023) ("Article 39 (e) directs the State to secure the health of workers, Article 42 directs the State to just and humane conditions of work and maternity relief, Article 47 casts a duty on the State to raise the nutrition levels and standard of living of people and to improve public health").

50 *Ibid.*

51 *See* The Rajasthan Right to Health Bill, 2022, *available at*: https://prsindia.org/bills/states/the-rajasthan-right-to-health-bill-2022 (last visited on July 22, 2023).

of Experts on the Impact of the COVID-19 Pandemic on Human Rights and Future Response, including the representatives from civil society organizations, independent domain experts and the representatives from the concerned ministries/ departments."[52] From the human rights perspective, using 'big data analytics' to track patients and trace contacts through applications such as 'Aarogya Setu' should conform to the principles of personal data protection, and the dissemination or use of such data or information must respect consent and transparency. It highlights the need for personal data protection and privacy legislation. COVID-19 highlighted the importance of a decentralised and polycentric response in tune with cooperative federalism.[53] India's approach to cooperative federalism may help to build capacities to address health issues at the grassroots level.[54]

During COVID-19, although the Central Government of India invoked The Epidemic Diseases Act, 1897 (EDA) and Disaster Management Act, 2005, more was needed "to address the health emergency effectively, given the dynamic nature of the disease."[55] In India, one of the striking realities revealed during COVID-19 was "the private health sector's passivity towards the COVID-19 patients, which is one of the important concerns for the National Health Policy 2017 (NHP-17)."[56] COVID-19 highlighted the importance of the public healthcare system in providing more robust, resilient and responsible healthcare. For such a resilient system that can absorb the pressure during health emergencies, "India needs to expand the public healthcare system and enhance the expenditure as per the set goals in NHP-17 and WHO standards."[57] In order to build a better preparedness strategy to ensure health equity in a pandemic, we need "robust and resilient public health infrastructure during normal times."[58] We must focus on building core competencies, including "leadership, stakeholder involvement, accreditation, data collection, and funding resources"[59]. Human rights can act as a constant reminder of the concerns of the people in vulnerable positions by demanding a more inclusive, transparent and accountable role of all the actors giving effect to the right to health. The pandemic strategy must engage "individuals, communities and other civil society actors to implement the right to health."[60]

52 *Supra* note 49.
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*
56 *Supra* note 35.
57 *Ibid.*
58 *Ibid.*
59 *Supra* note 34.
60 *Supra* note 3.

VIII. Conclusion

A human rights approach to health helps policy makers identify the specific requirement of the vulnerable groups and formulate policies based on the principles of equity, transparency and accountability. COVID-19 has exposed the fragility of the health care systems and infrastructure supporting health and highlighted the significance of a holistic approach to health, which recognizes the economic, social, cultural and biological determinants of health. It has provided an opportunity to the policymakers to examine the factors responsible for the realisation of the right to health. Human rights approach puts thrust on the interrelation and interdependence of the right to health on other human rights such as right to work, right to information, right to privacy and confidentiality, right to water and sanitation etc. A human rights approach to global health highlights the importance of global solidarity and international cooperation in promoting the right to health and access to medicine and healthcare.

SANCTION UNDER SECTION 19 OF THE PREVENTION OF CORRUPTION ACT, 1988: AN OVERALL PERSPECTIVE

Himanshu Shekhar[*]

Abstract

Public servants in India perform various roles and functions in service to the government and the public. Their work often involves serving the public interest, ensuring good governance, and contributing to the functioning of the state machinery. By fulfilling the roles and responsibilities assigned to them, the public servants act as a vital link between the government and the general public, contributing to the realization of government objectives and ensuring that policies and programs are effectively carried out for the betterment of the society. In recent years, Corruption emerged as a new major in India with respect to public servant duties. It is defined as the use of public office for private gains. As per the Transparency International (TI), with the score of 40 out of 100, India lies on 85th position in fight against corruption. Misuse of power, corruption, or any actions against the public interest are subject to legal consequences and disciplinary actions. Among such measures was the Prevention of Corruption Act, 1988 which replaced the earlier enactment of 1947. This article explores the requirement of sanction by the competent authority to prosecute a public servant under the Prevention of Corruption Act, 1988 and how over the period of time there have been efforts to strengthen the integrity of public service while preserving the rule of law.

Keywords: *Public servant, Sanction, Corruption, Good governance.*

I. Introduction

UNDER THE Indian law, a public servant is defined under the Indian Penal Code (IPC)[1] as well as other statutes. The description of a public servant is quite broad and comprehends several individuals holding public office or performing public duties under the official capacity granted by the government. The definitions under the statutes are wide-ranging and covers a vast array of individuals employed in government services and those appointed to perform public duties.[2] It is notable

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1 The Indian Penal Code, 1860, s. 21.

2 David H. Rosenbloom, Robert S. Kravchuk, and Richard M. Clerkin, *Public administration: Understanding management, politics, and law in the public sector* (Routledge, 2022).

that various other laws and regulations may have their specific definitions or delineations of public servants in the context of their respective areas. It broadly includes person authorized by law to discharge any government functions. The Public servants are subject to codes of conduct under rules and regulations; and are expected to uphold the veracity and duties associated with their official designations. These codes, rules and laws bound them to act in the public interest and perform their duties without biasness.[3]

Public servants in India perform various roles and functions in service to the government and the public. Their work often involves serving the public interest, ensuring good governance, and contributing to the functioning of the state machinery. It generally includes appropriate Government Departments and Agencies, policy implementations, administration, governance, regulatory, supervisory roles etc. By fulfilling the roles and responsibilities assigned to them, the public servants act as a vital link between the government and the general public, contributing to the realization of government objectives and ensuring that policies and programs are effectively carried out for the betterment of the society.[4] However, the actions and behaviour of public servants have both direct and indirect effect on the lives of individuals specially citizens. Their positive actions contribute to public welfare, social harmony, national development etc. but the negative actions can lead to distrust, inequality and a lack of confidence in governance as well as governing system.

In recent years, Corruption emerged as a new major in India with respect to public servant duties. It is defined as the use of public office for private gains.[5] Though the existence of corruption in an administration system can be widely observed, but it has been increased exponentially in recent years.[6] The major factors behind corruption are income inequality, religious fractionalization and media exposure.[7] The Transparency International's Corruption Perception Index (hereinafter referred as 'CPI') had portrayed India as becoming more corrupt in

3 Frank Anechiarico and James B. Jacobs, *The pursuit of absolute integrity: How corruption control makes government ineffective* (University of Chicago Press, Chicago, 1996).

4 Alex B. Brillantes and Maricel T. Fernandez. "Toward a reform framework for good governance: Focus on anti-corruption" 54(1) *Philippine Journal of Public Administration* 87-127 (2010).

5 Andrew Stark, "Beyond Quid Pro Quo: What's Wrong with Private Gain from Public Office?" 91(1) *The American Political Science Review*, 108-120 (1997).

6 Akhil Gupta, "Changing forms of corruption in India" 51(6) *Modern Asian Studies* 1862-1890 (2017).

7 Nicholas Charron, "The correlates of corruption in India: Analysis and evidence from the states" 18(2) *Asian Journal of Political Science* 177-194 (2010).

following recent years.[8] The TI also asserts that there are ample evidences to demonstrate that the corruption has decelerated the economic progress as well as poverty alleviation.

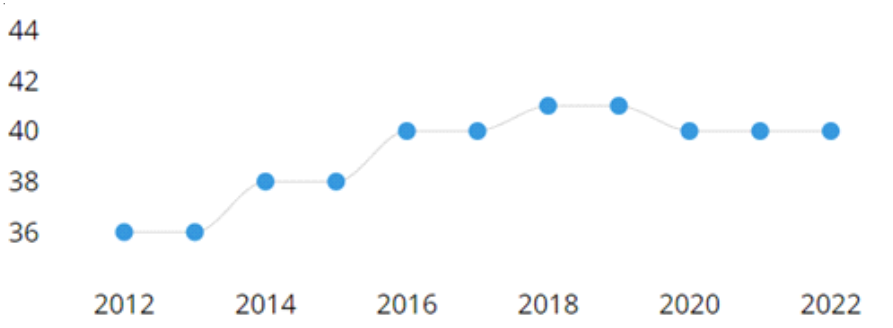

Figure 1: India's CPI Score 2012-22. Source: Transparency.org

As per the Transparency International (TI), with the score of 40 out of 100, India lies on 85th position in fight against corruption. The Indian Government took several significant measures to curb the corruption. There are specific provisions and laws that deal with offenses committed by public servants in the discharge of their duties, such as corruption, bribery, misuse of power, and other misconduct. Misuse of power, corruption, or any actions against the public interest are subject to legal consequences and disciplinary actions. Among such measures was the Prevention of Corruption Act, 1988[9] which replaced the earlier enactment of 1947[10]. This act widened the scope of definition of public servant and identified offences related to corruption, such as bribery, accepting or giving gratification other than legal remuneration, criminal misconduct by public servants, taking illegal gratification to influence public servants etc. However, there were still lacunas in the act which were addressed by the recent 2018 Amendment[11] to strengthen the legal provisions.

8 *Corruption in India – An Empirical Survey*, Transparency International India and ORG-MARG Research Pvt. Ltd., 2002, available at: https://transparencyindia.org/wp-content/uploads/2019/04/india-corruption-study-2002.pdf (last visited on November 06, 2022).

9 Act No. 49 of 1988 (w.e.f. 09 September 1988).

10 The Prevention of Corruption Act, 1947 (Act No. 2 of 1947).

11 The Prevention of Corruption (Amendment) Act, 2018. Ministry of Law and Justice. Available at: https://www.dvac.tn.gov.in/pdf/RTI/PC%20Act%20Amendment%202018.pdf (last visited November 06, 2023)

II. Sanction – Need and 2018 Amendment

One of the important magnitudes under the Act is the prosecution of the public servant alleged to commit the offences punishable under Section 7[12],11[13],13[14] and 15[15] of the Act. Section 19 mandates the 'sanction' to be obtained prior to the prosecution under the act. It states that:

> Section 19. No court shall take cognizance of an offence punishable under 2 [sections 7, 11, 13 and 15] alleged to have been committed by a public servant, except with the previous sanction 3 [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)].

The section mandates that no court shall take cognizance of an offense alleged to have been committed by a public servant without the prior sanction of the appropriate government authority. This provision of prior sanction is essential to ensure that public servants can execute their official duties without fear of being harassed or unnecessarily entangled in legal proceedings. It provides a level of protection to the public servants. The key essentials of the provision are:

1. Requirement of Prior sanction: This mandate states that formal consent or sanction from the appropriate government authority is required before any legal action against a public servant may be started. Before the court may move further with the case, this sanction must be granted by the authority.
2. Protection from Unwarranted Prosecution: The principal aim of Section 19 is to protect public officials against politically motivated or unjustifiable legal measures that could hinder or obstruct them in carrying out their official duties. It shields against petty or malicious prosecution for actions taken while performing official duties.
3. Balance Between Protection and Accountability: This section ensures that there is accountability in addition to protecting public personnel from needless harassment. The process of determining whether there is a valid case against a public servant for conduct that are outside the purview of their official duties is known as sanction for prosecution; it does not serve as an absolute prohibition against legal action.

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12 Section 7. Offence relating to public servant being bribed.

13 Section 11. Public servant obtaining undue advantage, without consideration from person concerned in proceeding or business transacted by such public servant.

14 Section 13. Criminal misconduct by a public servant.

15 Section 15. Punishment for attempt.

4. Government monitoring: By requiring prior sanction, the government adds an extra level of monitoring. Its prima facie inquiries into the claims made against the public servant and decides the issue prior approaching the court.

A similar approach can be observed in traditional laws including the Constitution, the Code of Civil Procedure, 1908[16] and the Code of Criminal Procedure, 1973[17]. The constitutional doctrine of sovereign immunity grants immunity from legal cases to the state or sovereign entity and its various arms, including government officials and agencies.[18] Section 132[19], 196[20], 197[21] of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C."), provides safeguard for public servants from undue harassment or legal action for actions undertaken in the discharge of their official duties. Similarly, under the Code of Civil Procedure, 1908 (hereinafter "CPC), Section 80[22] and Order 27[23] deals with the suits by or Against Government or Public Officers in their Official Capacity wherein there is compliance of 2-month period prior to instituting a suit.

The 2018 Amendment resurrected section 19 by including sanction as a necessary procedure. The object behind the requirement of grant of sanction to prosecute a public servant under the Prevention of Corruption Act or even under the Cr.P.C. is designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute an honest public servant for acts arising out of due discharge of his duty and also to enable him to efficiently perform the wide range of duties cast upon him by virtue of his office. The requirement of sanction acts as a filter to keep at bay any motivated, ill-informed and frivolous prosecution against the public servant.[24]

A plain reading of section 19(1) leaves no manner of doubt that the same is couched in mandatory terms and forbids Courts from taking cognizance of any offence punishable under Sections 7, 11, 13 and 15 of the PC Act against public

16 Act No. 5 of 1908.

17 Act No. 2 of 1974.

18 *State of Rajasthan* v. *Mst. Vidyawati*, AIR 1962 SC 933, See also *Kasturilal Ralia Ram* v. *The State Of Uttar Pradesh*, 1965 SCR (1) 375.

19 The Code of Criminal Procedure, 1973, s. 132. It talks about "Protection against prosecution for acts done under preceding sections."

20 *Id*., s. 196. It talks about "Prosecution for offences against the State and for criminal conspiracy to commit such offence."

21 *Id*, s. 197. It talks about "Prosecution of Judges and public servants."

22 The Code of Civil Procedure, 1908, s. 80.

23 *Id*., order XXVII. It talks about "Suits by or against the Government or Public Officers in their Official Capacity."

24 *Devender Gupta* v. *Central Bureau of Investigation,* 2022 SCC Online Del 1761.

servants except with the previous sanction of the competent authority enumerated in clauses (a), (b) and (c) to sub-section (1) of section 19. The provision contained in sub-section (1) would operate in absolute terms but for the presence of sub-section (3) to section 19. The language employed in sub-section (1) of section 19 operates as a complete and absolute bar to any court taking cognizance of any offence punishable under the abovementioned sections of the PC Act against a public servant except with the previous sanction of the competent authority.[25]

If no sanction is given for the prosecution of the accused, the Special Judge or the Concerned Judge will have no jurisdiction to take cognizance of the case and any trial in the absence of such sanction must be null and void. The trial would be invalid and *void ab initio*. In the absence of valid sanction, the court becomes incompetent to proceed with the matter.

III. Effect of Sanction After Prosecution

The decision to grant sanction must be made before a prosecution is started. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover, the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.[26]

The second sanction order issued for the prosecution would amount to be retrospective in its operation, which is not permitted. Grant of valid sanction has been held to be essential for taking cognizance by the Court, and the question about validity of any such sanction order can be raised event at the appellate stage. Therefore, the statute forbids taking of cognizance by the Court against a public servant except with the previous sanction of an authority competent to grant such sanction.

In case the sanction is found to be invalid the Court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law.

If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

25 *Nanjappa* v. *State of Karnataka*, (2015) 14 SCC 186.

26 *Basdeo Agarwalla* v. *Emperor*, AIR 1945 FC 16.

The Effect of Section 19(3) & 19(4)

Section 19(3) interdicts reversal or alteration of any finding, sentence or order passed by Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order in challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order in appeal or revisional proceedings except where it is found that a failure of justice has occurred by such invalidity. This in also evident from the conjoint reading of sub-sections (3) and (4).

The Supreme Court in the matter of *Prakash Singh Badal* v. *State of Punjab*[27] has drawn a distinction between a case where there was absence of sanction and a case where the order of sanction was vitiated on some ground. It was held that where there is absence of sanction, the issue can be agitated at the threshold of trial but when the sanction exists then question as to vitiation has to be raised during trial. The vitiation can be raised on diverse grounds such as non-availability of material before the sanctioning authority or bias of the sanctioning authority, or the order of sanction having been passed by an authority not authorised or competent to grant such sanction, etc.

Time Period of Granting Sanction and Effect of its Non-observation

Earlier there was no legislation prescribing the period within which a decision for sanction is to be taken, the Supreme Court in Vineet Narain's case[28] sought to fill the gap by setting a normative prescription of three months for grant of sanction. In Subramanian Swamy Case[29] the Supreme Court suggested that Parliament may consider prescribing clear time-limits for the grant of sanction and to provide for a deemed sanction by the end of the period if no decision is taken. The Parliament in the year 2018 by way of amendment to the P.C. Act inserted new proviso which mandates that the competent authority shall endeavour to convey the decision on the proposal for sanction within a period of three months with an extended period of one month.

The Supreme Court in the case of Vijay Rajmohan[30] held that three plus one month period is mandatory. However, the consequence of non-compliance with this mandatory requirement shall not be quashing of the criminal proceeding for

27 (2007) 1 SCC 1.
28 (1998) 1 SCC 226.
29 (2012) 3 SCC 64.
30 (2023) 1 SCC 329.

that very reason. The competent authority shall be accountable for delay and be subject to judicial review and administrative action by the Central Vigilance Commission.

The grant of sanction act as requisite at initial level of prosecution only. Mere grant of sanction doesn't confirm the conviction of the public servant as there can be no thumb rule that in a prosecution before the court of Special Judge, the previous sanction under Section 19 of the Act, would invariably be the only prerequisite. Furthermore, there is a material difference between the statutory requirements of section 19 of the Act and section 197 of the Cr.P.C. Under the PC Act, sanction is mandatory *qua* the public servant.[31] Procedure laid down under the section 19 doesn't amount to abuse of process or interest of justice and it cannot be quashed through the inherent powers of the high court under section 482 of the CrPC.[32] In relation to criminal conspiracy against a private individual under section 120-B[33] of the Indian Penal Code, 1860, the Supreme Court observed that:[34]

> The matter of sanction qua public servant would have no effect upon allegations of conspiracy and alleged cheating by private accused and the only effect would be Section 120B IPC would now not be used to prosecute private individuals for the offences under the Prevention of Corruption Act. Merely because the sanction is not granted does not mean the findings qua conspiracy/cheating cannot stand trial.

The act of sending sufficient and necessary materials to the sanctioning authority is liable to believed as a valid procedure to obtain the sanction. Sanction obtained thereby shall be valid and can be recorded as part of evidence.[35] Once sanction granted under section 19(1) of the Prevention of corruption Act for prosecution of the public servant, it is not necessary for the claimant to obtain any separate sanction from the government under the similar enactments such as under section 79(1) of the Kerala Value Added Tax Act, 2003 (KVAT Act).[36] These essentials ensure that the protection provided by section 19 is availed by public servants for

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31 *A. Sreenivasa Reddy* v. *Rakesh Sharma*, (2023) 8 SCC 711, para 59. See also *S.K. Miglani* v. *State (NCT of Delhi)*, (2019) 6 SCC 111.

32 *Anil Kumar* v. *State*, (2021) 4 HCC (Del) 445: 2021 SCC OnLine Del 5498.

33 Indian Penal Code, 1860, s. 120B. Punishment of criminal conspiracy.

34 *Ambuj Hotels & Real Estate (P) Ltd.* v. *Central Bureau of Investigation*, (2023) 3 HCC (Del) 242 : 2023 SCC OnLine Del 3869.

35 *C.N. Seshachalapathi Raju* v. *State of Andhra Pradesh*, (2023) 1 HCC (AP) 68 : 2023 SCC OnLine AP 754.

36 *G. Santhosh Kumar* v. *State of Kerala*, (2021) 2 HCC (Ker) 130: 2021 SCC OnLine Ker 2744.

actions performed in the course of their official duties, while also maintaining a system of accountability and oversight within the government for any potential misconduct.

IV. Conclusion

In a society that strives for justice and fairness, the changing legal landscape constantly adjusts to strike this balance. This is reflected in the ongoing effort to strengthen the integrity of public service while preserving the rule of law. The important notion is that public servants play an essential role in upholding the ideals of good governance, service delivery, and the efficient functioning of public offices. The law such as The Prevention of Corruption Act has established safeguards and legal provisions to shield the public servants from undue legal harassment, thus enabling them to execute their duties without fear of malicious legal actions. The evolving legal landscape remains a testament to a steadfast commitment to create a governance system that nurtures transparency, fairness, and the efficient delivery of public services while upholding the principles of justice and equity for all.

भारतीय कानून प्रणाली का विऔपनिवेशीकरण

*जस्टिस एस अब्दुल नज़ीर**

1. अखिल भारतीय अधिवक्ता परिषद (hereinafter एबीएपी), हैदराबाद की 16वीं राष्ट्रीय परिषद की बैठक में मुझे आमंत्रित किये जाने पर मैं अत्यधिक प्रसन्न हूं। मेरे लिए, ऐसे आयोजनों में बोलने के लिए आमंत्रित किया जाना हमेशा खुशी और सम्मान की बात होती है क्योंकि इससे मुझे बार के सदस्यों के साथ अधिक अनौपचारिक तरीके से जुड़ने का अवसर मिलता है।

2. सबसे पहले, मैं देश भर में वकीलों के लिए नियमित शैक्षिक कार्यक्रम संचालित करने के उद्देश्य से पिछले तीन दशकों में किए गए उनके काम के लिए एबीएपी को बधाई देना चाहता हूं। निरंतर कानूनी शिक्षा कानूनी कार्य का एक आवश्यक स्तंभ है और मुझे यह जानकर खुशी हुई है कि एबीएपी ने हमारे देश के वकीलों की निरंतर शिक्षा के उद्देश्य से कार्यशालाएं और सेमिनार आयोजित किए हैं, कानूनी सहायता केंद्र स्थापित किए हैं और नियमित रूप से अपनी त्रैमासिक पत्रिका प्रकाशित की है। वर्तमान परिषद बैठक कानूनी बिरादरी को शिक्षित करने में एबीएपी के प्रयासों का एक पहलू है।

3. मुझे यह जानकर खुशी हुई कि इस वर्ष एबीएपी की राष्ट्रीय परिषद की बैठक का विषय 'भारत कानूनी प्रणाली का उपनिवेशीकरण' है। हालाँकि ऐसा लग सकता है कि यह कानूनी इतिहास से संबंधित विषय है, यह मुद्दा समसामयिक रूप से इतना अधिक प्रासंगिक कभी नहीं रहा। पिछले कुछ महीनों में, सर्वोच्च न्यायालय के मेरे कई भाई न्यायाधीशों के साथ-साथ भारत के माननीय मुख्य न्यायाधीश ने भारतीय कानूनी प्रणाली पर पुनर्विचार करने और उसे फिर से तैयार करने की आवश्यकता के बारे में अपनी चिंताएँ व्यक्त की हैं ताकि यह भारत की वर्तमान वास्तविकताओं को प्रतिबिंबित करे जो कि पिछली शताब्दियों की हमारी समृद्ध और विविध विरासत और अरबों भारतीयों के उज्ज्वल भविष्य के सपनों और आकांक्षाओं का एक मिश्रण है। मैं इस अवसर का उपयोग इस विषय पर अपने कुछ विचार साझा करने के लिए करना चाहूंगा, ताकि इस विषय के संबंध में कानूनी बिरादरी के भीतर आगे की चर्चा, बहस और विचार-विमर्श को प्रोत्साहित किया जा सके।

I. प्राचीन भारतीय कानूनी प्रणालियाँ

4. भारतीय कानून परंपरागत रूप से कई स्रोतों पर आधारित है। हमारी कानूनी व्यवस्था हजारों साल पहले वेदों और समकालीन स्वदेशी रीति-रिवाजों से शुरू हुई थी। समय के साथ, यह विदेशी और घरेलू दोनों प्रभावों के सम्मिश्रण और प्रतिस्थापन के माध्यम से विकसित हुआ। 8वीं शताब्दी में भारत पर अरब आक्रमणों के बाद भारत के कुछ क्षेत्रों में इस्लामी कानून लागू किया गया। इसी तरह, भारत पर ब्रिटिश कब्जे के दौरान, सभी कानूनी सवालों से निपटने के लिए बॉम्बे, कलकत्ता और मद्रास के पहले उच्च न्यायालयों में अंग्रेजी आम कानून को अवशिष्ट कानून के रूप में पेश किया गया था,

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* जस्टिस एस अब्दुल नज़ीर भारत के सर्वोच्च न्यायालय के पूर्व न्यायाधीश एवं वर्तमान में आंध्र प्रदेश के राज्यपाल हैं। यह लेख अखिल भारतीय अधिवक्ता परिषद की 16वीं राष्ट्रीय परिषद की बैठक, हैदराबाद में जस्टिस नज़ीर द्वारा 26 दिसम्बर, 2021 को दिए गए भाषण का हिन्दी अनुवाद है। संपादकीय समिति जस्टिस नज़ीर का आभार प्रकट करती है।

जिसके संबंध में कोई भारतीय क़ानून या व्यक्तिगत कानून प्रचलित नहीं था। पुर्तगाली और फ्रांसीसी भारत में अपने उपनिवेशों में अपने स्वयं के कानूनों का उपयोग करते थे।

5. जब उपनिवेशवादियों ने पहली बार भारत पर आक्रमण किया, तो उन्होंने टिप्पणी की कि भारत में कानूनी सिद्धांतों या कानून के शासन का अभाव है। उन्होंने इसे भारत पर अपने विदेशी विचारों और प्रणालियों को थोपने के बहाने के रूप में इस्तेमाल किया। लेकिन ये भ्रामक टिप्पणियाँ और धारणाएँ भारतीय न्यायशास्त्र और प्राचीन भारत की कानूनी प्रणाली की गलत व्याख्या हैं। हो सकता है कि ये बयान अज्ञानता, या साम्राज्यवादी स्वार्थ, या भारतीय संस्कृति और सभ्यता के प्रति अवमानना के कारण दिये गये हों। इस गलत बयानी के प्रभाव के परिणामस्वरूप भारत और बाहर दोनों जगह भारतीय कानूनी प्रणाली के बारे में गलत धारणा पैदा हुई।

6. भारत की कानूनी प्रणालियों की सच्ची और सही तस्वीर पाने के लिए हमें प्राचीन भारतीय ग्रंथों में पीछे जाना चाहिए। तब हमें पता चलता है कि प्राचीन भारतीय न्यायशास्त्र की स्थापना कानून के शासन के आधार पर की गई थी और इसमें कुछ ऐसी विशेषताएं थीं जो प्राचीन दुनिया के लिए बेहद क्रांतिकारी थीं। इनमें शामिल हैं:

क. राजा स्वयं कानून के अधीन था और राजा का शासन करने का अधिकार, कर्तव्यों की पूर्ति के अधीन था, जिसका उल्लंघन करने पर राजत्व समाप्त हो सकता था;

ख. न्यायाधीश स्वतंत्र थे और केवल कानून के अधीन थे और प्राचीन भारत में न्यायपालिका की क्षमता, शिक्षा, सत्यनिष्ठा, निष्पक्षता और स्वतंत्रता के मामले में सभी देशों के मुकाबले सर्वोच्च मानक थे;

ग. भारतीय न्यायपालिका में मुख्य न्यायाधीश (प्रादाविवाका) के न्यायालय के साथ न्यायाधीशों का एक पदानुक्रम शामिल था; प्रत्येक उच्च न्यायालय को नीचे के न्यायालयों के निर्णय की समीक्षा करने की शक्ति दी गई थी;

ग. विवादों का निर्णय अनिवार्य रूप से प्राकृतिक न्याय के उन्हीं सिद्धांतों के अनुसार किया जाता था जो आज आधुनिक राज्य में न्यायिक प्रक्रिया को संचालित करते हैं।;

घ. प्रक्रिया और साक्ष्य के नियम उतने ही उन्नत थे जितने आज अपनाए जाते हैं;

च. आपराधिक मुकदमों में, अभियुक्त को तब तक दंडित नहीं किया जा सकता था जब तक कि उसका अपराध कानून के अनुसार साबित न हो जाए और दीवानी मामलों में मुकदमे में किसी भी आधुनिक मुकदमे की तरह चार चरण होते थे – मुकदमा, जवाब, सुनवाई और हुक्मनामा;

छ. प्राचीन भारतीय न्यायशास्त्र में रेस ज्यूडिकाटा (प्रांग न्याय) जैसे सिद्धांत प्रचलित थे;

ज. सभी मुकदमे, दीवानी या फौजदारी, कई न्यायाधीशों की पीठ द्वारा सुने जाते थे और शायद ही कभी एकल न्यायाधीश की पीठ द्वारा सुने जाते थे;

झ. राजा को छोड़कर सभी अदालतों के निर्णय स्थापित सिद्धांतों के अनुसार अपील या समीक्षा के

अधीन थे; और

ण. सभी न्यायालयों का मौलिक कर्तव्य 'बिना पक्षपात या भय के' न्याय करना था।

कानून के शासन

7. मेरे द्वारा उजागर की गई व्यापक विशेषता के अलावा, प्राचीन कानूनी प्रणालियों की कुछ अधिक सूक्ष्म विशेषताओं की गहराई से जांच करना उपयोगी होगा, ताकि भारत के लिए उन कानूनी प्रणालियों की जटिलता, न्यायसंगतता और उपयुक्तता की पूरी तरह से सराहना की जा सके। आइए हम इनमें से सबसे बुनियादी पहलू, नियम 'क़ानून का शासन' से शुरुआत करें।

8. स्वाभाविक रूप से, संबोधित करने वाला पहला प्रश्न यह होगा कि क्या प्राचीन भारत में कानून का शासन प्रचलित था? इस प्रश्न के अत्यंत सकारात्मक उत्तर के प्रमाण महान महाकाव्य ग्रंथों में उपलब्ध हैं। उदाहरण के लिए, महाभारत में कहा गया है कि 'जो राजा अपनी प्रजा की रक्षा करने की शपथ लेने के बाद भी उनकी रक्षा करने में असफल रहता है, उसके साथ पागल कुत्ते जैसा व्यवहार किया जाना चाहिए।' इसी तरह, महाभारत में कहा गया है कि 'लोगों को ऐसे राजा को फाँसी दे देनी चाहिए जो उनकी रक्षा नहीं करता बल्कि उनकी संपत्ति और संपत्ति से वंचित करता है और जो किसी से कोई सलाह या मार्गदर्शन नहीं लेता है।' ऐसा राजा राजा नहीं बल्कि दुर्भाग्य है। हालाँकि इस्तेमाल किए गए शब्द गंभीर और आधुनिक विधायी भाषा के अनुरूप हो सकते हैं, लेकिन संदेश स्पष्ट है कि राजा कानून से ऊपर नहीं है।

9. इन प्रावधानों से संकेत मिलता है कि संप्रभुता एक निहित सामाजिक अनुबंध पर आधारित थी और यदि राजा ने इस पारंपरिक समझौते का उल्लंघन किया, तो वह अपना राजत्व खो देगा। मौर्य साम्राज्य के ऐतिहासिक काल की बात करें तो, कौटिल्य ने 'अर्थशास्त्र' में एक राजा के कर्तव्यों का वर्णन निम्नलिखित शब्दों में किया है: ''अपनी प्रजा की खुशी में राजा की खुशी निहित है; उनके कल्याण में उनका कल्याण; जो कुछ उसे अच्छा लगता है उसे वह अच्छा न समझेगा, परन्तु जो कुछ उसके लोगों को अच्छा लगता है उसे वह अच्छा समझेगा।'' मैं ऐसे कई अन्य प्राचीन विद्वानों के बुद्धिमान शब्दों का उल्लेख करूंगा, जिनके कार्य हमें हमारे देश की प्राचीन कानूनी प्रणालियों के बारे में जानकारी प्रदान करते हैं।

10. कौटिल्य की ओर लौटते हुए, उनके द्वारा प्रतिपादित सिद्धांत एक बहुत ही प्राचीन परंपरा पर आधारित था जो रामायण के युग में पहले से ही स्थापित थी। अयोध्या के राजा राम को अपनी रानी को, जिससे वह प्रेम करते थे और जिसकी पवित्रता में उन्हें पूरा विश्वास था, निर्वासित करने के लिए मजबूर किया गया था, केवल इसलिए क्योंकि उनकी प्रजा ने उस पत्नी को वापस लेने के उनके कदम को अस्वीकार कर दिया था, जिसने अपने अपहरणकर्ता के घर में एक साल बिताया था। राजा ने लोगों की इच्छा के आगे समर्पण कर दिया, भले ही यह उसके हृदय को स्वीकार्य नहीं था।

11. महाभारत में, यह कहा गया है कि एक आम मछुआरे ने हस्तिनापुर के राजा से अपनी बेटी की शादी करने से इनकार कर दिया जब तक कि राजा ने यह शर्त स्वीकार नहीं कर ली कि उसकी बेटी के बेटे, न कि पूर्व रानी का उत्तराधिकारी, सिंहासन का उत्तराधिकारी होगा। राजकुमार देव व्रत द्वारा

सिंहासन का त्याग और आजीवन ब्रह्मचर्य की शपथ (भीष्म प्रतिज्ञा) महाभारत के सबसे मार्मिक प्रसंगों में से एक है। लेकिन कानूनी बिरादरी के लिए इसका महत्व यह है कि संप्रभु राजा भी कानून से ऊपर नहीं था। हस्तिनापुर के महान राजा अपनी शर्तों को स्वीकार किए बिना अपनी सबसे विनम्र प्रजा को अपनी बेटी से शादी करने के लिए मजबूर नहीं कर सकते थे। यह इस दृष्टिकोण का खंडन करता है कि प्राचीन भारत में राजा निरंकुश थे जो कानून या अपनी प्रजा के अधिकारों की परवाह किए बिना जो चाहें कर सकते थे।

प्राचीन भारत में न्यायपालिका

12. कौटिल्य के अर्थशास्त्र के अनुसार, जिन्हें आम तौर पर पहले मौर्य सम्राट (322–298 ईसा पूर्व) के प्रधान मंत्री के रूप में पहचाना जाता है, उस समय मौर्य क्षेत्र को 'स्थानीय', 'द्रोणमुख', 'खर्वतिका' और 'संग्रहन' (आधुनिक 'जिलों', 'तहसीलों' और 'परगना' के प्राचीन समकक्ष) प्रशासनिक इकाइयों में विभाजित किया गया था। 'स्थानीय' आठ सौ गांवों के केंद्र में स्थापित एक किला था, 400 गांवों के बीच में एक 'द्रोणमुख', 200 गांवों के बीच में एक 'खर्वतिका' और दस गांवों के केंद्र में 'संग्रहन' था। प्रत्येक 'संग्रहन' में और जिलों के मिलन स्थलों (जनपदसंधिषु) पर भी कानून अदालतें स्थापित की गईं। न्यायालयों में तीन न्यायविद (धर्मस्थ) और तीन मंत्री (अमात्य) होते थे।

13. महान न्यायविदों, मनु, याज्ञवल्क्य, कात्यायन, बृहस्पति और अन्य, और बाद के समय में वाचस्पति मिश्र और अन्य जैसे टिप्पणीकारों ने भारत में प्रचलित न्यायिक प्रणाली और कानूनी प्रक्रिया का विस्तार से वर्णन किया जो प्राचीन काल से मध्यकाल के अंत तक भारत में प्रचलित थी।

14. बृहस्पति स्मृति के अनुसार, प्राचीन भारत में न्यायालयों का एक पदानुक्रम था जो पारिवारिक न्यायालयों से शुरू होता था और राजा पर समाप्त होता था। सबसे निचला स्तर पारिवारिक मध्यस्थ का था। अगला उच्च न्यायालय न्यायाधीश का था; मुख्य न्यायाधीश का अगला व्यक्ति जिसे 'प्रादिविवाक' या 'अध्यक्ष' कहा जाता था; और सबसे ऊपर राजा का दरबार था।

15. प्रत्येक अदालत का क्षेत्राधिकार विवाद के महत्व से निर्धारित होता था, छोटे विवादों का निर्णय सबसे निचली अदालत द्वारा किया जाता था, और सबसे महत्वपूर्ण मामलों का निर्णय राजा द्वारा किया जाता था। प्रत्येक निचली अदालत के फैसले को ऊपर की अदालतों द्वारा प्रतिस्थापित किया जाना था। वाचस्पति मिश्र के अनुसार, ''इन न्यायाधिकरणों के निर्णयों का बाध्यकारी प्रभाव, राजा के निर्णय के साथ समाप्त होता है, आरोही क्रम में होता है, और प्रत्येक अगला निर्णय उच्च स्तर की शिक्षा और ज्ञान के कारण पिछले निर्णय के विरुद्ध प्रभावी होगा।''

16. यह उल्लेखनीय है कि आज भारतीय न्यायपालिका में भी समान सिद्धांत पर व्यवस्थित अदालतों का एक पदानुक्रम शामिल है – ग्राम अदालतें, मुंसिफ, सिविल जज, जिला जज, उच्च न्यायालय और अंत में सर्वोच्च न्यायालय जो की राजा का दरबार जगह लेता है। हम अनजाने में एक प्राचीन परंपरा का पालन कर रहे हैं।

17. न्याय का स्रोत संप्रभु था। भारतीय न्यायशास्त्र में न्याय देना और दंड देना संप्रभुता के प्राथमिक गुणों में से एक था।

18. न्याय का स्रोत होने के नाते, राजा से अपेक्षा की गई कि वह व्यक्तिगत रूप, कानून के जानकार न्यायाधीशों के मार्गदर्शन में, कानून के अनुसार न्याय करेगा। राजा के लिए अत्यंत कठोर न्यायिक आचरण संहिता निर्धारित की गई थी। उन्हें पारदर्शी तरीके से और अदालत कक्ष में मामलों का फैसला करना था, और उनकी पोशाक और व्यवहार ऐसा होना चाहिए था कि वादी घबराए या भयभीत न हों। उन्हें निष्पक्षता की शपथ लेनी थी और बिना पक्षपात या लगाव के मामलों का फैसला करना था। कात्यायन का कहना है कि ''राजा को शालीन कपड़े पहनकर दरबार में प्रवेश करना चाहिए, पूर्व दिशा की ओर मुंह करके अपना स्थान ग्रहण करना चाहिए और ध्यानपूर्वक अपने वादकारियों की सुनवाई सुननी चाहिए।'' उसे अपने मुख्य न्यायाधीश (प्रादिविवाक), न्यायाधीशों, मंत्रियों और अपनी परिषद के ब्राह्मण सदस्यों के मार्गदर्शन में कार्य करना चाहिए। जो राजा इस प्रकार और विधि के अनुसार न्याय करता है, वह स्वर्ग में निवास करता है।

19. ये कथन महत्वपूर्ण हैं। राजा को शालीन पोशाक (विनीता-वेश) पहनने की आवश्यकता थी ताकि मुकदमेबाज भयभीत न हों। न्यायाधीश के रूप में कार्य करते समय, राजा के लिए निर्धारित आचार संहिता बहुत सख्त थी और उसे सभी पूर्वाग्रहों के लगाव से मुक्त होना था। नारद के अनुसार, ''यदि राजा कानून के अनुसार मुकदमे (व्यवहारन) का निपटारा करता है और (अदालत में) आत्म-संयमित होता है, तो उसमें सात गुण, आग में सात लपटों की तरह, मिलते हैं।'' नारद इस बात का आनंद लेते हैं कि जब राजा निर्णय पत्र (धर्मासनम) रखता है, तो उसे विवस्वान के पुत्र की शपथ लेते हुए सभी प्राणियों के प्रति निष्पक्ष होना चाहिए; विवस्वान के पुत्र के रूप में निष्पक्षता की शपथ लेने वाले मृत्यु के देवता यम थे, जो सभी जीवित प्राणियों के प्रति निष्पक्ष थे।

20. किसी मामले की सुनवाई के दौरान राजा का मार्गदर्शन करने वाले न्यायाधीशों और सलाहकारों को स्वतंत्र और निडर होना चाहिए और उन्हें कोई भी त्रुटि या अन्याय करने से रोकना चाहिए। कात्यायन के अनुसार, ''यदि राजा वादकारियों को कोई अवैध या अधर्मी निर्णय देना चाहता है, तो न्यायाधीश (साम्य) का कर्तव्य है कि वह राजा को चेतावनी दे और उसे रोके। राजा का मार्गदर्शन करने वाले न्यायाधीश को अपनी राय देनी चाहिए जिसे वह कानून के अनुसार मानता है, यदि राजा नहीं सुनता है, तो न्यायाधीश ने कम से कम अपना कर्तव्य पूरा किया है। जब न्यायाधीश को पता चलता है कि राजा समानता और न्याय से भटक गया है, तो उसका कर्तव्य राजा को खुश करना नहीं है क्योंकि क्योंकि यह मृदु भाषण का अवसर नहीं है (वक्तव्यं तत् प्रियं नात्र); यदि न्यायाधीश अपने कर्तव्य में विफल रहता है, तो वह दोषी है।''

21. जैसे-जैसे सभ्यता विकसित हुई, राजा के कार्य अधिक से अधिक होते गए और उसके पास व्यक्तिगत रूप से मुकदमों की सुनवाई के लिए कम समय होता गया, और उसे अपने अधिक से अधिक न्यायिक कार्य पेशेवर न्यायाधीशों को सौंपने के लिए मजबूर होना पड़ा। कात्यायन ने कहा कि ''यदि काम के दबाव के कारण राजा व्यक्तिगत रूप से मुकदमे की सुनवाई नहीं कर सकता है तो उसे वेदों में विद्वान ब्राह्मण को न्यायाधीश के रूप में नियुक्त करना चाहिए।'' न्यायाधीश के लिए निर्धारित योग्यताएँ बहुत ऊँची थीं। कात्यायन के अनुसार, 'एक न्यायाधीश को तपस्वी और संयमी, स्वभाव में निष्पक्ष, दृढ़, ईश्वर-भयभीत, अपने कर्तव्यों में मेहनती, क्रोध से मुक्त, धार्मिक जीवन जीने

वाला और अच्छे परिवार का होना चाहिए।'

22. समय के साथ, एक न्यायिक पदानुक्रम बनाया गया जिसने राजा को अधिकांश न्यायिक कार्यों से मुक्त कर दिया लेकिन अपील की सर्वोच्च अदालत के रूप में उसकी शक्तियों को अछूता छोड़ दिया। जैसा कि ऊपर वर्णित है, मौर्य साम्राज्य के तहत एक नियमित न्यायिक सेवा मौजूद थी।

प्राचीन भारत में न्यायपालिका की सत्यनिष्ठा

23. अब मैं न्यायपालिका के गुणों और प्राचीन न्यायाधीशों के लिए निर्धारित आचार संहिता के बारे में कुछ शब्द कहूंगा। एक न्यायाधीश का सबसे महत्वपूर्ण कर्तव्य न्यायिक अखंडता थी जिसमें निष्पक्ष होने की ज़िम्मेदारी और पूर्वाग्रह या लगाव की पूर्ण अनुपस्थिति शामिल थी। अखंडता की अवधारणा को बहुत व्यापक अर्थ दिया गया था और अखंडता की न्यायिक संहिता बहुत सख्त थी। बृहस्पति ने कहा कि ''एक न्यायाधीश को व्यक्तिगत लाभ या किसी भी प्रकार के व्यक्तिगत पूर्वाग्रह पर विचार किए बिना मामलों का फैसला करना चाहिए; और उसका निर्णय ग्रंथों द्वारा निर्धारित प्रक्रिया के अनुसार होना चाहिए। एक न्यायाधीश जो इस प्रकार अपने न्यायिक कर्तव्यों का पालन करता है, उसे यज्ञ करने वाले व्यक्ति के समान ही आध्यात्मिक योग्यता प्राप्त होती है।''

24. न्यायाधीशों की निष्पक्षता सुनिश्चित करने के लिए सख्त सावधानियाँ बरती गईं। मुकदमा खुली अदालत में होना था और मुकदमा लंबित रहने के दौरान न्यायाधीशों को पक्षों से निजी तौर पर बात करने से मना किया गया था क्योंकि यह माना जाता था कि निजी सुनवाई से पक्षपात (पक्षपात) हो सकता है। शुक्र-नीतिसार द्वारा कहा गया था कि -पांच कारण निष्पक्षता को नष्ट कर देते हैं और न्यायाधीशों को विवादों में पक्ष लेने के लिए प्रेरित करते हैं। ये हैं मोह, लोभ, भय, शत्रुता और अकेले में पार्टी सुनना।

25. न्यायिक सत्यनिष्ठा का दूसरा तरीका यह था कि मुकदमों की सुनवाई एक न्यायाधीश द्वारा नहीं की जा सकती थी, भले ही वह राजा ही क्यों न हो। हमारे पूर्वजों ने महसूस किया कि जब दो लोग बातचीत करते हैं, तो भ्रष्टाचार या त्रुटि की संभावना कम होती है, और उन्होंने प्रावधान किया कि मामलों का फैसला करते समय राजा को अपने सलाहकारों के साथ बैठना चाहिए, और न्यायाधीशों को असमान संख्या वाली बेंचों में बैठना चाहिए। शुक्र-नितिसार ने कहा कि ''न्यायिक कर्तव्यों को सौंपे गए व्यक्तियों को वेदों का ज्ञान होना चाहिए, सांसारिक अनुभव में बुद्धिमान होना चाहिए और तीन, पांच या सात के समूह में कार्य करना चाहिए।'' इसी प्रकार, कौटिल्य ने भी कहा था कि मुकदमे की सुनवाई तीन न्यायाधीशों द्वारा की जानी चाहिए (धर्मस्थस्तय:)।

26. दुर्भाग्य से, अंग्रेजों द्वारा बनाई गई हमारी वर्तमान न्यायिक प्रणाली इस उत्कृष्ट विशेषता का पालन नहीं करती है। आज प्रत्येक मुकदमे की सुनवाई आर्थिक कारणों से एक ही मुंसिफ या सिविल न्यायाधीश या जिला न्यायाधीश द्वारा की जाती है। लेकिन प्राचीन भारत में राज्य की रुचि अर्थव्यवस्था से अधिक न्याय की गुणवत्ता में थी।

27. प्रत्येक स्मृति न्यायिक सत्यनिष्ठा के महत्व पर जोर देती है। शुक्र-नीतिसार ने कहा कि ''राजा द्वारा नियुक्त न्यायाधीशों को प्रक्रिया में पारंगत, बुद्धिमान, अच्छे चरित्र और स्वभाव का, वाणी में

नरम, मित्र या शत्रु के प्रति निष्पक्ष, सच्चा, कानून का विद्वान, सक्रिय (आलसी नहीं), क्रोध, लालच, या इच्छा (व्यक्तिगत लाभ के लिए) से मुक्त, और सच्चा होना चाहिए।'' भ्रष्टाचार को एक जघन्य अपराध माना जाता था और सभी अधिकारी एक बेईमान न्यायाधीश के लिए कड़ी से कड़ी सज़ा निर्धारित करने में एकमत थे।

बृहस्पति ने कहा कि ''यदि कोई न्यायाधीश रिश्वत लेता है और इस प्रकार अन्याय करता है और जनता द्वारा उस पर जताए गए विश्वास को धोखा देता है, तो उसे राज्य से निष्कासित कर दिया जाना चाहिए।'' भ्रष्ट न्यायाधीश, झूठा गवाह और ब्राह्मण का हत्यारा अपराधियों के एक ही वर्ग में माने जाते थे। विष्णु ने कहा था कि 'राज्य को भ्रष्ट न्यायाधीश की पूरी संपत्ति जब्त कर लेनी चाहिए।' न्यायिक कदाचार में मुकदमा लंबित रहने के दौरान वादियों से अकेले में बातचीत करना शामिल है। बृहस्पति के अनुसार, 'एक न्यायाधीश या मुख्य न्यायाधीश (प्रादिविवाक) जो मामले का फैसला होने से पहले एक हिस्से से निजी तौर पर बातचीत करता है (अनिर्णित), उसे एक भ्रष्ट न्यायाधीश की तरह प्रकाशित किया जाना चाहिए।'

प्राचीन भारत में कानून की व्याख्या के लिए नियम

28. प्राचीन भारत में, कानूनों की व्याख्या के लिए सिद्धांतों को उच्च स्तर की पूर्णता तक विकसित किया गया था। न्यायाधीशों को कानून के अनुसार आपराधिक और दीवानी मामलों का फैसला करना आवश्यक था (सम्यक, यथ-शास्त्रम, शास्त्रो इदतेन विधिना)। इसमें कानून के ग्रंथों की व्याख्या शामिल थी। इस कार्य ने कई समस्याएं पैदा कीं जैसे ग्रंथों में अस्पष्ट शब्दों और वाक्यांशों को स्पष्ट करना, एक ही कानून में परस्पर विरोधी प्रावधानों का समाधान, कानून के अक्षर और समानता, न्याय और अच्छे विवेक के सिद्धांतों के बीच संघर्ष का समाधान, रीति-रिवाजों और स्मृति के बीच समायोजन इत्यादि। कानून की यह शाखा अत्यधिक विकसित थी और न्यायालयों के मार्गदर्शन के लिए कई सिद्धांत प्रतिपादित किए गए थे। उनमें से सबसे महत्वपूर्ण धर्म-शास्त्र और अर्थशास्त्र के बीच संघर्ष से संबंधित है।

29. न्यायालय द्वारा मूल कानून की तीन प्रणालियों को मान्यता दी गई, धर्म-शास्त्र, अर्थशास्त्र, और प्रथा जिसे सदाचार या चरित्र कहा जाता था। धर्म-शास्त्र में ऐसे कानून शामिल थे जिन्हें स्मृतियों और सरकार के सिद्धांतों के अर्थशास्त्र से अंतिम मंजूरी मिलती थी। दोनों के बीच की सीमा रेखा अक्सर ओवरलैप हो जाती थी। कई मामलों में, अर्थशास्त्र और धर्म-शास्त्र में टकराव था। ऐसे में, किसी को स्वाभाविक रूप से आश्चर्य होता है कि जब विशेष मुकदमों में यह विवाद उत्पन्न हुआ तो कानून अदालतों ने इस संघर्ष को कैसे हल किया?

30. पहला सिद्धांत अविरोध का था- अदालत को दोनों के बीच किसी भी स्पष्ट संघर्ष को हल करने का प्रयास करना चाहिए। आज इसे निर्माण के सामंजस्यपूर्ण नियम का सिद्धांत कहा जाता है। लेकिन यदि संघर्ष का समाधान नहीं हो सका, तो धर्म-शास्त्र के प्राधिकार को प्राथमिकता दी जानी थी। भविष्य पुराण में प्रावधान है कि, जब स्मृति और अर्थशास्त्र असंगत होते हैं, तो अर्थशास्त्र में प्रावधान (स्मृति द्वारा) प्रतिस्थापित कर दिए जाते हैं; लेकिन यदि दो स्मृतियाँ, या एक ही स्मृति में दो प्रावधान विरोधाभासी हैं, तो जो भी समानता के अनुरूप हो उसे प्राथमिकता दी जाएगी। नारद स्मृति,

स्मृति के दो ग्रंथों के बीच टकराव की स्थिति में तर्क के अनुसार व्याख्या का एक समान नियम निर्धारित करती है। लेकिन कानून के लिखित ग्रंथों की व्याख्या करते समय, अदालत को यह ध्यान में रखना था कि उसका मौलिक कर्तव्य न्याय करना था, न कि कानून का शब्दश: पालन करना। बृहस्पति के अनुसार, ''अदालत को केवल शास्त्र के अक्षर का पालन करके अपना निर्णय नहीं देना चाहिए क्योंकि यदि निर्णय पूरी तरह से तर्क से रहित है, तो परिणाम अन्याय (धर्म-हानी) है।'' बृहस्पति ने आगे कहा कि अदालत को देश के रीति-रिवाजों और प्रथाओं के अनुसार निर्णय लेना चाहिए, भले ही वे कानून के पत्र के साथ असंगत हों, और उन्होंने कई उल्लेखनीय उदाहरण भी दिए जो संयोगवश समकालीन सामाजिक परिस्थितियों का मार्गदर्शन करने में सक्षम हैं।

प्राचीन भारत में कानून-निर्माण में रीति-रिवाजों का महत्व

31. प्राचीन काल में समाज में रीति-रिवाज (आचार, सदाचार, चरित्र) की महत्वपूर्ण भूमिका को ध्यान में रखते हुए राज्य को देश के विभिन्न हिस्सों में मनाए जाने वाले रीति-रिवाजों का एक प्रमाणित रिकॉर्ड बनाए रखना आवश्यक था। कात्यायन ने कहा कि ''किसी विशेष क्षेत्र में जो भी प्रथा का पालन किया जाना सिद्ध हो, उसे संप्रभु की मुहर के साथ एक रिकॉर्ड में विधिवत दर्ज (धार्य) किया जाना चाहिए।'' लेकिन यहां तक कि एक स्थापित प्रथा भी औपचारिक रूप से 'विस्थापित' हो सकती है, क्योंकि समय के साथ यह असमान हो जाती है। वस्तुत: समय-समय पर अप्रासंगिक रीति-रिवाजों को हटाना संप्रभु का कर्तव्य था। इस संबंध में, कात्यायन ने कहा कि ''जब संप्रभु संतुष्ट हो जाता है कि एक विशेष प्रथा समानता (न्यायत:) के विपरीत है - तो इसे संप्रभु के औपचारिक निर्णय द्वारा रद्द कर दिया जाना चाहिए।'' यह उल्लेखनीय है कि प्राचीन भारत की न्यायिक और कानूनी प्रणालियाँ कितनी विकसित थीं।

32. अक्सर किसी मुकदमे का निर्णय किसी प्रथा के अस्तित्व के प्रमाण पर निर्भर होता है। नारद ने कहा कि न्यायिक निर्णय (व्यवहार) का आधार (i) धर्मशास्त्र, (ii) पिछले न्यायिक निर्णय (व्यवहार), (iii) प्रथा (चरित्र), (iv) या संप्रभु के आदेश हो सकता है। इन चारों का अधिकार उल्टे क्रम में है, प्रत्येक पूर्ववर्ती को उसके बाद वाले द्वारा प्रतिस्थापित किया जा रहा है। अर्थ-शास्त्र में एक समान प्रावधान है।

33. इन प्रावधानों पर अधिक ज़ोर नहीं दिया जा सकता। कानून को बदलते रीति-रिवाजों के अनुरूप ढालकर, प्राचीन भारतीय न्यायशास्त्र ने कानून की अवधारणा को एक धर्मनिरपेक्ष अवधारणा दी। इसके अलावा, इसने कानून की विकासवादी अवधारणा की स्थापना की और पूर्ण, शाश्वत, कभी न बदलने वाले कानून की अवधारणा को खारिज कर दिया। मनु और पराशर दोनों ने कहा था, ''कृतयुग के नियम संधि और द्वापर के नियमों से भिन्न हैं, और कलियुग के नियम पिछले सभी युगों से भिन्न हैं; युग- प्रत्येक युग के नियम प्रत्येक युग के विशिष्ट चरित्र (युग रूपानुसरत:) के अनुसार होते हैं।''

प्राचीन भारत में साक्ष्य का नियम

34. साक्ष्य के कानून का अस्तित्व और सबूत के तरीके और मानक एक कानूनी प्रणाली की गुणवत्ता

के सूचकांक हैं। इस संबंध में, भारतीय कानूनी प्रणाली उस समय की किसी भी अन्य कानूनी प्रणाली से अधिक उन्नत थी।

35. प्राचीन समाजों में, अलौकिक उपकरणों द्वारा प्रमाण, जैसे अग्निपरीक्षा द्वारा परीक्षण, काफी आम था। इंग्लैंड में यह मध्य युग के अंत तक कायम रहा। लेकिन हमारी न्यायिक प्रणाली ने मौखिक या दस्तावेजी साक्ष्य उपलब्ध होने पर अलौकिक उपकरणों का सहारा लेने पर रोक लगा दी।

36. किसी भी न्यायिक प्रणाली की वास्तविक परीक्षा यह है कि वह कानून अदालतों को सत्य की खोज करने में सक्षम बनाए, और प्राचीन भारत इस परीक्षा में उच्च स्थान पर है। शोल गौतम ने कहा कि ''विवादों में न्यायालय को गवाहों से यह पता लगाना होता है कि क्या सच है और क्या झूठ है।'' सभी उपलब्ध साक्ष्य यह दर्शाते हैं कि प्राचीन भारत में झूठी गवाही देना बहुत घृणा की दृष्टि से देखा जाता था। मेगस्थनीज के सभी विदेशी यात्री तीसरी शताब्दी ई.पू. 7वीं शताब्दी ई. में हुआन त्सियांग ने गवाही दी कि भारतीयों द्वारा अपने सांसारिक संबंधों में सच्चाई का पालन किया जाता था। मेगस्थनीज के सभी विदेशी यात्री तीसरी शताब्दी ई.पू. – 7वीं शताब्दी ई. में हुआन त्सियांग ने कहा था कि भारतीयों द्वारा अपने सांसारिक संबंधों में सत्यता का पालन किया जाता है। मेगस्थनीज ने लिखा, ''सच्चाई, उनके अनुसार बहुत मूल्यवान है।'' फास हेन और हुआन त्सियांग (जिन्होंने हर्ष के शासनकाल के दौरान भारत का दौरा किया) ने इसी तरह की टिप्पणियां दर्ज कीं। एक हजार वर्षों से प्रचलित एक गुण एक कानूनी परंपरा बन गया।

37. न्यायालयों की प्रक्रिया और माहौल ने झूठ को हतोत्साहित किया। शपथ आज की तरह किसी चपरासी द्वारा नहीं बल्कि स्वयं जज द्वारा दिलाई जाती थी। शपथ देते समय, न्यायाधीश को गवाह को संबोधित करते हुए सत्यता को एक गुण के रूप में प्रचारित करना था और झूठी गवाही को एक भयानक पाप के रूप में निंदा करना था। बृहस्पति ने कहा कि ''धर्मशास्त्र में पारंगत न्यायाधीशों को गवाह को सत्य की प्रशंसा करने वाले और झूठ को उसके दिमाग से दूर करने वाले शब्दों में संबोधित करना चाहिए।'' गवाह को न्यायाधीशों के संबोधन में निर्धारित शब्द नहीं थे बल्कि एक नैतिक उपदेश था जिसका उद्देश्य उसमें ईश्वर का भय पैदा करना था। इस बात पर सभी प्राचीन ग्रंथ एकमत हैं। नारद के अनुसार, ''न्यायाधीशों को नैतिक उपदेशों का हवाला देकर गवाहों में भय पैदा करना चाहिए, जिससे सत्य की महिमा बरकरार रहनी चाहिए और झूठ की निंदा होनी चाहिए।'' इसके अलावा, सभी स्मृतियाँ इस बात पर एकमत थीं कि अदालत के समक्ष झूठी गवाही देना एक जघन्य पाप होने के साथ-साथ एक गंभीर अपराध भी था। झूठे साक्ष्य दिए जाने की संभावना को कम करने के लिए अन्य प्रावधान भी थे। यह सुनिश्चित करना राजा का विशेषाधिकार था कि अदालतों द्वारा गवाहों की जांच में कोई देरी नहीं होनी चाहिए क्योंकि देरी से याददाश्त कमजोर हो जाती है और कल्पना उत्तेजित हो जाती है। कात्यायन ने कहा कि ''राजा को गवाहों की गवाही में देरी के लिए कोई माफी नहीं देनी चाहिए; देरी के कारण बड़ी बुराइयाँ होती हैं और गवाह मुकर जाते हैं।''

प्राचीन भारत में प्रशासनिक संहिता का प्रचलन

38. प्राचीन भारत में राज्य के पास विशाल आयामों वाला एक सार्वजनिक क्षेत्र था जो वाणिज्य और

उद्योग में लगा हुआ था। आधुनिक पश्चिमी और पूंजीवादी धारणा कि राज्य द्वारा कोई उद्योग नहीं चलाया जाना चाहिए, प्राचीन भारतीयों के लिए असंवेदनशील प्रतीत होता। मौर्य साम्राज्य के तहत, एक राज्य व्यापारिक उद्योग, एक राज्य कपड़ा उद्योग, एक राज्य खनन उद्योग और एक राज्य व्यापार विभाग था, जिसका प्रभार क्रमश: नौवहन (नवाध्यक्ष), कपड़ा (सूत्राध्यक्ष), खनन अधीक्षक (अकाराध्यक्ष) और वाणिज्य अधीक्षक द्वारा लिया जाता था। प्रत्येक राज्य उद्योग का विनियमन उसके अपने शासन के अधीन था और सभी नियमों को अर्थशास्त्र में संकलित और वर्गीकृत किया गया था जिसे एक प्रशासनिक संहिता के रूप में माना जा सकता है। मैं कुछ उदाहरण दूंगा।

39. अर्थशास्त्र समुद्री और नदी नेविगेशन के लिए नियम निर्धारित करने वाला एक संपूर्ण प्रशासनिक कोड प्रदान करता है। इसमें प्रावधान किया गया कि राज्य में नेविगेशन का एक अधीक्षक-जनरल होना चाहिए, जिसके कर्तव्यों को इस प्रकार परिभाषित किया गया था: ''जहाजों का अधीक्षक न केवल महासागरों और नदियों के मुहाने पर, बल्कि स्थानिय और अन्य गढ़वाले शहरों के आसपास प्राकृतिक या कृत्रिम झीलों पर भी नेविगेशन से संबंधित खातों की जांच करेगा।'' अर्थशास्त्र में जहाजों की सुरक्षा सुनिश्चित करने के लिए सख्त नियम हैं। इसमें कहा गया है: ''बड़ी नदियों पर नेविगेशन के लिए, जिन्हें सर्दी और गर्मी के मौसम में भी पार नहीं किया जा सकता (अतरया), बड़ी नावों (महानावो) की सेवा होगी, जिसमें एक कप्तान (शसाका), पायलट (नियामका), दरांती और रस्सियाँ पकड़ने और नाव से पानी साफ़ करने के लिए एक दल होगा।''

40. अर्थ-शास्त्र में ऐसे नियम भी शामिल हैं जो दर्शाते हैं कि राज्य व्यापारिक समुद्री उच्च समुद्रों पर संचालित होता है और इसमें प्रावधान है कि ''शाही जहाजों पर बंदरगाह पर आने वाले यात्रियों को उनके मार्ग के पैसे (यात्रा-वेतनम) का भुगतान करना होगा।'' दरें अधीक्षक-जनरल द्वारा तय की जानी थीं। संयोग से, इस संहिता का अस्तित्व बिना किसी संदेह के साबित करता है कि भारत के लोग समुद्री यात्रा करने वाले लोग थे, जिनके विदेशी देशों के साथ व्यापक व्यापारिक संबंध थे।

41. इसी प्रकार, कपड़ा और सूती धागे का निर्माण, जो विदेशों में कपड़ा निर्यात करने वाला एक बड़ा उद्योग था, इसमें सार्वजनिक और निजी क्षेत्र भी था। सार्वजनिक क्षेत्र कपड़ा अधीक्षक (सूत्राध्यक्ष) की देखरेख में था। उनके अधीन एक बड़ा संगठन था। अर्थशास्त्र ने सूत्राध्यक्ष और उसके अधीन काम करने वाले अन्य अधिकारियों के कर्तव्यों को निर्धारित किया। इसके लिए उन्हें 'धागे (सूत्र), कोट (वर्मा), कपड़े (वस्त्र) और रस्सियाँ बनाने के लिए योग्य व्यक्तियों को नियुक्त करने की आवश्यकता थी।' उनके अन्य कर्तव्यों में महिलाओं को उनके ही घर में रोजगार देना भी शामिल था। कपास को उनके बीच वितरित किया गया और धागे में पिरोया गया। या तो विभाग द्वारा एकत्र किया जाता है या महिलाओं द्वारा स्वयं वितरित किया जाता है। लेकिन अर्थशास्त्र में ऐसी महिलाओं के साथ स्वतंत्रता छीनने या उनका वेतन रोकने के खिलाफ सख्त नियम हैं। इसमें निर्धारित किया गया है कि ''यदि अधीक्षक का अधिकारी ऐसी महिला के चेहरे को घूरता है या उसे अपने काम के अलावा अन्य मामलों में बातचीत में शामिल करने की कोशिश करता है, तो उसे ऐसे दंडित किया जाएगा जैसे कि वह पहले हमले का दोषी हो।'' इसमें यह भी प्रावधान किया गया कि वेतन भुगतान में देरी भी इसी तरह दंडनीय होगी। अन्य नियमों के अनुसार किसी भी महिला कर्मचारी को अनुचित लाभ देना

दंडनीय अपराध है। इसमें प्रावधान था कि ''यदि कोई अधिकारी किसी महिला को बिना काम किए वेतन देता है, तो उसे दंडित किया जाएगा।''

II. उपनिवेशवादियों द्वारा प्राचीन भारतीय कानूनी प्रणाली के साथ-साथ वर्तमान भारतीय कानूनी प्रणाली को भी विस्मृति में डाल दिया गया

42. भारत में प्रचलित अत्यधिक परिष्कृत पूर्व-मौजूदा कानूनी प्रणालियों की इतनी समृद्ध परंपरा के बावजूद, हर आक्रमण और कब्जे के साथ विदेशी और विदेशी कानूनी प्रणालियाँ हम पर थोपी गईं। दुर्भाग्य से, 1947 के बाद से भारत के स्वतंत्रता की ओर लौटने के बावजूद, भारतीय कानूनी प्रणाली के कई बुनियादी पहलू अपरिवर्तित बने हुए हैं क्योंकि इन्हें भारत पर ब्रिटिश कब्जे की अवधि के दौरान पेश किया गया था और हम पर थोप दिया गया था। यह इस तथ्य के बावजूद है कि भारत में दुनिया की सबसे पुरानी न्यायपालिका है और दुनिया में किसी अन्य न्यायिक प्रणाली की इतनी प्राचीन या उत्कृष्ट वंशावली नहीं है। इस प्रकार, पहले से मौजूद कानूनी प्रणालियों की अनुपस्थिति की आड़ में भारत की कानूनी प्रणाली पर औपनिवेशिक कब्ज़ा शोचनीय था और यह दुखद है कि उसी औपनिवेशिक कानूनी प्रणाली को आज 2021 में भी बड़े पैमाने पर अपरिवर्तित तरीके से जारी रखा जा रहा है।

43. फिर भी, प्राचीन भारतीय कानूनी प्रणाली के कुछ पहलुओं को आधुनिक भारत की पश्चिम-प्रभुत्व वाली कानूनी प्रणाली में भी देखा जा सकता है। आइए न्यायिक स्वतंत्रता की आवश्यक विशेषता का उदाहरण लें। न्यायिक स्वतंत्रता का सिद्धांत ब्रिटिश शासन से उत्पन्न नहीं हुआ। जैसा कि मैंने पहले कहा है, प्राचीन भारत में इसे पूरी तरह से समझा और लागू किया गया था। कात्यायन और अन्य सभी विद्वान कानून-निर्माताओं ने न्यायाधीशों के राजा से भी स्वतंत्र और निडर होने के सर्वोच्च महत्व पर जोर दिया।

44. 1947 में स्वतंत्रता प्राप्ति के बाद भारतीय न्यायपालिका ने न्यायिक स्वतंत्रता और अखंडता की प्राचीन भारतीय परंपरा को बरकरार रखा है। सुप्रीम कोर्ट ने मिसाल कायम की है और उसकी स्वतंत्रता का रिकॉर्ड दुनिया में किसी से पीछे नहीं है। उच्च न्यायालयों ने भी, कुल मिलाकर, उच्च स्तर की स्वतंत्रता बनाए रखी है, और न्यायाधीशों द्वारा कार्यपालिका का पक्ष लेने के मामले दुर्लभ हैं। सबसे अधिक प्रशंसा हमारी अधीनस्थ न्यायपालिका - मुंसिफों, सिविल न्यायाधीशों और जिला न्यायाधीशों को होनी चाहिए, जिन्होंने विभिन्न समुदायों और जातियों के नागरिकों के बीच निष्पक्ष न्याय किया है, और जिनका रिकॉर्ड ब्रिटिश न्यायाधीशों के साथ बहुत अनुकूल है, जो भारतीयोंऔर ब्रिटिश वादी के बीच हमेशा निष्पक्ष नहीं। इस प्रकार, भारतीय न्यायाधीश प्राचीन विद्वान बृहस्पति के आदेश पर खरे उतरे हैं, जिन्होंने कहा था कि एक न्यायाधीश को व्यक्तिगत लाभ या पूर्वाग्रह के किसी भी उद्देश्य के बिना मामलों का फैसला करना चाहिए और उसके निर्णय कानून के अनुसार होने चाहिए।

III. वर्तमान कानूनी व्यवस्था की कमजोरी और इसके उपनिवेशीकरण की आवश्यकता

प्राचीन भारतीय कानूनी प्रणाली के त्याग के कारण आधुनिक भारतीय कानूनी प्रणाली के लिए सैद्धांतिक विरासत का अभाव

45. आज हमारी कानूनी व्यवस्था की सबसे बड़ी कमजोरी यह है कि भारतीय कानूनी विरासत से अलग होने के कारण इसमें सैद्धांतिक पोषण का अभाव है। किसी देश की कानूनी व्यवस्था पर प्राचीन विद्वानों सहित न्यायविदों के सिद्धांतों का प्रभाव गहरा होता है, भले ही यह अदृश्य और अवचेतन प्रतीत हो। एक महान अमेरिकी न्यायाधीश, ओलिवर वेंडेल होम्स ने लिखा है कि उस समय की महसूस की जाने वाली आवश्यकताएं, प्रचलित नैतिक और राजनीतिक सिद्धांत, सार्वजनिक नीति की संस्थाएं, घोषित या अचेतन, यहां तक कि पूर्वाग्रह जो न्यायाधीश अपने साथियों के साथ साझा करते हैं, उन नियमों को निर्धारित करने में न्यायशास्त्र से भी अधिक भूमिका है। एक अन्य महान अमेरिकी न्यायाधीश, बेंजामिन कोर्डोज़ो ने कहा था कि तर्क, इतिहास और रीति-रिवाज, और सही आचरण के स्वीकृत मानक, ऐसी ताकतें हैं जो अकेले या संयोजन में कानून की प्रगति को आकार देते हैं। रोस्को पाउंड का यह भी विचार था कि वर्तमान नैतिक विचारों और नैतिक रीति-रिवाजों को अदालतों द्वारा लगातार लागू किया जाता है, हालांकि शायद ही कभी जानबूझकर।

46. भारत के सर्वोच्च न्यायालय ने यह भी कहा है कि यह निर्धारित करने में कि मौलिक अधिकार पर कोई प्रतिबंध उचित है या नहीं। तर्कसंगतता का कोई अमूर्त परीक्षण नहीं है और यह अपरिहार्य है जो उस समय की प्रचलित परिस्थितियों और सामाजिक दर्शन के अनुसार मिलता है। न्यायाधीशों को तर्कसंगतता के निर्धारण में महत्वपूर्ण भूमिका निभानी चाहिए। प्राचीन भारत में, न्यायाधीशों को ज्ञान की सभी शाखाओं के साथ-साथ न्यायशास्त्र और सरकार के विज्ञान (धर्मशास्त्र, कुशलै रर्थ शास्त्र विशारदाई) में पारंगत होना आवश्यक था। लेकिन आज का क्या? आज भारतीय न्यायाधीश जिस सामाजिक दर्शन पर पले-बढ़े हैं, उसमें कानूनी क्या है?

47. इंग्लैंड, पश्चिमी यूरोप और संयुक्त राज्य अमेरिका में, न्यायाधीशों और वकीलों को सदियों से विकसित हो रही अपनी सभ्यता के न्यायशास्त्र से निरंतर प्रेरणा और शिक्षा प्राप्त हुई है। इसी प्रकार, रूस में न्यायिक प्रक्रिया मैक्सिकन न्यायशास्त्र से पोषण प्राप्त करती है जो लगातार विकसित हो रही है। लेकिन भारतीय जजों या वकीलों को इसकी प्रेरणा कहां से मिलती है? अपनी सभ्यता के न्यायशास्त्र से नहीं. वह रोमन कानून और पश्चिमी न्यायविदों के सिद्धांतों के बारे में कुछ जानता है लेकिन अपनी सभ्यता के कानून और न्यायशास्त्र के विकास के बारे में बहुत कम जानता है। भारतीय विश्वविद्यालय में कानून की डिग्री के पाठ्यक्रम में भारतीय न्यायशास्त्र या प्राचीन भारत में राज्य के सिद्धांत या भारतीय कानून का इतिहास शामिल नहीं है। नतीजतन, न्यायिक प्रक्रिया एक सैद्धांतिक आधार के बिना, या अन्य देशों में अन्य संरचनाओं का समर्थन करने वाली नींव पर निर्मित एक इमारत है।

48. एक उदाहरण देने के लिए, मनु अपराध के लिए सार्वजनिक निंदा को दंड के रूप में निर्धारित करता है। इस प्रावधान को सोवियत आपराधिक संहिता द्वारा भी अपनाया गया था लेकिन मैकाले

द्वारा तैयार भारतीय दंड संहिता इसे पूरी तरह से नजरअंदाज करती है, हालांकि यह कई मामलों में सजा का एक प्रभावी रूप हो सकता है। जाहिर तौर पर रूसी न्यायविद भारतीयों की तुलना में भारतीय न्यायशास्त्र का अधिक सम्मान करते थे।

49. भारत में कानूनी और न्यायिक अध्ययन का निम्न स्तर आज एक जरूरी समस्या पैदा करता है। दूसरी ओर, हमारे उच्च न्यायालयों और सर्वोच्च न्यायालय को संविधान की व्याख्या करने और राज्य के किसी भी कानून या अधिनियम को इस आधार पर अमान्य घोषित करने की शक्ति प्राप्त है कि यह असंवैधानिक या अवैध है, या नागरिकों के मौलिक अधिकारों पर प्रतिबंधक है। सर्वोच्च न्यायालय द्वारा घोषित कानून की भारत के पूरे क्षेत्र में बाध्यकारी सर्वोच्चता है, और इसकी अपीलीय शक्तियां दुनिया की किसी भी अन्य संघीय अदालत की तुलना में व्यापक हैं। संविधान की व्याख्या और आर्थिक प्रगति के साथ कानून के शासन के निर्णय के लिए हमारे न्यायाधीशों को भारतीय न्यायशास्त्र और सामाजिक विज्ञान का गहन ज्ञान और न्यायिक प्रक्रिया में सामाजिक विकास के कानून को लागू करने की क्षमता की आवश्यकता होती है। दूसरी ओर, हमारे विश्वविद्यालयों और लॉ कॉलेजों में कानूनी शिक्षा का स्तर बहुत कम है। खराब कानूनी शिक्षा कमज़ोर न्यायविद और न्यायाधीश बनाती है। जो लोग हमारे भावी न्यायाधीश होंगे उनकी शक्ति और बौद्धिक उपकरणों के बीच वर्तमान असमानता एक ऐसी समस्या पैदा करती है जिसे केवल हमारे जोखिम पर ही नजरअंदाज किया जा सकता है।

50. मैं इस पक्ष में हूं कि विश्वविद्यालय सर्वोत्तम पश्चिमी विचार और विज्ञान पढ़ाए। लेकिन भारतीय न्यायशास्त्र और दर्शन, राजनीतिक दर्शन की लगभग पूर्ण उपेक्षा प्रत्येक भारतीय वकील और न्यायाधीश की शिक्षा को अधूरा छोड़ देती है। मैं इस निष्कर्ष पर पहुंचा हूं कि भारतीय कानूनी अध्ययन की नींव भारतीय न्यायशास्त्र का अध्ययन होना चाहिए और प्रत्येक भारतीय विश्वविद्यालय को कानून स्नातक की डिग्री के लिए इसे एक अनिवार्य विषय के रूप में शामिल करना चाहिए।

51. मैं मानता हूं कि भारतीय न्यायशास्त्र में बहुत कुछ ऐसा है जो आज पुराना हो चुका है। लेकिन यह न्यायशास्त्र की हर प्रणाली के लिए सच है। ग्रीक और रोमन सभ्यता गुलामी पर आधारित थी। यूरोप में 17वीं शताब्दी के अंत तक राजाओं का दैवीय अधिकार कायम रहा। तर्क के नियम की पहचान अक्सर ईसाई ईश्वर के नियम से की जाती थी। यूरोप में विश्वास या पूजा की कोई स्वतंत्रता नहीं थी, और विधर्म के अपराध के लिए कई लोगों को जिंदा जला दिया गया था। महिलाओं को डायन होने के अपराध में और पुरुषों को शैतान के साथ संबंध रखने के अपराध में जला दिया गया। पश्चिमी यूरोप में कानून और न्याय को अपमानित करने वाली कुछ अजीबोगरीब बेतुकी बातें भारतीय न्यायशास्त्र में अनुपस्थित हैं।

52. पश्चिमी कानूनी प्रणालियों की बेतुकी बातों के उदाहरण के रूप में, जो भारतीय कानूनी प्रणाली से अनुपस्थित थीं। मैं 17वीं शताब्दी तक यूरोप में होने वाले आपराधिक अपराधों के लिए जानवरों पर मुकदमा चलाने की अनोखी प्रथा का उल्लेख करूंगा। कीटन के 'एलिमेंट ऑफ ज्यूरिसप्रुडेंस' के अनुसार, जर्मनी में, एक बार एक मुर्गे को कैदी के बक्से में पूरी तरह से रखा गया था, और उस पर अनुचित तरीके से शोर करने का आरोप लगाया गया था। प्रतिवादी का वकील अपने पंख वाले

मुवक्किल की बेगुनाही को स्थापित करने में विफल रहा, और तदनुसार दुर्भाग्यपूर्ण पक्षी को मारने का आदेश दिया गया। इसी तरह, 1508 में, प्रोवेंस में कॉन्टेस के कैटरपिलरों पर मुकदमा चलाया गया और खेतों को बर्बाद करने के लिए उनकी निंदा की गई, और 1545 में, सेंट जीन डे-मॉरिएन के बीटल्स को भी इसी तरह दंडित किया गया। प्राचीन भारत की न्यायिक प्रणालियों में इन बेतुकी बातों के लिए कोई जगह नहीं है।

प्राचीन भारतीय कानूनी प्रणाली और औपनिवेशिक कानूनी प्रणाली के तहत अधिकारों और कर्तव्यों की पूरी तरह से असमान अवधारणाएँ

53. भारतीय और पश्चिमी न्यायशास्त्र के बीच एक महत्वपूर्ण अंतर अधिकारों और कर्तव्यों के प्रति उनका दृष्टिकोण है। वे दोनों प्रणालियों में सहसंबद्ध हैं, लेकिन जोर अलग है। भारतीय उत्तरदाताओं में दायित्वों पर जोर दिया गया है। वास्तव में, पूरे अनुशासन पर्व या अर्थशास्त्र में एक बार भी अधिकार शब्द का प्रयोग नहीं हुआ है। भारतीय न्यायशास्त्र उन सिद्धांतों पर आधारित है जो इस बात पर जोर देते हैं कि अधिकार कर्तव्यों के परिणाम हैं। यहां तक कि अभिव्यक्ति की स्वतंत्रता को भी बिना किसी डर के बोलने के कर्तव्य के रूप में मान्यता दी गई है। दूसरी ओर, पश्चिमी न्यायशास्त्र में, अधिकार, प्राकृतिक या कानूनी, या प्राथमिक, हालांकि प्रत्येक अधिकार के साथ एक समान कर्तव्य भी होना चाहिए। एक ओर अधिकारों और दूसरी ओर दायित्वों पर इस जोर का विवाह जैसी सामाजिक संस्थाओं पर महत्वपूर्ण प्रभाव पड़ा है। भारतीय न्यायशास्त्र के तहत, विवाह एक कर्तव्य था, कई सामाजिक दायित्वों में से एक के रूप में किया जाने वाला कार्य था, जिसे हर किसी को निभाना पड़ता था। लेकिन अधिकारों पर विचार करने वाली पश्चिमी सोच के परिणामस्वरूप विवाह को एक ऐसे गठबंधन के रूप में देखा जाने लगा, जिससे प्रत्येक साथी जितना हो सके उतना प्राप्त करने का प्रयास करता है। तलाक की उच्च दर विवाह के कर्तव्य पहलुओं की उपेक्षा का परिणाम है।

IV. भारतीय कानूनी प्रणाली के लिए आगे का रास्ता

54. अब तक हमने जो कुछ भी कहा है, उसके आलोक में हमारी कानूनी प्रणाली के भविष्य के मॉडल पर सवाल उठाना चाहिए। कानूनी व्यवस्था शून्य में संचालित नहीं होती। न्याय प्रशासन एक सामाजिक और न्यायिक प्रक्रिया है और कानूनी प्रक्रिया बड़ी सामाजिक प्रगति प्रक्रिया का ही एक हिस्सा है। इसलिए, कानून की अदालतें सामाजिक उद्देश्यों या 'समय की क्षेत्रीय आवश्यकताओं' की अवज्ञा या अज्ञानता में कार्य नहीं कर सकती हैं, जैसा कि जस्टिस होम्स ने उन्हें कहा था। लैटिन कहावत %फिएट फिएट यूस्टिसिया एट पेरेट मुंडेस% यानी, न्याय किया जाना चाहिए भले ही किरणें गिरें, न्यायाधीशों की निष्पक्षता की असंभवता पर जोर देती है लेकिन न्यायपालिका को सामाजिक आवश्यकताओं के प्रति उदासीन होने की अनुमति नहीं देती है।

55. भारतीय न्यायपालिका की भूमिका को राष्ट्र के सामाजिक उद्देश्यों से अलग नहीं किया जा सकता है। हमारे संविधान ने भारतीय लोगों के सामने पश्चिमी और समाजवादी जीवन शैली के संश्लेषण, व्यक्तिगत, स्वतंत्रता और सामाजिक नियंत्रण, लोकतंत्र की सुरक्षा और संरक्षण और राजनीतिक और आर्थिक स्वतंत्रता में अराजकता को खत्म करने का महत्वाकांक्षी लक्ष्य रखा है। मेरा यह मतलब नहीं समझा जाना चाहिए कि पश्चिमी लोकतंत्रों में बिल्कुल भी राजनीतिक स्वतंत्रता नहीं है। अंतर जोर देने

में है। हमारा संविधान राज्य की भूमिका और व्यक्तियों के अधिकारों और स्वतंत्रता के बीच संतुलन हासिल करने का प्रयास करता है। यह संवैधानिक कानून के क्षेत्र में गुटनिरपेक्षता की भावना को दर्शाता है। उद्योग पर सामाजिक नियंत्रण भारतीय परंपरा के अनुरूप है। मैंने पहले ही संकेत दिया है कि प्राचीन भारत में राज्य के पास एक विशाल सार्वजनिक क्षेत्र था, और अर्थशास्त्र कीमतें बढ़ाने के लिए बाजार पर कब्ज़ा करने जैसी व्यापार प्रथा का निषेध करता है। भारतीय संविधान ने हमारे लोगों के सामने एक बहुत ही महत्वाकांक्षी और कठिन लक्ष्य रखा है। संविधान अमूर्त सिद्धांतों का संग्रह नहीं है, न ही यह शून्य में संचालित होता है। यह जीवन के एक ऐसे तरीके को दर्शाता है जो विशेष लोगों को इन उद्देश्यों और महत्वाकांक्षाओं को साकार करने में सक्षम बनाता है। यदि वह ऐसा करने में विफल रहता है, तो इसे समझौते या अन्यथा द्वारा संशोधित या खारिज कर दिया जाएगा। संविधान के उद्देश्यों को प्राप्त करने में सक्षम होने के लिए, कानून के सिद्धांतों और प्रथाओं के प्रति उचित सम्मान होना चाहिए जो गोलू को लिज़्म के पास बुलाने के आगमन से पहले सदियों से भारत में प्रचलित थे।

56. यह कहना कोई अतिश्योक्ति नहीं होगी कि हमारे भावी वकीलों और न्यायाधीशों की योग्यता, बुद्धिमत्ता और देशभक्ति काफी हद तक भारत में कानून के शासन और संसदीय लोकतंत्र के भविष्य पर निर्भर करती है। ऐसे वकील और जज भारत की सामाजिक धरती से ही विकसित होंगे और यहीं के सामाजिक वातावरण से पोषित होंगे। महान वकील और न्यायाधीश पैदा हुए हों या न हुए हों, लेकिन वे उचित शिक्षा और महान कानूनी परंपराओं से बने होते हैं, जैसे मनु, कौटिल्य, कात्यायन, बृहस्पति, नारद, पराशर, याज्ञवल्क्य और प्राचीन भारत के अन्य कानूनी दिग्गज थे। महान ज्ञान की निरंतर उपेक्षा और विदेशी औपनिवेशिक कानूनी प्रणाली का पालन हमारे संविधान के लक्ष्यों के लिए हानिकारक है और हमारे राष्ट्रीय हित के खिलाफ है।

57. वर्तमान भारतीय कानूनी व्यवस्था में न्याय प्रशासन में एक औपनिवेशिक मानस कायम है। ब्रिटिश उपनिवेशवादियों ने अपने शासकों को अपने अधिकार सौंपने पर ही अपनी प्रजा की रक्षा की। दूसरे शब्दों में, न्याय की मांग नहीं की जा सकती थी, बल्कि राज्य द्वारा रियायत के तौर पर इसकी अनुमति दी जाती थी। यह प्राचीन भारतीय कानूनी प्रणालियों के विपरीत है, जहां न्याय की मांग की जा सकती थी, यह एक ऐसी अवधारणा थी जो अंतर्निहित थी। जैसा कि मैंने पहले बताया है, प्राचीन भारतीय कानूनी प्रणालियों के लिए राजाओं को भी कानून के शासन के सामने झुकना पड़ता था, और न्याय की मांग रिश्तेदारों या स्वयं राजा के खिलाफ भी की जा सकती थी। इस दृष्टिकोण के बजाय, ब्रिटिश उपनिवेशवादियों द्वारा छोड़ी गई औपनिवेशिक मानसिकता आज अदालतों में जिस तरह से दलीलों का मसौदा तैयार किया जाता है, जिस तरह से अदालतों को संबोधित किया जाता है, और, सबसे महत्वपूर्ण बात, अदालतों तक पहुंच से स्पष्ट है।

58. आज, न्याय की मांग नहीं की जाती बल्कि विनम्र शब्दों में प्रार्थना की जाती है। न्यायाधीशों को लॉर्डशिप्स और लेडीशिप्स के रूप में संबोधित किया जाना जारी है। सामान्य वादकारी अक्सर दूर की उच्च अदालतों में मुकदमेबाजी का खर्च वहन करने में असमर्थ होता है, यह प्रथा ब्रिटिश उपनिवेशवादियों द्वारा प्रिवी काउंसिल के साथ शुरू की गई थी।

59. इसके अलावा, मामलों के बढ़ते बैकलॉग का मतलब है कि न्यायाधीश असहाय हो गए हैं, भले ही वे सामान्य वादी की मदद करना चाहते हों। बड़ी संख्या में मामले लंबित होने का मतलब है कि यह अन्याय की बजाय अन्याय की डिग्री है जो यह निर्धारित करती है कि अदालतों द्वारा राहत दी जाएगी या नहीं। यह कि कानून छोटे-मोटे मामलों की भी उपेक्षा करता है, यह भी औपनिवेशिक मानसिकता का एक हिस्सा है।

60. इसमें कोई संदेह नहीं है कि यह औपनिवेशिक कानूनी प्रणाली भारतीय आबादी के लिए उपयुक्त नहीं है। कानूनी व्यवस्था का भारतीयकरण समय की मांग है। ऐसी औपनिवेशिक मानसिकता के उन्मूलन में समय लग सकता है, लेकिन मुझे उम्मीद है कि मेरे शब्द आपमें से कुछ लोगों को इस बारे में गहराई से सोचने और भारतीय कानूनी प्रणाली को उपनिवेश से मुक्त करने के लिए उठाए जाने वाले कदमों के बारे में सोचने के लिए प्रेरित करेंगे। भले ही यह एक बहुत बड़ा और समय लेने वाला प्रयास हो सकता है, मेरा दृढ़ विश्वास है कि यह एक योग्य प्रयास होगा जो भारतीय कानूनी प्रणाली को पुनर्जीवित कर सकता है और इसे हमारे महान राष्ट्र के सांस्कृतिक, सामाजिक और विरासत पहलुओं के साथ जोड़ सकता है, न्याय की अधिक मजबूत डिलीवरी और बहुत कुछ सुनिश्चित कर सकता है।

क्लिनिकल विधिक शिक्षा में 'लीगल एड क्लीनिक' के प्रायोगिक अनुभवों का समावेश : अवसर व चुनौतियां

शैलेष कुमार पांडेय *

हमारे देश भारत में आज हजारों की संख्या में विधिक शिक्षण संस्थान कार्यरत हैं एवं देश में कानून की पढ़ाई करवा वह भविष्य के जज, वकील, कारपोरेट लायर्स और विधिज्ञाता तैयार करने में वृहद भूमिका निभा रहे हैं। अन्य देशों की तुलना में भारत निश्चित तौर पर कानूनी शिक्षा को बढ़ावा देने में सफल रहा है एवं दिन प्रतिदिन सभी युवाओं का रुझान कानूनी डिग्री लेने की तरफबढ़ रहा है। देश में अगर कोई भी संस्था विधि की पढ़ाई पर स्नातक व स्नातकोत्तर स्तर की डिग्री देना चाहती है तो उसे अनिवार्य रूप से बार काउंसिल ऑफ इंडिया में पंजीकृत होकर बार काउंसिल द्वारा निर्धारित पाठ्यक्रम एवं मापदंडों का कड़ाई से पालन करना अनिवार्य है। देश के विधि संबंधी शिक्षा की गुणवत्ता बनाए रखने हेतु समय-समय पर बार काउंसिल ऑफइंडिया के द्वारा नए नए नियम एवं संशोधन लाकर कानूनी शिक्षा को बेहतर एवं सुदृढ़ बनाने का प्रयास किया जाता रहा है।

I. क्लिनिकल विधिक शिक्षा का अर्थ

क्लिनिकल विधिक शिक्षा का अर्थ है एक ऐसी शिक्षा जिसमें प्रायोगिक विधिक अनुभवों का पाठ्यक्रम के साथ एक शानदार समावेश कर यह सुनिश्चित किया जाता है कि समस्त छात्र-छात्राओं विधि की सैद्धांतिक बातों के साथ-साथ प्रायोगिक ज्ञान का भी लाभ एवं अनुभव मिलता रहे । इस प्रकार की शिक्षा की शुरुआत बीसवीं सदी के प्रारंभिक दौर में अमेरिका से हुई एवं धीरे-धीरे को देशों ने इस पद्धति को अपनाया। हमारा भारत आज भी इस शानदार शिक्षा पद्धति का लाभ लेने में पूर्ण रूप से सफल नहीं हो सका है।[1]

क्लिनिकल विधिक शिक्षा का विकास बीसवीं सदी के दौरान यूनाइटेड स्टेट्स ऑफ अमेरिका में होना शुरू हुआ था और इसके विकास के पीछे मुख्य कारण सैद्धांतिक एवं प्रायोगिक कानूनी ज्ञान के बीच सामंजस्य ना बैठा पाना था।[2] उस दौरान विधिक शिक्षण संस्थान एवं लॉ यूनिवर्सिटी सिर्फ सैद्धांतिक ज्ञान को बढ़ावा दे रही थी लेकिन प्रायोगिक ज्ञान को बढ़ाने एवं विकसित करने हेतु किसी भी प्रकार का कोई कदम नहीं उठाया जा रहा था इसी वजह से इस समस्या का उचित समाधान करने हेतु विधिक शिक्षण संस्थानों में प्रायोगिक ज्ञान को बढ़ाने की ओर ध्यान दिया गया और क्लिनिकल लीगल एजुकेशन के संदर्भ में वर्तमान में लीगल एड क्लिनिक अमेरिका के विभिन्न विश्वविद्यालयों में स्थापित की गई हैं जिनके जरिए पढ़ने वाले छात्र-छात्राएं प्रायोगिक ज्ञान भी हासिल करने में सफल हो रहे हैं।[3]

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* शोधार्थी, हिदायतुल्लाह राष्ट्रीय विधि विश्वविद्यालय, नया रायपुर, छत्तीसगढ।

1 S. Wizner, "The law school clinic: Legal education in the interests of justice" 70 *Fordham L. Rev.* 1929 (2001).

2 A.G. Amsterdam, "Clinical Legal Education—A 21st Century Perspective" 34 *J. Legal Education* 612 (1984).

3 G.S. Grossman, "Clinical legal education: History and diagnosis" 26 *J. Legal Educ.* 162 (1973).

भारत में क्लीनिकल विधिक शिक्षा का विकास एवं विस्तार अमेरिका में चल रहे लीगल एड क्लीनिक के तर्ज पर ही किया गया एवं विगत 20 वर्षों में अमेरिका में हुए व्यापक क्लीनिकल वैदिक शिक्षा संबंधी बदलाव को भारत में भी भली–भांति लागू करने का प्रयास किया गया। अब अमेरिका में क्लिनिकल विधिक शिक्षा संबंधी कार्यक्रमों मात्र उद्देश्य लीगल एड पर आधारित नहीं है वरन वह अब कानूनी शिक्षा को सुदृढ़ बनाने एवं अकादमिक वृद्धि हेतु क्लीनिकल विधिक शिक्षा का उपयोग कर रहे हैं वहीं, दूसरी ओर भारत में अभी क्लीनिकल विधिक शिक्षा पूरी तरह लीगल एड क्लीनिक एवं उससे जुड़े हुए संस्थानों के द्वारा बनाए गए नियमों एवं प्रणाली पर ही आधारित है। नियम अब बदलने की जरूरत है ताकिए समाज में बदल रहे परिवेश और परिदृश्य के अनुसार क्लीनिकल विधिक शिक्षा को भी और बेहतर बनाया जा सके।[4]

फेलिक्स के मुताबिक, 'कानूनविद एवं वकील वही बनते हैं जो विधिक शिक्षण संस्थान उन्हें बनाते हैं' स्टीफन के अनुसार विधिक शिक्षा जन कल्याण करें महत्वपूर्ण संबंध है अत: शिक्षण संस्थानों में प्राप्त अनुभव एवं ज्ञान का प्रयोग वकील एवं लीगल प्रोफेशनल्स समाज के कल्याण में करते हैं साथ ही साथ जी के छात्र छात्राओं का सामाजिक न्याय एवं समाज में हो रहे किसी भी अन्याय के विरुद्ध आवाज उठाने की इच्छा शक्ति को भी क्लीनिकल कानूनी शिक्षा के जरिए विकसित किया जा सकता है। एक कानून के छात्र छात्राओं को नैतिक मूल्यों व्यवसायिक कार्यप्रणाली और सामाजिक जिम्मेदारियों को भली–भांति समझाने हेतु क्लीनिकल विधिक शिक्षा का शानदार प्रयोग किया जा सकता है।[5]

कोलंबिया लॉ स्कूल के प्राध्यापक लीवलिन द्वारा भी यह स्पष्ट किया गया था कि आधारभूत कानूनी शिक्षा को बदलकर व्यवहार परख एवं प्रायोगिक कानूनी शिक्षा को अपनाने की तो जरूरत है और प्रायोगिक अनुभवों को लॉ कॉलेज एवं यूनिवर्सिटीज के द्वारा क्लीनिकल विधिक शिक्षा के माध्यम से ही प्रचारित प्रसारित एवं लागू किया जा सकता है।[6]

इस शोध प्रपत्र के जरिए विधिक शिक्षण संस्थानों में स्थापित लीगल एड क्लीनिक के छात्रों की शिक्षा में और भी अधिक योगदान देने हेतु जरूरी रचनात्मक सुझाव पर विमर्श एवं उचित टिप्पणी प्रस्तुत की जा रही है।

महान जूरिस्ट जेरोम फ्रैंक के द्वारा स्पष्ट तौर पर यह कहा गया की क्लीनिकल विधिक शिक्षण संस्थानों को हकीकत में स्थापित करना एक शानदार कदम हो सकता है क्योंकि इन संस्थानों के जरिए सिद्धांतों और प्रायोगिक विज्ञान में बढ़ रही दूरियों को जा सकता है एवं कानून की पढ़ाई कर रहे छात्र–छात्राओं को बेहतर समझ और उपयोगी शिक्षा उपलब्ध कराई जा सकती है।[7]

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4 Lee Dexter Schinasi, "Globalizing: Clinical Legal Education: Successful Under-Developed Country Experiences" 6 *T.M. Cooley J. Prac. & Clinical L.* 129 (2003).

5 Wizner, *supra* note 1.

6 K.N. Llewellyn, "On What Is Wrong with So-Called Legal Education" 35 *Colum. L. Rev.* 651 (1935).

7 T. Mkwebu,, "A systematic review of literature on clinical legal education: a tool for researchers in responding to an explosion of clinical scholarship" 22(3) *International Journal of Clinical Legal Education* 238-274 (2015).

इंटरनेशनल जर्नल ऑफ क्लिनिकल लीगल एजुकेशन के 2008 अंक में प्रकाशित शोध प्रपत्र के अनुसार आयरलैंड की राष्ट्रीय संस्था ने क्लीनिकल विद्युत शिक्षण पाठ्यक्रम को लगभग 50 वर्ष पूर्व अपनाया था जिसके तहत महत्वपूर्ण कौशल विकास संबंधी कदम उठाए गए सुखद परिणाम भी लगातार देखने को मिल रहे हैं।[8]

मार्गरिट बारी के अनुसार भारतीय विधिक शिक्षा के जनक डॉक्टर माधव मेनन ने ग्लोबल एलाइंस फॉर जस्टिस एजुकेशन कॉन्फ्रेंस में यह स्पष्ट किया था कि क्लीनिकल विधिक शिक्षा भारत के विधिक शिक्षा की एक नई क्रांति लाएगी और एक कानून के छात्र या छात्रा को सभी महत्वपूर्ण से परिपूर्ण करने मेक महत्वपूर्ण भूमिका निभाएगी।[9]

सन 1973 में बनी हाई लेवल कमिटी ने सुझाव दिया था कि भारत में विधिक शिक्षा के उन्नयन एवं विकास यह अत्यंत आवश्यक हो गया है जी कानूनी शिक्षा से जुड़े सभी संस्थानों में क्लिनिकल लीगल एजुकेशन हेतु विधिक सहायता केंद्र अथवा लीगल एड क्लिनिक स्थापित की जाए। अंततः 1981 में इसे अमल में लाने का प्रस्ताव दे दिया गया लेकिन इसके बावजूद बार काउंसिल एवं विधिक शिक्षण संस्थानों ने इस प्रस्ताव को गंभीरता से लागू करने के तरफ प्रयास नहीं किया। सन 1994 में अहमदी कमेटी ने देश के श्रेष्ठतम विधिक संस्थानों में और नेशनल लॉ यूनिवर्सिटी में क्लीनिकल लीगल एजुकेशन को बढ़ावा देने के लिए लीगल एड क्लीनिक के स्थापना पर भी भरपूर जोर दिया ताकि भारत की विधिक जरूरतों को पूर्ण करने हेतु ऐसे लॉ ग्रैजुएट्स तैयार किए जा सके जो सभी महत्वपूर्ण कौशलों एवं कानूनी ज्ञान से परिपूर्ण हो।[10]

भारत में क्लीनिकल विधिक शिक्षा के विस्तार एवं विकास का कार्य मूल रूप से राष्ट्रीय स्तर पर 1970 के दशक में चलाए जा रहे राष्ट्रीय लीगल एड मूवमेंट के विकास एवं विस्तार में विधिक शिक्षण संस्थानों की सहभागिता को बढ़ावा देने के उद्देश्य से किया गया था।[11] इसका मूल उद्देश्य यह था कि कानून की पढ़ाई कर रहे छात्र छात्राएं अपनी नैतिक जिम्मेदारियों को समझें एवं समाज के उपेक्षित वर्ग को नए प्राप्ति हेतु प्रोत्साहित कर सके एवं सामाजिक सुधार के सेनानी बनकर ऐसे लीगल प्रोफेशनल्स बने जो सामाजिक न्याय के लिए सकारात्मक भूमिका निभा सकें।[12]

8 L. Donnelly, "Irish Clinical Legal Education Ab Initio: Challenges and Opportunities" 13 *International Journal of Clinical Legal Education* 56-64 (2008).

9 M.M. Barry et.al., "Clinical education for this millennium: The third wave" 7 *Clinical L. Rev. 7* (2000).

10 *Ibid.*

11 N. Vasanthi, "Strengthening Clinical Legal Education in India" 42(4) *Social Change* 443-449 (2012).

12 S.P. Sarker, "Empowering the underprivileged: The social justice mission for clinical legal education in India" *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* 177-193 (2015).

II. क्लीनिकल विधिक शिक्षा हेतु स्थापित लीगल एड क्लीनिक से संबंधित महत्वपूर्ण कानूनी प्रावधान

बार काउंसिल ऑफ इंडिया रूल फॉर लीगल एजुकेशन-लीगल एड क्लीनिक

सन 2008 में बार काउंसिल ऑफ इंडिया द्वारा लीगल एजुकेशन रूल्स 2008 की सहायता से सभी विधिक शिक्षण संस्थानों में लीगल एड क्लीनिक की स्थापना का नियम बनाया गया था।[13] जिसके तहत देश में कानून की पढ़ाई करवा रहे सभी शैक्षणिक संस्थानों को अपने संस्थान के अंतर्गत एक सुचारू रूप से संचालित लीगल एड क्लीनिक का संचालन अनिवार्य रूप से करना था। हालांकि नियम होने के बावजूद इन लीगल एड क्लीनिक के गुणवत्ता और गतिविधियों का किसी भी प्रकार से गुणवत्ता आकलन नहीं किया गया जिसके फलस्वरूप लीगल एड क्लीनिक का जो फायदा शैक्षणिक संस्थानों में कानून की पढ़ाई कर रहे छात्र-छात्राओं को मिल सकता था अब तक मिल ना सका है।

बार काउंसिल ऑफ इंडिया के 2008[14] में बनाए गए नियम के अलावा वर्ष 2011 में राष्ट्रीय विधिक सेवा प्राधिकरण के द्वारा समस्त जिला विधिक सेवा प्राधिकरण को शैक्षणिक संस्थानों में लीगल सर्विस क्लीनिक की स्थापना हेतु उचित एवं आवश्यक कदम उठाने का आदेश भी जारी किया गया था। जिसके तहत मौजूदा समय में जिला विधिक सेवा प्राधिकरण द्वारा वित्तीय सहायता एवं संस्थागत ट्रेनिंग के जरिए लीगल एड क्लिनिक स्थापित किए जा रहे है।

राष्ट्रीय विधिक सहायता प्राधिकरण लीगल सर्विस क्लिनिक नोटिफिकेशन 2011

लीगल सर्विस क्लिनिक नियम 2011[15] के नोटिफिकेशन के तहत नियम 22[16] कानूनी शिक्षण संस्थानों में स्थापित लीगल एड क्लिनिक का स्पष्ट रूप से उल्लेख करता है और यह भी सुनिश्चित करता है कि इस नियम के सभी प्रावधान विधि छात्रों द्वारा स्थापित एवं संचालित लीगल एड क्लीनिक पर समान रूप से लागू होंगे।

नोटिफिकेशन का नियम 23,[17] लॉ कॉलेज एव विश्वविद्यालयों द्वारा किन्ही गांव को गोद लेकर उक्त गांव में विधिक साक्षरता एवं विधिक जागरूकता संबंधी कार्यक्रम एवं अभियानों को चलाने हेतु निर्देशित करता है जिसके तहत शैक्षणिक संस्थानों के अध्ययनरत छात्रों को समाज के अत्यंत पिछड़े वर्गों के मध्य गांव में जाकर जागरूकता का प्रचार प्रसार करने एवं गांव के लोगों के जरूरत एवं समस्या के उचित समाधानओं को समझने का स्वर्णिम अवसर भी प्रदान करता है । इसके अतिरिक्त ऐसे कार्यक्रमों के दौरान किए गए सर्वे की नतीजा संबंधी रिपोर्ट को जिला विधिक सेवा प्राधिकरण

13 BCI Rules of Legal Education, 2008, sch. III, rule 13.

14 *Ibid.*

15 National Legal Services Authority (Legal Services Clinics) Regulations, 2011.

16 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, rule 22.

17 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, rule 23.

के सम्मुख प्रस्तुत करने का निर्देशन भी नियम 23, के कंडिका 5, में स्पष्ट रूप से उल्लेखित किया गया है ।

2011 के नोटिफिकेशन का नियम 24,[18] भी इसी कड़ी में शिक्षण संस्थानों एवं लॉ यूनिवर्सिटी को लीगल सर्विस क्लीनिक की स्थापना कर राज्य विधिक सेवा प्राधिकरण के साथ स्थापना संबंधी महत्वपूर्ण जानकारियों को साझा करने का निर्देश प्रदान करता है और साथ ही साथ राज्य विधिक सेवा प्राधिकरण को ऐसी संस्थागत विधिक सहायता क्लिनिक्स की यथासंभव मदद करने एवं ट्रेनिंग संबंधी सुविधाओं का विस्तार करने के लिए भी उचित प्रावधान किया गया है ।

इसके अतिरिक्त नियम 24,[19] अंतिम वर्ष के विधि छात्रों को लीगल सर्विस क्लीनिक के अनुभवों को प्राप्त करने हेतु प्रोत्साहित एवं निर्देशित करता है एवं इस कार्य में एक शिक्षक समन्वयक को आवश्यक कार्यवाही एवं जिम्मेदारियां संभालने हेतु भी आवश्यक प्रावधान किए गए हैं ।

विधिक सहायता शिविरों एवं संबंधित गतिविधियों में प्रतिभावान छात्र-छात्राओं की प्रतिभा को पुरस्कृत एवं अलंकृत करने हेतु जिला विधिक सेवा प्राधिकरण को प्रमाण पत्र एवं प्रोत्साहन पत्र जारी करने हेतु भी निर्देशित किया गया है । महत्वपूर्ण तथ्य यह है कि 2011 के आदेश के अंतर्गत ना सिर्फ विधिक शिक्षण संस्थानों में लीगल एड क्लीनिक खोलने की अनिवार्यता है बल्कि, अगर जिला विधिक सेवा प्राधिकरण को जरूरत महसूस होती है तो अन्य शिक्षण संस्थानों में भी ऐसे क्लिनिक्स को स्थापित किया जा सकता है एवं लीगल एड क्लीनिक में तकनीकी एवं विधि सम्मत सुविधा प्रदान करने हेतु वकीलों एवं कानूनी जानकारी रखने वाले पैरा लीगल वालंटियर को भी तैनात किया जा सकता हैं।

महत्वपूर्ण तथ्य यह है कि 2011 के आदेश के अंतर्गत ना सिर्फविधिक शिक्षण संस्थानों में लीगल एड क्लीनिक खोलने की अनिवार्यता है बल्कि अगर जिला विधिक सेवा प्राधिकरण को जरूरत महसूस होती है तो अन्य शिक्षण संस्थानों में भी ऐसे क्लिनिक्स को स्थापित किया जा सकता है एवं लीगल एड क्लीनिक में तकनीकी एवं विधि सम्मत सुविधा प्रदान करने हेतु वकीलों एवं कानूनी जानकारी रखने वाले पैरा लीगल वालंटियर को भी तैनात किया जा सकता हैं।

2011 के नोटिफिकेशन के अंतर्गत नियम 25[20] विधिक सेवा प्राधिकरण द्वारा प्रशिक्षित पैरा लीगल वालंटियर को लॉ यूनिवर्सिटी के लीगल एड क्लीनिक में पदस्थापना करने हेतु विधिक सेवा प्राधिकरण को निर्देशित करता है और छात्रों के बेहतर विकास हेतु इस नियम के अंतर्गत इन पैरा लीगल वालंटियर के साथ विधिक छात्रों का विमर्श एवं आपसी सामंजस्य स्थापित करने हेतु प्रावधान भी किए गए हैं।

लॉ यूनिवर्सिटीज के अंदर स्थापित लीगल एड क्लिनिक के कार्यप्रणाली एवं गतिविधियों पर निगरानी एवं नियंत्रण बनाए रखने हेतु नियम क्रमांक 26,[21] के अंतर्गत राज्य विधिक सेवा प्राधिकरण द्वारा जिला विधिक सेवा प्राधिकरण के माध्यम से इन शैक्षणिक संस्थानों के मासिक कार्यवाही का

18 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, rule 24.

19 *Ibid.*

20 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, rule 25.

21 National Legal Services Authority (Legal Services Clinics) Regulations, 2011, rule 26.

विवरण मंगाए जाने का प्रावधान भी किया गया है। हर 3 महीनों में राज्य विधिक सेवा प्राधिकरण के द्वारा इन शैक्षणिक संस्थानों में संचालित लीगल सर्विस क्लिनिक्स के गुणवत्ता एवं कार्यप्रणाली पर समीक्षा करने हेतु भी निर्देश जारी किए गए हैं। इसी नियम के अंत में राज्य विधिक सेवा प्राधिकरण को यह सुनिश्चित करने का प्रावधान किया गया है कि सभी विधिक शिक्षा संस्थानों में कार्यरत एवं संचालित लीगल एड क्लिनिक संबंधी विवरण राष्ट्रीय विधिक सेवा प्राधिकरण तक अग्रेषित किया जाता रहे।[22]

III. क्लिनिकल विधिक शिक्षा : उपलब्ध शोध प्रपत्र का विश्लेषण

एडवर्ड द्वारा लिखित शोध प्रपत्र में दावा किया गया है कि मौजूदा विधिक शिक्षण प्रणाली एवं विधि व्यवसाय हेतु आवश्यक प्रोफेशनल कौशलों के मध्य लगातार कम होता जा रहा है एवं धीरे-धीरे सैद्धांतिक मूल्यों पर आधारित विधिक शिक्षा मौजूदा समय की जरूरतों के लिए नाकाफी साबित हो रही है।[23] मौजूदा समय में भारतीय लीगल एड क्लीनिक के माध्यम से क्लिनिकल विधिक शिक्षा का शानदार अवसर विधि के छात्र-छात्राओं को दिया जा रहा है जिससे कि प्रोफेशनल प्रशिक्षण एवं कौशल विकास के साथ-साथ सामाजिक न्याय की परिकल्पना को साकार करने का भी कार्य संभव हो सका है मौजूदा समय में विधिक शिक्षा बेहद आवश्यक है एवं पारंपरिक विधिक शिक्षण बिल्कुल उनकी व्यवस्था का परिचायक बनता जा रहा है की वजह से शिक्षा की गुणवत्ता भी लगातार गिर रही है।[24]

क्लीनिकल विधिक शिक्षा एवं लीगल एड क्लीनिक का सबसे प्रभावी रणनीतिक लाभ यह है कि इन गतिविधियों के माध्यम से भावी कानून विधि एवं अधिवक्ताओं को समाज के संघर्षरत वर्ग के अधिकारों हेतु आवाज उठाने की प्रेरणा दी जाती है जिससे कि उनका चरित्र निर्माण होता है और भविष्य में भी वह इस क्षेत्र में कार्य करने के लिए सजग रहते हैं।[25]

सिर्फ यह कहना कि क्लिनिकल विधिक शिक्षा के मायने व्यक्तिगत विकास एवं प्रायोगिक ज्ञान के प्रसार प्रचार हेतु आवश्यक है गलत होगा क्योंकि क्लीनिकल शिक्षा एवं लीगल एड क्लीनिक के माध्यम से भारत के संविधान में निहित मूल न्याय के सिद्धांत का अनुपालन सुनिश्चित किया जा रहा है एवं सामाजिक उत्थान हेतु इस प्रणाली का कुशल प्रयोग भी किया जा रहा है।[26]

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22 *Ibid.*

23 H.T. Edwards, "The growing disjunction between legal education and the legal profession" 91(1) *Michigan Law Review* 34-78 (1992).

24 R.A. Posner, "The decline of law as an autonomous discipline: 1962-1987" 100 *Harv. L. Rev.* 761 (1986).

25 H.D. Lasswell and M.S. McDougal, "Legal education and public policy: Professional training in the public interest" 52 *Yale L.j* 203 (1942).

26 G.P. Lopez, "Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education" 91(2) *West Virginia Law Review* 5 (1989).

भारतीय लॉ कमिशन रिपोर्ट क्रमांक 184, 2002

भारतीय लॉ कमिशन की रिपोर्ट क्रमांक 184 के तहत अब भारत में विधिक शिक्षा के लिए प्रयोग किए जा रहे पारंपरिक क्लास रूम लेक्चर मेथड के अतिरिक्त नवीनतम तकनीको एवं प्रणालियों का अनुप्रयोग किया जाए ताकि वैश्विक चुनौतियां एवं जरूरतों को प्रायोगिक प्रशिक्षण के जरिए सुलझाया जा सके। यह रिपोर्ट काफी हद तक मैथक्रेट रिपोर्ट के आधार पर ही बनाई गई है एवं इसके लिए सुझाव के तहत विधि व्यवसाय करने हेतु जरूरी कौशलों को भी बढ़ावा दिए जाने का प्रस्ताव रखा जा रहा है ताकि सैद्धांतिक एवं प्रायोगिक ज्ञान के बीच बढ़ रही दूरियों को मिटाया जा सके। भारतीय परिदृश्य के लिए आवश्यक बदलाव विधिक शिक्षण व्यवस्था में किए जा सके इस रिपोर्ट के तहत विधि संबंधी शोध ड्राफ्टिंग एवं अंतर वैयक्तिक संचार को सुदृढ़ किए जाने का अनुमोदन किया गया है। इसी रिपोर्ट के पाठ क्रमांक 5 के अंतर्गत मूलभूत वायरिंग कौशलों का करते हुए कानूनी समस्याओं के निराकरण के लिए आवश्यक सभी गुणों के समावेश एवं विधि व्यवसाय के दौरान क्लाइंट से बेहतर सामंजस्य एवं तालमेल बिठाने हेतु जरूरी सभी आवश्यक गुणों का विकास एवं विस्तार करने की बात भी की गई है।[27]

क्लीनिकल विधिक शिक्षा हेतु नेशनल लॉ यूनिवर्सिटी के प्रयोग

मौजूदा समय में भारतीय विधिक शिक्षा के क्षेत्र में राष्ट्रीय विधि विश्वविद्यालय जिन्हें एनएलयू भी कहा जाता है वह अग्रणी भूमिका निभा रहे हैं और सामाजिक न्याय के क्षेत्र में लगातार अपनी भागीदारी सुनिश्चित कर रहे हैं। एक शोध पत्र के अनुसार अब इन राष्ट्रीय विधि विश्वविद्यालय उन्हें अपनी सामाजिक जिम्मेदारी को अकादमिक सामाजिक जिम्मेदारी में बदल दिया है जिसके तहत इन संस्थानों में पढ़ रहे छात्र छात्राओं को लीगल एड क्लीनिक एवं क्लिनिकल लीगल एजुकेशन के माध्यम से सामाजिक न्याय के क्षेत्र में योगदान देने हेतु प्रेरित किया जाता है एवं अवसर प्रदान किए जाते हैं। साथ ही साथ ग्रामीण क्षेत्रों में भी कानूनी जागरूकता के प्रचार प्रसार हेतु प्रभावी योजनाएं इन संस्थानों के द्वारा लागू की गई हैं । एक शोध प्रपत्र के अनुसार क्लीनिकल विधिक शिक्षा का लीगल एड क्लीनिक के माध्यम से शानदार अनुप्रयोग जिंदल ग्लोबल लॉ स्कूल के द्वारा लाए गए व्यापक बदलावों से महसूस किया जा सकता है।[28] जहां लीगल एड क्लिनिक अप विभिन्न गतिविधियों के माध्यम से छात्र-छात्राओं को सामाजिक न्याय के दिशा में महत्वपूर्ण योगदान देने हेतु मंच प्रदान कर रहा है और ग्रामीण इलाकों में भी विधिक साक्षरता इससे जुड़ी गतिविधियों को पहुंचाया जा सका है।[29]

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27 Law Commission of India, (184th Report on The Legal Education & Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956, New Delhi, December 2002).

28 A. Pandey, "Social justice, the raison d'etre of clinical legal education" 11(2) *Jindal Global Law Review* 201-207 (2020).

29 Priya S. Gupta *et.al.*, "How Clinical Education Builds Bridges with Villages for a Global Law School in India" 63 *J. Legal Educ.* 512 (2014).

आज देश के लगभग सभी विधि विश्वविद्यालयों में प्रो बोनो क्लब्स संचालित हो रहे हैं जिनके माध्यम से विश्व विद्यालय के समस्त छात्र छात्राओं को प्रायोगिक विज्ञान प्रदान किया जा रहा है देश के अन्य विधि विश्वविद्यालय एवं महाविद्यालय भी एनएलयू के इस मॉडल को अपनी जरूरतों के हिसाब से अपना सकते हैं ताकि वह भी सामाजिक उत्थान एवं राष्ट्र निर्माण के प्रति अपनी भागीदारी सुनिश्चित कर सकें एवं छात्र छात्राओं को आत्मा विकास एवं प्रायोगिक ज्ञान के अवसर प्रदान कर सकें।[30]

IV. अध्ययन के प्रमुख निष्कर्ष

वर्तमान शोध में किए गए अध्ययन के बाद निम्नलिखित निष्कर्ष निकाले जा सकते हैं भारत के विभिन्न वित्तीय विश्वविद्यालयों में संचालित विधि पाठ्यक्रम में बार काउंसिल ऑफ इंडिया के द्वारा अनिवार्य रूप से लीगल एड क्लीनिक की स्थापना करने हेतु जारी नियम का मुख्य उद्देश्य भारतीय विधिक शिक्षण संस्थानों में क्लिनिकल लीगल एजुकेशन को बढ़ावा देना था और यह अमेरिका के तर्ज पर ही भारत में भी विकसित हुआ है।

- भारत में क्लीनिकल विधिक शिक्षा को बढ़ावा देने का एकमात्र कारण छात्र छात्राओं का बौद्धिक एवं चारित्रिक विकास करना नहीं था बल्कि भारत जैसे विकासशील देश मैं समाज के सभी वर्गों के हितों को ध्यान मैं रख कर उन सभी वर्गों के लिए सामाजिक न्याय की परिकल्पना को साकार करना भी इस शिक्षा को बढ़ावा देने का एक मुख्य उद्देश्य था।

- लीगल एड क्लीनिक के माध्यम से प्रतिभागी छात्र-छात्राओं को प्रोफेशनल कौशल विकास संबंधी प्रशिक्षण दिया जाता है ताकि वह कानूनी जटिल समस्याओं का निराकरण कर सकें साथ ही साथ सामाजिक न्याय को सार्थक करने हेतु भी लीगल एड क्लीनिक लगातार कार्य करती हैं।[31]

- क्लिनिकल विधिक शिक्षा परंपरागत विधिक शिक्षा के शानदार विकल्प के तौर पर विकसित हो रही है जिसके तहत विधि की पढ़ाई कर रहे छात्र-छात्राओं को प्रायोगिक ज्ञान एवं कौशल से परिपूर्ण किया जा सकेगा और देश के भावी लीगल प्रोफेशनल्स तैयार किए जा सकेंगे देश में विधि व्यवसाय का भविष्य विधि व्यवसाय करने वाले अधिवक्ताओं के चारित्रिक एवं प्रयोगात्मक ज्ञान पर निर्भर करता है जोकि क्लीनिकल विधिक शिक्षा के माध्यम से उन तक पहुंचाए जाते हैं।[32]

- अनेकों रिपोर्ट में यह माना गया है कि लीगल एड क्लीनिक के माध्यम से छात्र छात्राओं के प्रोफेशनल एथिक्स को मजबूत किया जा सकता है जिससे कि भविष्य में किसी भी प्रकार का

30 A. Kumari and P. Sharma, "Social Responsibility and Legal Education in India" in *Socially Responsible Higher Education* (Brill, Leiden, The Netherlands, 2021).

31 N.W. Tarr, "Current issues in clinical legal education" 37 *Howard LJ* 31 (1993).

32 S.V. Carey, "An essay on the evolution of clinical legal education and its impact on student trial practice" 51 *U. Kan. L. Rev.* 509 (2002).

अनैतिक व असामाजिक कृत्य नहीं करेंगे और एक जिम्मेदार नागरिक के रूप में अपनी भूमिकाओं का निर्वहन करेंगे।

क्लीनिकल विधिक शिक्षा : चुनौतियां

क्लीनिकल विधिक शिक्षा क्षेत्र में अनेकों जटिल चुनौतियां आज भी मौजूद हैं जिनकी वजह से शैक्षणिक संस्थानों में लीगल एड क्लिनिक अपनी गतिविधियां सुचारू रूप से नहीं चला पा रहे हैं एवं छात्र छात्राओं को इसका लाभ पूर्ण रूप से प्राप्त नहीं हो पा रहा है। वर्तमान में विधिक शिक्षण संस्थानों में चल रहे पाठ्यक्रम में क्लीनिकल विधिक शिक्षा हेतु बेहद सीमित प्रावधान किए गए हैं जिसकी वजह से मौजूदा दौर में इसे अपनाया जाना अत्यंत कठिन साबित हो रहा है। इसके अलावा संसाधनों, उचित मार्गदर्शन की कमी के कारण लीगल एड क्लीनिक अपने कार्य को बेहतर तरीके से करने में असमर्थ साबित हो रहे हैं।[33] एक राष्ट्रीय पाठ्यक्रम का ढांचा तैयार किया जाना आवश्यक है जिससे कि क्लीनिकल विधिक शिक्षा को शैक्षणिक संस्थानों में सुचारू रूप से क्रियान्वित किया जा सके । साथ ही साथ छात्र छात्राओं को उनके द्वारा किए प्रतिभागीता एवं प्रयासों हेतु प्रशस्ति पत्र एवं पुरस्कार के जरिए लगातार प्रोत्साहित किया जाते रहना चाहिए साथ ही साथ उनके कैरियर के उत्थान हेतु उन्हें अतिरिक्त ग्रेड इत्यादि भी दिया जाना चाहिए। इन प्रमाणपत्रों को ना सिर्फछात्र–छात्राएं अपने कैरियर की बेहतरी के लिए उचित मौकों पर प्रदर्शित कर सकेंगे यह इस बात का भी परिचायक होगा कि लॉ यूनिवर्सिटीज एवं कॉलेजों के छात्र छात्राएं समाज के उत्थान हेतु उचित भागीदारी करने में सफल रहे हैं एवं लीगल एड क्लीनिक की सहायता से सामाजिक न्याय एवं भारतीय संविधान द्वारा दिए हुए अधिकारों के संबंध में जागरूकता फैलाकर एक जिम्मेदार नागरिक होने का कर्तव्य भी निभाया है।

V. निष्कर्ष

अंतत: यह निष्कर्ष निकाला जा सकता है कि क्लीनिकल विधिक शिक्षा वर्तमान समाज में न्याय के सिद्धांतों की रक्षा एवं कानून की पढ़ाई कर रहे छात्र–छात्राओं के बौद्धिक सामाजिक एवं चारित्रिक विकास के लिए अत्यंत महत्वपूर्ण है । विधि के पढ़ाई करा रहे विधि विश्वविद्यालयों को यह सुनिश्चित करना होगा कि वह समाज के प्रति अपने मूलभूत दायित्वों का निर्वहन करने के लिए लीगल एड क्लीनिक स्थापना कर उन्हें प्रायोगिक तौर पर प्रभावशील बनाने का भी संकल्प लें एवं छात्र छात्राओं के सर्वांगीण कौशल विकास एवं प्रोफेशनल व्यवहारिक ज्ञान की वृद्धि हेतु यही आवश्यक भी है।

33 P.A. Joy, "The Cost of Clinical Legal Education" 32 *BCJL & Soc. Just.* 309 (2012).

34 S.L. Brustin and D.F. Chavkin, "Testing the Grades: Evaluating Grading Models in Clinical Legal Education" 3 *Clinical L. Rev.* 299 (1996).

INTERVIEW WITH PROF. (DR.) PRABHAKAR SINGH ON LEGAL EDUCATION AND RESEARCH IN INDIA

1. *Please tell us about your childhood and schooling.*

I originally belong to Darbhanga. It is a small town near the Indo-Nepal border in the State of Bihar. My schooling happened in Darbhanga until the 12th grade. I wanted to go out but could not for several reasons. So, all the early and almost everlasting influences are from that tiny place. My father was a Professor of Sociology. My mother is a school teacher in a middle school, so we are a teachers' family; perhaps it has shaped what I wanted to do. But even though both my parents are government teachers at a college and a school, I never went to a government school. The reasons are apparent. Anyone interested, including those who work at government schools, knows that the quality of education is quite alarming. So, even in smaller towns, anyone who can and has the resources wants their kids to go to a private school, and we were no exception. So, we all went to private schools in Darbhanga. However, at the time, Darbhanga's private schools were still in their infancy. I remember seeing that transition. My eldest sister and I spent a few years in a semi-government school without English-medium schools. But, in 1994, I remember when this big school started. My father shifted us to that school, so that's when I moved to a proper English-medium school. But I would still say that getting there in time did help us; for instance, my sister entered the school when she was in Standard 8, and I was in Standard 4, and you know, those four years in childhood significantly impact a child's development. We studied everything, but somewhere, I was always inclined towards literature, although I did not have enough opportunity to do English literature. But naturally, Hindi and Maithili literature were available, and I read them. Maithili is my native language. Moreover, because my parents were themselves readers, being teachers, I picked up the extensive reading from them. I liked biology, and I wanted to become a doctor initially. However, I ended up choosing mathematics, and you know, so eventually none of that happened to me to doing law, and I think what saved me then at the Law School was the fact that I was somehow more prepared than others with literature, although Hindi literature but, literature, nevertheless.

2. *So that would prove one thing for sure: none of the paths we see to success, even in academics, is linear.*

I had a challenging childhood in terms of schooling. As a teacher, my father always wanted to give the best education to his kids, but that was not available in that city. What I am telling you about is the post-liberalisation period. In 1991, the Indian

market was opening, and the impact of that opening was also seen in very small towns. So, I think the fact that we had a private school coming up, in some sense, has to do with the fact that we were trying to be liberal and open. I changed about seven schools in ten years. My father experimented by admitting me to a new school every two years. He would withdraw my admission from an established school and put me in some random new school. It significantly disrupted me, and I realised that the disruptions shaped me as a person because now when I share this story with some of my colleagues, they say that with so many changes and upheavals, people would essentially end up away from education itself. But this has shaped me. I suppose there are many interruptions, and you still must carry on and build some muscle.

3. *I can somewhat understand this because even my family migrated from Darbhanga. My sister, who is around seven years older than me, had to go through this. She studied in a school in Bihar, then she had to start school in Delhi, and she had this entire cultural shock. It takes a toll. Let's move to the next question, which concerns your academic journey after schooling, i.e., your graduation and master's. So, where did you complete these? And how was the experience there?*

As I said, having switched to mathematics, a B.Tech. was the only option. However, I could have been more enthusiastic about engineers, so I started exploring other options after my intermediate. There was a person who spotted me. My father's teacher, Prof. M.S. Verma, a retired Political Science professor, is very educated. He was a civil servant earlier. Later, he resigned from the civil service to become a teacher, so you can imagine how idealistic he must be. He was my father's teacher. Therefore, naturally, we were also introduced to him. He told my father, "Prabhakar is good with social sciences. I hardly see people interested in social sciences, and he reads all these sections on society and stuff that no other people read". Those were the days when the Hindu newspaper would arrive in Darbhanga a week later. We would go to his place and read a whole week's worth of news. So, he was the one who spotted it. And when I was doing my 12th, he suggested doing something other than regular, and he told me law school was a great idea. So, he was the one who brought the concept of a law school to me, and then I wrote a few examinations, both for NLUs and private colleges like GGSIPU. This is the pre-CLAT period. I did not get into NLS Bangalore, but luckily, I got into NLIU Bhopal in 2002. I would say I was fortunate to get into NLIU Bhopal because I was an outside Madhya Pradesh resident and general candidate, and there were only 19 seats. It's just a stroke of luck; my faith, which had troubled me so much in my schooling, finally had something in store for me, and that was all the bad luck of changing schools. I think all of that accumulated positive karma, and I got what I had not expected.

4. *Alright, so where did you do your postgraduate? And what was the area of research, among the various subjects we have, that, you know, interested you the most? And did you get some inspiration from it?*

What happens when we look at any scholarly research is that we see people in hindsight and think that it must have been a straight line from here to there. When I went to law school, I thought of my first feeling of jubilation and happiness at having gone to a national school. Because if you have not cracked IIT, at least you've cracked some national, if not Indian. So that was the first sense of achievement—that we are not useless. Having entered the National Law School, I was a misfit for a very long time because of things like the syllabi and the expectations. What is it like to be a National Law School student and all of that? Fitting into that took time. For instance, I was not interested in mooting; I felt it was too artificial, or perhaps the public speaking that is expected of you was something that I did not have, or maybe I had it, but I was not interested. Out of those five years, I think the first three years were wasting time, which went into passing exams, writing reports, and trying to fit into law school. After that, the soul-searching began when I asked myself what I wanted to do. Because I was not landing any internships at top law firms, all of that was always a function of connections, and I had none. We needed random internships that have no value in corporate eyes, just to put a new line in the CV, and having gone to the courts, I realised that I did not like any of that, either being a practicing lawyer or being at a law firm, and that again pushed me to think very hard about other possibilities, and it was at that point that I realised that my core strength is reading and reflecting, which I have always liked. But it was somehow hushed because you stick to other people's expectations of what you should become, and that is when I began to deconstruct. I had that strength, and the deconstruction started. I realised that I would like to read and write.

I think that was the fourth year of my B.A.LL.B. when I suddenly woke up and started to apply at non-conventional places. I landed an internship in Sri Lanka. I spent two months in Sri Lanka. In the summer, I got a full scholarship for the summer school in international trade law. For that, I went to Macau, next to Hong Kong. All these things that suddenly happened at the end of the fourth year for two and a half months of exposure changed me, and I came back as a changed person because I saw top-class professors for the first time in Hong Kong. The professors, even the governments, listen. The kind of professors whose views are respected or sought by the states. I saw that, and that exposure changed me, making me determined to become a professor.

This happened, and I got an almost full scholarship from Barcelona in trade law, which was the original subject of my summer school, and with the same set of

people, I had started the master's. I was lucky to get into it, and I made the transition meant for my master's almost fully funded. I took some loans, but not a lot, and I started doing my master's again. I knew I wanted to become an academic, but what should I do? Academia was still an open question, and this was when I began reading. I was reading through the law school also, but all of that now began to take shape, and proof of what I did is what I published in the Leiden Journal of International Law in 2010. If you've looked at that piece, it is a piece I wrote during my LLM during 2008–2009, and the article was published in March of 2010, just two months before I joined O.P. Jindal Global University as an Assistant Professor[1]. When I wrote this paper and it got accepted, I was essentially a student and a jobless postgraduate. At that time, it usually took international journals around six months to peer review, among other things. So, all of that happened during my master's, which was rigorous. So, for me, this paper was, more than anything, an expression of what I would do in the future. I used that slide in the paper to share my views and to signal to myself that this is the path I would like to take. I have had no doubts about becoming anything less than an academic. It was a matter of luck that I got into Jindal Global Law School when I decided on this. Also, if not that, had I been at any other place, I would have done the same.

5. *One question we skipped in the introduction part was your doctorate. What was the topic of your thesis? And where did you get your doctorate from?*

My master's was in International Economic Law. At some point, I was bored with what happened at the National Law School. It was too general, and my teachers were struggling. One of my teachers had become something somewhere in the government system. She was our teacher of public international law, and for a whole trimester, she narrated the India-Pakistan dispute, and only that was international law for us. I thought I would have to go outside India, not be in the same system, and get out of the system. I would go anywhere I got the opportunity to have a view from the outside. So, the initial priority was getting out of this system, and the second was to do something technical. My master's was very specialised in international economic loan policy. We studied investment and trade, something very technical and challenging for a fresh law graduate. We had, in that one year, some thirty-five examinations. So almost every second week, we had exams taught by top people like World Bank economists, people from Harvard, etc.

When I came back, I was jobless for six months and then got into Jindal; by that time, I had also applied for my Ph.D. Luckily, I got through the National University

1 Prabhakar Singh, "Indian international law: from a colonized apologist to a subaltern protagonist" 23(1) *Leiden Journal of International Law* 79-103 (2010).

of Singapore (NUS). I left my job at Jindal and went to NUS for four years to get my PhD. My PhD was on the sources of International Law. I moved from international economic law to a more general topic, heads of international law, Article 38(1)(d) of the International Court of Justice statute, which was very specific. But this was when I became interested in legal history, and something I saw was missing in the literature.

We are still trying to understand why India and China are different, both being developing countries. This should have been explained in the Third World Approaches to International Law (TWAIL) literature. So, I shifted to legal history to understand why different states have different approaches to international law, what lies behind it, and what makes them use other methods. I was in Singapore for four years in a well-funded programme with a central location, enabling me to travel extensively to Myanmar, Thailand, Cambodia, China, and Japan. I did extensive travelling because of the place, and I could marinate myself in that subject.

6. *Now, we can go to the next set of questions, which relate to the status of legal education in India. For undergraduate studies, what is the significant difference when it comes to a traditional law school, a national law school, or, for that matter, a private university—the ones that are coming up right now?*

Today, we see three kinds of law schools: national law schools started in Bangalore, and now we have twenty-plus national schools. Then, we have traditional central and state universities with their law departments. And then private schools. Jindal, of course, is a pioneering private school, and it is doing things that others can only dream of because of how it was conceived, funded, and run. To answer your question, the critical difference is that national law schools succeed because they have great teachers and because those who go there are incredibly competitive. If you choose 80 people out of 100,000 applicants, you end up having highly motivated young people. When you get that kind of talent to come, it is not so dependent upon teachers, so national law schools struggle with good-quality teachers as you look around them. As you speak, Professor Krishnaswamy's project is to get top teachers at the National Law School, Bangalore. If you look at NLS Bangalore at this point, this is the first time they have such teachers; I mean teachers who have been everywhere in top-class global standards. And they are being stuffed by Krishnaswamy because he has a project to turn NLS into an academic institution. That's why NLS has succeeded in creating top corporate lawyers, and NLS graduates are everywhere in the world now, but it is still not the place where you would say, well, it is producing its academics. National law schools are a different model, and, you know, this is post-Jindal, which did it twelve years ago, and in that sense, NLS is simply copying Jindal. If you look at the kind of emphasis Jindal had, why did

he succeed? Prof. Rajkumar, Vice Chancellor of the O.P. Jindal Global University, was evident when he said that the strength of a school is not its vice-chancellor or principal, as is the case in India. It is the teachers.

Traditional colleges create a system where the school is either the vice chancellor's fiefdom or the principal's fiefdom, and the governing bodies feed them, or a family runs it. Teachers are really at the bottom of the pecking order. So that is a huge difference. Traditional schools learn with a legacy like the University of Delhi, which has a legacy of producing great scholars. You know, in the last 60 years, it had teachers like Prof. Baxi, and the legacy runs on, and anyone who can tap into that legacy.

India has a lot of private schools, and none can be compared to Jindal Global Law School (JGLS). I can only speak for Jindal because that's where I started my journey. Jindal's model was very different in the sense that it created empowered teachers at the beginning.

When I joined, I was amazed to see the genuinely international level of education in a global environment. We spoke our minds before the Vice Chancellor whenever we wanted to. We fought if we had to fight, and on the other side, we were graceful enough to realise that all these people are self-determined intellectuals who are invested. Jindal is something now, but it was not that in 2009 when we joined; it was all dust and concrete with just 20 students. That's when we entered and had faith in whatever dust and concrete was in front of us. We, as teachers, were able to invest. I never went to national law schools and didn't want to go to national schools to become a teacher. I've had offers and requests, but I denied them. I knew what I wanted to do. I understand that this is the path I would like to choose, and it paid off, and you were able to see it at this point. So, these are three different animals producing three different kinds of things. For the first time in India, Jindal was a school where research-informed pedagogy persisted.

You might not be doing your own research. But you are researching. So even if you are doing international law, you're teaching the law of contract, the law of evidence, and the fact that you are constantly searching, writing, reading, and engaging with the world. It is impacting your writing, it is affecting how you speak, and it is building your vocabulary. You take that vocabulary to the classroom, practice it, and interact with it. You are creating an unprecedented environment where you are stationed geographically in India and function like any top school in the world; we saw that at Jindal.

I think it's a privilege for me to have been part of that system, given that every third word in Jindal is Oxford and the fourth word is Harvard. And I went to

none of those universities, but I never for once felt that they, in a way, were inferior or superior to anyone. We felt equality, and it simply had to do with the fact that, for me, an argument was more important than the name of a university. Harvard, Oxford, or any other university is only in name, not an argument. If you throw me Harvard as an argument, I will not accept it. My question is, what is the argument? You come from Harvard; what's your argument? If you have none, then there is nothing. I think that mindset was built because I invested in social science. Instead of being impressed by their profiles, I began to look for arguments. I've travelled widely in the last ten years, from Japan to Brazil, and I met all kinds of academics, and my question to them was the same: Yale, Harvard, or whatever. And most of them didn't have any, and they were useless to me. You might have gone to Yale or Harvard; it doesn't matter if there's no argument; that's it.

7. *You've done your post-graduation in Barcelona. There are similar programmes of post-graduation throughout these types of schools in India as well, and the programmes themselves are not research-led, and the programme's curriculum does not reflect research either. What do you think of the research culture we have in the country regarding the post-graduate level? So, what are your thoughts on that? How does a one-year programme affect the entire research culture?*

Overall, in India, if you look at post-graduate programmes, it could be better because those who run them themselves have no sense of what research is. They are made directors or directors of programmes, or they need to run programmes because, with time, they're expected to do it. Earlier, people became professors through promotions with age. Around five years before my father's promotion time came, that system was discontinued. I remember that very late in his life, my father had to learn to write something and then have some publication to qualify for associate and full professorships. Not long ago, people became professors from assistant professors with age, and research was never a priority. We read textbooks without asking who wrote them. Well, someone wrote it; that's why you are reading it. We read a textbook and an article without thinking that someone is writing. It's not our job to write.

But then, when you read the first footnote, you realise that somewhere, someone was a professor or a student who wrote the papers that we teach. This changed because I think there has been an emphasis on conducting research in the last twenty years, and we are expected to do research. This is easier said than done because suddenly expecting that generation to do research was difficult for them, even for the people who did their PhDs. Their research ended with their PhD.

The PhD is also not seen as arming you with skill-building, or, I mean, with writing or research ability. You do a PhD like I'm a doctor, and then it stops you. They do not think; they just read and teach. However, there are exceptions in exceptional

places. One of the places that has done wonderfully well in the Indian setup is the South Asian University (SAU). South Asian University masters' students are doing fabulous work, which is as good as any other standard. UK, US, and European international master's So, suddenly, what happened was that SAU was able to, in whatever limited form with its limitations, be able to produce. I know of this because those who do international law are usually connected with me through SAU. I know many examples and see them operating internationally, like a graduate from the London School of Economics or University College London. And the difference is not substantial; some of them have started getting PhDs right after their masters in India. This is also happening. But SAU is an exception, and you must ask why SAU is an exception. Well, SAU had people like Prof. Prabhash Ranjan and Prof. Srinivas Burra. So, eventually, it comes down to one or two people of that type who can galvanise the environment for excellence, and I know that because I'm also connected to them. Two people have done so much, and you will see that now SAU students are doing PhDs in Australia. I know of admission offers from this year, which I will not disclose at this point, from the top places in the world after SAU Masters. So, it is possible to achieve excellence even in the government system. The key is teachers and creating an environment where the teacher has always wanted to become a teacher.

8. *I would add to that question. I understand that individuals in the right places produce good results, which has been the focus. But is there something structurally wrong with our system?*

That's true; the first structural issue is that of our traditional teachers. Their focus is to become a Principal, Vice Chancellor, or Dean. There is nothing wrong with it, but that only happens with networking and connections. Professor Baxi became the Vice Chancellor; similarly, Professor B. S. Chimni became the Vice Chancellor. I'm not saying that it is wrong or unimportant. I was asked to become Dean of a law school. I did become the Dean. The problem is that once you become an assistant professor at some government college or university, the whole energy is diverted towards networking—for getting publications and the quid pro quo invitations—but not for knowledge creation. What made Prof. Prabhash, Prof. Burra, or Professor Chimni different? It is that they did not walk the beat in fast and the offers came to them, and we only know the offers they have taken, and we don't know of the office they declined. So, at some point, at some age, you're expected to be a Vice-Chancellor. But the office came to them in their sixties or seventies. These people did not become Vice Chancellors by application; the Governors invited them. People of eminence were invited by governors to become Vice Chancellors. Now, people pay to become Vice Chancellors, and there is a list of corrupt Governors who would take money to appoint a vice chancellor. I can't say more. It's a complete inversion of whatever it meant.

9. *The next question relates to the National Education Policy launched by the government in 2020, which aims to overhaul the entire education system from pre-primary to the doctorate. However, it focuses on ancient Indian wisdom and local languages. How do you see that impacting legal education? And as for the legal education in this country, it's more English, and regional languages are not given that much importance. With this perspective, how do you see National Education Policy 2020 impacting the legal education scenario?*

As we've received it from the British, legal education is in English. There's no doubt about it. I sent you that chapter. You know it's a very illuminating chapter. It answers all the questions anyone has about the Indian legal system in India, so there's no need for an interview[2]. It's so well done, and these are people of high credibility. This paper is by Yves Dezalay, a French sociologist, and Bryant G. Garth, an American law firm partner, who left that and became a professor. So two top people—a French sociologist and a former law firm partner, now a professor—are trying to come together to do something about India.

As far as using ancient wisdom to overhaul education policy is concerned, it is rhetoric. What is ancient? What do we know of ancient? Ancient is precisely what China is trying to convince the world about, and it is using that to claim territory, saying that this is ancient China. You must realize that the human mind works more on nostalgia than knowledge. We have this nostalgia for ancient India. I'm not saying we are not people with a continuous civilization. Yes, we are. However, how do you determine what was ancient and the content of that ancient wisdom? If you look at Marxist historians, I'm not saying I am a Marxist myself, but simply reading them. Their view is that Hinduism is a product of Buddhism. To put it in one sentence, Hinduism is a construction of Buddhism. RSS/BJP would say that Hinduism is one of the oldest, and Buddhism has come out of invasion. So then, of course, they are conciliatory people with conciliatory views; further, they would say Hindu Buddhists, so we can put them together and create some consciousness. Then, the Jains would say they are older than Hindus and Buddhists. Then the Sikhs would come along, saying, we are very new, but then we derive from Hindus. We look at Sri Guru Granth Sahib, and it talks about Ram and Rahim in equal measures. So, Sikhs also become part of that. Look at the Hindu Marriage Act. The Hindu Marriage Act includes Hindus, Sikhs, Jains, and Buddhists. Well, this together creates ancient Sikhism, which is very new. Marxist historians doubt whether

2 Yves Dezalay and Bryant G. Garth, "India: Colonial Path Dependencies Revisited: An Embattled Senior Bar, the Marginalization of Legal Knowledge, and Internationalized Challenges" in Yves Dezalay and Bryant G. Garth, *Law as Reproduction and Revolution: An Interconnected History* (University of California Press, California, 2021).

Hinduism, as we know it today, has been constructed for the last 400 years as an organised religion.

10. *If we secularise this question, we take out the entire debate about which was earlier and which was later. And we just focus on the rules as a society. Whether there was some rule of law at that point in time, whether there was some structure in the community that was followed, whether it was similar to what we had in critiques, and which Roman law draws from, can there be research or can there be an orientation towards realising the structure of society that we had?*

That research already exists. The politics of this top-down imposition of ancient wisdom is that those who speak about ancient wisdom have yet to read that literature. Marxist historians are thinking more seriously about religion than religious people. So, there is an academic way of thinking about this, and we must be objective enough that my personal bias as an upper-caste Hindu should not influence my reading. I should be able to be critical of reading religious texts while being very religious in my home. My father is not religious, but my grandfather is, and I am comfortable with them all. My point is that those who speak of ancient wisdom need to be more engaging. If you look at the Murty Classical Library of India List, it has been curated by Professor Sheldon Pollock. He is a professor of Sanskrit at Columbia University. Try reading one of his books and ask a Sanghi, a Congressperson, or a BJP person who is interested in ancient Indian wisdom to read ten pages and make a commentary on that. What is the expertise? So, all of this is nostalgia. That's the problem. All those pushing us to study Sanskrit are engineering graduates who never learned this, whose parents never allowed them to study Sanskrit and drove them away from Sanskrit and Hindi. I read a lot of Hindi because I was more interested in literature than science. Decidedly, a lot of Hindi was available to me automatically, and later I studied English. So, I consumed whatever was open to me. Therefore, ancientness is a nostalgia of the upper class and caste. You look around at the people you talk to; invariably, there will be an upper caste among both Hindus and Muslims, not just Hindus.

I'm not saying that caste is a Hindu thing; caste is a South Asian thing, and in the privacy of their house, you'll find Muslims, more casteists than some Hindus, and Sikhs, more casteists than some Hindus or Muslims. So, what I'm saying is that this is nostalgia. Now, given the kind of government we have and the manifesto of the party in power, they are pushing for whatever ancientness, but you must realise that we live with modernity. It is essential to overhaul yourself in a way that matches the rest of the world. It is possible to be modern and not trample on your roots. It's possible to do that. But the problem is the political part of it. It is dished out as a political project, which means that when you say ancient India, you mean ancient Hindu India. That is problematic because, of course, India is a Hindu majority, but

really, since ancient times, we have had people coming and going, and that has created what India is today. The most accurate information about ancient India is located in Chinese because when Hiuen Tsang, or Fa-Hien, came here to collect manuscripts, they went back and translated them into Chinese. So, it's not available in Sanskrit, but it's available in Chinese. If you really want to read ancient Indian wisdom, read Chinese so that you can decode all the text that Hiuen Tsang or Fa-Hien wrote, take it away, and store it in China. Invest in learning Chinese and Sanskrit.

Let's go to the next part of the question, which is related to the local language.

It is not very easy. The problem is that the aim of the legal system should be justice. If that requires that we speak English in Darbhanga, Patna, and the Supreme Court of India, then so be it. Judges don't have to start speaking in Maithili or Bhojpuri when put in Bihar. But at the lower level, we do that in the local language when the litigation begins. You will see that litigation is done in the local language in all the states. In high courts, it becomes English. And academia is so far away from reality. You are so far away from the actual play of law that we imagine things full of nostalgia, despite what practical value? Local languages have now disappeared. Why do we keep creating smaller new States under the Constitution?

Because we keep recognising languages, Maithili is now part of Schedule VIII, and along with Maithili, other languages were also included in it. You didn't speak Maithili when you moved to Delhi. Maybe your father is proficient, but you aren't. Who is to be blamed for that? Your roots are in Darbhanga, and you should be speaking Maithili, but I suppose you don't speak as well as your father. This is because you are not using it regularly. We have never been afraid of diversity; we are not China. Nehru, the then prime minister, said India's strength is in diversity, so you respect diversity. But, even if you appreciate diversity, you still have to have one language in which you speak. I propose we speak in Hindi, but Professor Anurag Deep said English is better because there's more. There is a bigger crowd for English. Naturally, I'm not saying that he's rejecting my local language or that he's rejecting me. He's just making a prudent decision about using a language that we're comfortable with and that will find us a larger audience.

11. *The next question is whether all these entrance tests for law schools are conducted in English. They do not even provide a Hindi translation, as we have, for instance, in JEE. We have a lot of scholars coming up who say that because of the English dominance in class and other exams that relate to being in education, it has become a very elitist profession. So, we've already talked about in the paper you sent me how that elitism is not being broken. How do you think introducing the local language will impact the elitism that we have in the legal profession and in education?*

The only problem with those proposing this overhaul and proposing local languages is, how on earth can you read five hundred books but not master one language? How is that difficult? What I'm trying to say is that if learning is about building skills and, in the future, the possibility of connecting from the District Court in Darbhanga to the International Court of Justice in the Hague, you cannot have five languages. And we are beneficiaries of English in some sense. We benefited from having better English proficiency than the Chinese, for instance. So, what I'm saying is that this is simple nostalgia.

You tell me those are proposing local languages; how often do they read local literature? Ask the same people. So, this means we are speaking without thinking, and all of this is because of the political climate.

If I'm operating globally today and you're interviewing me, or if I made my views heard on a different forum, it is simply because I did not write in Maithili and Hindi. I chose English as the medium, and it has made a huge impact on me, someone who, only twelve years ago, was not sure about what would happen because I don't want to be a lawyer, a judge, or, you know, a civil servant. I want to be an academic with impact, so I choose English. I'm sitting in Germany, and the whole course was taught in English because they are switching to English even though they are very nationalist. Remember, nationalism is not an Indian thing; it is a European export to the rest of the world through Latin America.

Accordingly, in your opinion, the solution to that would be that they, for legal education or at least for legal training, have English training first. English classes are mandatory at the National Law School. We had full-time English teachers. So that's why English graduates are recruited at the national law schools to become teachers. So, what I'm saying is that if you want to communicate with more people in the world today and avoid intellectual inbreeding, you have to shift to a language that is widely spoken. If you can choose Hindi and Chinese and don't speak English, then you also have a promising career.

You can choose not to speak English but Hindi and Chinese, so you can operate with the Chinese, make a lot of money, and be successful in China. They will know you in China. All I'm saying is that language is a medium, and as progressive people, we should not make it a subject of nostalgia but a subject of skill. You will naturally, from your parents, learn Hindi in school. You practice it amongst yourself. Now you don't want your kid to. You send your kids to Springdale, and you speak to them in English in your household, but outside, you want everyone to speak Maithili. This will not work.

My parents were government teachers. They never sent me to the government college because they knew that it was going backward. So, if they had resources,

they took them from the government system and put us in a private system. Why? Because they knew that in the government system, we would not be learning in English. We are a product of pragmatic decisions. And this, by no means, is relinquishing your past, your local language, or your cultural heritage. In fact, you become more competent to do it. Now I can speak about the work I do in Darbhanga, or the localization of International Law in Germany, Japan, or America, because I speak English. This skill has allowed me to internationalise my locality, my localism, and my regionalism. If that is your desire, then you should also learn English more vehemently.

12. *We'll go to the last part of these questions, and that relates to the private universities in India. You taught at one of the best schools in our country. These private universities have very exorbitant fee structures, to be honest, and that kind of fee structure cannot be afforded by most of the people in this country. When I talked about local languages, and now I'm talking about these fees, the impetus again is on inclusion and diversity, which is not the impetus of all the justices who go to all kinds of seminars and speak about it. So, what are we doing about it? All these premier institutes, be it the national law schools or good private schools, kept away from these people through language as a medium, or, for that matter, fees. So, what is your viewpoint on that?*

You are making one wrong assumption, which is that all those who speak local languages are poor; these are rather two exclusive things. You come to Sonipat; it is close to Delhi. At some point, land prices around Jindal Global University were so high that a farmer bought a helicopter. This is a true story; you can find it on the internet. So, these are ultra-rich people who certainly had our institution in front of them. They spoke their local languages, but they said we have enough money to send their children to Jindal, and it may internationalize their children. So, of course, when you say local languages and high fees, you think of poorer parts of our country like Bihar, parts of Bengal, etc. You go to South India; they speak their language, and they are rich. There is no connection between local languages and money. I'm saying that a lot of people who speak their local language very vehemently are capable of paying high fees.

Jindal offers a unique model. India is a large country. The world looks up to India to counter China. And in a situation like this, we don't have one law school in the global rankings. This is true. Jindal tried to create one such institution. And it took ten years for them to do it. IITs and IIMs have been there for ages, but Jindal did it in around ten years. In ten years, it secured a rank in the top hundred law schools in the world. Not the whole university, but the law school rankings. It was a product of a certain kind of imagination that excluded certain kinds of people. So, when you have a specialised project, it leads to exclusion. I'm not justifying it. All I'm

saying is that there are thousands of law schools where people can go, but this one we create for global rankings. India must have an elephant's task.

Anywhere you go in the world, the only place they know is Jindal, because it created that model successfully. Its fees are exclusionary; that is true. Nevertheless, why should everyone want to have a Jindal kind of education? It's not those who want to speak local languages and those who want to go backward. Jindal is not teaching Sanskrit, Parsi, Awadhi, or any other local language. The problem is that people who speak of Khadi eventually want to get a Raymond-tailored suit. It is exclusionary, and so are the National Law Schools, because the government is reducing funding and they have to be, so everyone talks about this. This is the classic problem. Everyone talks about high tuition fees, and you want to create a gurukul system and go back to ancient wisdom, expecting teachers to be poor. So how do you pay salaries to faculty members? They don't have to do other things. They can sit with peace of mind and think. They are not government institutions. Where do they collect money to pay high salaries? I was able to produce a scholarship because I did not think about anything else. I did not think about food on the table daily, which 99% of Indian teachers must think about in the system. They do not get salaries for six months. They prepare a separate register in private law schools, where they lie about what they pay to their faculty members. Is that not true? I have been a dean of a private school, and I've seen the kind of figures it generates and the kind of money-making that happens at the private law school. Now ask about the teachers that they hire and the kind of money they pay them. The same people are crying about Jindal being exclusionary. So, while you cry about the high salaries, these are also institutions that honour teachers and are creating teachers.

IITs were heavily funded by the government so that they could create future technocrats. It was cheap at the time, but not anymore because it was subsidised by the government. Private schools cannot do that. If the private school must create excellence, they have to charge the students. A middle-class person twenty years ago couldn't have gone to an IIT despite having cleared the examinations because of the high fees. It's very high, but it is an IIT, and you gradually get a 50 lakh per year package after studying there. The whole generation of people has paid very high fees at government institutions. Where did they get the money from? They did not have black money. They, of course, took out loans and arranged money for fees. I'm not justifying a high salary or a high tuition fee. All I'm saying is, look at the other side as well.

Kamkus Law Journal is the journal of a private law college. Look at it yourself after this conversation and think about it. I can see the numbers you would generate because I was a Dean at a private law school in Navi Mumbai. So, I can see the

amount of money that was being paid to the teachers and how they were treated. I had a huge issue there, actually. I left it because I didn't want to continue in Bombay, and I thought it was better to be around NCR. Then I had this offer and joined BML Munjal, which is another project. The current Dean at Munjal was a colleague of mine, a senior from Jindal. It's kind of Jindal transplanting. What I'm trying to tell you is that to be able to attract talent from universities like Chicago, Harvard, or Columbia that you need in this country, you will have to pay them, and if you are a private institution, where will you pay it from? The government will not hire foreign nationals. Only a private system can do it, and any of you who have worked with Jindal in whatever capacity will have seen the kind of quality teachers only because it had a free hand.

You can always create a parallel pro bono culture with teachers at law firms. I'm happy that you're thinking about publishing interviews. This is good, and I shared with you some examples from the past that I was aware of. You're thinking, That's great. Think more and create some kind of system where the faculty members also give some pro bono time to educate and train people in different corners of India. It is possible because people with passion don't want to care about money. If I get sufficient money from my job and I am comfortable as an academic, I don't go running for money. I would have done an MBA instead if I wanted to make money, but I didn't. I just want a comfortable life where I can feed my kid and have proper clothes. That is, basically taking care of my family, and with this, I'll put hard work into producing good quality work that is not produced even here. The only reason they (the Germans) invited me is that I have produced more work than most of the faculty combined at this school in Germany, in English, of course, because only then could they have realized. If I had written in Hindi, no one would have read me. We must realise that nostalgia is one thing, but we have to see through Pierce. So, to speak of this nostalgia, be progressive and think through things. So, I'm not supporting high tuition fees; it's exclusionary, but imagine that by creating an environment like Jindal, if you're able to, you can create some pro bono energy out of it. And if you're a teacher, you will always be happy to share your expertise in the farthest corner of our country to train people to train teachers, to make them think and support them. I will not find anyone who will say no to this. Yes, the fees are high, but, by using some imagination and some effort, you can create a system where you can do pro bono work at the same place where high fees are charged. You cannot take away Jindal from what Jindal did in ten years, and because it's so highly inaccessible because of the fee and other things like elitism, we have to now rethink democratising it and taking it to the farthest corner of our country. It will require some commitment on our part, but teachers are there to do this.

The German Society of International Relations has invited me for the first time to the conference, which happens once every two years. For the first time, they have an English-language panel, the opening panel for this conference, and I'm going to speak there. You see, Germans are organising an English panel on colonialism and international law, which is my subject of study. They are changing and adapting to move forward, but we want to go backward. And the biggest irony is that nationalism is their product, not ours, and you are more nationalist than them. There are so many kinds of nationalism in this country, like food nationalism and language nationalism. By doing so, we're creating a web instead of cutting through it, which we must realise.

13. *Let's go to the final part, which relates to research and training. In the last part of your answer, you talked about a faculty development programme where a trained teacher could go ahead and deliver something along the lines of how to give lectures to their students. But then there is more to do with teachers in this country. What is the current research framework as far as teachers are concerned? And you know, again, since I'm from the same system, I've seen some budding standards regarding the teachers and their research culture. What are your perspectives on this?*

The teaching and research culture is not changing, and it's deteriorating. If you face Jindal and put your back on the rest of the country, you will think that India is reaching heights, but if you put your back on Jindal and look at the rest of the country, you will see that it is going down. So, it's about looking at the problem first and accepting that there is a problem. Most of the master's and PhD programmes are kicking the box and are not aimed at creating excellence. Why? For someone to conceive excellence, they must have excelled before. How can I speak of excellence if I have not excelled before? So, it's a question of capacity building, which has always been our question. And with several fake journal publications and similar things in the last few years, it has just become worse. A tremendous amount of counterfeit publishing is happening, and people are falling into it. This means that we have to sit and think about this profound question, which is a question of capacity building, and every problem comes with an opportunity. Thus, the other side of that problem is an opportunity for a specific institution or person. There is a considerable problem of plagiarism and fake publishing, and India has roughly a thousand universities. So, there are a few hundred law schools, and everyone has to publish, which means that none of them is publishing anything good. People are going that way, which means there's a vast amount of training to be done. It's the problem side; the solution or opportunity side is that some institute, law school, or set of people can create a system inviting people to train them. Of course, the trainers will require some energy investment; then, you pay them to make such a system. Let me give you an example. The

government provides UGC with enough money for research grants. A teacher can get around 3–4 lakh worth of grants and develop something. As students, we pay tuition fees to learn and prepare for civil services and other competition exams and take coaching. So, of course, we have all always spent money on training ourselves, but suddenly, when we become professors, we would much rather plagiarise than invest in training, with the mindset that it must come for free.

You go to a doctor with around five years of experience, and you pay a fee of 500 or 1000; then, for the next visit, you again pay for a consultation. You pay the consultancy fee, the doctor prescribes you medicine, and then you buy medicine, and the treatment starts. Like a doctor, I've also invested ten years in legal education, including bachelor's, master's, and Ph.D. But the expectation is that I must go around giving my knowledge for free. The problem is that this assumption is drowning out the boat. How do professors make side money? Take money from the university in the name of a grant, do nothing but plagiarise, use only some amount of that, and keep all the money to themselves.

This is a big problem, and we don't want to look for solutions. Someone must sit down and start looking for an answer. India needs to have something in the world rankings. Prof. C. Rajkumar of JGU dreamed about it. He ran from pillar to post and created that in ten years. If that is possible, this is a much easier thing to do.

14. *Does this current teacher selection system itself incentivize the kind of research framework we have in this country? If it remains point-wise, it will. This will remain likewise. It doesn't matter what the quality of your publication is. It doesn't matter whether you contribute or not, which can shake your hand.*

To enable someone to write, the first requirement is to make them read. Access to books and journals must be given before expecting someone to write. What made me an academic? Eventually, I remember the third year of my law school in Bhopal. There was a journal exchange programme with American institutions. They sent us their journals, which got accumulated, but we have yet to publish or transmit any. When I lifted the first hard copy of their journal and read the titles of the articles, it stayed with me. That was something unique. It would be best if you created sovereignty in your own journal. The 2009 Jindal Law Review was started, and I was the co-editor of the following two issues. I changed the aesthetics and tried to make it international and more professional. All of this is skill development, capacity building, correct thinking, and a sense of giving. So, academicians and the university's administration must create a pro bono, participatory environment. Expecting teachers to not provide themselves and their families with an excellent living standard is unjustified. That model is not going to work anymore. Excellence can be built with such expectations.

It's easy to use terms like overhauling, but it's easier said than done. India is not a product of revolution or any transformation but a product of colonial continuity, and we have benefited from it. Article 372 of the Constitution says that colonial laws are good laws and can be changed in a piecemeal manner whenever required. China is a product of the revolution, and see, there are no human rights there. Similarly, Russia is a product of the revolution of 1917. Remember, we are not a product of revolution but a continuation of colonialism. The Indian Constitution is inspired by all the Constitutions present in the world; we're benefiting from their hard work.

15. *Which brings me to the next part of the question: in the last 5–6 decades, we've seen, of course, a few exceptions we've already mentioned, like others. The legal scholarship in this country has not been that developed. We've not seen so many scholars go out. Now, we see scholars going out. But before that study, Post General, perhaps I can say that we've failed to produce such legal scholars. So, to speak of international appeal, we keep reading about legal luminaries worldwide, which is essential because cross-referencing is a crucial tool in academia. But then, where did we lack the ability to produce our own? Such, you know, because this is a development question. We start with the problem with our education system and then the problem with that research. And then, ultimately, what is the problem? But that is why this kind of entire interview answers this question. But then, again, if you have something to add to why we cannot produce such people of international appeal?*

Because we keep looking backward, the world is moving in one direction, and we walk in the other, so we never meet international repute. It's a question of capacity. How do you create excellence? With capacity building? So, this reflects on everything. Our highest point in the Olympics is one medal. It used to be a silver medal; this time, we got gold. So, one gold medal in a country of 1.4 billion people. This tells you where we are. If this is what lawyers and law teachers do, we are only moving away from excellence.

Excellence requires that you keep thinking, think against the tide, and think outside the box. We need to create possibilities for thinking outside the box, invest in progress, and invest in creating a free society. America rules because it has bombs and technology. But what has allowed America to create technology? Free thinking. At this point, China and India are also getting richer. However, most Indians and Chinese are leaving their respective countries to settle abroad. Where is the money going, then? You cannot close your eyes to this; you cannot close your eyes to facts. You can have interpretations of the same fact, but you really cannot say the day when it's night. So critical thinking, in other words, will allow you to excel. It is difficult; you will not be supported because most people are not thinking, let alone thinking critically.

Another thing, more specifically for lawyers, is to read more and more. There is so much that is available these days, and that too easily. You can read all the material available with a laptop and an Internet connection. Please read them. Think about them and ask questions. Learn to ask, and questioning is not disrespectful. It would be best if you learned to question in a way that the other person does not find rude, but you nevertheless engage in a discursive debate.

The next thing is that quality takes time. It took me ten rejections and seven years to publish something I published in 2020, a piece on the Indian Princely States. Legal history is a very weak discipline, as the general research is inadequate, and even within that legal history, no one does legal history. But I wanted to do it with international law. So, I put international law and legal history together, and it took me seven years to write one paper and six years to do my law graduation and master's. My paper was longer than my first and second law degrees put together. Even two days ago, I got a rejection from a journal where I've already published because I'm trying to do something very original. Translating originality in the mind to originality on paper is a long process. You must embrace rejections cheerfully so that rejections become your teachers. This is self-taught because I wanted to excel and sit with the best in the world. I didn't design myself to accept failure because I come from the India-Nepal border. I did not resign to my fate. I would excel, see the best in the world, and do better than them. So, I developed my methods. Sometimes, a paragraph I write is the product of ten years of thinking and crystallisation of things coming together to make sense for me.

We live in a system where you would not spend a thousand rupees listening to that person share. Teachers are expected to just operate for free. But you pay the experts. Universities can spend money on getting rankings rather than on teachers. Nevertheless, you wish an academic who thinks for years and writes a paper in seven years could set everything free. This means only the legal experts and the scholarship are valued.

People only invest in lifestyle but not in skill development and education. If someone does not know any language and is facing problems, it is better to invest and learn it rather than cry over it. We have failed because we are full of contradictions. We want to become international scholars, but at the same time, we want to follow the Guru-Shishya Parampara. This immense country has only produced two legal scholars in history and only one world-class university. We are failing because we don't respect teachers. Teachers who have the key to success are the least respected in our country. Nobody respects the teachers, from the university administration to the students. We talk about Gurus and ancient India but don't respect them. Gurus were the most respected ones in ancient India. Why not now? Why this hypocrisy? We need to think about it.

16. *This is what I like. My next question was how to do a PhD in this country, at least in India, which is more attractive, rewarding, and socially valuable. Endeavour for people who graduate from, for instance, my batch itself. There were a few people who were interested in the academics. I have an academic bent of mind, so I'm engaging with you today. But I think doing a PhD here or pursuing pure academics is not rewarding enough for me. This is me personally speaking; that is why I'm taking up a corporate position. So, how do we make this entire circle more rewarding so that people with an academic bent and critical thinking are attracted to it? Ultimately, this is a circle of reward. After all, as you said, we cannot expect the scholars to have that for the whole image anymore because everybody wants those minimum standards.*

The first thing is that you need to explore yourself. If money satisfies you, you should work somewhere where you can make money, like coaching institutes where you need not be a scholar. There are many such avenues available. But you need to think that if you were that person, you would wait seven years to publish an article. People look for quick gratification, but it is not possible in teaching. Teachers can't meet the salaries of partners in law firms. This prevents talented people from pursuing teaching as their career. To attract talented people towards academics, you need to incentivize their careers.

You must do that kind of work that will be useful to other legal professionals, practicing lawyers, or judges. In the last few years, the Supreme Court judges, Justice Chandrachud in particular, have cited publications by Indian scholars. The Supreme Court has cited many articles published in NLU's Law Journals. And 99.9% of scholars are from Jindal. But it wasn't happening ten years ago. So, because of the Jindal phenomenon, the Court started to look at where quality is produced. It's created an image of respect for them. They began to engage with them, and then, of course, they've been graceful enough to cite Jindal's academics in the judgments. So, this is one example of how Supreme Court judges cite academics; it is also happening, but you must produce that kind of work. It's not that it's not happening, but you must create that kind of work, which should give you satisfaction. The point of pride is that the top people in the field are engaging with your work in whatever way, in a judgment, or in their articles, or in a larger sense. So, that should excite you, and then you can carry on.

You have to ensure that the PhDs are not looked down upon, which means they should be treated at least like assistant professors. Earlier, people became assistant professors, and then later, they did the PhD side by side, and this takes much time. However, good institutions outside India offer fully funded PhD programmes. So, you must create a system where you pay them relatively decently because they are young, so that they can manage. But you know, not the bare minimum, but something comfortable, and then allow them the time and space to produce and create that environment. So, you have to also, like others, make it lucrative.

The colleges eventually return to the books to see what is coming in and going out. It is about money at some point, so you must incentivize it to make it lucrative enough for people to be attracted to us. And you must see value in the fact that this will produce something relevant. It takes more time to be palatable than food. The college principals and the board must subtly understand PhD scholars' consumption, results, and observations. Only then can PhDs become better and stronger.

17. *The final question relates to the fact that most lawyers come to the courts or otherwise. Even in academics, some people are studying at 2 or 3 cities or colleges that are not even visible on the map of India, so to speak, not the traditional law schools. We talk about the big ones and all the good private universities. There are schools that we still need to learn about. I would say the standard and quality would not be up to par. Is it something to blame on the regulator because, ultimately, the BCI has many jobs? But BCI also regulates legal education. What do I see in the range? The spectrum of a person who's been going through the same syllabus and curriculum at a top law school and a person going through the same syllabus and curriculum at your 3-law college is so broad. It almost seems that the regulator itself is different. So, what do we do? We need an overhaul in the sense that we have that in medicine. Right? So, in medicine, we have one regulator and different colleges, good and bad. But ultimately, when the doctor is produced, they have to pass a few final tests, which would be like, you know, standard tests, which would be all across the board, right? And if you do not pass it, you do not become a doctor. So, what is it we can change in the current setting? We need to rethink the regulation part. Or what is it that we can change? This spectrum is not too wide. I understand. People who graduate from the top are very competitive, and you know they are highly bright individuals, but the spectrum should not be such that we, you know, cannot even relate to the two individuals graduating from different colleges. I'm sorry my question is too lengthy, but I think you get it; I understand.*

Again, a lawyer practicing in Delhi and one practicing in Darbhanga don't have to be the same. The work fields of a lawyer in Darbhanga and a lawyer in Delhi are different. So, expecting them to match quality is in itself a problematic thing. More than education, it's the skill. One thing that will always bridge the gap is communication, and how does communication happen? It happens with language. So, instead of thinking about local languages and all that can be used for the private sphere, having one language, English, and strengthening its use for only professional purposes will do the trick. Diversity is good in other ways. Even though we are comparing, when people are diverse, you can't reach them. See, anthropologically, they are two distinct people. The apples and oranges cannot be compared. So, if you are comparing a lawyer in Darbhanga to a lawyer in Delhi, they must speak the same language, at least with the same proficiency. And then you test whether the skill is similar or not. Again, you don't have to do this ancient wisdom business for that to happen because Indian law is not ancient.

They could do something about working on linking language skills, which is central. That is more central than knowing the law because you can experience the law during your practice and become a better lawyer every day, every week, every month, and every year. But it must begin with investing in the language, something that national law universities will push for through moot court competitions. That's why mooting, etc., is promoted. People then began to value speaking skills, presentation, and linguistic ability. So, working on that, I think we must start working on this instead of saying that this is a problem. Hindi could also be a foreign language for me because if you speak Maithili or Bhojpuri, there is always some distance between the two languages. So, I think that's the skill, and you must work on that queue because that is when we can communicate perfectly or even more efficiently.

18. *I don't know how many people will go through this once it is transcribed. But you've touched one person, one interested academic but still a corporate person, and I thank you for that. I invite you to give some concluding remarks and a way forward for people who want to pursue a career in education or are still doubtful because of the reward theory we discussed. So, just some concluding remarks to our entire interview.*

My concluding remarks would be that it is essential to sit with yourself and consider whether you want to be an academic; you should not be pressured to do a PhD or become an academic. All of this is pleasing; all my colleagues are practicing lawyers, and I admire them. I admire how brave they are; they started from scratch and knew they were doing well. That requires a different kind of skill. Being an academic requires different types of artistic endeavours. I suggest we all sit with ourselves, look for examples, read, try to know what an intellectual is, and read books. There's a lot to be learned from the books; do what academics do, and then make an informed choice. They should by no means come here for fashion or to meet other people's expectations; they should be convinced that they want to produce. It is rewarding for people who believe that they want to become academics. It is not satisfying for people who are not convinced and who have come here because they think working at a law firm is very tiring. This can also be very tiring; it's tiring in its own way. You've been sitting with a draft for five years; is it not tiring? It is tiring. This is not a refusal for people who do not want to practice or do not want to work in a law firm. It must not be seen like that. It has the autonomy to be academic, and they should be convinced about it. They should look for examples and listen to people. Now, because of the internet, you can listen to several great scholars on YouTube. Listen to them, and then you will know yourself. And eventually, this is for everyone; if someone wants to become a judge, lawyer, or something else, they must know themselves first. Invest in learning yourself, and then you'll see if you wish to do this or that.

Thank you for inviting me; conversations are vital. Academia is a product of conversation, as we prefer. When someone is a thinker or a scholar, it demands a privilege, and acknowledging influences is not always possible. And there are numerous influences, which go unappreciated. Even though they go unappreciated, their impact could be significant. So, we must establish an environment of conversation, create an atmosphere of motivation, and think imaginatively as academics. We need to invest in the aspects of academia by engaging intellectually and monetarily with time, ideas, and teamwork. This is a good start, and I'm grateful and honoured. Thank you.

LEGISLATIVE COMMENT ON THE DIGITAL PERSONAL DATA PROTECTION BILL, 2022

Saurabh Bindal & Satyarth Kuhad *

I. Introduction

IT IS not a disputed fact that India is digitising at a massive rate.[1] India has surpassed China in terms of population and has become one of the largest data consumers and producers in the world.[2] The achievement which India has shown in the recent past, comes with a pinch of salt. It would not be wrong to state that technology has equal potential to harm as it has to protect.[3] This potential harm is equally placed for organisations as well individuals. Misappropriation of an individual's personal data amounts to breach of privacy which is essentially a violation of the right to life,[4] one of the fundamental rights granted to the citizens in the Constitution of India.[5] It is not uncommon to find news about data misappropriation across the world which has led all the powerful countries to make laws regarding this issue. Based on different principles, these major powers of the world have different laws regarding data protection. Currently, three approaches to data protection exist,[6] *laissez-faire,* the liberty approach of the United States, national security risk approach of China and the approach taken to hold individual dignity by the European Union (EU). GDPR, the data protection law of the EU seems to be a

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1 Presently, there are over 76 crore (760 million) active internet users (Digital Nagriks) and over the next coming years this is expected to touch 120 Crore (1.2 billion), Explanatory Note to Digital Data Protection Bill, 2022, Data protection Framework, *available at*: https://www.meity.gov.in/data-protection-framework (last visited on June 10, 2023).

2 *Ibid.*

3 Emily A. Vogels, Lee Rainie and Janna Anderson, "Tech causes more problems than it solves", *available at*: https://www.pewresearch.org/internet/2020/06/30/tech-causes-more-problems-than-it-solves/ (last visited on June 10, 2023).

4 The Constitution of India, art. 21.

5 *Justice K. S. Puttaswamy (Retd.)* v. *Union of India*, (2017) 10 SCC 1. The Supreme Court held that the right to privacy is a fundamental right flowing from the right to life and personal liberty as well as other fundamental rights securing individual liberty in the constitution. Chandrachud J. remarked about data protection, "Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State."

6 *Supra* note 1 at 3.

composite and one of the most important regulations amongst them all.[7] The basic idea of all these approaches boils down to one belief that *it is the individual herself who decides in what manner her personal data is to be processed.* The approach taken by India seems inclusive of all these and focuses more on the individual's liberty and personal dignity.

The leitmotif of this article is to analyse the recent data protection Bill i.e., "The Digital Data Protection Bill, 2022 (hereinafter referred to as "the bill")"[8] drafted by the Government of India and suggest on how the shortcomings in the Bill can be rectified. The authors also discuss about the way forward.

II. History of the Data Protection Laws in India

The Government of India has been dedicated to make India a digital power for the last few years, but there have been very few measures undertaken to protect the digital systems as well as data stored by the government.[9] In the very first attempt, the Government of India provided for sections 43A and 72A in the Information Technology Act in 2000. These sections make provision for compensation to individuals whose personal data has been compromised and criminalising intentional data breach. Later in 2011, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 were framed under section 43A of the IT Act 2000. The protection and transfer of sensitive personal data or information are governed by these rules. These guidelines provide for procedures to be followed by the corporate bodies and persons collecting data on their behalf. These rules make up a major part of the data protection regime of the country.

In 2013, the Department of Electronics and Information Technology launched the National Cyber Security Policy which comprises advisory guidelines for preventing data breach. The Supreme Court of India in *Justice KS Puttaswamy* v. *Union of India,* pronounced the landmark judgement, unanimously recognising the right to privacy under Article 21, considering it intrinsic to an individual's life and liberty. Consequentially, the Government of India, in 2017, constituted an expert

7 The General Data Protection Regulation (GDPR) is the toughest privacy and security law in the world. Though it was drafted and passed by the European Union (EU), it imposes obligations onto organisations anywhere, so long as they target or collect data related to people in the EU. The regulation was put into effect on May 25, 2018. The GDPR will levy harsh fines against those who violate its privacy and security standards, with penalties reaching into the tens of millions of euros, *available at*: https://gdpr.eu/what-is-gdpr/ (last visited on June 10, 2023).

8 The Digital Data Protection Bill, 2022.

9 *Supra* note 1 at 6. Currently, the law does little to protect individuals against such harms in India.

committee under the Chairmanship of Justice B.N. Srikrishna to examine the data privacy concerns. The committee prepared a report: "A Free and Fair Digital Economy Protecting Privacy, Empowering Indians (hereinafter referred to as, "committee report")"[10] Along with the committee report, a draft bill was also submitted in 2018 which was modified and later introduced as the Personal Data Protection Bill, 2019 (hereinafter referred to as, "the 2019 Bill") in the Lok Sabha. The Bill was referred to the Joint Parliamentary Committee which submitted its report in December, 2021. However, the Bill could not be passed and was withdrawn in August, 2022.

Later, the Ministry of Electronics & Information Technology had introduced another draft Bill titled, the Digital Personal Data Protection Bill 2022. In a series of attempts to create a legislation for protecting personal data of the citizens, the Government of India has drafted a second bill specifically for data protection, after the Government had withdrawn the 2019 Bill, from the Lok Sabha in August, 2022. Presently, the bill has been passed by both the houses of the Parliament of India awaiting the consent to be given by the President of India.

III. The Digital Personal Data Protection Bill, 2022

The Ministry of Electronics and Information Technology, along with the Bill, had also issued an explanatory note to the Bill[11]. The note mentions the following seven fundamental principles on which the Bill is based: -

1) **Manner**- The usage of personal data must be done in a lawful, fair, and transparent manner by the organisations.
2) **Purpose Limitation**- The personal data must be only used for the purposes for which it is collected.
3) **Data Minimisation**- Only specific personal data which is required for a specific purpose must be collected.
4) **Accuracy**- To ensure that the personal data of the individual is accurate and up to date.
5) **Storage Limitation**- The personal data should be stored for such duration as is necessary for the stated purpose for which personal data is collected.
6) **Data breach prevention**- To ensure that there is no unauthorised collection or processing of personal data.

10 Government of India, "A Free and Fair Digital Economy, Committee of Experts under the Chairmanship of Justice B.N. Srikrishna" (2018).

11 *Supra* note 1.

7) **Accountability**- The person who decides the purpose and means of processing of personal data should be accountable for such processing.

These principles essentially carry their lineage from various provisions of the IT Act, 2000 and the committee report. While most of the fundamental rights are enforceable only against the State, this Bill, if enacted, would make up for a rare case where the fundamental right of privacy would be applied horizontally. Another fact that makes this Bill unique is that it is India's first legislative document to use the pronouns "her" and "she" to refer to persons irrespective of gender.

Analysis of Key Provisions of the Bill

Definitions

The Bill defines "child" as "an individual who has not completed eighteen years of age".[12] It seems from the provisions of the bill that emphasis has been laid on protection of data related to children.[13] The regulations worldwide have considered the children of age as low as 13 years to provide consent.[14] This Bill defines child as a person less than 18 years to keep it compatible with other legislations like Indian Contract Act, Juvenile Justice Act, and POCSO Act. This threshold has been criticized for not being in line with global standards as it is too high.[15] Although the committee report recognizes that "from the perspective of the full, autonomous development of the child, the age of 18 may appear too high" and suggested to determine the cut-off age anywhere between 13 to 18 years.[16]

The terminologies, "Data Principal" and "Data Fiduciary", are in consonance with the suggestions made in the committee report.[17] In other regulations the individual whose data is collected is referred to as "data subject" and the entity that collects the data is referred to as "data controller".[18] This terminology clearly gives a hint that the "controller" "controls" the "subject", which places the interest of the individual whose data is collected secondary to the entity that collects the data. And when the regulations are weak and the interests are discriminated against, data misappropriation takes place. The belief behind using a new terminology can

12 *Supra* note 8, s. 2(3).

13 The Bill also prohibits profiling of children which includes "behavioural monitoring" and "targeted advertising" to children. However, it can be exempted by the Government through a notification.

14 *Supra* note 10 at 43.

15 *Ibid*.

16 *Supra* note 10 at 48.

17 *Id.* at 49.

18 *Id.* at 53.

possibly be to place the interests of Data Principals at par with the interests of Fiduciaries. The Government of India has adopted these terms since the inception of this legislation in 2018. The prejudicial terminology is however still used in other important regulations like General Data Protection Regulation (GDPR).

"Harm" has been defined as "(a) any bodily harm; or (b) distortion or theft of identity; or (c) harassment; or (d) prevention of lawful gain or causation of significant loss"[19]. This definition misses out some other important possible forms of "harm" and is not exhaustive. The 2019 Bill provided a more detailed list which included: (i) mental injury, (ii) loss of reputation or humiliation, (iii) discriminatory treatment, (iv) blackmail or extortion, (v) any observation or surveillance not reasonably expected by the data principal, and (vi) restriction of speech, movement, or any other action arising out of fear of being observed or surveilled. The Joint Parliamentary Committee recommended adding to the list of harms one another form i.e., 'psychological manipulation that impairs the autonomy of the individual', but it is not included in the bill.[20]

Section 2(13) defines "personal data" as "any data about an individual who is identifiable by or in relation to such data". The issues mentioned in above definitions regarding ambiguity persist in this definition also. Also, the definition is narrow. The definition used earlier i.e., the one given in the IT Rules 2011 was more expansive and clearer than this.[21] The committee report differentiated between "personal data" and "sensitive personal data" and provided for categories.[22] It defined "sensitive personal data" and provided for several heads which gave enough guidance to frame the definition, such as, passwords, financial data, health data, official identifiers which would include government issued identity cards, sex life and sexual orientation; biometric and genetic data; transgender status or intersex status, caste or tribe and, religious or political beliefs or affiliations. This bill however does not differentiate and places all kinds of data on equal footing which makes all kinds of data equally protectable.

Interpretation

This Bill is regarding protection of personal data of individuals, the collection of which is now part of almost every individual's regular life. The Bill provisions for

19 *Supra* note 8, s. 2(10).

20 Legislative Brief, The Draft Digital Personal Data Protection Bill, 2022, PRS; available at: https://prsindia.org/billtrack/prs-products/prs-legislative-brief-4053#_ednref7 (last visited: 15th August 2023)

21 For definition of "data", See, S. 2(e), Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011, and S. 2(1)(o), The Information Technology Act, 2000.

22 *Supra* note 10 at 30.

opting from the languages mentioned in the eighth schedule only.[23] This bill, if enacted, would affect all types of individuals including illiterates and people from uneducated strata of the society. For a clear understanding of the notice, consent and other procedures regarding the data processing, language in which the individual is most comfortable must be used. India being a highly diversified country boasts a large number of languages. The exact number of languages although cannot be stated but the numbers range from around 300 to 1500 according to different sources. In such a country where the language changes within a few hundred kilometres, provision for only 22 languages in the legislation concerning such a sensitive issue is highly unjustified.

Applicability

The protections available in the Bill only applies to the digital personal data and ignores the misappropriation of data in the offline mode. Misappropriating any data in offline mode is easy to do and there are no other laws or rules available for data protection which can possibly deal with the protection of personal data in the offline mode. This defeats the very purpose of the legislation.

A unique feature of the Bill is that along with its application in the territory of India, the bill has extraterritorial applicability also when "processing is in connection with any profiling of, or activity of offering goods or services to Data Principals within the territory of India" where "profiling" means, "any form of processing of personal data that analyses or predicts aspects concerning the behaviour, attributes or interests of a Data Principal"[24]. However, the Bill does not provide a mechanism to protect the data from getting exported outside India. The Bill confers wide discretionary powers to the Central Government to notify countries and permit data exportation to those countries.[25] This clearly amounts to excessive delegated legislation, as the factors under which such notification be made are not provided in the Bill.

Notice

The format of the notice is not provided in the bill. The provision prescribes for a clear notice in plain language mentioning the data required and the purpose. But there is no provision that provides for the notice to possess details of how the data will be processed and who would be able to possess and access the data. The provision does not specify whether the notice should be in written form or not. It mentions "itemised notice"[26] which must be just a list.

23 *Supra* note 8, s. 32.

24 *Supra* note 8, s. 4(2).

25 *Id.,* s. 17.

26 *Id.,* s. 6.

Even in cases where there are grounds for processing that are not consensual, the concept of notice must be made necessary. Any exemption from the requirement of notice must only apply in extreme cases or when giving notice renders the lawful processing purpose impossible to achieve. Additionally, the details offered at the time of notice must be increased. The law must also include provisions for proactive disclosure of a privacy policy and the common terms of data processing.[27]

The retrospective provision[28] is highly unreasonable and impractical for the Fiduciaries to comply with. An individual might have given her consent a thousand times over the internet. It is not practicable and traceable. This can possibly lead to a large number of false and frivolous litigations.

Consent

Section 7 deals of the bill with the consent to be given by Data Principals while providing the personal data to Data Fiduciaries. Although, the section provides enough safeguards about the consent which has to be received before processing the personal data, there remains a fundamental issue. Similar to the provision for notice, there is no specified form prescribed for the consent. Just an "affirmative action" would be considered as a consent. Leaving ambiguity in such a critical part of the law to be made, can be tricky for the Data Fiduciaries to follow and implement.

The clause discussing withdrawal of consent provides that the consequences of such withdrawal should be borne out by the withdrawing Data Principal.[29] However, such consequences should only be restricted to consent for processing personal data necessary for the execution of a contract.[30] The clause also mandates that the ease of such withdrawal shall be comparable to the ease with which consent may be given.

Deemed Consent

The personal data of an individual might also be processed without a consent in a number of situations where the consent is deemed to be given by the Data Principal. Although the provided situations seem to be just and equitable, there is a scope of misuse. E.g., the bill authorises the State and its instrumentalities to use an individual's personal data for providing her benefit through different schemes.[31] This might be

27 Page 8, Comments on Draft Digital Personal Data Protection Bill, 2022, VIDHI Centre for Legal Policy.

28 *Supra* note 8, s. 6(2).

29 *Id.*, s. 7(4).

30 *Supra* note 27.

31 *Id.*, s. 8(2).

considered as valid ground for assuming a deemed consent but the provision does not supply with a mechanism which ensures that only the data necessary for that purpose would be shared, that too with the concerned department only.

Also, it seems unclear whether private entities would be authorised to avail these grounds, given that the processing needs to be "in public interest". Section 11(1) can be read as a similar provision where only the Central Government has been authorised to notify a Significant Data Fiduciary.[32] There is also the ground of "fair and reasonable purpose", but in this case, it would have to be notified by the Government as to what amounts to a "fair and reasonable purpose". In doing so, the Government can also consider the Data Fiduciary's legitimate interests.[33]

Obligations on Data Fiduciary

Section 9 relates to obligations on Data Fiduciary however it does not provide any mechanism to fulfil those obligations. The provision mandates the Data Fiduciary to make reasonable efforts to ensure data accuracy, storage and deletion etc. but no fool proof mechanism is provided which can guide the subjects of this bill to make rules and regulations regarding the "reasonable efforts". A Data Fiduciary is required to "implement appropriate technical and organisational measures"[34], for which a Data Fiduciary must be at a high-powered position in the organisation she is working with. In an organisation where there are no minimum necessary technical and organisational facilities, the obligations on the employee who would be a Data Fiduciary would be unfair. In case of any data breach, the Data Fiduciary or Data Processor would have to inform the Data Principals affected, but the Data Fiduciary is not obliged to mitigate and prevent further data breach at the earliest.[35]

The Bill specifies two classifications of Data Fiduciary namely, Data Fiduciary and "Significant Data Fiduciary". While a Data Fiduciary can be appointed by any organisation (private and government), a Data Fiduciary can be notified as a "Significant Data Fiduciary" only by the Central Government, based on the factors mentioned in section 11(1). The most important issue that arises here is that only the Central Government can notify a "Significant Data Fiduciary" and no other Government, state instrumentality or private entity is authorised to perform this function. Since the factors on the basis of which the Central Government may

32 *Supra* note 8, s. 11.

33 What's In India's New Data Protection Bill?; *available at*: https://www.mondaq.com/india/privacy-protection/1258868/whats-in-indias-new-data-protectionbill#:~:text=On%2018 %20November%202022%2C%20the,Bill%20by%2017%20December%202022 (last visited on June 15, 2023).

34 *Supra* note 8, s. 9(3).

35 *Id.,* s. 9(5).

perform this function are of national importance, such duty must be bestowed upon all significant stakeholders and accountable entities (including private organisations) of the country.

Section 12 is a praiseworthy provision which empowers the Data Principal to obtain information regarding processing of her personal data by keeping it under the ambit of the "right to information". The access to the information seems easy too, as it makes it mandatory for the Data Fiduciary to maintain a summary of the processing of personal data. This Section along with other sections furnish wide significant rights for Data Principals including, "Right to correction and erasure of personal data", "Right of grievance redressal" and "Right to nominate".[36]

Duties of Data Principals

Interestingly, the Bill does not only protect the personal data of the Data Principals unidirectionally, by providing them rights, but also provides with duties to be performed by the Data Principals. In case any Data Principle fails to abide by duty prescribed in section 16(2), there is a provision for imposition of costs as the penalty.[37]

Exemptions

The Bill confers broad powers on the Central Government without any checks and balances provided. Under the exemptions provided therein Data Principals are left with no rights in those cases which defeats the very purpose of this Bill.[38] This provision would empower the Central Government to obtain and possess personal data of any individual for an indefinite period of time and no procedure has been prescribed in this section which is a violation of the fundamental right of "right to freedom". Article 21 of the Constitution of India states, "Protection of life and personal liberty —No person shall be deprived of his life or personal liberty except according to procedure established by law". Since protection of privacy and personal data of an individual comes within the ambit of article 21, accessing personal data without establishing a fair procedure would be a violation of article 21.

In *Maneka Gandhi* v. *Union of India*,[39] the Supreme Court laid down the triple test to be passed before making any law interfering with personal liberty:[40]

36 *Id.,* ss. 14 and 15.

37 *Id.,* s. 21(12).

38 *Id.*, s. 18.

39 (1978) 1 SCC 248.

40 *Ibid.*

(1) It must prescribe a procedure;

(2) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and

(3) It must withstand the test of article 14.

Another issue is violation of the principle of proportionality. The powers intended to be given to the Central Government are absolute. The Central Government can possess an individual's personal data indefinitely. Using these exemptions, based on several grounds, a government agency would be able to create a 360-degree profile for surveilling individuals.[41] This can be done by utilising the data retained by various government departments for other lawful purposes. This raises the question whether these exemptions will meet the proportionality test. The Supreme Court in *Justice KS Puttaswamy* v. *Union of India*,[42] held that any infringement of the right to privacy should be proportionate to the need for such interference. Any restriction must be proportionate and narrowly tailored to the stated purpose.[43] One of the grounds on which the Central Government can exempt any government department from receiving consent before processing personal data, is "security of the State".[44] The Supreme Court in *People's Union for Civil Liberties* v. *Union of India*,[45] had laid several guidelines regarding interception of communication between individuals, on grounds of national security:[46]

The authority issuing the interception order must maintain records of: (i) the intercepted communications; (ii) the extent to which material is disclosed; (iii) the number of persons to whom the material is disclosed and their identity; (iv) the extent to which the material is copied; and (v) the number of copies made (each of which must be destroyed as soon as its retention is no longer necessary).

Although the Bill does not specifically mention interception of communication in the Bill, the above safeguards could be used as guiding principles for making a framework of processing data under special circumstances. The Committee Report also recommends expeditiously bringing in a law for the oversight of intelligence gathering activities.[47]

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41 Report on Draft Digital Personal Data Protection Bill 2022, PRS; *available at*: https://prsindia.org/billtrack/draft-the-digital-personal-data-protection-bill-2022 (last visited 15 June 2023).

42 *Supra* note 5.

43 *Ibid.*

44 *Supra* note 8, s. 18(2).

45 (1997) 1 SCC 301.

46 Chaitanya Ramchandran, "PUCL v. Union of India Revisited: Why India's Surveillance Law Must Be Redesigned for The Digital Age" 7 *NUJS Law Review* 105 (2014).

47 *Supra* note 10.

Compliance Framework

Chapter five of the Bill provides the compliance framework of personal data protection. The compliance shall be managed by a board, namely, "Data Protection Board of India" (hereinafter referred to as "the Board") which would be constituted by the Central Government. The chapter lays out the details of composition, functions and procedures to be followed by the Board.

The Bill however intends to keep the functioning of the Board independent,[48] but even a simple reading of the provisions related to the Board would make it sound dubious. The Bill delegates all responsibilities regarding composition, strength of the Board, removal of the Chairman, and terms and conditions of the services of the members, to the Central Government. This empowers the Central Government to change the structure as well as the terms and conditions at any moment of time. This can lead the Central Government to use the Board for various unlawful benefits including political benefits. The Board has been mandated to discharge functions as assigned by the Central Government along with its main function of determining non-compliance of the Act.[49] Under this provision, the Central Government can certainly influence the functioning of the Board making it act like its agent. The Central Government is going to become an organisation with the largest number of Data Fiduciaries in the country. It processes the personal data of millions of people for the services and benefits, granting of permits, licenses, and official IDs. This fact makes it necessary for the regulatory body to develop the rules and regulations to be independent of the government's influence in order to ensure fair protection of data principal's interests.[50]

The 2019 Bill sought to provide for an independent Data Protection Authority and the necessary details such as composition, manner and terms of appointment were specified in the Bill itself.[51] The committee report also supplies with sufficient details regarding composition and functioning of the Board (therein named as "Data Protection Authority") including detailed obligations and enforcement tools at the disposal of the Board.[52]

Section 21(8) of the Bill mandates the Board to complete the enquiry at the earliest. However, there is no specific time period prescribed to dispose of the complaints received by the Board. At the level of Data Fiduciary, there is a prescribed time

48 *Supra* note 8, s. 19.

49 *Id.*, s. 20(1).

50 PRS Legislative Brief, *available at*: https://prsindia.org/billtrack/prs-products/prs-legislative-brief-4053#_edn23 (last visited on June 12, 2023).

51 *Ibid.*

52 *Supra* note 10.

period of seven days to deal with the grievance of Data Principals but the purpose for an early redressal is defeated when the Board has discretion with respect to time period to hold the inquiry and close the complaint.

The Bill empowers the Board to review its orders by an adjudicating group larger than which passed the concerned order.[53] There is no provision of any appellate body in the Bill. The aggrieved party would be able to appeal directly to the High Court. This can possibly lead to unjustified harassment of the victim of data breach until the High Court decides on the matter. However, there were provisions for an Appellate Tribunal in the 2019 Bill.[54]

Section 25 provides for penalty in cases where the non-compliance is "significant". However, disappointingly only financial penalty is the only form of punishment prescribed in the Bill. Data breach can significantly harm an individual's life. Along with it, non-compliance to any provision of this bill would amount to the violation of a Fundamental Right of the affected individual. Other than this, data breach can in many ways prejudice our nation's security and integrity. No criminal liability has been set out for such violations.

Miscellaneous

One of the major shortcomings of the Bill is absence of two significant rights of the Data Principals namely, "Right to data portability" and "Right to be forgotten". Both these rights were part of the 2019 Bill. The Committee report in its recommendations of Chapter V explicitly recommended for provision of these two rights.[55] According to the Committee report, "the right to data portability is critical in making the digital economy seamless."[56]

Right to data portability

"The right to data portability allows Data Principals to obtain and transfer their data from data fiduciary for their own use, in a structured, commonly used, and machine-readable format."[57] This right enables the Data Principals to have a better control over their data with respect to data migration between different Fiduciaries.

Right to be forgotten

The "Right to be forgotten" refers to the right to erase or limit the disclosure of an individual's personal data available on the internet. This right can prevent access

53 *Supra* note 8, s. 22.

54 The Personal Data Protection Bill, 2019, Ch. 12.

55 *Supra* note 10, Ch. 5.

56 *Id.* at 75.

57 *Supra* note 50.

to an individual's personal data by the public at large. Although this right has not been granted explicitly by any statute or judgement in India, the Supreme Court and High Courts have discussed and considered it to be a part of "Right to privacy". The Committee Report observed, "that the right to be forgotten is an idea that attempts to instil the limitations of memory into an otherwise limitless digital sphere."[58] In *Justice K.S.Puttaswamy (Retd)* v. *Union Of India*,[59] Sanjay Kishan J. observed that the "Right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the Internet"[60] While, the IT Rules, 2021 also do not include this right, they do however, lay down the procedure[61] for filing complaints with the designated Grievance Officer so as to have content exposing personal information about a complainant removed from the internet.[62]

IV. Conclusions and Suggestions

The issue of personal data protection is highly sensitive and affects every individual's life. The Bill if enacted, would be the first dedicated legislation for personal data protection in India. Considering the sensitivity of the issue as well as the number of people this legislation would affect, it is quite difficult to predict the success of the legislation. Its actual repercussions and shortcomings would be known only once it is implemented. However, the Bill is a mixed bag legislation. It contains certain praiseworthy provisions, some of them being the stronger and improved versions of the preceding drafts. Although the Bill has promising features, it needs to be refined in terms of definitions and clarity of language. The bill also grants arbitrary powers to the Central Government with respect to exemptions to its agencies from compliance. This can possibly prevent fair implementation of the law. Along with this, the Data Protection Board which is the regulatory authority needs to be more independent with statutory authorization for uninfluenced regulation of the compliance of the provisions.

The Digital Personal Data Protection Bill, 2022 deals with an issue which has never been strictly regulated by the State. Even after the declaration of right to privacy as a fundamental right by the Supreme Court of India, no dedicated law has been enacted by the Parliament yet. The Bill has been passed by both the houses of the Parliament. The effort of the Central Government is a necessary step in the right

58 *Supra* note 10, at 77.

59 *Supra* note 5.

60 *Supra* note 5, para 62 [Judgement of Sanjay Kishan J.].

61 Page 23, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

62 *Ibid.*

direction. With this progress, the citizens of the country are waiting for this legislation to be enacted, with great expectations.

The Bill is undoubtedly drafted in simple language and an easy to understand, still there is a need to clarify the language in some provisions, such as the language surrounding the legitimate interest type of ground which we believe is at the heart of privacy legislation.[63]

The Bill certainly lacks of some important mechanisms. There should be some implicit mechanisms which could act as guidance for proper implementation of the law. E.g., There is no provision in the Bill which could suggest that even those handling the personal data would have limited or reasoned access to the personal data. There should be a mechanism to permit for access and record whenever given.

The provisions of deemed consent should include more stringent requirements like (a) the implied consent for processing personal data must be for a specific purpose; (b) the implied consent must be revocable; (c) it must be illegal to use implied consent to process sensitive personal data or to process any personal data in a way that poses a significant risk of harm; and (d) additional guidance may be provided on when consent may be given.[64]

63 *Supra* note 5, s. 8(9).

64 *Supra* note 27.

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I. Introduction

In the ever-evolving landscape of international trade, the role of strategic Free Trade Agreements (FTAs) is becoming increasingly vital and in the past two decades, FTAs have proliferated across the globe.[1] As per the World Trade Organization (WTO), 360 FTAs[2] are currently in force.[3] A Free Trade Agreement (FTA) is basically an international treaty between two or more countries through which the partner countries agree on specific terms and conditions that affect trade[4] between them.[5] These terms and conditions can include reduced or pre-determined tariffs, greater market access, stronger IP protection, provisions for Rules of Origin (ROO), etc.[6] An FTA is considered as an exception to the Most Favored Nation (MFN) principle of the WTO Agreement.[7] However, they still have to comply with the governing WTO Rules.[8] In the last two decades, these agreements have

1 Daniel Yuichi Kono, "Are Free Trade Areas Good for Multilateralism? Evidence from the European Free Trade Association" 46(4) *International Studies Quarterly* 507 (2002).

2 This includes bilateral, multilateral, regional and mega-regional FTAs.

3 WTO, "Regional Trade Agreement", *available at:* https://www.wto.org/english/tratope/regione/regione.htm (last visited on Sept. 06, 2023).

4 FTAs can be both for trade in goods as well as trade in services. *See* International Trade Administration, "Free Trade Agreement Overview", *available at:* https://www.trade.gov/free-trade-agreement-overview (last visited on Sept. 06, 2023).

5 International Trade Administration, "Free Trade Agreement Overview", *available at:* https://www.trade.gov/free-trade-agreement-overview (last visited on Sept. 06, 2023).

6 *See generally*, Mahindra Siriwardana, "An Analysis of the Impact of Indo-Lanka Free Trade Agreement and its Implications for Free Trade in South Asia" 19(3) *Journal of Economic Integration* 568 (2004); Blayne Haggart, "Modern Free Trade Agreements are not About Free Trade" *New Thinking on Innovation* 15 (Jan. 1, 2017); Dani Rodrick, "What Do Trade Agreements Really Do?" 32(2) *The Journal of Economic Perspectives* 73 (2018); Kati Souminen, "The Changing Anatomy of Regional Trade Agreements in East Asia" 9(1) *Journal of East Asian Studies* 29 (2009).

7 *See* The General Agreement on Tariffs and Trade, 1947 (GATT 1947), art. XXIV; *See also* WTO, "Principles of the Trading System", *available at:* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited on Sept. 06, 2023); Congressional Research Service, "Free Trade Agreements and the WTO Exceptions" (July 2, 2008); "Chapter 1: Most-Favored-Nation Treatment Principle", *available at:* https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (last visited on Sept. 06, 2023).

8 Rules laid down by Committee on Regional Trade Agreements especially the Transparency Mechanism; *See* WTO, "Regional Trade Agreements", *available at:* https://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited on Sept. 06, 2023); Department of Foreign Affairs and Trade, Government of Australia, "WTO and Free Trade Agreements", *available at:* https://www.dfat.gov.au/trade/organisations/wto/Pages/the-world-trade-organization-wto-free-trade-agreements (last visited on Sept. 06, 2023).

expanded significantly in their scope and coverage, encompassing not just market access but also addressing issues within national borders, far beyond the scope and mandate of WTO.[9] Further, with the emergence of prominent Mega Regional FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[10] and Regional Comprehensive Economic Partnership (RCEP),[11] FTAs are now considered as favorite vehicles to achieve trade policy goals.[12] Many countries are also curating their own blueprints for FTAs based on their experiences, perceptions, and strategic and security interests.[13]

Following this global geo-pollical trade trend, India has also been experimenting with FTAs.[14] India entered into its first FTA with Sri Lanka in 2000,[15] and since then, it has now become a signatory to 13 Free Trade Agreements.[16] However, there is a widely held perception in India that, as compared to its partnering countries, India has not sufficiently benefitted from its existing FTAs.[17] Hence, an in-depth analysis of the problems and the factors hindering India's realization of the potential benefits from its FTAs is critical. *Have the FTAs delivered for India? What should be the way ahead for India? Should it even enter into more FTAs? What steps can India take to enhance its benefits from FTAs?* These questions become significant considering the

9 *See generally* Henrick Horn, Petros C. Mavroidis, *et. al.*, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements* (2009); Asian Development Bank, *How to Design, Negotiate, and Implement a Free Trade Agreement in Asia* 4 (2008); Masahiro Kawai & Ganeshan Wignaraja, "Asian FTAs: Trends, Prospects, and Challenges" *ADB Economics Working Paper Series* No. 226 (2010); C. O'Neal Taylor, "Of Free Trade Agreements and Models" 19(3) *Indiana International and Comparative Law Review* 570 (2009).

10 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018).

11 Regional Comprehensive Economic Partnership (RCEP) (2020).

12 Arvind Shukla, "Free Trade Agreements of India: A Policy Analysis" *Indian Institute of Management Bangalore* (2021).

13 C. O'Neal Taylor, "Of Free Trade Agreements and Models" 19(3) *Indiana International and Comparative Law Review* 570 (2009).

14 Arvind Shukla, *supra* note 12.

15 The India-Sri Lanka Free Trade Agreement (ISFTA) (2000).

16 Press Information Bureau, "India has signed 13 Regional Trade Agreements (RTAs)/ Free Trade Agreements (FTAs) with Various Countries/Regions", *available at:* https://pib.gov.in/Pressreleaseshare.aspx?PRID=1843902 (last visited on Sept. 06, 2023); *See also* Ministry of Commerce & Industry, "FTAs", *available at:* https://pib.gov.in/PressReleasePage.aspx?PRID=1814151 (last visited on Sept. 06, 2023).

17 *See e.g.*, Arvind Shukla, "Free Trade Agreements of India: A Policy Analysis" *Indian Institute of Management Bangalore* (2021); MVIRDC World Trade Centre Mumbai, "India and Free Trade Agreements: Opportunities and Challenges" (2018); Rohit Singh, "India's Free Trade Agreements (FTAs): Dynamics and Diagnostics of Trade Prospects" (2018); Divesh Pandey & Meera Unnikrishnan, "Free Trade Agreements (FTAs) by India: Review and Implications for Future" (2023).

fact that India has signed two more FTAs in 2022 with UAE[18] and Australia,[19] and the ongoing negotiations with the United Kingdom has reached an advanced stage, with both the countries expecting to sign the FTA soon.[20]

In the backdrop of this intricate web of intertwined issues and concerns regarding FTAs, the publication of the book "*Fee Trade Agreements: India and the World*"[21] authored by Dr. V.S. Seshadri, a distinguished author and expert in international economics,[22] is both timely and of immense significance. In this book, Dr. Seshadri provides an authoritative, compelling, and thorough exploration of India's experience with the FTAs. This book is intended to not only systematically enhance our understanding of FTAs but also to provide an authoritative account of the vast changes taking place in the FTA landscape globally. The book tries to capture various aspects of FTAs by keeping India's position, its relatively limited participation in the FTAs, and its future course in mind. Dr. Seshadri has curated the present book by drawing upon his vast experience as a diplomat, trade negotiator and trade administrator.

II. Structure and Overview of the Book

The present book is inspired by the idea to study and present, in a single volume, the global evolution of FTAs and their utilization by India.[23] In this pursuit, Dr.

18 The Comprehensive Economic Partnership Agreement (CEPA) (2022).

19 Australia-India Economic Cooperation and Trade Agreement (ECTA) (2022).

20 *See* Melisaa Cyrill, "India, UK FTA Negotiations: Key Updates" *India Briefing*, Sept. 04, 2023, *available at:* https://www.india-briefing.com/news/india-uk-fta-25699.html/ (last visited on Sept. 06, 2023); Saurabh Sinha, "FTA with UK likely by Diwali, talks on with many other countries: Piyush Goyal", *The Times of India*, Sept. 06, 2022.

21 V.S. Seshadri, *Free Trade Agreements: India and the World* (Oxford University Press, Oxford, 2023).

22 Dr. V.S. Seshadri, I.F.S. (Retd.), is a Senior Fellow for International Trade at the Delhi Policy Group. He is a former Ambassador, retired from the Indian Foreign Service, and has wide experience in dealing with trade issues. He has served as the Joint Secretary (WTO) for the Ministry of Commerce from 1993-2003 (during the Doha Round negotiations). He has served as the First Secretary (Trade Policy) in India's diplomatic mission to the European Community in Brussels from 1986-89. He has served as the Minister (Commerce) in the Embassy in Washington DC from 2003-2006 (during this time the US was in an active negotiation mode for concluding FTAs with several trade partners). Further, upon retirement he has served as the Senior Advisor and then as Vice Chairman (2013-17) of the Research and Information System of Developing Countries (RIS) where he has taken appraisals of implementation of India's FTAs with the Republic of Korea, Japan & Singapore. *See* V.S. Seshadri, *Free Trade Agreements: India and the World* preface xiii (Oxford University Press, Oxford, 2023). Dr. Seshadri has contributed a number of research articles and discussion papers on trade and international economics issues. *See* Dr. V.S. Seshadri, I.F.S. (Retd)., https://www.delhipolicygroup.org/faculty/dr-vs-seshadri-ifs-retd.html (last visited on Sept. 06, 2023).

23 *Supra* note 21, at xiv.

Seshadri has expertly dissected the subject matter of FTAs into seven (7) carefully curated chapters. Each chapter explores a unique facet of the journey through the world of free trade agreements. The following section provides a concise summary of each chapter. This section will serve as a guide for the reader to the rich content that is contained in the book.

In the *opening chapter*, Dr. Seshadri lays the groundwork by surveying the historical evolution of the FTAs globally. This chapter studies the evolution of FTAs in three waves[24] and analyses how these agreements have become more profound and broader in their scope. It also discusses how the contemporary mega-regional FTAs[25] are going beyond WTO rules. One of the critical discussions in this chapter, which is particularly relevant for law students, is with relation to the Legal Framework of the WTO regarding FTAs. FTAs are legal instruments, and hence, they can come in conflict with the Most Favored Nation (MFN) principle, which is a cornerstone of WTO. In such a context, how an FTA is conducted, which WTO norms countries have to comply with, and what are the limitations of FTAs have been explained lucidly and comprehensively in this chapter.

In the *Second and Third Chapters*, Dr. Seshadri has provided rich insights into the Indian experience regarding FTAs. The second chapter, titled *India's Free Trade Arrangements*,[26] provides a thorough analysis of India's past FTAs. In this chapter, Dr. Seshadri has carefully profiled and compared the scope and depth of different FTAs that India has entered into and charted out their salient features. It also

24 "The first wave from the 1950s to early 1980s led mainly by Western Europe, the second wave from the mid-1980s to late 1990s when both US and Europe were actively involved in FTA-making, and the third wave in the 2000s when leading trading Asian nations also joined Europe and US that gave regionalism further momentum. Each wave was not just limited to the leading countries themselves but had a demonstration or knock-on effect promoting other countries to take similar initiatives", *Supra* note 21 at 9; *See also* World Trade Organization, *World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (2011).

25 Mega-Regional FTAs have been defined as "deep integration partnerships in the form of FTAs between countries or regions with a major share of world trade and FDI, and in which two or more of the parties serve as hubs in global value chains/global production networks (i.e., the US, the EU (Germany), Japan, China)"; Eszter Luacs and Katalin Volgyi, "Mega-FTAs in the Asia-Pacific Region", 17(1) *European Journal of East Asian Studies* 158 (2018). Examples of such Mega FTAs include Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018); Regional Comprehensive Economic Partnership (RCEP) (2020), etc. *See e.g.*, Badri Narayanan G., Dan Ciuriak, *et. al.*, "Quantifying the Mega-Regional Trade Agreements: A Review of the Models" *International Institute for Sustainable Development* (April 2015); Thomas Hirst, "What are Mega-Regional Trade Agreements", *World Economic Forum*, *available at:* https://www.weforum.org/agenda/2014/07/trade-what-are-megaregionals/ (last visited on Sept. 08, 2023).

26 *Supra* note 21 at 40-99.

provides a comparison of certain provisions such as market access commitments in goods, services and investment, Rules of Origin (ROO), trade remedies, technical standards, regulations, dispute settlement, etc., across India's various FTAs. The Third Chapter of the book, titled *Impact Assessment of Three Indian FTAs*,[27] is a continuation of the previous chapter. It takes the discussion in the previous chapter further by providing a detailed analysis of the implementation, impact and issues relating to three of India's comprehensive FTAs with the Republic of Korea, Japan, and Singapore, namely IKCEPA,[28] IJCEPA[29] and ISCECA,[30] respectively. The analysis is based on the studies conducted by Dr. Seshadri from 2015-17 while being a member of the Research and Information System for Developed Countries (RIS) and the ASEAN-India Centre. It offers rich and comprehensive firsthand insights into the working of these FTAs.

In the *next three chapters*, Dr. Seshadri has shifted his focus to the international level and has delved into the global evolution of FTAs with three specific examples. The first one is a case study contained in Chapter Four. In this chapter, Dr. Seshadri has taken up Republic of Korea (South Korea) as a case study and has examined how over the years, South Korea has evolved the rules governing merchandise trade in the FTAs entered by it. This chapter has explored the evolution of Korea's rich and comprehensive FTAs portfolio. Its current bilateral FTA partners, apart from India, include the EU, the United States, China and ASEAN. Studying the evolution of South Korea's FTAs provides an in-depth understanding of the different templates and strategies regarding FTAs it has developed over the years.

In the *next two chapters*, Dr. Seshadri has focused on studying two major FTAs namely the Comprehensive and Progressive Transpacific Partnership (CPTPP)[31] and the Regional Comprehensive Economic Partnership (RCEP).[32] The Fifth chapter examines the various provisions of CPTPP. Several of these provisions go much beyond the existing WTO rules and mandate. For instance, CPTPP not only contains

27 *Id.* at 101-165.

28 India-Republic of Korea Comprehensive Economic Partnership Agreement (IKCEPA) (2010).

29 India-Japan Comprehensive Economic Partnership Agreement (IJCEPA) (2010).

30 India-Singapore Comprehensive Economic Cooperation Agreement (ISCECA) (2005).

31 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) (It is a recent mega international FTA considered to be of a high standard. Despite it being a somewhat truncated Transpacific Partnership (TPP) is considered to have set even higher benchmarks for future FTAs).

32 Regional Comprehensive Economic Partnership (RCEP) (2020) (It is the World's Largest Free Trade Agreement).

33 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Chapter 19 (2018).

provisions related to labour[33] and environment[34] but these issues have also been made a subject matter of dispute resolution. In the Sixth Chapter, Dr. Seshadri has traced the evolution and framing of the Regional Comprehensive Economic Partnership (RCEP) and analyzed its various chapters. This chapter also makes comparisons between the RCEP and CPTPP. Both these treaties have several common signatories.[35] In the concluding part of this chapter, Dr. Seshadri has explored and analyzed the possible reasons as to why India decided to pull out of the RCEP negotiations at an advance stage in 2019.

In the *concluding seventh chapter* titled *The Way Forward for India*,[36] Dr. Seshadri has charted out a future course for India. This chapter, firstly, seeks to better understand the impact assessments from earlier FTAs with the aim to answer the broader questions, such as *Should India be pursuing negotiations for further FTAs and whether the past FTAs could have been negotiated in a better way?* It examines the key features of the FTAs that India has recently concluded with UAE and Australia. It also highlights the crucial aspects that India should focus on to enhance its market access opportunities by negotiating more FTAs but with well-chosen FTA Partners. Furthermore, the author also underscores the critical factors that should be taken into account in taking forward any ongoing or future FTA negotiations. These key aspects include discussion on provisions related to market access, rules of origin, trade remedies, digital trade, government procurement, and intellectual property, etc. Lastly, in this chapter, Dr. Seshadri provides a fivefold plan to strengthen the monitoring and implementation of FTAs once they are concluded. Throughout these seven chapters, readers are bound to develop a deep understanding of the challenges and opportunities that lie before India in its involvement with the FTAs.

III. A Brief Insight into the Few Unique Sections of the Book

This section focuses on the two unique, engaging, and significant parts of the book.[37] The first is chapter 4, titled *Republic of Korea and Its FTAs.*[38] As mentioned in the previous section, this chapter examines the FTAs of the Republic of Korea

34 *Id.* at ch. 20.

35 The common signatories include Australia, Brunei, Japan, Malaysia, New Zealand, Singapore and Vietnam; *See* Jeffrey J. Schott, "Which Countries are in the CPTPP and RCEP trade agreements and which want in", *available at:* https://www.piie.com/research/piie-charts/which-countries-are-cptpp-and-rcep-trade-agreements-and-which-want (last visited on Sept. 06, 2023).

36 *Supra* note 21 at 313.

37 The book contains several remarkable and unique features that are significant in their own respect, but for brevity only these two sections have been taken up for discussion.

38 *Supra* note 21 at 168-221.

as a case study.[39] South Korea is an unusual choice when undertaking a comparative study, as generally Indian scholars prefer the UK, USA, Singapore, Australia, New Zealand and other common law countries for a case study. As explained by the author, South Korea has been chosen because it has a vibrant and diverse FTA portfolio (having concluded around 18 FTAs covering 58 countries, including India and almost all its trading partners).[40] Dr. Seshadri analyses the evolution of South Korea's FTA Network in three phases (First phase: 1998-2004, Second Phase: 2004-2012, Third Phase: 2013-present). The case study of South Korea's FTAs in this chapter is significant for certain elements that it brings out in FTA making, such as the need for room for creativity in structuring market access concessions, the drive for a first mover advantage, the attention given by Korea to compensate what was seen as a potentially losing sector from its FTAs, the agriculture sector, and how geopolitical considerations matter. The discussion on Rules of Origin (ROO),[41] its compliance and certification mechanism, safeguard clauses[42] and other Trade remedy provisions[43] will be of particular interest to diplomats, agreement drafters, and law students. India can draw several lessons from the comprehensive Korean strategy regarding FTAs, such as preserving and promoting trade with principal partners, showing flexibility to accept FTA templates of its partners, and trying to gain early mover advantage wherever possible.

One of the other most important discussions of the book is contained in its seventh chapter, *The Way Forward for India*. In this chapter, Dr. Seshadri has outlined a five-fold plan to monitor and implement FTAs upon conclusion.[44] With an expanding FTA portfolio, an effective implementation strategy will undoubtedly play a vital role for India. To this extent Dr. Seshadri has expressed the necessity for action on the following five key fronts viz: (i) Familiarization with the provisions of any new FTAs; (ii) Devising and Implementing a companion export and investment strategy for the new FTA Partners; (iii) Monitoring of FTA Utilization; (iv) Making full use of the FTA provisions; and (v) Actions that can be taken by India's Diplomatic Missions in the FTA Partners and other countries. In enunciating this five-fold action plan, Dr. Seshadri has utilized his tremendous experience as a diplomat and international trade expert. For instance, in the first step, i.e., to create

39 This chapter assumed significance, in part, because the chapter was included by author, boldly, despite the doubts expressed by the reviewers about the synchronization of the chapter with the overall thrust of the book.

40 *Supra* note 21 at 212.

41 *Supra* note 21 at 189.

42 *Id.* at 200.

43 *Id.* at 196.

44 *Id.* at 348.

"Familiarization with the provisions of any new FTAs",[45] – Dr. Seshadri has emphasized that this not only means making the legally worded document available on the official website along with a few FAQs (which is typically the case with official government websites in India) but rather goes much beyond that. To ensure the effective implementation of the FTA, familiarizing the stakeholders (exporters and importers) in simple and plain language about each FTA is essential. To this extent, a cue can be taken from other countries like Australia, Canada, New Zealand, and Singapore, etc. These countries have taken steps to explain their FTAs in a lucid, instructive, and comprehensive manner. They also provide a host of additional information, such as fact sheets, summaries, and illustrative examples.[46] This suggestion by Dr. Seshadri is very pertinent, given the Indian context. India can also emulate such models and provide a step-by-step handholding guide to the stakeholders, which could help in addressing the regular complaints regarding lack of information.[47] To further strengthen the familiarity of the stakeholders with the FTA provisions, industry-government-academic consultative workshops can also be organized, which will help in the development of relevant "practice-oriented material" for the stakeholders and for wider circulation.

IV. Conclusion

In light of the reversal of globalization, erosion of multilateralism, and re-emergence of emphasis on self-reliance during the COVID-19 pandemic, the concept of free trade has changed significantly. With international Institutions like the IMF and WTO facing numerous crises[48] and unable to deliver satisfactorily on their mandate, trade and trade policies are increasingly becoming intertwined with strategic and security issues. Trade negotiations are no longer purely related to trade but are aligned with the strategic and security interests of the participating countries.[49] In this context, it is critical for India to reassess the significance and role of FTAs, an instrument from the early globalization period. *Have the previous FTAs delivered for India? What went wrong with India's FTAs? What can India do to enhance the success rate of its FTAs? What can it learn from the FTA experience of other countries?* These are some of the critical questions that Dr. Seshadri has sought to explore in this book.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 Patrick Low, "The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting Down the Conversation?" 21(3) *World Trade Review* 274 (2022).

49 Mona Pinchis-Paulsen, "Let's Agree to Disagree: A Strategy for Trade Security" 25(4) *Journal of International Economic Law* 527 (2022).

Curating the book on the touchstone of his immense experience and knowledge gained over the years in the area of international trade, Dr. Seshadri has provided a timely, authoritative, meticulously designed and intellectually rich commentary on the subject of Free Trade Agreements. With India currently seeking to expand its FTA network on the backbone of its enhanced domestic manufacturing capability through Atma Nirbhar Bharat and strengthened export capacities, a well-constructed and well-executed plan, not only for FTA expansion but also for ensuring effective implementation, will be vital for India. Toward this end, the recommendations made by the author in the book offer a roadmap that will assist India in successfully navigating the multifarious issues and challenges related to FTAs. Additionally, Dr. Seshadri has also explored the implications of India's evolving role in the global supply chain, by examining how FTAs have influenced manufacturing and service sectors.

The present book is a valuable addition to the prevailing literature on Free Trade Agreements. It offers a comprehensive account of India's past, present and future approach to FTAs that is both technically rich and lucid to understand. The book is well suited for a diverse audience, including students, research scholars, policymakers, analysts, business leaders, entrepreneurs, and government officials. It will not only provide valuable inputs to its readers but can also be used as an authoritative reference material for further research as well as for framing policy options.

Vikas Gahlot[*]

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