CRITICAL EVALUATION OF HANDCUFFING AND ABSCONDING LAWS IN BNSS FROM A HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

In 2023, the Parliament replaced the long-standing colonial Laws, IPC, CrPC, and IEA, with three new Criminal Laws. Since that time, it has generated discussions and conversations within the legal field about the backwards and unclear laws. The Government contends that the new criminal laws help in enhancing and streamlining the justice system by replacing the old colonial laws. The Government aims to reform the judiciary by bringing in new enactments, citing changes such as Addressing Emerging or Unforeseen Crimes, Modernising and Streamlining the Criminal Justice System, Protecting Vulnerable Groups, Ensuring National Security, etc. While the experts, such as legal practitioners, journalists, and minority group leaders, believe that the new criminal laws are authoritative and give undue power to the state while infringing upon the rights of minorities and weaker sections of society. The study, through various case laws, research papers, journals, and other secondary sources, shall establish the validity and viability of new criminal laws. The study aims to mediate and decide on an equitable and possible approach that could be adopted, balancing national security and human rights to create a just and honourable society. The objective of the study is to find a middle ground between the absolute powers of the state and issues of human rights as incorporated in international conventions.

Keywords: BNSS, CRPC, Human Rights, Absconding, Handcuffing.

LITERATURE REVIEW

The exploration of human rights violations by police in India reveals a complex interplay between judicial activism and systemic abuses. Various research papers highlight the persistent

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issues of custodial violence, illegal detentions, and the misuse of police powers, despite the judiciary's efforts to uphold constitutional protections. A crucial aspect that is worth noting is the analysis of judicial activism in the context of police regulation, which pivots on the significance of certain critical cases like Maneka Gandhi v. Union of India and Hussainara Khatoon v. Home Secretary, Bihar. These cases have broadened the interpretation of Article 21, which provides for the right to life and personal liberty, such as the right to privacy and fair trial processes.

However, the paper remarks that even with these judicial measures in place, human rights violations are rampant as a result of political interference and ignorance of constitutional provisions among police officers. A related empirical work on police procedures and accountability, and in particular, the provisions of the Code of Criminal Procedure, 1973. This study shows how the wide powers conferred upon police to arrest and investigate encroach upon the rights of individuals available under Article 21. The Supreme Court also has classified handcuffing among other repressive measures as barbaric (e.g., Prem Shankar Shukla v. Delhi Administration), and also set forth proper guidelines to ensure that members do not inflict on individuals' unnecessary disrespect and aggression during their arrest. However, these measures are often flouted, and as a result, wrongful detention and torture while in custody do take place.

The paper on undertrial prisoners in India by Ayushi Priyadarshini and Madhurika Dubey provides a review and analysis of the human rights situation.

Key Areas or Concerns: The paper primarily raises concerns about the high number of undertrial prisoners in India, constituting around two-thirds of the total prison population. A significant concern is that many undertrials, presumed innocent, remain incarcerated due to their inability to pay bail, highlighting economic discrimination. The authors also point to the failure of the judiciary to effectively implement Section 436A of the Criminal Procedure Code (CrPC), which mandates the release of undertrials who have served half of their potential maximum sentence. Further concerns include the prejudiced nature of the bail system against the poor, inadequate legal representation for the needy, police torture, and the degrading quality of life in prisons for undertrials, the failure to segregate undertrials from convicted criminals, and the denial of speedy justice. The disproportionate representation of marginalised communities (Muslims, Dalits, and Tribals) among undertrials is also highlighted as a concern reflecting potential bias.

Shortcomings for Future Research: While providing a comprehensive overview, the paper has some potential shortcomings that future research could address.

Limited recent empirical data: While it cites NCRB data from 2015, more recent statistical Analysis on the under-trial population, implementation of Section 436A, and the impact of various interventions would be valuable.

Lack of in-depth qualitative analysis: The paper primarily presents statistical and legal arguments. Future research could benefit from qualitative studies exploring the lived experiences of undertrial prisoners, the perspectives of legal aid lawyers, and the challenges faced by the judiciary and prison administration in implementing reforms.

Limited exploration of the reasons behind non-implementation: While it points to the failure of implementation, a more detailed analysis of the specific systemic and practical barriers hindering the effective execution of existing laws and judicial pronouncements would be beneficial.

Comparative Analysis: The paper focuses primarily on the Indian context. Future research could benefit from a comparative analysis of undertrial populations and prison reforms in other countries with similar socio-economic conditions or legal systems.

Impact assessment of proposed solutions: While the paper suggests solutions, further research could focus on developing specific, measurable, achievable, relevant, and time-bound (SMART) indicators to assess the potential impact and feasibility of these proposed reforms. The article titled "What are the Rights against being handcuffed in India?'' by Sanchita Kadam discusses the evolution of jurisprudence in India regarding the use of handcuffs, highlighting several key Supreme Court cases that have shaped the current restrictions. The article explains that while handcuffing was once a common practice, the Indian Supreme Court developed jurisprudence in the late 1970s and 1980s to restrict its use, requiring law enforcement agencies to seek the court's permission before handcuffing a person. This jurisprudence views indiscriminate handcuffing as unnecessarily restrictive and humiliating, potentially depriving individuals of dignity, especially since they might be deemed innocent after trial. The primary motive for using handcuffs, to prevent escape, does not apply to every under-trial or accused person. The article titled "Judicial Activism in Regulating 'Human Rights Violations' by Police Authorities in India" by Dr. Sandeepa Bhat B extensively discusses human rights violations by police in India. Human rights violations by the police in India are frequently in the headlines.

Fundamental freedoms guaranteed under the Indian Constitution are often ignored during police actions. The judiciary in India, particularly the Supreme Court, has tried to regulate these violations in many cases. The Supreme Court has laid down norms for several areas, including:

- Custodial death.
- Cruel treatment in prisons.
- Continued detentions after the completion of a prison term.
- Fake encounters.
- Unwarranted breach of the right to privacy of individuals.
- Registering fraudulent cases.

Despite the judiciary's efforts, human rights violations by the police have not abated due to the strong political influence on the police. The ignorance of the public, who often fear the police. The Indian Constitution, particularly Part III listing fundamental rights, is the source of human rights in India, and the Supreme Court acts as the custodian of these rights. Articles 14, 19, 20, 21, and 22 are key provisions for the protection of human rights. The prison walls do not exclude these rights.

The article titled "The Plight of Trial in Absentia: An Analysis about the Operative Criminal Procedural Laws" acknowledges the persistent difficulties encountered by the Indian Judiciary when determining whether an accused individual's absence is a deliberate act or a result of legitimate circumstances. The authors have collectively endeavoured to elucidate the disparate approaches adopted by the Indian Judiciary in addressing instances of absconding accused persons. Furthermore, the article delves into varied international perspectives on this subject matter, citing judicial interpretations of the concept and the associated policies implemented in different countries. Additionally, it engages in a detailed examination of the existing legislative provisions in relation to this issue, exploring its legal scope within both national and international domains.

Section 43(3) of the Bhartiya Nagarik Suraksha Sanhita: Section 43(3) of the Bhartiya Nagarik Suraksha Sanhita grants discretionary powers to police officers to handcuff an individual under arrest based on the gravity of the offense committed. The right may be exercised against habitual offenders, syndicates of crime, terrorist acts, and in other serious crimes. Yet, this power is not absolute and is meant to be checked by the constitutional protection available in Article 21 of the Constitution, which vests a person's right to life and personal liberty.

JUDGEMENTS

In Sunil Batra v. Delhi Administration Supreme Court ruled that Article 21 prohibits deprivation of personal liberty except under the procedure established by law, and restriction of personal liberty to such a degree would amount to deprivation. The court held that the minimum mobility of movement which even an under-trial prisoner has a right to under Article 19 of the Constitution, cannot be reduced brutally by imposition of handcuffs or other hoops. The unthinking use of handcuffs while accused persons are brought to and from court and the shortcut of imposing force irons upon prison inmates are illegal and must be discontinued immediately, except in a limited class of cases. Inconsiderate handcuffing and chaining in public is degrading, is shameful to higher sensibilities, and a discredit to our culture. In Prem Shankar Shukla v. Delhi Administration Supreme Court has consistently warned against the limit of police power in the case of imposing orders of handcuffing. In Prem Shankar Shukla v. Delhi Administration, the court examined the rationale for the restraints and held that on the face of it, handcuffing is inhuman and thus unreasonable and arbitrary in the absence of fair procedure and objective supervision. The court added that if there is no compelling justification to restrain one's limbs, it is cruel, arbitrary, tyrannical, and degrading to humiliate a person by shackling him. Hence, the court held that handcuffs should be a last resort and not a routine practice. Paragraphs 26.21A and 26.22 of Chapter XXVI of the Punjab Police Manual were held to be arbitrary because they stated that all undertrials who were charged with a non-bailable offence punishable by more than three years' imprisonment shall be regularly shackled. The court held that the escorting officer must offer reasons to the presiding judge for handcuffing the accused and seek his permission. The court ruled that the officer accompanying the accused must justify to the presiding judge for the handcuffing and obtain the judge’s consent. The court thus conferred on the trial court the freedom to determine whether or not a prisoner should be handcuffed, as per the observation of the court in this verdict. The only situation where chaining can be adopted as an extreme solution is when there is no other reasonable means available to preclude escape at present.

CITIZENS FOR DEMOCRACY V. STATE OF ASSAM, 1995

Citizens for Democracy vs State of Assam and Ors, decided by a bench of Justices Kuldip Singh and N Venkatachaliah, resulted in stricter directives that clarified the court’s position on restrictions, making it unequivocally binding. In 1995, the Supreme Court reviewed a letter from journalist Kuldip Nayar detailing the suffering of detainees under the Terrorist and

Disruptive Activities (Prevention) Act (TADA) in Guwahati at a hospital where they remained handcuffed to their beds, even though the room was secured and multiple policemen were monitoring it. The government justified stating that the detainees were zealous believers of an outlawed party and had been charged with terrorism, disruption, murder, extortion, and so forth. The court liberally drew reference from the judgments given by Sunil Batra and Prem Shukla, for both discussed the important situation under which police authorities and jail complexes are permitted to apply handcuffs on prisoners both inside and outside jail. But the court was compelled to issue further directions, observing, "The directives given by this Court are not being followed and are treated as a pious expression." We realise that the police and jail authorities are still using handcuffs and other restraints indiscriminately and without reason. It has, therefore, become necessary to issue mandatory directions and enforce them strictly. Citizens for Democracy vs State of Assam and Ors., ruled by a bench of Judges Kuldip Singh and N Venkatachaliah, led to more stringent guidelines that made it clear where the court stood regarding restrictions, and it became binding. In the plainest language, the court said the following, we assert, command, and establish as a principle that handcuffs or other restraints must not be imposed on a prisoner whether convicted or on trial while held in a jail anywhere in the nation or during transportation or transfer from one jail to another or from jail to court and return. The police and jail officials, independently, will not possess the power to order the handcuffing of any inmate within a jail in the nation or while being transferred between jails or from jail to court and back. If the police or jail authorities have a solid reason to strongly infer that a specific prisoner might escape or break free from custody, the prisoner should be presented to the relevant Magistrate, and a request to handcuff the prisoner should be submitted to that Magistrate. Except in rare instances of clear evidence of the prisoner's inclination towards violence, his likelihood of escaping, given his dangerous/desperate nature and the determination that no alternative means to prevent escape exist, the Magistrate may authorise the use of handcuffs on the prisoner. When police apprehend an individual under a warrant issued by a Magistrate, that individual shall not be handcuffed unless the police have also received authorisation from the Magistrate for the handcuffing of the individual to be arrested. Therefore, the position of the nation's supreme court is unequivocal regarding the use of restraints to confine inmates. It considers it to be a humiliating procedure intended to be a last resort, subject to the approval of the Magistrate, and is not within the discretion of the police. Recent court rulings, like Suprit Ishwar Divate v. State of Karnataka, 2022, remind the authorities that they need to adhere to established norms and uphold constitutional safeguards. Concerning this, the Indian legal regime for the practice of handcuffing is such that it requires

maintaining a balance between the security needs of the state and the rights of citizens, where these measures do not offend human dignity or run counter to the principles of the constitution. These Judgments clearly show us that this specific judgement does not match with the different judgements given by the Hon'ble Supreme Court and Various other High Courts of the nation.

UNITED NATIONS ON THE USE OF HANDCUFFS

The United Nations Standard Minimum Rules for the Treatment of Prisoners, commonly referred to as the Nelson Mandela Rules, establish the care to be provided to inmates. The regulations are set to guarantee the prisoners respect and dignity during their protection against torture and degrading, or inhuman treatment. Regulation 47, Subsection 1 states that 1. Use of chains, iron devices, or other instruments of restraint that are inherently degrading or painful must be prohibited. These directives are considered world-recognised standard procedures, and section 43(3) has violated these procedures.

A COMPARISON OF HANDCUFFING LAWS IN SINGAPORE AND INDIA

The rules of handcuffing in Singapore are guided by its Constitution, Criminal Procedure Code (CPC), Police Force Act, and Prisons Act. Handcuffing is not the standard practice but is selectively practised when necessary to prevent escape or provide security. Constitutional Guarantees Against Harsh Punishments Article 11(1) of the Singapore Constitution guarantees no one can receive a punishment worse than that legally provided for at the time when the offense took place. The rule applies to the use of restraints like handcuffs, meaning their application should be lawful and proportionate to the danger of security being posed by the accused. Excessive or unwarranted use of handcuffs can be punitive rather than preventative, which is not allowed by constitutional law. The Criminal Procedure Code (CPC) defines the circumstances under which restraints such as handcuffs can be applied. Section 24 says that a police officer can either touch the person being arrested physically or have them in custody unless the person voluntarily agrees to cooperate. If the suspect resists or tries to run away, the officer may apply necessary force to finalise the arrest. But in case of voluntary compliance, the handcuffing or any other form of coercion is forbidden. This means handcuffs are only to be used if it can be reasonably feared that the person would run away. In addition, weapons can be used only against persons who pose a violent threat or if there are reasonable grounds to believe that their life is in peril. Judicial Decisions on Handcuffing in Singapore Singaporean law takes a cautious stance in limiting accused individuals, whereby both the presumption of

innocence and the principle of necessity are addressed when deciding whether or not handcuffs are to be used. Court decisions have always demonstrated that handcuffing is not mandatory but ought to be used only when it is essential. In Tan Kheng Ann v PP (1965), several defendants engaged in violent acts, such as arson and murder of prison officers. During their trial, they attempted to destroy evidence and interfere with court procedures. As a result, they were restrained and fixed to secure control. However, once they followed court rules, their restraints were removed. This case highlights that limitations are imposed only when necessary and withdrawn as soon as compliance is obtained. In another incident, nearly 100 political protesters were charged with illegal assembly. During their trial, they behaved in a disorderly manner, damaged court property, and refused to stand up for the judge. Instead of handcuffing them, the court used alternative measures, such as constructing a special dock in the courtroom and securing benches so that they would not get damaged. Riot police were on standby, but restraints were only used when necessary. This case is an example that courts prefer alternative security measures over physical restraints. During a rape trial, a defendant resisted the session by hurling his sandal in the direction of the judge. The prosecution moved to have him led to the back of the court in handcuffs, but this was rejected by the presiding judge, who stated that the defendant was entitled to presumed innocence. After this contempt of court, he was convicted after the trial concluded. This ruling shows that punishment for misconduct in court should not necessarily involve being handcuffed and that all steps taken must accordingly be proportionate to the offense. The courts have always promoted the right to a fair trial and have resisted the policy of imposing restraints on a defendant without regard to hostile conduct.

SECTION 356 OF BNSS CRITICAL ANALYSIS FROM A HUMAN RIGHTS PERSPECTIVE

Section 356 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 provides for trial in absentia of an accused who is a proclaimed offender and has gone underground to avoid being tried. It assumes that the accused relinquishes their right to be present and tried personally, and the court can conduct the trial and pass judgment even if they are absent. This raises some basic questions about fair trial rights, natural justice norms, and constitutional protection under Article 21 of the Indian Constitution. The right to be present during one's trial is the bedrock of due process, and Section 356, in permitting trials in absentia, impeaches this basic protection. This article discusses contradictions between Section 356 and traditional Indian principles of law as reflected in leading case laws like Basheshar Nath v. CIT (1959), Behram

Khurshed Pesikaka v. State of Bombay (1955), Matru v. State of U.P., Sekaran v. State of Tamil Jagabandhu Mohalik v. State of Orissa, and Bidya Sagar Rabi Das v. State of Assam 20. In addition, this article examines conflict with international human rights norms, such as the ICCPR and UN Human Rights Committee (UNHRC) suggestions. Lastly, it outlines alternative legal measures that uphold justice while ensuring procedural fairness.

CONFLICT WITH INDIAN CASE LAW AND ARTICLE 21 OF THE CONSTITUTION

Subversion of the Right to a Fair Trial under Article 21 of the Indian Constitution assures no one will be deprived of their liberty or life except by a procedure established by law. The Supreme Court has held time and again that such a procedure has to be just, fair, and reasonable. A trial in absentia, not providing for the presence of the accused person to defend themselves, is against this principle. Different milestone rulings emphasise the requirement of the presence of an accused at trial;

Basheshar Nath v. CIT (1959): The Supreme Court held that fundamental rights cannot be waived, especially where they serve the greater public welfare. Section 356 goes against this ruling by presuming waiver of rights with no express and voluntary demonstration of will on the part of the accused.

Behram Khurshed Pesikaka v. State of Bombay (1955): A law that violates fundamental rights would be held unconstitutional and void. Section 356, permitting trial without guarantee of defence to the accused, is inherently defective.

Matru v. State of UP: The Supreme Court emphasised that an accused individual must be given a real and effective chance to appear in court. To conduct a trial in their absence is tantamount to presuming guilt and taking away effective defense.

Sekaran v. The State of Tamil Nadu: The Court ruled that procedural fairness is an essential component of justice. To deprive an accused of the right to cross-examine witnesses or present their defence goes against this principle.

Bidya Sagar Rabi Das v. The State of Assam: The decision reiterated that procedural guarantees are essential so that an accused person is not falsely convicted. Any legislation that gives permission for trial in absentia without adequate safeguards is unjust.

Violation of Audi Alteram Partem (Right to Be Heard): The Audi alteram partem principle is a basic rule of natural justice. Section 356 of BNSS disregards it by assuming that a deceased absconding accused forfeits their right to a fair trial. The Supreme Court in Maneka Gandhi v. Union of India (1978) held the right to be heard to be included in the "procedure established by law" as mandated by Article 21. Refusal of the right of an accused person to present their defence renders the trial process arbitrary and against the Constitution.

Contradiction with International Human Rights Conventions: Contravention of the International Covenant on Civil and Political Rights (ICCPR). India is a signatory to the ICCPR, which ensures the right to a fair trial. Article 14(3)(d) of the ICCPR explicitly states that an accused is entitled to be tried in their presence, defend themselves in person or through counsel. Section 356 contravenes these guarantees by allowing trials without ensuring the attendance of the accused, contrary to India's international obligations.

UN Human Rights Committee (UNHRC) Observations: The UNHRC has consistently believed that trials in absentia are acceptable only if there are robust protections. In Mbenge v. Zaire, the committee held that: There can be a trial in absentia only when the accused has deliberately evaded justice and has been appropriately notified. Where an accused has been convicted in absentia, they should have the right to appeal and claim a retrial upon their return. Section 356 lacks such assurances, and therefore, it violates international human rights standards.

European Court of Human Rights (ECtHR) Precedents: Poitrimol v. France; The ECtHR argued that a waiver of trial rights must be voluntary, clear, and with guarantees of procedure. Section 356 lacks such guarantees. In Colozza v. Italy, the ruling was that an accused must be allowed to appeal against a conviction rendered in absentia. Section 356 does not provide such a remedy.

THE INDIAN JUDICIARY DILEMMA AND IMPERATIVE FOR REFORM

Courts struggle to rule:

- Whether an accused is intentionally absconding or due to cogent reasons (e.g., coercion or force).
- Whether a person charged has waived their right to appear for trial.

- A provision of the kind of Section 356 fails to consider exceptional circumstances, leading to miscarriages of justice.

Law Commission Recommendations for Reforms on Fair Trials: The Law Commission of India has already recommended establishing a system where trials in absentia are only allowed in extraordinary circumstances, and with a mandatory right to a retrial if the accused subsequently appears, and giving an accused multiple opportunity to contest proceedings before deeming them an absconder.

Alternative Legal Approaches: Instead of allowing trials in absentia, India can adopt more balanced approaches.

Virtual trials: Allow remote attendance for absent accused wherever possible.

Enhanced legal representation: Ensure that a state-provided lawyer defends an accused in their absence.

Retrial rights: Allow an accused to seek a new trial upon return, so that justice is not compromised.

Stricter procedural safeguards: Offer concrete evidence that an accused deliberately and knowingly evaded trial before proceeding in absentia.

Justice P.N. Bhagwati rightly observed, “Law cannot stand still; it must change with changing social concepts and values.” Section 356 of BNSS is derogatory to due process and fundamental rights and, therefore, is a regressive provision in modern criminal jurisprudence. Instead of highlighting procedural ease over fairness, India's criminal justice system must adhere to constitutional and international legal standards. The government should also think about reforming BNSS to prevent the unjust conviction of accused parties in absentia. A fair trial is the pillar of justice, and any act of law that disregards the rights of the accused goes on to tarnish the judiciary in the eyes of the public. For the sake of the dignity of the Indian judiciary, Section 356 must be repealed in an effort to adhere to the principles of justice, equity, and human rights.

CONCLUSION

Sections 43(3) and 356 of the Bharatiya Nagarik Suraksha Sanhita (BNSS) pose serious doubts on human rights and constitutional protections under Article 21. Section 43(3), which permits arbitrary handcuffing by the police, is contrary to many Supreme Court decisions such as Sunil Batra, Prem Shankar Shukla, and Citizens for Democracy v. State of Assam, which state that handcuffing should be a last option with judicial sanction. This section is also contrary to the Nelson Mandela Rules, indicating it is not in line with global human rights norms. Section 356, which allows trials in absentia, also violates basic rights by negating the right to a fair trial. Supreme Court judgments like Maneka Gandhi and Basheshar Nath have been of the opinion that procedural fairness is to be maintained at any cost. The section also violates India's international commitment under the ICCPR as it allows trials without ensuring the presence of the accused or the right to a retrial. India's judiciary has to consider fairness and the dignity of human beings above ease of procedure. These sections have to be reformed by the government to bring them in line with constitutional protection and international norms. Implementing options such as more effective legal representation, online trials, and automatic retrial guarantees can provide equality of fairness in balancing dispensing justice and protection of citizens' rights. The reformed BNSS based on human rights will increase the Indian criminal justice system's credibility by making it fair, humane, and constitutionally strong.