

PROTECTION AND REHABILITATION OF MANUAL SCAVENGERS IN INDIA: A CRITICAL ANALYSIS

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Abstract

The Government of India has been laying emphasis on sanitation and has launched mass campaigns like 'Swachatha Abhiyan'. Cleanliness and sanitation have a significant role in improving the overall standards of living of the people. Any effort to address the problem of sanitation requires greater understanding and analysis of the complex issues around sanitation. The prevalence of manual scavenging as an age-old occupation exclusively carried out by the people belonging to the lower caste indicates that issues involved have a bearing on exploitative social structures. Given the dehumanising nature of the work, modern technological interventions should replace humans. However, there is very tardy progress in this direction. Despite legal interventions, society continues to witness manual scavenging where human beings are compelled to come in direct contact with human faces and clean up the same. This paper critically analyses the legislative measures and the judicial interventions towards eliminating this obnoxious practice and restoring a life of dignity to those individuals who are involved in manual scavenging. It also identifies the areas for improving the effectiveness of implementation and makes plausible solutions.

I Introduction

INDIA HAS been striving to achieve constitutionally mandated socio-political equality¹ and remove the economic inequalities through various developmental activities since Independence.² The internationally recognised socio-political-economic equalities as human rights³ have been accommodated in India at different stages, either through

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1 The Constitution of India, Part -III, Fundamental Rights; See M. P. Singh, "Mapping the Constitutional Vision of Justice and its Realisation" 3(1) *Journal of National Law University Delhi* 1-15 (2015).

2 For the detailed discussion about Socio-Political Development and the government's effort to address socio, economic and political development, *Stuart Corbridge, The Political Economy of Development in India since Independence* (Routledge *Handbook of South Asian Politics*, Routledge, 2010). Also see Manoranjan Mohanty, *Inequality from the Perspective of the Global South* (The Oxford Handbook of Global Studies, 2018), available at: <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190630577.001.0001/oxfordhb-9780190630577-e-42> (last visited on Aug. 24, 2021).

3 The Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966.

legislative measures⁴ or the judicial process.⁵ Similarly, to address the prevailing inequalities, various social welfare measures have been launched over seven decades to uplift the weaker sections and marginalised communities to have inclusive growth.⁶ However, India has been battling against manual scavenging and rehabilitating manual scavengers for more than decades without much success.⁷ Ironically, manual scavenging received much less attention than it deserves at both domestic and the international level. This is evident from the non-recognition of sanitation as an independent right either globally or nationally. The right to sanitation is not merely about health and a clean and safe environment. This right is fundamental to life with human dignity.⁸ Infringements on human dignity are not wholly captured when sanitation is considered only in the context of its links with other human rights.⁹ Due to the lack of recognition as an independent right, the core component of the right to sanitation, *i.e.*, sewage cleaning and scavenging and the issues surrounding it have received scant attention until the 1990s.¹⁰

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- 4 Aspalter Christian, “The state and the making of the welfare system in India” 3 *Journal of National Development* 149-179 (2003); also see for the recent legislative efforts Ghosh, Sujay, “Democracy and human development: recent legislation in India” 34 *Development Policy Review* 539-561(2016).
 - 5 There are many occasions wherein the Courts have addressed the socio-economic and political rights. For example, on Right to Education, Government of India, Law Commission of India, “165th Report on Free and Compulsory Education for Children,” (November 1998), Para. 6.6, available at: <http://lawcommissionofindia.nic.in/101-169/Report165.pdf> (last visited on July 23, 2021); *Society for Un-aided Private Schools of Rajasthan v. Union of India*, (2012) 6 SCC 1. For further details in general see Natasha G. Menell “Judicial Enforcement of Socio Economic Rights: A Comparison between Transformative Projects in India and South Africa” 49 *Cornell International Law Journal* 723 (2016); Sony Pellissery, Sattwick Dey Biswas, “Emerging property regimes in India: What it holds for the future of socio-economic rights?” *SSRN Electronic Journal* (2012); Rodríguez-Garavito, César. “Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America” 89 *Texas Law Review* 1669 -1671 (2010).
 - 6 Maya Suzuki, “Indian Government Strategy Against Caste Inequality: Liberating Untouchables in the Context of Welfare Schemes” 12 *Journal of Political Science and Sociology* 65-83 (2009).
 - 7 Philippe Cullet, Sujith Koonan, *et.al.* (eds.), *Right to Sanitation in India-Critical Perspectives* (OUP 2019); Bhasha Singh, *Unseen: The Truth about India's Manual Scavengers*, Penguin (Penguin, UK, 2014); Shiv Prakash Katiyar, “Manual Scavenging: Retrograding Policy and Sustained Discrimination” 8 *Indian Journal of Human Development* 111-146 (2014).
 - 8 Philippe Cullet, Sujith Koonan, *et.al.* (eds.), *Right to Sanitation in India - Critical Perspectives* (OUP 2019).
 - 9 Sujith Koonan, “Right to Sanitation in India: Nature and Scope” in K. J. Joy, Sarita Bhagat *et.al.* (eds.) *Right To Sanitation In India Nature, Scope and Voices from the Margins* 1-14(Forum for Policy Dialogue on Water Conflicts in India, 2016).
 - 10 See the Employment of Manual Scavengers and their Rehabilitation Act, 2013, Preamble. The availability of the literature, media attention, Governmental and executive efforts on manual scavenging and the issues associated were not considerate enough.

The practice of manual scavenging is prevalent in Indian society, despite being unacceptable and hazardous as a disposal method and availability of scientific and technological solutions to avoid manual scavenging.¹¹ It is a practice that passes on from generation to generation,¹² and several studies conclude that it has some connection with caste.¹³ It is due to the mounting pressure from across the society, including NGOs, the first-ever legislation on the prohibition of manual scavenging, *i.e.*, Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993,¹⁴ was enacted prohibiting humans from carrying out scavenging and the constructing dry latrines. However, the 1993 Act completely ignored the aspect of rehabilitation of those engaged as manual scavengers.¹⁵ Various schemes and policy initiatives to address the issue of manual scavenging were also mooted after independence.¹⁶ However, the efforts could not yield any substantial results due to a lack of holistic implementation and apathy engendered due to deeply entrenched caste hierarchies prevalent in India.¹⁷ According to the 2001 Census, nearly 787000 manual

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- 11 Ankur Bisen, *Wasted: The Messy Story of Sanitation in India A Manifesto for Change* 42-55 (Pan Macmillan India, New Delhi, 2019).
- 12 Tripathi, Tulika, "Safai Karmi Scheme of Uttar Pradesh: Caste Dominance Continues" 47 *Economic and Political Weekly* 26-29 (2012).
- 13 Ravichandran, B. "Scavenging Profession: Between Class and Caste?" 46 *Economic and Political Weekly* 21-25 (2011); Maya Suzuki, (2019) "Justice and Human Rights at the Grassroots Level: Judicial Empowerment in Dalit Activism", in Tatsuya Yamamoto, Tomoaki Ueda, *et.al.* (eds.), *Law and Democracy in Contemporary India -Human Rights Interventions* (Palgrave Macmillan, Cham, 2019). ; Lekhraj Balmiki, "Balmiki Community in Darjeeling Hills: Socio- Economic Profile" 7 *Journal of Political Studies* 01-19 (2013). ; Harsh Mander, *Resource Handbook for Ending Manual Scavenging* 15 (International Labour Organization 2014). ; Govt. of India, "Report of the B. N. Barve Committee on the Living Conditions" Ministry of Home Affairs, Communication No. 19/66/56-Pub.-III dated 22nd December, 1956 on Subject mentioned: Scavenging Work-Amelioration of the Conditions of sweepers (Bhangis) employed on.
- 14 Hereinafter, it will be referred to as the 1993 Act.
- 15 Rastriya Garima Abhiyan, "Report on Eradication of inhuman practice of Manual Scavenging and comprehensive rehabilitation of manual scavengers of India" (2011); G V Narasimha Rao, 2015."Employment of Manual Scavengers: A Curse on Human Dignity" *Lawasia J.* 77 (2015); Mohd. Shahid, "Manual Scavenging: Issues of Caste, Culture and Violence" 45(2) *Social Change* 242-255 (2015).
- 16 For the detailed report on various policy initiatives on manual scavengers and the committees, see *Manual Scavengers: Welfare and Rehabilitation*, Lok Sabha Secretariat Parliament Library and Reference, Research, Documentation and Information Service, (2013) available at: http://164.100.47.193/Refinput/New_Reference_Notes/English/Manual%20Scavengers%20welfare%20and%20Rehabilitation.pdf (Last visited on November 2021) and Government of India, "The report of the Task Force for Tackling the Problems of Scavengers and Suggesting Measures to abolish Scavenging with Particular Emphasis on their Rehabilitation" (Planning Commission of India, 1990-1991).
- 17 Sujith Koonan, "Background Note on Prohibition of Manual Scavenging and Protection of the Rights of Sanitation Workers in India" *International Environmental Law Research Centre* (2013), available at:<http://www.ieirc.org/content/f1305.pdf> (last visited on Nov. 2021).

scavengers were identified. The 2011 Census recorded 182505 manual scavengers and 2606278 dry latrines. These figures suggest that the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, failed to achieve its objective.

Due to this ineffectiveness of the legislation,¹⁸ the apex court was approached¹⁹ through public interest litigation (PIL) under article 32 of the Indian Constitution²⁰ for the prohibition of manual scavenging and to seek further appropriate directions on issues connected.²¹ In the meantime, realising the importance of the problem, new legislation, *i.e.*, The Prohibition of the Employment as Manual Scavengers and their Rehabilitation Act, 2013, has been enacted to address the issue very comprehensively. However, the practical realities still suggest that the problems of the manual scavengers are not handled very effectively. The practice of cleaning night soil from dry latrines has been substantially eliminated in urban areas. However, due to water scarcity in the rural areas and the overpopulation in the metropolitan areas, open defecation and manual scavenging have not been completely eliminated, and this fact is corroborated by a recent study that highlighted the current state of affairs.²²

In the context of the above, it is worth examining the various measures, in general, and the new legislation, in particular, which is aimed at total elimination of manual scavenging in India while serving the rehabilitation needs. This paper aims to trace the administrative and legislative measures taken till date while critically analysing the effectiveness of the measures in providing a comprehensive solution to the problem of manual scavenging and rehabilitation of manual scavengers within the socio-legal framework.

II Manual scavenging: A brief overview

The dehumanising practice of manual scavenging constitutes direct, structural and cultural violence inflicted on a specific caste group.²³ Policy initiatives to end this practice are stumbled due to culturally fostered mythical constructions. Some accounts support

18 *Supra* note 8.

19 *Sajai Karamchhari Andolan v. Union of India* (2014) 11 SCC 224.

20 The Constitution of India, art. 32. deals with constitutional remedies for the fundamental rights violations through the 5 types of writs namely; *Habeas Corpus*, *Mandamus*, *Certiorari*, *Prohibition*, *Quo-Warranto* besides High Courts under art. 226.

21 The Writ of *Mandamus* was filed for the rigorous enforcement of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 which overrides the fundamental rights guaranteed under The Constitution of India. arts. 14, 17, 21, 47.

22 Water Aid India, *Strengthening Rule of Law To Advance Rights And Freedoms Of Manual Scavengers In India* (End of the Action Study Report, 2021), available at: <https://idronline.org/wp-content/uploads/2021/08/strengthening-rule-of-law-to-advance-rights-and-freedoms-of-manual-scavengers-in-india.pdf> ,(last visited on Oct. 20, 2021).

23 Mohd.Shahid, "Manual Scavenging: Issues of Caste, Culture and Violence" 45(2) *Social Change* 242-255 (2015).

the view that scavenging was initially given as a punishment for the slaves²⁴ and that evidence of scavenging work historically undertaken by certain caste groups was not credible enough due to the high prevalence of open defecation. It is argued that scavenging as a practice can be traced to Muslim Rule²⁵ and was necessitated due to the cultural and social lifestyle of the people, especially in the royal families. Socio-cultural practices of higher strata of the society resulted in the engagement of people for removing the night soil, which was later identified with different community names in other geographical locations. From the previous research it has been established that such communities, relates manual scavenging with castes groups identified as Bhangi, Chura, Halalkhor, Jamâdar, Lal Begi and Mehtar in northern India. In southern parts of India, they are called Chakkiliyan, Madiga and Thoti.²⁶ However, it may also be noted that manual scavenging as a caste-based occupation is not confined to castes/groups with a particular religious identity given the fact that certain castes *viz:* Lal Begi, Biradaris following Islam are also found to be engaged in manual scavenging in certain parts of northern India, particularly Uttar Pradesh.

Even though these kinds of literature show disconnect between the caste and the scavenging in ancient India, it could not prove the same since the pre-independence era. Different studies conducted from the beginning of the 20th Century reveal that those engaged in manual scavenging belong to the lower castes. The caste system indeed played a crucial role in imposing manual scavenging on lower castes.²⁷ Division of labour based on caste was very much prevalent in ancient India.²⁸ They were on the lower pedestal of the untouchables themselves. The manual scavengers were discriminated against largely due to their caste identity inherited by birth than due to the nature of their job.²⁹ The preamble to the 2013 Act clearly stated that the

24 See for a detailed discussion on the history of the manual Scavenging in India, B.N. Srivastava, *Manual Scavenging in India: A Disgrace to the Country* 13 (Concept Publishing Company (P) Ltd., 1997).

25 *Id.* at 10 – 15.

26 *Supra* note 23.

27 B. R. Ambedkar, “The Annihilation of Caste” (May 1936), *available at:* https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/aoc_print_2004.pdf, (Last visited on August 20, 2021). ; Harsh Mander, *Resource Handbook for Ending Manual Scavenging* 15 (International Labour Organization 2014). ; Human Rights Watch, *Cleaning Human Waste, “Manual Scavenging,” Caste, and Discrimination in India* (August 25, 2014), *available at:* <https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india>(last visited on Aug. 25, 2021).

28 B. R. Ambedkar, “The Annihilation of Caste” (May 1936), *available at:* https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/aoc_print_2004.pdf, (Last visited on Aug. 20, 2021). Sumeet Mhaskar *The State of Stigmatized Employment in India: Historical Injustices of Labouring* (Oxfam India 2019); Vijay Prashad *Untouchable Freedom-A Social History of a Dalit Community* (OUP 2000); *Supra* note 8 at 82.

29 Ankur Bisen *Wasted : The Messy Story of Sanitation in Indian- A Manifest for Change* (Macmillan 2019).

dehumanising practice of manual scavenging is due to insanitary latrines and a highly iniquitous caste system prevailing in India, and various legislative and executive measures couldn't eliminate insanitary latrines and manual scavenging. The 2013 Act was thus enacted to prohibit scavenging and rehabilitate the manual scavengers by correcting the historical injustice and indignity suffered by those who are forced to take up manual scavenging as an occupation, however degrading it is.

Section 3 of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 explicitly prohibits employing a Scheduled Caste or Scheduled Tribe person for manual scavenging as an offence. In December 2021, the Ministry of Social Justice had released the caste-related data of 43,797 scavengers identified and stated that 42,594 of them are from scheduled caste and 421 are from scheduled tribes and 431 from other backward classes.³⁰ This data resonates well with the preamble of the 2013 Act, which stated the prevalence of a highly iniquitous caste system in Indian society as one of the reasons for the existence of manual scavenging in India. Thus, even towards the end of 2021, Government was silently agreeing to the fact that manual scavenging remains a caste-based occupation, as expressly stated by them in the preamble of the 2013 Act.

The existence of dry latrines is proof that manual scavenging is still in practice in India.³¹ The 2001 and 2011 censuses very well pointed out the number of manual scavengers and the existence of insanitary latrines in India. There are various other surveys conducted by the government, including the Ministry of Social Justice and other private parties and NGOs. The data collected from various governmental reports and surveys done by NGOs and other private parties and organisations concerning manual scavengers and dry latrines, does not tally well, and there are obvious reasons for such mismatch in figures of manual scavengers and dry latrines. Except 2001 and 2011 Census data, the rest of the data is the outcome of the surveys conducted either by a few states or excluding a few states entirely or excluding a few districts completely, which itself is proof that the number of manual scavengers and the number of dry latrines can be more than what is projected here. For example, National Safai Karamcharis Finance and Development Corporation surveyed in 2018 and found 87913 Manual scavengers, but this survey count was based on only towns situated in 14 states. A survey conducted by Water Aid India in collaboration with the Association for Rural and Urban Needy (ARUN) and Centre for equity studies initiated a three year project from 2018-2021 based on 'four states' identified initially 2505 dry latrines, but by the end of the project, they projected decline in number of dry latrines to 75%-

30 Press Information Bureau, *available at*: <https://pib.gov.in/PressReleasePage.aspx?PRID=1776847>.

31 *Supra* note 24 at 20-21. ; Government of India, "Annual Report of the National Commission for Safai Karamcharis" (NCSK, 2005-2006 & 2006-2007), *available at*; https://www.ncsk.nic.in/sites/default/files/AR2005-06_2006-07_EN.pdf (last visited on Nov. 13, 2021).

90%. This study report is based on four states that prove the existence of dry latrines; though there is a decline in the number, one needs to keep in mind that the count can further go up if we conduct surveys in the rest of the states as well.³²

The Ministry of Social Justice in December 2021 has given caste-related data of 43,797 scavengers identified. The government in July 2021 also claims that there has been no death reported in the past few years, which itself is shocking and contradicting when compared to the reports from print media, social media and as per NGOs.³³ The further explanation given by the government gave us the clarification that deaths due to hazardous cleaning of sewer lines and septic tanks were not taken into account.

The discussion above points out that manual scavenging as a practice is prevalent and has a strong association with caste. This incontrovertible fact has been acknowledged by the state irrespective of the inconsistencies in the statistics from official and non-official sources. It is very much evident that the state has not only recognised the dehumanising effect of manual scavenging on those who are burdened with such degrading work but also took specific initiatives to address it, though, one may say, such initiatives have not yielded the desired results. A brief review of such initiatives is presented with brevity.

III Administrative and legislative measures

Administrative action for improving the conditions of manual scavengers

There have been many efforts taken by respective governments to look into the issues of manual scavengers since 1949. A Committee to inquire into the living conditions of the scavengers was constituted under the chairmanship of B N Barve by the Government of Bombay. The committee's report was submitted in 1952. The recommendations made were circulated to all state governments for appropriate action.³⁴ The committee noted the deployment of the Bhangi caste persons for removing the night soil at houses using hands and carrying it on the head and should be prohibited entirely and strongly recommended to stop this inhuman practice by constructing new latrines. Further, it suggested that the *Gharaki* or system of customary right of scavenging should also be abolished. The committee was not only concerned about the sanitation aspect of the general public but also about the sanitation and living conditions of the scavengers. Unemployment of the scavengers due to the construction of latrines should be handled by local bodies to absorb the scavengers into suitable

32 *Supra* note 22.

33 Press Information Bureau, available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1776847> (last visited Dec. 15, 2022).

34 Government of India, Ministry of Home Affairs, Communication No. 19/66/56-Pub.-III dated Dec. 22, 1956 on Subject mentioned: Scavenging Work-Amelioration of the Conditions of sweepers (Bhangis) employed on. It was addressed to all state governments along with the summary of the recommendations.

employment considering the social condition prevailing in the area. Further, it prescribed working hours and the minimum wages to be paid to the scavengers deployed in other sewage cleaning activities.³⁵

Similarly, in its report, the First Backward Classes Commission, 1955³⁶ raised concern about the living conditions of the scavengers while acknowledging their role in maintaining society's sanitation and recommended the abolition of inhuman practice as pointed out by Mahatma Gandhi.³⁷ Based on this, the Government of India stressed all state governments to remove outdated techniques of removing night soil and argued for constructing new latrines with up-to-date techniques.³⁸ For the same, the Government of India rolled out various grant-in-aid schemes to the municipalities and local bodies for the cleaning³⁹ and eradicating night soil carrying practice as head load.⁴⁰ A rehabilitation scheme to provide housing assistance to the scavengers was also launched.⁴¹

In due course of time, the Central Advisory Board, Ministry of Home Affairs, Government of India constituted a Committee to inquire conditions of scavengers in 1957⁴² under the chairmanship of N. R. Malkani, and the committee submitted its report in 1960.⁴³ The key recommendations included the recommendations that Government offices, schools, public buildings, hospitals, *etc.*, should have flush-out

35 Government of India, "Report of the B. N. Barve Committee on the Living Conditions" Ministry of Home Affairs, Communication No. 19/66/56-Pub.-III dated Dec. 22, 1956 on Subject mentioned: Scavenging Work-Amelioration of the Conditions of sweepers (Bhangis) employed on.

36 The First Backward Classes Commission, 1955, *available at*: <https://dspace.gipe.ac.in/xmlui/handle/10973/33678>, (last visited Oct. 15, 2021).

37 *Id.* at 30-31.

38 Government of India, Ministry of Home Affairs, Communication No. 8/43/55-BC dated Oct. 10, 1956 on Subject mentioned: Report of the Backward Classes Commission-Problems of Special groups- Bhangis.

39 Govt. of India, Ministry of Home Affairs, Communication No. 24/7/59-SCT III dated 30th July, 1959 on Subject mentioned: Grant in aid to Municipalities, Local Bodies for the purchase of hand carts/wheelbarrows for sweepers (Bhangis) employed on scavenging work.

40 Government of India, Ministry of Home Affairs, Communication No. 20/2/60-SCT III dated April 13, 1960 on Subject mentioned: Grant in aid to Municipalities/Local Bodies for undertaking schemes to eradicate the practice of carrying night soil by sweepers as head load.

41 Government of India, Ministry of Home Affairs, Communication No. 20/142/58-SCT III dated Dec 20, 1958 on Subject mentioned: Housing Schemes for Scheduled Castes and Scheduled Tribes etc. - Provision of a Trench latrine and bath.

42 The Committee was constituted on Oct. 12, , 1957 which commenced its working from January, 1958 and submitted its report on 26th December, 1960.

43 Government of India, "Report of the Scavenging Conditions Enquiry Committee , Central Advisory Board" (Ministry of Home Affairs, 1960), *available at*: <https://indianculture.gov.in/report-scavenging-conditions-enquiry-committee-0> (Last visited October 10, 2021).

toilets or septic tanks model or aqua-privies as far as possible;⁴⁴ use of the receptacle to prevent hand touch;⁴⁵ government housing schemes should be with a latrine (sanitary model);⁴⁶ supply of rubber gloves and prohibition of carrying night soil on the head;⁴⁷ other technological tools to the scavengers;⁴⁸ developing underground drainage;⁴⁹ construction of fly proof latrines and sanitary latrines at railway stations across India;⁵⁰ prohibition of customary night soil cleaning rights given to the private households known as *Gharaki, Jagirdari, Jimani, Dastoori, Virat, etc.*;⁵¹ emphasised the proactive role supposed to be played by the local bodies;⁵² living conditions of the scavengers and other social welfare and rehabilitation measures.⁵³

As pointed out by the Barve committee and the Scavenging Conditions Enquiry Committee, the customary rights system should be eliminated while addressing other issues of scavengers, and the same should have been done in a phased-out manner with a fixed timeline. However, nothing was done until 1963. In this regard, a special committee was constituted in 1965⁵⁴ under the chairmanship of N.R. Malkani, who was part of previous committees, to study the customary rights prevailing amongst the scavengers in the few states, *i.e.*, Andhra Pradesh, Gujarat, Jammu and Kashmir, U.P., Rajasthan, Punjab and Madhya Pradesh. As far as other states were concerned, either the municipalities had taken control of the private toilets and implemented the reforms or freed the scavengers from customary rights by levying latrine tax by the local bodies.⁵⁵ It was at first, this committee strongly advocated that the scavenging should not be considered as a property right within the ambit of article 19(1) (f) of the

44 Government of India, “Report of the Scavenging Conditions Enquiry Committee, Central Advisory Board” 14 (Ministry of Home Affairs, 1960).

45 *Id.* at 9-13.

46 *Id.* at 14.

47 *Id.* at 19.

48 *Id.* at 38-50.

49 *Id.* at Chapter 8.

50 *Id.* at 77-78.

51 *Id.* at 79-84.

52 *Id.* at 93. It reads: “...the problem of improving the scavenging conditions should be dealt with by the Local Self Government Departments of the States/Union Territories or such other Departments as may be concerned with it. All the necessary legislation, policy, directive principles, etc., should be issued by them and they should evolve a machinery to ensure the implementation of their directives etc., fully and properly through the local bodies and such of their officers as they may like to appoint. Mere enacting of legislation or issuing directives would not be so helpful as their proper implementation...”.

53 *Id.* at 97-108.

54 The Committee submitted its report on Aug, 1966.

55 Government of India, “Report of the Committee on Customary Rights to Scavenging” (Department of Social Welfare, 1966), available at: <https://indianculture.gov.in/report-committee-customary-rights-scavenging> (last visited on Aug, 20, 2021).

Constitution of India⁵⁶ and recommended various measures for the liberation of scavengers from the inhuman practice⁵⁷ with the help of technological advancements⁵⁸ and the suggested rehabilitation measures.⁵⁹

Subsequently, in 1967 a Committee to study the Conditions of Sweepers and Scavengers was constituted under the chairmanship of B.P. Pandya, National Commission on Labour, Government of India, New Delhi and its report of 1968⁶⁰ recommended advanced mechanisation of scavenging for the freeing of the humans from the inhuman practice and argued for the introduction of appropriate social security and welfare measures for the livelihood of the scavengers adequately by the States and the Centre.⁶¹ It also advocated for bringing relevant legislation for the welfare of manual scavengers and sweepers.⁶² Similar committees to study the scavengers' living conditions were constituted at the state level in Haryana⁶³ and Karnataka.⁶⁴ The Rajasthan Government had initiated Bhangi Kasht Mukti Niwaran Yojan in 1969.⁶⁵

In due course of time, the issue of manual scavengers was raised in Parliament by pointing out the delay in addressing this national problem. While responding to a starred question in Lok Sabha, 1983, in the course of further discussion, the then

56 *Id.* at 16.

57 *Id.* at 75-78.

58 *Id.* at 79-83.

59 *Id.* at 68-74.

60 The report was submitted *vide* the Communication No 3(9)/68-NCL dated Oct. 15, 1968 from the Chairman Bhanuprasad Pandya to chairman, National Commission on Labour, *available at*: <https://dspace.gipe.ac.in/xmlui/bitstream/handle/10973/52169/GIPE-124430.pdf?sequence=1>, (last visited on Sep. 3, 2022).

61 Government of India, "Report of the Committee to study the working and service conditions of sweepers and scavengers" 71-91 (National Labour Commission, 1969).

62 See the Communication No 3(9)/68-NCL dated 15th October, 1968 from the Chairman of the Committee set up by the National Labour Commission to study the working and service conditions of sweepers and scavengers, 1969, Bhanuprasad Pandya to the Chairman, National Commission on Labour, where in it was argued that Entry 5 of List II and Entries 22, 23, and 24 of the List III could be very well invoked for the betterment of scavengers and sweepers to bring suitable legislations.

63 Haryana constituted a committee in 1969. See for the same, 2nd Report of Government of India, "Report of the National Commission for Safai Karamcharis" 2 (Government of Haryana, 1996).

64 Committee to study the living and working conditions of Sweepers and Scavengers in the State under the chairmanship of I P D Salappa, in 1972 and the report was submitted in 1976. For further details See, "Manual Scavenging in Karnataka A Situation Assessment", Safaikarmachari Kavalu Samithi – Karnataka, 11, (Jan. 2020). It reads: *Based on the interim recommendations of this Committee, a circular was issued which provided for banning of the practice of carrying night soil as head load or the manual handling thereof in any manner and for the practice to be eradicated by 15.8.1973. But unfortunately, the directions issued through the circular were not seriously implemented.*

65 Report of the Commissioner for the SCs/STs as required under art. 338, 61-62, 1969-1970.

Prime Minister assured that this obnoxious system would be abolished and the efforts were being taken. Further, it was indicated that the existing dry latrines would be substituted by wet ones and the alternative employment to the people who would lose their livelihood in this process.⁶⁶

Nearly after 20 years, the Planning Commission of India constituted a task force to study the problems of scavengers to suggest remedial measures to abolish this practice under the chairmanship of S.K. Basu, the Adviser (Backward classes), Planning Commission⁶⁷ and the report was submitted in 1991.⁶⁸ The committee that was mandated to suggest welfare measures for the scavengers was apparently proactive identified the lacunae in the existing welfare schemes and social security measures and offered concrete solutions for the same,⁶⁹ It criticised the previously adopted strategy saying that much focus was given to improve the working and living conditions of the scavengers rather than replacing the dry latrines to pour fresh latrines.⁷⁰

Even after the constitution of many committees, task forces and taking welfare measures, manual scavenging could not be eliminated. Even it provided a draft model law to be adopted by the urban local bodies to eradicate the inhuman practice. All these measures taken by the government could not yield the desired result because of then prevailed customary right practice, inadequate organisational and financial resources with local bodies and the non-committal approach of the state governments. Thus, after recognising the limitations of the administrative actions and welfare measures, the government decided to divert its course through the legislative route. In continuation of this, one could see the legislative response, *i.e.*, the 1993 Act prohibiting the dry latrine while entrusting the welfare measures to the National Commission for Safai Karamcharis (NCSK)⁷¹ besides the National Commission for Scheduled Caste (NCSC).⁷²

66 Government of India, "The report of the Task Force for Tackling the Problems of Scavengers and Suggesting Measures to abolish Scavenging with Particular Emphasis on their Rehabilitation" 3(Planning commission of India, 1990-1991).

67 Planning Commission of India, Communication No. PC/BC/17-8(1)/88 dated July 29, 1989 on the subject: Taskforce Force on the problems of scavengers for suggesting remedial measures to abolish this practice.

68 *Supra* note 66.

69 *Id.* at 2.

70 *Id.* at 10 -24.

71 NCSK was established through the National Commission for Safai Karamcharis Act, 1993. S. 8 describes the powers and functions.

72 The National Commission for Scheduled Castes is an Indian constitutional body established with a view to provide safeguards against the exploitation of SC and to promote and protect their social, educational, economic and cultural interests; special provisions as mandated in the Constitution, NCSC has been established under art. 338 of the Indian Constitution.

Legislative action for prohibition of manual scavenging

Constitutionally guaranteed fundamental rights such as the right to equality;⁷³ protection against caste discrimination;⁷⁴ prohibition of untouchability;⁷⁵ right to life, and personal liberty⁷⁶ are *inter alia* available to the manual scavengers also. Further, considering the recognition of manual scavenging as a 'customary right', the act of manual scavenging is to be regarded as forced labour and discriminatory practice that could be well covered within article 23.⁷⁷ The state must ensure that these rights are not infringed. Similarly, the State's obligation to uplift or improve the health & living standard⁷⁸ and education and economic interest of the S.C., S.T. and Weaker Sections⁷⁹ given under Directive Principles of State Policy are equally applicable for manual scavengers. Though, it was well advocated by Pandya and N.R. Malkani in 1969⁸⁰ to invoke entries 22, 23 and 24 of List - III, Schedule 7 and Entry 5 of List - II⁸¹ for addressing the issue of manual scavenging and the rehabilitation of these people who have lost their dignified life and continue to practice manual scavenging from generation to generation, it was only in 1993, by invoking article 252 (1),⁸² first-ever legislation prohibiting manual scavenging and construction of dry latrines, *i.e.*, Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 was enacted.

Before enacting the 1993 Act, it was only possible to invoke either the Protection of Civil Rights Act, 1955 or The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 to address the issue of manual scavenging. Though the above

73 The Constitution of India, art. 14.

74 *Id.*, art.15 and 16.

75 *Id.*, art. 17.

76 *Id.*, art. 21.

77 *Id.*, art. 23. *Prohibition of traffic in human beings and forced labour.*—(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

78 *Id.*, art. 47.

79 *Id.*, art. 46.

80 See the Communication No 3(9)/68-NCL dated Oct. 15, 1968 from the Chairman of the Committee set up by the National Labour Commission on Labour to study the working and service conditions of sweepers and scavengers, 1969 to the National Labour Commission.

81 *Id.*, Part IX deals with Legislative Relations between the Union and the States. List 1 is for the Union, List 2 for the States and List 3 for Union and States which is also known as Concurrent List.

82 *Id.*, art. 252 empower the Parliament to legislate for states with their consent.

two legislations did not explicitly deal with manual scavenging,⁸³ an act of compelling one to do manual scavenging could be termed as forced labour, and the relevant provisions could be invoked.⁸⁴ Even customary rights prevailed could also be equated with bonded labour.⁸⁵ Only after the enactment of the 2013 Act, in 2015, The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was also amended, and after that, it explicitly prohibits employing an SC/ST person for manual scavenging is now considered as an offence.⁸⁶

It is worth to point that while tracing the evolution of various new dimensions to the fundamental rights, though the Constitution does not expressly state about the right of sanitation, it is only through interpretation by courts in cases like *Ratlam*,⁸⁷ which focused on the infructuous contentions of municipalities and the local bodies, *i.e.*, non-availability of sufficient means and investment in sanitation equipment and toilets, and sewerage facilities, held that the right of sanitation is also part of fundamental rights⁸⁸ These constitutional provisions bring to light that the law of the land has provisions to protect the rights of manual scavengers, although not distinct and specifically for their rights. Still, we can see that non-implementation of those rights

83 The Protection of Civil Rights Act, 1955 was only meant to give effective implementation to the constitutionally protected fundamental rights such as prohibition of untouchability, protection against discrimination and forced or bonded labour. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 also deals with atrocities against the SCs/STs. Thus the forced labour aspect could be well connected here with manual scavenging, s. 3 of the Act could be invoked for the same in general.

84 See for the same argument, Harsh Mander, *Resource Handbook for Ending Manual Scavenging* 15(International Labour Organization 2014).

85 Balakrishnan Rajagopal, Joel Campos Alvis, *et. al.*, *From Promise To Performance: Ecological Sanitation As A Step Toward The Elimination of Manual Scavenging In India, An Assessment of Sanitation and Human Rights in Palyad* (Massachusetts Institute of Technology, 2006). available at : https://www.files.ethz.ch/isn/26700/Promise_Performance.pdf, (last visited Nov.10 2022).

86 As amended in 2015, it reads: Section 3 *Punishments for offences atrocities*:(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—.....(j) makes a member of a Scheduled Caste or a Scheduled Tribe to do manual scavenging or employs or permits the employment of such member for such purpose; and the same shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

87 *Municipal Council, Ratlam v.Vardhichand* AIR 1980 SC 1622.

88 *Ibid*. The court held: "...the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under Nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems- not pompous and attractive, but in working condition and sufficient to meet the needs of the people cannot be evaded if the municipality is to justify its existence. A bare study of the statutory provisions makes this position clear...".

has been provided in the Constitution in favour of these people who have lost their dignified life and continue to practice manual scavenging from generation to generation and have been tagged with these terminologies. A discussion needs to be done on the legislative framework that has been enacted to uplift this section of society and provide them with a meaningful life, with the inquiry into the effective implementation of these legislations and allied legal framework.

IV Implementation of law on prohibition of manual scavenging: A critical analysis

The Employment of Manual Scavengers and Construction of Dry Latrine (Prohibition) Act, 1993, prohibited the construction of dry latrines and employing of people for scavenging activities which were the twin objectives of the statute. However, the same could not be achieved due to implementation level problems. The 1993 Act came into force only on January 26, 1997,⁸⁹ in six states and the Union Territories.⁹⁰ The 1993 Act had minimal application due to the narrow construction of various definitions and restricting the scope of that legislation. For illustration, the 1993 Act defined “*dry latrines*,” which “*means a latrine other than a water-seal latrine.*”⁹¹ While dry latrines remained focal to manual scavenging, the 1993 Act ignored other latrines lacking sanitation facilities that would require manual cleaning.⁹² The power conferred on the state governments to exempt such activity defeated the very purpose of the Act of 1993.

Similarly, the definition of manual scavengers⁹³ was also very narrowly constructed by eliminating other activities like cleaning, disposing of which are integral components of manual scavenging connected with the human excreta. As a result, those employed

89 See Jan. 26, 1997, vide notification No. S.O. 58(E), dated Jan. 24, 1997, see Gazette of India, Extraordinary, Part II, sec. 3(ii) and also see The Employment of Manual Scavengers and Construction of Dry Latrine (Prohibition) Act, 1993, available at: https://legislative.gov.in/sites/default/files/A1993-46_0.pdf (Last visited on August 5, 2021).

90 As per the Act notified in the gazette, it came into force only in Andhra Pradesh, Goa, Karnataka, Maharashtra, Tripura and West Bengal and in all Union Territories.

91 The Employment of Manual Scavengers and Construction of Dry Latrine (Prohibition) Act, 1993, s. 2 (c).

92 *Id.*, s. 3 ; Prohibition of employment of manual scavengers, etc.—(1) Subject to sub-section (2) and the other provisions of this Act, with effect from such date and in such area as the State Government may, by notification, specify in this behalf, no person shall—(a) engage in or employ for or permit to be engaged in or employed for any other person for manually carrying human excreta; or (b) construct or maintain a dry latrine. (2) The state government shall not issue a notification under sub-section (1) unless—(i) it has, by notification, given not less than ninety days’ notice of its intention to do so; (ii) adequate facilities for the use of water-seal latrines in that area exist; and (iii) it is necessary or expedient to do so for the protection and improvement of the environment or public health in that area.

93 *Id.*, s. 2 (j) which reads; “manual scavenger” means a person engaged in or employed for manually carrying human excreta, and the expression “manual scavenging” shall be construed accordingly.

or involved in the said activities were never considered manual scavengers, and the 1993 Act did not apply to them. It is quite disgusting to point out that in 2008, the Government of NCT, Delhi, in its affidavit before the Supreme Court stated that carrying human excreta in wheeled barrows or buckets or removing from drains could not be considered as manual scavenging as per the 1993 Act and declared that the act of manual scavenging was a misnomer.⁹⁴

The 1993 Act entrusted the implementation to the state governments, which would be done by constituting various authorities to monitor the implementation in their respective jurisdictions and decide on levying fines for committing an offence.⁹⁵ The offences were punishable with one-year imprisonment and a fine of Rs. 2000/- and the subsequent offences would attract Rs 100/- each;⁹⁶ all these offences were cognisable and were in a way non-bailable.⁹⁷ Offences committed by the companies/institutions were also punishable, as said above.⁹⁸ However, it is interesting to note that if the person responsible could prove that the offence was committed without his knowledge, such a person would not be prosecuted.⁹⁹ It is quite disheartening that such an inhuman activity could be committed without the company/institution's knowledge. Though it declared the manual scavenging an offence, it required the previous sanction to initiate criminal proceedings without which the court could not take cognisance.¹⁰⁰

94 Shomona Khanna "Invisible Inequalities - An Analysis of the Safai Karamchari Andolan Case" in Philippe Cullet, Sujith Koonan, *et.al. (eds.), Right to Sanitation in India-Critical Perspectives* (OUP 2019) - "Government of Delhi submitted an affidavit before the Supreme Court stating that there were no manual scavengers because 'the practice of manual scavenging in its strict sense i.e. carrying night soil on head does not exist as per MCD'. The State government asserted that those who carry excreta on the side, or in wheeled barrows or buckets, or manually remove it from drains, are not manual scavengers, and therefore not entitled to the protection of the law."

95 The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 ss.5- 13.

96 *Id.*, s. 14.

97 *Id.*, s. 16.

98 *Id.*, s. 15.

99 *Id.*, s. 15- "Offences by companies.—(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence."

100 *Id.*, s.17. Provision in relation to jurisdiction.—(1) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act. (2) No prosecution for any offence under this Act shall be instituted except by or with the previous sanction of the Executive Authority. (3) No court shall take cognizance of any offence under this Act except upon a complaint made by a person generally or specially authorized in this behalf by the Executive Authority.

Further, the 1993 Act was utterly silent on the aspect of hazardous manual cleaning of sewer and septic tanks. It did not attract the Railway Department, which employed scavengers for removing human excreta at the track and the station premises, which could be seen even today, the manual scavenging practice prevailed in the defence establishments and other government establishments.¹⁰¹ The twin objectives could not be achieved due to the above-discussed reasons. Further, lack of awareness among the victims, failure of the government machinery to ensure that suitable alternative technology is made available and scarcity of water in the urban and the rural areas led to the construction of more dry latrines in the country.¹⁰² In some rural areas, the scheduled caste people were not provided with access to water, thus denying any meaningful access to sanitation.¹⁰³ Even the practice of open defecation due to the non-availability of proper sanitation facilities in both rural and urban was also adding fuel to the fire, especially in the urban areas, which created a scenario of sweepers cleaning the open defecated excreta and open drain.¹⁰⁴

The 1993 Act was heavily criticised for focusing only on the prohibition of manual scavenging and construction of dry latrines while leaving the issue of ‘rehabilitation of manual scavengers’.¹⁰⁵ However, it is worth stating that the issue of rehabilitation has been left to be handled by the NCSK since 1993, and the efficacy of the schemes and the programs have been highly contentious. With the deep-rooted majoritarian

101 Aditya Nigam, “In Search of a Bourgeoisie: Dalit Politics Enters a New Phase.” 13 *Economic and Political Weekly* 1190-193 (2002). ; Rajeev Kumar Singh, Ziyuddin “Manual Scavenging As Social Exclusion: A Case Study” XLIV *Economic and Political Weekly* 522 (2009). ; *Violations of the right to water and sanitation*, Submission to the UN Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque for her annual thematic report to the Human Rights Council. Joint submission by Rashtriya Garima Abhiyan (RGA), National Campaign on Dalit Human Rights (NCDHR) and the International Dalit Solidarity Network (IDSN) (February 2014), available at: <https://www.ohchr.org/Documents/Issues/Water/HRViolations/JS.pdf>, (Last visited July 11, 2021).

102 Marisa Arpels, Phuong Anh Bui, et.al., *Moving Forward: Ending Manual Scavenging in Paliyad* (Program On Human Rights and Justice, Massachusetts Institute of Technology, 2008), available at: http://web.mit.edu/dusp/dusp_extension_unsec/reports/rajagopal_india_practicum_moving_forward_2008.pdf (last visited on Oct. 11 2022).

103 Human Rights Watch, *Cleaning Human Waste, “Manual Scavenging,” Caste, and Discrimination in India* (August 25, 2014) available at: <https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india> (Last visited on Aug. 5, 2021).

104 Siddharth K J *Manual Scavenging in Karnataka A Situation Assessment* (Safaikarmachari Kavalu Samithi, Karnataka, 2020). Available at: <http://www.thamate.org/wp-content/uploads/2020/02/Manual-Scavenging-in-Karnataka-A-Situation-Assessment.pdf> (last visited on Aug. 5, 2021).

105 Harsh Mander, *Resource Handbook for Ending Manual Scavenging* 17 (International Labour Organization 2014).

attitude, there was not even a single case reported under the Act.¹⁰⁶ Even the 1993 Act lacked the vision on treatment and disposal mechanisms that are essential for the human environment.¹⁰⁷

Further, as stated, the 1993 Act came into force after five years of its enactment only in 6 states and Union Territories; it took another 13-15 years to be adopted in all states after the apex court's warning of initiating contempt proceedings in 2012.¹⁰⁸ It could be well concluded that lack of political will and administrative apathy impeded proper planning and implementation of the 1993 Act, thus leading to its failure in all respects.¹⁰⁹

V Judicial interventions for prohibition of manual scavenging-A critical appraisal

The plight of the manual scavengers brought to the notice of the larger public through the non-governmental organisations (NGOs) such as Safai Karmachari Andolan, Sulabh International, Navsarjan, Rashtriya Garima Abhiyan, Rights Education and Development Centre (READ), which are committed even today to create mass awareness among various stakeholders to free from their enslavement, and to lead a life liberated from the indignity of manual scavenging itself. One of such notable and laudable initiatives by Safai Karmachari Andolan¹¹⁰ is the public interest litigation (PIL) filed in 2003.

Though it was the first occasion in which the inhuman act was challenged within the purview of the Constitution before the apex court, few of the high courts had few instances to encounter with manual scavenging as a customary right and its contractual enforcement.¹¹¹ As the issues were primarily on the enforceability of customary practice(s), *i.e.*, manual scavenging either between the scavengers or between the scavengers and the house owners, the courts did not wish to put an extra effort to inquire the priority behind the manual scavenging which nullifies the constitutionally guaranteed fundamental rights and thus self-restrained to issues relating to the enforceability of manual scavenging as customary right in civil appeals. While discharging

106 PUCI-Karnataka, "A Millennial Struggle for dignity: Manual Scavenging in Karnataka" 165 (April 2019). ; United Nations Development Programme and UN Solution Exchange (Gender Community of Practice), "Report of the National Round Table Discussion on Social Inclusion of Manual Scavengers" (2012).

107 *Supra* note 8.

108 *Safai Karmachari Andolan v. Union of India* (2011) 15 SCC 611; *Supra* note 8.

109 United Nations Development Programme and UN Solution Exchange (Gender Community of Practice), "Report of the National Round Table Discussion on Social Inclusion of Manual Scavengers" (2012).

110 Safai Karmachari Andolan (SKA) is a national movement to the eradication of manual scavenging and to assist them to get liberated from manual scavenging. It also helps them in rehabilitation.

111 Sujith Koonan, "Manual scavenging in India: state apathy, non-implementation of laws and resistance by the community" 5 *Indian Law Review* 149-165 (2021).

their constitutional role as appellate courts, Madras,¹¹² Madhya Pradesh,¹¹³ and¹¹⁴ High Court of Allahabad concluded that manual scavenging is not a valid custom and thus cannot be transferred,¹¹⁵ mortgaged¹¹⁶ and enforced.¹¹⁷

However, it was only in *Radhya*¹¹⁸ case, Dixit J, at first, traced reasonableness and enforceability of manual scavenging as a customary right in civil cases in the realm of Constitution and held:¹¹⁹

112 *Raghudu v. Erraiya*, AIR J938 Mad 881. However, in this case, the court held it not a valid custom and not enforceable because such practice is detrimental to the larger public. It held: "Lastly, it is contended that the claim of the plaintiff is based on custom and therefore it is sustainable. It is a well settled principle that any custom which is contrary to public good and operates to the prejudice of the many and beneficial only to a particular individual is prima facie unreasonable and cannot be enforced by any Court of law."

113 *Radhya v. Kamray*, AIR 1951 MadhBha 120.

114 *Dhanduv. Girdhari Lal*, AIR 1961 All 518. ; *Buddha v. Balwanta*, AIR 1958 All 699.

115 *Dhanduv. Girdhari Lal*, AIR 1961 All 518. The court while relying on *Buddha v. Balwanta*, AIR 1958 All 699 held that it is not enforceable. However, the same ratio could not be seen in the judgment. The *Buddha* Court while examining the legal position of brit-Jajmani through the Division Bench of the High Court of Calcutta in *Gourmoni Debiv. Chairman of Panibati Municipality*, 12 Cal IJ 74 (D). , The court took note of the Calcutta Courts Observation. The researchers strongly feel that the Dhandu Court had mistakenly relied on this. The extracted portion of the Dhandu case reads: The right could have originated either in an agreement between the sweepers amongst themselves or in a grant, usage or Prescription. Till the origin of the right was known it could not be possible to determine the incidents of that right and the extent to which it was enforceable or transferable. In the present case unfortunately no evidence appears to have been led to show how the birtkhakrobi right which was made the subject-matter of mortgage and lease in this case had really originated. There is no evidence on the record to show that it was based on any custom, grant or agreement. There is also no evidence to show that there was any custom recognising the right as a transferable right or as a right in immovable property. There was, therefore, no basis on which the right could be held to be transferable.

116 *Supra* note 112. The court held: *It is clear from this provision that the mortgage of the income derivable in future from the scavenging work to be done would be invalid being expectancy or a possibility within the meaning of S. 6 (a), T.P. Act. If, therefore, the mortgage is invalid the plaintiff cannot claim any relief thereon.*

117 *Supra* note 113. and also see *Buddha v. Balwanta*, AIR 1958 All 69; It was further held that a custom to be valid, must have four essential attributes: first, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and fourthly, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. It was again observed that in order to ascertain whether a particular custom is reasonable or not one must look to the possible period of its inception. It was further held that a voluntary consent of the people to the employment of the plaintiff of his predecessors as cremation priests, cannot confer upon them any exclusive right, and the continuance of this state of things even for generation, cannot confer upon him a legally enforceable right.

118 *Supra* note 113.

119 *Ibid.*

I respectfully agree with those observations and applying them to the case before me, I hold that the custom to claim a right to scavenge and to mortgage or sell such a right cannot be recognised by a Court of law as such a custom is prima facie unreasonable. I do not think that it can be contended with any force that such a custom could have been reasonable at its commencement. That it would not be reasonable today under the Constitution of India giving all citizens the fundamental right to practice any profession, or to carry on any occupation, trade or business, is clear enough. The plaintiff appellants suit, for the redemption of an invalid mortgage of a right which is not legally enforceable, must, therefore, fail.

This standpoint of the *Dhandu* case was further reiterated by the full bench of the same high court in the *Pearey* Case of 1964.¹²⁰ However, the High Court of Rajasthan in *Khairati*,¹²¹ while relying on the *Pearey* with respect to the *long and uninterrupted usage* and failed to take note of the ratio, *i.e.*, customary right of manual scavenging cannot be enforced and hence remanded the matter to the trial court.¹²² Subsequent to the enactment of the 1993 Act, the same High Court of Rajasthan had another occasion to examine the nature of 'customary right of scavenging' in *Kalua* case,¹²³ which is the second appeal of a suit of 1984.¹²⁴ Before the court, the relevant core issues

120 *Pearey v. Pachchoo*, AIR 1964 All 249.

121 *Khairati v. Devi Sabai*, AIR 1974 RAJ 131.

122 *Supra* note 120. The court held: *it was observed that* "in a claim of Khakrobi in respect of scavenging rights it is necessary to establish by evidence its origin or a long and uninterrupted usage. For, the basis of the claim may be either an agreement or a lost grant from the owners of a long and uninterrupted usage so as to raise a presumption of lost grant. It is only when the incidence, the extent and the nature of the right claimed by evidence that such a right can be held to be enforceable. It is well settled that no court can enforce an agreement between two parties involving the right of a third party unless it is established that it has consented to or in a matter of indifference to that party. It may be stated here that the plaintiffs in the present case have pleaded the origin and the uninterrupted usage in respect of the right of scavenging to the exclusion of others and it is to be seen in the course of trial whether they are able to establish their right".

123 *Kalua v. Kinna* 2011 SCC Raj 1216.

124 Plaintiff mortgaged his customary scavenging right to the defendant for Rs.800/- in the year 1958 (Samvat Year 2015). As per customs prevalent amongst those scavengers, no interest is required to be paid against the amount paid while mortgaging the scavenging right which can be redeemed at any time. The plaintiff paid the said amount and asked for redemption but the same was denied by the defendant after receiving the said money from the plaintiff. Thus, the plaintiff filed a suit for redemption of mortgage of customary scavenging right which was done in the year 1958 on August 21, 1984 and the was decreed by the Munsiff Court of Bharatpur on July 25, 1989. The first appeal was decreed on Aug. 31, 1991 by the Additional District Judge, Bharatpur against which this second appeal was preferred.

were:¹²⁵ *Whether the right for scavenging is an immovable property; whether the right of scavenging is an immovable property can the same be mortgaged without any document and Registration? And whether the suit for redemption is maintainable?*

While deciding these questions of law, neither the counsels for the parties¹²⁶ nor did the court acknowledge the existence of the 1993 Act, which explicitly prohibited the scavenging, and ruled that scavenging is a property and could be mortgaged and redeemed. It held:¹²⁷

Birat Jajmani' viz., Whether or not the right of scavenging is capable of being mortgaged, is no more res-integra because this court in *Khairati Vs. Devi Sahai*, supra, relying on full bench judgment of Allahabad High Court in *Pearey and Another v. Pachchoo*, supra, and the earlier judgment of this court in *Mst. Chandiv. Rampratap*, held that the right of *Birat Jajmani*, which is a right of scavenging, is a right of property, which is heritable as well as transferable. If that be so, such a right would also be capable of being mortgaged.....The learned trial court, in my view, was thus perfectly justified in directing redemption of the mortgage of this right on return of Rs.800/- to the defendant by the plaintiff.

Considering the availability of the literature and the technological advancements, the court could have taken the pain of cross verifying the ratio of the *Pearey* case. The court miserably failed to protect the constitutionally guaranteed fundamental rights which prohibit the customs like 'customary right of scavenging' and the very existence of the 1993 Act in the era of *Maneka Gandhi*,¹²⁸ and the bare minimum expectation from the second appeal court is that it could have decided in line with *Radhya*¹²⁹ and *Pearey*. Unfortunately, no appeal has been preferred against the said order. It is quite shocking that when there is a series of directions getting issued to enforce the 1993 Act by the apex court in the Writ filed by the *Safai Karmachari Andolan*, the court ruled that the right to scavenging could be implemented. Such recognition of an

125 The other question(s) of law before the court were: *Whether the suit of the plaintiff-respondent is barred by limitation? Whether the finding of the learned District Judge that there is custom in Harijans by which the right of scavenging is mortgaged is based on no evidence?.*

126 From the arguments made by the counsels, it could be learnt that the focus was only on the uninterrupted usage of customary right of scavenging and proving the same. Hence, the authors feel that the legality and enforceability aspects were never regarded.

127 The court further justified the enforceability of scavenging and redemption of mortgage. It held: *I am not inclined to uphold the argument raised by learned counsel for defendant-appellant that the plaintiff-respondent was not able to discharge the burden of proving that there was a custom of Biran Jajmani in their community or that it was heritable or transferable. This has been conclusively decided against the defendant-appellant by a number of judgments of this court, especially in Khairati v. Devi Sahai, AIR 1974 RAJ 131.*

128 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

129 *Supra* note 113.

unconstitutional and illegal act as a property right and enforceable through the court of law in 2011 could only be termed as barbaric and such order should be recalled. The high courts have missed these occasions during which they could have proactively declared that the agreements based on inhuman practice could have been decided as 'void ab initio'.

Safai karamchari andolan case

As stated, it was only through Safai Karamchari Andolan, along with six other NGOs and seven individuals who were from this community¹³⁰ at first, knocked the doors of apex court through a writ in the year 2003 in which the Supreme Court dealt with this obnoxious act and sought for appropriate directions for the proper implementation of the 1993 Act.¹³¹ While hearing the writ, it was argued by the states that the scavenging practice is a misnomer and eliminated the dry latrines, and it was pleaded to dispose of the writ petition.¹³² In turn, it was established by the petitioners that scavenging practices were prevalent and submitted evidence.¹³³ The apex court, after realising the non-committal attitude of the government institutions and their lackadaisical approach, issued various directions for the meaningful implementation of the 1993 Act.¹³⁴ In due course, international institutions also expressed their concerns about manual scavenging and untouchability on various occasions.¹³⁵ The Supreme Court, nearly after a decade, as contended by the petitioners, ruled that manual scavenging is unconstitutional and against India's commitment towards International Legal Instruments.¹³⁶ At the final stage of the disposal of this writ petition, due to mounting pressure from the Supreme Court, Civil Society and other stakeholders, the parliament brought the 2013 Act. The main contention of the petitioners was that the 1993 Act

130 Safai Karamchari Andolan along with Jan Sahas, Adharshila, Young Women's Christian Association, Safai Kamgar Parivartan Sangh, Dalit Research Institute, National Campaign for Dalit Human Rights joined with the seven individuals including Bezwada Wilson from the Scavenging community filed this Writ petition. It is worth highlighting the contributions rendered by former bureaucrat Sankarn in shaping and guiding this movement.

131 *Safai Karamchari Andolan v. Union of India* (2014) 11 SCC 224.

132 *Supra* note 8.

133 *Safai Karamchari Andolan v. Union of India* (2009) 17 SCC 788.

134 *Safai Karamchari Andolan v. Union of India*, (2011) 15 SCC 611; *Ibid.*

135 The Committee on the Rights of the Child in 2004, The UN Committee on Elimination of Discrimination of Women in 2007, The UN Committee on the Elimination of Racial Discrimination, 2007 and The UN Committee on Economic, Social and Cultural Rights reiterated these concerns in 2008 expressed their concern about the prevailing practice of manual scavenging in India.

136 This inhuman practice would be in violative of individual dignity as per the provisions of the Universal Declaration of Human Rights (UDHR), 1948; Convention on Elimination of Racial Discrimination (CERD), 1965 and the Convention for Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.

failed to a great extent in uprooting this obnoxious practice because of the lenient approach taken by the government. One of the main reasons they pointed out was that of the narrow construction of the term “manual scavenger.” Thus, various reliefs were sought from the apex court.¹³⁷ While delivering the judgment, the apex court had taken note of the same and issued the directions to the States and other institutions like rehabilitation, livelihood assistance, education and entrepreneurship/ alternative sustenance training and legal assistance wherever required.

Further, the court directed to approach the high courts in case of any violations in future.¹³⁸ But the court, while addressing the contentions raised by petitioners, didn't give much attention to the narrow construction of the definition of “manual scavenger”, on the lenient approach taken by the government and with respect to the prosecution of the violators or with respect to the submission of compliance report by respective state governments. The petitioners had to submit proof regarding the existence of manual scavenging and dry latrines, which led to the conclusion that the state themselves are the violators either by not addressing the issue or by not admitting the same.¹³⁹

During the pendency of this writ petition in the Supreme Court, the High Court of Madras¹⁴⁰ and High Court of Patna¹⁴¹ expressed their concerns about the plight of persons entering into the manhole for sewage cleaning, manual scavengers, the efficiency of implementation of schemes for the elimination of dry latrines and rehabilitation and compensation.¹⁴² The Supreme Court, in the case of *Delhi Jal Board*,¹⁴³ delved into

137 There were various reliefs sought by petitioner: complete eradication of dry latrines, to declare existence of dry latrine and manual scavenging as violative of The Constitution of Indian art. 14,17,21 and 23 and 1993 Act, to direct respondent to necessary directions to the local bodies and prosecute violators, to direct respondent to adopt and implement the 1993 Act, to direct respondent to formulate detailed plan on timely basis to eradicate manual scavenging and rehabilitate those engaged and to file compliance report periodically with respect to the directions of the court.

138 Inasmuch as the Act 2013 occupies the entire field, we are of the view that no further monitoring is required by this court. However, we once again reiterate that the duty is cast on all the states and the Union Territories to fully implement and to take action against the violators. Henceforth, persons aggrieved are permitted to approach the authorities concerned at the first instance and thereafter the high court having jurisdiction.

139 *Supra* note 94.

140 *A.Narayanan v.The Chief Secretary* , W.P.No.24403 (2008) High Court of Madras.

141 *Dharmendra Kumar v. The State Of Bihar*, W.P.No. 6334 (2011) High Court of Patna.

142 *Supra* note 140. The court held that entering into the manhole and cleaning septic tank would be squarely falling under the ambit of Manual scavenging. It read: *In order to put an end to these menace once for and all, we wish to pass orders for strict compliance by CMWSSB as well as the second respondent herein namely, the Secretary to Government, Municipal Administration & Water Supply Department, Chennai to ensure that manual scavenging is totally prohibited in the State and that no case of such unwarranted deaths takes place by permitting the gullible employees to enter the drainage system in the Metropolitan Cities and cleaning of septic tank in other places.*

143 *Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage and Allied Workers*, (2011) 8 SCC 568.

the importance of constitutional provisions including fundamental rights, the directive principles of state policy like article-38, 39(e) and 42 of the Constitution of India, which laid emphasis on the welfare of the people and the securing just and humane conditions of work and directed that the same should be complied by the state.¹⁴⁴ The court in the case focused on an essential aspect of responsibility on the state and its agencies/instrumentalities or the contractor to ensure the safety of those engaged in hazardous jobs like entering the manhole for sewage cleaning, providing safety measures or protective gears, compensation for the deceased/victims and other matters connected therewith.¹⁴⁵

Based on the above discussion, it is worth summarising that the Judiciary, due to the civil society's intervention, has stepped out to safeguard the marginalised community from the so-called obnoxious practice. The Safai Karamchari Andolan case is not merely a fight for justice. Instead, it is a movement that created awareness and brought to fore many vital issues compelling the instrumentalities of the state to recognise manual scavenging as a socio-economic and politico-legal problem requiring a multi-pronged approach. As highlighted, because of the mounting pressure from the civil society and the judicial pressure, the government decided to replace the 1993 Act by introducing the 2013 Act, which was passed, came into force immediately, unlike the 1993 Act¹⁴⁶ and the rules were also notified.¹⁴⁷ It is worth examining whether the new legislation has corrected the snags of the 1993 Act.

VI Employment of Manual Scavengers and their Rehabilitation Act, 2013: An overview

This 2013 Act has been enacted with an open acceptance that the practice of manual scavenging has been termed as a historical injustice to those who were socially compelled, and it has been aimed to restore the dignity of those people.¹⁴⁸ In a way, it is an open secret that the government has accepted the failure/inefficiency of the previous legislation, various policy initiatives and administrative measures, thereby the injustice caused to those people. The very nomenclature of the 2013 Act indicates that it aims for a holistic approach towards the obnoxious act, including the rehabilitation of the victims, unlike the 1993 Act, which focused solely on prohibiting the construction of dry latrines.

144 *Ibid.*

145 *Ibid.*

146 It came into force on Sep. 18, 2013.

147 The rules were notified on Dec. 12, 2013 *available at*: <http://socialjustice.nic.in/pdf/manualsca-rules2013.pdf> (last visited on Mar. 2, 2020).

148 The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, Preamble.

Compared with the 1993 Act, the present Act provides extensive coverage of people involved in manual scavenging in all forms. Thus cleaning of the sewage/ septic tanks, manhole, open drain, *etc.*, is also to be understood as manual scavenging.¹⁴⁹ Without proper protective gear, such activities are strictly prohibited.¹⁵⁰ One institution which employed people for manual scavenging until recently is Indian Railway, and the employees deployed for removing/cleaning human excreta at the track and the station premises was not covered under the 1993 Act. In the 2006 Affidavit, it was assured that the railways would come up with Bio-Toilets. It also converted a few ordinary toilets into bio-toilets, but thereafter, not much progress was reported. However, the same has been addressed through an express inclusion of cleaning at railway premises under the 2013 Act.¹⁵¹ Similarly, the definition of insanitary latrine has also been more broadly construed than the concept of dry latrine under the 1993 Act.

The rehabilitation measures required for gainful employment of the people who are freed from manual scavenging and enable them to lead a life with dignity received due attention in the 2013 Act.¹⁵² Concerning the penal provision and penalty part, violation of those provisions would lead to a minimum of one year and a maximum of five years punishment if there are any subsequent offences by the same person. The fine amount would range from 50,000 to 2 Lakh.¹⁵³ Moreover, the offences under this Act are cognisable and non-bailable also.¹⁵⁴ For the proper implementation, it is required to constitute a monitoring committee and time to time measures.¹⁵⁵ But, at the same time, we also need to note that on 57th Standing Committee of Social Justice and Empowerment 2017-2018 says that there is hardly any FIR registered in the year 2014

From a bare look and understanding of the provisions of the 2013 Act, it is reasonable to conclude that the 2013 Act is an enabling legislative action that gives more teeth for enforcing the prohibition on manual scavenging and restoring the dignity of millions of people hitherto condemned to carry on degrading work. Realisation of the objectives, however, depends on its implementation in letter and spirit.

Inadequacies and limitations: A critical appraisal

The definition of 'hazardous cleaning' has the potential to increase the number of human beings employed rather than using machines. It lays emphasis on mandatory use of protective gears while carrying out hazardous cleaning works. When it comes

149 The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, s. 2(g) and s. 5.

150 *Id.*, s. 2(d).

151 *Id.*, s. 2(g).

152 *Id.*, s. 11-16.

153 *Id.*, s. 5-10.

154 *Id.*, s. 22.

155 *Id.*, s. 24.

to manhole cleaning, the type of protective measures, suitability, and adaptability of that equipment should also be studied and used very carefully. The Act further emphasises that the state should provide all the protective gears for cleaning the sewage, tanks, manholes, *etc.*, and such a cleaning process involving protective gears would not be considered as manual scavenging.

Similarly, cleaning with protective gears in the railway will not be termed as scavenging according to the 2013 Act. It is worth to be noted that the protective gears used in the swage and tank cleaning are entirely different from using protective gears for the excreta removal at the railway track. Chapter II of The Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules, 2013 very clearly prescribes the use of various types of protective gears and safety devices and careful adherence to other safety precautions with respect to cleaning of sewer and septic tanks.¹⁵⁶ The standard operating procedure published by the Ministry of Housing and Urban Affairs also provides various procedural and technological measures for cleaning sewers and septic tanks.¹⁵⁷ Sewer related deaths can be attributed to the failure on the part of employers and non-adherence to appropriate safety protocols. The Act does not provide for any *ex-gratia*/compensation in the event of the death of manual scavengers due to the negligence of employers.

Information received by the commission about the number of sewer deaths from 1993 to 26th July 2021.¹⁵⁸

The Ministry of Social Justice also points out that the data is based only on the information received by the Commission from States/Union Territories/ Print and electronic media reports, complaints received by the Commission, *etc.*, and is a dynamic data that keeps changing/updated upon receipt of fresh information by the Commission. Recently in July 2021, it has been officially claimed that there has been no death reported in the past few years. This is in stark contrast with the reports from print media, social media. NGOs involved in advocacy challenged the claim pointing to a considerable increase in the number of people who died while cleaning the

156 The Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013 available at: <http://ielrc.org/content/e1314.pdf> (Last visited on February 09, 2022).

157 Government of India, “Standard Operating Procedure (SOP) for Cleaning of Sewers and Septic Tanks” (Ministry of Housing and Urban Affairs 2018) available at: <http://164.100.228.143:8080/sbm/content/writereaddata/AMRUT%20SOP%20Book%20Final.pdf> (last visited on Feb. 09, 2022).

158 National Commission for Safai Karamcharis, “sewer Death Cases” available at: <https://ncsk.nic.in/about-us/sewer-death-cases>, (Last visited on October 3, 2021). The Ministry of Social Justice also points out that this data is based only on the information received by this Commission from States/UTs/ Print and electronic media reports, complaints received by the Commission, *etc.* This is dynamic data which keeps changing/updated upon receipt of fresh information by the Commission.

sewer.¹⁵⁹ The discrepancy is on account of the non-inclusion of deaths due to hazardous cleaning of sewer lines and septic tanks, as clarified later. Adopting suitable technology for cleaning the sewers and manholes is more appropriate than engaging humans with protective gears, and the same will be consistent with personal liberty and dignity. Therefore, complete modernisation of sewage cleaning and septic tank cleaning is required to restore human dignity.

Further, the Act defines the term ‘insanitary latrine’ encompassing all those latrines where human excreta is to be cleaned either in an open pit or drain where such excreta is discharged or flushed. However, the proviso in the definition exempts the Indian Railways, which engages a sizeable number of manual scavengers. Such exclusion will perpetuate manual scavenging, ultimately defeating the fundamental objective of the 2013 Act. The exception, arguably necessary for transition, becomes a cause of concern when it allows for laxity in adopting bio-toilets replacing the insanitary latrine. Even after eight years from the inception of the Act majority of train coaches lack bio-toilets. The only ray of hope is East Coast Railway, which completed 100 per cent bio-toilets installation in all 3247 coaches.¹⁶⁰ Teething troubles do exist with respect to maintenance of bio-toilets in railway coaches *viz*, choking, foul smell and non-functioning. South East Railway tried to solve the same by inventing the Natural Draft Induced Ventilation system (NDIVS), which should be adopted throughout India.¹⁶¹ Installation of bio-toilets in all the railway coaches as well as addressing all the issues related to their maintenance is essential for total prohibition of manual scavenging in railways which remains unfinished till date.

Exclusion of those who were previously liberated out of the inhuman practice within the purview of manual scavenger definition would be a serious injustice to them. Ideally, all the social welfare schemes and rehabilitation measures should be extended as long as required. Failing to do so would force them back to the practice of manual scavenging, and that brings the validity of the act to point zero.¹⁶²

Rapid industrialisation and urbanisation have led to the migration of people from rural to cities. As a result, toilets are insufficient, which results in open defecation.

159 Press Information Bureau, *available at*: <https://pib.gov.in/PressReleasePage.aspx?PRID=1776847> (last visited on Dec., 2022).

160 E-Paper, All train coaches under East Coast Railway now fitted with Bio Toilets, *The Times of India* *available at*: <https://timesofindia.indiatimes.com/city/bhubaneswar/all-train-coaches-under-east-coast-railway-now-fitted-with-bio-toilets/articleshow/77239545.cms>, (last visited Nov. 20, 2022).

161 E-Paper, No more stinking bio-toilets: Indian Railways implements award-winning new system, *The Economic Times* *available at*: <https://economictimes.indiatimes.com/industry/transportation/railways/no-more-stinking-bio-toilets-railways-implements-award-winning-new-system/articleshow/65303123.cms?from=mdr>, (last visited Nov. 12, 2022).

162 *Supra* note 8.

Therefore, again this would force some people to clean the human excreta unless the state intervenes with a suitable urban planning policy.

A careful analysis of the implementation of the 2013 Act till date gives a disappointing picture. Contrary to the legislative intent to completely eliminate manual scavenging, it has become a source of continuing inhuman practice of manual scavenging. The protective gears have become metaphors of protecting manual scavenging than manual scavengers and have become effective tools for shielding employers of manual scavengers from punitive actions. The fight for the rights of manual scavengers does not seem to end even after detailed discussions and directions held in the case of *Safai Karamchari* and the Delhi Jal Board. The 2013 Act tried to fill the lacunas that were left out by the previous act but somewhere, it has become more encouraging for activities like manual scavenging. These instances can be seen through cases filed after the 2013 Act.

VII Judicial interventions: Post-2014

Subsequent to the *SKA* case, the compliance of the directions of the apex court was monitored by the high courts. There are many such instances. A few of them are briefed below.

In the case of *The Secretary to the Government of Tamil Nadu, Municipal Administration and Water Supply Department v. Valaiyakka*¹⁶³ High Court of Madras directed the authorities to comply with the orders and directions of the court and provide compensation to the respondents as merely because the death occurred at premises of private owners would not absolve the state government from making payment. The appeal, in this case, was dismissed, and the directions given in the *Safai Karamchari Andolan* case were referred for its compliance. This being one of those several cases is pointing at the lackadaisical approach of the authorities under the Act. The approach of authorities has been one aspect that the Act lacks in, but it is not the only point to be considered. Compensation has been a part of the act and has been reiterated in many cases after the *Safai Karamchari Andolan* case.

Similarly, in *Change India, represented by its Director, A. Narayanan v. Government of Tamil Nadu, represented by Chief Secretary, Chennai*¹⁶⁴ in which the High Court of Madras highlighted the delay in payment of compensation to the dependants of persons who died and were manual scavengers and has directed to pay the compensation along with interest for the identified heirs of manual scavengers who had lost their lives during manual scavenging. This case has pointed to the fact that it is not just the duty of the State to compensate but also that the private entities that employ manual scavenging

163 *The Secretary to the Government of Tamil Nadu, Municipal Administration and Water Supply Department v. Valaiyakka*, MANU/TN/0667/2016.

164 W.P.No.25726(2017), High Court of Madras.

are also bound to pay compensation to the dependants. Therefore, it is worth concluding by saying that the state has committed another historical error by enacting such inefficient legislation on manual scavenging, and the courts have tried to fill the gaps, and the lacunas left out by the legislature and are trying to provide relief, but it still does not cover the faults of the legislation.

Unlike the 1993 Act, many cases have been registered under the 2013 Act for the offences being committed against the private entities and individuals when they employed persons for cleaning septic tanks;¹⁶⁵ however such an approach could not be seen when such casualties occur in municipalities and urban local bodies. It is only after the high court's interventions the criminal proceedings were initiated in all such cases.¹⁶⁶

The employment to the deceased manual scavenger's legal heir on compassionate grounds was emphasised by the High Court of Karnataka in *S. L. Shankar* case.¹⁶⁷ Due to the lethargic approach of the Government institutions, the writ of *mandamus* was invoked in Karnataka for the non-implementation of the financial assistance cum welfare schemes for the liberated manual scavengers even after the sanction order issued by the competent authority.¹⁶⁸ There are many such instances in which various high courts have directed the states to implement welfare measures for the betterment of the scavenging community.¹⁶⁹

After taking *suo motu* cognisance of the media report on sewer deaths,¹⁷⁰ High Court of Punjab and Haryana banned the manual cleaning of sewers, septic tanks and manholes in the States of Punjab, Haryana and U.T. Chandigarh and held that the same should be cleaned mechanically by employing the latest technological appliances. Further, the court directed financial assistance incentives for the use of modern technology for cleaning sewers, septic tanks and other spaces. Further, taking note of the existence of insanitary latrines in the States of Punjab, Haryana and U.T. Chandigarh, the court directed to demolish them immediately. It is worth noting that it was directed that contravention of the provisions of the 2013 Act should be dealt with strictly, and the criminal proceedings should be initiated in all such grave violations. It may be

165 *Gourav Data v. State of Haryana*, 2020 IndLaw PNH 609 ; *Ranganath K. S. S/o K. S. Subbaraya v. State of Karnataka by Station House Officer Shivamogga*, 2018 Indlaw KAR 12659.

166 *In Re : Deaths of Sanitation Workers v. State of Odisha*, 2021 SCC Online Ori 383 and *Court on its own motion v. Union of India*, 2019 Indlaw PNH 2138.

167 *S. L. Shankar S/o Kempamma and Late K. Lakshmana v. Chairman and Managing Director, Bangalore*, 2020 Indlaw KAR 1536.

168 *Velram S/o Ramu v. State of Karnataka*, 2018 Indlaw KAR 13651.

169 *Anupriya Yadav v. Union of India and Ors.*, (PIL) No.681 of 2021 available at: <https://lawtimesjournal.in/allahabad-hc-asks-for-the-states-response-in-the-pil-for-the-execution-of-the-manual-scavengers-act/> (last visited Oct. 26 2022).

170 *Court on its own motion v. Union of India*, 2019 Indlaw PNH 2138.

concluded that implementation of the Act is being done by judicial interventions as the administrative systems are found to be wanting its effective implementation.

VIII Scope for effective measure to prevent manual scavenging

Though 2013 focuses on the prohibition of manual scavenging along with rehabilitating the scavenging communities by providing alternate livelihoods and other assistance, the provisions are silent about those who got liberated from this inhuman practice prior to the implementation of the 2013 Act. This leeway has been leading to many hardships for those who got liberated. Formulating policy measures to address the issues of these people could be considered as a foremost task. As argued and suggested, gradual and complete migration to technological tools, where such technical assistance could not be so effective, proper safety equipment or protective gears should have been strictly adhered to. Further, good working ambience with social security like group insurance schemes with minimum assured pension during their old age should also be adequately considered. If these measures are implemented, it would undoubtedly vouch for completely derailing the caste-based discrimination from society.¹⁷¹

As stated above, it is the technological advancements and the societal change that would play a vital role in manual scavenging; recently, it has been noticed that 15 such technical solutions have been rolled out all over the country. Nearly five dozen mini jetting machines that could be effectively used to clear the sewer blocks in narrow lanes and smaller colonies have been put in action at Hyderabad. In Thiruvananthapuram, engineers have designed a spider-shaped robot that cleans manholes and sewers with precision.¹⁷²

Project Bandicoot- a successful project of KSUM (Kerala Start-up Mission) has successfully demonstrated how the fully automated robotic technology, with the help of cameras, could be very effectively used in clearing sewer blocks rather than sending humans to the manhole.¹⁷³ On December 24, 2020, the government launched a mobile application named “*Swachhta Abhiyan*” for identifying the existing insanitary latrines and manual scavengers whereby the general public, including the NGOs, can report the same and upload pictures. The Government’s main idea behind launching such an app was to bridge the gap between the missing data of insanitary latrines as well as the manual scavengers. The app didn’t receive expected results as it was not given wide

171 *Supra* note 8.

172 Subhojit Goswami, Manual scavenging: A stinking legacy of suffocation and stigma, *available at*: <https://www.downtoearth.org.in/news/waste/manual-scavenging-a-stinking-legacy-of-suffocation-and-stigma-61586>, (Last visited Sep. 15, 2022).

173 “A robot powering India towards ‘Swachh Bharat’” *The Economic Times*, June 7, 2019, *available at*: <https://economictimes.indiatimes.com/small-biz/startups/features/a-robot-powering-india-towards-swachh-bharat/the-curse-of-manual-scavenging/slideshow/69686468.cms>, (Last visited on August 20, 2020).

publication and hence couldn't reach out to the whole population. The National Safai Karamcharis Finance and Development Corporation's Swachhta Udyami Yojana was launched for providing concessional loans and Self-Employment Scheme for Rehabilitation of Manual Scavengers, and their dependents can be provided with a capital subsidy for procuring instruments/vehicles for mechanised cleaning of sewers and septic tanks. But neither scavengers are identified, nor they are aware of these schemes, and if at all they are aware of these schemes, hardly few have got the benefits of these schemes, which itself is proof of the lethargic approach of the government to uproot the inhuman practice.

It is not just the technology that can eradicate manual scavenging from society but also the work of some non-government organisations and private companies which contributes through trust. Some of these CSR initiatives are like the one taken up by the Tata Trust named Project Garima; this aims to provide safe and humane conditions of work for sanitation workers and spread awareness about the segregation of waste into biodegradable and non-biodegradable. These initiatives offer protection to the manual scavengers and create awareness in the people's minds and bring to light such social issues.

Manual scavenging won't stop with enacting a new law, as the issue is so deep-rooted in India and is a customary practice that is caste-based and causes social exclusion with other social problems that are all interrelated. The practice has become involuntary with time, and the people identified from a particular caste to work as manual scavengers don't want to work. However, the authorities still hire them and discriminate, leading to a barrier in the functioning of the act. These acts lead to a practice that creates a vicious circle, and the entire family of manual scavengers gets caught in this, causing no deviance to be practiced, and if deviated, the society makes them face the penalty in the form of threat or harassment by withholding wages and evicting them from their place of stay and thereby causing them to fear leaving such a job.

The 2013 Act was enacted due to many lacunae that were present in the previous act, but it can be observed that there hasn't been much difference in ending the practice of manual scavenging. It's not the act acting as a barrier, but it's the system that is implementing it. The Act contains provisions that focus on the rehabilitation of manual scavengers in cash assistance, livelihood, scholarships, and other legal programs. The Government has provided many schemes like the National Safai Karamcharis Finance and Development Corporation (NSKFDC), Self-Employment Scheme for Rehabilitation of Manual Scavengers (SRMS), and others to protect the rights of the manual scavengers. The actual problem arises at the moment of its implementation. The process of implementation goes through municipalities, local bodies, and corporations and which loses track of cases or are ignored and causes gaps as not all people favour such practice or provide help and support to identify manual scavengers,

and this is due to lack of literacy or awareness causing this caste-based discrimination to be still in practice. Even though the Act is implemented, the Act cannot cover every possible scenario, and that causes the poor implementation of the provisions in the case of protective gears under the 2013 Act, the cleaner needs to be provided with protective gear. These implied protective gears are not being provided and causing the manual scavenger deaths and the non-fulfilment of the objective of the act. The law is having a prolonged effect and is not covering all the jobs that still exist, like the open defecation. These activities needed to be stopped, and only then can the practice be prohibited. There has been some relief provided to people after the 2014 Supreme Court judgment, which provided for compulsory rehabilitation and compensation of 10 lakh rupees to families of those manual scavengers who died working since 1993.

The ways in which these violations under the 2013 Act can be curbed is through the use of technologies to intervene and act as an alternative for cleaning manholes. There is a need to create awareness among those engaged in manual scavenging regarding the pernicious psycho-social consequences it can have on them and their families. There is also a need for proper implementation of the Act as well as the schemes and the authorities responsible must be oriented towards the objective of eliminating manual scavenging and held accountable for non-compliance of the provisions evident from large number of avoidable the deaths of sewer workers being reported. Rehabilitation plays a very significant role and proper allocation of funds to ensure sustainable gainful employment of those identified as manual scavengers should be made. Increased investments in technology based solutions with training programmes for skill upgradation of manual scavengers is pivotal to realise the objectives of the Act.

IX Conclusion

Prohibition of Manual Scavenging and Protection and Rehabilitation of Manual scavengers from this inhuman and degrading practice is an arduous task in a country where the actual data of several manual scavengers engaged in manual scavenging vary from the data reported and submitted by the government authorities and where the more active role in the rehabilitation of manual scavengers is being played by NGOs. More accurate data of death of manual scavengers are being reported by private parties, associations, and NGOs. The recent media report also points out that even children are being engaged in scavenging.¹⁷⁴ In a country wherein the name of Swatch Bharath Abhiyan, public latrines are being constructed throughout the country both in rural

174 Pragya Akhilesh, Ranbir Kumar “Manual Scavenging Is Continuing Unabated in India – and Even Children Are Forced Into it” *The Wire*, January 26, 2022, available at: <https://thewire.in/rights/manual-scavenging-is-continuing-unabated-in-india-and-even-children-are-forced-into-it> (last visited on January 26, 2022) -They also claims to support their statement through documentaries on various states based on the Rehabilitation Research Initiative (RRI India) and South Asian Labour Network (SASLN) study in 27 states, between 2017 and 2021.

and urban without admitting or unknowingly or purposefully ignoring the fact that India is a country where access to water is still a far-reaching dream to one section of the population, which can further drag more and more people into this profession to clean up the dry latrines which are so-called modern wet latrines. So whether we need to think about the scarcity of water or, to be precise, the access to water is the real issue that the present government needs to address, or the construction of the latrines to gear up the *Swachh Bharath Abhiyan* is still a question. We need to construct and ensure in both urban and rural areas more eco-friendly toilets like “*Namma Toilets*” as put forward by the Tamil Nadu Government.

The various cases that were addressed by the judiciary and the reports submitted by various commissions, NGOs and other private entities show that state governments themselves are the main violator of the laws passed for curbing manual scavenging and hence who should be made accountable is a big question that still goes unanswered. Moreover, funds allocated for the prohibition of this inhuman practice and for protecting and rehabilitation of those already engaged go unutilised or underutilised or being utilised for those not in the field is a big reason for the existence of manual scavenging in India.

Coming to the compensation distributed to the needy, hardly one per cent of the actual community received the same. Technology is being used to replace manual scavenging, and other skill-based training was given to those rehabilitated. Still, various documentaries and newspaper reports show that a bunch of people who got skill-based training returned to sewer cleaning stating no regular income and no job opportunity.¹⁷⁵ The best example and one among the many to cite here is that the Government of Delhi had recently supplemented machines with humans to clean the septic tanks and sewages by training those family members where death was reported because of the scavenging activity they were engaged in. This approach may appear to be oriented towards the economic wellbeing of the dependents of the deceased sewer workers but can hardly provide a justifiable answer to the question as to why the government is facilitating the next generation to engage in the occupation of cleaning human excreta which is dehumanising by its very nature irrespective of the work being mechanical or manual. It reinforces the stereotypes of community whose members were identified with manual scavenging not out of choice but due to no other choice. It is time to recognise that manual scavenging as a caste based or decent based work is highly degrading and exploitative. It has robbed generations of manual scavengers of their human dignity. It is a cultural violence sustained by hegemonic relations and

175 “Fifty labourers return to manual scavenging despite participating in Delhi Government’s skill development programme” (January 27, 2019), available at: <https://www.firstpost.com/india/fifty-labourers-return-to-manual-scavenging-despite-participating-in-delhi-govts-skill-development-programme-5970051.html>, (Last visited on September 2, 2021).

ordained by caste structure. A thorough understanding of lessons from the failure of past and present legislations, schemes, policies and measures, along with the lessons drawn from countries where drastic improvement in sanitation has been achieved through technical and policy interventions, may pave the way for a humane approach needed for uprooting this obnoxious practice.