

## **NOTES AND COMMENTS**

### **HUMAN RIGHTS COURT IN INDIA: KEY LEGAL CONCERNS**

#### **Abstract**

This paper shall identify and flag up key legal concerns regarding Human Rights Courts in India as provided for by the Protection of Human Rights Act, 1993 (PHRA). To aid the gestalt comprehension, researcher will first study and analyse the concomitant circumstances which prevailed during the birth of PHRA in India. The legislative design including the institutional framework in terms of establishment of the fourth branch institutions, for the protection and promotion of human rights in India, will be scrutinised. In this context, Human Rights Courts will be analysed. Recent Delhi Gazette Notification F.No. 6/13/2011-Judl./Suptlaw/1132-1137 on November 24, 2020 has designated the court of Additional Sessions Judge in each District as Human Rights Court. It is opportune time to look at the legal concerns regarding such courts and need for immediate interventions, if any. The guiding aim of this research paper is to strengthen the institutional framework to effectively protect and promote human rights in India.

#### **I Introduction**

RESPECT FOR humanity including human lives and human dignity forms the very core of any human rights discourse. Annals of humankind bear testimony to the violations and infractions of the human rights, which still continue albeit in one form or other. State is considered to be the protector of human rights. In the same breadth, there is a growing belief that the governments alone cannot be left to safeguards these rights. Hence the international mechanisms and international scrutiny of human rights standards, for instance Universal Periodic Review (UPR) by the Human Rights Council. Various mechanisms have been evolved both at the international and national levels to ensure respect for and observance of human rights. It must be noted that with the ever increasing globalisation, there is dilution of rigid national boundaries. In other terms, the state boundaries are becoming porous.<sup>1</sup> There is *inter alia* movement of people, goods, ideas and cultures. Sceptics argue that with this unprecedented movement, national demography's have increasingly become diverse and multicultural and has provided fertile land for conflicts. Instances are often cited of Charlie Hebdo

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1 See Robert O. Keohane and Joseph S. Nye, Jr., "Globalization: What's New? What's Not? (And So What?)" 118 *Foreign Policy* 104–119 (2000), available at: <https://doi.org/10.2307/1149673> (last visited on Dec. 28, 2021).

2 Rahel Philipose, "Explained: 5 years after terror attack, why Charlie Hebdo has reprinted caricatures of the Prophet" *The Indian Express*, Sep. 6, 2020, available at: <https://indianexpress.com/article/explained/explained-five-years-after-deadly-terror-attack-why-has-charlie-hebdo-reprinted-caricatures-of-the-prophet-6580382/> (last visited on Dec. 20, 2021).

attack,<sup>2</sup> the most recent attack on Hindu community in Bangladesh.<sup>3</sup> However, proponents of pluralism argue that diversity does not necessarily result in conflicts and see scope for civic nationalism as opposed to ethnic nationalism, as guiding principle of modern nation-states.<sup>4</sup>

The Constitution of India in its preamble states, India to be a ‘Sovereign, Socialist, Secular, Democratic, Republic’. It is in stark opposition to neighbouring countries which in their constitution recognise state religion. The Indian constitutional promises and aspirations, provided at least legally, grounds for pluralism to foster. In such a diverse or rather ‘super-diverse’<sup>5</sup> country like India which considers ‘unity in diversity’ as its crowning glory, prevention and management of conflicts becomes important. Hence, the issue of mechanisms for protecting and upholding human rights attains saliency. It is the task of legislature to design proper mechanisms to protect, uphold human rights and in case of breach, provide for their redressal. It cannot be gainsaid that legislative drafting is a highly imaginative enterprise. It requires enormous amount inputs, lateral thinking, brainstorming, discussions, revisions, feasibility assessment and others. On scrutinizing the human rights mechanisms as provided for by the PHRA. To commence the scrutiny, let us look at the circumstances which led to the birth of PHRA.

## II Locating Protection of Human Rights Act, 1993

The modern foundation of human rights at the international arena was laid down with the seminal document titled ‘Universal Declaration of Human Rights, 1948 (UDHR)’. And since then, major strides have been taken to progressively improve human rights protections. In the 1990’s, major efforts were undertaken to ameliorate and strengthen the human rights standards all over the globe. The ‘World Conference on Human Rights’ at Vienna in 1993, observed promotion and protection of human rights as a priority objective of the United Nations.<sup>6</sup> It resulted in ‘Vienna Declaration and Programme of Action’ whereby governments of the world were urged to strengthen

3 See “Bangladesh: Deadly Attacks on Hindu Festival” *Humans Rights Watch*, Oct. 21, 2021, available at: <https://www.hrw.org/news/2021/10/21/bangladesh-deadly-attacks-hindu-festival> (last visited on Dec. 22, 2021). Also see, Taran Deol, “3,600 Attacks Since 2013 - Violence Against Hindu Minority Not A First For Bangladesh” *The Print*, Oct. 21, 2021, available at: <https://theprint.in/theprint-essential/3600-attacks-since-2013-violence-against-hindu-minority-not-a-first-for-bangladesh/753947/> (last visited on Dec. 22, 2021).

4 See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 15<sup>th</sup> edn., 1995).

5 Steven Vertovec, “Super-Diversity and Its Implications” 30 *Ethnic and Racial Studies* 1024-1054 (2007), available at: <https://doi.org/10.1080/01419870701599465> (last visited on Dec. 28, 2021).

6 See Part I Para 4 of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on June 25, 1993, (A / CONF.157 / 23), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (last visited on Dec. 28, 2021).

national structures and institutions of society which play a role in promoting and safeguarding human rights.

In the Indian context, 1990's were of great significance. She had already witnessed the scourge of emergency<sup>7</sup> (June 25, 1975 to March 21, 1977) and which exerted its pernicious pressures on all the institutions of democracy. In brief, emergency was set at the behest of Indira Gandhi then Prime Minister. With the onset of emergency in the vestiture of 'internal disturbance', Indira Gandhi got authority to rule the country by decree and thereby allowing elections to be cancelled and civil liberties to be suspended. In other terms, fundamental rights were suspended and politicians who opposed Indira Gandhi were arrested. In those testing times, in the deliberations of the apex court for instance in *ADM, Jabalpur v. Shivakant Shukla*,<sup>8</sup> one can observe and cull out the pivotal human rights concerns. Justice Hans Raj Khanna in his famous, what Professor Guinier would refer to as 'demosprudential dissent'<sup>9</sup> noted:<sup>10</sup>

The principle that no one shall be deprived of his life or liberty without the authority of law is rooted in the consideration that life and liberty are priceless possessions which cannot be made the plaything of individual whim and caprice and that any act which has the effect of tampering with life and liberty must receive sustenance from and sanction of the laws of the land. Article 21 incorporates an essential aspect of that principle and makes it part of the fundamental rights guaranteed in Part III of the Constitution. It does not, however, follow from the above that if Article 21 had not been drafted and inserted in Part III, in that event it would have been permissible for the State to deprive a person of his life or liberty without the authority of law.

During 1990's India also witnessed increased coalition politics. Supreme Court being 'sentinel on the qui vive' was continually laying down jurisprudential foundations to progressively realise the constitutional mandates. The importance of constitution and its mandate is reflected by Khanna J., in his book<sup>11</sup> in following words:

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7 "Emergency: Dark Age of Indian Democracy" *The Hindu*, June 27, 2015, available at: <https://www.thehindu.com/specials/in-depth/the-emergency-imposed-by-indira-gandhi-government/article7357305.ece>. (last visited on Nov. 28, 2021).

8 (1976) 2 SCC 521.

9 See Lani Guinier, "Courting the People: Demosprudence and The Law/Politics Divide" 127(1) *Harvard Law Review* 437-444(2013), available at : <http://www.jstor.org/stable/23741406>. (last visited on Nov. 28, 2021). Also see, Lani Guinier and Gerald Torres, "Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements" 123(8) *The Yale Law Journal* 2740-2804 (2014), available at: <http://www.jstor.org/stable/43617006> (last visited on Nov. 28, 2021).

10 *Supra* note 9.

11 Hans Raj Khanna, *Makings of India's Constitution* 164 (Eastern Book Company, 2<sup>nd</sup> edn., 2008).

If the Indian constitution is our heritage bequeathed to us by our founding fathers, no less are we, the people of India, the trustees and custodians of the values which pulsate within its provisions! A constitution is not a parchment of paper, it is a way of life and has to be lived up to.

In article 15 of the Constitution one can notice the constitutional solicitude especially toward women and children. Similarly there are myriads of provisions in the Constitution which casts and mandate protection of human rights of the people. In *Mohd. Ahmed Khan v. Shab Bano Begum*,<sup>12</sup> Supreme Court held that Muslim men cannot deny maintenance to their divorced wives under the secular law and thereby push them into penury and destitution. However, the government at that time, guided by appeasement politics, brought with frantic hurry Muslim Women (Protection of Rights on Divorce) Act, 1986 to placate the Muslim vote bank. Hence, there was always need felt for mechanisms to ensure protection of human rights. It is in this context with domestic incidents like 1984 Anti-Sikh Riots, Babri Masjid incident and mounting global pressure, the President of India on September 27, 1993 promulgated an ordinance for creation of National Human Rights Commission (NHRC). Human rights commission Bill was introduced in Lok Sabha on May 14, 1992 and was referred to the standing committee on home affairs of the Parliament. A bill on human rights was passed in Lok Sabha on December 18, 1993 to replace the ordinance promulgated by the President the Bill became an act having received the assent of President on January 8, 1994 and was published in Gazette of India extraordinary part two, section one on January 10, 1994. Thus, the Protection of Human Rights Act (no 10 of 1994) came into force. Article 13 provided that it should be deemed to have come into force on September 28, 1993.

At this stage, it would be beneficial to scrutinise and comprehend the present state of affairs in India. The government of the day has passed legislation titled 'The Muslim Women (Protection of Rights on Marriage) Act, 2019' whereby it has made *talaq-e-biddat*<sup>13</sup> or any other similar form of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband to be a culpable offence. Increased official activity<sup>14</sup> is also reported towards the Uniform Civil Code (UCC), mandate for which flows from the article 44 of the Constitution. Same also found way in BJP's

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12 1985 (2) SCC 556.

13 A morally reprehensible form of divorce even as per the Islamic personal law.

14 Neha Shukla, "BJP committed to promise of Uniform Civil Code: Rajnath Singh" *The Times of India*, Mar. 16, 2021, available at: <https://timesofindia.indiatimes.com/india/bjp-committed-to-promise-of-uniform-civil-code-rajnath-singh/articleshow/81522024.cms> (last visited on Dec. 28, 2021). See, *Satprakash Meena v. Alka Meena*, 2021 SCC OnLine Del 3645, wherein High Court of Delhi reiterated the need for Uniform Civil Code.

election manifesto<sup>15</sup> wherein need for UCC was observed as a pre-requisite for ensuring greater gender equality and protection of rights of women in such a religiously diverse nation. It can be lucidly observed that present day government is taking steps towards ensuring realisation of constitutional values and ensuring that even within the realm of personal laws, injustice cannot be permitted.<sup>16</sup>

At the global stage, we see that nations are taking steps to tackle inhumanity even addressing the ubiquitous speciesism. Recently, Greece has banned *kosher* and *halal* for inhumane religious slaughter practises.<sup>17</sup> United States Commission on International Religious Freedom (USCIRF), a United States Federal Government Commission, in its Annual Report 2021 has recommended to designate India as a 'country of particular concern'.<sup>18</sup> It becomes important to understand and decipher the United States freewheeling attitude especially with regards to human rights. Despite being centre of the world politics (it is commonly said that US sneezes and the whole world catches cold) it has yet not ratified many key human rights treaties. For instance, United States is the only country that has not yet ratified convention on rights of the child.<sup>19</sup> Its aversion to ratification of human rights treaties and if ratified, usage of RUD strategy<sup>20</sup> to diminish its intended effects is well known. We witness United States outlook right from backing out of climate deals at the eleventh hour<sup>21</sup> to institutional racism

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15 BJP Election Manifesto (2019) at 37, *available at*: <http://library.bjp.org/jspui/handle/123456789/2988>. (last visited on Dec. 28, 2021).

16 See Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton, N.J., Princeton University Press, 1999).

17 Official records in English could not be accessed however there are news items with regards to Greece ban for instance - "Gravitas: Halal and Kosher slaughter banned in Greece" YouTube, WION, Nov. 1, 2021, 3:32 minutes, *available at*: <https://www.youtube.com/watch?v=2Y53zMzB27I> (last visited on Nov. 28, 2021). See, Central Israe~lisch Consistorie van Belgie~ and Others, Dec. 17, 2020, C-336/19, ECLI:EU:C:2020:1031 wherein court demonstrated definite preference for animal welfare over freedom of religion, *available at*: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200163en.pdf> (last visited on Dec. 28, 2021).

18 Annual Report 2021 of United States Commission on International Religious Freedom at 37, *available at*: [https://www.uscirf.gov/sites/default/files/2021-04/2021%20Annual%20Report\\_0.pdf](https://www.uscirf.gov/sites/default/files/2021-04/2021%20Annual%20Report_0.pdf). (last visited on Dec. 28, 2021).

19 Signature and Ratification status can be checked from UN Treaty Body Database, *available at*: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en). (last visited on Jan. 28, 2022).

20 Reservations, Declarations, Understanding and further declaring treaties as 'non self-executing' to diminish the treaties intended effects.

21 The United States President Donald Trump announced on June 1, 2017, that the United States would withdraw from the Paris Agreement and immediately cease implementing the agreement including implementing the Nationally Determined Contributions (NDCs) and financial contributions.

erupting into BLM movements<sup>22</sup> to torture for instance Abu Ghraib torture and prisoner abuse.<sup>23</sup>

### III Fourth branch institutions

The PHRA establishes two human rights bodies that is NHRC and State Human Rights Commissions (SHRC's) as provided for in chapter two and chapter five of the Act respectively. Section 12 of the Act, enumerates functions of NHRC. The focus is promote and ensure human rights. It will be useful to have a closer look at the key terms which controls/defines the functions of NHRC – 'inquire into' human rights violations (HRV), 'intervene' in proceedings involving allegation of HRV with approval of concerned court, 'visit', 'review', 'study', 'spread' human rights literacy, 'encourage' *etc.* For the purpose of said inquiry, NHRC is bestowed with powers of civil court only for matters as provided in section 13 of the Act. Section 18 states that where inquiry discloses HRV, NHRC can make recommendations to Central Government. These recommendations may be acted upon by the government. Hence, no wonder why NHRC is referred to as 'toothless tiger'. It doesn't have power to prosecute HRV and/or see if its recommendations are acted upon/carried out. Section 21 (5) of the Act states, SHRC's can inquire into HRV pertaining to List II (state list) and List III (concurrent list) in seventh schedule to the Constitution. Section 21 (8) of the Act, states that Union territory of Delhi, Union territory of Jammu and Kashmir and Union territory of Ladakh shall be dealt with by NHRC. Vide The Protection of Human Rights (Amendment) Act, 2019, three significant changes were introduced - the term of chairperson and members was reduced from five years to three years and phrase 'shall be eligible for re-appointment' inserted and one mandatory women member was added. Reduction of existing term with possibility of re-appointment evinces ample scope for the governmental control over the body. Section 36(2) of the Act, expressly limits scope of inquiry to HRV that took place up to one year. Hence, if HRV is pertaining to a period beyond one year then commission cannot inquire. Further, section 19 takes power of inquiry out of hands of the commission if it pertains to armed forces. This indicates that the scope/extent of the safety net that these fourth branch institutions can provide is limited. However, it is in no way to suggest that NHRC or SHRC's have not contributed and/or they lack potential to significantly contribute to the human rights landscape in India. NHRC issued advisory dated May 14, 2021 for

22 See Juliet Hooker, "Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair" 44(4) *Political Theory* 448–469 (2016), available at <http://www.jstor.org/stable/24768058>. (last visited on Dec. 28, 2021).

23 Gregory Hooks and Clayton Mosher "Outrages against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror" 83(4) *Social Forces* 1627–1645 (2005), available at: <http://www.jstor.org/stable/3598406>. (last visited on Dec. 28, 2021). The graphic photographs of torture can be accessed from general search of 'Abu Ghraib torture and prisoner abuse' on any major internet search engine.

‘upholding the dignity and protecting the rights of dead’ in light of unprecedented COVID-19 deaths in India. There is no specific legislation for protecting the rights of dead in India, as there was never need felt in light of the societal conventions and mores. However, during COVID-19 related deaths and the consequent explosion in mortality figures in India, there were media reports of unclaimed, unaccounted and unidentified dead bodies found floating in rivers.<sup>24</sup> The advisory ensured that even in cases of COVID-19 related deaths, the human dignity of dead is observed.

The oft-repeated argument that what is the need for such specialised human rights bodies at the domestic level when there is already a criminal justice system and others, to protect and uphold human rights, needs to be analysed. In simple terms, these bodies stand together with other institutions to ensure that core values which are non-negotiable are upheld. They ensure people have access to other mechanisms to address their HRV. Is it indictment of other institutions which are supposed to be protect rights and observe law and order? Not necessarily. Democracies have adorned mechanisms to ensure that state apparatus and public bodies (including bodies carrying out public function) respect human rights. For Instance, in United Kingdom, Human Rights Act, 1998 (which incorporates rights and freedoms delineated in European Convention on Human Rights), provide for redressal in case of violation of human rights. This is in addition to the existing criminal justice system. Similarly, albeit at the international level, The European Court of Human Rights which is the court of the Council of Europe based in Strasbourg in France, ensures that the countries of the Council of Europe, respect the European Convention on Human Rights. If human rights have been breached and a person has not been able to get a remedy in domestic mechanisms, one may be able to take case to the Strasbourg Court. Hence, there is need to have human rights redressal mechanisms in addition to the existing systems. Such mechanisms however must be clearly designed so as to provide efficient redress to HRV.

### **V Human rights court**

Chapter six of PHRA pertains to human rights courts (HRC). It contains only two sections. Section 30 states that in order to provide speedy trial of offences arising out of Human Rights Violations (HRV), court of session in each district of state can be specified to be human rights courts. Section 31 states that there shall be special public prosecutor for conducting such cases in HRC. Delhi Gazette Notification F.No. 6/13/2011-Judl./Suptlaw/1132-1137 on November 24, 2020 has designated the court

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24 Avaneesh Mishra and Dipankar Ghose, “Behind Bodies Found On River Banks, A Covid Shadow” *The Indian Express* May 15, 2021, available at: <https://indianexpress.com/article/india/covid-crisis-dead-bodies-on-ganga-riverbank-coronavirus-cases-7315632/> (last visited on Dec. 28, 2021).

of additional sessions judge two in each district as HRC. No further mechanism is provided in the PHRA with regards to functioning of such HRC.

Examining major legal issues which arise because of such designation of existing court of session as HRC. But before let us address some of the issues which will aid understanding of the legal issues with regards to human rights courts as provided for by PHRA.

*Article 32 (3) of the Constitution of India states:*

“Without prejudice to the powers conferred on the Supreme Court by clause ( 1 ) and ( 2 ), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause ( 2 )”

Article 32 provides remedies for enforcement of fundamental rights. B.R. Ambedkar referred to them as ‘heart and soul of the constitution’.<sup>25</sup> This article permits democratised decentralisation of judicial work and powers, thereby ensuring grassroots level coverage to the people of the India living in far flung areas. Empowering of grassroots courts as the courts of first instance especially for HRV, can ensure affordable and effective redress for HRV. This goes further towards the broader concept of access to justice.

Be that as it may, first logical question that arises is what is the amplitude given to ‘human right’?

Section 2(1)(d) defines human rights as follows:

means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India

Further clarity is provided by section 2(1)(f) – International Covenants means

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.

Hence, the dualism (in international law sense) is quite clear. Further, human rights definition is very specific. HRV in light of this understanding can be addressed by such courts. A subsequent question arises that is in case of HRV where should one

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25 Constituent Assembly Debates (Proceedings) on Dec. 9, 1948, *available at:* [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/1948-12-09](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-09) (last visited on Nov. 28, 2021).



approach for redress. Is it that commission which will refer matter to the HRC or should HRC be directly approached. One must not lose sight of the fact that section 193 of the Code of Criminal Procedure, 1973 states that 'no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a magistrate under this Code'. So, is it the intent of the legislature to overstretch the existing understaffed and under-resourced trial courts with it. If legislature in its wisdom thought to utilise existing judicial system for redressing HRV then it is in a way functionally equivalent to another criminal offence section being added to the penal code. Pendency/Delays and procedural technicalities would shy away the victims of HRV unless there is sufficient recruitment of judges especially at the district and subordinate courts level. If court of session is to be the court for providing efficacious remedy to HRV then its procedure must be simplified with the court users in mind, so that there is accessibility and time bound justice can be ensured. This would also require that the designated HRC should look at only HRV matters and forgo usual sessions court functions. For instance, establishment of fast track special courts and exclusive courts like POCSO courts.

In *D.K. Basu v. State of West Bengal*,<sup>26</sup> it was observed by Supreme Court:<sup>27</sup>

...There is nothing on record to suggest that the [State] Governments have at all made any attempt in this direction or taken steps to consult the Chief Justices of the High Courts of their respective States and examine the feasibility of specifying Human Rights Court in each district within the contemplation of Section 30 of the Act.

It is indeed worrisome, what kind of feasibility study has been/was conducted by state governments for instance Delhi Government before coming up with above mentioned gazette notification. If court of additional sessions judge was to be designated as HRC, redressal mechanisms including procedural aspects should have been lucidly dealt with, as placed in the larger scheme of human rights institutions in India and the domestic realities in which Indian justice system is located. There is critical shortage of judges particularly in the district and subordinate courts. This move can further exacerbate the pendency issues and further clog the system.

In *Rasiklal M. Gangani* case<sup>28</sup> High Court of Bombay observed:<sup>29</sup>

there is no provision in the Human Rights Act to hold that the Special Judge designated under the Human Rights Act is a Court of original

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26 (2015) 8 SCC 744.

27 *Id.*, para 30.

28 *Rasiklal M. Gangani v. Government of Goa through Chief Secretary, Government of Goa, Secretariat Writ Petition Nos. 537, 541 and 542 of 2003*, decided on 29.03.2004 by High Court of Bombay (Goa Bench).

29 *Id.*, para 21.

jurisdiction. Therefore, the Human Rights Court can only take cognizance of the complaints which are committed to it for trial by the Magistrate as per section 209 of the Code of Criminal Procedure. Appropriately, on a charge-sheet being filed, the Special Judge can proceed with the trial after the same is committed to it for trial under Section 209 of the Code of Criminal Procedure. The procedure for the trial before the Special Judge would be the procedure set out in Sections 225 onwards in Chap. XVIII of the Code of Criminal Procedure. Since the mandate of the law is that the trial before the Court of Session should be conducted by the Public Prosecutor, the Special Public Prosecutor, so designated under Section 31 of the Human Rights Act, can alone conduct the prosecution before the Special Judge.

Para 22

Human Rights Court, being a Court of Session for trial of offences violative of Human Rights, does not have the power to take cognizance of any offence as a Court of original jurisdiction unless the case is committed to it by a Magistrate. A Magistrate of the first class or a Magistrate of the second class, as the case may be, when empowered in this behalf, can take cognizance of any offence upon receiving a complaint or facts, upon a police report or upon information received from any person other than a police officer or upon his own knowledge. Court of Session, however, cannot do so and accordingly Human Rights Court also cannot take cognizance of the offence as the Court of the first instance. There is, thus, an error in the impugned judgment in thinking that petitioner-appellant has the remedy in the Human Rights Court.

Another view rather contrasting taken by High Court of Gujarat in Registrar of Junagadh Agricultural University case,<sup>30</sup> which is as follows:<sup>31</sup>

Thus, upon conjoint reading of this provision, it is evidently clear that Human Rights Commission has got jurisdiction to entertain and investigate the complaints made to it in respect of violation of Human Rights and after making such inquiry, as contemplated under Sections 13 and 14 of the Act, the Commission has authority of law to initiate proceedings for prosecution, or such other stable action as it deems fit and proper. Thus, under Section 30 of the Act, the State Government has been empowered to constitute the Human Rights Court to try offences in respect of violation of Human Rights. No such direct

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30 *Registrar of Junagadh Agricultural University v. State of Gujarat*, CR.MA/7874/2012; decided on July 6, 2017 by High Court of Gujarat (Ahmedabad Bench).

31 *Id.*, para 9.

complaint is maintainable before the Court, and therefore, the present complaint for regularization in service made by the respondent no.2 herein on the ground that there is a violation of her right to equality is not maintainable, and therefore, the learned Sessions Court / Human Rights Court so also the Court of learned Chief Judicial Magistrate has no jurisdiction to entertain and try the complaint.

Hence, before bringing in gazette notification a feasibility should have been conducted. Because the way HRC stands today, it is no good for HRV and human rights jurisprudence in India. A fortiori, in recent speech<sup>32</sup> Chief Justice of India N.V. Ramana raised “the issue of legislature not conducting studies to assess the impact of the laws it passes which sometimes leads to big issues.” Earlier, the CJI had spoken about the “issue of legislature passing laws without proper discussions. He had commented that it was a sorry state of affairs that many laws had ambiguities, and due to lack of discussions, it was not possible to understand the intention of the laws. This was leading to unnecessary litigation”.<sup>33</sup>

#### VI Way forward

Before we deal with the way forward, let us look at some of HRV where the state machinery faltered. Here the issue is not of Herbert packer’s due process or crime control model rather it is of the Lombroso’s atavistic ideology which still guides the institutional practices albeit here it is not so much so about the physical traits as it is about the social traits and social identity.

In shadow report<sup>34</sup> titled ‘Hidden Apartheid: Caste discrimination against India’s Untouchables’ which was submitted in response to Indian Government’s submission to the United Nation Committee on the Elimination of Racial Discrimination (CERD) which is a body of independent experts responsible for monitoring states’ compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, some persistent observations were made to which then PM Manmohan Singh, commented, “Dalits have faced a unique discrimination in our society that is fundamentally different from the problems of minority groups in general. The only

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32 “Legislature Does Not Assess Impact of Laws It Passes; This Leads To Big Issues : CJI NV Ramana” *Live Law* website, available at: <https://www.livelaw.in/top-stories/legislature-does-not-assess-impact-of-laws-it-passes-this-leads-to-big-issues-cji-nv-ramana-186433?infinitescroll=1> (last visited on Nov. 28, 2021). Also see, “Legislature does not conduct studies or assess impact of law, leading to big issues: CJI” *The Times of India* Nov. 27, 2021, available at : <https://timesofindia.indiatimes.com/india/legislature-does-not-conduct-studies-or-assess-impact-of-law-leading-to-big-issues-cji/articleshow/87947953.cms> (last visited on Nov. 28, 2021).

33 *Ibid.*

34 “Hidden Apartheid: Caste discrimination against India’s Untouchables” *Humans Rights Watch*, February 2007 available at: [https://www.hrw.org/sites/default/files/reports/india0207\\_webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/india0207_webwcover_0.pdf) (last visited on Dec. 28, 2021).

parallel to the practice of ‘untouchability’ was apartheid in South Africa. Untouchability is not just social discrimination. It is a blot on humanity.”<sup>35</sup> This is despite untouchability being constitutional offence.<sup>36</sup>

Some of the instances of HRV are as follows : In book ‘Caste Matters’, Suraj Yendge observes:

The rape of ‘Nirbhaya’, in Delhi in December 2012 was disgraceful and it deserved the attention it got. However, how does one explain the fact that six years earlier, in 2006, forty-year-old Surekha Bhootmange was mercilessly raped along with her seventeen-year-old daughter Priyanka, a twelfth-grade topper, by the Kunbi-Marathas of Khairlanji village, not far from Nagpur, in broad daylight at the village square? Chilli powder, rods and sticks were forced into their vaginas. They were stripped, battered and then paraded naked and eventually murdered. In this brutal episode, Surekha’s sons Roshan, twenty-one, and Sudhir, nineteen, were also stripped, mercilessly beaten and killed in cold blood. The issue did not get the desired media coverage. Had it not been for Dalit activists and a young American reporter<sup>37</sup> who was then interning at the Times of India, it would have been completely buried. Did we have a national uprising after the Khairlanji massacre was reported? Did we take this act as a moment of national disgrace? On the contrary, the Dalits who tried to fight the injustice were hounded by the police and the state. Many individuals had to flee their hometowns to avoid arrest.

Yashica Dutt<sup>38</sup> in her memoir ‘Coming Out As Dalit’, shares her lived experiences and the operation of discrimination in insidious and explicit ways for a Dalit life. In one of her anecdotes she recounts:

even in such an impressionable time such as in school, children are often asking about each-others caste. How my parents told me umpteen times not to disclose my caste, fearing of discrimination at the hands of not only school children, but teachers and school authorities. A close friend of many years at the school, when I was invited to her home, her parents inquired about my parents job and immediately asked about my caste. I

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35 *Id.* at 3.

36 See, The Constitution of India, 1950 art. 17.

37 Sarah Buckwalter, “Just Another Rape Story”, *The Times of India* Oct. 29, 2006, available at: <https://timesofindia.indiatimes.com/india/Just-another-rape-story/articleshow/222682.cms> (last visited on Nov. 28, 2021). For a detailed analysis of this ghastly incident see Anand Teltumbde, *Khairlanji: A Strange and Bitter Crop* (Delhi: Navayana, 2008).

38 “NL Interviews: YashicaDutt on coming out as Dalit” YouTube, NewsLaundry, Feb. 25, 2019, 30:31 minutes, available at: <https://www.youtube.com/watch?v=KkMRArwLlMU> (last visited on Nov. 28, 2021).

told them I am Scheduled Caste. Immediately energy in the room changed that tea was served to Dalit person in upper caste household. Her parents realising that I am Dalit said that we are progressive and do not discriminate. Next day in the bus, I saw my friend and greeted her. She ignored me and looked the other way and I pondered what just happened. I think I knew the reason.

In my reckoning school is the microcosm of operating societal realities. Younglings conduct themselves in manner which they learn from their parents or observe in their immediate surroundings. There are many more instances which outrightly offend any sense of law and rights including human rights for example, Mirchpur killings wherein Dalits were burnt alive by the upper castes; caste discrimination (both institutional and individual) in university deliberately stalling PhD of Dalit researcher including denying her access to laboratory<sup>39</sup>; hand of Dalit labourer cut/dismembered for demanding his wages<sup>40</sup>. It is not to suggest that there is no law and order or paint a grim picture of ground reality. However, it points towards the urgent need to have robust human rights redressal mechanism in India to protect and uphold human rights of especially those belonging to vulnerable groups and marginalised communities. Supreme Court in its recent judgement<sup>41</sup> authored by L. Nageswara Rao J., was pained to observed that in para 39:

...caste-motivated violence in the country demonstrate the fact that casteism has not been annihilated even after 75 years of independence. According to Dr. B.R. Ambedkar, inter-caste marriage is one remedy to get rid of casteism in order to achieve equality. His vision for ensuring justice and equality to all sections of the society, especially to the repressed segments, is well enshrined in the preamble of the Constitution. The bigotry perpetuated by such caste-based practices which are prevalent even today, impedes this objective of the Constitution of equality for all its citizens.

There are voices raising concerns of diversity and representation in governmental positions including judiciary. It is welcome step that ex-CJI<sup>42</sup> and present CJI are

39 Jaikrishnan Nair, "I was made to do everything, except actual research work, says Dalit PhD student" *The Time of India*, Nov. 14, 2021, available at: <https://timesofindia.indiatimes.com/home/sunday-times/i-was-made-to-do-everything-except-actual-research-work-says-dalit-phd-student/articleshow/87693719.cms> (last visited on Dec. 28, 2021).

40 Subhash Kumar, 'Translated into English "Madhya Pradesh: Hand dismembered of Dalit laborer for asking for his wage" *Amar Ujala*, Nov. 21, 2021 available at: <https://www.amarujala.com/madhya-pradesh/man-cuts-dalit-labour-hand-for-demanding-of-remuneration-police-arrested-three-persons> (last visited on Dec. 28, 2021).

41 *Hari v. State of Uttar Pradesh*, Criminal Appeal No. 186 of 2018 in the Supreme Court of India.

42 Apoorva Vishwanath, "Time has come for a woman Chief Justice of India", *The Indian Express*, April 16, 2021, available at: <https://indianexpress.com/article/india/supreme-court-woman-chief-justice-of-india-7275376/> (last visited on Dec. 28, 2021).

concerned about inclusivity. Present Chief Justice of India asked chief justices of high courts to ensure that ‘judicial appointments reflect the social diversity of country’.<sup>43</sup> Only time will tell, whether the concerns are translated into actions and how many judges are appointed/selected from scheduled castes, scheduled tribes, women, and non-binary backgrounds/groups. A judge from these sections of the society is more likely to understand the specific problems faced by their communities.

Steps in the right direction would include the concerned fourth branch institutions must be infused with enough powers to provide safety net to victims of HRV who have not been able to secure redress through the existing avenues. For instance, commission can seek action report which has been taken based on its recommendations. If satisfied with the said report proceedings can come to its logical conclusions. Else, commission must be provided with enough powers to ensure that justice is done and also seen to be done. This may include moving courts and/or legislature for suitable assistance. Final report (after completion of inquiry by the commission) may be sent to HRC for appropriate executions. The definition of human rights under the PHRA should be widened by the legislature. If HRC (which bank upon existing judicial infrastructure) is to be the method to redress HRV then, the judicial system must be properly resourced and staffed and recruitment of judges should be done to address the increased load on account of such cases. The scope and jurisdiction must be lucidly delineated. If the concern is that highly nuanced delineation is not conducive for human rights cases then, human resource including judges must be suitably sensitised about the way conduct of such cases as they needs unconventional adjudication. For instance, if a party alleges breach of human rights relating of equality and dignity, what should be the way its trial can be conducted by HRC. Further, does the HRC supplement or supplant other legal remedies including criminal law remedies that might be available to concerned individual whose human rights have been violated.

Thus, in order to change the face of human rights jurisprudence in India, if HRC mechanism is to be adopted in true spirit, abovementioned steps must be solemnly considered and broached upon.

*Karan Choudhary\**

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43 Krishnadas Rajagopal, “Judicial appointments should reflect social diversity: CJI”, *The Hindu*, June 4, 2021 available at: <https://www.thehindu.com/news/national/judicial-appointments-should-reflect-social-diversity-cji/article34730621.ece> (last visited on Dec. 28, 2021).

\* Metropolitan Magistrate, Saket Court, Delhi.