

Decentralized Governance and The Eradication of Manual Scavenging: A Socio-Legal Analysis

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Abstract

Even though the concept of untouchability was officially and constitutionally abolished, in India, although it is officially and legally outlawed, manual scavenging continues to be present. Not merely a failure of law as such but a more fundamental failure of governance which is caste hierarchies, institutional fragmentation and lack of local accountability. It is in this backdrop of decentralized governance that the present paper applies socio-legal analysis on issues surrounding manual scavenging in a bid to understand how the act has remained and how it may have been eliminated by the Panchayati Raj Institutions and Urban Local Bodies. It claims that the survival of manual scavenging is structurally connected with inefficiency of decentralization, functional, financial and administrative, but not the lack of legal norms. In evaluating not only the constitutional demands, but also the statutory demands, judicial claims, and also the practices at the ground level, the paper has established that the local institutions of governance are indeed the most significant yet least tapped areas of transformative change. The paper ends with a recommendation of governance based reforms that dwell on accountability, mechanization, social audits, and caste sensitive policy formulation with an endeavor geared towards making significant eradication of manual scavenging and restoring human dignity in India.

Keywords: Caste, Decentralized Governance, Human Dignity, Manual Scavenging, Panchayati Raj, Urban Local Bodies.

1. Introduction

The practice of manual scavenging has continued to persist in the countryside and in urban areas although it was practiced in shadows and informally in most instances over the years by the issue of statutory prohibition after statutory prohibition until most judicial history has been reviewed. The manual scavenging practice would necessarily entail the manual transfer or disposal or handling of human wastes, in most cases, without protective gears. The workers of this action have been extensively the representatives of historically discriminated against Dalit communities, to which the caste hierarchy has conventionally indicated sanitation labor. It is not an

occupation hazard but a kind of structural violence that enslaves employees by establishing a system that helps to promote social stigmatization and poverty across generations. India seems to be in a good position to legally fight against this injustice. The Constitution of India defines equality before the law, no one must be discriminated against based on caste, untouchability is to be abolished and a right to life with dignity is to be guaranteed. Manual scavenging is expressly criminalized by legislations leading to the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, and the requirement on the part of the state in good faith

to rehabilitate those affected. The judicial interferences have nearly ratified, and once more challenged that, manual scavenging is unconstitutional and against basic rights. The ineffectiveness of the normative law rather than the failure of the implementation and governance to operate is only suggested by the fact that the practice is still continuing because it binds the Panchayati Raj Institutions (PRIs) and Urban Local Bodies in the constitution, which has the mandate of sanitation, health and social welfare. The special position of these local bodies is between law and life. They are the main promises, where the sanitation systems are to be established, the labor force is to be enlisted, the adherence to the Constitutional Amendments is to be guaranteed or violated, the inclination towards the more democratization and the involvement of the participating population as well as being concerned with the life of the local population. Theoretical decentralization must allow the marginal communities to have some power since this would bring the decision-making process nearest to the affected community. De advent, the Indian process of decentralization has been biased and was prejudiced. Many local governments do not have sufficient finances, capacity as well as independence. Better said, the territorialized ways of governing repeat and re-evaluate the status quo of caste hierarchies, and this restricts their ability to change the situation in the example of manual scavenging. On the one hand, it is the legal duty of the local authorities to find and eliminate the insanitary latrines, sanitize and mechanize the sanitation, to introduce the rehabilitation programs and identify the manual scavengers [1].

2. Conceptual Framework: Decentralization, Law, and Socio-Legal Governance

Decentralized governance is seen as devolution of power, accountability and resources by the top government and bottom and the local elected institutions. The 73rd and 74th Constitutional Amendments have constitutionally guaranteed the Indian concept of decentralization which make it a point to institutionalize democratic rule at the grassroot level by the Panchayati Raj Institutions (PRIs) and Urban Local Bodies (ULBs). The practice

of manual scavenging is linked to the activities of these institutions that are mainly concerned with the sanitation, the public health, welfare and social justice- areas. Decentralization may also replicate the social disparities which exist in the high stratification societies as the powers are shifted to the local elites who can only control the social and economic capital as per the official regulations. Rather, it underlines the fact that law is instilled in societal structures, culture and practices of the institution. The rules of law will only be meaningful and effective when they are subjected to interpretation and implementation whereby the institutions and acting actors exist in particular social contexts. The difference between the official ban and the unofficial practice of the case about the manual scavenging is the testimony that the caste stratifications and bureaucracy rituals can easily overwhelm the legal intervention. The approach of assigning the sanitation work to the definite Dalit groups also has the long history and centuries of caste-based oppression became a new standard of the administrative process. Even in place of a legal structure, which criminalizes the activity of manual scavenging, the local governance institutions might still conduct the practice of using caste based scavenging labor within the informal structure of employing, which is the contractual system, or the tacit acceptance system. The latter process illustrates that law can co-exist and in fact passive promote social injustice in situations where institutional incentives and social norms are not changed. Decentralized governance has two functions in the process. On the one hand, local based bodies are placed on the legal point of view as the agent of change. They are expected to find the manual scavengers, clear unsanitary latrines, install mechanized sanitation and put up rehabilitation programs. Quite on the contrary, these are the institutions where the caste based practices are likely to be reproduced in the wall of bureaucracy. This is explained by the fact that the notion of decentralization cannot be regarded as an a priori emancipation but as a local contingency process forming the relations of power in terms of lack of finances, technical capacity and autonomy into dependence on risky manual labour. The other

conceptualisation in this structure is that of accountability. There are weak or distorted accountability mechanisms. Grievance redress and participatory forums, as well as social audits, are likely to lock out or simply engage sanitation workers in meaningless pursuits. There is a lack of effective accountability in decentralization, then impunity can be rendered instead of offering justice. The concept of institutional invisibility is also utilized in the framework. Manual scavenging continues to exist, in part, due to the invisibility which it encounters in the records. Local authorities might not acknowledge the manual scavenging to evade legal requirements, which will result in under-reporting and omission of the rehabilitation programs. This invisibility is not created by chance but created structurally by the bureaucratic motivation and the social bias [2].

3. Constitutional and Legal Framework Governing Manual Scavenging

The legislative and constitutional machineries governing manual scavenging in India are not only comprehensive but normatively sound. Paper-wise, the Indian legal system is categorical against the practice to consider it unconstitutional, unlawful, and inappropriate to human dignity. However, the lack of mechanization of scavenging still shows a fundamental disjuncture between the will of law and life. The eradication of manual scavenging has a normative baseline upon which the Constitution of India is based. This framework is based on article 17 that abolishes untouchability in any form. Manual scavenging as a caste-determined profession based on the concept of purity and pollution is one of the strongest forms of untouchability. Article 17 has repeatedly been affirmed in cases by the Supreme Court to have a positive obligation to the state to end practices based on caste discrimination, and Articles 14 and 15 forbid discrimination of the laws based on caste. The fact that certain caste groups are still involved in dirty sanitation work is a structural breach of these assurances. The right to live with dignity, health, and safe working conditions has been judicially expanded to protect the right to life and personal liberty in article 21. The manual scavenging, which is connected with the direct contact with human excreta and dangerous places, is also the

direct contravention of this broad interpretation of Article 21. Additionally, Article 23 forbids forced labor and begar. Although in much of the literature on this subject, the act of manual scavenging is described as an act of employment, the lack of a meaningful choice, coupled with the caste-based form of forced labor and economic coercion, make it a part of forced labor. Taken together, the provisions in this Constitution define that the scavenging of the manuals is not only not a desirable act, but also unconstitutional. The Directive Principles of State Policy support this standpoint also. Articles 38, 39, 41 and 46 are mandatory to enhance social justice, safeguard the workers and support the interests of Scheduled Castes. These principles, though not Justiciable, serve as a guide to legislative and administrative activity and have an interpretive role to play in the fundamental rights, although there was a long lag by the state in acknowledging the seriousness of the issue. The first national level legislative effort at banning the practice was the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. The Act tried to prohibit the use of dry latrines and hiring of manual scavengers but local authorities had a major limitation on the execution. Its definition of manual scavenging was also narrow, mechanisms of enforcing it weak, and rehabilitating facilities were weak too. Most importantly, the implementation has remained largely to the state and local governments, most of which lack the political will or a denial that they even practice the same. Due to this, the Act did not make any significant eradication. These deficiencies resulted in the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. A more rights-based and comprehensive law is the 2013 Act. It extends the definition of manual scavenging to hazardous cleaning of sewers and septic tanks, is explicit in acknowledging the dignity of sanitation workers, and has strict requirements on the state. The Act makes the use of manual scavengers a criminal offense and gives penalties in case of the violation even by the government officials. Notably, it makes the local governments the most important stakeholders in the implementation process, thus a direct connection

between decentralized governance and compliance with the law [3].

4. Judicial Interpretation and Enforcement

The judicial intervention has been decisive in the interpretation and organisational support of the legal framework regarding the prevention of manual scavenging. The courts have always believed that the practice is against the basic rights and have given orders to compensate, rehabilitate and mechanize. Courts have made it very clear that money cannot be used to excuse acts of disdain and destruction of life. Nonetheless, the judiciary cannot do more than that. Courts depend on executive to implement them through primarily the local governments. Keeping mandamus and monitoring systems, symbolically strong as they are, cannot take the place of the day-to-day administrative complies. The fact that manual scavenging has continued to persist even after the judiciary has condemned the practice on multiple occasions indicates the shortcomings of the judiciary in the ability to regulate the legal and normative discourse on the topic of manual scavenging. The practice has been repeated by the courts and especially the Supreme Court, through constitutional interpretation, public interest litigation and through the continuation of mandamus, which the courts have denounced as unconstitutional and incompatible with human dignity. The judicial interventions have helped in legal visibility, policy reform and affirmation of rights in a symbolic way. But the continuity of manual scavenging also demonstrates the structural constraints of adjudication, particularly with respect to dealing with governance failures based on decentralized institutions. Judicial intervention with manual scavenging should be placed within the context of a wider tradition of public interest litigation (PIL) in India. PIL has allowed courts to deal with institutional breach against communities of marginalized people who do not have access to institutional means of justice. Invisibility, stigma, and power imbalance, which are the main elements of manual scavenging, also became the target of judicial review exactly because the traditional mechanisms of enforcement proved inefficient. The judiciary promoted the idea of non-compliance within the administrative sphere to one of

justice by outlawing the practice as a constitutional offense instead of a statutory one. The constitutional framing has played a very significant role in defining that the abolition of manual scavenging is not a policy option but a mandatory state practice. The judicial utterances have also influenced the interpretation of the key constitutional provisions. Article 21 on right to life has been construed to mean the right to dignity, good working conditions as well as health. Courts have specifically acknowledged that imposing people to be involved in degrading sanitation work contravenes these promises. On a similar note, Article 17 of the prohibition against untouchability has been given a wide interpretation to include actions that uphold caste-based occupational segregation as was applied to manual scavenging. Courts have dismissed the claims on financial constraint or administrative impracticability arguing that resource limitations cannot be used as an excuse to infringe on the basic rights. This has served to promote the normative precedence of constitutional values over administrative convenience, and has brought moral clarity to the matter, in addition to having an effect on legislative reform. Constant court cases and judicial commentaries regarding the ineffectiveness of the 1993 Act helped to bring about the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. Another significant aspect of judicial intervention is compensation jurisprudence, which is a rights-based, but not a welfare-oriented, approach. The governments have been instructed to compensate families whose sanitation workers have died when cleaning sewers or septic tanks by courts. These guidelines recognize the riskiness of sanitation activities, and the role of the state in preventable deaths. Compensation orders also have a deterrent effect because they involve financial penalties in governance failures. But judicial interventions are severely restricted in practice. Courts do not directly implement, but rather leave that to the executive arm of power, especially the local governments. Well-formulated judgments rely on administrative good will and enforcement ability. In a decentralized system of governance, this dependence turns into an acute weakness, with local governmental institutions

frequently having no incentives or means of accountability to follow directives by courts. This limitation has been attempted to be overcome by the use of continuing mandamus whereby the court does not relinquish jurisdiction to watch compliance. Although the continuing mandamus has brought better supervision in some situations, it is not a viable alternative to institutional reform. Day-to-day sanitation activities in thousands of local jurisdictions cannot be monitored by the courts. Judicial surveillance is only able to signify lack of compliance but it is unable to change administrative cultures as well as break down enduring caste hierarchies. When governments are reacting to court directives, they can react by issuing circulars, by creating committees, or by submitting affidavits that prove that they are following the directive formally, without making any changes to ordinary administrative practices. This process is a reflection of the larger trend in symbolic compliance in decentralized form of governance where the aspects of law are respected but not internalized [4].

5. Decentralized Governance in India: Structure, Promise, and Limitations

The decentralized form of governance holds the centre-stage in the constitutional vision of the Indian democracy of administration and social justice. The 73rd and 74th Constitutional Amendments which institutionalized the local self-government was aimed to democratize power, increase the participatory governance and better service delivery by bringing the decision making nearer to the populace. Decentralization is especially important in the framework of manual scavenging because sanitation, public health and welfare services will be well within the functional scope of the local governments. The offer of decentralization, however, has not succeeded as constitutional status was granted to Panchayati Raj Institutions (PRIs) in rural communities, whereas the Urban Local Bodies (ULBs) received the same status under the 73rd Constitutional Amendment Act, 1992. These amendments included the regular election, Scheduled Castes and Scheduled Tribe and women reservation, and formation of State Finance Commissions and District Planning Commissions. Notably, they added the Eleventh and the Twelfth

Schedules of the Constitution that enumerates the topics that can be devolved to local governments, such as sanitation, public health, and social welfare. Through decentralization, the Constitution aimed at establishing institutions that are less responsive of the national interests and more accountable to the marginalized populations. In the case of sanitation workers and manual scavengers, decentralization has brought with it increased visibility, participation, and access to local level of decision making power and control over sanitation policies and labor arrangements. But in India, decentralization has been marked by high levels of asymmetry between intention on the Constitution and administrative reality. There has been unequal devolution of functions within the states as many state governments are not ready to give away their control in vital sectors. Although sanitation is formally vested on the local bodies, substantive control of the infrastructure, budgeting and staffing is usually centralized. One of the most pertinent constraints is fiscal decentralization, which diminishes the ability of the local governments to carry out the statutory directions. State and central transfers are highly relied on by local government and they have few powers of taxation and revenue collection. Sanitation systems, mechanization and rehabilitation of workers demand a lot of financial input that most local governments cannot raise on their own. Without proper funding, local governments have to resort to cost-cutting tools such as the use of manual labor, contractualization, and informal ways of hiring workers that continue to promote unsafe working conditions. Administrative decentralization is also limited. The local entities do not have much control over the staff especially the technical staff needed in managing sanitation. State cadres often provide engineers, health officers and sanitation supervisors which restrict local autonomy and responsibility. Besides institutional ownership of sanitation reforms is undermined by this administrative fragmentation, and responsible compliance with anti-manual scavenging laws is so much diffused that local power relations influence such governance. The local governments are not social vacua, and the caste-based rural and urban social systems. In most instances, the elected officials

and leaders are members of the dominant caste, and the sanitation employees are members of the marginalized Dalit groups. Such power imbalance affects decisions regarding priorities in policy, resource distribution and enforcement. In these situations, decentralization may support caste inequalities instead of eliminating them. Scheduled Castes and women reservation of seats in local bodies was meant to reduce these inequalities. Although the reservations have enhanced descriptive representation, substantive empowerment is restrained. The elected representatives of the marginalized communities are frequently social excluded, bureaucracy resists them and they are marginalized politically, within the local institutions. As a result, concerns of sanitation workers such as manual scavenging might not be given a long-term focus even in the decentralized forums. Urban local government is even more problematic. The high pace of urbanization has increased the size and complexity of sanitation systems causing mammoth pressure to the municipal bodies. Poor sewerage systems, informal settlements, and deteriorating infrastructure increase the risk of sanitation. Sanitation services are often contracted out by municipalities to outside companies, which results in an incomplete accountability system. Contracts enable the municipalities to purport to act in accordance with the legal standards as the sanitation workers remain to do dangerous jobs in unsafe conditions. There is also the lack of accountability mechanisms of the decentralized governance. Social audits, grievance redress mechanisms and ward-level committees are either not well implemented or unavailable to the marginalized workers. The stigma, illiteracy and financial instability of manual scavengers allow them to interact with such mechanisms seldom. It is a betrayal of the democratic ideal of decentralization because there is no meaningful participation to uphold the democratic ideal of decentralized governance in the manual scavenging. The eradication of the practice is the legal duty of local bodies, which in most cases lack the capacity, motivation, and intentions to carry out such duties. Local governments being close to the affected communities do not necessarily imply that they will

be empathetic and accountable. Rather, normalization of caste based labor in the name of administrative necessity can be achieved as a result of close proximity. However, decentralized governance is also transformative. In places where the local governments are well-financed, socially responsible and politically dedicated, they have managed to establish mechanized sanitation systems, do away with dry latrines, and rehabilitate sanitation employees. These examples indicate that decentralization is not the issue, but its incomplete and unfair execution constrained its efficacy. This discussion shows that to eliminate manual scavenging, decentralized administration needs to be reinforced on the functional, fiscal, and administrative levels. It also must instill constitutional principles of dignity and equality in local institutions. In the absence of such a reform, it is possible that decentralized governance can turn into the place where historical injustices can be reproduced instead of being repaired [5].

6. Policy and Governance Reforms: Reimagining Decentralization for Eradication

Despite the constitution, statutory protection and judicial mediation, the persistence of manual scavenging proves that there was a necessity to reconsider the principle of the approach towards governance. The section gives an argument that eradication is not to be transpired on a case-to-case basis by using incremental changes in policies but rather redefining dependent governance that will be bifurcated in terms of the institutional design, allocation of resources and accountability systems to meet the constitutional values of dignity and equality. The principal reform agenda should therefore be governance based, caste sensitive and implementation oriented. The development of functional decentralization should therefore be viewed as a key reform agenda. It is the local governments that should possess a real control with the sanitation systems rather than implementing the decisions that have been made higher. This is in the form of a statutory definition of the role in the form such that the Panchayati Raj Institutions and Urban local bodies have a clear mandate on the role of sanitation planning and workforce management

besides the infrastructure deployment. It is also a way out since there is ambiguity that maintains the fragmentation of fiscal decentralization. Capital intensive is particularly the reform of sanitation especially mechanization and rehabilitation. The local governments cannot be relied upon to stamp out manual scavenging without a forecasted and adequate amount of money. State Finance commissions should be empowered, funds earmarked in time and devolution of funds. Sanitation in this case should be considered a national concern of the state and central governments and provide the local governments with a long-term financial support rather than the one-off alternatives. Training, maintenance, and integration of the sanitation machinery should also be acquired and incorporated in the day-to-day running of the company. Technology can never do away with manual scavenging but it cannot do away with it either. The local governments must be motivated -and made accountable- towards eliminating the application of hazardous manual cleaning by establishing performance standards that are legally binding. Rehabilitation policy should include the transformation of a limited welfare-based policy to a holistic, rights-based policy. Rehabilitation should be a process that incorporates safe other job opportunities, local labor market training, housing stability, education opportunities and social re-integration. Special attention should be given to women manual scavengers who have informal and invisible labor. The inter-generational entrapment and non-exclusion should be avoided by gender-responsive rehabilitation programs. There should be reinforced accountability mechanisms on several levels. The process of institutionalizing social audits, independent checks and monitors and monitoring by the community and their presence to the sanitation workers should be enhanced. The sanitation contracts, safety record of the workers and accident reports should be transparent. The other significant area of reform is the protection and redress system of whistleblowers and overcoming the fear of retaliation and social stigma. The training programs must also not be technical i.e. about the issue of handling sanitation but about constitutional values, sensitivity of caste and work rights. It is impossible to alter the

institutional cultures of labor based on caste without a deliberate normative action. To ensure sustainable change, constitutional morality needs to be institutionalized in the administrative practice and political accountability enhanced. The local development strategies and elections accountability systems should not be left without including manual scavenging. The political motivations can change to comply and reform by using sanitation safety and worker rehabilitation performance indicators. Finally, the civil society organizations and media should increase inter-governmental coordination. Decentralization does not imply that high levels of government should be left out of the responsibility. The center and state governments must provide monitoring, technical and enforcement services to the local agencies. The local governments must have well-documented procedures of escalation in case they fail to meet the legal requirement [6 - 14].

Conclusion

Manual scavenging is one of the most vocal contradictions, as far as the constitutional democracy in India is concerned. Although the apparent legal system of the practice was outlawed, the fact that the practice has continued has proved that there were structural malpractices of the governance system, accountability and social transformation. As it has been pointed out in this paper, manual scavenging is not only a social vice or illegal practice, but a failure of the structural government due to the completeness and imbalance of decentralization. The type of government on the balance is not replaceable by the denunciation of the judiciary and the legal solutions so long as it is as much as it is. In the absence of the fiscal, administrative and normative decentralization, it is likely that decentralization will remain history reproduction of the historical injustice behind the democratic shroud. The abolition of manual scavenging, in turn, will have to be a transition between the symbolic abolition and the substantive governance reform. It involves balancing out the decentralized aspects of institutions with constitutional morality and accountability is an aspect of the practice in administration and centralized across the lived experience of the impacted communities. It is on this basis of a holistic approach

that India can be in a position to attain the constitutional commitment of dignity, equality and social justice.

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