

**Three Studies
on
Law, and The Shifting
Social Spaces of Justice**

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2008

May 2008

Report on Social Justice - IV

Published by:
Mahanirban Calcutta Research Group
GC-45, Sector - III, First Floor
Salt Lake City
Kolkata - 700 106
India
Web: <http://www.mcrg.ac.in>

Printed by:
Timir Printing Works Pvt. Ltd.
43, Beniapukur Lane
Kolkata - 700 014

This publication is a part of a research and dialogue programme on “The Dynamics of Social Justice in India”. The support of the Ford Foundation is kindly acknowledged. This paper was presented during the Second Critical Studies Conference (20-22 September 2007, Kolkata) on the theme of “Spheres of Justice”.

[With the publication of Issue no. 13 of Policies and Practices (PP) we began a series of short status reports on social justice in India. This issue (no. 19) is the fourth in that series of reports.]

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Need for Sentencing Policy in India

R. Niruphama

What is Sentencing and When Does it Start?

Sentencing is that stage of criminal justice system where the actual punishment of the convict is decided by the judge. It follows the stage of conviction and the pronouncement of this penalty imposed on the convict is the ultimate goal of any justice delivery system. This being said no further explanation is required to understand how much of attention needs to be paid to this stage. This stage reflects the amount of condemnation the society has for a particular crime. The underlying rationale of any criminal justice delivery system can be determined by looking at the kind of punishment given for various crimes. However in a system like ours, with so many actors involved apart from the accused and victim, it is not possible to expect all of them to react in the same manner to a particular act of crime. For instance, the victim might express stronger emotions than a judge who is a total stranger to both the opposing parties. In the same manner the accused might be convinced that his action was in fact correct giving more importance to the surrounding factors. It is in order to reach a consensus on a given incident that judges and other legal players are appointed. The decision to be reached here is not restricted to whether there was a wrong done or not but also, and more importantly, what has to be done in case of a wrong being committed. The options are many. In case of a victim-centric system the most opted solution would be restoration of the victim to the same position as he/she was in before the wrong had been caused. This is mostly used in torts cases and generally in economic crimes. This cannot be applied across the board in cases of physical, emotional and psychological harm where restoration is rarely possible. In such cases there are two options – retribution and rehabilitation. In the former, the system focuses at condemnation of the crime as more important rationale for penalising than any other. Rehabilitation is more accused-friendly and believes in reclamation of the person back to the mainstream of the society. Another most-favoured justification for punishment is deterrence of the basic premise of which is prevention of reoccurrence of the same scene.

This paper will not advocate any of these systems. Instead what this paper aims is to put forth briefly is the need for a sentencing policy. The problem with the existing system as provided for in the Criminal Procedure Code is the variation in the result obtained from the same or similar set of facts. The judges are allowed to reach the decision after hearing the parties. However, the factors which should be considered while determining the decision and those which should be avoided is not specified anywhere. This is where the judge is expected to use his/her personal discretionary capacity to fix the punishment. This discretion eventually gets abused

in a large number of cases due to irrelevant consideration and application of personal prejudices. This is the primary reason for advocating a sentencing policy or guidelines.

This research paper will initiate the discussion by explaining the procedure for sentencing in India and its practical application. This will be followed by a discussion of various opinions on sentencing policy – their advantages and disadvantages. The requirements as far as India is concerned will be discussed in the backdrop of the sentencing guidelines in UK and USA¹ interspersed with the opinion of the author.

The Sentencing Procedure as Under Criminal Procedure Code, 1973

The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361. S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgement of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a quasi trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these will affect the sentence.² Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work.³ This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

The section just does not stop at allowing the convict to speak but also allows the defence counsel to bring to the notice of the court all possible factors which might mitigate the sentence and if these factors are contested then the prosecution and defence counsels must prove their argument. This ordeal must not be looked on as a formality but as a serious effort in doing justice to the persons involved. A sentence not in compliance with S.235 (2) might be struck down as violative of natural justice. However, this procedure is not required in cases where the sentencing is done according to S.360.

¹ However it is already clarified by the author that due to lack of sufficient exposure and experience this paper would only act as a spring board for the thought process to trigger and would not draft a complete policy in itself. This paper merely aims to bring to light the various factors that need to be looked into when sentencing policy is dealt with.

² R.V.Kelkar, *Criminal Procedure*, K.N.Chandrasekharan Pillai (Rev.)4thed. 2001(Rep.,2003) ,pp500-503.

³ For instance, if the convict is a bread winner then the court might provide that the convict be given such work that he gets paid for it and the payment be made to his family.

S.248⁴ comes under Chapter 19 of the Code dealing with warrants case. The provisions contained in this section are very similar to the provisions under S.235. However, this section ensures that there is no prejudice against the accused. For this purpose, it provides in clause 3 that, in case where the convict refuses previous conviction then the judge can based on the evidence provided determine if there was any previous conviction.

The judge at any point cannot exceed his powers as provided under the code in the name of discretion. In cases where the magistrate feels that the crime proved to have been committed is of greater intensity and must be punished severely and if it is outside the scope of his jurisdiction to award the punishment then he may forward the case to the Chief Judicial Magistrate with the relevant papers along with his opinion.⁵

The main part of judicial discretion comes in S.360 which provides for release of the convict on probation. The aim of the section is to try and reform those criminals in cases where there is no serious threat to the society. This is conveyed by limiting the scope of the section only to cases where the following conditions exist:

- A woman convicted of offence the punishment of which is not death or life imprisonment
- A person below 21 years of age convicted of offence the punishment of which is not death or life imprisonment
- A male above 21 years convicted of an offence the punishment of which is fine or imprisonment of not above 7 years.

In the above cases, when there is no history of previous conviction, the court can, having consideration to other relevant factors such as age, circumstances while committing the crime, character, mental condition, etc. use its discretion and release the convict on entering into a bond with or without sureties. If a magistrate of class II and not authorised by the High Court opines that the person tried deserves the invocation of this section then he might record his opinion and forward the case to the magistrate of I class. To enable the judge to get full facts of the case, the section provides all rights to the judge for enquiry into the details of the case.

Also if the crime committed is of such nature that the punishment awardable cannot be more than 2 years or a simple fine then, having consideration to the various factors connected to the convict, the court may leave the convict without a sentence at all after mere admonition. The court also takes steps in case the person does not comply with the rules laid down at the time of the release as provided under this section such as re-arrest of the person. For release under these provisions it is necessary that either the convict or the surety are residing or attend regular occupation in the jurisdiction of the court.

The Code through S.361 makes the application of S.360 mandatory wherever possible and in cases where there is exception to state clear reasons. Wherever the punishment given is below the minimum prescribed under the relevant laws the judge must give the special reason for doing so. The omission to record the special reason is an irregularity and can set aside the sentence passed on the ground of failure of

⁴ Supra n.6 at pp.522-524

⁵ S.325, CrPC

justice. These provisions are available only to trials before the Court of Sessions and the trials of warrants case.⁶ The Probation of Offenders Act, 1958 is very similar to S.360 of the CrPC. It is more elaborate in the sense that it explicitly provides for conditions accompanying release order, a supervision order, payment of compensation to the affected party, powers and predicaments of the probation officer and other particulars that might fall in the ambit of the field. S.360 would cease to have any force in the States or parts where the Probation of Offenders Act is brought into force.⁷

Procedure in Practice

Having understood the procedure in the Criminal Procedure Code, its efficiency can be understood only by seeing its application in practice. The discretion provided for under the existing procedure is guided by vague terms such as '*circumstances of the crime*' and '*mental state and age*'. Agreeably these can be determined but at what point will they have an effect on the sentence is the question left unanswered by the legislature. For instance, every crime has accompanying circumstances but which ones qualify as mitigating and which ones act as aggravating circumstances is something which is left for the judge to decide. Therefore if one judge decides a particular circumstance as mitigating this would not (except for a meagre precedential value) prevent another judge from ignoring that aspect as irrelevant.⁸ This lack of consistency has encouraged a few judges to misuse the discretion on the basis of their personal prejudices and biases.

Apart from the personal biases and prejudice the idea of what constitutes justice and what is the purpose of punishment varies from person to person. For instance, in the case of *Gentela Vijayavardhan Rao v. State of Andhra Pradesh*⁹, the appellant had, with the motive to rob, burnt a bus full of passengers, resulting in the death of 23 passengers. The sentence provided by the judges of the lower court was death penalty for convict A and 10 years of rigorous imprisonment for convict B. This was challenged by the convict. The apex court quoted from the judgment *Dhananjay Chatterjee v. State of West Bengal*¹⁰ to support its view to uphold the judgment:

“Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals.

⁶ Supra n.6 at pp.563-575

⁷ Section 19 of the *Probation of the Offenders Act*, 1958

⁸ Suresh Chandra Bahri v. State of Bihar *AIR1994SC2420* - “This sentencing variation is bound to occur because of the varying degrees of seriousness in the offence and/or varying characteristics of the offender himself. Moreover, since no two offences or offenders can be identical the charge or label of variation as disparity in sentencing necessarily involves a value based judgment. i.e., disparity to one person may be a simply justified variation to another. It is only when such a variation takes the form of different sentences for similar offenders committing similar offences that it can be said to desperate sentencing.”

⁹ *AIR1996SC2791*

¹⁰ (1994)2SCC220

Justice demands that Courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime.”

This judgement reflects the principles of deterrence and retribution. But this cannot be categorised as wrong or as right for this is a product of the belief of the judges constituting the bench.¹¹ Similarly in the case of *Gurdev Singh v. State of Punjab*¹² the court confirmed the death penalty imposed on the appellant keeping in mind the aggravating circumstances.¹³ Though on the face of it this might be nothing but a brutal revenge for the crime done by the convicts, on a deeper study one can realize from the judgment that the act was absolutely unforgivable for the judges. This cannot be stated to be the inability of the judges to feel sympathy. This is just a reflection of their values.

On the other hand, *Mohd. Chaman v. State*¹⁴ the courts have shockingly reduced the sentence of death penalty to rigorous imprisonment of life due to the belief that the accused is not a danger to the society and hence his life need not be taken. The accused in this case had gruesomely raped and murdered a one and a half year old child. The lower courts having seen the situation as the *rarest of the rarest*¹⁵ cases imposed death penalty. This was reversed by the apex Court as it was not convinced that the act was sufficiently deserving of capital punishment.

The question to be addressed here, having the inability to adjudge the situations objectively, how do we decide which is the most preferred judgment. Had the same issue be addressed in a vice versa manner, the former convict would have been in the prison and the latter would have died.

How helpful would a guideline be to this scenario? A guideline if laid down would principally have a *primary rationale*¹⁶ for punishing (whatever this rationale

¹¹ The rationale of the judges was that though their ultimate motive was wealth, the convicts had chosen a highly vicious means to attain it. Therefore the amount of cruelty demands such a punishment.

¹² AIR2003SC4187

¹³ “The aggravating circumstances of the case, however, are that the appellants, having known that on the next day a marriage was to take place in the house of the complainant and there would be lot of relatives present in her house, came there on the evening of 21.11.1991 when a feast was going on and started firing on the innocent persons. Thirteen persons were killed on the spot and eight others were seriously injured. The appellants thereafter went to another place and killed the father and brother of PW-15. Out of the thirteen persons, one of them was a seven-year old child, three others were at the threshold of their lives. The post-mortem reports show their age ranged between 15 to 17 years.”

¹⁴ 2001CriLJ725

¹⁵ The Indian Judiciary had strongly felt the need to have a sentencing guideline at least to the extent of imposition of death penalty. Therefore in the cases of *Bachan Singh v. State of Punjab* and subsequently in the case *Machhi Singh v. State of Punjab*, the Court laid down the ‘rarest of the rarest test’ by which death penalty should be imposed in only exceptional situations and such exceptional reasons must be recorded. This was followed in numerous cases both to save the life of the accused and to validate the imposition of the death penalty.

¹⁶ Andrew Ashworth, *Sentencing and Criminal Justice*, 2005 4th ed.. One of the main criticism of this primary rationale principle is that it does not provided for all scenarios and results in stereotyping all situations into one. It is the opinion of the author that there can always be an

may be - retribution is the underlying purpose or rehabilitation and reclamation is the ultimate goal). This primary rationale would help the judges determine what exactly needs to be achieved of the punishment.

Taking off from here, the mitigating and aggravating circumstances can also be easily determined once the *primary rationale* is clear. Illustrating this point, in the case of *Raju v. State*¹⁷ the Courts reduced the punishment below the minimum prescribed in the statute for reasons which in the opinion of the author are very frivolous. The judge took into account the alleged “immoral character and loose moral of the victim” and reduced the sentence for the accused to the term served. Had there been a clear indication of a victim-centric penal system, a judgment which benefits the accused for the faults of the victim will not be delivered. In *State of Karnataka v. S. Nagaraju*¹⁸ the judge convicted the accused more as a deterrent measure to prevent other potential offenders than to penalise that particular convict.

It is not alleged that in the above scenarios and many other similar ones the judges are irrational or unjust. The only point placed for the observation is variations in the idea of justice and this drastically affects the societal demand of what the judiciary must do in a particular state of affairs.

There have been judges like Justice Krishna Iyer who have taken rehabilitation and reclamation to a different level of understanding. In the famous case of *Mohammad Giasuddin v. State of Andhra Pradesh*¹⁹ he explained punishment as follows:

“Progressive criminologists across the world will agree that the Gandhian diagnosis of offender as patients and his conception of prisons as hospitals - mental and moral - is the key to the pathology of delinquency and the therapeutic role of ‘punishment’.”

Strongly agreeing with the above proposition it is unfair to allow some convicts reap the benefit of the sympathy of the judge and to let others bear the brunt of the wrath of the others.

Sentencing Policy and its Contents

Having made a case for the need for having a sentencing guideline and policy, it is now necessary to look into its contents. There have been numerous propositions and juristic opinions on what would constitute and should constitute sentencing policy. In order to equip oneself to discuss such a proposition it is necessary to understand the already proposed policy. This would help in grasping the spirit of the exercise and co-ordinate a more wholesome product as a result.

The 35th Law Commission report on *Capital Punishment* comprehensively explains various aspects relating to sentencing, focussing more closely on capital

exception to the rule and hence having a rule per se for the sake of guidelines and equality is not harmful. This would only reduce the arbitrariness in the system.

¹⁷ AIR1994SC222

¹⁸ JT2002(Suppl1)SC7

¹⁹ AIR1977SC1926

sentencing. The discussion in the report on the codification of the factors to guide the discretion vested in the judge for awarding capital punishment can be extended to the general discussion on *Certainty and Predictability versus Judicial Discretion*.²⁰ The response from a Rajya Sabha member and Inspector-General led to the narrowing down of the influencing factors to passion, opportunity, acquired habit, insanity and innate instinct.²¹

As far as India is concerned, the Indian Penal Code provides us with a broad classification and gradation of punishments. This has been further carved by various judicial decisions on sentencing. However, these rulings of the court suffer from the following disadvantages:

a) Fact specific: Though these guidelines are given as *Obiter Dicta*, the application of such guidelines is misleading in the subsequent judgments. Currently the well-established guideline followed by the courts is with respect to death penalty as explained above. The application of this test in the case of *A. Devendran v. State of Tamil Nadu*²² explains this point. This was a case of triple murder. However, the Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and as the main object was to commit robbery. This case should be compared with *Gentela Vijayavardhan Rao v. State of Andhra Pradesh* discussed above. The motive in both is to rob the victim. However, in one case it has been used as an aggravating factor and the other it is used as a mitigating factor. This shows how the same test has been contradictorily applied.

b) Not followed by lower courts: Another side of the coin is that the lower courts do not follow these guidelines as they are not binding on them. The precedents are usually ignored or differentiated from the existing fact scenario so as to give the judge his space to rule on the case.

c) More of a legislative job: More importantly, it is the job of the legislature to make rules and of the judiciary to interpret and enforce it. It would not be fulfilling or correct to expect and allow the judges to frame the rules by themselves.

d) A final reason as to why the judiciary should not frame the rules is that it once again boils down to the whims and fancies of the judge framing it. This would only be a mere extension of the belief of one judge over all others.

One of the propositions which will be discussed here is that proposed by Andrew von Hirsch and Nils Jareborg.²³ They divided the process into stages of determining proportionality while determining a sentence. The four steps are:-

- What interests are violated or threatened by the standard case of the crime – physical integrity, material support and amenity, freedom from humiliation, privacy and autonomy

²⁰ 35th Law Commission Report, 1967, pp190 - 202

²¹ It should be, however, remembered that this report was made in 1967 and its applicability need not be complete. The author merely draws support for the argument put forth.

²² AIR1998SC2821

²³ Supra n.16

- Effect of violating those interests on the living standards of a typical victim – minimum well-being, adequate well-being, significant enhancement
- Culpability of the offender
- Remoteness of the actual harm as seen by a reasonable man

Factors which determine culpability vary depending on which of the following schemes one intends to follow-

1. Determinism – Where factors outside oneself determines the actions e.g. self-defence and duress. However, most people have sufficient freedom to determine their actions so this will not hold good at all times.
2. Social and familial background – low family income, large family, parental criminality, low intelligence and poor parental behaviour.
3. The employment, education and economic policy have a major impact on individuals. They result in consequences such as deprivation and marginalization leading to development of criminals in the society.

The chief criticism of this procedure is that once again it involves a wide discretion of the judge when it comes to determining the culpability. This once again leads to certainty as against the discretion. It, therefore, suggested to look at the UK and USA laws at this point to discover whether this conflict has been solved and, if yes, how this conflict has been resolved.

What are the Relevant Factors?

It is not possible for any single individual to come up with all the relevant factors that need to be considered. It has to be a group exercise with a representative from every section of the society contributing to the guideline. This being so what is attempted here is a basic analysis of what, in the opinion of the author, should be a part of the Guidelines keeping in mind the Indian perspective. Before moving on a small summation of the UK and USA policy is preferred.

As far as the UK sentencing policy is considered, it was born as a result of the Halliday report and the subsequent White Paper named *Justice for All* which was presented in the British Parliament. The main aim of the sentencing framework as explained by the White Paper is deterrence and protection of society above all others.²⁴ In order to aid the judge a *Pre-sentence_report* is prepared by a parole

²⁴ As according to the Halliday Report a few of the important recommendations are:

The principles governing severity of sentence should be as follows:

- severity of punishment should reflect the seriousness of the offence (or offences as a whole) and the offender's relevant criminal history;
- the seriousness of the offence should reflect its degree of harmfulness, or risked harmfulness, and the offender's culpability in committing the offence;
- in considering criminal history, the severity of sentence should increase to reflect a persistent course of criminal conduct, as shown by previous convictions and sentences.

Imprisonment should be used when no other sentence would be adequate to meet the seriousness of the offence (or offences), having taken account of the offender's criminal history.

officer which contains “a front sheet, offence analysis, offender’s assessment, risk assessment and a conclusion”²⁵. As far as sentencing Guidelines are concerned, paragraph 5.14 explicitly states as follows: “*We need to have a consistent set of guidelines that cover all offences and should be applied whenever a sentence is passed. We must work to eradicate the wide disparity in sentencing for the same types of offences and the public’s mistrust of the system that comes partly from this inconsistent sentencing.*” The answer of the Halliday report to this problem is, “*For a new framework, an Act of Parliament should set out the general principles, specify the newly designed sentences, provide for review hearings, prescribe enforcement procedures and require guidelines to be drawn up. The Act should take the form of a Penal Code, which would be kept continuously available in up to date form.*” This led to the establishment of the Sentencing Guidelines Council headed by the Lord Chief Justice. Also a whole new set of punishments with reformatory purpose have been introduced. In short, the main aim of the policy in protection of the public and rehabilitation. As far as discretion goes, there has not been any specific restriction except for ensuring that the judge has complete knowledge of all the details of the convict before passing the sentence. The aim, as can be seen, is to put forth the case in the best possible way and thereby ensure that no stone is left unturned.

In the US system, the Guidelines are the product of the United States Sentencing Commission and are part of an overall federal sentencing reform package that took effect in the mid-1980s. In the aftermath of *US v. Booker*, the Guidelines are discretionary, meaning that judges may consider them but are not required to adhere to their standards in sentencing decisions. That being said, federal judges almost invariably use the Guidelines at least as a starting point when sentencing criminal defendants. Any sentence outside of the scope of the guidelines requires a written explanation, by the judge, as to the reason for the discretion. The Guidelines determine sentences based primarily on two factors: (1) the conduct associated with the offence and (2) the defendant's criminal history. The statutory mission as stated in the 2005 Federal Sentencing Guideline Manual²⁶ is “...detering crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.” Once again discretion though guided is not completely removed in the case of US also.

Moving on to the India scenario, what can be envisaged? It is not possible to do away with discretion all together. However, what one has to keep in mind is one

Courts should have clear discretion to pass a non-custodial sentence of sufficient severity, even when a short prison sentence could have been justified – bearing in mind their ability to re-sentence in the event of repeated breach of conditions.

The so-called “totality principle”, which requires courts to look at all the offences before the court as a whole, and increase sentence severity accordingly without adding the total suitable for each individual offence cumulatively, should remain.

²⁵ To know what each of this constitutions refer to the white paper, *Justice for All*, p. 88

²⁶ http://www.uscc.gov/2005guid/tabcon05_1.htm

particular system should treat a particular fact as either aggravating or mitigating. This highly depends on what is the aim of the system. As seen in both the jurisdictions discussed above, there is clarity as to the aim of punishing. This clarity leads to determine whether a specific factor is going to be helping the convict or not. Adding on to the above expressed opinion, it is opined that one factor which needs addressal but has been ignored in both systems is the *economic and social strata* of the accused. This gains immense relevance in the context of crimes such as theft and robbery. Also having in mind the extensive impact of the social diversification in India this too will gain extreme prominence as far as India is concerned unlike the other countries.

It is therefore concluded with two propositions: -

1. There needs to be a sentencing policy clearly elucidating the purpose of the system.

As far as India is concerned, immense importance needs to be given to the social and economic background of the convict as a mitigating circumstance.

References

1. Andrew Ashworth, *Sentencing and Criminal Justice*, 2005 4th ed., Cambridge University, UK
2. CK Boyle & MJ Allen, *Sentencing Law and Practice*, 1985 1st ed., Sweet & Maxwell, London
3. Cyrus Tata & Neil Hutton (ed.), *Sentencing and Society – International Perspective*, 2002 1st ed., Ashgate Publishing Ltd., England
4. Martin Wasik, *Emmins on sentencing*, 1998 3rd ed., Blackstone Press Ltd., London
5. Philip C. Stenning, *Accountability for Criminal Justice*, 1995 1st ed., University of Toronto Press, Toronto
6. R.V. Kelkar, *Criminal Procedure*, 2001 4th ed., Eastern Book Company, Lucknow
7. 35th Report of Law Commission of India, 1967
8. John Halliday, *Making Punishment Work- Report of a Review of the Sentencing Framework for England and Wales*, 2001
9. *Justice for All*, 2002
10. Silvia D'Ascoli, EUI Working Group on International Criminal Law, 2005

Dalit Life Narratives as Ethnographies of Justice¹

Saptarshi Mandal

‘Situations of marginality produce ideas of justice.’ While thinking about the notion of ‘justice’ in the context of the Dalits, this statement in the Preparatory Note of the Conference kept flashing in my mind. Some of the questions that followed were: What constitutes ‘situations of marginality’ for the Dalits? Where do I find articulations of such situations, by Dalits themselves? What do such articulations tell me about the notion of justice? Could these articulations be understood as speaking about justice in a ‘different’ voice? If justice, minimally defined, means delivering what people are due, then in what ways is a Dalit perception of justice distinct from that of any other marginalized group? In this paper, I hope to answer these questions by looking at three Dalit autobiographies written in the last twenty-five years.

As a distinct literary genre, autobiography is understood as writing about the self. It’s a retrospective narrative, often confessional, where the primary focus of the author is upon her own life as an individual, through which she charts out the journey of the self. Personal accounts by the Dalits however, defy such an understanding. In these texts, the subject/narrator moves back and forth between the individual ‘I’ and the collective ‘we’. Secondly, such autobiographies act in most cases, as instruments of intervention with the explicit objective of documenting instances of discrimination and experiences of suffering. The *experience of marginality* of both the self and the community becomes a critical resource here, which is utilized to “create testimonios of caste-based oppression, anti-caste struggles and resistance”², and in that a distinct world-view is offered. Also, as Sarah Beth shows, Dalit autobiographies “transform an experience of pain into a narrative of resistance”³. It follows then, that for the author, the act of writing autobiography is much more than a literary exercise and constitutes a ‘political’ act. Writing autobiography is political because: one, the act of ‘writing’ itself is an act of assertion, for caste ideology prohibits the Dalit’s access to knowledge and the Letters; two, the autobiographies talk of caste not in terms of the dominant narrative of socio-economic backwardness but frame the discourse in terms

¹ I should record my gratitude to Rukmini Sen, lecturer, National University of Juridical Sciences, Kolkata for introducing me to the world of autobiographies and their much imaginative uses. I also thank her, for her comments on this paper. I thank all the participants at the Second Critical Studies Conference (21st – 23rd September 2007), where this paper was first presented, for their comments and encouragement. I also thank the organizers of the Conference, the Calcutta Research Group.

² Rege, Sharmila. 2006. *Writing Caste/Writing Gender: Reading Dalit Women’s Testimonios*, at 14

³ Beth, Sarah. *Dalit Autobiographies in Hindi: The Transformation of Pain into Resistance*, at 1

of its experiential dimension i.e. 'caste as political inequality'; three, since the authors are Dalits themselves and have the lived-experience of caste discrimination, through the autobiographies the authors claim their moral right to theorise Dalit experience and selfhood; and finally, autobiography constitutes "an institutional space, through which the Dalit writers can enter the literary public sphere"⁴. Thus, it is more appropriate to refer to these texts as 'life narratives' rather than autobiographies. In this paper, I examine how these life narratives could be used for our understanding of justice, specifically for the Dalits.

The narratives present detailed accounts of everyday life, customs and beliefs of the communities and social practices, by constantly shifting the focus between the individual and the community. Just like an ethnographer, the authors document instances of deprivation, suffering, violation experienced and also resistance posed by them and their communities. Although, the narratives do not tell us explicitly what 'justice' means from a Dalit standpoint, the reader gets a sense of the justice-concerns of the subjects by traversing through these narratives of hope and despair interwoven together. Where the texts used here differ from academic ethnographies is that, here the narrator does not feel burdened with the requirement of 'objectivity' and does not feel pressured to distance herself from the subjects' emotions. However, this difference notwithstanding I prefer to call these narratives as, *Ethnographies of Justice*.

I must say a word at this point, about the limitations of this study. I began this paper with the objective of recording the voices of the marginalized, in order to understand their conception of 'justice'. In other words, this study is about the epistemological implications of studying a universal notion of justice, through the mediation of marginalized voices - in this case, that of the Dalits. The assumption was, that the life narratives represented the voice of the marginalized. This assumption about 'representation' constitutes the first limitation of this study. The majority of the Dalit population in India is unlettered, and hence cannot record their opinions and reflections by writing life narratives. Additionally, the authors of the texts under study are members of the educated middle-class among the Dalits, engaged in government services, while the majority of the Dalit population is found in the informal sectors. Therefore, a method that relies on the written life narratives as its primary source, is able to capture the 'situation of marginality' of only a privileged section of the Dalit population.

Secondly, the authors of the texts used in this paper come from diverse regions: Valmiki from Uttaranchal, Pawde from northern Maharashtra and Limbale from southern Maharashtra - the disputed region between Maharashtra and Karnataka. It must be noted that there remains an undeniable connection between the anti-caste social movements in these regions and the life narratives produced by the authors; for the former often influence and give the necessary context to the latter. An exploration of the texts, without a discussion on the diverse socio-political contexts that have produced them, renders the exercise, incomplete. The way these three texts in this paper, have been clubbed together to proffer a Dalit voice and vision,

⁴ Beth, at 1

shouldn't lead one into believing that there is a pan-Indian Dalit identity in existence. As a matter of fact, the anti-caste movements in India are extremely region-specific with their own historical trajectory, nature of leadership and terms of discourse.

Thirdly, due to lack of English translations of life narratives written by Dalit women and due to my inability in accessing the existing ones, this study has not been able to discuss the Dalit feminist conception of justice. Such a perspective would have to problematise the practices within the Dalit families and the Dalit gender-relations. It would require an appreciation of the strategies sought by the Dalit women in confronting Dalit patriarchy and also the violent implications of the emerging Dalit modernity.

I admit, that the search for an 'authentic' Dalit voice is akin to running after a mirage. I also realize that one cannot really talk about a single, unified Dalit voice, undifferentiated by the markers of region, gender, literacy and occupation. As a 'workable solution' to these problems, I consider a self-conscious Dalit identity and experience of caste-based discrimination and humiliation, to be the common features between the diverse strands that could be broadly referred to as the Dalit voices.

Comprehending 'Situations of Marginality'

I was kept out of extracurricular activities. On such occasions I stood on the margins like a spectator. During the annual functions of the school, when rehearsals were on for the play, I too wished for a role. But I always had to stand outside the door. The so-called descendants of the gods cannot understand the anguish of standing outside the door.⁵

In the above excerpt, Omprakash Valmiki, the author of one of the life narratives I am looking at, talks about his experience of exclusion in school, where all the teachers and the majority of the students were from the upper-caste⁶ Tyagi community. Even though expressed in plain and simple language, the passage generates a sense of disturbance in the reader, what I want to pose here is a question of method and understanding. Why is it that the representations of injustice and exclusion in the mainstream literature on justice remain confined to figures and statistical enumeration? And why is it, that I feel a greater sense of revulsion by reading this passage than what I feel by reading the specialized reports produced by the National Commission on Scheduled Castes and Scheduled Tribes? In other words, are we as researchers equipped to understand and respond to "the anguish of standing outside the door" that Valmiki talks about? In an insightful discussion on 'indignities', Bishnu Mohapatra argues that, experiences of humiliation, fracture a shared world. When someone listens to the experiences of indignities of others, a connection is established between the listener and the sufferer, which in turn enables

⁵ Valmiki, Omprakash. 2003. *Joothan: A Dalit's Life*, at 16

⁶ In order to distance myself from the notions of 'upper' and 'lower' castes, I shall denote such words in capitals throughout the text.

the shared world to re-emerge⁷. There is a tendency, in the academic community to privilege neutral, impersonal, third-person accounts of injustice over first-person ones. In this pursuit of objectivity, the quandaries of everyday lives and the experiential dimension of caste-based marginality are lost on the researcher. Making a case for the appreciation of emotions in Social Science methodologies, Mohapatra further notes, “emotional experiences not only processes information pertaining to a concrete setting but also provides coherence to them. It makes visible certain relationships and helps several morally important features of a situation to emerge”⁸. It is a part of the argument in this paper that, it is much more rewarding to use Dalit life narratives, for a nuanced understanding and a better grip of a slippery and unwieldy idea like justice.

The contemporary programmes – both national and international – for the emancipation of Dalits are marked by the absence of a Dalit vision or a Dalit voice. This paper is an attempt to reclaim that vision and voice, through the medium of life narratives. The authors of the texts speak for themselves, and are thereby transformed from voiceless and passive objects of history to conscious subjects, who create alternative modes of knowledge and knowing.

The texts that I consider for this purpose are: Joothan by Omprakash Valmiki, Akkarmashi by Sharankumar Limbale and Antasphot by Kumud Pawde. Joothan, originally written in Hindi, was published in 1997. The word ‘joothan’ refers to the leavings on the plate of a person, after she has finished eating. The word has connotations of ‘pollution’ attached to it. Akkarmashi, a landmark in Marathi Dalit literature was written by the author at the age of twenty-five and was published in 1984. Akkarmashi means one who is an outcaste or one of an illegitimate birth and is used only as an abuse. The third text, Antasphot, is also written in Marathi and was published in 1981. It is credited to be the first published narrative by a Dalit woman. The word Antasphot literally means outburst, but the author (Pawde) understands the concept as ‘thoughtful outburst’ rather than an emotional one. For this paper, I shall rely on the English translations of these texts. I treat the three words (joothan, akkarmashi and antasphot or pollution, exclusion and thoughtful outburst), not as titles of individual texts, but rather, as themes that I find running through each of the texts. This makes one see the three texts as one single narrative, with a polyphony of voices.

Joothan: A Metaphor of Poverty, Pollution and Humiliation

During a wedding, when the guests and the baratis, the bridegroom’s party, were eating their meals, the Chuhras (the caste that the author belongs to) would sit outside with huge baskets. After the baratis had eaten, the dirty pattals or leaf-plates were put in the Chuhras’ baskets, which they took home, to save the joothan sticking to them. The little pieces of pooris, bits of

⁷ For a discussion on the drawbacks of prevalent Social Science methodologies in reception and understanding of ‘indignities’ see, Mohapatra, Bishnu. 1998. ‘*Understanding Indignities*’

⁸ Mohapatra, at 45.

sweetmeats, and a little bit of vegetable were enough to make them happy. The joothan was eaten with a lot of relish. The bridegroom's guests who didn't leave enough scraps on their pattals were denounced as gluttons. Poor things, they had never enjoyed a wedding feast. So they had licked it all up. During the marriage season, our elders narrated, in thrilled voices, stories of the baratis that had left several months of joothan⁹.

Valmiki goes on to give a detailed description of preserving and eating the joothan after reprocessing it, during the 'hard days of the rainy season'. The memories of his childhood associated with joothan, often come back to haunt him and cause him renewed pain and humiliation. At the first blush, the passage seems to be giving a glimpse of the scale of poverty and suffering due to hunger in Valmiki's community. However, on closer reading, another aspect of this deprivation comes to the fore. The passage highlights the association of the Dalits with the notion of 'pollution'. Consider the following lines from Limbale's book *Akkarmashi*.

The teacher asked the high-caste boys and girls to collect the leftovers on a piece of paper and give it to us. I and Parshya carried the bundle of the leftover food on the way back. The high caste boys and girls were laughing and joking, but our whole attention was on the bundle. Mallya carried a bundle of bhakri on his head and we, the Mahar (the author's caste) boys, followed him excitedly like hungry vultures. At last we gathered in Girmalya's farm and opened the bundle. It contained crumbs of different kinds of food and their spicy smell filled the air. We squatted in a circle and stuffed ourselves greedily. We had never tasted food like that before. We were all really gluttonous. Our stomachs were greedy as a beggar's sack. When I got home I told my mother all about this. Like the victim of a famine she said, 'why didn't you get at least a small portion of it for me? Leftover food is nectar'¹⁰.

The similarity in themes in the two excerpts is striking. What I find more striking and what is more critical to my purpose here is the 'naturalness' of the teacher's asking the 'high-caste' students to collect the leftover food and give them to the Mahar students. Once again, along with suggesting poverty and hunger, the passage signifies the Mahars as deemed polluted. Although the class-identity of the authors and their communities come up in all these texts, especially *Akkarmashi* which could also be read as a testimony of rural poverty, it is the caste-identity and the resulting cultural implications that is foregrounded in the context of accepting leftover food. As mentioned earlier, joothan or leftover food carries the connotation of ritual pollution, when used in relation to anyone other than the original eater. It is this association with ritual pollution, and the stigma and discrimination resulting thereof, that sets apart the Dalits from the other deprived groups or 'have-nots' in the Indian society. And it is this association with ritual pollution that is invoked to explain and justify the infra-human status assigned to the Dalits by the caste system.

⁹ Valmiki at 9

¹⁰ Limbale, Sharankumar. 2003. *The Outcaste: Akkarmashi*, at 9

Another aspect of this association with pollution is the Dalit's engagement with the so-called 'unclean' occupations. Certain occupations – mostly associated with death and human bodily waste – are regarded as unclean and degraded and therefore assigned to those considered to be outside the pale of humanity. In fact, the link between the Dalit as embodying pollution and the polluting occupations follows a circular logic: Why are the jobs polluting? Because they are performed by Dalits. Why are the Dalits polluting? Because they perform polluting jobs.

What needs to be stressed is that the idea of pollution here does not refer to lack of hygiene. Tasks such as announcing the news of death or epidemic, or beating of drums at weddings, funerals and festivals are also considered polluting as these involve inauspicious events like death and contact with animal hide. One confronts this irony in the logic of pollution, along with Limbale in the following lines.

I used clean clothes, bathed everyday and washed myself clean with soap, and brushed my teeth with toothpaste. There was nothing unclean about me. Then in what sense was I untouchable? A high caste who is dirty was still considered touchable!¹¹

One comes across a host of themes and emotions in these lines. One, there is a sense of anguish in being subjected to a set of rules, that defy any reason or logic. Two, the sarcasm at one level entails a critique of religion, rituals and caste; however at another level, it also captures a sense of helplessness in realizing one's inability to break the vicious circle of pollution and caste despite bodily cleanliness. The following epigraph portrays the same sentiment:

All I knew was that I did not want to go into the line of work that my ancestors had been doing for thousands of years. I had written to Pitaji, informing him of my decision to leave college and learn this technical work in a government factory. He was delighted. He kept saying repeatedly, 'At last you have escaped "caste".' But what he didn't know till the date he died is that 'caste' follows one right up to one's death.¹²

And, as Pawde muses poignantly:

The result is that although I try to forget my caste, it is impossible to forget. And then I remember an expression I heard somewhere: 'What comes by birth, but can't be cast off by dying – that is caste'.¹³

What is it about caste that makes it difficult to "cast off"? The answer is that caste is justified by the logic of pollution; and hidden within the ideology of pollution is the issue of power. The manner in which caste is articulated in the public sphere, it is packaged in neutral, innocuous terms like 'rituals' and 'traditions'. This sanitized description has the effect of masking the power relations that caste embodies. And this is where the Dalit life narratives become important in posing a counter discourse. Valmiki's life narrative reveals this aspect successfully. In the very act of giving joothan or leftover food to the Dalits lies an exercise of power by the Upper Castes. On the occasion of the landlord's daughter's wedding, when all the guests have eaten,

¹¹ Limbale at 107

¹² Valmiki at 77-78

¹³ Pawde, Kumud. 1981. *The Story of My Sanskrit*, at 97

young Valmiki's mother asks the landlord for some fresh food for the children. The landlord remarks: 'You are taking a basketful of joothan. And on top of that you want food for your children. Don't forget your place Chuhri'¹⁴. Pick up your basket and get going.'¹⁵ Thus, giving of joothan is a process which ensures that the Chuhras don't forget their "place" and the caste hierarchy and the corresponding power structure is maintained. Giving of joothan is not only an act of charity towards the impoverished and hungry, but given, it's cultural/symbolic meaning, it is also a means of robbing the Dalit of her humanity, dignity and sense of worth, and binding her into perpetual subordination.

In an elegant summation of the point, Berreman argues, that 'the human meaning of caste for those who live it, is power and vulnerability, privilege and oppression, honour and degradation, plenty and want, reward and deprivation, security and anxiety'¹⁶. Although Berreman looks at this formulation in opposition to that of the pure/polluted dichotomy, I would like to suggest that the two frameworks of understanding caste, in fact complement each other. Any attempt geared towards securing justice – through law or otherwise – for the Dalits must address this matrix of pollution and power.

Akkarmashi: Between the Excluded and the Illegitimate

Akkarmashi, the title of Limbale's book is a Marathi word, which roughly translated means 'outcaste', and signifies ostracism. The word also denotes *exclusion*, for an outcaste is essentially excluded from the community and the associated resources, rights and privileges. Experiences of exclusion act as a common theme and move the narrative forward in each of the texts I have analyzed in this paper.

A good way to explore the forms of exclusion is to start with the spatial dimensions of it. The most stark and visible form of exclusion in the public sphere is the segregation of the Dalit houses from rest of the community and restrictions on the spatial mobility of the Dalits. In both, Joothan and Akkarmashi, the authors mention that the Dalit settlements are located outside the boundaries of the village. Thus, Limbale talks about the Maharwada¹⁷ and Valmiki describes the filth and squalor of the Chuhra Basti. However, one finds a different account in Pawde's narrative. Pawde, who was born and grew up in an urban setting, says that her house was 'encircled on all sides by the houses of caste Hindus'¹⁸. Similarly, both Limbale and Valmiki recount incidents where the Dalits are either prevented by the Upper castes from using the village roads altogether or are required to step down the road in order to make way for the latter.

¹⁴ The colloquial feminine of Chuhra, the caste that Valmiki belongs to.

¹⁵ Valmiki at 11

¹⁶ Gerald Berreman, 'The Brahmanical View of Caste' in Dipankar Gupta (ed.) Social Stratification, p. 88

¹⁷ literally, the Mahar quarters.

¹⁸ However, this is not to say that caste-segregated neighborhoods are absent in urban areas.

Another facet of exclusion is the exclusion from education or learning. The religious scriptures prohibited the Dalits from acquiring formal education or any technical knowledge. Specifically, the women and the Dalits were forbidden from studying Sanskrit, the language in which the scriptures were written. The Manusmriti¹⁹ laid down that hot oil should be poured into the ears of those Shudras who dared to listen to the recitation of the sacred Vedas. The irony is brought out in the narrative of Pawde, a Dalit woman, who not only goes on to study Sanskrit but also becomes a revered Professor of the subject; but not before overcoming the structural and attitudinal barriers posed on her way. Pawde recounts,

After I entered high school, I took Sanskrit as an elective subject in class nine. The school where I went supported Brahminical prejudices. All sorts of indirect efforts were systematically made to prevent me from learning Sanskrit. ‘You won’t be able to manage. There will be no one at home to help you. Sanskrit is very difficult,’ etc., etc. But I was firm as a rock. Seeing that no form of persuasion had any effect on me, the persuaders stopped persuading. But how to remove the prejudice in their minds?²⁰

The Head of the Department was a scholar of all-India repute. He didn’t like my learning Sanskrit, and would make it clear that he didn’t. And he took a malicious delight in doing so. The sharp claws of his taunts left my mind wounded and bleeding. In a way, I had developed a terror of this great pandit.²¹

We have seen earlier in Valmiki’s case, how he used to be excluded from the extra-curricular activities in school. Valmiki relates another instance, where the teacher always kept him out of the chemistry lab ‘on some pretext or the other’, thus preventing him from doing any lab experiment. Even after seeking the intervention of the school Principal, the teacher’s behavior did not change but turned for the worse. He writes:

I was unable to conduct experiments during that whole year. Not only did I do very poorly in the lab tests in the board exam, I also got low marks in the oral, even though I had answered the examiner’s questions quite correctly.

When the results were announced, I was among the failures. I had good marks in all other subjects except chemistry. I had failed the lab tests.

This turn of events had put a barrier in my path. I no longer felt interested in studying. I felt surrounded by darkness.²²

Besides the feeling of demotivation and helplessness suffered by the author, the reader is made to confront the systemic and institutionalized nature of exclusion practiced in education in modern India. The passages above pose a significant counter-point to the idea of ‘meritocracy’, which is based on the premise that students are evaluated strictly on the basis of ‘merit’, irrespective of their caste identity and that caste-discrimination in education is a myth. The passages are live

¹⁹ An ancient Brahmanical legal text

²⁰ Pawde at 101

²¹ Pawde at 104

²² Valmiki at 65-66

testimonies of continuing caste discrimination in the secular public sphere, which also help in positing caste as the central fault line in modern India.

The word *akkarmashi*, used in the specific context of the book also means the illegitimate one. Limbale was branded as illegitimate by his community, because he was born of a sexual relationship outside marriage, between an upper caste man and a Dalit woman. I feel the usage of the word ‘illegitimate’ is not specific to the circumstances of Limbale’s birth alone, but also encapsulates a significant facet of the Dalit’s situation of marginality. It is often argued by the upper caste critics of the State’s affirmative action policy, that the Dalits are *not legitimate* claimants of the benefits given to them. One gets a feeling of this *deemed illegitimacy* in the words of Pawde.

One thing irked me – the ironical comments about the scholarship I got. ‘She’s having fun and games at the expense of a scholarship. Just bloated with government money!’ From the peons themselves to the senior officials, there was the same attitude. I couldn’t understand. Was it charity they were dispensing from their personal coffers?²³

Just like the Dalit’s association with the notion of ‘pollution’, the factor of ‘illegitimacy’ prevents the Dalits from asserting a positive moral identity. Traditional Hindu law denied the Dalits their ‘right to be human’²⁴ by not recognizing their equal claim to natural resources like water. While the law in modern India seeks to undo this by conferring full citizenship on the Dalits, their being viewed as *illegitimate* bearers of this citizenship, poses serious challenge to any thinking on inclusion, emancipation or empowerment of the Dalits.

Antasphot: Dalit Political Assertion as Thoughtful Outburst

Antasphot is a Marathi word which literally means ‘outburst’. The author has clarified in her subsequent writings that by outburst, she does not mean only emotional outburst, but for her, this outburst is a thoughtful one. In her own words,

When a culture based on hierarchy as in the case of the Indian society literally bites the flesh off the minds of individuals and communities and wounds them, then how do I see my life and that of my wounded community as human beings? This question keeps eating at my brain.

The narrator here reveals a critical awareness; an awareness about the ‘self’, about the social location of the ‘self’ with respect to her immediate community and with respect to the power structures that marginalizes her and her community. And one senses this awareness throughout the narratives. Thus Limbale observes, “Our plight made us introspective”²⁵. This takes me back to my starting point that, situations of marginality produce ideas of justice. The awareness about one’s situation of marginality, when expressed in words or action takes the form of outburst –

²³ Pawde at 103-104

²⁴ The phrase is borrowed from Upendra Baxi’s book ‘The Right to be Human’, New Delhi: 1987

²⁵ Limbale at 83

thoughtful outburst. I would argue that this trope of *thoughtful outburst* is helpful in understanding the Dalit political assertion and other modes of claiming justice.

One wonders, whether the thoughtful outburst is only about the consciousness of one's marginality or does it have the potential of becoming a violent outburst, seeking retribution? I must hasten to add that, the issue of violence itself needs to be contextualized. Upper caste violence against the Dalits must be differentiated from the acts of violence done in retaliation by the Dalits. In other words, Dalit counter-violence cannot be understood in the same terms as upper caste violence²⁶. For Ambedkar, such counter-violence or "direct action" is an effective strategy for claiming justice, since it would unsettle the moral world of the caste Hindu by creating a "crisis" against the "customary codes of conduct" of the caste Hindu. "The crisis will compel him (the caste Hindu) to think and once he begins to think he will be more ready to change than he is otherwise likely to"²⁷. In Ambedkar's formulation, the Dalit counter-violence is not seen as retribution but as a means of "salvation"²⁸. Although, this distinction is of great analytical value, my reading of the life narratives, suggest that one may not answer this question without ambivalence.

I came across only one instance in Limbale's narrative that hints toward the possibility of privileging retribution over reconciliation:

Santamai (Limbale's grandmother) and I went to the moneylender. He was drunk. Santamai and I stood at some distance from him. Santamai's blouse was torn exposing her breast. The moneylender kept staring at the peeping breast, but he refused to lend us the money. His look spread like poison in my heart. I wished that the blouse of this moneylender's mother or sister was torn so that I could stare at *their* (emphasis original) breasts. I burned from within. Our poverty was detestable. I wanted to rebel against such humiliation.²⁹

I am not willing to understand this in terms of a connection between the gender of the author and propensity for violence. I do not have adequate material at this point to make such a claim, though it's a question that needs thoughtful analysis.

For the time being, I find my answers in the words of Valmiki:

In the early days, I used to get angry. In my rage, I would clash with people. It is not that I don't protest now. However, my approach is different today. Now I can take it with the attitude that it is a social disease that I am contending with. When caste is the basis of respect and merit, important for social superiority, this battle can't be won in a day. *We need an ongoing struggle and a consciousness of struggle, a consciousness that brings*

²⁶ I am indebted to Prof. Kalpana Kannabiran for this insight.

²⁷ Ambedkar, B.R. 'What Congress and Gandhi Have Done to the Untouchables?' in Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 9, at 136.

²⁸ Ibid.

²⁹ Limbale at 82

revolutionary change both in the outside world and in our hearts, a consciousness that leads the process of social change (emphasis supplied).³⁰

The idea of a critical consciousness leading to thoughtful outburst in the form of assertion for dignity and justice, is relatable to Jotiba Phule's formulation of the concept of *Tritiya Ratna*. For Phule, education was the source of liberation. He saw education, not as mere alphabetical knowledge but as the ability to be critical and see through the working of oppressive structures (Phule spoke about Brahmanism, patriarchy and the oppression of peasants by money-lenders). For Phule, education was the *Tritiya Ratna* or the third eye which could pierce through the veil of ideology and endow the individual with a consciousness that would eventually liberate her from oppression.

Pollution, Exclusion, Outburst: A Framework for Thinking about Justice for the Dalits

While it is relatively simpler to point out and mark the acts that constitute 'injustice', the idea of 'justice' defies easy definition. The precision of definition notwithstanding, the life narratives explored here, do give us a broad framework within which one can *think about justice* for the Dalits. I have argued in this paper, that the themes of pollution, exclusion and thoughtful outburst offer such a framework, in which one can locate the justice-concerns that mark the lived reality of the Dalits. While the themes of *pollution*, *exclusion* and *illegitimacy* capture the Dalit's situation of marginality, the trope of *thoughtful outburst* helps to understand the strategies employed by them in the quest for justice.

The Dalit life narratives constitute a significant rejoinder to the communitarian views on justice. Essentially, the narratives construct the Dalit as an individual endowed with reason, inherent dignity and Human Rights. And in that, the narratives display a modernist and universal orientation by invoking the imagery of the 'human being' as conceived by modern Human Rights paradigm. However, even while speaking in the language of universalism, the subjects introduce new cultural meanings to the ideas of deprivation, exclusion and rights. The success of both national and international programs for Dalit Human Rights lies, in the proper appreciation of these cultural meanings.

Finally, I see the present paper as an intervention in a broader discussion regarding justice for the Dalits in modern India. The primary mode, in which the State in India conceives of justice for the Dalits, is that of reservation or distributive justice. As the life narratives suggest, the justice-concerns of the Dalits go much beyond the narrow confines of distributive justice and touch upon the so-called 'non-cognitive' issues like fear, powerlessness, violence and humiliation. The narratives confirm what Iris Young points out, that it is a mistake to reduce the idea of justice to distribution of resources alone³¹. For Young, while thinking about justice, the concept

³⁰ Valmiki at 132

³¹ Young, I.M. 1990. *Justice and the Politics of Difference*

of distribution should be explicitly limited to material goods, like things, natural resources, or money. This paper is a modest attempt in that direction.

References

- Ambedkar, B.R. 'What Congress and Gandhi Have Done to Untouchables?' in Dr. Babasaheb Ambedkar Writings and Speeches, Vol. 9. Education Department, Government of Maharashtra.
- Berreman, Gerald. 'The Brahmanical View of Caste' in Dipankar Gupta (ed.) Social Stratification, New Delhi: Oxford University Press.
- Beth, Sarah. *Dalit Autobiographies in Hindi: The Transformation of Pain into Resistance*. Available online at www.sasnet.lu.se/EASASpapers/4SarahBeth.pdf
- Limbale, Sharankumar. 2003. *The Outcaste: Akkarmashi*. Translated by Santosh Bhoomkar. New Delhi: Oxford University Press.
- Mohapatra, Bishnu. 1998. 'Understanding Indignities', Seminar, 471, pp. 43-46
- Pawde, Kumud. 1981. 'The Story of My Sanskrit' in Dangle, Arjun, ed. [1992] 1994. *Poisoned Bread: Translations from Marathi Dalit Literature*. Hyderabad: Orient Longman.
- Rege, Sharmila. 2006. *Writing Caste/Writing Gender: Reading Dalit Women's Testimonios*. New Delhi: Zubaan
- Valmiki, Omprakash. 2003. *Joothan: A Dalit's Life*. Translated by Arun Prabha Mukherjee. Kolkata: Samya and New York: Columbia University Press.
- Young, I.M. 1990. 'Defining Injustice as Domination and Oppression' in Freeman, M.D.A. 2001. *Lloyd's Introduction to Jurisprudence*. 7th Ed. London: Sweet & Maxwell Ltd.

The Creation of Social Space for the Articulation of Gender Justice - A Case Study

Shritha K. Vasudevan

Introduction

The date is 22nd November 2006. The time is at around 5.30 p.m. in the evening aboard the state owned Public Transport Corporation (PTC) bus. She was an ordinary college student studying her BBA degree course at a local college. She was a regular traveler by the PTC buses to and from her college. On that particular day she was traveling to a rotary club meeting on behalf of her college, and held a rotary report in her hand. At this point this lanky guy enters, wearing a white-stripped shirt, which was folded at his elbow. The bus is too tightly packed to determine the colour of his trousers. This girl and I chat about co-education (or the lack of it) in schools and colleges. Now while we were speaking with each other, this lanky guy moves closer and closer. He doesn't stop with moving closer. On more than one occasion his hand, inadvertently no doubt, seemed to brush our heads and backs. Or maybe it was just my imagination. Our conversation still progressed along the lines of co-education. At the point when this girl tells me how much fun she had when there were boys in her class, this lanky guy, stops trying to be inadvertent. He stops trying to hide his lurks and begins openly brushing against both of us. Even I couldn't be mistaken at this point. This lanky guy was openly sexually assaulting. Well though all of this sounds like some fanatical Talibanish place, welcome to the city of Chennai, located in secular, democratic India ostensibly governed by the rule of the law. The scene described above is typical of the sexual assault that regular women commuters by the public transport buses face on an everyday basis. And it is based on a field study conducted over the buses 29C, 41C, 1A, 1B, 5A, 5B, 7E, 7H, 7M, 41C, 41D, 24C and 24A, covering the areas of Annanagar, Nungambakkam, Sterling Road, Gemini, Life Insurance Corporation of India road, Anna Salai, Mylapore, Luz Church Road, Alwarpet and Adyar, over the months of November-December, 2006, covering well-known routes in Chennai city.

Hitherto women's rights whether in a democracy or systems with some semblance of the rule of the law, or within movements fighting for political sovereignty, have always been subordinated to the political. Violations of the inalienable human rights of women are still taking place, in the context of societies governed by the rule of the law, only because guaranteeing women's rights is considered "state largesse". The primary purpose of this paper is to show how creating social space for ensuring women's rights is not state largesse, but is something intrinsic to the existence of the state itself. This would be done with

reference to the field study mentioned above. Secondly, this paper would also analyze women's rights within the structural framework of political movements fighting for sovereignty, and the rule of law, as this becomes the precursor to the modern democratic State, in order to bring out how the very political movements would be vitiated if women's rights were subordinated to other political goals. Now, it is important to note that, when talking about movements that are fighting for political sovereignty, I mean political sovereignty in the context of nationalist movements aiming to establish a democratic, secular society, governed by the rule of the law. The reference here is limited to nationalist movements that seek to overthrow despotic, absolute, anti-human right regimes or regimes that have been propped up by outside powers against the sovereign will of the people. This does not connote religious, fundamentalist, separatist or extremist movements, which reject the idea of a democratic society, because this paper fundamentally believes that human beings can only live in security in a society that totally respects the rule of the law. As much as this paper is against the perception of the primary function of the State to only perpetuate power, this paper is also against extremist movements that seek to undermine democracy and the rule of the law. Thus, the scope of this paper is limited to a democratic society governed by the rule of law and political movements that seek to establish a democratic state governed by the rule of law.

The 'Common' Experience - Sexual Assault

Now, I look around trying to fathom if this case is "one of its kind". The bus is jam-packed and the crowd is horrendous in its density with hardly enough space to stand. All women passengers who do not get seats, stand facing the side that is meant for the women. But uniformly, I observe all the male passengers who do not get seats stand facing the women's side, and more often than not spill over on the women. Am I paranoid or do I actually observe brushing against hips, hair, ears, stamping and falling, routinely, as the sun rises in the east? And more startlingly none of the women are protesting at all, they seem to accept sexual assault by men as *normal* behavior. It is relevant to note here, that during the course of the field study, I was unable to observe a single instance of a woman sexually assaulting a man. Secondly, sexual assault took place in a majority of the instances when women were clothed in the socially acceptable *salwar kameez*. Thirdly, a bus notoriously known for sexual assault was perceived to be known so as it originated from a heavily patriarchal quarter of the city, where social patriarchy held so much sway that women were hardly respected and sexual assault was the norm in public places, like streets and shops and the same generally governed behavior on the buses.¹ Thus, the prevalence of sexual assault on the PTC buses, unabated, itself negates any conception of the

¹ For instance, one of the lady respondents indicated that the bus that we were on, the '29C' bus, sexual assault was even more rampant than on the others as it originated from a place called 'Perambur' in Chennai city, which she told me was steeped in patriarchy wherein men would openly sexually assault women in public places and totally ignore protests by the victims.

rule of the law totally, as sexual assault was viewed as something natural and ‘part of life’.

Sexual Assault Perceived as ‘Social’

The reaction to the issue of sexual assault, when I questioned people in general, was that it was for the women to take good care of themselves. It is always the woman who has to ‘protect’ herself. There was a sense of desperation sometimes, on the part of women, when they revealed that men (the sexual assaulters) would never change and that they would continue to sexually assault women, given the chance. Sexual assault was looked upon as the ‘lust’ of a man and something women have to guard themselves from. It was not viewed as a criminal act punishable by law. It was viewed more in terms of the natural propensities of men, validating sexual assault socially and culturally, making it seem like an outcome which is natural to a society structured on entrenched patriarchy.²

The ideological component, which perpetuated sexual assault only *against* women was brought out with clarity in the reaction of men, when questioned about the prevalence of sexual assault on the PTC buses. The first male respondent I spoke with was an auto driver who traveled occasionally by bus and stated that the sexual assault women faced on the buses hardly lasted for “20-25” minutes and was in fact nothing at all. He refused to recognize that sexual harassment or assault was any significant problem and advised me to study instead the “culture” of Tamil Nadu! And two other respondents, who worked in a supermarket in Annanagar, a suburb of the city and commuted to work everyday by the PTC buses, also actively denied that there existed anything like sexual assault on the PTC buses. They simply stated when asked, that they generally had no time to notice ‘these things’ and got in and out of buses just minding their business. Significantly, they also refused to give in their names. The second kind of response I received was that women ‘brought it upon themselves’. According to this view it was that the increase in ‘indecently’ attired women were primarily to blame for the prevalence of sexual assault in the buses.³ Finally, a respondent, also felt that the patriarchal movie culture in Tamil Nadu was to blame. He stated that with an increasing proliferation of movies featuring sexual assault, the young men of Tamil Nadu imitated these icons. But he also cautioned that it would be better for girls to dress properly. He stressed on better enforcement of laws, and very strict and swift punishment, in order to prevent sexual assault from taking place.

The reaction to sexual assault seemed to suggest that people viewed sexual assault in socio-cultural terms than as law and order problem. The idea that the rule

² Leela Dube, *Anthropological Explorations in Gender- Intersecting Fields*, 1st Pub. 2001, p.106.

³ One respondent seemed to wonder that any person would be able to resist the temptation to sexually assault girls who ‘over expose’ themselves; Another engineering college student, who traveled occasionally by the PTC bus to college, stated that though there was a problem of sexual assault on buses, but it was for women to protect themselves.

of the law could be effectively used to tackle sexual assault does not enter into common perception, as sexual assault has continued unabated, despite the existence of the rule of the law, expounded by our Constitution in India. This was further established by the fact that none of the women, who traveled by the PTC buses, considered legal redressal as an option as they considered the problem of sexual assault incapable of being tackled by the legal mechanism.

Thus, it can be seen that the general atmosphere in the bus did not even remotely suggest that all women possessed any inalienable human right to liberty and personal security. The manner and method of perpetuation of the crime of sexual assault, described above, and its perception by the people, wherein they believe it to be a social issue as the same has existed despite laws to tackle the same, and in violation of the fundamental rights guaranteed by the Constitution, testified to this. Thus, it can be conclusively seen that there is a tendency to view as social, problems which have been inadequately addressed by the rule of the law. The people, have come to believe that the rule of the law *can never* tackle a crime like sexual assault as it is viewed as social behavior rather than the crime it is. Now, the following section would prove how this sexual assault is part of a larger societal patriarchal climate that totally controls the lives of citizens, much more effectively than the rule of the law.

Sexual Assault- A Component of a Larger Patriarchal Whole

An issue, which crops up at this juncture, is whether this sexual assault is only unique to the PTC buses? Does it actually take place in a vacuum, or is this sexual assault an aberration of normal social behavior? Well to answer this question I will take you through some key events in Chennai city- for just *airing* of views on safe pre-marital sexual intercourse, political parties, yes actually political parties burn effigies of the speaker and take out slipper processions in protest, against this attack on honor,⁴ sexual segregation is strictly enforced on pain of corporal punishment in schools and professional colleges, dress codes are imposed exclusively on women in professional educational institutions, where in a public forum, a *professor* from a reputed university deems it shameful to utter the word “sexual intercourse” at all, while elaborating on the rising ‘immorality’ of high school children.⁵ And then on the 14th of January 2007, the Madurai bench of the Madras High Court has *accepted* a PIL petition, against the former Miss Universe Sushmita Sen, for an interview published on October 7th, 2006, wherein she is alleged to have stated that “inquiring from a man whether or not he was married before falling in love with him was beyond comprehension”.⁶ A “learned” male advocate has filed this petition on the grounds that Ms. Sen’s views “gave the impression that women and men in India are not

⁴ controversy on kushboo’s pre-marital sex remarks: Thursday, October 6 2005; <http://news.indiainfo.com/2005/10/06/0610kushboo-remarks-controversy.html>; 27th March, 2007.

⁵ Interview with Samuel Savio, Professor, Loyola College, 28/12/2006.

⁶ Deccan Chronicle Correspondent , (?), Deccan Chronicle, Sunday 14th January 2007, p.1.

chaste and argued that such statements affect the very basis of Indian culture”.⁷ He further alleged that such statements would ‘mislead’ young men and woman and also constituted a ‘direct’ insult to womanhood.⁸ The petitioner has called for stern action against Ms. Sen for “this act of atrocity against the women of India”.⁹

Thus the sexual assault referred to above has not been taking place in a vacuum. It is only one part of a larger patriarchal fundamentalist force that dictates to the residents of the city, controls their behavior, prevents women from seeking legal redress by ideological indoctrination that sexual assault is natural to men and in short governs the entire life of its citizens in this regard. Well so much has come up in the media against *religious* fundamentalism, but social patriarchal fundamentalism does not seem to have captured the attention of the Indian media! The following section would bring out how the existence of this larger social patriarchal fundamentalist force, poses a threat to the existence of the democratic state, and thus calls for addressing the root of social patriarchy instead of expounding largely, reactions, to the problem of socially enforced patriarchy.

How Sexual Assault Poses a Grave Threat to the Existence of the Democratic State?

As has been established above, in a patriarchal society, it is a fundamentalist social system that governs the lives of the people, and the rule of the law, which forms the basis of a democratic society, simply has no influence and no sway over the lives of the people. Further, the prevalence of crimes like sexual assault against women, attests to the fact that the measures taken in this regard by the democratic state do not tackle the *cause* of socially enforced patriarchy, but merely *reacts* to the same. For instance, laws dealing with sexual assault propose more stringent punishment, or the state regularly introduces ‘welfare measures’ for the upliftment of women. But all these policies have failed to rout out that social force that legitimizes and perpetuates oppression against women, sexual assault being just one of them. And hitherto, these policies have failed only because the State thinks that tackling such problems and creating an egalitarian society, is something like “**State Largesse**”. To elucidate, there exists a group of extremely powerful individuals controlling the apparatus of the state, and ostensibly democratically elected. And it is believed that guaranteeing of basic human rights, in this context women’s rights, is a mere corollary to the existence of the state. The State, it is deemed, exists only for perpetuating that power and control that is intrinsic to the State and it is believed that the State apparatus can actually exist independently of human rights violations. That is why the measures of the State to tackle social crimes against women, have ignored or refused to confront patriarchy and tackle its roots in society. The form of these measures only react to social crimes against women, and fall short of destroying the larger patriarchal foundation of society, because this patriarchal foundation, it is believed, is incapable

⁷ Ibid.

⁸ Ibid.

⁹ Deccan Chronicle Correspondent , Deccan Chronicle, Sunday 14th January 2007, p.1.

of affecting the democratic state. In other words, the people controlling the state apparatus believe that social patriarchy is merely social and would never affect the control exerted by the democratic state over society. They are under the impression, that the rule of the law still holds a sway that would subsume patriarchal influences and secure the larger allegiance of the people to the democratic state. The patriarchal influence, it is deemed, only affects one constituent of society and since there is no direct threat posed to the democratic state, measures to tackle the crimes perpetuated by patriarchy is viewed as 'setting right society' that merit welfare measures which aim at alleviating the suffering after the social crimes have taken place. But the primary point to be noted here is that the existence of a social patriarchal force that controls the social lives of its people does indeed pose a grave threat to governance by the rule of law, and the following would prove the same and establish a rationale for the state to compulsorily tackle this social patriarchal force, in order to ensure survival of the democratic state structure.

Firstly, one of the principles, which legitimate the engagement of government, is that of consent which is rooted in an idea of a founding compact through which individuals agree to entrust certain of their natural rights to the governing authority so that the common good may be achieved.¹⁰ In societies which are in the tentacles of a deep, unequal patriarchal force, as is Chennai city, the entrusting of the welfare of the citizens has already been entrusted to fundamentalist forces. Sexual assault takes place on the PTC buses, dress codes are imposed without any rule of law, and the law and order machinery is being used to impose social patriarchal norms on citizens. The social force perpetuating patriarchy has so much force that it has succeeded in *naturalizing* patriarchy, to the extent that people have begun viewing the crime of sexual assault in terms of the 'natural' propensities of men. The state thus, no longer claims the allegiance¹¹ of the majority of its citizens in situations, wherein patriarchal social forces dominate the behavior of society. On the contrary, the fundamentalist patriarchy does. The core constituency of democratic state power, the rule of law, is being contested because of the equally pervasive control that patriarchy exists. In fact the control exerted by social patriarchy holds more sway over the people presently, as their immediate lives are conducted according to patriarchal social norms that has permeated society, naturalizing sexual assault against women, imposing dress codes and contributing to the continued oppression of women. The perception of the crime of sexual assault is also viewed in social terms, which clearly proves that social patriarchy has indeed greater influence over the people than the secular, democratic State. Thus, the Secular State is being slowly routed out from the lives of the people and has already been partially replaced by the rule of social patriarchy.

This has now become an all out war between a secular, democratic state and fundamentalist patriarchy, contesting over establishing hegemony over the people. It is amply clear that the State is being challenged on its own turf by social patriarchy. And the battlefield, by virtue of patriarchy controlling the social lives of the people,

¹⁰ Martin Loughlin, *The Idea of Public Law*, 1st pub. 2003, p.6.

¹¹ Martin Loughlin, *The Idea of Public Law*, 1st pub. 2003, p. 13.

is necessarily located socially. And in order to win, the State should consciously confront patriarchy in its strongest constituency- within the precincts of society. It is only by routing out the social patriarchal force in society, can the state re-establish the rule of law and governance by democracy. The democratic State, in order to internalize the rule of law among the people, which is essential to ensure survival of the democratic state structure, has to persuasively interfere in society in a positive and constructive manner that is able to dislodge the patriarchal force from society and help in re-establishing the governance of society by the rule of law. Now, an advantage that the State has is that social patriarchy, by virtue of suppressing women, would be definitely opposed by the people who are at the receiving end of the oppression. The rule of the law can thus, only be re-established by securing the allegiance of this oppressed constituency to the democratic state. And considering the potential of the democratic state to ensure equality, guarantee a right against discrimination and exploitation, the oppressed constituency(women) would readily take to any system of governance that opposes the oppression perpetuated by them on patriarchy, denying them the right to develop their capabilities in ways that would enhance their potential, and make them contribute constructively to the national economy.

And the most effective way to carry out this battle and rout out this fundamentalist patriarchy and re-establish the rule of the law, is by creating the social space in which the equality of women is naturalized instead of patriarchy. Unless the State takes immediate action, the core constituent of the state- its power is being gradually eroded. Already social patriarchy holds greater sway over the citizens, despite the existence of the rule of law. Now, unless the rule of law is re-established and can command greater allegiance than a patriarchal social force, the democratic State is itself in danger of being ousted. The most serious consequence of this ouster is our country is to our Constitution- that sacred instrument that has held together our nation in precarious situations of communal and political turmoil. The challenge from one section of society itself has been overlooked as the great danger that patriarchy poses to the rule of the law has not been realized. The Constitution of India is hailed as expressing the will of the people, and today, a social force is actually subverting this will and instead promoting allegiance to an oppressive social force that only spells exploitation, trauma and denies the attainment of the goals enshrined as 'fundamental rights' in our Constitution. Unless, the State realizes that the foundation of its rule, our secular, democratic Constitution is being subverted by a mere social force, the social force would spread further and weaken the influence of the rule of law, replacing it instead with the rule of patriarchy. Thus, any action by the state to tackle this threat should be aimed at replacing the hold of patriarchy over society, by the rule of law. It is submitted that one of the most effective ways of re-establishing the rule of law by dislodging the hold of patriarchy, is by the secular democratic State immediately creating the social space necessary for naturalizing women as equal human beings. This social order established by the rule of law, would only be capable of providing a better alternative to the existing oppressive patriarchal order and thus, conclusively re-establish the rule of law over society.

Possible Strategy for Battle against Patriarchy

There are a number of levels by which the battle against patriarchy can be undertaken by the State and the present section would suggest a few ways. Firstly, this approach involves mobilizing all the three pillars of democracy into a conscious approach of attacking patriarchal norms, notions ideas and practices. The approach should go beyond the conservative approach of merely strengthening the criminal justice delivery system to tackle complaints of violations. As has been shown above, merely *reacting* to patriarchy will not solve the inherent social attitudes which rationalize patriarchal hegemony and violations of the natural rights of women. The state has to undertake a conscious policy that undermines and disentangles the hold that social patriarchy has over its constituents and routs out the stronghold of patriarchal social power.

Firstly, the executive branch of the government must follow a coherent policy of economic investments that improve the living conditions of women, initiate training programmes that induct women into professions reserved exclusively for men like the armed forces, involve women consciously in the process of democratic decision making, structure aid/relief programmes in such a way that the woman of the household is the receiver of the same, pressurize the industrial sector by possibly utilizing the tax mechanism to accord priority to women workers, at both the worker and executive level based on the requisite competency consideration and develop the infrastructure of cities and towns to make them more women friendly. For instance, in the specific case mentioned above, a large number of women respondents suggested that improving inter-city transport and providing exclusive buses for women or buses which can accommodate all commuters comfortably (as sexual assault more often than not prevailed greatly in extremely crowded, jam-packed buses) would definitely reduce the incidence of sexual assault.

The emphasis in this regard, should be the creation of equality of opportunity to women that cuts across socially enforced norms for oppression and gives women a genuine chance to compete on an equal basis with society in all walks of life. This would also greatly enhance the productivity of the nation. The economic investments should go beyond being 'welfare' measures, but should seek to develop the capabilities of women in a permanent and lasting way that establishes their legitimate place in society. It is only economic investments that aim at provision of equality of opportunity to women and enhancement of their potential that can ultimately rout out social patriarchy and reestablish the rule of law as women would participate increasingly in the perpetuation of a social order that guarantees their rights as human beings. Simultaneously, the State would also be able to ensure that the rule of law prevails and that, it has not been ousted by the patriarchal social force. Women would willingly contribute to the development of this economy, thus subjecting themselves to democratic regulation by the rule of law, instead of oppressive social forces. Thus, economic investments aimed at provision of equal opportunities for human, which would naturalize their role as legitimate and equal partners in society is one very effective method of acquiring the allegiance of the oppressed, the women, establishing a very strong foundation for the sustenance of the rule of law, as women

are most definitely going to contribute to the sustenance of a system that would remove the oppression from their lives and give them the opportunity to develop their potential to the best extent possible. This conscious tackling of patriarchy by executive state action would propel women to express allegiance to the secular state structure, loosening the hold of oppressive social norms and increasing adherence to the sustenance of democracy. Ultimately, the battle to rout out social patriarchy *via* executive state action, which implements such action to secure the very survival of the rule of law, would improve the capacity of women, strengthen their allegiance to democracy and thus, help sustain the superstructure of democracy itself in our country. This creation of opportunity for wholesome advancement should also take place in a background of an efficient state structure that is able to accommodate the varied aspirations of womanhood in order for it to be effective.

The second major way in which the battle against social patriarchy by the executive can be waged is through education. The education curriculum should be structured so as to include thought-provoking subjects on human nature, like anthropology, sociology and psychology. The education system at every stage should seek to inculcate democratic thinking and the power of questioning in the minds of young people. Such an education should be made accessible to all citizens of the country, so that the teaching process becomes the step in ensuring allegiance of the citizens to the secular, democratic state instead of any oppressive social forces, and which would most definitely weaken the hold that patriarchy currently exerts over society. Since the education system has been unable to permeate to large segments of the population, oppressive social forces still hold sway over the people, preempting rule by the democratic state. Thus accessible, quality education plays a very important role in building up appreciation to the idea of the rule of the law and dislodging patriarchal attitudes from society, and ensuring permanent sustenance of our democratic structure.

Now, the reasons for advocating the above is that the implementation of measures in an attitude of 'state largesse', i.e. largely policies which *react* to the problem of social patriarchy, would not and has not secured the allegiance of women as these measures are not aimed at routing out patriarchy from society. Consequently, the implementation of these State measures take place within a larger patriarchal social structure. The policies thus, in a way validate that social force which poses a grave threat to the sustenance of democracy itself, by tackling specific outcomes of the problem instead of addressing and eliminating the problem itself. Thus, the patriarchal social force has been able to prevail and circumvents any policy which merely reacts, rendering their effects largely nugatory. It is only when policies are aimed at the destruction of the roots of the patriarchal social force that has hitherto existed such a great control on the lives of citizens, despite the existence of the rule of law, will the State be able to meaningfully dislodge the patriarchal social force and reassert the rule of law over society. Now, the State has not undertaken this dislodging in the past, primarily because it has not realized the threat that patriarchy enforced socially poses to the rule of law. But, now it has been proved above that the existence of patriarchy is most definitely a threat to the existence of the democratic state structure. Thus, the taking of measures to tackle the same has become

imperative. The use of economic development to dislodge patriarchy is thus a method to reassert the rule of law over society and rout out patriarchal social forces through establishing an egalitarian social order that provides equality to the oppressed constituents, women, and thus permanently secures their allegiance for the perpetuation of the democratic order.

The ideas given out above are only suggestive in nature, and it is up to the State to evolve its own policies to pre-empt patriarchy from society and uphold the rule of the law, by realizing that violations of the rights of marginalized groups, in this particular instance-women, pose a challenge to the existence of the State itself. Thus it is hoped that the State mechanism would move towards a progressive human rights vision of governance that realizes that in the long run, the very existence of the State, is possible only by ensuring the security and human dignity of all its people or followers.

Finally, I would like to extend the above argument to state that anywhere in the world, in democratic societies governed by the rule of the law, unless the State guarantees women's rights, brute force of patriarchy instead of the rule of law would prevail, posing a threat to the sovereign, secular democratic state.

What about Societies without any Rule of Law?

Now, the above proposition, that guaranteeing of women's rights is fundamental to the very existence of the State itself, applies only in the context of a democratic society governed by the rule of the law. It does not address itself to despotic regimes wherein the rule of the law does not form part of the fundamental governing principle. Now, human rights movements, activists and NGO's have shown us that human rights violations are a common undercurrent of despotic regimes. And human history shows that no matter how oppressive a regime, suppression of human thought and spirit never goes unchallenged. Sooner or later a revolutionary movement that challenges despotic regimes that perpetuate oppression rise up against all odds to reclaim the human spirit. And unless these movements are brought about by leaders who are concerned with furthering their own selfish purposes, such movements in today's world seeks to establish a sovereign, democratic, secular state. At this point, it is important to reiterate a point mentioned at the beginning of this paper, namely that the reference here is limited to nationalist movements aiming to establish a democratic, secular society, governed by the rule of the law seeking to overthrow despotic, absolute, anti-human right regimes or regimes that have been propped up by outside powers against the sovereign will of the people. This does not connote religious, fundamentalist, separatist or extremist movements, which reject the idea of a democratic society, because this paper fundamentally believes that human beings can only live in security in a society that totally respects the rule of the law. Thus, it is important to analyze the subordination of women's rights to the political within movements fighting for political sovereignty, as this becomes the precursor to the modern democratic state.

Now, there are two possible ways in which the political movement can subordinate women's rights to the attainment of other political goals. The first is

when the movement openly subordinates the attainment of women's equality in a patriarchal society that has hitherto denied equality of women, to the attainment of political goals. Thus, this can result in a refusal to tackle inequality of women, with all that it entails including sexual assault, rape, denial of education and employment and general relegation of women as second class inhabitants of society, until the attainment of the political goal of democracy. The second can be when a particular power clique which also oppresses women, actually extends its support, and concomitantly the power it wields over its oppressed constituents, to the movement fighting for political goals. The political movement would then have to compulsorily subordinate the attainment of women's equality to this power clique as otherwise an important ally would be lost.

Now, movements fighting for political sovereignty against despotism (should) proceed on the fundamental assumption that human rights should provide a corpus of constraints on public-decision making, and in the languages of transparency and public choice.¹² They are concerned with a normative quest for governance structures that produce legitimate laws that are structured on a serious concern with human rights and emphasize the democratic rights of the people.¹³ Such movements also emphasize on the participatory rights of the people - such as their rights to constitute governance, through free and fair elections, self-determination through devolutionary modes of power, identity rights and the rights to cultural and physical survival as communities or groups.¹⁴ Ultimately the movement in order to succeed, and effectively rout out the scourge of despotism from the face of that particular society should consider 'human rights' as an arena of transformative political practice that disorients, destabilizes and helps destroy deeply unjust concentrations of political, social, economic and technological power.¹⁵ Only a political movement structured as explained above would be capable of true political success, because if the new state happens to violate human rights, its support base would be eroded and it would either be removed from power by elections, in a democracy, or be overthrown through the same historical and revolutionary forces that put that state into power.

Thus, the very success of any political movement that aims at overthrowing a state structure that perpetuates oppression and does not contain any self-redressal mechanisms, would depend on the ability of the movement to function in a way that guarantees equality to all its supporters. The goal of the movement and the methods it seeks to utilize must be inclusive of the aspirations of all the oppressed constituents that it purports to represent. When a political movement seeks to subordinate the attainment of women's rights to the attainment of political sovereignty, therein the

¹² Upendra Baxi, *The Future of Human Rights*, 1st pub. 2002, second imp. 2002, p. 8.

¹³ Ibid.

¹⁴ Upendra Baxi, *The Future of Human Rights*, 1st pub. 2002, second imp. 2002, p. 8.

¹⁵ Upendra Baxi, *The Future of Human Rights*, 1st pub. 2002, second imp. 2002, p. 10.

seeds of its own destruction have been sown. Any movement fighting oppression cannot claim to overthrow one kind of oppression while condoning another variety and claiming that the same would be addressed after the first goal was attained. The creation of a hierarchy of overthrowing oppression poses the greatest threat to the political movement, as there arises a contradiction within the movement, capable of disrupting the core ideology of the movement, which inculcates adherents and perpetuates the movement in society. The core ideology would lose its credibility when it subordinates overthrow of one kind of oppression to another. Unless the movement is totally committed to destroying the roots of *all* and *any oppression*, the movement will not be capable of true success. Thus, political movements which relegate the attainment of the equality of women to the attainment of political goals will never be capable of implementing their vision as the very vision would be vitiated by contradiction. Thus, any political movement which subordinates the attainment of equality for women to other political goals, will never be capable of evolving a strong democratic state structure that would permanently sustain itself. Even if such a force succeeds in establishing democratic state, as has happened in many parts of the world today, sooner or later, the patriarchal social force would begin threatening the democratic state structure, as has been described in the previous section, and the State would be forced to rout out the patriarchal social force to ensure survival of the rule of law. Thus, unless political movements consider women's rights as part and parcel of the concept of human rights, will they succeed in overthrowing despotic regimes and also in establishing an enduring democratic State.

But this paper does not deny that in the interim period of despotism and a democratic state, massive violations of women's rights could take place without an effective redressal. In fact the experience of such despotism should be a warning lesson to movements that seek to overthrow them, that human rights violations only entail suffering and discord, and thus any ruling force that perpetuates human misery, ultimately is sowing the seeds of its own destruction.

Regarding the second way in which a political movement can subordinate women's rights to other political goals, it is submitted that once again, since the very movement itself is against oppression and tyranny, utilizing a portion of the oppressed for the movement would prove self-contradictory. Ultimately the entire movement itself would be undermined if the support of an oppressor is undertaken. Thus the strength and spirit of the movement would be in danger of withering to an empty void of falsehood and consequent failure of the movement itself, if the attainment of women's rights is considered secondary to a political movement that ostensibly is seeking to overthrow despotism and yet is not willing to ensure, within its current perception, equal rights to women.

Therefore, political movements fighting to establish nationalist democratic governments, in order to attain success in their goals, should incorporate unequivocally, women's rights as part and parcel of the movement as even if democratic state structures are established on an assumption that women's rights would be granted after the attainment of democracy, the potential threat posed by patriarchy to any democratic state would be too high a price to pay. Sometimes, the

State might not be totally capable of utilizing economic investments to re-establish the rule of law and thus this might result in a possible breakdown of the democratic order. Thus, the political movement would guarantee success and sustenance of the democratic state only when it realizes that the very movement would be vitiated if the attainment of women's rights are subordinated to other political goals. In other words, any political movement fighting for democracy can only truly succeed when it incorporates women's equality within the structure of the movement. Otherwise, the movement would never be capable of succeeding and establishing a permanent democratic state structure.

Conclusion

Thus the entire refrain of this paper has been that the attainment of women's rights, considering the challenges posed to the existence of the state by fundamentalist patriarchy can no longer be considered social rights, relegated to state largesse. As patriarchy seeks to undermine the democratic state and usurps the rule of law, the existence of the state is being challenged, by eroding the core power constituent of the state, as the allegiance of the citizens moves towards this social patriarchy rather than the secular state. This has been illustrated using a field study on sexual assault within a democratic society. It was established that the battle for re-establishing the rule of the law, should take place socially, because the social space is the key stronghold of patriarchy. Attacking at this stronghold and reestablishing the rule of law, is the only effective option open to the state to re-assert its hegemony and rout out fundamentalist patriarchy. A few ways in which this could be accomplished by executive state action were suggested. The most important was executive state action implemented through economic investments that would dislodge the patriarchal order in society by throwing open opportunities to women that would naturalize their legitimate position in society. This would most certainly secure the wholehearted allegiance of women as this social order secures their equality and helps tackle the social force that legitimizes their oppression. Thus, it was established that the most effective way of sustaining the superstructure of democracy itself was by ensuring the equality of women in society. Secondly this paper has also brought out that in movements fighting to establish a democratic society, sustaining political success would be impossible without incorporating women's rights as an inherent part of the movement itself.

Therefore, it is hoped that the creation of social space for articulating, enforcing, ensuring equal rights for women, becomes the rallying cry that defeats fundamentalist patriarchy from human civilization and helps secular, democratic forces prevail and enables women to contribute towards the progress of humanity, by realizing their inherent creative potential in a world non-constrained by fundamentalist or any kind of patriarchy.

Bibliography

- Leela Dube, *Anthropological Explorations in Gender-intersecting Fields*, 1st pub. 2001, Sage Publications, New Delhi.
- Martin Loughlin, *The Idea of Public Law*, 1st pub. 2003, Oxford University Press, Oxford, United Kingdom.
- Upendra Baxi, *The Future of Human Rights*, 1st pub. 2002, second imp. 2002, Oxford University Press, New Delhi.
- controversy on Kushboo's pre-marital sex remarks: Thursday, October 6 2005; <http://news.indiainfo.com/2005/10/06/0610khushboo-remarks-controversy.html>; 27th March, 2007.
- Deccan Chronicle Correspondent , pil field as such remark hurt women, Deccan Chronicle, Sunday 14th January 2007, p.1.
- Interview with Samuel Savio, Professor, Loyola College, 28/12/2006.

List of Abbreviations

- BBA- Bachelor of Business Administration
- Constitution- Constitution of India
- Ed.- Editor
- Edn.- Edition
- Ibid.- Ibidem
- P.- Page
- PIL- Public Interest Litigation
- PP.- Pages
- PTC- Public Transport Corporation
- Pub.- Published
- Rep.-Reprint
- Std.- Standard