

National Advisory Council

Note on Recommendations for Follow-up Measures to Eradicate Manual Scavenging

1 The NAC in its meeting of October 23, 2010, expressed its deep anguish at the official failure to eradicate 'manual scavenging', the most degrading surviving practice of untouchability in the country. This involves mostly women, but also men and even children gathering human excreta from individual or community dry toilets with bare hands, brooms or metal scrapers into wicker baskets or buckets; and then carrying this on their heads, shoulders or against their hips into dumping sites or water bodies. Others are similarly employed to clear, carry and dispose excreta from sewers, septic tanks, drains into which excreta flows and railway lines.

2 The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 outlawed employing persons from manual scavenging, and government launched programmes for livelihood rehabilitation of freed manual scavengers; education of their children; and promotion of flush latrines in place of dry latrines. However, as the NAC noted in its resolution of October 23, 2010, these have not resulted in the eradication of the practice, and governments have tended to look at this as an issue of sanitation rather than human dignity as guaranteed to all citizens by the Constitution.

3 The Chairperson of the NAC, accordingly, wrote to the Prime Minister of India on 9 November, 2010, requesting the government to take necessary steps to ensure the end of this demeaning scourge in a time-bound manner. Accordingly, the matter was reviewed at the highest levels of Government. On April 28, 2011, the Secretaries of Social Justice and Empowerment, and of Housing and Urban Poverty, Government of India, made presentations about the efforts and plans of Government of India to deal with this practice. On May 9, 2011, some Members and officers of NAC met officials of the Government of India. The Prime Minister also wrote to NAC Chairperson Mrs Sonia Gandhi on May 11, 2011, reiterating government's 'determination to completely eradicate this abominable practice in a very short time', including by making the employment of SC ST persons to handle excreta an offence under the SC ST Atrocities Act, and ensuring 'full and complete rehabilitation'.

4 While appreciating the new sense of urgency and priority accorded to the issue after the NAC resolution, NAC has the following observations and suggestions:

1. Need for a New Law

1.1 The Government of India has proposed amendments to the original Act Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, to strengthen its accountability mechanisms, widen the definition of manual scavenging, and above all to shift the focus to human dignity from merely sanitation.

1.2 NAC supports many aspects of the revised amendments. But a major limitation of amending the law would be that it would remain a law under the state list of the Constitution. It has taken 18 years for all state legislatures to adopt the Act. There is little

hope that a time-bound eradication of manual scavenging in the next one or two years would be possible, if the amendments would need ratification of state legislatures once again to come into force.

1.3 A new law built on new realities and experiences gathered in the last decades, with provisions for active monitoring, redress and accountability will strongly further the momentum, which has sadly been lacking in the last 17 years since the Abolition of Manual Scavenging Act (1993) was adopted.

1.4 It is therefore recommended that the a new legislation be introduced in Parliament.

2. Legislative Competence for the revised law

2.1 Schedule VII of the Constitution of India enumerates three lists, namely the Union, State and Concurrent, from which the legislative competence for enacting legislations is derived. In its decisions, the Supreme Court has laid down principles that further clarify, whether the Union or the State, or both have the power to legislate on any given subject. First, the entries in the legislative lists must not be construed in a narrow and pedantic sense and that widest amplitude must be given to the language of these entries. Second, it applied the doctrine of 'pith and substance' to a law that covers various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment¹.

2.2 In this regard, the Manual Scavenging and Construction of Dry Latrines (Prohibition) Act, 1993 was enacted under Entry 6 of the State List: 'Public health and sanitation; hospitals and dispensaries'. However, the intent of prohibition of Manual Scavenging is much broader than mere 'public health and sanitation', and is inextricably linked to the Constitutional guarantee to abolish untouchability in all its practices and forms. The *raison d'être* of the Manual Scavenging (Prohibition) Act is similar to that of the Protection of Civil Liberties Act, 1955, mainly to outlaw practices of untouchability, for which the power to enact was directly derived from the Fundamental Rights & Directive Principles of State Policy. Both of these are social welfare legislations anchored in the fundamental rights enshrined in the Indian Constitution. (Articles 15, 17, 21, 23) In pith and substance, therefore, the prohibition on Manual Scavenging would fall under the following category:

¹ On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the List belonging to the other legislature. (*Kartar Singh v. State of Punjab*, 1994 SCC (3) 569). Thus, while determining the legislative competence of Parliament to make a law, it should be first ascertained if the subject matter of the legislation falls in the State List under which the Parliament cannot legislate. If the law does not fall in the State List, the Parliament would have the legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or Concurrent List. (*Union of India v. H.S. Dillon*, [1972] 2 S.C.R. 33; *S.P. Mittal v. Union of India*, [1983] 1 S.C.R. 72)

- a) Article 248 read with Entry 97, List I (Union List)- Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

2.3 In addition, the Union may also derive the power to legislate under these additional categories:

- b) Entry 24, List III (Concurrent List)- Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
- c) Entry 23, List III (Concurrent List) Social Security and Social Insurance; employment and unemployment

2.4 It must be noted, though, that it may be the more appropriate legislative practice if the Union used its residuary powers listed under option (a) to derive its legislative competence for the Manual Scavenging (Prohibition) Act. It is also important to ensure through a Statement of objects and reasons to emphasise that it is a law for "social welfare" and not a law relating to "public health" or even "labour welfare".

3. Features of the New Law

Much of the amendments proposed by the Government should be incorporated into the new law. Some other features of this new law proposed are as under:

- (i) *Definition of manual scavenging:* We agree with and welcome the revised wider definition of manual scavenging in the GOI draft: 'a person engaged in or employed by an individual or urban local body or any public or private agency, for manually cleaning, carrying or disposing or dealing in any other manner with human excreta in a latrine, a tank, a drain or a sewer line or open spaces including railway tracks'.

But there should be different consequences of different aspects of manual scavenging: a) for those who worked manually handling human excreta in dry latrines (coming under the narrower definition of the 1993 Act), there should be immediate liberation and demolition of the latrine and the full rehabilitation package, within a short defined time frame; b) for those in other forms of manual scavenging like sewer and railway workers, there should be liberation through a longer defined time frame (five years?). This liberation would be through introducing technical changes, which eliminates the humiliating and unsafe aspects of the livelihood. The livelihood itself is not abolished. The onus of enforcing these technical and administrative changes would lie with the hiring authority, and the Act should create direct accountability on these, and a strong monitoring mechanism.

- (ii) *Implementing Agencies:* The implementing agencies under the Act should be the District Collector and Municipal Commissioner.

(iii) *Offences and Penalties*: There should be no further tolerance for pushing back the time frames for eradication of both types of manual scavenging; and failure to eradicate without reasonable cause beyond this should be defined as an offence by public officials, with severe penalties. But it should be clarified that manual scavengers themselves should not be punished under this Act. The offence should be investigated and heard with the same provisions as are contained in the SC ST Atrocities Act.

(iv) *Historical Wrong*: The preamble of the Act should acknowledge, as does the Forest Rights Act, that this law seeks to correct an enormous centuries-old historical wrong, of requiring people to manually handle human excreta because of their birth in a particular caste.

4. Plan a new survey and a system of continuous joint surveillance

4.1 The recurring experience of past official surveys of manual scavengers and dry latrines is that state governments are mostly in denial; having declared that manual scavenging has been eradicated, they reject community findings, even when backed by strong evidence. If government and community activists conduct separate surveys, it is most unlikely that they will agree on most of the findings, and the time-bound eradication of the practice will be impossible.

4.2 NAC is convinced that this can be prevented only if there is a continuous system of joint surveillance, beginning with a *joint survey* by designated teams of government officials and community members. For this, the Safai Karmchari Andolan would nominate 15 persons per district. The District Collector and Municipal Commissioners would constitute a number of teams for this survey; they would nominate 2 persons from the community list to each team, and 2 officials, and each team of 4 members would jointly conduct the survey in their designated locations. This would be repeated by a rapid survey every 3 months, until full eradication is accomplished. There would also be provision for self-declaration by manual scavengers.

4.3 In constituting these joint teams in every district, care should be taken to ensure that all communities which are actually engaged in manual scavenging in that district are represented. For instance, in some districts, Dalit Muslims communities like Hela and Halalkhor undertake manual scavenging, and are often excluded from surveys and rehabilitation packages.

4.4 There should be built-in processes for transparency and participation in the survey, and provision for people to suo-moto report the existence of scavengers and dry latrines, and also for appeals when their claims are rejected.

4.5 For rehabilitation purposes, it is important to note that we will need to have data both on a) families in which one or more member is currently engaged in manual scavenging; and b) families in which one or more member was engaged in manual scavenging since when the Act was notified in the state, or 10 years, whichever is longer.

5. Individual Rehabilitation plan:

5.1 Government of India ran a National Scheme Liberation of Scavengers (NSLRS) since 1993, replaced with a 'new and approved' scheme 'Self employment Scheme for Rehabilitation of Manual Scavengers' (SRMS). Each identified manual scavenger receives a loan from a public sector bank, and subsidy; some also receive training. Government reports that under 5 lakh scavengers have been assisted since 1993 with loan and subsidy under this programme.

5.2 However, several studies and reports, official and non-official, including the CAG, have identified many grave problems with this programme:

- i. The large majority of persons benefited under the programme were not actually engaged as manual scavengers.
- ii. An estimated 95% manual scavengers are women, whereas the majority of schemes and beneficiaries are men.
- iii. Many are older women, with little education, skills and experience; and a loan and subsidy enterprise programme is mostly useless for them.
- iv. There is also evidence of large-scale corruption, lack of transparency, delay, uncertainty and harassment.

5.3 In order to prevent this from recurring, it is proposed that after identification, demolition and liberation from manual scavenging, the District Collector will cause to be issued to each manual scavenger a card, which will list the person and members of her nuclear family, and her entitlements under this programme.

5.4 The rehabilitation plan for every person/family identified will have 4 components:

5.4.1 Livelihood rehabilitation (to be implemented by government within 3 months of identification): This will be applicable only for families in which one or more member is currently employed in manual scavenging as defined in the 1993 Act, or was engaged in manual scavenging on the date that the 1993 Act was notified in that state.

- i. Given the past experience of corruption and harassment in loans, and the fact that most manual scavengers are women, many of whom are older and with poor literacy, the scheme should be entirely grant-based. Women should have the option of receiving a monthly pension of Rs 2000, or an enterprise grant of up to Rs 1 lakh, supported by training and counselling facilities.
- ii. If she is in municipal or formal employment in government, semi-government or private companies (on regular, daily wage or contract basis), the law will require that her employment is not terminated, and instead she is confirmed in regular employment in a task not connected with scavenging.

- iii. Finally, in case she chooses, she will be permitted to sponsor one daughter or son to benefit under the SRMS Scheme of MoSJE, and this application will be fast-tracked.

5.4.2 Guarantee of Priority or BPL Card (rural or urban) as may be applicable, to all families in which one or more member was engaged in manual scavenging.

5.4.3 Housing Plan. Most manual scavengers live in urban settlements of castes of manual scavengers. If persons continue to live in these colonies, they will be identified as belonging to the stigmatised manual scavenging community even after liberation from the actual vocation. Therefore HUPA should create a scheme akin to Rajiv Awas Yojana, and enable them if they choose, to access a house under in a mixed colony, and thereby escape permanently caste identification. The HUPA scheme should require Government to bear the entire cost of the EWS house.

5.4.4 Education: The education entitlement will be for all children who are in families in which one or more person is currently engaged in manual scavenging, or was so engaged on or since the date the state adopted MS 1993. It would guarantee:

- i. government funded school education, for every child of school going age.
- ii. Children would be offered alternatives of study in social welfare hostels, or other residential schools run by central and state governments.
- iii. Alternately they could choose to go to day schools (government or private) supported by a high monthly scholarship and stipend from class 1 to 12; and also
- iv. Post- matric scholarships, including for marketable modern caste-neutral vocational and computer training

6 Survey of Dry Latrines

6.1 Government has linked the survey of individual latrines to the recently concluded Census 2011. However this Census consciously did not collect data on community latrines.

6.2 It is proposed that the same team proposed at every district suggested above conducts joint survey to a) verify the census list of dry latrines, in urban, semi-urban and rural areas; b) gap-fill for any individual dry latrines that may have been left out; and c) survey community dry latrines.

6.3 Once again, there should be continuous joint surveillance every 3 months until total eradication, and provision for suo-moto reporting.

6.4 It should be the legal duty of the District Collector to ensure that demolition of all indentified individual and community dry latrines should take place within 3 months of identification, and failure to do so would be a punishable offence.

7 Sewer Workers and Railways:

For sewer workers and railway workers, liberation will come from introducing necessary technological changes which will render the occupation humane, dignified and safe, and avoid any direct human contact with excreta. The maximum time period for this to be fully accomplished should be 4 years from the date of promulgation of the new Act. The law will also guarantee that no person who is employed at the time the Act comes into force in casual, contract or regular employment in any of these tasks, will not be terminated, and instead he will be confirmed in regular employment.