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### **Recommendations:**

India is a party to several international laws which speak of the duty to prosecute, investigate, and punish crimes. In light of India's commitments to international law, the scope of its criminal laws appears to be failing on several counts.

The following are a few general and specific recommendations for penal law reforms in India. These have been framed in light of several international developments, international laws, and relevant Indian laws and judgments. The recommendations concern the following themes:

1. Gaps in criminal law
2. Harmonization of Standards
3. Liabilities for Derogations from Fundamental Duties (cultural heritage)
4. A Project for Decolonization

### **→ Gaps in Criminal Law**

Because practices including acts of torture and harmful traditions have been designated as grave crimes under international law, the following suggestions are being made for amendments to Indian law/s.<sup>1</sup>

### **Torture**

India has not ratified the Torture Convention.

In terms of country-specific laws on torture, there is an onus on States to incorporate new forms of torture including cyber-torture and psychological torture.<sup>2</sup> Further, scholars in the field are advocating for the prosecution of acts of torture committed by private individuals.

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<sup>1</sup> Also consider the crimes of genocide and enforced disappearance.

<sup>2</sup> UN Human Rights Council, Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (March 2020).



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Considering that the “universal prohibition of torture is recognized to be of an absolute, non-derogable and peremptory character and has been restated in numerous international instruments of human rights, humanitarian and criminal law”<sup>3</sup>, criminal law in India is grossly inadequate for not legislating on the crime of torture.

### Harmful Traditions

The international human rights systems have advanced various strategies to curb harmful traditions against women and other vulnerable groups. Female Genital Mutilation, for instance, has been criminalized in many parts of the world.<sup>4</sup> In the absence of a law on torture, and a law on preventing and prosecuting “harmful traditions”, several harms against women and other groups remain invisible and unchecked.

In the recent Policy Report of the UNICEF, “Enabling Environments for Eliminating Female Genital Mutilation”, a mandate for the criminalization of FGM is provided. On the mandate for criminalization, the report states, that there should be “a legal framework that clearly defines female genital mutilation, prohibits its practice and provides for criminal sanctions against it is an effective way to fulfill a State’s obligation under international human rights law. It also sends a strong message that female genital mutilation is an unacceptable harmful practice and creates a positive environment for the transformation of the discriminatory gender and social norms that underpin the practice.”<sup>5</sup>

In this regard, the onus for forging culturally specific standards/legislation for the prosecution of harmful traditions (including FGM) in India arises.

### **→ Harmonization of Standards**

India, as a signatory to several international treaties, is required to harmonize international standards with domestic standards.

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<sup>3</sup> *Ibid.*

<sup>4</sup> Charlotte Proudman, *Female Genital Mutilation: When Culture and Law Clash* (2022).

<sup>5</sup> UNICEF, Policy Brief, *Enabling Environments For Eliminating Female Genital Mutilation Towards a Comprehensive and Multisectoral Approach* (2021).



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Worth noting is the report submitted by the UN Special Rapporteur on Violence against Women, “rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention”.<sup>6</sup> In the making of the report, the Special Rapporteur received 207 submissions that highlighted the significant gaps between States’ obligations and international human rights standards on rape. While defining rape as a “grave, systematic and widespread violation”, the Special Rapporteur has made a strong case for closer scrutiny of laws and legal provisions dealing with rape in different legal systems. The report particularly takes into account the lack of harmony in domestic law provisions which deal with the definition and constitutive elements of rape, the mitigating and aggravating factors during sentencing, the prosecution of rape by intimate partners, and the provisions on sanctions and punishments. The report labels the lack of harmony as “gaps between state obligations and international human rights standards” which in the case of rape also include “hidden domestic norms” that protect perpetrators of the crime.<sup>7</sup> In the Indian context, the report advocates for changes concerning there being “no statute of limitation for the prosecution of rape”<sup>8</sup> and others.<sup>9</sup>

### → Liabilities for Derogations from Fundamental Duties

In the last few years, much attention has been given to duties of citizens within constitutions.<sup>10</sup> Derogations from duties have been subject to prosecution, as a part of the broader enforcement strategies adopted by States.

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<sup>6</sup> UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, “Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention” (April 2021). Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/089/99/PDF/G2108999.pdf?OpenElement>

<sup>7</sup> See Deepa Kansra, The Harmonization of domestic and international human rights standards on criminalization of rape, *Rights Compass* (June 2021). Available at <https://philpapers.org/archive/KANTHO-3.pdf>

<sup>8</sup> *Supra* note 7.

<sup>9</sup> The case for harmonization of standards cuts across several areas governed by Indian criminal laws, including defamation, hateful speech, internet-based crimes, etc.

<sup>10</sup> See Eric R. Boot, *Human Duties and the Limits of Human Rights Discourse* (2017); Wim Voermans, Maarten Stremler, Paul Cliteur, *Constitutional Preambles A Comparative Analysis* (2017).



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Under the Indian Constitution, the enforcement of fundamental duties has been a concern. However, some duties now require a stronger framework for enforcement. Take the example of Article 51-A (Part IVA), clauses (f), and (j).<sup>11</sup> The subject matter of the clauses has been closely reviewed in the international rules and domestic laws of countries. In the Indian context, the case of *Periyambadi Narasimha Gopalan v. Secretary to Government*<sup>12</sup> discussed the duties of States and Citizens toward the protection and preservation of cultural heritage. The Court also refers to the international guidelines adopted by the United Nations Educational, Social and Cultural Organization (UNESCO).

On the inadequacies of law, the Court states, “according to Article 51A(f), it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture. The Constitution thus, not only brings an obligation on the State, but also a duty on every citizen of this country to value and preserve the rich heritage of the culture of this country, which goes without saying that it includes temples, arts, sculptures and scriptures. However, it is the sorry state of affairs that the Government has miserably failed in its duty not only to protect the places of national importance, but also the properties of temples, such as idols, lands etc. Therefore, the Directive Principles of State Policy must be directed towards protection of the ancient monuments and idols and thwart all attempts to damage and/or smuggle them.”

As part of an emerging global ethic on cultural heritage, non-enforcement of applicable criminal laws raises serious concerns.<sup>13</sup>

### **→ A Project for Decolonization**

The process of decolonization has been advanced as a tool in many countries, for the sake of initiating and asserting reform within existing legal frameworks. In 2020, the UN General

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<sup>11</sup> Indian Constitution, Article 51-A (Part IVA), clauses (f), and (j). provide- (f) to value and preserve the rich heritage of our composite culture, and (i) to safeguard public property and to abjure violence.

<sup>12</sup> W.P.(MD)No.24178 of 2018

<sup>13</sup> Other duties as provided under the Indian constitution can also be reviewed from the prism of criminal law prosecutions and sanctions.



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Assembly announced the Fourth International Decade for the Eradication of Colonialism (2021-2030).<sup>14</sup>

In the context of India, judicial interventions for the decriminalization of begging (beggary laws), homosexuality (IPC), and adultery (IPC) are some notable examples that align with the objectives of the decolonization process. It is of utmost importance to proactively initiate an alignment with the decolonization project by reviewing and assessing the totality of criminal law provisions in India (substantive and procedural). The project should support two objectives namely **the review of existing laws, and the creation of new criminal rules in a participatory and culturally sensitive manner.**

### **Final remarks**

Legal reforms not only concern legal rules but also societies and public institutions. This understanding makes a compelling case for introducing long-term thematic projects with academic institutions and other stakeholders committed to critical and interdisciplinary research for legal and social change.

The recommendations mentioned above require a comprehensive set of targets involving a critical study of different aspects of criminal law and justice in India. It is a good cause for encouraging and blending academic research into criminal law policy and reforms. It is also a good cause for aligning with the best practices, models, and rationalities advanced by other countries.

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<sup>14</sup> UNGA Resolution adopted by the General Assembly on 10 December 2020, on the Eradication of Colonialism (2021-2030). Available at [N2036283.pdf \(un.org\)](#)