



Rewriting Charu Khurana and Others v. Union of India and Others for the Indian Feminist Judgments Project: Some Reflections

Reescrevendo Charu Khurana and Others v. Union of India and Others para o Projeto Indiano de Julgamentos Feministas: Algumas Reflexões

Rachna Chaudhary¹

¹ School of Human Studies, Dr. B.R. Ambedkar University Delhi, India. E-mail: rachna@aud.ac.in. ORCID: <https://orcid.org/0000-0002-7274-7811>.

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Abstract

This article is semi-experiential, written from the vantage point of a critical insider/outsider as the author has no formal degree in Law but her research at the intersections of law and feminism and her teaching experience as a Political Science faculty in a law school, for seven years, mark her as an insider. This specificity or rather ambiguity of her location aids in an act of appropriation and subversion in keeping with the vision of the Feminist Judgments Projects from different parts of the world, to rupture the Law's/judges' claim to exclusivity of judging. The key objective of the article is to engage with methodological and epistemological challenges that a feminist rewriter of a judgment has to face in a neo/post-colonial context like contemporary India. The author draws attention to the lack of interdisciplinary perspectives in legal education curriculum and pedagogy in India and argues that reimagining of justice by supplying radical interpretive frameworks requires re-imagination of the system that educates students of law who then enter legal practice in various capacities and roles. The article also locates judicial privilege and hierarchy in everyday practices and technicalities of law insisted upon in courts; exhibited in complexity of legal language and discursive gestures; and the materiality of judicial authority inherent in spatial practices, symbols and monuments.

Keywords: Feminist Judgments Project; Indian Feminist Judgments Project; Legal Education; Interdisciplinary Perspectives; Feminist Methodology; Feminist Jurisprudence.

Resumo

Este artigo é semi-experiential, escrito a partir do ponto de vista de uma crítica que é insider/outsider, na medida em que a autora não tem formação em Direito, mas a sua pesquisa nas intersecções entre Direito e feminismo bem como a sua experiência de ensino como docente de Ciência Política numa Faculdade de Direito, durante sete anos, marcam-na como insider. Esta especificidade, ou melhor, ambiguidade da sua localização ajuda num ato de apropriação e subversão, em consonância com a visão dos Projectos de Julgamentos Feministas de diferentes partes do mundo, para romper com a reivindicação de exclusividade do julgamento por parte do Direito/juízes. O principal objetivo do artigo é o de abordar os desafios metodológicos e epistemológicos que uma (re)escritora feminista de uma sentença tem de enfrentar num contexto neo/pós-



colonial como o da Índia contemporânea. A autora chama a atenção para a falta de perspectivas interdisciplinares no currículo e na pedagogia do ensino jurídico na Índia e argumenta que a reimaginação da justiça através do fornecimento de quadros interpretativos radicais requer a reimaginação do sistema que forma os estudantes de direito que depois ingressam na prática jurídica em várias qualidades e funções. O artigo também localiza o privilégio e a hierarquia judiciais nas práticas quotidianas e nos aspectos técnicos do direito utilizados nos tribunais; expostos na complexidade da linguagem jurídica e dos gestos discursivos; e na materialidade da autoridade judicial inerente às práticas, símbolos e monumentos espaciais.

Palavras-chave: Projeto de Julgamentos Feministas; Projet de Julgamentos Feministas Indiano; Ensino Jurídico; Perspectivas Interdisciplinares; Metodologia Feminista; Jurisprudência Feminista.



Introduction^{1 2}

This is an interesting yet contradictory phase in Indian legal system as there have been some changes that can be marked as conducive to promotion of gender equality while everyday practices and procedures continue to operate in a conservative mode that continues to favour dominant groups and privileged individuals. The Chief Justice of the Supreme Court³ of India, on 16th August, 2023, released a “Handbook on Combating Gender Stereotypes”⁴ with the aim of setting some bench marks for judges and the legal community to avoid using sexist and misogynist language in everyday exchanges as well as formal writings. This event should be read in conjunction with a series of judgments delivered by the Supreme Court in the past few years which can be marked as progressive in terms of upholding gender equity.⁵

¹ I thank Fabiana Severi for helping me with this paper at various stages and in myriad ways. I am also grateful to Shubhra Nagalia who read multiple drafts and gave crucial inputs.

² *Charu Khurana and Others v. Union of India and Others* (2015)1 SCC 192- Charu Khurana, a judgment delivered by the Supreme Court of India in 2015 is hailed as one of the ‘good’ judgments as it upheld women’s right to work as make-up artists in the Hindi film industry based in Mumbai, India. The petitioners challenged the decision of the Cine Costume Make-up Artists and Hairdressers Association of Mumbai as the Association denied their request to be allowed to work as make-up artists. This was done on mainly two grounds, one, that the petitioners were women and could thus only be hairdressers according to the rules of the Association and two, they were also not domiciles of Maharashtra, an Indian state, for a continuous period of five years at the time of applying for membership of the said association. The Association denied that the membership request was rejected on the ground of their being women as they had applied for hairdressers category only. The Association then went on to admit that this choice of having applied under this category was restricted since there was no provision of giving membership to women as make-up artists. This was done for the ‘betterment of the association and not to discriminate on the basis of gender’ even as it was explicitly stated that “It is the rule of association to disallow the female members to work as Make-up Artists.” The matter came up in the Supreme Court and the court decided to give relief to the petitioners by quashing the discriminatory clauses of the Association’s constitution. The author has rewritten this judgment for the Indian Feminist Judgments Project. The rewritten judgment has not yet been published.

³ The Supreme Court of India was established under the Constitution of India on 26th January, 1950. It is the final court of appeal and its decisions or judgments are binding on all other courts in India which includes a high court for each state (with few exceptions), lower courts at district level and subordinate courts below them. The Supreme Court is recognized as the final interpreter of the Constitution and has original, appellate and advisory jurisdiction. It has a sanctioned strength of 34 judges at present, including the Chief Justice. See Aparna Chandra, Sital Kalantry and William H.J. Hubbard (2023).

⁴ It’s available at: https://main.sci.gov.in/pdf/LU/04092023_070741.pdf

⁵ *The Secretary, Ministry of Defence v. Babita Puniya & Ors.* MANU/SC/0194/2020; *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.* (2018) SCC OnLine SC 1690; *Shafin Jahan v. Asokan K.M. and Ors.* AIR 2018 SC 1933; *Independent Thought vs. Union of India* (2017) 10 SCC 800; *State of Maharashtra & Anr. v. Indian Hotel & Restaurants Assn. & Or.* (2013) 8 SCC 519; *Anuj Garg and Others v. Hotel Association of India and Others*, AIR 2008 SC 663 - These judgments are being marked as progressive as they endorsed certain rights asked for, by the petitioners, for instance, against discriminatory religious practices and gender based employment discrimination, recognition of basic rights of sex workers, and thus paved way for more such decisions that favoured women approaching the Supreme Court for relief. It is not being claimed that the terms of relief in these judgments can be read as ‘feminist’ as the outcome is not reflective of the problems inherent in judicial reasoning and language used in these judgments.



A few days earlier, on 11th August, 2023, the Union Home Minister introduced three Bills in the *Lok Sabha*, lower house of the Parliament of India, to replace the Indian Penal Code (IPC), 1860; The Code of Criminal Procedure, 1973 (originally enacted in 1898); and the Indian Evidence Act, 1872, a move that is projected as a complete overhaul of colonial-era criminal laws but critical reviews of this attempt at Indianisation/indigenisation have indicated problems in the proposed framework.⁶ Meanwhile, subordinate courts keep coming up with orders and judgments using sexist and misogynist language, indulging in moral policing and vilifying women while dealing with matters involving women as litigants, especially in cases of sexual or domestic violence. These judicial communiqués are indicative of continued regressive approach towards the idea of gender equality and justice. However, it is important to emphasize that it doesn't imply that all subordinate courts operate in a patriarchal manner and that the Supreme Court has only handed down progressive rulings, but instances of problematic formulation of decisions are more frequent at the lower levels of the judicial system.

These background facts have a bearing on transformatory projects like the Feminist Judgments Projects (FJPs). These projects can be found all over the world as they have covered a vast geographical expanse in comparison to the initial days when some of the projects were launched, starting with the Women's Court of Canada on March 6, 2008 (CHANDRA, SEN, CHAUDHARY, 2023). While the 'fatigue' of FJPs has been marked in some reflections, this is also the time to consolidate the gains made by individual projects and infuse new critical energy in the movement that uses rewriting judgments as a method of undertaking feminist critique(s) of Law and its workings (O'DONOGHUE, 2019; HUNTER, 2012).

This article addresses some aspects of the following concerns/questions. What does it mean to be involved in a project like the Indian Feminist Judgments Project (IFJP) in these contradictory times in a post/neo-colonial context? (CHANDRA, SEN, CHAUDHARY 2021; 2023). How do we stake claims to the legacy of a larger transnational movement like FJPs? What is similar and/or different about IFJP, situated in the Global

⁶ The critical reviews have pointed out problems like the existing criminal laws are to be replaced completely by the proposed new laws that have been given Hindi names. While Hindi is the official language mentioned in the Constitution of India, there is a long and troubled history of resistance against imposition of Hindi as the dominant language throughout the country which makes this act of naming the proposed laws controversial. Other points raised by reviewers include retention of the language/categories of existing laws, creation of new categories with stringent provisions, among others. See Editorial, *The Hindu* (August 14, 2023); Anup Surendranath (August 13, 2023); S. Srinivasa Rao (2008).



South and its context, in comparison to the other FJPs, mostly located in the geopolitical Global North?

About the last concern, it's important to indicate that this distinction is not only being made in terms of marginality and privilege but also because most of the publications and substantial public presence is associated with FJPs located in the developed world/First World and hence more nascent projects including those from the Third World, turn to these for support and reference. The FJP projects from Global South are gradually marking their presence as both, IFJP and the Feminist Judgments Project- Brazil have brought out publications. The Pakistani and African Feminist Judgments Projects have also been working on rewriting judgments from their respective jurisdictions.

This article has been written in my individual capacity as a co-convenor of the Indian Feminist Judgments Project, as a reviewer of submissions of rewritten judgments and commentaries and as one of the judgment writers of the project. The IFJP has three convenors, Jhuma Sen, Aparna Chandra and Rachna Chaudhary. The arguments/points made here are personal and are not made on behalf of the project. The idea is to be a critical insider/outsider and relook at the process of rewriting judgments from a feminist perspective and also to engage with certain epistemological and methodological dilemmas faced by feminist judgments projects, especially in the Global South. The format of this article is closer to the 'Reflections' included in *Feminist Judgments in International Law* which share insights from the rewriting process taken up by its project (HODSON, LAVERS, 2019; MCDONALD, POWELL, STEPHENS, HUNTER, 2017).

I do not have any formal disciplinary training in Law but most of my research has been at the intersections of law and feminism. I have also taught Political Science to undergraduate law students from 2003-2010 at a law school in Delhi, India. My doctoral work on 'Penal Discourse and the Female Criminal: A Study of Delhi High Court Judgments' has also helped me in engaging with the legal world and its practices. All these specifics help me in claiming the status of an insider while the lack of formal training in law and my teaching experience of teaching Political Science at undergraduate level and Gender Studies at Master's and research programmes' level, mark me as an outsider. It is against this background that I have written this semi-experiential piece. I got introduced to the world of judgments while doing random



searches for a 'relevant' Ph.D. topic in the late 1990s and have been working with and around judgments ever since.

I start with a definition of critique borrowed from Fernando which I use as a methodological device for framing my reflections in this article (FERNANDO, 2019). The next section outlines a very sweeping and brief history of autonomous women's movement(s) in India to contextualise this article. The aim is to mark certain key issues, events and efforts to highlight the fact that women's movement(s) in India and feminist theorizations have engaged with the State in diverse, contradictory and complex ways as far as legal reforms around women's rights are concerned (SREEKUMAR, 2009).

The following sections reflect on the larger context of legal education in India, statutory provisions and spatial practices which bestow power and privileges on the judiciary in India. The later section of the article draws upon my experience of rewriting *Charu Khurana and Others v. Union of India and Others* for the IFJP.

Critique as Methodology

Critiquing legal practice and illustrating alternative ways of judging is the key objective of the Feminist Judgment Projects. Following Fernando, I use critique as a form of care to rethink legal ethics as well as cross-cultural/national feminist solidarity (FERNANDO, 2019). The author draws upon the life and works of anthropologist Saba Mahmood to frame "critique as care" as "subjecting our ideas, assumptions, and commitments about the world to constant scrutiny, if it means making us more open to others and less certain of ourselves" (FERNANDO, 2019). I find this imagination of critique as facilitative of conversations and hence a useful device for a critical project like FJP rather than imitating the adversarial model of litigation, practiced in modern, common law based legal systems.

The FJPs envision judgments as the key site of socio-legal transformation and hence we need to be alert to the immediate context in which judgments get produced which includes the court – both as a spatial entity and as a concept. The FJPs, through the rewriting endeavours, have focused on judicial behaviour/reasoning and the role of language in upholding, reproducing and reiterating patriarchal, casteist, classist and misogynist biases. I posit that we also need to pay attention to the larger context that



bestows and upholds the privileges of the court and the judges in the respective legal jurisdiction that the FJPs are located in. The diverse scholarship in critical legal theory and feminist legal theory should be supplemented by bringing perspectives and methodologies from other disciplines to target “what is presumptive, sure, commonsensical, or given in the current order of things” (BROWN, 2009).

Women’s movements, feminism and law

This section briefly traces the genealogy of women’s engagement with the state and the law in modern India to contextualise the IFJP. Starting with the colonial period or the ‘prehistory’ of constitutional rights seems to be relevant to a project like IFJP as it was also the beginning of the common law legal system.⁷

Sen emphasises the importance of the colonial period by describing it as “a watershed in gender relations” since modernity as a process was set in motion by colonial and indigenous initiative (SEN, 2000). Sen’s observation about how colonial modernity had a fractured impact that benefitted a small group of elitist women by giving them access to education, employment and political participation while simultaneously disempowering the poor, low caste and minority women, needs to be kept in focus (SEN, 2000). This was evident in the struggle for equality in this period which was marked in terms of social reforms and often resulted in legislation on issues like sati, widow remarriage, child marriage, female education, among others.⁸ But these changes had limited impact as many groups were left untouched by these ‘reforms’ due to various reasons and also because many of these legal provisions proved to be counter-productive (SANGARI, VAID, 1989). Sangari and Vaid attribute this to the failure to ‘distinguish between the forms of patriarchy which were cross caste or class and those which were specific to particular groups’ and also because of the inherent

⁷ The foundation of the contemporary legal system in India was laid down by the British by codifying various laws and thus establishing uniform laws to be followed throughout the areas under British rule with the Indian Penal Code, 1860/1862 being the first such law (KANNABIRAN, 2010).

⁸ The British colonial authorities highlighted as cruel/barbaric, certain socio-religious practices in 19th Century India as these were considered to be not in tandem with the project of ‘civilising’ the natives. This resulted into a series of ‘reforms’ addressing Indian women’s (deplorable) condition and a reconstitution of tradition by constructing women as emblematic of tradition in the debates that these corrective measures generated. Sati was one such practice. Sati, which was a custom practiced by upper caste Hindus in some parts of India, was the most contentious of these practices as it involved self-immolation by a widow, and there are varied accounts around it being a voluntary act or one forced by the family/community (Lata Mani, 1987).



conservative bias in such legislation that negated the radical potential of these laws (SANGARI, VAID, 1989). This “dual and paradoxical attitude toward the “woman’s question”” is not peculiar to the colonial state only and is a constant even in the approach of the independent state in contemporary India (SEN, 2000).

Kannabiran highlights how, even during the colonial period, women from different backgrounds kept challenging the monolithic notion of a universal Indian womanhood, something that we continue to struggle with, in the courts in contemporary times (KANNABIRAN, 2010). This does not mean that there was no common ground for struggles that ranged from countering violence in various forms, to seeking legal remedies and rights, along with fighting for political representation (SEN, 2000). Some of the judgments being rewritten by the IFJP will re-engage with these struggles and dilemmas.

The independence from British rule in 1947 and the subsequent enactment of the Constitution changed the discourse of the women’s question as formal equality and universal adult franchise promised an egalitarian socio-political and economic order. The decade of the 1970s saw a resurgence of the women’s movement as feminism gained foothold in the western/developed countries and the UN declared 1971 as the international year of women and then the whole decade was designated as such. Even though symbolic and tokenist in some ways, these gestures had an impact on local politics also as governments took up measures ranging from stock taking to bringing changes in laws and developing new policies with women in focus as the beneficiaries.

The Government of India appointed a Committee on the Status of Women which was an eye-opener in many ways despite various limitations that subsequent reviews have brought up, including reflections by some of the committee members.⁹ The report of the Committee indicted the Indian state by pointing out that the condition of Indian women (especially poor women) had worsened since 1911 as gender disparities had widened in employment, health, education, and political participation (SEN, 2000). This was also a period of rise of various social movements as women from different classes, castes, tribes, regions and communities learnt their political lessons while fighting the state’s liquor policy, protesting against price rise, highlighting environmental concerns,

⁹ The report titled *Towards Equality* is considered to be an important document for the women’s movement in India and infused new life into the struggle for gender equality. Part 1 of the report is available at <https://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf>



opposing the emergency imposed by the then Prime Minister Indira Gandhi in 1975, among other struggles.

The fight against gendered violence was the unifying force for the women's movement during the 1970s and 1980s, starting on a wider scale with the Supreme Court judgment in what is known as the Mathura rape case and the subsequent outrage against it.¹⁰ The uproar led to significant changes in the relevant legal provisions in the Indian Penal Code, the Evidence Act, the Criminal Procedure Code including the introduction of a category of custodial rape. The campaign against dowry related deaths led to amendment in the Dowry Prohibition Act, 1961 and the insertion of Section 498-A, which widened the definition of cruelty by including mental cruelty along with physical harm.¹¹ It is not that these legal provisions changed the lives of Indian women but these were important victories as apart from getting legal remedies on the statute book, these campaigns also generated discussions around these issues that both strengthened the women's movement in certain ways and deepened the existing fissures (SEN, 2000). The beginning and subsequent institutionalisation of Women's Studies added to these conundrums as a growing body of feminist scholarship contributed to these debates (MAZUMDAR, 1994; PANDE, 2018; CHAUDHURI, 2012; DATTA, SEN, SREENIVAS, 2021; SREEKUMAR, 2017).

It is beyond the scope of this article to track the debates surrounding these and many more campaigns that the women's movement engaged in, not only due to lack of space but also because a quick appraisal would not be able to do justice to the complex formulations underlying these campaigns and the debates that surrounded these issues and also because there is no longer any dearth of relevant literature in these areas. Even in the last three-four decades, there have been mobilisations around questions of

¹⁰ *Tuka Ram And Anr v State Of Maharashtra*, 1979 AIR 185 - This case involved charges of custodial rape against two policemen who raped a tribal teenaged girl in a police station in 1972 in the state of Maharashtra in India. The Supreme Court acquitted the policemen and made some very derogatory remarks about Mathura, the girl who was raped. There was a huge mobilisation and series of nation-wide protests against the judgment after four law professors, Upendra Baxi, Raghunath Kelkar, Lotika Sarkar and Vasudha Dhagamwar wrote an open letter to the Supreme Court against the misogynist and regressive order. This phase is seen as a turning point for the autonomous women's movement in India and gradually led to series of changes in the penal provisions dealing with rape. The Open Letter can be accessed at <https://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf>.

¹¹ Dowry refers to the customary practice among Hindus, of giving gifts including cash, clothes, jewelry, furniture, household items and gadgets, vehicles, immovable property by the family of the bride to the groom/groom's family. Many women have lost their life or suffered violence in their matrimonial family as demands for dowry became an excuse for continued violence, at times leading to death by suicide or murder by matrimonial family members. Despite stringent laws, the practice continues and is now being adopted even by some communities where it was not a customary practice.



gender-based violence, sexual violence, reproductive health and rights, gender based employment discrimination, gender based discrimination in personal laws, sexual rights, among others. A brief mention is still warranted in the context of a project like IFJP so that we have a sense of the struggle before us and the need to delineate the agenda for future feminist politics.

The next section gives a critical appraisal of the contemporary legal education system in India as the functionaries in the court who supply the terms of reference/s for the judgments, are product of not just their gender, class, religion, region, ethnicity, caste and political location but also of their education.

Integrating Social Sciences in Legal Education

Legal education in India is offered in mainly two modes, a three-year, post-baccalaureate programme generally offered by conventional law colleges/faculties affiliated to a university and a five-year system where a dual degree of Bachelor of Arts and Bachelor of Legislative Law is offered, which students pursue directly upon completion of their school education. While the three-year programmes generally focus on what are termed as core law courses, the five-year law degree programmes also include social sciences in their curriculum for the initial two years of the programme. Despite multiple attempts at *modernising, standardising* and *reforming* legal education, integration of social sciences in five-year legal education curriculum remains tokenist (BABBAR, CHAUDHARY, 2020). This gap has an impact upon the ability of students of law to make cross-disciplinary connections in their research and writing. While this tendency to guard against any breach of disciplinary boundaries is a common conventional practice in all disciplines, in law this tendency has greater ramifications when the writing becomes the basis of adjudication. The content and pedagogy of contemporary legal education differs from that of liberal arts, both methodologically as well as politically since the inbuilt veneration for law in relevant literature has an impact upon the way law is taught (GUDAVARTHY, 2013).¹²

¹² The social sciences or liberal arts are not being projected as crisis free areas within academia and it is not just Law programmes that seem to be averse/immune to interdisciplinarity as Babbar and Chaudhary (2020) have argued. Gudavarthy (2013) labels efforts directed at introducing interdisciplinary approaches in India



Lakshminath summarises the effect of the legal education as: “simultaneously reflect and produce a normalised lawyer’s way of thinking that in turn affirms the complicity promoted within the passivising classroom environment and perpetuates the prevailing legal ideology” (LAKSHMINATH, 2008). It is important for FJPs to incorporate in their work, reforms of legal education in their respective jurisdiction as an aligned and important issue. McDonald et al. have also emphasised upon the need to ‘start with our students’ as a major step towards integration of feminist judgments into mainstream legal education (MCDONALD, POWELL, STEPHENS, HUNTER, 2017).

My experience of teaching Political Science to students studying Law has been that of inhabiting the margins as social sciences’ faculty were not allocated students as dissertation supervisors, nor were we invited to the dissertation viva voce examination and there were no efforts towards collaborative teaching.¹³ Even interdisciplinary courses like Law and Development were taught by faculty with a disciplinary training in law. The affiliating university made policy changes including waiving of credit requirements for social science subjects for calculating final grades and decreasing total assigned credits for social science subjects thus highlighting the marginal status of these ‘non-professional’ courses. Social science and humanities or liberal arts’ teachers are often asked by students about the relevance of studying these subjects as they saw these as unnecessary (SEN, 2016; BABBAR, CHAUDHARY, 2020).

This approach towards social sciences and liberal arts is difficult to align with the key objective of most FJPs, which is to use the rewritten judgments as a pedagogical tool. We need to keep in sight these gaps to effectively facilitate the inclusion of rewritten judgments in legal education curriculum and pedagogy.

as ‘non-starters’ (2013, p. 234) and he attributes this failure to multiple factors like “deep discomfort from pedagogic methods to recruitment for teaching positions in the colleges and universities” (p. 232).

¹³ These experiences are not being cited as pan-Indian phenomena as elaborated by Babbar and Chaudhary in their Introduction and the experiences enumerated in the book are from a privately funded college affiliated to Guru Gobind Singh Indraprastha University, Delhi. The time frame of that tenure was from 2003-2010. Many practices have since changed but social sciences remain at the periphery of legal education in majority of the law programs. There have been certain individual attempts, both at personal and institutional level to encourage interdisciplinarity but these are mostly confined to elite institutions like some of the National Law Universities in the metropolitan areas. We need more qualitative accounts to validate this argument for a larger context. See Shilpa Khatri Babbar and Rachna Chaudhary (2020).



'Courting' Power

I argue that the reverence towards Law and its functionaries (judges in this instance), that is taught in the law programmes, is carried to legal practice as well and is sustained and reinforced by the privileges bestowed upon the judiciary and senior lawyers. This is evident as the case law approach still remains the dominant pedagogical choice in legal education thus passing on the inherent biases to the future practitioners of law. Law schools also take pride in giving practical training to their undergraduates by organising and participating in moot court competitions where existing practices are emulated by the students and the simulated experience is kept as close as possible to 'real practice' in format and content. The insistence on propriety and decorum in the court; demand for specific styles and colours of clothing; deferential mode of address towards the court and the process; the use of honorifics like Honourable, My Lord/Lordship, Your Honour serve as tools of reiteration of privilege and hierarchy.¹⁴ These rituals/procedures of the court help in maintaining the 'pseudo-sacral air' around the idea and practice of judging (SCOTT, 2016).

The Advocates Act, 1961 makes a hierarchical distinction between different categories of lawyers.¹⁵ The Act specifies that the Attorney-General of India shall have pre-audience over all other advocates. After that, the Solicitor General has the privilege of pre-audience over all other advocates, followed by the Additional Solicitor General. The next in line of this privilege of pre-audience are the Advocate-General of any state and amongst them, their respective seniority decides the order of audience before the court. The last category to get this preference is senior advocates based on their respective seniority. Institutional arrangements and practices like these are necessary for their functional value but also add to the power of the institution as well as aid in congealing hierarchies within the judicial system. This is paradoxical as these rules are contradictory to the principles of equality that the court is expected to uphold and protect.

¹⁴ This has been a bone of contention as The Bar Council of India (BCI) Rules, which regulate professional etiquettes to be followed by lawyers across the country, had in 2006 made it binding on lawyers to address judges of High Courts and Supreme Court as "Your Honour" or "Your Lordship". The use of my lord or your lordship is cited as a colonial relic and has been a point of debate. The insistence on old/archaic or more democratic forms of address, are left to the desire of individual judges with insistence on using a dignified and respectful form. Some portions in this article have been borrowed from an article co-authored by me. I thank my co-author Rashmi Gopi for agreeing to the use of those references, sentences or quotes. See Rashmi Gopi and Rachna Chaudhary (Jan-March 2021).

¹⁵ Available at: <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/Advocates-Act1961.pdf>



A petition can only be filed in the Supreme Court by an Advocate-on-Record and in English language (CHANDRA, KALANTRY, HUBBARD, 2023). The dominance of English, both as a medium of instruction in legal education and in legal practice, is not just a colonial relic or a tool of knowledge capitalism but also a ‘value’ that sustains the divide between the privileged and non-privileged knowledge/justice seekers.¹⁶ The negative impact of ‘linguistic shortcomings’ or language barrier of marginal legal subjects on access to justice is well documented (ELSRUD, LALANDER, STAAF, 2017). The experience of marginality gets exacerbated in the context of India due to a number of factors like the dismal judge to-population ratio, a high rate of poverty and illiteracy, huge monetary costs, long drawn procedures, the complexity of the process, and lack of legal aid (GURUSWAMY, ASPATWAR, 2013). How do we/FJPs engage with these issues/concerns that are context specific and yet common for most jurisdictions, though the variables might be different for each context?

Architecture and Spatiality of Justice

The field of law and architecture has produced substantial literature to map the court ‘as a representational form of architecture’ (Scott 2016: 11). A virtual tour of the Supreme Court of India, uploaded on its website, provides rich material in terms of the self-perception of the court.¹⁷ The voice-over is in impeccable English and the adjectives used for the Supreme Court add to the ‘grandeur’ of the court. The Supreme Court is described at various points in the virtual tour as a monolithic institution, the third pillar of democracy, flag bearer of *Dharma* (path of righteousness), temple of justice, a shrine for intense discussions and debates, indomitable, undeterred, alpha court, architecturally coherent and artistically sound, the immense workload of the judges is described as a Herculean task. Halder (1994:199) observes that through the display of splendour vis-à-vis the court, ‘the outsider is subjected, through admiration and astonishment, to monumental law’.

¹⁶ D. P. Pattanayak quoted in Natraj et al (2001), p. 3131.

¹⁷ This section is based on videos titled, A Virtual Tour of the Supreme Court of India, and a Documentary on Supreme Court of India – “Truth Alone I Uphold”. Available in: <https://guidedtour.sci.nic.in/showVideos.drt>. Access date: 5 September, 2023.



The building that houses the court is described as an architectural marvel, designed in Indo-British style, in the shape of a balance with a pair of scales. Reference was also made to 'the exquisite beauty and the riveting history of this magnificent institution'. A glimpse into the functioning of the apex court shows the Chief Justice arriving in a chauffeur driven luxury car, with a beaming red light on the roof and the door is opened by a liveried man. Elitism and opulence is inherent in everything that is associated with the institution like the sprawling building and the compound, murals and statues installed on the premises, ceremonial attire of the support staff, the crockery and the furniture in use, shining and well-polished brass number plates outside court-rooms, and liveried staff helping the judges in putting on their robe. The way codes of conduct for judges are drafted, both at national and international levels, perpetuates the sense of aloofness, privilege and exclusivity.¹⁸ Baxi's observation that in the courtroom, the architecture of the building, demarcation of spaces, articulation of cases by advocates and the adjudication by the judges produces and reiterates power hierarchy is validated in this virtual tour (BAXI, 2014). The court complex has heavy security and it is difficult to access the premises even though the video of the virtual tour claims that 'being a public court' the Supreme Court maintains a visitor's lounge to allow public access to all court proceedings. Scott marks this 'architecture of contradiction' by pointing out the democratic spirit inherent in the 'gestures of receptivity and permeability' by welcoming the public and simultaneously ensuring that the court complex is an exclusive zone with circumscribed access to those outside the legal system (SCOTT, 2016). The three storied judges' library is considered to be one of the largest in Asia. The use of raised structures, be it the main court complex or the podium where the judges sit indicates the hierarchy inherent in the 'lofty' role played by the judges and those who approach the court seeking justice (PERRY, 2001). This is in sharp contrast to the physical conditions in which lower courts in the country function as the court buildings are over-crowded, lacking proper seating arrangements, shortage of

¹⁸ The Supreme Court Officers and Servants: Conditions of Service and Conduct, 1961. Available on: https://main.sci.gov.in/pdf/Gazette/01102022_082727.pdf. Access date: 26 August, 2023. The exclusionary character of this institution is evident in the title of the Rules as it marks a distinction between officers and 'servants' of the court.

The Bangalore Principles of Judicial Conduct, 2002 were recognised by the United Nations Economic and Social Council (ECOSOC) as complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary. Available on: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. Access date: 26 August, 2023.



basic amenities like drinking water and toilets, inadequate space/chambers for lawyers, among others.

'Person' in law: grandiloquence and ambiguity

The trial in a courtroom is a privileged site where we may trace how the law constitutes its truth (BAXI, 2014). In this process of constituting truth, the judge, the advocates, the parties of the case and the larger group of persons present in the court complex – all imagine courtroom simultaneously at two levels, as an extension of society and also as spaces where society is produced (SURESH, 2019).

It is evident that the vision and version of the truth solely rests with the judge and this institutional power of making truth, magnifies the power of the person and the position. Ambiguity is thus written into the technicalities of legal language and processes. Baxi highlights that the court's spatial arrangements also produce ambiguity since it is an auditory space organized on the principle of 'visibility of justice rather than its audibility' (BAXI, 2014). She notes that the greater the audibility, the closer an individual is to privilege. Baxi concludes that what is said to the judge and what the judge speaks is not audible to many (BAXI, 2014). At the end what reaches the public is also the dictated words of the judge to the clerk (BAXI, 2014). In the process, plurality of words, silences and emotions are sanitised from the record. Can the judgments then be perceived as 'an elevated form of self-expression' where the judge is marking himself apart from other judges and those involved, yet reaffirming the fraternal codes? (GASMAN, EPSTEIN, 2003). The rewritten feminist judgments are also *imitations* of the *original* judgments as most projects have tried to stay as close to their contextual judgment writing formats as possible. How are we, the feminist judgment writers, going to escape from 'writing in' privilege and hierarchy if the context and format remains the same?

The IFJP held writing workshops in May and October 2018 and we invited serving/retired judges, practising lawyers along with academicians, activists, as resource persons to give their inputs to the commentary and judgment writers. An important suggestion that was given to IFJP group was to keep our judgments simple, closer to actual judgments in format and also to make them less academic. The fear of being



too/only academic and for an academic audience appears to a common feature of the FJPs (HUNTER, 2012). These suggestions were considered essential if we wanted the rewritten judgments to be taken seriously by the community of legal practitioners. A difference was thus posited between academic writing as rigorous and theoretical while judgment writing is being perceived as simpler and closer to lived contexts. FJPs have creatively countered imaginations like these as such binary constructs foreclose the possibilities of interconnections between theory and practice and also establish both as separate domains and activities.¹⁹

The Constitution of India, in Article 129, specifies that the Supreme Court shall be a court of record and hence have all the accompanying powers of such a court including 'the power to punish for contempt of itself'. Donde observes that the law of contempt is not meant for protecting the judges, but it is for the protection of the institution of the judiciary from insulting, vilificatory and groundless attacks against the institution as opposed to the persons that form a part of it (DONDE, 2007). In the past few years, there have been instances when this power has been used by the SC in a controversial way, to stifle the right to protest and to free speech (SHAH, 2020).

How would a feminist judge reimagine the role and powers of the court to avoid replicating these practices? Are we not creating another register of power where our feminist identity seems to be qualification enough to rewrite a 'better' judgment while we leave structural practices of judgment writing intact. The feminist judgment writers also indulge in self-effacement as judges while crafting the rewritten judgment as the 'authentic'- professional text that carries legal authority (PALRIWALA, 2005). I suggest that feminist judgments writers share their experience of rewriting the judgment to highlight the constraints of (feminist) judgment writing and also how they try to counter hegemonic and masculinist writing practices. The next section addresses some of these concerns by elaborating on the dilemmas I faced while rewriting *Charu Khurana and Others v. Union of India and Others*.²⁰

¹⁹ The publications brought out by FJPs have included chapters or articles outlining the vision of the respective projects, devoted energies to delineating methods and methodologies adopted for the rewriting process, and contextualised the projects with the help of relevant literature.

²⁰ *Charu Khurana and Others v. Union of India and Others* 2015 1 SCC 192.



Rewriting the Feminist Rewriting

The Charu Khurana case required the court to decide the constitutionality of a clause in the constitution of a registered Union of Cine make-up artists which allowed women to work only as hair dressers and men could be both make-up artists as well as hair dressers. While the court quashed the said discriminatory clause, the judgment itself is full of contradictory logic. The terms of these masculinist protection(s) end up in production of 'regulated, subordinated, and disciplined state subjects' as Wendy Brown calls these dependent subjects (BROWN, 1992). We need to focus on the system of meanings that these judgments are a part of, to retain the radical edge of a critical endeavour like FJP. The judge writing the judgment on behalf of the bench, indulged in some timeless and decontextualised traveling to legitimise women's claim to equality. A 1792 quote by Mary Wollstonecraft followed by an 1869 quote by JS Mill, another by Susan B. Anthony in the same year as well as 1871, were cited by the judge in support of the demand for equality by women make-up artists and hair dressers in 21st century India.

This example aligns with the earlier point I made about integration of interdisciplinary perspectives in legal research and writing for more layered and nuanced understandings of larger issues at the core of such individual cases. My research and teaching experience in the area of Women/Gender Studies helped me in going back to sources where Indian women writers and their writings on gender as an organising principle and the resultant structuring of hierarchies in their respective socio-temporal contexts are available. Some of these women wrote in 19th century and early 20th century so there is a rich tradition of women writing and theorising about gender and inequality.²¹ This should not be read simply as an attempt at displacing the global by substitution of local writing but aligns with Narayan's warning about keeping in mind 'contextual asymmetries' while working with 'decontextualized information' (NARAYAN, 1997, p. 96). I read it as a political and methodological move also since women writers do not get easily written into canons of any kind and many of these women struggled to get educated or even learnt reading and writing despite and inspite of their contextual constraints including lack of educational infrastructure for women as well as social sanction against women's literacy during the 19th and early 20th century. The act of

²¹ See Hossain, 1905; Ramabai, 1887; Tharu and Lalita, 1991.



recuperation has to be constant and continuous for any project aimed at social transformation.

In the same vein, the judge describes Ralf Waldo Emerson as 'the famous American Man of Letters' and mentions Goethe indirectly as 'One of the greatest Germans'. Lord Denning and his book *Due Process of Law*, U.N. Secretary General, Kofi Annan and Charles Fourier were other celebrities cited by the judge as great men who had espoused the cause of gender equality at various points in human history. Such indulgence is a costly affair for a legal system that is plagued by approximately 50.2 million pending cases in various courts of the country.²² These quotes from altogether different contexts and time periods could have been easily avoided as they hardly served any purpose other than to establish the need to give women their due. The text of the judgment is also unnecessarily repetitive which was avoidable. The tendency to cite men's contribution to the cause of gender equality needs to be called out by feminist rewriters of judgments as a problematic strategy of writing. It reproduces and reiterates the masculinism inherent in law. This brings us to the question of problematising men's relationship with feminism especially those men who are actively involved in the rewriting process. IFJP envisioned gender as the key analytic for our critical project but it is not the only identity axis around which marginalisation was to be interrogated. This choice has implications in Indian context as our legal system is still numerically dominated by men apart from the masculinism inherent in legal practice.²³ IFJP has had male participants in its writing workshops and as judgment/commentary writers. IFJP's vision to be reflexive and question rather than assume both privilege and marginality makes it imperative that the dilemmas and challenges of men doing feminism be theorised. There have been efforts in the Indian context but these have been more in the form of initial conversations than sustained theorisations (CHOWDHURY, BASET, 2015; SIRCAR, 2015; CHATTERJEE, 2016). Stephen Heath's problematisation of this desire in (some) men to be a subject of feminism/or be a feminist despite being agents/representatives/carriers of the patriarchal power might be a relevant point to start these conversations with (HEATH, 2001).

²² See *The Economic Times*, 20 Jul, 2023.

²³ See SPANDANA, June 2023. This survey from June 2023 mentions that there were 3 women judges out of total strength of 31 in the Supreme Court, 107 women judges out of the 788 judges in all High Courts across the country which is mere 13%.



Another point in the original judgment that requires reflection is that international conventions and treaties were used to showcase how hard humanity was striving towards changing the world. A substantial critique of the human rights discourse and practice as legitimizing tools as well as modes of governmentality in neoliberal contexts and feminist complicity in the resultant subjectification processes already exists. My initial interpretation was that mentioning CEDAW, Beijing conference, etc. are tools of obfuscation as they do not take into account the fact that these instruments have limited application when read in conjunction with domestic laws. In addition, there are exceptions sought by governments to evade implementation in totality, and these provisions are mostly morally rather than legally binding (MEHRA, 2013). This understanding was countered by the discussant/critical reader of the long abstract of my rewritten judgment, Saumya Uma, who commented on my draft during the Writing Workshop held by IFJP in October 2018. Her arguments about the moral sanction of these instruments, helped me in rethinking my rather assertive yet narrow reading of the incorporation of these tools of collective and collaborative thinking. Confronting and understanding our feminist angst is also something that feminist rewriters need to work with and upon, while rewriting judgments (LORDE, 2007).²⁴ Dianne Otto's review of the *Feminist Judgments in International Law* also helped me in arriving at a more nuanced way of engaging with the shortcomings of such instruments and treaties as they lack legal sanction and allow discretionary power to the states that prove counterproductive to the very objectives of these instruments (OTTO, 2020). Her suggestion of creating "more opportunities for challenging reservations needed to be created, including an independent body empowered to determine the compatibility of reservations, and a new rule that nation states, in making reservations, must also provide an explanation" aids in establishing accountability to a certain extent (OTTO, 2020).

Most of the portions from precedents cited in the original Charu Khurana judgment were pedantic rather than dealing with questions of law. Grandiloquence and ambiguity are regular features of some of the judges' writing style (SHARMA, 1973; BAXI, 1982). The choice of words in some judgments is such that the words rather than

²⁴ When I reread the draft of my rewritten judgments I had presented at the workshop, I came across the mention of my feminist angst at reading the original judgment and I posed this as plea for help to the audience as I didn't want to lose the angst without making use of it in my reframing but was also conscious of the dismissiveness/derision that accompanies radical feminist claims. I managed to invoke laughter at the caricature of a 'nagging/angry feminist' but we moved on to more substantial inputs. It was only when I read Audre Lorde that I could theorise this angst (LORDE, 2007).



the meanings to be conveyed become an end in themselves. Baxi explains how judges have to choose between self-indulgence and social impact when they write their opinions (Baxi, 1982, p. 854). Most often, judges believe that judicial flamboyance has a consciousness-raising impact on students of law and practitioners of law (BAXI, 1982). Dipak Misra, the writer judge of Charu Khurana case is known for suffusing such words in his judgments. The use of grand words hardly serves any legal or even practical purpose but definitely maintains the illusion of the grandeur of the idea of justice as it sets the court apart from the rest of the society since it exhibits a 'no tolerance' policy towards gender oppression and subordination. The judge is thus addressing not just the litigant/petitioner but also the larger public. Elitism is evident in the language, the presumptions and the indictments of the court. Another possible outcome of ambiguity in judicial writing, as Baxi highlights is that it forces people to come back to the courts to ascertain the 'actual' meaning, thus increasing the court's control over the policy making process (BAXI, 1982).

A few remarks from the original judgment might help in illustrating these points further. The judge remarked, "Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment."²⁵ Further, the judge observed, "Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile."²⁶ Sentences like these are not just factually incorrect but also contradict the progressive self-fashioning that the courts, as the protector of women's rights and upholder of gender equality, often indulge in. While such readings render all women as perpetual passive victims who have suffered silently over many centuries and across the world waiting for learned men to rescue them, they decimate the individual acts of resistance/subversion/defiance by ordinary women and also ignore the entire history of an autonomous and vibrant women's movement(s) in India (GANDHI, SHAH, 1992; KUMAR, 1993). As feminist rewriters, we need to be conscious of the dangers inherent in judicial sympathies if it leads to reconstruction of a victim subject which is problematic for different reasons. This generosity can be immediately read as denial of agency and patronising attitude towards adult women. It also individualizes the act rather than seeing it in the larger

²⁵ *Charu Khurana and Others v Union of India and Others* (2015) 1 SCC 192.

²⁶ *Charu Khurana and Others v Union of India and Others* (2015) 1 SCC 192.



context which doesn't create opportunities/safe spaces for women workers especially in organisations or domains that are male-centric. So, the demand by the women petitioners will be seen as unjustified since they are more suitable for a comparatively low paying job instead of seeing it as an act of systemic violence.

The format of judgment writing that allows obiter dicta to be a part of the judgment, needs to be thought through as it can be useful for strengthening judicial subjectivities in a rewriting process by allowing some space for expressing opinion that is incidental and not necessarily an interpretation of the law. The meanings that facts acquire thus depend on the interpretive framework that judges use for a particular narrative (RIDEOUT, 2013). Even though such indulgences are a costly affair for a legal system that is plagued by millions of pending cases in various courts of the country, this tool of legal writing aids a feminist rewriter to experiment with format of judgment writing.

The legal system in India still uses Latin words in everyday practice which is symbolic of the elitism invested in judicial authority and exercised regularly by the judiciary by producing 'unintelligible' judicial writings. Similarly, even archaic Persian/Urdu language words that were part of legal systems in earlier periods are still very much in use, especially by the police while preparing their reports/documents or filing First Information Report (FIR) that becomes the basis of further legal action and hence crucial for that case.²⁷ Insistence on legal terms/language and the tendency to project the state and its agencies' practices as neutral, obfuscate the fact that these are tools that further alienate the public from understanding what is happening in the court. In constructing unintelligible judicial writings, the judiciary marks its superiority from rest of the society. The truth is covered in complexities of language and technicalities of the court to the extent that it becomes unreachable/inaccessible for other citizens (GHOSH, 2019; BAXI, 2019).²⁸

Naffine (2003, p. 349-350) enumerates that in law, three types of persons are counted. These three categories of persons may merge or diverge in front of law

²⁷ In a Public Interest Litigation case, *Vishalakshi Goel v Union of India and Anr.* in 2019, the Delhi High Court issued order to the Commissioner of Delhi Police to direct the police officers in Delhi to not use Persian/Urdu words while filing FIR to keep the content simple and accessible to general public. This is not necessarily about power at the subordinate levels and can be attributed to the prevalence of these words in police training academies as well as everyday practices that have not been changed in keeping with change in context. The order is available at: <https://indiankanoon.org/doc/19667313/>

²⁸ The litigants or those accessing any kind of legal service are not being thought of as passive victims in this imagination. They devise various ways of negotiating these complex terrains and the processes/procedures involved.



depending upon a particular case. The first one is a legal person without any metaphysical moorings. The second one is a natural or divine person with essentialised qualities. The third one is the intelligent, responsible and moral person. The discretion exercised by the judges to see a person in a particular manner emanates from the judicial power that they use to categorise persons approaching the court. Charu Khurana's case is an apt example as she was seen as a rational woman due to her class location (she could afford fees of advocate and other expenses to approach the court), age (an adult woman) and knowledge/ skill-sets derived from a much coveted degree earned from the West. Ms Khurana's agency was reflected in the fact that she consistently followed her case even when faced by fines and threats. The court noted that traditionally, women in this field were not educated and belonged to economically weaker sections of society who could neither challenge the powerful Association in fear of losing livelihood opportunities nor had money to approach the court. This observation by the court brings in what Brown and Halley spoke about the limitation of languages in legal discourse (BROWN, HALLEY, 2002, p. 422). When a woman brings forth the case of sexual discrimination or harassment, the court interpellates that woman to a monolithic category of woman who seeks protection from the paternal state and in return promises obedience. Secondly, by seeing woman as a monolithic category, the court is also setting the standards, here in case skill-sets acquired from abroad, required to claim rights. To reinforce one as a visible and rational person in front of the law, social markers become relevant. Therefore, as Brown and Halley emphasise, the experience of some women becomes the experience of all women (BROWN, HALLEY, 2002, p. 424). The pluralities of experiences and consciousness of women are unarticulated and unaddressed as the juridical discourse performs its function of objectification (SMITH, 1999, p. 212).

The relationship between language and law is thus complex and mutually reinforcing. Agamben highlights the fact that when the law is using a language, it is marking absence and presence simultaneously (AGAMBEN, 2005). The legal language removes the original meaning of a word and at times reinforces an old meaning. In Charu Khurana's case, by removing discriminatory clauses based on sex and residence, the language deleted relevance of sex and residence in a make-up artist. However, it is simultaneously writing what kind of women are welcome in this profession, and not all women are included. Similarly, the judgment is not overtly speaking about men and



trans persons who want to be hairdressers, thus erasing the pluralities of desires and ambitions in persons beyond binary oppositions of man and woman.

Conclusion

Since the FJPs have spread globally, it is being considered a movement of sorts and it becomes imperative, as Mrinalini Sinha suggests, to figure out how the local is to be tackled in this global context (SINHA, 2012, p. 356). Sinha's warning about looking for substitutes and alternatives to counter Eurocentrism inherent in a global perspective of gender as 'disingenuous' is a good reminder in this quest (SINHA, 2012, p. 373). The violence inherent in judging, both as an act and ideology is likely to get replicated in feminist rewritings as we indulge in appropriation of voice of the other(s) (ALCOFF, 1992). Alcoff's (1992) argument about the location of the speaker/author being a part of the effect of the speech act might serve as a good reminder while rewriting judgments from a feminist perspective.

It is interesting that we claim that the feminist judgments projects are interdisciplinary but the imagination of their pedagogical impact is perceived to be on the actors who are directly and often formally associated with legal profession. Our claim of interdisciplinarity then circulates within the dominance of law, both as a discipline as well as practice. This is necessary as well as counter-productive as I have tried to illustrate in this article. The re-imagination of juridical power that the FJPs are engaging in, would benefit from indulging in some transgressions by feminist rewriters. We can try being 'bad girls' by experimenting with textualities, by being irreverent, by questioning the normative practices of judgment writing, by questioning/theorising power and privilege, by being uncertain, by being partial, by being subjective, by being non-judgmental feminist judges, and by adding to this list of transgressions (YAQUB; QUAWAS, 2017; HUNTER, 2012).²⁹

²⁹ Hunter's summing up of the focus of FJPs is also worth emulating. She writes, "The legal knowledge generated by feminist judges must remain contingent, contextualised, diverse, debated, open to critical scrutiny, and above all a collective enterprise." (HUNTER, 2012, p. 147)



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About the author

Rachna Chaudhary

Dr. B.R. Ambedkar University Delhi, India. E-mail: rachna@aud.ac.in. ORCID: <https://orcid.org/0000-0002-7274-7811>.

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