

The *harmonization* of domestic and international human rights standards on criminalization of rape

In the field of human rights, expressions like justice and legal reform are closely linked to the process of harmonization of domestic and international human rights standards. *Harmonization* of human rights standards can be described as a *process* wherein international human rights are incorporated or given full effect to at the domestic level.ⁱ To *harmonize* the two set of standards i.e. domestic and international is viewed as both a commitment and obligation of states under international law. In terms of state practice, the process of harmonization may entail a set of actions including adoption of laws and creation of mechanisms for enforcement and redressal of violations.

At the international level, the *harmonization agenda* is actively promoted at forums including the Universal Periodic Review (UPR) or during consultations between states and human rights treaty bodies, etc. Questions on whether states are in compliance with their international human rights commitments under treaties and other resolutions are to a large extent determined based on the extent of harmonization. Other pertinent questions being whether existing domestic laws are compatible with international human rights standards? What conditions obstruct and facilitate harmonization of human rights standards? Are there any parameters to measure harmonization?

While *harmonization* is widely promoted, its study and assessment is complex. Under the Torture Conventionⁱⁱ for instance, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment raised concerns over the use of lawful sanctions by states to justify torture, the prohibition of which in international human rights law is absolute, non-derogable and cannot be justified by any legislative, administrative or judicial act.ⁱⁱⁱ

In the context of gender-based violence, more cues on *harmonization* can be gathered from the report of the UN Special Rapporteur on Violence against Women. The report titled *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*^{iv} refers to the harmonization of standards as a human rights imperative (in the context of standards on gender-based violence). The report particularly discusses the need for greater harmonization of domestic criminal law provisions with international human rights standards and jurisprudence on the subject.^v According to the Special Rapporteur, it is the *primary responsibility of States to effectively and with due diligence prevent, criminalize and prosecute rape in accordance with international legal standards, applicable both in peacetime and during conflict*.^{vi}

In the making of the report, the Special Rapporteur received 207 submissions which highlighted *the significant gaps between States' obligations and international human rights standards on rape*.^{vii} While defining rape as a *grave, systematic and widespread violation*, the Special Rapporteur makes 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 case of rape also include “hidden domestic norms” that protect perpetrators of the crime.

The Report while using expressions like “full incorporation” of international standards seeks to promote harmonization and identify the ways in which it can be achieved. Based on the submissions by states and other stakeholders, the report provides the *course of action for states* in specific cases.^{viii} Taking the incidents of rape by an intimate partner, the report seeks *urgent repeal of laws* exempting marital rape from criminalization. And with regard to sanctions and punishment for rape, the imposition of fines as punishment or as an alternative to punishment is viewed as incompatible with human rights standards. As per the report, “the use of fines as the only sanction should be abolished”.^{ix} While raising several concerns, the report makes further additions to the field of international standards aimed at addressing impunity in cases of gender-based violence against women and girls.

What one can say is that harmonization whether in the context of criminalization of gender-based violence or other human rights agendas would necessarily involve the consideration of at least three factors; (a) the cultural, political and economic conditions within a state.^x (b) the parameters and indicators being used to identify *gaps* or conclude *incompatibility* between standards, and (c) the *course of action* recommended to states in order to bring about the “full incorporation” of international human rights standards within domestic settings.

Notes

ⁱ According to Fredman, there is a similar common core of human rights both internationally and domestically. And “major human rights instruments have been widely ratified, forming a shared international frame of reference even where individual jurisdictions do not automatically incorporate international law”. See at Sandra Fredman, *Comparative Human Rights Law*, Oxford University Press, 2018, at pg. 4.

ⁱⁱ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

ⁱⁱⁱ Available at <https://undocs.org/A/HRC/46/26> (March 2021).

^{iv} Available at <https://undocs.org/A/HRC/47/26> (April 2021)

^v In addition to international human rights law and criminal law of states, the report also covers the ambit of international humanitarian law and international criminal law on rape.

^{vi} *Supra* note v, pg. 4 pt. 19.

^{vii} The report covers the conditions in 105 States across all regions with responses from 46 Governments, 19 national human rights institutions and 142 other entities, comprising civil society organizations, international organizations, academia. *Supra* note v.

^{viii} The report covers other agendas which would require greater attention from states and the international community. These include extraterritorial application of laws on rape, statutes of limitation for prosecution of rape, lack of reporting of incidents of rape etc.

^{ix} *Supra* note v, pg. 15 pt. 90

^x In the context of the Convention against Torture, the Special Rapporteur on Torture sheds light on some of the conditions and practices which are associated with or conducive to torture and ill-treatment. In one of its reports it is provided that criminal justice systems that are over reliant on confessions as the primary source of evidence are at a higher risk of using coercive interrogation techniques with a view to extracting forced confessions or testimonies. Also, in systems where corruption is widespread, torture and ill-treatment are likely to be prevalent. *Supra* note iv, pg 3 pt 13. In another report, the following observations were given- “(a) all States, to a greater or lesser extent, are plagued by insufficient governmental transparency and accountability; (b) those shortcomings undermine the effective prevention, investigation, prosecution and redress of torture and ill-treatment; and (c) in all regions of the world, there is widespread public and institutional complacency with regard to governmental secrecy and impunity and the resulting risks and prevalence of torture and ill-treatment”. See <https://www.undocs.org/pdf?symbol=en/A/75/179> at pt. 4 pg. 25.

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<https://www.betheclassroomseries.com/post/the-harmonization-of-domestic-and-international-human-rights-standards-on-criminalization-of-rape>