Chapter 3

Legislative and Constitutional Protection provided to Scheduled Castes and Scheduled Tribes during British Regime and After
"History shows that where ethics and economics come in conflict, victory is always with economics. Vested interests have never been known to have willingly divested themselves unless there was sufficient force to compel them." --- Dr. B.R. Ambedkar.*

This chapter deals with the Legislative and Constitutional protections provided to the Scheduled Castes and Scheduled Tribes and steps taken by the Government to prevent atrocities against Scheduled Castes and Scheduled Tribes. The Legislative protections given to these sections of the people during British Rule in India and after independence laws made by the Indian Government to protect these people from the atrocities committed by the upper classes of the society, have also been discussed in detail. The laws have covered all the areas through which a man passes i.e., the education, property including landholdings, other economic rights, injuries to body if he sustained any. There are mainly, four laws which share and bear the responsibility of protecting Scheduled Castes and Scheduled Tribes from various kinds of atrocities. The laws are temple entry acts made by the British Government, Indian Penal Code, Criminal Procedure Code, protection of Civil Rights Act 1955 and more particularly the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. Though these laws are dealt in detail, these are not effective in the eyes of Society. These laws are purely and surely provide administrative mechanism to provide justice in general but not fruitful justice to the Scheduled Castes and Scheduled Tribes.

I. DURING THE BRITISH RULE IN INDIA

I.1. Caste Disabilities and the Law in British India:

During the period of British rule in India, the practices which came to be called "Untouchability" received limited and for the most part indirect support from the law. The establishment of a nation-wide legal system brought a general movement of disputes from tribunals responsive to the locally powerful into the government's courts and spread a consciousness of rights which might be vindicated independently of local opinion.¹ The government's courts espoused a norm of equality before the law and, with few

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¹ On the general character of the legal system, see Galanter 1968 b, Oxford University Publication.
exceptions, applied the same rules to all. As Shastric and customary law was supplanted, the use of caste as a criterion in the application of general criminal, civil, and commercial law was restricted and eventually discarded. In the application of Hindu law to family and ceremonial matters, Varna and caste distinctions remained relevant in some areas, but these legal categories did not spread to other fields. The abolition of slavery in the middle of the nineteenth century extended elementary rights to many Untouchables.\(^2\) These lowest orders, then, enjoyed equality in the eye of the law and had access to it, at least formally. In practice legal institutions often adopted themselves to the prevailing patterns of disability.\(^3\) However, the general features of the legal system were not articulated to a social system of graded inequality. The overall British policy toward caste was a policy of non-interference. In this section we shall trace the judicial response to caste from the consolidation of the modern legal system, which can be dated roughly at about 1860, to the advent of Independence.\(^4\)

I. 1.b. Direct Enforcement of Claims for Precedence and for the Imposition of Disabilities:

With respect to use of religious premises, caste groups did enjoy the active support of the courts in upholding their claims for precedence and exclusiveness. Courts granted injunctions to restrain members of particular castes from entering temples – even ones that were publicly supported and dedicated to the entire Hindu community.\(^5\) Damages were awarded for purificatory ceremonies necessitated by the pollution caused by the presence of lower castes; such pollution was actionable as a trespass to the person of the higher caste worshippers\(^6\) It was a criminal offence for a member of an excluded caste knowingly to pollute a temple by his presence.\(^7\) These rights to exclusiveness were

\(^2\) Legal enforcement of slavery was outlawed by the Indian Slavery Act (Act V of 1843); Possession of slaves was made a criminal offense by the Indian Penal Code (Act XLV of 1860) S 370.

\(^3\) On the incidence of exclusion of Untouchables from courts, see O'Malley 1941:375; Government of Bombay (State Committee) 1930: 56-7.

\(^4\) For a discussion of the impact of law on caste organization, see McCormack 1966.

\(^5\) Anandrav BhiMji Phadke V. Sankar Daji Charya, I.L.R. 7 Bom. 323 (1883); Sankaralinga Nadan V. Raja Rajeswara Dorai, 35 I.A.C. 176 (1908); Chathunni V. Appukutan, A.I.R. 1945 Mad. 232.

\(^6\) See cases cited, note 5 above, Cf. S.K. Wodeyar V. Ganapati A.I.R. 1935 Bom. 371, where damages were awarded although the parties agreed there should be no finding on the question of pollution.

\(^7\) Atmaran V. King-Emperor, A.I.R. 1924 Nag. 121
vindicated by the courts not only where the interlopers were “Untouchables” but also against such “touchables” as Palshe Brahmans and Lingayats, whose presence in the particular temple was polluting.

In these cases the courts were giving effect to the notion of an overarching, differentiated Hindu ritual order in which the various castes were assigned, by text or by custom, certain prerogatives and disabilities to be measured by notions of varna, pollution and required ceremonial distance. Thus, in *Anandav Bhikaji Phadke V. Shanker Daji Charya*, the Bombay Court upheld the right of Chitpavan Brahmans to exclude Palshe Brahmans from worshipping at a temple, on the ground that such an exclusive right “is one which the Courts must guard, as otherwise all high-caste Hindus would hold their sanctuaries and perform their worship, only so far as those of the lower Castes chose to allow them.” In *Sankaralinga Nadan V. Raja Rajeswara Dori* the Privy Council upheld the exclusion of Shanars from a temple and granted damages for its purification after a careful scrutiny of their social standing. Finding “their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies (who are on all hands regarded as unclean and prohibited from the use of Hindu temples) and below that of the Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples,” the Court concluded that the presence of Shanars was repugnant to the “religious principles of the Hindu worshippers.” As late as 1945, Nair users of a public temple were granted damages for pollution for the purificatory ceremonies necessitated by Ezhuvas bathing in tanks.

Indian criminal law is extraordinarily solicitous of religious sensibilities. Defilement of places of worship, disturbance of religious, ceremonies and outrage and

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9. On this and contrasting conceptualizations of caste, see Galanter 1968a, Oxford Publications.
10. 7 Bom. 323 at 329.
11. 35 I.A.C. 176 at 182.
wounding of religious feelings are serious criminal offences.\textsuperscript{13} These protections applied among Hindus inter se as well as between members of distinct religions. Punishable defilement included ritual defilement; physical impurity was not required.\textsuperscript{14} Untouchable Mahars who entered the enclosure of a village idol were convicted on the ground that "where custom......ordains that an untouchable, whose very touch is in the opinion of devout Hindus pollution, should not enter the enclosure surrounding the shrine of any Hindu god,......" such entry is a defilement in violation of Section 295 of the Indian Penal Code.\textsuperscript{15}

These cases reveal a judicial notion of a single articulated Hindu community in which there were authoritative opinions (supplied by custom and accepted texts) which determined the respective rights of the component groups.\textsuperscript{16} This conception of an overarching Hindu order is revealed clearly in the refusal of the courts to enforce claims for exclusiveness among Christians. In \textit{Michael Pillai V. Barthe}, a group of Roman Catholic Pillais and Mudalis sued for an injuction to require the Bishop of Trichipoly to re-erect a wall separating their part of the church from that entered by "low-caste Christians" and to declare plaintiffs' exclusive right to perform services at the altar. The Court characterized the claim as one for "a right of freedom from contact which can have but one origin.....that of pollution."\textsuperscript{17} The Court refused to recognize pollution as either a spiritual or a temporal injury among Christians. Not being Hindus, plaintiffs "cannot.....invoke the authority of accepted sacerdotal texts for perpetuating the distinction between touchables and untouchables during a particular life solely by reason

\textsuperscript{13} Indian Penal Code, S.295-298 (Act XLV of 1860) and S 295A (introduced by Criminal Law Amendment Act XXV of 1927, Sec.2

\textsuperscript{14} In \textit{Sivakoti Swami}, I Weir 253 (1885), a division bench of the Madras High Court divided over whether these sections were applicable to Hindus inter se and whether to defile included ritual defilement caused by a goldsmith pouring coconut-water over a lingam-Muttusami Aiyar, J., upholding the affirmative on both propositions.

\textsuperscript{15} \textit{Atmaram V. King-Emperor}, A.I.R. 1924 Nag. 121. Borale 1968: 223 cites a similar case, unreported, decided in 1880.

\textsuperscript{16} This approach did not always work to the disadvantage of the excluded class. In \textit{Gopala V. Subramania}, A.I.R. 1914 Mad. 363, members of the Elaivaniyar community obtained a declaration of their right to enter the outer hall of the temple and an injunction restraining other worshippers from ejecting them.

\textsuperscript{17} A.I.R. 1917 Mad. 431 at 433.
Practices of exclusion in religious premises were further reinforced by the civil laws regarding religious trusts which obligated the trustees to administer the trust property in accordance with the terms of the trust and the usage of the institution. Thus even if a majority of the worshippers at a temple were willing to allow excluded groups to enter, the trustee was subject to civil suit by the hold-outs, prohibiting such action. If trustees still persisted, they might be removed from office or made liable for damages. Thus the law made trustees responsive in this matter to the most intractable of their constituents. Exclusionary practices did not enjoy the same active judicial support—at least not from the higher courts—in regard to “secular” public facilities such as schools, wells and roads. The courts declared that no right could be maintained to exclude other castes or sects from the use of streets and roads. The situation was more complicated in regard to the use of water-sources. For a low-caste person to take water from a public well was held not to be the offence of corrupting or fouling a well under S 277 of the Indian Penal Code. It was held that the “defiling or “corrupting” in the statute referred to “some act which physically defiles or fouls the water.” The Lahore Court held other users had no right to prevent Chamars from drawing water from a public well. However, other courts conceded that a right to exclude might be upheld if a custom of exclusive use by higher castes could be proved. However, such customs were difficult to prove. In *Marriappa V. Vaithilinga*, Shanars obtained an order allowing them to use a large tank on the ground that no custom of exclusion was proved. A right of exclusion in regard to one well in the dispute was upheld where such a custom was proved. The

18. Ibid., at 78 P. This dispute was still going strong twenty years later.
20. Nevertheless, such exclusion was widespread.
22. *Queen Empress V. Bhagi Kom Nathuba*, 2 Bom. L. Reporter 1078 (1900) (Magistrate had convicted a Vanjari woman of “corrupting water in a public cistern and causing the water less fit for drinking purposes” under S 61 of the District Police Act when she had contravened the repeated “directions” and “objections” of higher castes not to touch it.)
absence of a custom of exclusion from the large tank, as distinguished from the well, was indicated by textual passages to the effect that precautions for impurity can be less intense in a body of water of this size. In *N.D. Vaidya V. B.R. Ambedkar*, the Court found it unproven that there was any long-standing custom of exclusion in a municipal tank. Textual provisions indicating that no elaborate precautions against pollution are required in a tank of that size rendered it “doubtful whether any attempt would have been made to secure exclusive use of the water until such time as the tank came to be surrounded by the houses of caste Hindus.” The Court distinguished the temple cases on the ground that “in such cases long practice acquiesced in by the other castes and communities may naturally give rise to a presumption of dedication to the exclusive use of the higher castes, and may threw on the ‘untouchables’ the burden of proving that they are among the people for whose worship a particular temple exists. No such presumption of a lawful origin of the custom can be said to arise here.” And were such an immemorial custom established, said the Court, it would be necessary to consider whether such a custom was unenforceable because it was unreasonable because it was unreasonable or contrary to public policy.

In dealing with exclusionary rights the courts tried to confine themselves to claims involving civil or property rights as opposed to mere claims for standing or social acceptance. Thus the courts refused to penalize such defiance of customary disabilities as failure to dismount from a wedding palinquin or failure to concede another caste an exclusive right to *mampam* or ceremonial deference. The prevailing notion was that social and religious prerogatives did not give rise to enforceable legal rights unless the right was the sort of thing that could be possessed and made use of. Thus we find gradation from the temple cases, where there was ready enforcement of exclusionary rights, to water-sources, where it seems enforcement might be forthcoming if difficult technical requirements were met, to customs in no way connected with the use of specific

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24. 1913 M.W.N.247.
26. *Ibid* 25 at 81 P.
property, where there was no enforcement at all. Where the courts intervened to uphold custom, this custom was evaluated and rationalized in terms of notions of ceremonial purity and pollution-existing in different degrees among different groups of Hindus.

Inaction where Disabilities were enforced by “Self-Help”:

A second variety of judicial support is found in instances where members of higher castes undertook themselves to “enforce” their prerogatives against lower castes and the latter responded by attempting to invoke judicial protection. It is clear that courts were reluctant to interpret the law so as to provide remedies against such “self-help.”

Where Sonars, excluded from social intercourse and from use of the village well by other Hindus, brought criminal charges against leading villagers, the Court found the villagers’ conduct amounted neither to a nuisance nor an insult with intent to provoke breach of the peace. Where members of the Nilgiri Mahratta caste assembled and resolved that others were members of an inferior caste, it was held not to amount to criminal defamation. Where Reddis asserted their superiority over Balijas and resolved to have no social intercourse with them and that village servants should not serve them, the Balijas brought charges of criminal defamation. The Madras High Court held that this conduct was not criminal defamation. “The evidence discloses only the combination of one caste against another....and however inconsiderate and oppressive such a combination may be it is not penal unless it is for one of the purposes specified in S 141, Indian Penal Code.”

When the excluded group were not Hindus and the difference was one of religion rather than (or as well as) caste, judicial assistance might be forthcoming. Thus the

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29. Ramditto V. Kirpa Singh, 1883 Punjab Record (Criminal) 3. The Sonars here were members of the Shumsee sect (followers of a pir named Shums-Tabrez) and had “peculiar customs” like burying their dead.
30. Salar Mannaji Row V. C. Herojee Row, I Weir 614 (Madras High Court, 1887).
31. Venkata Reddi (Criminal Revision case No.265 of 1885, decided 12 June 1885, Muttusami Aiyar, J.) Reported I Weir 575 [Madras High Court, 1885].
32. S 141 of the Indian Penal Code makes unlawful assemblies for such objects as intimidating public servants, resisting the execution of law, committing mischief or trespass and “by means of criminal force” to take another’s property or “compel any person to do what he is not bound to do or to omit to do what he is legally entitled to do.”
Madras High Court found that where a breach of the peace was threatened as a result of village Hindus' exclusion of Christians from rightful use of a well (on grounds of their low caste), the magistrate “must give such relief as the circumstances admit of,” and might forbid the Hindus to interfere.33

Those parts of the Criminal Law protecting religious sensibilities did not serve to protect lower castes from enforcement actions of higher castes. Where Brahmans tore the sacred thread from the neck of an Ahir who had lately taken to wearing it, the Court ruled that since he was a *Sudra*, the wearing of it was not “part of his religion” vis-à-vis other Hindus. To them it was an assertion of a claim to higher rank. Therefore the injury was not an offense to his religious susceptibilities—but only to his dignity. Had it been torn by non-Hindus, it might have been an insult to his religion itself.34

Thus it appears that lower-caste litigants (and their lawyers) explored a number of possible avenues of relief against such “self-help” but could find none that paid off. It may be surmised that those lower castes who wanted to carry their struggle into the legal arena probably diverted their efforts to bringing charges of ordinary crimes (assault, trespass, etc.) against their opponents.35 Success in such litigation would depend only on the competitive struggle to produce convincing evidence, not on securing from the judiciary favourable interpretations of existing law. Even here, success was not readily to be had. Cohn concludes that: The lower castes have generally been unsuccessful when, through the use of police or of the urban courts, they have sought to redress what they believe to be the corporate wrongs done to them by upper castes. The upper castes maintain their economic position; their knowledge of the courts and the intricacies of the law and better access to officials have thwarted attempts to change the position of the lower castes in the village society and economy.36

The potentialities of “self-help” were enhanced by the British policy of loosening legal control over the provision of services by village artisans and servants. It was early

35. For some instances of unsuccessful use of criminal law by Untouchable groups in their attempt to throw off the domination of higher castes see Cohn 1955:
36. Cohn 1965: 108
established that there was no right to enforce the provision of customary services,\textsuperscript{37} even where receiving them was a requisite for retaining good standing in one's caste.\textsuperscript{38} The service castes' exclusive right to serve was similarly unenforceable.\textsuperscript{39} "The claim is against common sense and could never be upheld in a country where the law allows the freedom which is enjoyed under British government."\textsuperscript{40} Dominant groups could now threaten diversion of patronage without fear of legal redress. Untouchable groups dependent for their livelihood on service relations might be subjected to pressure and find little relief in the courts, even where their offices were semi-governmental.\textsuperscript{41} Sweepers, whose natural monopoly might have afforded them some protection, were often excluded from the general voluntarism and bound into their service relations by criminal penalties.\textsuperscript{42} One of the most powerful tools of enforcement of disabilities against lower castes was secondary boycott, i.e., depriving the offender of the services of village servants.\textsuperscript{43} The British policy of making traditional service relations unenforceable deprived those subjected to secondary boycott of avenues of relief at the same time that it made the service castes more available to the power of the dominant groups. Service relations were not fully susceptible to the exercise of local political and economic power.\textsuperscript{44} Self-help need not take the form of overt violence to be effective. Their economic dependence and lack of resources made the Untouchables vulnerable to economic and social boycott. The Starte Committee concluded: that "We do not know of any weapon

\textsuperscript{37} Phagoona Nayee V. Menya Matha, 1854 S.D.A. (Bengal) 465.
\textsuperscript{38} Raj Kisto Majee V. Nobaee Seal, I Weekly Rep. 351 (H.C., Cal., 1864).
\textsuperscript{39} Coopa Mootoo V. Baupen, II S.U.A. 77 (Mad., 1844) (barbers); Parythy Caytholah Madey V. Toonery Ryoo, II S.U.A. 83 (Mad., 1844) (Midwife).
\textsuperscript{40} Cooppa Mootoo V. Baupen II S.U.A. 77 at 78 (Mad. 1844).
\textsuperscript{41} Consider the case of the Mahars, who early experienced difficulty in enforcing their rights to the traditional perquisites of their office (here, skins of bullocks). Suntoo Wulud Madnak V. Babajee Bin Shripurrow, Morris (Part 2) 68 (1849).
\textsuperscript{42} E.g., the U.P. Municipalities Act (Act 2 of 1916) S 85 (1) makes it an offense for a board-employed sweeper to absent himself without reasonable cause or to resign without the permission of the board.
\textsuperscript{43} E.G., Majumdar 1958: 76 ff.
\textsuperscript{44} See, eg., Sheikh Jinaut V. Sheikh Khusen, 7 C.W.N. 32 (1902), where it was held that the use of defendants' influence "to stop the services of the village barber, washerman and others from being rendered to the complainant" was not sufficient to justify an order requiring defendants to post security under S 107 of the Code of Criminal Procedure.
more effective than this social boycott which could have been invented for the suppression of the Depressed Classes. The method of open violence pales away before, for it has the most far-reaching and deadening effects. It is the more dangerous because it passes as a lawful method consistent with the theory of freedom of contact.  

Boycotts might effectuate not only the withdrawal of economic relations – opportunities for earning, buying food, borrowing money – but also extend to areas where Untouchables possessed enforceable legal rights – the use of footpaths, their remuneration as village servants, etc. Indeed the power of boycotts led some observers to despair of the possibility of government vindication of these rights.

No legislative or administrative action can restore to the depressed class people the right to use public wells. This disability of theirs springs from their abject dependence on the land-owning high castes. Concerted pressure is often brought to bear on them to dissuade them from exercising their right. The Zamindar may refuse to employ them; the Bania may refuse to sell them provisions; the Zamindar may let loose cattle on their crops destroying them; and if that does not suffice, the dwellings of such obdurate people may also be demolished. The depressed classes have neither money nor influence to assert their right.

I. 1. c. Upholding Caste Disciplinary power against Reformers

We have seen that where lower castes were not themselves subject to governmental enforcement of the claims of higher castes, the criminal law was interpreted to give broad immunity to the efforts of higher castes to keep the lower castes in their place. Judicial doctrine also provided a third line of protection, by upholding the disciplinary powers of castes against avowed reformers and others who would soften the imposition of disabilities.

This was an application of the general doctrine of caste autonomy. Generally courts held themselves disqualified to intervene in the internal affairs of castes, even

45. Government of Bombay (Starte Committee) 1930: 58.
46. Ibid. For classic instances of upper castes using boycotts and violence to secure economic advantage and to enforce detailed restrictions, see Hutton 1961: 205-6; Ambedkar 1945a: 6-8.
47. M. Singh 1947: 144.
48. On “caste autonomy” see Mulla 1901; Kikani 1912; Ramakrishna 1921.
where internal disputes led to the outcasting of a person or a faction. The only exception was where the outcasting led to a deprivation of civil or property rights or to defamation. Even here the courts undertook a merely supervisory jurisdiction, emphasizing the procedural regularity of the excommunication.

Thus reformers who provoked severe response from caste authorities found no protection in the courts. A spiritual superior might excommunicate someone associated with widow remarriages for the spiritual benefit of his sect.\textsuperscript{49} It was not defamation to dismiss a purohit on the ground that he associated with persons involved in widow remarriages.\textsuperscript{50} This rule clearly applied to anti-disabilities reformers. The head of a Math was not guilty of criminal defamation for outcasting a Gowda Saraswat Brahman on the grounds that the latter had attended a Brahmo Samaj dinner at which Pariahs were present.\textsuperscript{51} The same privilege attached, of course, among Untouchables themselves. It was not defamatory for Gharagapur Julahas to excommunicate a member for associating with Jaswara Chamaras.\textsuperscript{52} A caste could excommunicate one for associating with sweepers and shaking hands with them. But it was defamation for individuals to impute that a Bhurji had become a sweeper by joining a procession in which some sweepers were included where no properly convened caste panchayat had formally made such a decision.\textsuperscript{53} Similarly, it was defamation to allege that a social reformer among the Powars of Bhandara was outcasted for marrying a daughter among the Powars of Chanda when the panchayat had stopped short of outcasting.\textsuperscript{54}

Support from Subordinate Officials:

Active judicial enforcement of rights of precedence was confined mostly to cases involving religious premises. There was, though, passive support in the form of unwillingness to employ the civil or criminal law in ways that interfered with "self-help" of higher castes, whether directed against lower castes or against reformers within. But

\textsuperscript{49} Queen V. Sankara, I.L.R. 6 Mad.381 (1883).
\textsuperscript{50} Venkaya V. Venkataramiah, A.I.R. 1915 Mad. 908.
\textsuperscript{51} Sri Sukraternar Thirtha Swami V. Prabhu A.I.R. 1923 Mad. 587.
\textsuperscript{52} Desai V. Emperor, 33 Crim. L.J. 472 (Allahabad, 1931).
\textsuperscript{53} Khamani V. Emperor, A.I.R. 1926 All. 306.
\textsuperscript{54} Babulal V. Tundilal, 33 Crim. L.J. 835 (Nagpur, 1932).
while at the High Court level support for disabilities was thus mainly indirect and passive, there is some indication that at the lower levels of the legal system there was often active governmental support of the claims of the higher castes.\textsuperscript{55}

Thus we find the Allahabad High Court reversing the conviction of Dorns who were arrested for carrying a bride and groom through a village contrary to custom. The Dorns had requested police protection and had been ordered by the police to observe the custom.\textsuperscript{56} We find the Lahore High Court upbraiding a magistrate for issuing a succession of orders intended to keep Chamars from using a public well and expressing a hope that the magistrate will “refrain from taking any action under any other section of any Act or Code with a view to stultifying this order.”\textsuperscript{57} We find the Nagpur High Court expressing incredulity at the magistrate and subordinate judge who had required one caste to post security to an undertaking to recognize the exclusive rights of a higher caste to mampam at a festival.\textsuperscript{58} In Madras, we find the High Court cautioning a magistrate that Adi-Dravidas have the same civil rights as others to take a procession through the streets. The magistrate had forbidden the procession, noting that they were putting forth “fresh claims.” The High Court observed that “the fact that the Adi-Dravidas have been exercising restricted rights in the past was rightly taken into account; but it is not in itself a sufficient ground for refusing them protection in the exercise of their full rights.”\textsuperscript{59}

As the last three instances attest, the support secured by the higher castes was not necessarily in the form of a recognition of substantive rights, but rather by use of the power of the magistracy to preserve the public peace by issuing restraining orders against those who challenged the status quo.\textsuperscript{60} The power to issue such restraining orders to prevent danger, disturbance and injury provided a powerful means for higher castes to elicit help from sympathetic police and magistrates “Fresh claims” by lower castes especially when they elicited stiff resistance might indeed be seen as emergencies.

\textsuperscript{55} There is evidence that government officials assisted in returning runaway indentured servants long after slavery was formally abolished. See Harper 1968b: 47.

\textsuperscript{56} Jasnani V. Emperor, A.I.R. 1936 All. 534.

\textsuperscript{57} Kazan Chand V. Emperor, A.I.R. 1926 Lah. 683; A.I.R. 1927 Lah. 430.

\textsuperscript{58} Govinda Amrita V. Emperor, A.I.R. 1942 Nag. 45.

\textsuperscript{59} Shanmuga Pandaram V Ponnuswami, A.I.R. 1938 Mad. 714.

\textsuperscript{60} Criminal Procedure Code (Act V of 1898) SS 144, 145, 147.
justifying the issuance of such orders, while assertions of exclusiveness by higher castes would be less likely to convey the same quality of urgency.\footnote{E.g., Venkatroya Gowondan V Rondy, 71.C.343 (1910).} It is difficult to estimate the extent of such active intervention by the lower courts. One knowledgeable observer reported (in 1929): It often happens that even when a well has been dug at public expense or is maintained in the same manner the higher castes claim the well as their own and let in evidence that they have all along been using it to the exclusion of others. Sometimes they are able to obtain an order under Section 144 of the Criminal Procedure code preventing others from interfering with such wells. More often on the ground of such exclusive use and enjoyment, they are able to assert their prescriptive rights and obtain orders under Section 145 of the Criminal Procedure Code.\footnote{Appasami 1929: 151} A reformer, writing fifteen years later, observes that Untouchables are “unable to exercise their rights” because when they are obstructed by the higher castes “Section 144 of the Code of Criminal Procedure is resurrected and untouchables are restrained from exercising their lawful rights.”\footnote{Venkatraman 1946: 11.}

The overall impact of the law on Untouchability in the British period is difficult to assess. The law opened some possibilities for advancement and change to the lowest castes, as it did to others. But it did not provide any special leverage for Untouchables to use these opportunities, so that use of them tended to correspond to the existing distribution of power. That is, those who already had other resources could make use of new legal opportunities. The law did not provide an instrument for aggressively suppressing the Untouchables as that of Jim Crow laws in the Post-Reconstruction of Southern United States,\footnote{See Woodward 1957.} but the law provided a resource with which higher castes could protect their claims and in some instances perhaps even tighten their hold on valued resources to the exclusion of lower castes.\footnote{Chidambaram Pillai (1933) argues that British law recognized and promoted more restrictive claims of exclusiveness regarding temples in South India than had prevailed earlier.}
Isolated governmental action to protect the lower castes from disabilities may be found as early as the mid-nineteenth century. At the turn of the century, the “depressed classes” became an important focus of concern among reformers. It was only after 1909 that fears of diminished Hindu majorities and proposals for special legislative representation for “Untouchables” propelled “Untouchability” from the realm of philanthropy into the political arena. In 1917 the Indian National Congress reversed its long-standing policy of excluding “social reform” from its program to pass a hesitant anti-disabilities resolution. The congress urges upon the people of India the necessity, justice and righteousness of removing all disabilities imposed by custom upon the Depressed Classes, the disabilities being of a most vexatious and oppressive character, subjecting those classes to considerable hardship and inconvenience.

As reform activity on behalf of Untouchables and political activity by Untouchables multiplied, resolutions and orders confirming the right of Untouchables to equal use of governmental facilities, schools and wells were passed in Bombay and Madras as well as in several of the progressive princely states. In 1923 the Bombay Legislative Council resolved that Untouchables be allowed to use all public watering places, wells, schools, dispensaries, etc. The Provincial Government did not however undertake direct responsibility for enforcement as to local facilities, but requested “collectors.....to advise the local bodies in their jurisdiction to consider the desirability of accepting the recommendations made in the Resolution so far as it relates to them.” The flavor of enforcement activity is conveyed by the action of a District Board which, seven years later, resolved to post notices that facilities were open to Untouchables “at only those villages in the district where the public opinion is favourable for such action.”

69. Government of Bombay (Starte Committee) 1930: 52.
70. Quoted at Senjana 1946: 237.
time the ‘Starte Committee’ concluded that the policy was a “complete failure” when it could not “find a single instance where Depressed Classes are continuously using the same public well as the higher classes. There may be such wells, but if so, they must form an infinitesimal proportion of the hundreds of thousands of public wells in the Presidency.”

In 1931, the annual meeting of the Indian National Congress at Karachi propounded a program of fundamental rights for future republican India which included:

(vi) no disability to attach to any citizen by reason of his or her....caste....in regard to public employment, office of power or honours, land in the exercise of any trade or calling

(vii) equal rights of all citizens in regard to public roads, wells, schools, and other places of public resort.

It was only after Gandhi’s 1932 fast in opposition to the Communal Award’s provision of separate electorates for Untouchables that Congress leaders were willing to countenance the affirmative use of law to abolish disabilities-and in particular to obtain by law the admission of Untouchables to Hindu temples, thereby symbolizing their inclusion within the Hindu community.

A conference of caste Hindus, convened in Bombay on September 25, 1932, to ratify the Poona Pact, unanimously adopted the following resolution: This Conference resolves that henceforth, amongst Hindus, no one shall be regarded as an untouchable by reason of his birth, and that those who have been so regarded hitherto will have the same right as other Hindus in regard to the use of public wells, public schools, public roads and all other public institutions. This right shall have statutory recognition at the first opportunity and shall be one of the earliest Acts of the Swaraj Parliament, if it shall not have received such recognition before that time. It is further agreed that it shall be the duty of all Hindu leaders to secure, by every legitimate and peaceful means, an early removal of all social disabilities not imposed by custom upon the so-called untouchable classes, including the bar in respect of admission

71. Government of Bombay (Starte Committee) 1930: 52
72. All-India Congress Committee n.d.: 66.
73. On the fast, the Poona Pact (or Yeravda Pact) which ended it, and reaction to these developments, see Pyarelal 1932.
to temples.74

Between 1932 and 1936 a number of temple-entry and anti-disabilities bills were introduced in the Central Legislative Assembly and in the Madras and Bombay Legislatures.75 Temple-entry bills in Madras were denied sanction by the Government on the ground that the subject was of an all-India character. A similar bill and an anti-disabilities bill, introduced into the Central Legislative Assembly in 1933, enjoyed only limited support within Congress and met stiff resistance from the orthodox and a decidedly cool reception from the Government. The bills never came to a vote and were withdrawn when new elections impended and their Congress support dissolved.76

None of these bills contained any penal provisions. The temple-entry bills provided for trustees opening temples to Untouchables if a majority of the Hindu voters of the locality approved. The anti-disabilities bills declared the general right of Untouchables to use all public facilities, and outlawed any enforcement to the contrary by courts or public authorities.

The new popular governments which took office in 1937 avowed their opposition to the imposition of disabilities. Governmental posture at this point is typified nicely in a statement of policy sent in May, 1938 to all District Magistrates in the United Provinces. Public wells are as much free and open to these (Untouchable) castes as to the high caste Hindus and other sections of the community: Government cannot possibly recognize and distinction on any ground whatsoever in the case of users of public wells and will do their utmost to enforce such right. All people are entitled to a free and unfettered use of all public property, such as public highways, public wells, public parks, and public buildings. While Government will not fail to do their duty in regard to this matter, it is obvious that public and social opinion must exercise the greatest influence in the solution of any difficulties which may arise in any part of the province. Government appeals most strongly to all sections of the public to ensure full support to the members of the

74. Quoted in Rajagopalachari 1933: 1
75. Information on these bills is available in Venkatraman 1946, Rajagopalachari 1933, Bakhle 1939.
76. Ambedkar 1946: 117ff. For a defense of the Congress shift, see Rajagopalachari 1946
scheduled castes in the peaceful enjoyment of their fundamental rights in this respect.77

In 1938 the Madras legislature passed the first comprehensive and Penal Act to remove social disabilities, making it an offense to discriminate against Untouchables not only in regard to publicly supported facilities such as roads, wells, and transportation, but also in regard to "any other secular institution" to which the general public was admitted, including restaurants, hotels, shops, etc.78 The Act also barred judicial enforcement of any customary right or disability based on membership in such a group.79 Violation was made a cognizable offense80 with a small fine for the first offense, larger fines and up to six months imprisonment for subsequent offenses.81

It will be recalled that it was in regard to the use of religious institutions that Government had most readily intervened to support the exclusionary rights of the higher castes in the 1930s, Temple-entry was proclaimed in a few progressive princely states notably Baroda (1933) and, most spectacularly, Travencore in 1936.82 In 1938, for the first time in British India, did governments intervene to secure the opening of temples when Bombay and Madras passed temple-entry acts. The Madras legislation began with an act providing that temples in the Malabar District might be opened by majority vote of the caste-Hindus of the locality and an ordinance indemnifying officials and trustees against liability arising out of the opening of certain Malabar temples.83 This was followed by a comprehensive province-wide act authorizing trustees to open temples to excluded classes if, in their opinion, "the worshippers of such temple are generally not opposed."84 When a temple was so opened, both trustees and the formerly excluded groups were protected from legal retaliation. The Bombay act is similar and contains a

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80. i.e., an offense for which a police officer may arrest without a warrant. Code of Criminal Procedure (V of 1898) S 4 (f)
82. See Venkatraman 1946: 26 ff.
84. Madras Temple Entry Authorization and Indemnity Act (XXII of 1939).
penal provision, making it an offense to obstruct Harijans from worshipping in an opened temple.\textsuperscript{85} Similar bills were in process in the Central Provinces and Berar and in the United Provinces when the Congress Governments resigned.\textsuperscript{86}

Between the end of the Second World War and the enactment of the Constitution, with power passing entirely into Indian hands, acts removing civil disabilities of Untouchables were passed in most of the provinces and in many of the larger princely States.\textsuperscript{87} With some variation in detail, these statutes followed the general lines of the Madras Removal of Civil Disabilities Act. Enforcement of disabilities against Untouchables,\textsuperscript{88} variously described as Harijans, Scheduled Castes, excluded classes, backward classes or depressed classes, was outlawed in regard to public facilities like wells and roads and places of public accommodation like shops, restaurants and hotels. Violations were made criminal offenses, in most cases cognizable.\textsuperscript{89} Judicial enforcement of customs upholding such disabilities was barred.

During the same period, the provincial legislatures were active in the temple–entry field. The pre-war temple-entry legislation had been only permissive. It protected

\begin{footnotesize}
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\item \textsuperscript{85} Bombay Hindu Temple Worship (Removal of Disabilities) Act (XI of 1938).
\item \textsuperscript{86} Venkatraman 1946; 581v; Santhanam 1949: 45. For a critical account of the accomplishments of the Congress Governments of 1937-39 in respect of disabilities, see Coupland 1944: II, 144
\item \textsuperscript{88} Some of these acts conferred rights explicitly on “Untouchables.” See, e.g., U.P. Removal of Social land Religious Disabilities Act (XIV of 1947). But others were more broadly worded to confer rights on non-Untouchable groups as well. E.g., Travancore-Cochin Removal of Social Disabilities Act (VIII of 1125 [1950]) out-lawed discrimination against any person on grounds of belonging to a particular caste or religion. SS 3, 4, 6
\item \textsuperscript{89} The Orissa and U.P. Acts were the only ones in note 87 above under which offenses are not cognizable.
\end{itemize}
\end{footnotesize}
trustees and excluded groups from legal penalties if the former chose to ignore the
customary practices of exclusion. But trustees were under no obligation to do so and
excluded groups had no enforceable right to enter temples. As late as 1945 the Madras
High Court had upheld an award of damages to high-caste worshippers for pollution
caused by Ezhuvas entering a temple.90

Also, in spite of the symbolic victory, the results of the earlier temple-entry
legislation were not at all impressive. Surveying the progress in 1945, a reformer noted
that as a result of the Madras enactments "several small temples in the province were
thrown open to Harijans. The Kallalagar temple in Madura, the temples under the control
of the Tanjore Prince, the Courtallam and Palani temples were thrown open. But most of
the major temples in the land continue to be still closed to Harijans."91 However,
another reformer found the results "marvellous beyond imagination" and estimated that
"in all about a hundred big temples including one dozen prominent ones are now
accessible to Harijans."92 In Bombay, early returns were equally disheartening. In 1938,
the Bombay Government reported 23,362 Hindu (and Jain) temples receiving state
grants, of which 510 were open to Harijans.93 In 1939, after a year of voluntary temple-
entry, 142 temples were reported to be thrown open, but only 21 of these were temples
with trustees; apparently the others were wayside shrines in little need of such opening.
Of the 142,94 102 were in Poona and Dharwar Districts, none were in Gujarat. A.V.
Thakkar's report in the mid-1940s, which lists 37 temples in Maharashtra and a few in
other parts of the Province does not seem to record appreciably greater progress.95
Madras again took the lead in enacting a comprehensive Temple-Entry Act,96 making it a
criminal offense for any person to prevent any Hindu from entering or worshipping at any

91. Venkatraman 1946: 56.
92. A.V. Thakkar in Santhanam 1949: 86
93. Figures reproduced in Bakhle 1939: 89-90.
95. Santhanam 1949: 87.
96. Madras Temple Entry Authorization Act, 1947 (V of 1947) and Amending Act of 1949 (XIII of
1949).
temple to the same extent as Hindus generally.\textsuperscript{97} Similar acts, varying slightly in detail, were passed in most of the provinces and a number of the larger princely states.\textsuperscript{98} These Acts withdrew any judicial enforcement, either civil or criminal, of customary rights of exclusion and gave Untouchables\textsuperscript{99} an enforceable right of entry in temples.\textsuperscript{100}

Thus in 1950 when the Constitution came into force, the exclusion of Untouchables from public facilities and Hindu temples, previously recognized and to some extent enforceable as law, had been transformed into statutory offenses throughout most of India.\textsuperscript{101} The Constitution itself carried the prohibition on this conduct a step further, by entrenching freedom from such disabilities as a fundamental right.

**Constitutional Abolition:**

The Constitution of 1950 enacts as justiciable fundamental rights a battery of provisions designed to eliminate caste discrimination on the part of governmental bodies.\textsuperscript{102} Most of the Fundamental Rights conferred by the Constitution are restrictions solely on the actions of the state.\textsuperscript{103} But several provisions, including those concerning Untouchability, go beyond this to regulate private as well as official behavior. Article 17

97. For an example of efficacious use of this act by local militants as leverage to effect temple-entry, see Aiyappan 1965: 144


99. Like the social disabilities acts (see note 87 above) some of these temple-entry acts concerned only rights of “Untouchables,” making it an offense, e.g., to exclude “members of a scheduled caste” [United Provinces Removal of Social land Religious. Disabilities Act (XIV of 1947) S 3 (d)] or “excluded classes” [Central Provinces & Berar Temple Entry Authorization Act (XI of 1947); East Punjab (Removal of Religious and Social Disabilities) Act (XVI of 1948); SS 3-5]. See Bhaitchand Tarachand V. State of Bombay, A.I.R. 1952 Bom. 233, holding the Bombay Act so confined. Other acts were more broadly phrased to confer rights even on groups not Untouchable. E.g., the Travancore-Cochin Act, note 98 above.

100. Except for the United Provinces and Coorg Acts, all created cognizable offenses.

101. The only areas which did not have such regulation at the time of the enactment of the Constitution were Assam, Manipur, PEPSU, and Rajasthan.

102. Article 15 (1) forbids discrimination by the State on grounds of caste.

provides that: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability in arising out of "Untouchability" shall be an offense punishable in accordance with law.\textsuperscript{104}

It is further provided in Article 15(2) that: No citizen shall, on grounds only of religion, race, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:

a) access to shops, public restaurants, hotels and places of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Article 29 (2) forbids persons in charge of "any educational institution receiving aid out of state funds" to deny admission to an applicant "on grounds only of religion, race, caste, language or any of them." Article 23 prohibits begar and forced labour.

Article 25, which guarantees freedom to profess, practice and propagate religion is specifically made subject to the other fundamental rights provisions and is explicitly qualified by the proviso that:

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law.

(b) Providing for social welfare or reform or the throwing open of Hindu religious Institutions of a public character to all classes and sections of Hindus. Thus a broad range of disabilities is directly outlawed and government is empowered to take corrective action.

Article 17 not only forbids the practice of "Untouchability" but declares that "enforcement of disabilities arising out of 'Untouchability' shall be an offense punishable in accordance with law." Article 35 provides that "Parliament shall have, and the Legislature of a State shall not have, power to make laws prescribing punishment for those acts which are declared to be offenses under this Part" [i.e., the Fundamental Rights

\textsuperscript{104} Only two other provisions in the Fundamental Rights section of the Constitution regulate private as well as public conduct: Art. 24, which forbids child labor in hazardous employment; and Art. 18 (2) which prohibits acceptance of titles from foreign states.
section of the Constitution]. Parliament is specifically directed to “make laws prescribing punishment” for acts declared offenses in Part III “as soon as may be after the commencement of this Constitution.” Until Parliament discharged this duty, existing laws prescribing punishment for such acts were continued in force “until altered or repealed or amended by Parliament.”

Thus existing State (i.e., provincial) law was continued in force, but was frozen in its then-existing form, beyond the power of the state legislatures to modify or repeal.

In 1955 Parliament exercised this exclusive power and passed the Untouchability (Offences) Act, which remains the culmination of anti-disabilities legislation to the early 1970s. The Untouchability Offenses Act outlaws the enforcement of disabilities “on the ground of Untouchability” in regard to, inter alia, entrance and worship at temples, access to shops and restaurants, the practice of occupations and trades, use of water sources, places of public resort and accommodation, public conveyances, hospitals, educational institutions, construction and occupation of residential premises, holding of religious ceremonies and processions, use of jewelry and finery. The imposition of disabilities is made a crime punishable by fine of up to Rs.500, imprisonment for up to six months, cancellation or suspension of licenses and of public grants.

The power of civil courts to enforce any claim or recognize any custom, usage or right which would result in the enforcement of any disability is withdrawn. The previous provincial enactments had also withdrawn all governmental sanction, but they did not venture into the area of “caste autonomy” or behaviour indirectly supporting the

105. Art. 35 (b), Constitution of India.
108. XXII of 1955.
109. SS 3-6.
110. S 8. Where the offense is committed in relation to a trade or profession in respect to which the convicted person holds a license.
111. S 9. Where the convicted person is manager or trustee of a place of public worship receiving grant of land or money from the government.
112. Cf. Shelley V. Kraemer, 334 U.S. 1 (1948) in which the Supreme Court of the United States held that enforcement by a state court of a racially restrictive covenant between private parties amounted to state action prohibited by the 14th Amendment.
practice of Untouchability. But the Untouchability offenses Act, punishes not only the enforcement of disabilities, but indirect social support of Untouchability. The use of social boycotts against persons who exercise rights under the Act,\textsuperscript{113} the use of sanctions, including excommunication, against persons who refuse to practice Untouchability,\textsuperscript{114} and the instigation of the practice of Untouchability in any form\textsuperscript{115} are likewise prohibited and penalized. The Act contains one further novel and notable feature: it provides that where any of the forbidden practices “is committed in relation to a member of a Scheduled Caste....” the Court shall presume, unless the contrary is proved, that such act was committed on the ground of “Untouchability.”\textsuperscript{116}

\textbf{I.1.e. Constitutional Context of Anti-Disabilities Legislation:}

Having traced the development of anti-disabilities legislation we now turn to its reception in the courts. Before examining the specific problems of the UOA in the higher courts and in the lower courts, we shall consider the judicial treatment of three general issues which relate to the constitutional foundation and limits of anti-disabilities legislation: (A) the constitutional meaning of “Untouchability”, (B) constitutional challenges to anti-disabilities legislation; (C) the constitutional position of the caste group

\textbf{Constitutional Challenges:}

Anti-disabilities statues have survived challenges to their constitutional vires. An early challenge to a state act on grounds that it violated the freedom to carry on one’s occupation or trade was rejected by the Calcutta High Court, along with contentions that the Act was discriminatory under Article 15 and denied equal protection Article 14.\textsuperscript{117} Since then, a number of challenges have been directed to the constitutionality of temple-entry provisions in the light of the guarantees of freedom to religious denominations in Article 26. However, the courts have uniformly decided such challenges in favour of the temple-entry power.\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{113} S 7 (1)b of UoA Act.
  \item \textsuperscript{114} S 7 (2)
  \item \textsuperscript{115} S 7 (1) C.
  \item \textsuperscript{116} S 12.
  \item \textsuperscript{117} Banamali Das V Pakhu Bhandari, A.I.R. 1951 Cal. 167.
  \item \textsuperscript{118} The leading case here is Shri Venkataramana Devaru Vs. State of Mysore A.I.R. 1958 S.C. 255.
\end{itemize}
I.1.f. To manage its own affairs in matters of religion:

At first glance it may be difficult to see how such denominational autonomy can be reconciled with governmental power to provide for temple-entry. Denominational rights would seem to represent the outermost constitutional limit of the temple-entry power; the two could be reconciled by excluding denominational institutions from the “Hindu religious institutions of a public character” mentioned in Article 25(2)b.

However, the courts have been unwilling to impose such a limitation on the temple-entry power. *Sri Venkataramana Devaru V. State of Mysore*¹¹⁹ involved a denominational temple, founded for the benefit of the Gowda Saraswat Brahman community. The general public were admitted on most occasions, although non-GSB’s were excluded from some ceremonies. Under the Madras Temple-Entry Act,¹²⁰ which defined a temple as a “place which is dedicated to or for the benefit of the Hindu community or any section thereof as a place of public religious worship,” the temple was a public one and subject to temple-entry laws. The trustees resisted the application of the Act on the ground that as a denominational temple they enjoyed freedom to manage their affairs in “matters of religion.”

Is it the exclusion of all or some other communities a “matter of religion”? The Supreme Court conceded that religion embraces not merely doctrine and belief but also “practices which are regarded by the community as part of its religion.”¹²¹ The Court allowed that under the Hindu law of ceremonial, “the persons entitled to enter into [temples] for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion.”¹²² Thus the claims of the denomination here fall squarely within the ambit of Article 26(b). The Court concedes that if the issue were to be decided on grounds of 26(b) alone; the application of the Act to denominational temples would be unconstitutional.

Does Article 25(2)b authorize the state to provide for temple-entry at

temples? The Court holds that the Article extends not only to those temples dedicated to the Hindu community as a whole and not merely those used by all "touchable" Hindus, but even to denominational institutions. For "public" institutions include those founded for only a section of the public and thus include denominational temples. Textual arguments that the temple-entry power is subordinate to the denominational rights are rejected on the ground that they ignore the true nature of the right conferred by Article 25 (2)b.

That is a right conferred on 'all classes and sections of Hindus' to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Article 25(1) or against a denomination under Article 26(b). [Although] Article 25(1) deals with the rights of individuals, Article 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Article 25(1) and Article 26(b).123 Article 26(b) must then be read as subject to the temple-entry proviso. Thus the Court reconciles denominational rights with temple-entry power by what amounts to forthright judicial amendment. In order to preserve the temple-entry power from attrition by denominational rights, it treats the temple-entry provision as if it appeared in Article 26 as well as in Article25.124 It also reads the temple-entry provision as conferring rights on individuals instead of merely powers on the government. The Court repeatedly speaks of the "rights" conferred by Article 25(2)b. It is clear that if this proviso actually confers any rights, they are considerably broader than those enforced by the criminal sanctions of the Untouchability Offenses Act. They would be rights as extensive as the full ambit of the power which the proviso seems to authorize.125

But to read Article 25(2)b as conferring "rights" is somewhat paradoxical. Unlike Article 17, it does not speak in tones of prohibition. It does not seem to confer any rights on excluded groups, nor of itself to extinguish any existing exclusionary rights.

123. Ibid at 98 P.
124. The textual difficulty is the result of the distribution of subordinating qualifiers. Article 25(2)b expressly exempts the temple-entry power from limitation by the rights granted in Article 25(1), but is silent concerning the effect of the rights granted by Article 26.
125. The constitutional power extends not only to temples, but to all "Hindu religious Institutions."
On its face, it is merely an enabling provision, insuring that the guarantee of freedom of religion does not remove governmental power in this field. If the Supreme Court were taken literally, it would represent a major piece of judicial legislation. But what the Court presumably means is that the rights conferred by the state pursuant to this provision have constitutional status comparable to those granted in Part III itself. It is not necessary to infer that the Section creates new rights of access in all classes and sections of Hindus, but only that the rights of entry given to particular classes by temple-entry legislation are rights of constitutional status and of such weight as to overcome the rights granted in Article 26(b).

Although the temple-entry rights have overriding force, the denominational rights may be exercised so long as they do not “substantially reduce the right conferred by Article 25(2)b.” The denomination may exercise its rights to exclude others institutions.” and confine certain services to initiates so long as “what is left to the public of the right of worship is something substantial and not merely the husk of it.” The Supreme Court found that other occasions of worship were sufficiently numerous and substantial that temple-entry rights could be exercised compatibly with the denomination’s right to excluded all non-GSB’s during certain ceremonies.

The courts, then, have preserved anti-disabilities legislation against challenges of conflict with other fundamental rights. They have read the constitutional provisions in a manner that provides broad scope for legislative implementation of the constitutional commitment to abolish Untouchability. However, as we shall see, the legislatures have been hesitant to employ the full ambit of this power.

The Constitution and the Caste Group:
During the British period, the chief legal support of Untouchability was not through affirmative enforcement of disabilities, but through the broad area of immunity enjoyed by the self-help of higher castes in enforcing disabilities. This self-help might take the form of sanctions imposed on Untouchables directly, or of “secondary boycott”

127. Ibid 123 at 100 P.
against third parties, or of disciplinary action against those within the caste group who defied the norms of Untouchability. The Constitution of its own force makes illegitimate any affirmative legal enforcement of disabilities. In *Aramugha Konar V. Narayana Asari*, two communities claimed a customary right to use a public well to the exclusion of Asaris and Thevars of a village. The purported reasonableness of a custom of exclusive use of public property, held the Madras Court “can straightaway be disposed of by reference to Art. 15 of the Constitution....” However, even after the passage of the Constitution, indirect enforcement of disabilities by boycott or excommunication was not per se illegal. The earlier anti-disabilities legislation passed by the states did not undertake to control this indirect enforcement of disabilities. The ordinary law still provided little protection for the anti-disabilities reformer. Abusing a reformist priest as a “chandal,” and accusing him of associating with Untouchables and lacking a sense of purity was held not to be a criminal defamation, since it was merely admonition and abuse but not an imputation on his reputation.

In spite of legislative and judicial expressions of a desire to minimize the impact of caste in public life, the doctrine of “caste autonomy,” which before Independence gave caste groups a broad measure of immunity from judicial interference has remained in large measure unimpaired. Courts still refuse to entertain suits involving caste questions and castes retain their disciplinary powers over their members. The caste group still retains its power of excommunication. In spite of the Changing social order, said the Madras High Court.

Where an individual has done something wrong or prejudicial to the interests of his community, the members of this community which, by virtue of custom or usage is competent to deal with such matters [can] take a decision by common consent; and so

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128. A.I.R. 1958 Mad. 282
129. Ibid 128 at 100 P.
131. Thus the use of caste as a legal identification has been discouraged.
134. Subject to the provisions of the UOA, S 7(2), discussed below and the provision of S. 123 (2) of the Representation of the People Act, 1951 (XLIII of 1951).
long as such a decision does not offend law, it can be enforced by the will of the community. It is still a good defense to a criminal action for defamation to assert the privilege of communicating news of an excommunication to one's caste fellows. Indeed, the Supreme Court has held in Saifuddin Saheb V. State of Bombay that the power to excommunicate for infractions of religious discipline is part of the constitutional right of a religious denomination to manage its own affairs in matters of religion.

The Untouchability (Offences) Act attempts, for the first time in any anti-disabilities legislation, to reach boycotts and caste disciplinary power. It provides that:

Whosoever

(1) denies to any person belonging to his community or any section thereof any right or privilege to which such person would be entitled as a member of such community or section, or
(2) takes any part in the excommunication of such person, on the ground that such person has refused to practice "Untouchability" or that such person has done any act in furtherance of the objects of this Act, shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

The constitutional protection afforded to excommunication in Saifuddin's case would not appear to reach the excommunication banned by the Untouchability Offenses Act. In Saifuddin's case, the Bombay Prevention of Excommunication Act, which made any excommunication a criminal offense, was held to violate the rights of a Muslim sect to manage their own affairs in matters of religion by excommunicating dissidents in order to preserve the essentials of their religion. This does not imply similar constitutional protection for the caste group as such. Even if a caste group could meet the first

138. Sub-Clause (2) of the Untouchability Offences Act.
requirement and was recognized as a religious denomination (or section thereof) – and some have been.\textsuperscript{139} It is unlikely that the enforcement of Untouchability would be regarded as an essential part of its religion, within the protection of Article 26. In the Venkataramana Devaru case the Supreme Court held that the denomination’s exclusion of outsiders from temple services was indeed a matter of religion.\textsuperscript{140} But the Supreme Court decision in Sastri Yagna Purushdasji V. M.B. Vaishya indicated that the Supreme Court would not be likely to take that view today.\textsuperscript{141} There, the Supreme Court suggested that a sect’s apprehension about the pollution of their temple by Untouchables “is founded on superstition, ignorance and complete misunderstanding of the true teachings of the Hindu religion.....”\textsuperscript{142}

But even if the Court did not take an activist stance in estimating the religious character of the practice,\textsuperscript{143} and was willing to recognize the claim as a religious one, it is clear from the Venkataramana Devaru case that the religious rights would run subordinate to the rights conferred by the temple-entry power and by Article 17.\textsuperscript{144} In Saifuddin, the Supreme Court refused to give such overriding force to the Bombay Prevention of Excommunication Act. The majority there refused to see the measure as one of social reform insofar as it invalidated excommunication on religious grounds. However, they conceded that the “barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a above measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of...[Article 25 (2)b].”\textsuperscript{145} By drawing a strict distinction between religious grounds and obnoxious social practices, the Court avoided the question of deciding which would prevail in case of conflict. But it seems clear from the Venkataramana Devaru case, that it is the anti-Untouchability policy which would prevail. For the temple-entry power reaches even those practices

\textsuperscript{139.} Sri Venkataramana Devaru V. State of Mysore, A.I.R. 1958 S.C. 255.
\textsuperscript{140.} A.I.R. 1958 S.C.255 at 265.
\textsuperscript{141.} A.I.R. 1966 S.C. 1119.
\textsuperscript{142.} Ibid at 103 P.
\textsuperscript{143.} Shri Govindalaji V. State of Rajasthan, A.I.R. 193 S.C. 1638; authors cited note 149
\textsuperscript{144.} In Ram Dial V. Sant Lal, A.I.R. 1959 S.C.855.
\textsuperscript{145.} A.I.R. 1962 S.C. 853 at 870.
considered essential to a sect.146

The case of excommunication for failure to uphold Untouchability might, however, be distinguished from Venkataramana Devaru on the ground that the excommunicated party is, unlike the Untouchable in the Devaru case, not the beneficiary of the constitutional right: he is asserting no constitutional right of his own but is only vicariously asserting the Article 17 right of the Untouchable. However, the language of Article 17, which outlaws the practice of Untouchability "in any form" seems broad enough to be read to confer directly on every person a right to be free from caste action against him for the purpose of enforcing untouchability.147 The abolition of Untouchability was presumably meant to liberate all Indians from this evil, not only Untouchables.

In this respect autonomy of the caste group seems to be enhanced by the Constitution. One of the basic themes of the Constitution is to eliminate caste as a differentia in the relation of government to individuals-as subjects, voters or employees. The Constitution enshrines as fundamental law the notion that government must regulate individuals directly and not through the medium of the caste group. The individual is responsible for his own conduct and cannot, by virtue of his membership in a caste, be held accountable for the conduct of others. Thus the imposition of severe police restrictions on specified castes in certain villages on grounds of their proclivity to crime was struck down as being unconstitutional, since the regulation depended upon caste membership rather than individual propensity.148 Similarly, in State of Rajasthan V. Pratap Singh, the Supreme Court struck down a punitive levy upon certain communities on the ground that it discriminated against the selected communities on grounds of caste and religion, in violation of Article 15.149 The State had stationed additional police to 24 villages on grounds that they were harboring dacoits, receiving stolen property, etc. In assessing the villagers for costs, the State had exempted the Harijan and Muslim

146. This is explicitly the position of the concurring judge in Safiuddin, who distinguished the Venkataramana Devaru case there (Id., at 875).
inhabitants on the grounds that the great majority of members of these communities were not guilty of the conduct which necessitated the stationing of additional police. The Supreme Court said that: even if it be that the bulk of the members of the communities exempted or even all of them were law-abiding, it was not contended that there were no peaceful and law-abiding persons in these 24 villages belonging to the other communities.150

Thus the State discriminated unconstitutionally against the law-abiding members of the other communities and in favor of the Muslim and Harijan communities on the basis only of caste or religion.

It is not clear whether the Pratap Singh case would rule out any anti-disabilities measures which attempted to impose collective responsibility. It may be that collective penalties are unconstitutional per se, not only when they involve classifications forbidden by Article 15. On the other hand, if Article 15 is the obstacle, measures imposing collective responsibility along village lines might be constitutional.151 Thus, several states have announced a policy of withholding grants from villages where Untouchables are not accorded equal rights.152

Again, anti-disabilities measures which attempted to utilize caste solidarity by imposing collective responsibility might be thought distinguishable from e.g., dacoity, inasmuch as the commission of anti-disabilities offenses by their very nature involve assertions of caste solidarity. Such offenses are in many cases not the acts of isolated offenders, but the expression of patterns which are maintained by the active and passive support of one or more caste groups.153 It is an open question whether the Article 15 rights of members of such groups would prevail against the rights under Article 17 to be free of such patterns of disabilities.154

I. 1.g. The Untouchability (Offences) Act in the Higher Courts:

Having examined some aspects of the larger constitutional setting of anti-

150. Ibid 149 at 104 P.
disabilities legislation, we shall now proceed to see how the Untouchability (Offences) Act has operated in practice. In this section we shall describe its reception in the appellate courts; in the next section we shall deal with it on the ground, as applied by the trial courts and police.

No case involving the UOA has reached the Supreme Court and, since few petty criminal appeals do, it is not likely that the Supreme Court will play a significant role in interpreting the Untouchability (Offences) Act.\textsuperscript{155} It seems fair to say that the Untouchability (Offences) Act has not fared well in the High Courts, in contrast with the earlier state legislation, which generally received favorable interpretations from these Courts.

This unfavourable reception by the High Court seems to involve three problem areas: The requirement that the forbidden act be committed “on the ground of Untouchability”; the uncertainty about coverage of private property; and the limitation of rights to those enjoyed by members of the same religious denomination.

The “Ground of ‘Untouchability’” problem:

The principal substantive sections of the Untouchability (Offences) Act, forbid the denial of facilities and services “on the ground of ‘Untouchability.’”\textsuperscript{156} This requirement of specific intent makes it difficult to secure convictions, since states of mind are difficult to prove. The drafters of the Untouchability (Offences) Act attempted to obviate this difficulty by reversing the onus of proof; the Act provides that where any of the forbidden practices “is committed in relation to a member of a Scheduled Caste...the court shall presume, unless the contrary is proved, that such act was committed on the ground of ‘untouchability.’”\textsuperscript{157}

Even accompanied by this presumption, the “ground of Untouchability” requirement restricts the operation of the Untouchability (Offences) Act to instances in

\textsuperscript{156.} Untouchability (Offences) Act, SS 3-6.
\textsuperscript{157.} Untouchability (Offences) Act, S 12.
which the accused’s act proceeds from or is accompanied by a specific mental state. However, as we have seen (IIIA above) the nature of this mental state is far from clear. Neither the Constitution nor the Untouchability (Offences) Act denies Untouchability; judges required to define it find it no easy matter. Government, the legislature and the courts all tend to define it denotatively-by pointing to well-known examples of its practice rather than connotatively by specifying boundary criteria. How then can the judge as trier of fact decide whether this complex and obscure notion of Untouchability was a component of the mental state of the accused at the time of the purported offense? States of mind can only be inferred from observed behavior. And observed behavior may involve a complex admixture of motives: economic, religious, social and psychological. Making this imponderable mental state a part of the offense makes it difficult to deal with those patterns of discriminatory conduct whose incidence does not correspond precisely and directly with the touchable-untouchable distinction. For example, let us take the situations we may call “tokenism,” “over-discrimination” and “intervening motives.”

The potentialities for evading the Untouchability (Offences) Act by “tokenism” are demonstrated, if not exemplified, in the case of *Kandra Sethi V. Metra Sahu*,\(^{158}\) where a dhobi complained of exclusion from a village kirton. The defense was that dhobis as a class were not excluded, since the kirton had been attended by a dhobi (apparently the dhobi headman). The Court upheld the defense that the exclusion of the complainant was not, then, on the basis of his caste. The mere admission of one Untouchable was taken to defeat the “ground of Untouchability” requirement. The Kerala High Court was much more sensitive to the problem of tokenism when it took the contrary view in *Ramachandran Pillai V. State of Kerala*.\(^{159}\) Where the headmaster of a girls’ school constituted a separate division exclusively of Harijan students, the fact that there were some Harijan students in other classes did not overcome the illegality of this segregation, for each individual student had an equal right not to be singled out.

Another situation, the reverse of “tokenism,” might be called “over

\(^{158}\) XXIX Cuttack L.T. 364 (1963).
\(^{159}\) (1964) K.L.R. 226.
discrimination.” Suppose a discrimination is aimed not only at Untouchables but also at other low castes? The Allahabad High Court reversed the conviction of a hotel proprietor who had put up a sign intimating that the hotel would serve only Brahmans, Thakurs, Vaishyas, Kayasths and Yadavanshis. The Court held that since many other communities besides Harijans were not served, refusal to serve the latter was not on grounds of Untouchability and therefore not an offense. The reversal of the burden of proof attempted by the Untouchability (Offences) Act would not suffice to correct this anomalous result, for it is clear that the ground of discrimination here is broader than “Untouchability” as defined by the courts. However, individuation (as suggested by the Kerala High Court) would at least enable the Court to focus on the case of the Untouchable complainant undistracted by the other exclusion.

A third problem with the “ground of Untouchability” requirement is what we might call the problem of the “intervening motive.” Suppose dhobis or restaurateurs who refuse service to Untouchables assign as their motive fear of loss of trade or of social standing? State Vs. Banwari, decided under the United Provinces Removal of Social Disabilities Act, graphically and dramatically presents this problem:

“On the passing of the Act the Chamars served notice on the barbers and dhobis of the village calling upon them to render services to them. When they did not agree, a Panchayat was called by the Chamars; it was attended by....[the dhobis]. In the Panchayat, the Chamars and other people assembled there asked the (dhobis) to render service to the Chamars. The Chamars brought bundles of clothes to be washed. At first the [dhobis] agreed to render service and even accepted the bundles of clothes for washing. Then they said that they would reconsider the matter and held consultation with one another at some distance from the Panchayat, returned and told everybody that they had decided not to render service to the Chamars and returned the bundles to them. They were pressed to reconsider that decision but they remained adamant and the Panchayat broke up”.

160. High Court at Allahabad, 6 February 1957
161. A.I.R. 1951 All. 615.
162. Ibid 160 at 107 P.
Appealing their conviction under the Uttar Pradesh State Act, the dhobis asserted that their refusal was not merely on the ground that the Chamars were Untouchables, but also that if they rendered service to these Chamars, they would lose the trade of other Hindus. The Uttar Pradesh Court held that since this loss of custom would be the consequence of the fact that the Chamars were Scheduled Castes, the reason for refusal of service reduced to their Untouchability and was forbidden.

The Uttar Pradesh Statue involved in Banwari did not contain “on the ground of ‘Untouchability’” language, but provided that no person should refuse to render services “to any person merely on the ground that he belongs to a Scheduled Caste....” A less resolute court might easily have allowed the “merely” to elevate the loss of trade argument into a good defense. (The language of the Untouchability (Offences) Act is stronger in this respect, since it omits the restricting “merely” or “only” found in some state statutes.) Again, in Ramachandran Pillai, it was claimed that the segregation of Harijan Students was on grounds of their intellectual deficiency and with the intention of providing them better coaching. Although finding that the evidence did not support this assertion, the judge there made clear that an admixture of other motives for discrimination would not excuse the act, since there was no requirement that Untouchability be the “only” ground. Nor did he find any requirement of mens rea. The fact that Untouchability was one of the grounds of discrimination was sufficient to establish a finding of guilty.

The “ground of ‘Untouchability’” requirement, then, does not prevent convictions under the Act, but it acts as a slope, inclining toward a restrictive interpretation of the Act. Judicial attentiveness, resoluteness, sympathy and inventiveness are required to isolate this imponderable state of mind and resist the pull toward restrictive interpretation. Resistance of the kind displayed in Banwari and Ramachandran Pillai may sometimes be forthcoming, but a statute is not likely to be effective where it is dependent on extraordinary exertions of judicial energy to carry out its policy.

The Private Property Problem:

A second weakness in the Untouchability (Offences) Act is the equivocation in its
coverage of facilities which are used by the “public” but are not, technically, public. In Benudhar Sahu Vs. State, two Pano boys were prevented from drawing water from a privately owned well used by most villagers.163 The High Court reversed the conviction of the owner of the well on the ground that the boys had no right to use the well. The Court was unwilling to measure their access to the well by the access of other villagers, but insisted that it be shown they had a right to use the well. Merely because he was permitting other people to draw water from his well, it cannot be said that every villager had a right [to use]....the well. The prosecution must affirmatively establish that the public had a right [to use] the well in question before the offence....is established.164

It is not clear here that this conclusion is required by S 4 (iv) of the Untouchability (Offences) Act, which provides: Whoever on the ground of “Untouchability” enforces against any person any disability with regard to (iv) the use of, or access to, any river, stream, spring, well.....which other members of the public have a right to use or have access to...... It seems equally plausible that only a showing of public “access” is needed, not a showing of “a right to use” in the public. In any event, this seems to leave the Untouchable with a remedy only against exclusion from places used by the public as of right. Since there is no exact correspondence between facilities ordinary used for public life in villages and those which the public has an enforceable right to enter, Untouchables are left with restricted rights.165

The court below had convicted the well-owner for violation of S 7 of the UOA which makes it an offense to prevent or obstruct “any person from exercising any right accruing to him by reason of the abolition of ‘Untouchability’ under Article 17 of the Constitution.” The High Court found there was no offense since “no right accrued to the Pano boys to use the well....merely by reason of the abolition of “Untouchability” under Article 17 of the Constitution.”166 However, since Article 17 establishes a right not to be

164. Ibid 63 at 109 P.
the subject of Untouchability “in any form,” it might be argued that it includes disabilities respecting use of privately owned property which is part of the ‘public” life of the village. There is no limitation in Article 17 which restricts its operation to property that the public has a “right” to use.\textsuperscript{167}

A similar situation is found in State of M.P. V. Tikaram, where a villager organized a recitation of the Ramayana in an open space (of unspecified ownership) and invited the public to come and make offerings over the book.\textsuperscript{168} Untouchables were refused permission to make offerings admittedly on the grounds of Untouchability. The High Court held that this was not a violation of the Untouchability (Offences) Act since this was not a “place of public worship.” Again, the Untouchability (Offences) Act failed to secure to Untouchables the same rights of everyday use that were enjoyed by the public in general.

The “Same Denomination” Problem:

Crucial sections of the Untouchability (Offences) Act provide that an Untouchable can enter and use premises open to other persons “professing the same religion or belonging to the same religious denomination or any section thereof.” Section 3 of the Untouchability (Offences) Act provides that:

Whoever on the ground of “Untouchability” prevents any person:

(i) from entering any place of public worship which is open to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person: or

(ii) from worshipping or offering prayers or performing any religious service in any place of public worship, or bathing in, or using the waters of any sacred tank, well, spring or water course, in the same manner and to the same extent as is permissible to other persons professing the same religion or belonging to the same religious denomination or any section thereof, as such person; shall be

\textsuperscript{168} 1965 Madhya Pradesh Law Journal. (Notes of Cases) 7.
punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees or with both.

The scope of the rights conferred by this provision (and other crucial sections of the Act) depends on the meaning of the qualifying phrases, "the same religion or the same religious denomination or section thereof." The lawmakers, presumably for the purpose of clarifying these terms, added an explanation that: Persons professing the Buddhist, Sikh, or Jaina religion or persons professing the Hindu religion in any of its forms or developments including Virashaivas, Lingayats, Adivasis, followers of Brahmo, Prarthara, Arya Samaj and the Swaminarayan Sampradaya shall be deemed to be Hindus.

In spite of this explanation, the courts have resisted the implication that temple-entry provisions obviate denominational and sectarian distinctions. In State V. Puranchand169 It was held that denial to Untouchables of entry to Jain temples is not a violation of Section 3 of the Untouchability (Offences) Act, since those excluded are not of the "same religion" as those admitted. The Untouchability (Offences) Act, according to the Court, does not abolish the distinction between Hindus and Jains, nor does it create any new right-either in Untouchables or in caste Hindus-to enter Jain temples. It only puts the rights of Untouchables on a parity with the right of "others of the same religion"; i.e., Untouchables have the same rights to enter a Jain temple that were previously enjoyed by caste Hindus. If the temple was not open to the latter before, it is no offense to exclude Untouchables from it now. Jain Untouchables, if there are any, would of course now have the right to enter Jain temples since the latter are open to persons of the "same religion."

This interpretation of the temple-entry provisions is supported by the absence in the Untouchability (Offences) Act of any evidence of intent to confer any new rights on non-Untouchables. The Act penalizes exclusion only "on grounds of Untouchability," not on grounds of caste or sectarian exclusiveness. It would be, as the High Court points out, anomalous Untouchables were given rights of entry more extensive than those enjoyed by their high-caste co-religionists.

What, then, was the purpose and effect of including this expansive definition of Hinduism in the Untouchability (Offences) Act? One of the judges in the Puranchand case attributes its presence to a desire to "bring the Act in line" with the Explanation appended to Article 25(2)b and to preserve the distinctions between places of public worship belonging to different religions.\textsuperscript{170} Since the power saved to the State by Art. 25(2)b is clearly confined to Hindus and Hindu institutions, the desire to provide against narrow construction of this power is readily understandable. But this does not account for the Explanation found in the Untouchability (Offences) Act.

According to the High Court in the Puranchand case, the sum effect of the Explanation is two fold: first, to insure that the exclusion of their respective co-religionists is forbidden among Jains, Sikhs, Buddhists and sectarians as well as among Hindus in the narrower sense; second, to extend to Hindu Untouchables whatever rights caste Hindus might enjoy regarding entrance and worship at Jain, Buddhist, Sikh and sectarian shrines. But both of these objectives are accomplished by the wording of Section 3 itself; the Explanation, as interpreted, is not required for either purpose. For, first, the Act is not on its face limited to Hindus in either the narrow or broad sense.\textsuperscript{171} Its language would seem to cover exclusion on grounds of untouchability even when practiced by those beyond the widest possible definition of Hinduism.\textsuperscript{172} And secondly, parity of rights in sectarian temples is accomplished without the Explanation, for the rights of entry are measured not by the sectarian character of the premises, but by the affiliation of those who use it.\textsuperscript{173}

It appears, then, that the Court has read the Explanation right out of the Untouchability (Offences) Act. But the result would not be much different if it were taken in its most direct and plausible meaning—as lumping all of the named groups into the "same religion." For the "same religion" qualification is followed by the further requirement that the excluded persons belong to the "same religious denomination or section thereof" as those admitted. Even if all of the different faiths and sects mentioned

\textsuperscript{170} Nenaskar, J., A.I.R. 1958 M.P., at 354.171. Lok Sabha Debates, 27 April 1955. Cols. 6545, 6672.\textsuperscript{172} Unless, of course, "Untouchability" is to be taken as coterminus with Hinduism.\textsuperscript{173} See the definition of "place of public worship" in UOA, Sec. 2 (iv).
In the Explanation are deemed to be the “same religion” they would still remain distinct denominations or sections within it.¹⁷⁴ And these denominational lines would set the boundary of the rights conferred by the Untouchability (Offences) Act.¹⁷⁵

In State of Kerala Vs. Venkiteswara Prabhu,¹⁷⁶ Untouchables were prevented from entering the Nalambalam of a temple belonging to the Gowda Saraswat Brahman community. Finding no evidence that persons other than members of this community ordinarily entered this part of the temple, the High Court held that exclusion of Untouchables from it was not a violation of section 3, since those refused entrance did not belong to the same “denomination or section thereof.” While enlarging the rights of Untouchables to a parity with other caste Hindus, the UOA did not increase the rights of the latter. Since members of other communities enjoyed no right of entry to this part of the temple, no such right was conferred on Untouchables.

The acceptance by the courts of denominational lines within Hinduism as limiting the operation of temple-entry provisions may produce some unanticipated results.¹⁷⁷ For the “religion” and, “denomination” qualifiers also appear in other provisions of the UOA relating to: use of utensils and other articles kept in restaurants, hotels, etc.; use of wells, water sources, bathing ghats, cremation grounds; the use of “places used for a public or charitable purpose”; the enjoyment of benefits of a charitable trust; and the use of dharmasalas, sarais and musafirkhanas.¹⁷⁸ Given the reading of “religion” and “denomination” generated by judicial solicitude for sectarian prerogatives, the rights granted by some of the central and crucial provisions of the Untouchability (Offences) Act seems to be seriously limited.

There is thus a wide gap between the extent of the power conferred by Article 25(2)b, as interpreted by the Supreme Court in the Venkataramana Devaru case and the exercise of this power in the Untouchability (Offences) Act, as interpreted by the High

¹⁷⁵. This would seem to comport with the provision of an expansive definition of Hinduism and with the UOA’s avowed purpose of opening facilities to Untouchables.
¹⁷⁷. Devarajiah V. Padmanna, A.I.R. 1958 Mys. 84
¹⁷⁸. SS 4(ii), 4(iv) and 4(ix) of UoA Act, 1956.
Courts. The Untouchability (Offences) Act, as interpreted, uses only part of the power conferred by the Constitution, for it recognizes denominational and sectarian differences as limiting the extent of rights of entry. But the Constitution empowers the state to confer cross-denominational rights to enter and use premises not only of the same religion or denomination, but any Hindu institution.

Aware of the denominational limitations of the UOA and also troubled by the anomalous situation that while it is an offense to exclude Untouchables from temples, classes of touchable Hindus could be excluded with impunity, several states have enacted supplementary legislation. A Bombay Act makes it an offense to prevent “Hindus of any class or sect from entering or worshipping at a temple to the same extent and in the same manner as any other class or section of Hindus.” An Uttar Pradesh Act, inspired by judicial barriers to entry of Harijans at the Vishwanath temple in Benares, declares the rights of all sections of Hindus to offer worship at any Hindu temple. These laws apparently utilize the full ambit of the constitutional power regarding temples. They extend protection to non-Untouchables and they overcome the sectarian and denominational limitations which the courts read into the Untouchability (Offences) Act. Although the states are limited in their power to legislate directly on untouchability, this legislation will substantially broaden the rights of Untouchables as well. For the rights of the latter under the Untouchability (Offences) Act are automatically elevated to a parity with the new rights which the state legislation confers on caste-Hindus.

These problems in the Act are by no means insurmountable. As we have seen, the Untouchability (Offences) Act demands constant inputs of judicial energy, sympathy, and inventiveness to resist the pull toward a weak restrictive interpretation. It may be expected that, as the Act becomes older and the consciousness of the evils that inspired it

179. Besides the statues referred to in notes 208 and 209 below, the “denomination” limitations of S 3 of the UOA are overcome by the Madras Temple Entry (Authorization) Act, 1947.
182. The power conferred by Art. 25(2)b is wider than that exercised by the UOA in another respect.
183. See Galanter 1961a.
becomes less vivid, this pull will be even stronger. The Act will be used less often (see V below), techniques of evasion will become more sophisticated; defense lawyers, with more experience of its provisions, will become more plausible. The more acquittals, the less the Act will be used; and the less it is used, the more difficult it will be for judges to make the extraordinary exertions required to carry out its original policy of abolishing Untouchability “in any form.”

The Effectiveness of Anti-Disabilities Legislation:

We have discussed the way in which the Untouchability (Offences) Act and kindred measures have been interpreted and applied by the higher courts. However, in order to estimate the effectiveness of this legislation in implementing the national policy of abolishing disabilities, we must examine working of this legislation on the ground. What kind of impact does it have on the officials who are to administer it and on the ultimate “consumers” who are supposed to be regulated by it? Does this legislation clearly enunciate public policy regarding the practice of Untouchability? Does it promote new patterns of behavior? Does it deter offenses? When offenses occur, does it provide an efficacious remedy for the aggrieved Untouchables?

Assessment of the impact of anti-disabilities legislation is rendered exceedingly difficult by the absence of any reliable measure of recent changes in the condition of the Untouchables. Some notable advances are evident. Untouchables have succeeded in participating in public life to an extent unimaginable a few decades ago. Increasing numbers of Untouchables have succeeded in securing employment in the higher reaches of government and in attaining political office. There has been a marked increase in the number of Untouchables receiving education at all levels. But the vast majority of Untouchables remain poor, rural, landless, uneducated, indebted and dependent.\(^{184}\) There is reason to believe that there has been some decline in the level of disabilities suffered by Untouchables. In cities, anonymity, indifference and changing attitudes have freed many from public exhibition of disabilities. Even in rural areas, there has been, with

\(^{184}\) A useful compilation of a variety of data can be found in Planning Commission 1965; Dept., of Social Welfare 1969
wide local variation, a general softening in the rigor of disabilities. However, resistance to change is very great, though it is often indirect and is rarely articulated publicly.\textsuperscript{185} Although the decline in disabilities varies from locality to locality and from one aspect of Untouchability to another, a few generalizations may be tendered on the basis of scattered reports. Disabilities have, it seems, declined more in urban than in rural areas; they have declined more in public and occupational life than in social and family matters; they have declined more among the educated than among the uneducated; more among men than among women. The highest castes are, it seems, generally more accepting of change than the middle groups.\textsuperscript{186} The higher groups among the Untouchables are the greatest beneficiaries of these changes; their disabilities have declined more than those of the lower groups, especially the sweepers.\textsuperscript{187}

Official reports almost invariably overstate the progress that has been made. That the continued existence of disabilities should be understated should be of no surprise in view of the timidity of Untouchables in calling attention to them, the unwillingness of caste Hindus to admit their presence, and the reluctance of officials to discover them.\textsuperscript{188} Occasionally a note of frankness obtrudes, as when the Chief Secretary of Uttar Pradesh wrote to all magistrates in 1959 that there had been: No appreciable improvement in the treatment given by members of the so-called higher castes to the persons belonging to the Scheduled Castes. The practice of Untouchability continues unabated....The provisions of the Untouchability (Offences) Act are being disregarded on a large scale.\textsuperscript{189} From a variety of sources, we may conclude that most Untouchables continue to suffer under disabilities which are both onerous in themselves and which severely restrict their life chances.\textsuperscript{190} The public disabilities most often reported are exclusion from restaurants and hotels (and restrictions on the use of utensils), restrictions on the use of wells and other water sources, denial of services by barbers, dhobis, etc. and, in rural areas, denial of

\begin{itemize}
\item \textsuperscript{185} For some instances, see Ghurye 1961: 235 ff.
\item \textsuperscript{186} Cf. the suggestive opinion survey of Oommen 1968.
\item \textsuperscript{187} R.C., SC&ST 1962-63: 1-14.
\item \textsuperscript{188} See, e.g., RC., SC&ST 1955: 79.
\item \textsuperscript{189} Quoted at RC., SC&ST 1960-61: 25.
\item \textsuperscript{190} Committee on Plan Projects 1959: 189.
\end{itemize}
equality in seating arrangements, and exclusion from accommodation.\textsuperscript{191} Exclusion from schools and government offices is rarely reported of late and entry into Hindu temples is common, although restrictions within temples are not unusual. All of this exists against a background of widespread harassment of those who assert their right to equality and a pervasive discrimination which bars even the more fortunate urban and educated Untouchables from full social acceptance and full participation in society.\textsuperscript{192}

Many concurrent influences have had a share in producing the changes that are taking place. The far-reaching commitment of the Indian government to elevation of the Untouchables includes not only anti-disabilities legislation but also a variety of other policies and programs. The other programs may be divided roughly into three types which we may label redistribution, uplift, and symbolic inducements.\textsuperscript{193}

Redistributive programs include all those arrangements aimed at securing to Untouchables a larger share of tangible resources and opportunities-political, occupational, educational, etc. Along with tribals, Untouchables are the only group which are guaranteed representation in legislative bodies; a share of government jobs is reserved for them; scholarships and other educational advantages and a variety of other welfare schemes are provided for them. All of these efforts are directed at improving the conditions of Untouchables themselves.

Second, there are efforts, declining in recent years, to increase the Untouchables' cultural achievements and moral status in Indian society by inducing them to give up drink and drugs and "unclean" or polluting practices. Government has especially attempted to reduce the pollution of castes engaged in work as sweepers and scavengers by introduction of equipment that will reduce contact with the offending substances.

Both of these types of program aim at changing the conditions of Untouchables directly. A third type is aimed at bringing about a change in the behavior of others toward them, so that they cease to impose disabilities and admit Untouchables to the benefits of community life. Directly and through the medium of private agencies which

\begin{itemize}
\item \textsuperscript{191} Annual Reports of the Commissioner for Scheduled Castes and Scheduled Tribes and those in Harijan Seva (especially Nos. 44, 46, 47 and Oct.-Dec. 1967).
\item \textsuperscript{192} See Isaacs 1965.
\item \textsuperscript{193} For a review of these programs and their impact, see Dushkin (1961, 1967): Beteille (1965).
\end{itemize}
it subsidizes, Government has engaged in a wide array of activities intended to persuade people to change their attitudes toward Untouchability. Harijan Days and Weeks are sponsored by state governments, often celebrated by inter-caste dining, entertainments, and speeches by politicians denouncing Untouchability. The end of Untouchability is proclaimed by the traditional method of drumbeat through the village. Fairs, exhibitions, lecturers, posters, films and broadcasts, school textbooks, meetings and conferences are utilized to carry the message of equality. Inter-caste dinners are sponsored and the mixing of castes in hostels, meetings, and fairs is subsidized. Some states have even required that Untouchables must be employed to prepare and serve meals in every canteen, tea shop, and hotel maintained by the government. Some governments provide monetary rewards for inter-caste marriages; prizes are awarded to villages which succeed in ending disabilities. Some states attempt to put pressure on local bodies by announcing that grants will be withdrawn from villages where Untouchables are not allowed equal rights. It is in the setting of these government policies that the working of anti-disabilities legislation must be examined.

The Untouchability (Offences) Act came into force on June 1, 1955. It made more things punishable; it made all offenses cognizable; it extended throughout India.

It provided heavier penalties and contained a presumption designed to make proof easier. It was accompanied by a great deal of publicity. One would then expect that there would be more enforcement activity on the basis of this stronger and more extensive statute. This was anticipated both by its proponents and by critics who considered it too far-reaching and harsh.

During the first few years that the Untouchability (Offences) Act was in force, there was a slight increase in the number of prosecutions registered, but this tapered off in the early 1960. By a rough projection from the data available, we arrive at an average of approximately 520 cases a year during 1956-64. This is probably a slight overstatement, since it does not take into account the decline in recent years. But for the moment we may take this figure as representing roughly the level of use of the Act. Most

194. This is computed by figuring an ideal rate for each state.
of the "increase" in reported cases over the period 1952-55 is accounted for by the inclusion of Rajasthan, which had no earlier state act. Population increases more than offset the remainder of the increase. So we may conclude that, contrary to expectations, the Untouchability does not have a significantly higher level of use than did the predecessor state acts. In those areas covered by the state acts, there were more anti-disabilities prosecutions in the early 1950s than in the early 1960s. If we break up this overall rate and consider the rate of use for each state, the trends become somewhat more clear. Setting aside Assam, in which there has been no use of the Untouchability (Offences) Act, we find that the average number of cases registered annually ranges from 2.0 in Jammu and Kashmir and 4.25 in West Bengal to 72.8 in Gujarat and 105.87 in Madhya Pradesh. To provide a clearer notion of the extent to which Untouchables avail themselves of the Act, we can adjust these totals according to the size of the Scheduled Caste population in each state.¹⁹⁵ We can then restate the rate of use of the Untouchability (Offences) Act in terms of cases registered annually per million Scheduled Caste population. The discrepancies in the use of the Act from state to state emerge even more dramatically. The rate (excluding Assam again) varies from 0.6 cases per million in West Bengal and 0.9 per million in Bihar to 28.5 per million in Madhya Pradesh and 53.5 per million in Gujarat – a difference of nearly ninety times.¹⁹⁶

On the basis of available data, it is not possible to suggest a single explanation for the high and low groupings. It would seem that several factors are at work, with different intensities in different states. The general division seems to correlate closely with the degree to which caste dominance has been expressed in terms of public display of distance and touch avoidance rather than in more economic terms. Thus in the 1930s when lists of Scheduled Castes were being established, it was found that criteria of avoidance and exclusion from temples served to distinguish the Untouchables in southern, western, and central India, but not in northern and eastern India.¹⁹⁷ It is

¹⁹⁵. Of course, the correspondence between Untouchables and Scheduled Castes is not exact.
¹⁹⁶. The UOA is relatively little used as measured against, e.g., recourse by American Negroes to administrative remedies.
¹⁹⁷. See Dushkin 1957: Chap. V. One may speculate that such ritual expression of untouchability is correlated with the elaboration of caste ranking in various areas.
roughly in those areas where Untouchables were readily identified by these pollution
criteria that the Act is used. However this does not account for all of the variation.
Another factor is the prevalence of activities by uplift organizations who have social
workers helping to bring cases (Gujarat and Madhya Pradesh). Some of the variation
seems attributable to other factors. For example, the novelty of the legislation in an area
which did not have any prior state legislation and where the initial impetus is still in the
course of running down (e.g., Rajasthan). Another factor may well be the degree of
literacy, political organization and other resources at the disposal of Untouchables
(Kerala). Neither of the states in which Scheduled Caste politicians have been prominent
in the ruling party is a “high use” state (Andhra Pradesh, Bihar).

The decline in anti-disabilities prosecutions which can be seen in the overall
figures emerges even more clearly upon inspection in the course of affairs in any of the
states with sizable numbers of cases (e.g., Bombay, Rajasthan, Madhya Pradesh.). It is
sometimes claimed that the decline in prosecutions reflects the success of the
Untouchability (Offences) Act in eradicating disabilities, a claim labelled “fantastic” by
the Commissioner of Scheduled Castes and Scheduled Tribes. If there is any merit at
all to the “success” explanation it is only a partial explanation of the decline. By itself,
such an explanation would have difficulty in accounting for the course of the decline.
For example, in Bombay there appear to have been two separate declines in prosecutions,
one under the earlier state acts and one under the Untouchability (Offences) Act nor
could the “success” explanation account for the dramatic increase in cases in Madras in
1964.

The impact of Anti-Disability Legislation:

The impact of anti-disabilities legislation is not to be measured merely by the few
cases that are brought. The aim of such laws is not to prosecute offenders, but to promote

198. Andhra Pradesh is the striking exception to the regional pattern. Other indicators suggest that the
Andhra government gives low priority to the interests of the Scheduled Castes.
199. The Harijan Sevak Sangh reported that its workers in Gujarat brought 127 cases in
1963-64 and 55 cases in 1964-65.
new patterns of behavior. Undoubtedly the total effect of the Untouchability (Offences) Act as propaganda, as threat and as leverage for securing external intervention outweighs its direct effect as an instrument for the prosecution of offenders. To some extent, however, its effectiveness at an educational device and as a political weapon depends upon its efficacy as a penal provision. The power of the law to elicit widespread compliance depends in part on its ability to deal with obvious cases of non-compliance.\(^{201}\) A law that permits effective prosecution of offenders may, of course, not succeed in inducing widespread compliance, but surely a statute which fails to enable effective prosecution is less likely to secure general compliance.

This is especially so in the case of laws like the Untouchability (Offences) Act. For successful legal regulation depends upon what might be called the "halo-effect" - the general aura of legal efficacy that leads those who are not directly are targets of enforcement activities to obey the law. The "halo" may be generated by self-interest, approval of the measure, generalized respect for the law-making authority, the momentum of existing social patterns, expectation of enforcement-or a combination of these. In the case of anti-disabilities legislation which runs counter to the sentiments and established behavior patterns of wide sectors of the public, the "halo" of efficacy depends very heavily on the expectation of enforcement. By this measure, the Untouchability (Offences) Act appears an unwieldy and ineffective instrument; its shortcomings as a penal provision vitiate its capacity to secure general compliance.

However, even where there are massive inputs of governmental enforcement, the other components of compliance (approval, self-interest, momentum of existing patterns) must be successfully mobilized to some extent. In the case of the Untouchability (Offences) Act, there is little in the way of these other components, except for generalized respect for government. The law goes counter to perceived self-interest and valued sentiments and deeply ingrained behavioural patterns. Thus the difficulties of securing general compliance in the case of anti-disabilities legislation are so formidable that to measure the Act in these terms sets too high a standard. A more modest approach

\(^{201}\) Andeneas 1966.
would be to ask how the Act stands as an enabling measure. First, to what extent does it enable Untouchables to improve their position vis-à-vis disabilities? Does it provide useful leverage for those willing to expend their resources and take risks? Second, does the level of enablement sustain itself? Is the Act effective enough so that its use as an enabling measure is cumulative and self-reinforcing?

Perhaps the greatest "enabling" feature of anti-disabilities legislation is its general symbolic output. This legislation has an effect on the morale and self-image of Untouchables, who perceive government action on their behalf as legitimating their claims to be free of invidious treatment. By providing an authoritative model of public behavior that they have a right to demand, it educates their aspirations. More generally, such legislation promotes awareness of an era of change in caste relations. Specifically it provides an alternative model of behavior; it puts the imprimatur of prestigious official authority upon a set of values which are alternative to prevailing practice. Thus it presents a challenge to social life based upon hierarchic caste values. As Henry Orenstein observed in a Maharashtrian village, "The villagers knew that there was a prestigious alternative to the traditional values of caste."

Although mere knowledge of the existence of such legislation does not in itself bring about changes, there are instances in which these laws have contributed to "widespread change in daily behaviour." For at least some groups the Act provided leverage for securing favorable changes. However, this successful use did not lead to widespread use of the legislation.

II. AFTER INDEPENDENCE LAWS ENACTED BY THE GOVERNMENT TO PREVENT ATROCITIES AGAINST SCHEDULED CASTES AND SCHEDULED TRIBES:

The Constitution though laid down high structured guidelines for the upliftment of Scheduled Castes and Scheduled Tribes but no real development has taken place due

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202. Lynch (1968: 26) observes that anti-disabilities legislation communicates government support for the greater salience of citizen roles over caste roles in interaction.
204. Ibid 202 at 123 P. E.g., Aiyappan 1965.
to the atrocities and violence committed against Scheduled Castes and Scheduled Tribes. We shall examine how and to what extent these laws provide protection to the Scheduled Castes and Scheduled Tribes from the oppression of upper classes.

II.1.a. Untouchability. Prevention of Atrocities against Scheduled Caste and Scheduled Tribes under Indian Penal Code:

The Scheduled Castes and Schedule Tribes are subjected to various kinds of humiliations, ill treatment and physical abuse by the upper caste-community. They have been doing it as a matter of right and social sanction through ages. Therefore, these acts are never considered as legally punishable offences in the Hindu Code (religious law). It is only with the advent of a democratic and civil society that these offences were recognized as crimes by the mainstream society. The legal lexicon defines an offence “as an act or omission punishable by law.”

It is the British Government, which has for the first time introduced the concept of offence for acts of inhuman treatment meted out to the Untouchables or Dalits. In 1850’s the British Government for the first time barred the inhuman practice of Untouchability.206 Further, British Government in India considering all crimes that were perpetuated in the society, for their convenience, codified them and introduced as Indian Penal Code. The renowned Governor-General William Bentick, who is known for suppressing the social evils like ‘Untouchability’ and ‘Sati’ condemned the practice along with the father of Indian Renaissance Raja Rama Mohan Roy. Considering all these factors, Lord McCauley, inserted offences relating to Scheduled Castes and Scheduled Tribes in I.P.C., which is a substantive law, prescribed punishments providing relief to the Scheduled Castes and Scheduled Tribes. The Indian Penal Code continuous to be in operation in the free India as well. As such, a thorough examination of the provisions is necessary to know how these provisions are useful to the Scheduled Castes and Scheduled Tribes to protect themselves from the clutches of the dominant sections of the society. The crimes against Scheduled Castes and Scheduled Tribes, which are to be viewed, as social and physical violence, can be broadly categorized under I.P.C. as207

206. Ibid 204 at 123 P
1. Murder
2. Hurt
3. Rape
4. Kidnapping and Abduction
5. Dacoity
6. Robbery
7. Arson
8. Of Abetment
9. Criminal Conspiracy
10. Of false evidence and offences against public Justice
11. Of defamation

The Ancient Hindu scriptures, which discriminated between the Sudras and upper castes in the imposition of penal provisions, had been replaced with Indian Penal Code, which provides equal treatment to all in the imposition of punishments for offences. Though IPC never specifically mentioned the offences committed against the Scheduled Castes and Scheduled Tribes but recognized the crimes for punishing offenders committing atrocities against Scheduled Castes and Scheduled Tribes.

Special laws enacted to benefit Scheduled Castes and Scheduled Tribes were included in the IPC for dealing with such atrocities. Sec.2 (1)(f) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Act allows IPC as it expounds in its definition that “In this Act unless the context otherwise requires, words and expressions not defined in this Act but defined in the code or the IPC shall have the meanings assigned to them respectively in the code, or as the case may be, in the IPC “It is expressed that punishment prescribed for the offences in penal laws will be applied to the special laws. Sec. 6 of POA, 1989 directly adopted certain provisions of IPC. The provisions in IPC i.e., Sec. 34, Sec.53 – 75, Sec.76 – 106, Sec.107 -120, Sec.120A to 120B, Sec.511 and 149 will be applied in dealing with the offences as they apply for the purpose of IPC. Important element of the crime i.e., men’s rea especially dealing with Special Act which is essential in IPC seems to be no arbitrariness in the omission of the
mens rea in most of offences under Sec.3 of Prevention of Offences Act.\textsuperscript{208} Sec.349 of IPC i.e., 'force' as it is inserted in Sec.3(1)(xi) of the Act. 1989 curtails the persons who use force to any women belonging to Scheduled Caste and Scheduled Tribe with intent to outrage her modesty will be punished according to Section i.e., 352 of IPC. Sec. 34 of IPC i.e., act done by several persons in furtherance of common intention will be applied in any offence committed on Scheduled Caste and Scheduled Tribes by group will serve the purpose of it for the Special Act. If any of assembled persons are guilty of offence on Scheduled Caste and Schedule Tribe they will be charged under 141 of IPC. Sec. 53-75 of IPC i.e., the punishment to which offenders are liable will also be made applicable to deal with the offenders committing offences against the Scheduled Castes and Scheduled Tribes. Sec.76-106 of IPC dealing with general exceptions are also applicable to the offences under Special Acts. Sec.76 of the penal code provides that nothing is an offence done by a person who is or who by reason of a mistake of fact or the reason of mistake of law in good faith believes himself to be, bound by law, to do it. If the situation prevailing at the scene of the offence was such as to justify the order given by the deputy commissioner of police to open fire the respondent can seek the protection of that order and plead in defense that they acted in obedience to that order and, therefore they cannot be held guilty of the offence of which they are charged.\textsuperscript{209} Section 107 which reads about abetment, a person who by willful concealment of material fact which he is bound to disclose voluntarily causes or procures, or attempts to cause or procure a thing to be done, is to instigate the doing of that thing will be punished according to the IPC and also special laws. Section 120A and 120B which is criminal conspiracy is an act besides the agreements done by one or more parties to such agreement in pursuance thereof to commit an offence shall be punished according to IPC and also according to offences under other Special Acts. These sections of IPC assist to punish the offenders who commit atrocities against Scheduled Castes and Scheduled Tribes, which are made valid under several judgments awarded by Courts.

\textsuperscript{208} 1963 Cr. L.J.475 Municipal Committee Vs. Basakhiram.
Protection of Scheduled Castes and Scheduled Tribes under Criminal Procedure Code:

Criminal Justice system as an important mechanism for maintaining peace, justice and freedom in society includes both substantive and procedural justice. Substantive justice is that which is concerned with how best to allocate, distribute and protect the substantive values of society whereas, procedural justice is concerned with how the law is administered—in other words, what mechanisms or process are used in applying the law and making decision in specific cases which Cr. P.C. is meant to do this.210

The provisions of the Cr. P.C., though general in dealing with the provisions of the I.P.C. may be applied to the offenders who have committed offences against the Scheduled Castes. The offenders may be arrested with or without warrant. The houses of the culprits may be searched who have committed offences against Scheduled Castes and their property may be seized on their refusal to accept summons and the trail may be conducted either by Magistrate Courts or by the Special Courts which are instituted for this purpose. The Cr. P.C. is purely a procedural law to initiate the proceedings for the punishments prescribed under I.P.C.

The Criminal Procedure Code has empowered the police and judiciary with wide powers for the prevention of crime in the society. The police and judiciary may exercise these powers for the purpose of protecting the Scheduled Castes and Scheduled Tribes from the violence perpetuated by the dominant sections of the society.

Constitutional Safeguards for Scheduled Castes and Scheduled Tribes:

After Independence India emerged as a “Sovereign Socialist Secular Democratic Republic” mainly based on the constitutional philosophy and ideology of a welfare state with the heavy commitment to the vulnerable sections of the society.211 After recognizing prohibition of Untouchability as a fundamental right, the Constitution has provided all sorts of safeguards by not leaving them (i.e., untouchables) at the mercy

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211. Ibid 210 at 127 P

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of the Government. In addition to this, several other constitutional and legal provisions are made from time to time so as to lift the downtrodden sections of the society into the mainstream of development on par with other developed sections of the society. Particularly, providing employment opportunities using the public property, some special provisions accorded to the Scheduled Castes and Scheduled Tribes under directive principles, special seats reserved for the Scheduled Castes and Scheduled Tribes both in Assemblies and Lok Sabha and also Special Commission to be set up to look after the welfare of the Scheduled Casts are some of the safeguards created by the Constitution of India.

Article 15 directs the State not to discriminate against a citizen, such as caste, colour, creed, sex and race. When a law comes within the prohibition of Article 15, it cannot be validated by recourse to Article 14 by applying the reasonable classification. Article 15(2) is a particular article guarantees the right to equality in using shops, hotels, temples, wells, parks, owned by the government by all citizens irrespective of caste, colour, creed, race and sex. The pre-independent India has witnessed so many cases by not allowing to use the water belonging to the public tank. In a leading case from the Karnataka the Apex Court has convicted the offenders who have prohibited people of Scheduled Castes to use the water belonged to public usage which is violative of Article 17 of the constitution of India and similar violation may be attracted to the sub-section (2) of Article 15 which is also a fundamental right. The object of Article-15(2) is to eradicate the abuse of the Hindu social system and to herald a United Nation. Article-15(4)(1), which deals with the provisions of backward classes, is only an enabling provision and does not impose any obligation on the State to take any special action under it. Before this in a case State of Madras Vs. Champakam Dorai Rajan an order requisitioning land for the construction of a Harijan colony was held to be void under Article 15(1). This was resulted in 1st Amendment to the Constitution 1951. After inserting this article it made possible for the State to put up a Harijan colony in order to

212. Kathi Ranning Vs. States of Saurastra, AIR SC.123.
213. Supra Note No.127 P.
214. Special provision for advancement of backward classes.
215. AIR 1951 SC.226.
advance the interest of backward classes.

Article 16 provides equality of opportunity in matters of appointment to State services. Article-16(1) and (2) is the general rule of equality of opportunity whereas, Article-16(4) envisages 15% of jobs which are reserved for the Scheduled Castes which is an important provision. Article-16(4) differs from 16(1) and (2). Under this article 15% of jobs are reserved for Scheduled Caste, which is an important constitutional provision. After Mandal case 217 i.e., Apex court laid that there shall be no reservation in Government jobs. Seventy-seventh amendment of the Constitution was passed in 1995 and added 16(4)(a) to this article which provides that "nothing in this article shall prevent the State from making any provision for reservation in matter of promotion to any class or classes of post in the services of the State in favour of the Scheduled Castes and Scheduled Tribes which is in the opinion of the State are not adequately represented in the services under the State” which means that reservation in providing promotion in government jobs will be continued in favour of Scheduled Castes and Scheduled Tribes if the Government want to do so218. Parliament and State Assembly committees which are constituted to look after the reservation of Scheduled Castes may undertake tours to all over State and districts to make on the spot study and to submit their report to the respective Governments. Even though 15% reservation is being implemented number of people belonged to the Scheduled Caste and Scheduled Tribe remained unemployed. The launching and the momentum picked up by the Dalit movements forced both Central Government and A.P. State Government to promise filling up of Backlog vacancies meant for Scheduled Castes. The most important provision enshrined in the Constitution is providing opportunities to Scheduled Castes and Scheduled Tribes. Dr. B.R. Ambedkar called the education as ‘milk of the lioness’ and gave it the top priority in his social reform movement.219. Under the Indian constitution, initially no provision for

217. Ibid 216 at 129 P.
reservation in admissions to the educational institutions was made. But to overcome the situation raised on account of Smt. Champakam Dorai Rajan's case the Constitution was amended and article 15(4) inserted, enables the state to make the provision for reservation in admission to educational institutions in favour of Scheduled Castes and Schedule Tribes. On basis of this article 15% of seats are reserved in all schools and colleges to the Scheduled Castes. In a number of cases the Apex court has upheld the classification and the reservation policy particularly in the field of education and employment. All the professional colleges without any violation fill up the sets of 15% from among the scheduled castes. Otherwise, the institutions may be penalized which are not strictly adhered the reservation policy. In the Indian Constitution, specific provisions for reservation were made for scheduled castes in contesting elections, which are reserved to this caste for Lok Sabha and State Assemblies.220 For example 5 seats are reserved for scheduled castes from Andhra Pradesh likely to enter into Lok Sabha. These are Amaluram, Nellore, Tirupati, Nagar Kurnool, and Peddapally. These seats are according to the population of Schedules castes in Andhra Pradesh.

Implementation of Constitutional Provisions:

Though the constitution is keen to provide all facilities to avoid the disparities between touchables and untouchables but the position of Scheduled Castes and Scheduled Tribes do not change much even after 55 years of Republic of India. The percentage of Scheduled Castes and Scheduled Tribes below the poverty line is very high. The mandate under Article 47 i.e., promotion of economic interest could not be achieved among the Dalits due to their poverty and indigence.221 Their land holdings their employment opportunities are not being increased. The Constitution though provides social, economic and political justice to these people, Government and other bodies have put their deaf-ear to the cause of Scheduled Castes and Scheduled Tribes.

Reservations allotted for Dalit castes is a core point of the Constitution which is conferred by Article-15(4) is become weak now a days. The privilege provided under

this Article to the Dalit community is restricted only to Government Sector. As the scenario of the world at present is fast changing its pattern by introduction of globalization, which is affecting our country by, specific attacks on these rights by enlarging private sector which is harmful to these people. The large masses of employed section, which are in private sector, are not covered by job reservations in any way. Only about 5% of total employment is in the public sector and no reservation in any case applicable to the balance 91% -95% of the employment opportunities. Of course, the only substantial exception to reservation is the educational sector where even un-aided private educational institutions are required to provide for reservations. Virtually the deplorable conditions of the Dalits re pushing them to the poorer sections causing severe dropouts and increasing rate of private educational institutions forcing them to become bonded or contractual labour.

Since the beginning of the reservation policy it has been applied both at the stage of recruitment and at the stage of promotion. In the Mandal Commission Judgement, The Supreme Court observed that reservation in promotion should be done away with. Thus a large number chunk of higher posts would have been inaccessible to the Dalits. Fortunately, the Indian Constitution was amended by incorporating Article-16(4)(a) which reads nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which in the opinion of the State or not adequately represented in the services under the State.

The small benefits, which the Dalits are getting through reservations, are also constantly being eroded. In any event the reservation policy is not being implemented properly. Despite 50 years of reservation hardly 3 to 4% of class-II and I reserved category candidates are occupying posts. Moreover there going to be a decline in the number of posts available for reservation. To top it all, the courts have been restricting

222. Supra Note No.221 at 131 P.
struggle it is important to re-claim the places, which are being lost.

Finally, above mentioned reasons pay attention on constitution where concept of welfare looks wither away. The politics adopting on behalf of liberalization, privatization and globalization is an important cause for the curtailing of jobs in the public sector, closing down of industries, increasing number of private educational institutions have buried the fate of Scheduled Castes and Scheduled Tribes. Declining trend on the part of Government to implement welfare measures for the development of Scheduled Castes and Scheduled Tribe is nothing but denial of the fundamental rights. So, the movements launched by the Scheduled Castes and Scheduled Tribes for reservations in private sector are gaining momentum.

The implementation of the constitutional provisions at preset is always in contraverse. The provisions of the constitution are not enough for the up-bringing of Scheduled Castes and Scheduled Tribes because of the carelessness of the government. The government and political parties which are dominated by upper casts are not let the constitution to prevail upon. All these discussions are held in brief to draw the attention of reader towards the cause of Scheduled Castes and Scheduled Tribes which is not being fulfilled though the commissions are set up to look after the welfare of Scheduled Castes and Scheduled Tribes.

Some of the important Constitutional Provisions to safeguard the Scheduled Castes and Scheduled Tribes:

The Constitution of India provides for a number of safeguards for promoting and safeguarding the interests of the Scheduled Castes and Scheduled Tribes. These safeguards have been provided with a view to facilitate the implementation of the Directive Principle contained in Article 46 of the Constitution which States that:

"The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

The relevant articles from the Constitution are reproduced below:-
Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or Place of birth, but special provision for Scheduled Castes/Scheduled Tribes.


Article 17: Abolition of Untouchability.

Article 18: Protection of certain rights regarding freedom of speech etc., - special Provision for Scheduled Tribes.

Article 23: Prohibition of traffic in human beings and forced labour relevant to Instances of bonded labour among Scheduled Castes and Scheduled Tribes.


Article 29: Protection of interests of minorities-religion, race, caste, language-no bar To admission in educational institutions.

Article 35: Legislation to give effect to the provisions relating to Fundamental Rights.

Article 38: State to secure a social order for the promotion of welfare of the people.

Article 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other Weaker Sections.

Article 164: Other provisions as to Ministers-Appointment of Minister-in-charge of tribal welfare in Bihar, Madhya Pradesh and Odissa.

Article 244: Administration of Scheduled Areas and Tribal areas.

Article 244A: Formation of an autonomous State comprising certain tribal areas in Assam and creation of local Legislature or Council of Ministers or both therefore-

Article 275: Grants from the Union to certain States. Grants for Welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas- special provision for Tribal Areas of Assam.

Article 320A: Functions of Public Service Commissions-Consultation with Public Service Commission not necessary as regards the manner of giving
Effect to safeguards for Scheduled Castes/Scheduled Tribes as referred to The clause (4) of article 16.

Article 330: Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.

Article 332: Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

Article 334: Reservation of seats and special representation to cease after thirty years.

Article 335: Claims of Scheduled Castes and Scheduled Tribes to services and posts.

Article 338: Special officer for Scheduled Castes, Scheduled Tribes etc.

Article 339: Control of the Union over the Administration of Scheduled Areas and the Welfare of Scheduled Tribes.

Article 340: Appointment of Commission to investigate the conditions of backward Classes.

Article 341: Scheduled Castes – Lists of

Article 342: Scheduled Tribes – Lists of

Article 371A: Special provisions with respect to the States of Nagaland, Assam and 371B & 371C Manipur.

The working of some of the Constitutional safeguards provided for the Scheduled Castes and Scheduled Tribes like the Protection of Civil Rights Act, 1955, the representation of and reservation for the Scheduled Castes and Scheduled Tribes as provided in the various services and posts under the Central and State Governments, and educational development of Scheduled Castes and Scheduled Tribes, have been discussed by the researcher in the previous topics.

III. SPECIAL FOCUS ON “THE PROTECTION OF CIVIL RIGHTS ACT – 1955:

Article 17 of the Constitution of India, in Part III, a Fundamental Right, made an epoch-making declaration that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law. In exercise of the power in second part of Article 17 and Article 35(a)(ii), the Untouchability (Offences) Act, 1955 was passed, which as renamed in 1976 as "Protection of Civil Rights Act."

Abolition of Untouchability in itself is complete and its effect is all-pervading applicable to State actions as well as acts of omission by individuals, institutions, or juristic body of persons. Despite its abolition it is being practiced with impunity more in breach. More than 75 per cent of the cases under the Act are ending in acquittal at all levels. Apathy and lack of proper perspective even by the courts in tackling the knotty problem is obvious. The Act is not a penal law simpliciter but bears behind it monstrous Untouchability relentlessly practiced for centuries dehumanizing the Dalits, Constitution’s animation to have it eradicated and to assimilate 1/5th of Nation’s population in the mainstream of national life.

The above mandate and goal of the Constitution would be a reality if only the law is enforced strictly. The march of law should match to protect the life and there should be factual improvement in the quality of life of the Dalits; equality of opportunity and of status, justice – social, economic and political to relieve them of their travails, tortures and tribulations endured for centuries due to historical reasons. The handicaps, disabilities and sufferings, restrictions or conditions to which they are subjected need eradication and redressal under rule of law by bridging the gaps by pragmatic interpretations.

The Act not only prescribes penal offences but also accords civil and social rights as part of constitutional scheme. It requires to be enforced, interpreted and the evidence evaluated on the touchstone of the constitutional creed and ethos and any negation would abrogate and abnegate the constitutional policy.

The provisions of this Act seek to serve threefold purposes: (i) outlawed the disabilities to which Dalits are subjected to; (ii) they are made an offence under the Act; and (iii) provided rights enforceable as civil rights. Untouchability is the root cause and
consequently any religious, social, customary or moral grounds to enforce Untouchability no longer subsists nor is valid after January 26, 1950. Enforcement of any disability is a crime against human rights and the Constitution entails the wrongdoer with punishment.

All customs, usages, practices, directly or indirectly recognizing or encouraging the practice of Untouchability in any form is void, being opposed to public policy. Even a contract, covenant or any private transaction tending to recognize, encourage or effectuate Untouchability in any form is, therefore, void – ab-initio.

The right to reservation for appointment to an office or a post under the State, has been guaranteed under Articles 16 and 14 and right to admission into an educational institution is guaranteed under Articles 15 and 29(2). The right to residence and settlement in any part of the country has been guaranteed under Article 19(1)(e) and right to an avocation or a profession has been guaranteed by Article 19(1)(g). Article 335 gives them the right to an appointment to an office or post under the State. These positive rights created in favour of the Dalits, when violated or denied, they are not only enforceable in a court of law but also the infractors are liable to punishment under the Act.

Take for instance the practice of bonded labour is not only an offence but its abolition is also a right enforceable under Abolition of Bonded Labour Regulation Act. Similarly the institution of Jogins and Devadasis by virtue of its prohibition under Article 23 is no longer a valid customs. Any person tending to encourage it is liable to not only damages but also criminal prosecution. Similarly denial of admission into educational institutions on grounds of caste is an offence and also is enforceable through appropriate proceedings. To impede the exercise of the right to residing in any part of the country and settlement, on grounds of Untouchability is not only an offence but the conduct amounts to an offence under the Act. Under the welfare schemes when the houses constructed for the Dalits, Tribes and backward classes, if they are so allotted as to perpetuate Untouchability, the officer not only commits misconduct in the discharge of public duty but also by his conduct becomes liable for prosecution. Any contract or sale of the allotted lands or buildings to others is void being opposed to public policy and the purchaser acquires no right, title or interest therein. The Dalits or the State are entitled to
restitution of such houses or lands allotted to them.

The criminal law primarily concerns with social protection, prescribes rules of behaviour to be observed by all persons and punishes them for deviance, transgression or omission. Mens rea is not an essential ingredient in social legislations is the settled law. As stated by Justice Krishna Iyer in his Social Mission of Law at p. 91 that, "the act may or may not be accompanied by guilty mind but for the sense of justice among the community, being ordinarily effective against individual, to leave it to the moral plane; the law makes intent, knowledge and degree of negligence an ingredient of the offence. But where social necessity demands from the angle of public welfare or because of the difficulty of proof of accused’s mental stage, jurisprudence points dispensing with or of the onus of proof of mens rea."

The Parliament in 1955, with exercise of the power conferred under Act 35(a)(II), enacted the Untouchability (Offences) Act. This Act preconceives punishment for the practice of ‘Untouchability’ and for the enforcement of any disability arising there from. However, it was found that the punishments awarded under the Untouchability (Offences) Act were few and inadequate. In 1965, a committee on ‘Untouchability’, was appointed to make recommendations for the economical and educational development of the Scheduled Castes and for the amendment of Untouchability (Offences) Act. Thereafter, a Bill to amend the Act was introduced in 1972 and was passed in 1976, which renamed the Act as the ‘Protection of Civil Right Act, 1958’. This Amended Act also made significant changes in the existing law, viz all offences to be treated as non-compoundable and offences punishable upto three months to be tried summarily; punishment of offences enhanced; a civil servant showing negligence in the investigation of offences to be punished as an abettor; privately owned places of worship brought within its purview; preaching of ‘Untouchability’ or its justification made an offence; the State Government empowered to impose fines on the inhabitants of an area involved in or abetting the commission of offence. Machinery emerged for better administration and enforcement of the provisions.

It is interesting to note that neither in the Constitution nor in the Protection of Civil Rights Act 1955 there was no attempt to define ‘Untouchability’, Protection of Civil
Rights Act 1955 defines “Scheduled Castes” as prescribed in Constitution mentioned in Article 366(24). Supreme Court in a case explained ‘untouchable’ in India has got a special meaning i.e., the class of people whose touch was formerly considered as pollution by Indus of highest status and has developed historically. Temple entry in perhaps one of the most sensitive area which has attracted juridical attention very often. Prior to this Act (PCR Act) in a case of pollution caused by the entry of Untouchable in a temple, he was asked to pay damages for purification ceremony of temple and court said that deliberate pollution of temple by an untouchable was a criminal offence. Now it was reversed by this Act and the Supreme Court upheld section 2(d) of this Act. In Shri Venkatsomeswar V. State of Mysore the question of the right of entry of untouchable to a denominational temple came up for consideration where the Supreme Court answered the question in the affirmative and upheld the right of Untouhables to enter the temple. The Apex court in another case while discussing the scope of section 3 (b) of the P.C.R. Act 1955 held that the following conditions are necessary to attest the impugned section i.e. the prevention must be from worshipping or offering prayers of performing my religious services in ‘place of public’ worship, or from doing any act to the same extent and in the same manner as is permissible to other persons of the same religious denomination, or section thereof and that the prevention must be on the ground of Untouchability. The Protection of Civil Rights Act of 1955 in Section 3, 4, 5 and 6 forbid the denial of facilities and services on the ground of Untouchability. The Kerala High Court in Rama Choudari Pillai V. State of Kerala upheld the conviction of the complainant for segregating Harijan Students and making a separate division exclusively for them. The plea that there were some Harijan students in other classes did not find favour with the court. Rejecting the appellant’s contention, the court observed that Sec. 5 of P.C.R. Act, 1955 is applicable, even if the discrimination is not solely on the ground of ‘Untouchability’ or if ‘Untouchability’ is only one of the grounds of discrimination, the

224. See.2(d b) of P.C.R. Act 1955.
person practicing such a discrimination would be guilty of the offence. In other words, any denial of equal treatment amounts to discrimination. From the language of Art 17 and Section 5 of Protection of Civil Rights Act it is evident that every person, who is singled out for differential treatment is the victim of discrimination, and to that extent there is discrimination. Therefore, by segregating the Harijan students into a separate division the accused has already committed the offence.

The question of intervening motive came up before the Allahabad High Court for consideration in the case of State V. Banwari Y. The Chamara (Harijan)229 Chamaras served a notice on the barbers and washer men (dhobis) of the village asking them to render services to them. When they did not agree, a panchayat was called by the Chamaras. Initially dhobis agreed to render service, but later refused. The dhobis were prosecuted for discriminating the chamaras on the ground of Untouchability. They contended that they would loose the Hindu customers if they agree to the demand of the chamaras. Held, that since the loss of customers would be the consequence of the fact that chamaras were Scheduled Castes, the reason for the refusal of service may be attributable to ‘Untouchability’ and so this practice should be forbidden.

Apart from these provisions the Civil Liberties Act covers some broader area from where the problem of ‘Untouchability’ is to be eradicated. A person who ever molests, annoys or injures a person belongs to Scheduled Castes as notified by the President who ever comes under the category of untouchables, for this a punishment of imprisonment of not less than one month and not more than 6 months or a fine of not less than hundred or not more than 500 is prescribed by Sec. 7 of the 1955 Act. If the owners or the householders engaged a person belonged to the Scheduled Castes in a work without his willingness, such person is liable for punishment of imprisonment of not less than 3 months or not more than 6 months and also with fine which shall not be less than 100 rupees and not more than 500 rupees. The most important section which attracts the area of the Sale of Goods in Sec. 8 of 1955 Act. When ever a person who belongs to the Scheduled Caste Community is refused to purchase goods from the seller on the basis of

229. 1964 (2), A.I.R., Kerala.
'Untouchability' his license may be cancelled at any time. Section 6 of this Act imposes restrictions of fine and imprisonment on those who refused to sell the goods to the persons belonging to untouchables. This section further imposed some severe punishments like cancellation of licenses. Section 9 of Civil Liberties Act forced a manager of trustee of the public worship or other religious purposes not to show any discrimination on the basis of 'Untouchability', otherwise he is liable for punishment in form of suspension of grants issued by the Government. Section 10 read with Sec. 107 to 120 of IPC deals with the offences of abetment. A person whoever abets another to commit offence against untouchable is liable for punishment under IPC particularly, the public officials who are inactive or negligent in conducting enquiry on the cases against untouchables are deemed as abettors. Accordingly the trail courts and other courts may impose punishments under I.P.C. Section 12 of the Act deals with presumption by courts in certain cases, which says that where any act constitutes an offence under this Act is committed in relation to a member of a Scheduled Castes the court, shall presume unless the contrary is proved that such act was committed on the ground of "Untouchability". The Civil Rights Act laying emphasis on the protection of untouchable by preventing courts to pass a decree or a judgment either wholly or partially on the claim, which is contrary to the provisions of civil rights or the claimant, is convicted under the provisions of this Act. Thus, this Act placed a limitation on the courts not to violate the jurisdiction and limitation created by this Ac, Section 13, which bars the civil courts from issuing a decree in favour of convicted person under the provisions of this Act is pivotal land keystone of Civil Rights Act, Section 14 of this Act brings within its purview the companies for showing discrimination or ill treatment of the persons belonging to untouchables. The company as a juristic person may sue or may be sued for any discrimination shown in case of a person belonging to Scheduled Castes. Section 14-A is a section of exception i.e. the State Government employees are exempted for acting in good faith though it is not beneficial to the Scheduled Castes. Section 15-A is again said to be the ancillary section to Art.17 of the Constitution, authorizing the State Government to ensure the persons belonging to scheduled castes to avail their rights provided by the various enactments of Parliament including the Constitution. In order to protect the
persons belonging Scheduled Castes and Scheduled Tribes and their rights this Act has laid down that no other Act or decree or the judgment which is inconsistent with provisions of any or the total provisions of this Act may be deemed to declare as null and void. That means, this Act is superior which is enacted with a clear intention to abolish the institution of 'Untouchability' can be considered as Parent Act which could not be violated or superseded by any Act of the Government or legislature.

It is gratifying to note that, the above mentioned Act and its provisions which are supposed to be vigilant on the age old evil of 'Untouchability' is gradually disappearing except for occasional reporting of a few monstrous crimes committed against the so called untouchables. The judiciary is helping in eradicating this social evil by positive interpretation of the law so as to give effect to the intention of legislature and by upholding the provisions of this protective legislation. This Act is of utmost importance to look after the welfare of the untouchables particularly to recognize their rights like access to shops, hospitals, purchase of goods from shops and so on. Maintaining the validity and superiority of this Act, the others Acts may be declared as null and void which are inconsistent with the provision's of this Act.

IV. BRIEF SUMMARY OF THE CHAPTER:

In this chapter an attempt was made to focus on the measures taken by government. Particularly by the legislature to protect the Scheduled Castes and Scheduled Tribes against the violence committed by upper caste people in the Society. Finally, special focus on protection of Civil Rights Act has laid, to highlight the history of this Act and its implementation.