CHAPTER VI

JUDICIARY AND THE UNTOUCHABILITY

The important problem with which the judiciary is concerned is about the meaning of Untouchability and the scope of its application. The problem arises mainly due to the absence of definition of Untouchability either in the Constitution or in the protection of Civil Rights Act, 1955 enacted by parliament.

6.1 PROBLEM OF THE DEFINITION OF 'UNTOUCHABILITY'

The 'untouchability' has not been defined either by the Constitution or by any statute. The Government - the executive, legislature and the courts - tend to define the term 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 offence? There is need for precisely defining the term.  

6.2 LEGAL MEANING OF UNTOUCHABILITY

Abolition of Untouchability aims to root out the very practice of Untouchability "in any form". Untouchability is the tyranny of the so-called caste Hindus and all those people who style themselves as landlords and zamindars. The Untouchable were not allowed the ordinary rudimentary facilities required for a human being. "The sting of Untouchability went deep into the hearts of certain sections of the people and many of them had to leave their own faiths and seek protection under religions which were tolerant."  

1. A specific definition was suggested to the Joint Committee of Parliament (but not accepted by the majority) on these lines: "Untouchability' means and includes subjecting a member of the Scheduled Castes or others to any discrimination, disability, suffering, restriction, liability or a condition on the ground of pollution, and isolation, caste, race, religion or any of them of such person or of his parents of family".  


3. Ibid., p.665.
The term "Untouchability" in Article 17 is given in inverted commas. The Constitution has not defined Untouchability. "In the first place I would like to point out that the term "Untouchability" is nowhere defined. You follow up the general proposition about abolishing 'untouchability' by saying that it will be in any form an offence and will be punished at law". The word 'untouchable' can be applied to so many variety of things that we cannot leave it at that....The word 'Untouchable' is rather loose....Untouchability on the ground of religion or caste is what is prohibited. "Consequently we are at a great loss in understanding what is meant by Untouchability". It is not clear what constitutes "its practice in any form" or "any disability arising out of "Untouchability".

Article 17 has three elements. First, 'Untouchability', second, its practice in 'any form' and third, 'any disability' arising out of Untouchability is made

'Punishable'. It is already seen the term 'Untouchability' is not defined in the constitution. Its practice in any form is forbidden, but the 'forms' of Untouchability are nowhere identified and defined. Any disability arising out of Untouchability is punishable in accordance with law made under the constitution. The law that has been enacted for this purpose is now known as the Protection of Civil Rights Act. It is not correct to say that all forms of disabilities arising out of Untouchability are declared punishable by the said Act. It is possible that the clause 'its practice in any form is forbidden' is wider in its scope than the "disabilities made punishable" under the Protection of Civil Rights Act. These factors have their ominous shadow over the legal meaning of Untouchability.

The term untouchability was officially used for the first time in the Census Report of 1910. The term 'Untouchability' gained wide currency in the last 80 years, but it did not gain legal clarity. Although the meaning of the constitutional command still remains unclear in some important respects, the work of the courts so far provides some guidelines.
In its broadest sense, 'Untouchability' might include all instances in which one person treated another as ritually unclean and as a source of pollution. In this sense, women at childbirth, menstruating women, persons with contagious diseases, mourners, persons who eat forbidden food or violate prescribed states of cleanliness are subjects of social boycott might be considered to be untouchables.

Prof. K.T. Shah had complained that the lack of any definition of the term Untouchability "makes it open for busybodies and lawyers to make capital out of a clause like this" and he gave example of a hygienic or rather sanitary character"....and asked "what about those diseases and people who suffer from which are communicable, and so necessarily to be excluded and made untouchables while they suffer?"

It is abundantly clear that it was not the intention of the framers of the Constitution to make observance

1. C.A.D. Vol.VIII. P.668
of such temporary and expiable practices and disabilities subject to the Constitutional ban as 'Untouchability'.

Untouchability is the permanent social stigma. It goes on from one generation to another generation.

The Mysore High Court, the first to address itself to the problem, pointing out that the word 'Untouchability' appears in Article 17 between inverted commas, inferred that "the subject matter of that Article is not Untouchability in a literal or grammatical sense but the practice of it as it had developed historically in this country.

Thus, a single judge Srinivasa Rao, J, of the Mysore High Court made an attempt to define the meaning and scope of untouchability in Devaajaiah v. Padmanabha.¹ In this case an orthodox Jain issued a pamphlet contending that the complainant, a non-Jain had no right to enter or offer worship in Jain temples. In addition to that, the pamphlet exhorted the Jains to prevent him from entering and offering

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¹ A.I.R. 1959, Mya. 84.
prayers and religious services in places of worship belonging to the Jain community. He was prosecuted under the untouchability (Offences) Act for encouraging untouchability by instigating the Jains not to have social or religious intercourse with others of the same religion as the complainant. The Magistrate, however, made an order holding that no offence under the Act was disclosed. Whereupon petition was filed before the High Court against the order contending that the tendency of the pamphlet which advocated exclusion of particular persons from worship, religious service, food etc., was to promote untouchability in the Jain Community.

The High Court speaking through Justice Srinivasa Rao, held that the acts and conduct referred to in the petition might amount to an instigation to "Social boycott" of persons had not been based solely on the ground of their origin or birth "in a particular Class", the alleged acts, and conduct did not amount to practice of untouchability and cannot come within the mischief remedied by the Act and the petition was therefore dismissed.

1. Ibid., p.85.
It is interesting to refer to the reasons adduced by the learned judge in support of the above decision. He said the word untouchability in Art. 17 "is enclosed in inverted commas. This clearly indicates that the subject matter of that Article is not untouchability in its grammatical sense that the practice is has developed historically in this country". Developing the point further, he stated that the word could only refer "to those regarded as untouchables in the course of historical development. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observances such as one associated with birth or death or on account of social boycott resulting from caste or other disputes". From this theoretical exposition he reached the conclusion that the imposition of untouchability has no relation to the causes which relegated certain classes of people beyond the pale of the caste system. Such relegation has always been based on the ground of birth in certain classes.

1. Ibid,
2. Ibid,
Thus according to the Mysore High Court, the word Untouchability has reference to practice of untouchability towards these groups of persons who, in the course of historical development, were relegated "beyond the pale of caste system on grounds of birth". By this phrase the Mysore High Court seems to suggest rather obliquely that the word untouchability has reference to groups of persons found outside the four castes (varnas) of Sanskrit Law Books.¹

The meaning of Untouchability then is to be determined by reference to those who have traditionally been considered 'Untouchables'. But it is no easier to define precisely 'Untouchables' than it is to define 'Untouchability'. 'Beyond the pale of the caste system' is an impressive and unworkable formulation. Even the lowest castes are within the system of reciprocal rights and duties, their disabilities and prerogatives are articulated to those of other castes. Presumably the Mysore Court means by this phrase 'outside' the four varnas of the classical law books. In reference to their custo-

mary rights. Untouchables have sometimes, particularly in Southern India, been referred to as a fifth varna, below the Sudras, but in other places they were regarded as Sudras. For purposes of personal law, the courts have never attempted to distinguish Untouchables from Sudras, all Hindus other than the twice-born have been lumped together as Sudra.

Even where Untouchables are popularly regarded as Sudras, they cannot be equated with them since there are non-touchable groups which belong to this category. Thus, the tests used for distinguishing Sudras from the twice-born for purposes of applying personal law, cannot be used as a satisfactory measure of Untouchability.

In attempting to identify untouchable groups for the purpose of giving them benefits and preferences the Government has not tried to apply general criteria, but has adopted the device of compiling lists of castes in each locality.

1. a. Maharajaiah of Kolhapur Vs. Sundaram Ayyar, AIR,1925, Mad 497, 521 (This explicitly included untouchables)
b. Manickam V. Poongavanamal, AIR.1934, Mad.323 (Adi Dravidas)
c. Bhoia Nath V. Emperor, AIR 1924 Cal 616 (DOMS).
6.3 CONSTITUTIONAL VALIDITY OF UNTOUCHABILITY (OFFENCES)

ACT, 1955

The Constitutionality of the untouchability (Offences) Act, 1955 was challenged in Banamali Das Vs. Pankhu Bhandari.¹ In this case Banamali Das lodged a complaint against Pankhu Bhandari that the accused had refused to cut the hair of the complainant and also to render similar services to others who belonged to the same caste as the complainant, his caste being that of a cobbler. Proceedings were instituted against Pankhu Bhandari. His contention was that the Untouchability (offences) Act, 1955 was invalid as it placed unreasonable restriction on the exercise of his profession of a barber. It was also contended that the Act was discriminatory in its tendency. His contention was rejected by the High Court which observed that nothing in the Act cut down the right to carry on the profession of a barber.

In the words of High Court,

"All it does is to prohibit him from discriminating between one Hindu and another in carrying out his duties as a barber. The act compels him to serve all and really enlarges the scope of his services rather than restrict the same.... The citizens of India should not be subdivided, but should form a united body and that is an end that is rightly sought for by our law-making bodies. The makers of the constitution have recognised it and have abolished untouchability and have also provided that there should be no discrimination only on the ground of caste or religion.... The Act does not discriminate but penalises and abolished tendencies in Hindu society to discrimination.... It does not deny any person equality before law. It tends to make all persons equal in society before law and it cannot possibly be argued that this act denies any person equal protection of laws\(^1\).

6.4 UNTOUCHABILITY – A PRODUCT OF CASTE SYSTEM

In C.M. Arumugam Vs. Rajgopal\(^2\), it was observed by the Supreme Court that the institution of caste is a peculiarity of Indian Institution.

1. Ibid., pp.168-169.
In Laxman Jayaram Vs. State of Maharashtra, it was held that "Untouchability has been defined neither in the Act nor in the constitution. The "Untouchability" is a product of the Hindu caste system.

In Smt. Sita Devi Vs. State, the court held that "Untouchability" when translated in Hindi means Aachoot. The word may bring within its ambit an element of disgrace and insult. But the use of the word chamar which signifies a particular caste or sect, cannot be understood to mean a synonym for Aachoot.

6.5 ENFORCEMENT OF DISABILITY AMOUNTING TO UNTOUCHABILITY

In Laxman Rao Vs. State, on the ground of untouchability, a person is removed from a tea shop, it amounts to enforcing disability against such person on the ground of untouchability with in the meaning of Section 4 of the P.C.R. Act. In this case the court held that violently objecting to a persons entry into such a place and his presence in such a place also amounts to enforcing disability against such a person on the ground of untouchability.

3. 1980, Cr.L.J. (NOC) 36 Kant.
In State of Karnataka vs. Irappa, the accused was prosecuted under sections 4(1) and 7(1)(b) of the act on the allegation that he kept separate cups and saucers for Harijans. But the complaint was lodged 12 hours late and the delay was not explained but the complainant has also mentioned nowhere that the accused had kept separate cups and saucers for Harijans and prosecution witnesses were also related to each other, it was held that the acquittal of the accused was justified.

In Souriyar vs. N.S. Pillai, the court held that refusal to admit persons to hospital etc., on the ground of untouchability has been made punishable under section 5 of the protection of Civil rights Act, 1955.

In State vs. Banwari, the Uttar Pradesh Removal of Social Disabilities Act, 1947 was challenged by 5 barbers and two washermen. The High Court held that the applicants had no right to refuse to render their service on the ground that the person demanding their service belonged to a scheduled caste.

1. 1981, Cr.L.J. (Noc) 104 (Kant).
3. A.I.R. 1951, All, 615.
6.51 ABUSE OR INSULT ON THE GROUND OF UNTOUCHABILITY - OFFENCE

In *Subasini Baban Kate Vs State of Maharashtra*, where on being objected for throwing rubbish on the public road by the sub-inspector who was in charge of the cell dealing with offences under the protection of civil rights Act, and who was passing by the same road, the accused resident of the same colony in which the sub-inspector resides, abused the sub-inspector communicating to him that he (Sub-inspector) is cobbler by caste and he should leave the locality immediately as all the residents belong to Maratha Community, the accused was convicted under Sec. 7(1)(d) of the Act, which provides for punishment for insulting or abusing a member of Scheduled Caste on the ground of untouchability.

6.52 ENFORCEMENT OF ART.17 - PRIVATE INDIVIDUALS

In *People's Union for Democratic Rights Vs. Union of India*, the Supreme Court held as per the Constitution of India Art.17, when ever a fundamental right which is

1. 1985, Mah LR 341.
enforceable against private individuals such as for example a fundamental right enacted in Art.17 is being violated, it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course the person whose fundamental right is violated can always approach the court for the purpose of enforcement of his fundamental right, but that cannot absolve the state from its constitutional obligations to see that there is no violation of the fundamental right of such person, particularly when he belonged to the weaker sections and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him.

Art.17 of the constitution dealing with the problem of untouchability is couched in very strong terms. It not only abolishes untouchability but enjoins punishment for 'any disability arising out of untouchability' and enjoins the parliament to lay down the outline of the law in this regard. The Protection of Civil Rights Act was a consequence of this mandatory injunction of the
Civil Rights Act and the Constitutional provisions is to render practically ineffective state laws. Twenty one of these State laws have been named in the repealing clause of the Protection of Civil Rights Act itself. The repealing clause, however repeals these acts only to the extent to which they or any of the provisions contained therein correspond or are repugnant to this Act or any of the provisions contained therein. Even though these repealed Acts have been saved for certain purposes. The effect of article 35 is that the penalty power no longer rests with the states at least in so far as it must not go against the penalty provisions of the Protection of Civil Rights Act. A list of the Acts so repealed by the Protection of Civil Rights Act has been appended in the Schedule to the Act.

6.5 TEMPLE ENTRY - UNTOUCHABILITY

After passing of the "Untouchability (Offences) Act\(^1\) in 1955, some states passed the temple entry laws in 1956 purporting to clarify that intent of Untouchability

(Offences) Act so far as it related to the disability arising out of the practice of prohibiting some groups of Hindus to enter certain public temples for purposes of worship. The Bombay Act, particularly, is a consequence of the interpretation of the Untouchability (offences) Act as protecting certain denominations which attempted to exclude entry of some Hindu Castes into their temples which were held by the Courts as the denominational ones. Section 3 of the Bombay Hindu places of Public Worship (Entry Authorisation) Act, 1956, throws open the door of even denominational institutions of worship to all classes of Hindus. In fact the provisions of this Act were called into question before the Supreme Court in Sastri Yanapurusadasji Vs, Muldas Bhanwardas,¹ wherein its validity and constitutionality were upheld.

In P.S. Chary Vs, State of Madras,² the High Court of Madras held that the Madras Temple Entry Authorisation Act, 1947 as amended in 1949 was not repugnant to any of the provisions of the constitution of India. To prevent

2. A.I.R. 1956, Mad.541.
certain classes of Hindus who were once called depressed classes from entering into a public temple was certainly to practice untouchability. What was enacted in the Act of 1947 was merely the fulfilment of the directive contained in Article 17 of the Constitution.

6.61 FREEDOM OF RELIGION AND SOCIAL WELFARE

In the Social arena of enforcement of the disability of untouchability, the decision of Gajendragadkar, J. in the Yeγγpapurusadaγji case\(^1\) is clearly in favour of the welfare measures. The learned judge refused to allow the plea of the denominational Swaminarayana Sect that they were not Hindus and, therefore, the provisions of the Bombay Temple Entry Act could not be held binding on them.

There is, however, a trend both of the Supreme Court as well as that of the High Courts showing an unwillingness to report from the long judicially upheld belief that in religious matters, the Caste management must be left free to operate and that the decision of the heads of denomination should be treated with great respect. It would be

sufficient to illustrate the continuing judicial adherence to the 'Caste-autonomy' doctrine in religious matters through two cases. One, the Madras High Court in Sri Sukratendra Thirtha Swami of Kasimut case of 1923¹, and the other by the Supreme Court of India in Saifuddin case².

In his Holiness Sri Sukratendra Thirtha Swami of Kasi Mutt Vs. Prabhu,³ an order of interdict on certain Members of the Gowd Saraswat Brahmin Community by a religious Head, for taking part in a prohibited all-cases dinner celebrating Brahma Samaj Centenary, was not held defamatory.

Ramesan, J, observed "It must be remembered that though action like that of the accused savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the general community becomes more catholic, so long as a submission to the head ship of a Swami remains the usage of the caste and the members of the community do not shake themselves

off from such headships, the Swami is perfectly with in his rights to resort to the orthodox methods of conventional discipline and of vindicating caste usages provided principles of natural justice are not violated. The advancing community is not justified in expecting its own progressive opinion to be reflected in the immutable minds of Swami or other faithful followers, nor can they be coerced to change with the times for fear of criminal prosecution”¹.

In Saifuddin Sahab Vs. State of Bombay² the majority decision of the Supreme Court held the Bombay prevention of ex-communication Act, 42 of 1949, unconstitutional and as destroying the right of the Dai-Ul-Muhtalq of ex-communicating any member of the Dawoodi Bohra Community on religious grounds. Negativing the argument the Act should be upheld as a Social Welfare measure under the mandatory provisions of Article 25(2)(b)³ of the Constitution. The majority decision asserted the old 'Caste autonomy' doctrine in the following terms.

1. Ibid, p.591.
3. Providing a law for Social Welfare and reform or the throwing open of Hindu religious institution of a public character to all classes and sections of Hindus.
"The barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Article 25. But barring of excommunication on religious grounds pure and simple, cannot, however, be considered to promote social welfare, and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Bar's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever including religious grounds it must be held to be in clear violation of the right of the Dawoodi Bohra Community under Article 26(b) of the Constitution."²

It is true that the Saifuddin case is not one relating to the Hindu Community, but the doctrine announced in that case is applicable to all denominations including those belonging to the Hindu Community. In a way the Saifuddin case is a sequel to the Devaru case³ wherein the

1. Religious denomination shall have the right - to manage its own affairs in matter of religion.
2. Ibid, p. 870
Supreme Court has taken pains to reconcile an apparent conflict between the provisions of Article 25(2)(b) enjoining enforcement of welfare programme with regard to caste integration and the near absolute guarantee under Article 26(b) to denominational institutions to manage their institutions and affairs according to their own insight without any outside interference. Formula providing special time of the day for exclusive denominational worship and performance of the denominational sites as well as isolating specific areas in the temple up to which the members of scheduled castes could be allowed to enter for worship has been worked out and upheld as illustrative of the harmonious construction doctrine.

It is difficult to predict the judicial attitude to their hitherto upheld "Caste-autonomy" doctrine in religious matters. When the Tamil Nadu legislature unanimously resolved a request for a constitutional amendment to enable Harijans to be temple priests, the Parliament acceded to it. The Kerala Government has already provided facilities for teaching "Agamas" to Harijans and some Harijans are learning them. No decision of the Supreme Court could be arrived at on the very recent issue of
the unconstitutionality of a Tamil Nadu Act providing for 'Archanas' in Tamil only and forbidding them in Sanskrit as the writ petition was summarily disposed of by the Supreme Court on the Tamil Nadu Government's assurance that they did not seek to impose. Tamil only for 'Archanas' should be conducted in Tamil if so desired by the devotees. It is said that these efforts by the party in power in Tamil Nadu, who do not believe in Temple worship, are not guided by the reform motive but are intended to destroy the feeling of sanctity of temples.

It should make any usage or practice or restriction on temple entry by the untouchable Hindu illegal and provide for punishment for the caste Hindus refusing to throw upon the religious institution to all classes and sections of the society\(^1\).

Any act of discrimination after admission on the ground of Untouchability within the premises of a hospital, dispensary, educational institution or hostel etc., is forbidden under Section 5(b) of the Protection of Civil

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Rights Act. The person so discriminating and subjecting any unfavourable distinction commits an offence under the protection of Civil Rights Act.

In Kandra Sethi vs. Motra Sahu, the meaning of different terms is interpreted. Here in this case the complainant was a washerman by caste. An astaprathi kirtan was held in village Jamakoil on 12th February, 1952 to which the villagers and the neighbouring villagers were also invited to perform Namesankirtanam. Several persons including the complainant came to attend the functions. The complainant and one of his companions were prevented by the accused persons from participating in the function on the ground that they were shobies to harijan class. The complainant lodged the complaint. The plea of the accused person was one of denial. Their case was that the function was a private one held by Hirad Bhoi and they had no hand in the matter and, in any case the function was held in the private premises and that was never a place of public worship as contemplated under the provisions of the Act.

The Magistrate held that this being a private function not being held at a place of public worship, Section 3 of the Act 22 of 1955, the Untouchability (offences) Act, had no application to such a case and acquitted the accused.

The complainant filed an appeal before the Orissa High Court against the order of the sub-divisional magistrate.

Justice Das observed that Section 3 of the untouchability (Offences) Act, 1955 applies to a case where a person is prevented from entering into a place of public worship on the ground that he was untouchable. Section 2(d) defines a "place of public worship" as a place which is used as a place of public religious worship or which is generally dedicated to, or is used generally by person professing any religion or belonging to any denomination or any section thereof, for the performance of any religious service or for offering prayers therein. In this case, it has been established that the Astaprahari was being held in private premises and it was purely a private function and in no sense could the place
be called a place of public worship within the meaning of section 3. It was held that merely because the host permitted some others to come and attend the function, it would not give any right to the complainant or, for that matter, to anybody also to join the function as of right nor would it convert the religious ceremony to one of public character.¹

It was further observed that Untouchability has not been defined anywhere either in the Act 22 of 1955 which punishes untouchability as an offence nor in Article 17 of the Constitution which directs abolition of untouchability and forbids its practice in any form and declares that enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. In its broad sense we understood the word to import a sort of social disability that certain classes of people suffer by reason of their birth in particular castes.²

¹. Ibid., p.365.
². Ibid., p.365.
It was held that the case has not been made out against the accused respondents. The order of acquittal passed by the magistrate was maintained and the appeal was dismissed.

6.62 PURIFICATION OF HARIJANS - TEMPLE ENTRY

In Surya Narayana Chowdary Vs. State of Rajasthan, the practice of purification of Harijans prior to enter in temple of Shri Srinathji near Udaipur, was questioned with reference to Article 14, 15 and Art 17 of the constitution of India and the Nathdara Temple Act. It was held by J.S. Verma, Farooq Harsan, JJ, that the practice of Harijans were being permitted to enter the temple of Sri Srinathji after being purified by requiring them to wear "Kanthimala" and sprinkling them with "Ganga Jal" (Ganga Water) and giving them thulasidal prior to entry/in the temple amounts to preaching untouchability and is also discriminatory.

6.7 JUDICIARY AND THE DESEGREGATION POLICY

In Oliver Brown Vs. Board of Education of Topeka\textsuperscript{1} the Kansas law was attacked by Negro parents. The Kansas statute Ann.C.72 1724 (1949) authorises cities of the first class to organise and maintain separate schools for the education of white and coloured children below the High School grades.

The Supreme Court of the United States held that segregation by race in the public schools was in violation of Constitutional prohibition applicable to the states under the 14th Amendment and to the District of Columbia under the 15th Amendment. From this decision the following propositions be drawn:

1. School authorities may temporarily suspend for economic reasons, the Negro High School alone.

ii. Segregated instruction may be imposed on private schools.

iii. Equal opportunity is provided within a state own borders.

\textsuperscript{1} U.S. 493, 98 L.Ed. 873.
iv. White and coloured public school teachers similarly situated and qualified must be paid equal salaries.

v. Opportunity for legal education must be similarly after all races without any discrimination.

vi. Facilities and devices for legal education must be truly equitable.

vii. An enrolled graduate student must not be segregated in a State University.

viii. Terms such as 'separate but equal' should have no place in public education.¹

The judgements of the Courts in India also help us to draw certain conclusions if any, about, the segregated classes in India.²

In P. Sudarshan vs. State of Andhra Pradesh³, it was held that in exercise of the power under Article 15(4) of the Constitution of India a state may direct that a certain percentage of seats in each faculty in an educational institution be reserved for candidates from the

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¹ Ibid., pp.882, 883
backward classes. If the students belonging to the back-
ward classes, by their merit secure more than the pres-
scribed seats in the general competition, the role cannot
be invoked to reject the boys above the prescribed num-
ber; for, in that event their fundamental right under
Article 29(2) would be violated.

A similar principle as in Champakam's case was
applied in Venkatarasana vs. State of Madras\(^1\), by the
Supreme Court Justice J.R. Das held the Communal C.O.
of the Madras Government which besides making reserva-
tion of posts for Harijans and backward Hindus, as men-
tioned by clause (4) of Article, also makes reservation
of posts for other communities viz., the Muslims, Chris-
tians, non-brahmin Hindus and Braham was repugnant to
the provisions of Article 16 and was as such void.

In re M. Thomas,\(^2\) Chief Justice Rajamannar up-
held the Madras Education Rule 92 providing concession
in school fees to Harijan Christian converts, and further
held that the Directive principles in Articles 37 & 46,
were not enforceable by Courts of law.

The following conclusions can be drawn from these decisions:

i. that admission to educational institutions was in the beginning denied to the segregated classes;

ii. that reservation of seats for the Scheduled Castes was challenged in Courts of law;

iii. that admission to educational institutions on merit is a fundamental right, but the protection to the Scheduled Castes is only a directive principle;

iv. that the state is not prevented, under first Amendment of the Constitution, from making special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes. There is no compulsory legislative measures taken in these respects, and legislation is not compulsory.

v. the question of separate and equal protection clause of giving and providing "separate education" to these segregated classes is not applied.
VI. cases are decided for the backward classes
on the ground of admission; but not of the
Scheduled Castes.

6.8 AFFIRMATIVE ACTION ON GROUP MEMBERSHIP

In Urmila Cinda v. State,¹ Urmila, a lady belonging
to a high caste married Flt. Cinda, a member of a
Scheduled Caste. She applied for a post and she was placed second in the list of selected candidates. But she
did not get the job. On making inquiries she was told
that the post was reserved, and that she being a member
of a higher caste herself, could not be given the post
merely on the ground of her marriage with a Scheduled Caste
person. A single judge of the High Court who heard the
writ petition was of the view that she was not entitled
to any relief. The judgement gives two reasons as to why
a person belonging to a higher caste could not be consi-
dered for a post reserved for the Scheduled Castes. First,
there is the possibility of the abuse of the provision
which enables a person of a higher caste to be considered
as a Scheduled Caste. Second, it enables a person who is

¹. A.I.R. 1975, Del.115.
not subject to the same kind of social and educational backwardness to compete for the post. But viewed from the point of social change such marriages deserve encouragement. A report of the Commission for Scheduled Castes and the Scheduled Tribes submitted in 1979 recommended that where one of the spouses is a member of a Scheduled Caste and the other is not, some concessions in recruitment to services may be given to the non-scheduled caste spouse.¹

In Khazen Singh v. State², Khazen Singh who was a Jat, a non-scheduled caste, was adopted by Kishan Lal, a member of Scheduled Caste. He secured a Scheduled Caste certificate on the basis of the adoption and obtained a job as a sub-inspector of Police. Subsequently his appointment was cancelled on the ground that he was not a member of Scheduled Caste by birth. The learned judge relied on the language of section 12 of the Hindu Adoptions and Maintenance Act, 1956, which says that an adopted child shall be treated as a child of the adoptive father or mother "for all purposes". Therefore, full

1. Report of the Commissioner for Scheduled Castes and Scheduled Tribes (1978-79) para 5.44 (Also called as Bholu Paswan Sastry Report)
2. A.I.R. 1980 Del. 60.
effect was given to the statutory provision. Referring to the possibility of abuse J. Ranganathan stated:
"The worst that could be said is that borrowing a leaf from the "tax-planner's" note-book in regard to the permissible, if not exactly laudable, practice of taking advantage of loophole in the law, the petitioner has done a bit of "career planning". Since it is lawful, if it has the legal effect for which he contends it has to be given effect to and it is not permissible to refuse to give the legal effect because the course was adopted by the petitioner to obtain the post in Government service".

He further added "There could be adoptions in the other directions as well and also adoptions with the more laudable object of promoting social harmony....In the long run it may be found that the principle contended for the petitioner in the present case may not be really opposed to the object and scheme of the Constitution in regard to reservation for scheduled castes and scheduled tribes. On the other hand if genuine adoptions, both ways, become frequent they may eventually lead to the

1. Ibid., at 66.
development of that social equality at which the Constitutions aims.

On the other hand, the Eleyaperumal Committee (as popularly called) voiced its concern at fake adoptions as a device to evade the policy behind reservations. It noted that out of 28 seats reserved for the Scheduled Castes in 1969-69 in Rajasthan, 16 were taken by those who had secured Scheduled Caste certificates on the basis of adoptions. The Committee noted further that according to reports received by it the practice is prevalent in the States of Uttar Pradesh and the Punjab. It recommended that Scheduled Caste certificates should not be issued to non-scheduled castes on adoption.

6.81 CONCEPTUAL BASIS OF RESERVATIONS

What has been noted before leads to the question as to the conceptual basis behind reservations. A judge of the Supreme Court of India referred to reservations as a "conceptual disaster area".

1. Ibid.
The fact that ex-untouchables who became converts to Christianity or Buddhism or some other religion are not entitled to avail of the benefits of affirmative action shows that the policy is not based on compensation. Further the cost or burden of reservations falls upon Muslims and Christians who were in no way responsible to the Historical injustices committed against the Scheduled Castes. Betelille points out that Protective discrimination can and should seek to satisfy present needs; it can do nothing to repair past injuries.

The protective principle merits attention in view of the broad directive of article 46 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 the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". Also, the word "Protective discrimination" has gained currency in academic writings to denote affirmative programmes. If the protective principle is understood in its wider sense as protection from all forms of Social injustices,
then it falls appropriately within the principle of social justice.

Mathew, J. in his opinion in *State of Kerala v. N.M. Thomas* relied upon the principle of proportional equality as the basis for reservations.

Mathew, J, stated "There is no reason why this court should not also require the state to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims."^2

The conceptual basis of reservations that deserves notice is social justice. It finds a place in the preamble to the Constitution of India and in article 38.

Thus the principle of social justice as the basis of reservations finds place in the constitution.

2. Ibid., p.517.
6.82 QUALITATIVE AND QUANTITATIVE ASPECTS OF RESERVATIONS

In view of the specific mention in the provisions of the Constitution, the inherent validity of reservations qua reservations was never in issue. On the other hand, the issues centred round two questions: 1) whether reservations should be confined to initial appointments only or they should be extended to promotions also; and 2) what should be the quantum or extent of reservation?

The first question was considered by the Supreme Court of India in General Manager, Southern Railway v. Rajachari. There a railway employee challenged the directive of the General Manager ordering the reservation of selection posts in class III Railway service for the benefit of the Scheduled Caste and the Scheduled Tribe employees. The Supreme Court of India by a majority of 3 to 2 upheld the directive. Delivering the majority opinion Gajendragadkar, J., stated that "The condition precedent for the exercise of the powers conferred by Art.16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its

services. The condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes require not only that they should have representation in the lowest rung services but that they should aspire to secure representation in selection posts in the services as well.\textsuperscript{1}

Reservations in promotions have given rise to much criticism and dissatisfaction. Firstly, it has been stated that reservations in promotions on the criterion of backwardness will demoralize the efficient and hardworking members in the services and is inimical to efficiency in services. Secondly, it has been urged that those who are holding a post or a job cannot be considered as belonging to the "backward classes" and therefore reservation in their favour is unjustified.

As regards quantum of reservation \textit{Balaji v. State of Mysore}\textsuperscript{2} is the leading case on the point. Though the case primarily deals with reservations in favour of "Other

\textsuperscript{1} Id., at 44
\textsuperscript{2} A.I.R. 1964, S.C. 179.
"Backward Classes" (Backward Classes other than those belonging to the Scheduled Castes and Scheduled Tribes). Yet one of the principles laid down in it was followed in reservations for the Scheduled Castes and Scheduled Tribes. There the Government of Mysore passed an order providing for reservation up to 65% in services and in admissions to professional institutions like medical in favour of the Scheduled Castes, the Scheduled Tribes and other Backward Classes. The petitioner, an applicant to the medical course, challenged the order. The Supreme Court inter alia held that reservation under article 15(4) is in the nature of an exception and therefore, reserved seats should be below 50 per cent.

The Supreme Court in Devadasan v. Union of India1 followed this principle as to the quantum reservation in posts. There the "carry forward" rule applied by the Central Government was challenged. Under the rule if in any year suitable candidates are not available from the Scheduled Castes and the Scheduled Tribes to fill the reserved vacancies, the reserved vacancies would be

de-reserved and filled up by open competition. A corresponding number of reserved posts would be carried forward for the next year. Under the rule, the unfilled vacancies of the Scheduled Castes and the Scheduled Tribes could be carried forward for two years preceding the recruiting year. By the operation of the rule it was possible that 54 per cent of the vacancies would be filled by the reserved categories as against 46 percent available to the general pool. The Court held that the rule stated in Baleji's case is equally applicable in the case of posts. The majority of judges in Devadasan's case were also of the view that article 16(1) lays down the general rule of equality of opportunity and article 16(4) (which provides for reservations) is an exception to it, Subba Rao, J. expressed his dissent. In other words, according to him there is no limit as to the number of seats that may be reserved by the State.

But the opinion in State of Kerala v. N.M. Thomas 1 cast a considerable doubt on the principle laid down in Devadasan's case. There, under the rules framed

by the Government of Kerala, exemptions for a limited period were granted in favour of the Scheduled Castes and the Scheduled Tribes employees from passing the departmental tests for promotion to higher posts. The result was that out of the 51 posts of upper division clerks 34 posts were filled by candidates belonging to a Scheduled caste or a Scheduled tribes who did not pass the test, and 17 were given to those who passed the test. The Supreme Court by a majority of 5:2 upheld the validity of the rules. Ray, C.J. and Beg. J. upheld the rules on the ground that they conferred exemption from passing the tests for a limited period only. But Krishna Iyer and Feiz Ali, JJ. went further and stated that article 16(4) is not in the nature of an exception to article 16(1) thus expressing considerable doubt on the ruling in R. v. Government of India. In A.B. S.K. Sangh (Rly) v. Union of India, the Supreme Court clarified that the "carry forward" rule in the selection of Scheduled Caste and Scheduled Tribe candidate should not in any given year be considerably in excess of 50%. To this proposition the rider was added that "that some excess will not effect but that substantial excess will
void the selection". The Court held that the "carry forward" rule is valid not only with selection posts but also with promotion posts. They also upheld the circular that the Scheduled Caste or a Scheduled Tribe candidate gets one grading higher than otherwise assignable to him, that is, if he is "good" he will be categorized as "very good" and if "very good" as "outstanding".

6.33 APPRAISAL OF ROLE OF JUDICIARY

It is difficult to understand why in almost all cases the courts fight shy of imposing a sentence of imprisonment, though the Act provides for imprisonment. In one instance, in Uttar Pradesh, the Panchayat members maltreated a Harijan for giving water to a high caste Thakur at the latter's request. They terrorised the Harijan and wrongfully confined him so that in future he might not commit such a "crime". The Allahabad High Court, after stating that a serious view should be taken of a violation of Untouchability Offences Act, confirmed the lower court's sentence of fine of Rs.150 only.¹ It

appears imperative to write into the statute a minimum term of imprisonment for the commission of the offence of untouchability even for the first time. It may be argued that severe punishment may lead to the disturbance of peace and harmony of rural life and therefore a change of heart should be attempted. But the lenient attitude of the courts seems only to perpetuate the practice. If any real change of heart is brought about, the Act itself provides for compounding of the offence. In another case\(^1\) on the accused pleading that the Scheduled Caste complainant had profaned him by touching his utensils and thus prevented her from taking water from a public water tank, the High Court reduced the paltry fine of Rs.20 to Rs.10. If there are strong age-long anti-social prejudices only find encouragement in lenient sentence.

The Elayaperumal Committee\(^2\) on Untouchability observes:

During the tour in various States, the Committee came to know that the powerful weapon of social and economic boycott is very often used against a member of the Scheduled Caste by the caste Hindus, whenever the former attempts to free himself from the bondage of ageold traditions of performing certain menial jobs....


What the Committee has observed during the course of its tours is that forced labour is still being practised in disguise. No doubt, forced labour is a penal offence but if a Scheduled Caste person refuses to perform some menial jobs, he may not be compelled but he may be socially and economically boycotted and refused to be given any employment on frivolous grounds. The Committee feels that book is conspicuously lacking in enforcing them. We think that once a law is passed, the problem has been solved. It is no exaggeration to say that compared to the spread of the evil of untouchability, the Untouchability Offences Act is the most poorly administered law. The Blayaperumal Committee report graphically points out the poor implementation of the law:

(1) "The guardian of the law who are expected to take cognizance of the offences under the Act were mostly ignorant of it."

(ii) "Copies of the Act were not even available at many of the district offices and that many Government officials had no knowledge

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1. Ibid., p. 43.
of the provisions of the Act"\(^1\)

(iii) "The sentinels (small committees at State and District level) recommended by the Joint Committee of both Houses of Parliament which were absolutely essential to gauge the working of the Act were not created by the Various Governments and thus, which was not kept on the working of the Act, which was very essential for the removal of social disabilities"\(^2\)

(iv) "Some cases are deliberately delayed in order to subject the Scheduled Caste people to various hardships, so that they may be tired out as a result of procrastination and may not be left with any energy and resources to contest the cases."\(^3\)

For example, in a case in Maharashtra, the trial dragged on for two years and then the case was dismissed because the complainant was absent.... A unique feature of the case was that during all the hearings the accused was never present in the court.

\(^{1}\) Ibid.
\(^{2}\) Ibid.
\(^{3}\) Ibid., p. 51.
(v) "In a case of Untouchability Offences Act, 1955, the Scheduled Caste people will not get protection from the police and the Magistrate. The Police and the Magistrate naturally love their class more."\(^1\) The result is that the accused escape with a light fine. Imprisonment is rare and that also only seven days' simple imprisonment.

(iv) "We have to welcome the Gujarat Government for taking a radical step by issuing special instructions to all the village panchayats to throw open the public wells and water tanks, and if it is not done, Government will be constrained to stop their developmental and other grants"\(^2\)

Dr. P.T. Borale, in his work, complains that "there is no right to economic independence and abolition of the ghetto system which is at the root of the system of untouchability".\(^3\) According to him, the present legislation, therefore, "is absolutely inadequate and is also not covering the real spirit of the Constitution."\(^4\)

1. Ibid., P.52.
2. Ibid., P.41.
4. Ibid.
6.9 JUDICIAL ENFORCEMENT OF PROTECTION OF CIVIL RIGHTS ACT

Judicial enforcement of the Protection of Civil Rights Act requires special sensibility on the part of justices. Unfortunately, we have no studies of sentencing attitudes of justices in prosecutions for untouchability offences. Most cases lie buried at District Court levels. Decisions of district Courts are not published. Given indifferent prosecution, high-caste density of the appellate bar, lack of specialized legal services, unavailability of focused programmes of aggressive legal action by or on behalf of the untouchables, the rate of cases going to High Courts is insignificant. The Supreme Court of India, despite the fact that Article 17 is a fundamental right, has had no opportunity to review enforcement of the Civil Rights Protection Act. But a recent Bombay High Court decision in Mangla1 reveals the ineptitude of appellate courts.

In Mangla's Case the Court held that section 12 should not be read as to cast the burden of proof on the accused to show that the complainant was not a member

of the Scheduled Caste. "It was for the prosecution... to first show that the complainant was a member of the Scheduled Caste and that the act was committed in relation to him as a member of the Scheduled Caste."\(^1\) The presumption of section 12 could arise only after the prosecution has discharged this burden.

It may be fair to insist that the prosecution prove that a person against whom a CRIA offence has been committed belongs to the Scheduled Caste. But once this is shown, the language of the section is quite clear that unless contrary is proved the act should be presumed by the Court to have been committed on the ground of untouchability. By requiring the prosecution to initially show that the act in question was committed in relation to him as member of the Scheduled Caste, the Higher Court nullifies both the language and the purport of section 12 restricting the scope of the already circumscribed Section 12.

\(^1\) Id. at 284.
UNTUCHABILITY OFFENCES TO BE COGNIZABLE AND TRIABLE SUMMARILY BY THE COURTS

The protection of Civil Rights Act provides under Section 15 that the untouchability offences are cognizable. On receipt of the complaint the police officer can arrest the offender without warrant and start the investigation. For speedy trial all the offences where minimum punishment provided is less than 3 months are triable summarily.

Prior to the amendment in 1976 the old Section had provided for the offence under the Act to the compoundable with the permission of the Court. At the time when the untouchability (Offences) Act, 1955 was considered by the Joint Committee of Parliament, it was observed that if the provisions of the Act were made strict that may defeat the very object of the Act and so the offences were made compoundable with the permission of the Court. But, experience of working of the provisions indicated otherwise and so the parliament by Act 106 of 1976 substituted the present section 15 in place of original section 15.
Now the protection of Civil Rights Act provides for maximum punishment i.e., imprisonment for 2 years and fine of Rs. 500/-. By virtue of Section 4(2) read with First Scheduled of the code of Criminal Procedure, 1973, the offences under this Act are bailable.

If at the beginning of the trial, looking to the nature of the offence alleged, the magistrate feels that in case of conviction of the accused, the punishment to be awarded should be more than 3 months, then he should not try the case summarily. As the maximum sentence of imprisonment that can be awarded under the Civil Rights Act is of 2 years, the Procedure to be adopted would be that of the trial of a summons case as under Criminal Procedure Code.

The courts are given full powers under the present Civil Rights Act to prescribe punishment for preaching and practice of untouchability, for the enforcement of any disability arising there from and for matters connected therewith.
Thus, the judiciary is only an important contributory institution in prohibiting this evil practice of untouchability in the present day society. It is the administration which is concerned with the day to day affairs and the problems of the untouchables. Hence, an attempt is made in the succeeding chapter to know the efforts of the administration in minimising the social inequality and eradication of untouchability.
"The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe out every tear from every eye...."

Pt. JAWAHARLAL NEHRU.