

UNTOUCHABILITY: HUMAN RIGHTS PERSPECTIVES AND RESPONSE OF LAW IN THE POST-INDEPENDENT INDIA

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'Vasudaiva Kutumbakam' and 'Casteism' both ironically belong to our society. Till today attempts to eliminate the caste system are continuing. In the 17th Century a Tamil poetess sang –

There are only two castes,

Those who uphold justice, love & do charity belong to higher caste

And those who don't, belong to the lower.¹

In 1940s a freedom fighter wrote -

There are no castes, oh little child!

To speak of higher caste & lower caste is a sin

People rich in justice, high thoughts & love are superior!²

Gandhiji stated in the Second Round Table Conference in London that independent India will establish a political society in which there would be no distinction between high class and low class of people and dignity, justice -social, economic and political, would be ensured to the teeming millions of India. Swami Vivekananda opined that caste is devilish and must go.

Recently the Supreme Court of India lamented:

“The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality.”³ An upper caste fellow killed four persons including his sister's husband because his sister had married a dalit keralite, their neighbour. The court commuted the murder sentence to life imprisonment with minimum twenty five years in jail.

Untouchability connotes the caste action or practice of non- touching of the members of the lowest caste by the high caste members of the society. It means separation, segregation, and isolation of such low castes. It kept them away from the mainstream of society for misplaced fear of pollution. This practice kept them aloof from places of public resort including temples. It impelled absence of social intercourse and forbade inter-caste marriage. It resulted in socio-economic discrimination, low status and absence of civil personalities and rights caused only by low caste birth.⁴

The purpose of this paper is to look at untouchability from human rights perspectives and trace the response of law in independent India to combat untouchability.

Untouchability - a misfit in human rights regime

Human Rights are the expressions of those traditions of tolerance in all cultures that are the basis of peace & progress. Human rights, properly understood & justly interpreted are foreign to no culture & native to all nations.

Kofi Annan.

All members of the human family possess inherent dignity & equal rights.⁵ Equal dignity -equal rights is the basis of human rights philosophy. Caste discriminations defy the very idea of equality of all human beings. Human rights are the rights that a human being has in virtue of whatever characteristics he has that are both specifically and universally human.⁶ Universal Declaration on Human Rights declares that everyone is entitled to all the rights and freedoms set forth in it without any distinction of any kind such as race, colour etc.⁷

All conventions on human rights whether universal or regional are based on the bed rock “equality”. Civil and political rights,⁸ economic, social and cultural rights,⁹ rights against cruelty¹⁰, right to development,¹¹ right to environment¹² are recognized equally to everyone without any discrimination. International Convention on the Elimination of all forms of Racial Discrimination 1966, Convention on the Elimination of all forms of Discrimination against Women 1979, Convention on the Rights of Persons with Disabilities 2006, etc. are to further and fortify the principle of ‘equality’.

Untouchability is a form of intolerance and is against fraternity and universal brotherhood. In 2002, the UN Committee on the Elimination of all forms of Discrimination laid down in its recommendation that all member states of the Convention enact domestic legislation declaring against descent based discrimination, caste and analogous systems of inherited status. India has ratified this convention in 1968. UN Human Rights Council has in 2009 issued guidelines on discrimination based on work and descent. It has considered ‘caste’ as a factor. Supreme Court of India has said that caste discriminations though peculiar to India is comparable to racial discrimination of America while comparing the affirmative action in these countries.¹³

‘Untouchability’ is an age old practice in India of treating persons as untouchables for belonging to particular castes. There was the belief that birth entailed on the person a kind of ‘impurity’ and the touch of such person could pollute the others belonging to the so-called higher castes. The Untouchables were denied access to education, temples, wells, public roads, etc. Segregation was practised in the name of caste stratification. British rulers defined untouchability and recorded it in the census enumeration. 1911 Census laid down tests to mark off untouchables. The tests included ‘cause pollution’ and ‘eat beef and do not reverence the cow’.¹⁴ Simon Commission prescribed thirteen tests for including a caste in the scheduled list and the 1931 census sought to estimate their number¹⁵

The practice of untouchability affronts ‘dignity’ and is inconsistent with the human rights values. Everyone shall have the right to recognition everywhere as a person before the law.¹⁶ Human rights is a visibility project. Each of us counts. None shall be pushed beyond the periphery of the human community’s vision.^{16a} Human rights means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the courts in India.¹⁷ Supreme Court of India observed: “.... human rights jurisprudence in India has a constitutional status and sweep.... so that this magna carta may well toll the knell of human bondage beyond civilized limits”¹⁸

Response of Law- The Constitution of India, 1950

Fundamental Rights Independent India with a new Constitution sought to abolish distinctions on the basis of caste and establish equality ensuring social justice through protective discrimination. “We the people of India ...” the opening words of the **Preamble** strongly express the bond of oneness of the people dismissing the divisions and the classes. Preamble secures to all citizens equality of status and opportunity. It further promises promotion of fraternity so as to secure dignity of individual and unity and integrity of the nation. **Article 14** guarantees against

hostile discrimination- the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Constitution of India makes equality the rule. Discrimination of any citizen on grounds only of caste is prohibited by **Articles 15, 16, 23(2), 29(2) and 325**. Access to shops, public restaurants, hotels and places of public entertainment, public wells, roads and temples have been guaranteed to all without distinctions of caste and free of any disability, liability, restrictions or condition. **Article 17** that abolishes untouchability is the most important Part III provision in the interest of the untouchables. It declares- *“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”*. Firstly it establishes a new social order and public morality and frees the untouchables of ‘untouchability’ and the disabilities, discrimination, indignities, exploitation, liabilities associated with the age old abuses of untouchables. Secondly it incorporates a higher legal rule which is enforceable. No person can be subjected to the practice and no one shall practice it in any form. Enforcing disability on ground of untouchability shall be an offence punishable by law. Article 17 is a very significant provision from the point of view of equality before law. It guarantees social justice and dignity of man, the twin privileges which were denied to a vast section of the Indian society for centuries together.¹⁹ It is pertinent to note that the National Commission to review the working of the Constitution has recommended that **Article 359** should be amended to ensure that the right under Article 17 also is not suspended during emergency.²⁰

Article 15(2) also helps in the eradication of untouchability, as no person on the grounds only of ‘religion, race, caste, sex, place of birth or any of them’ be denied access to shops etc.. This provision clearly guarantees against the illogical ‘equal but separate doctrine’ which was the law in America till *Brown v. Board of Education*, {347 US 483(1953)}²¹ **Article 25(2)(b)** provides for opening of Hindu temples of a public character to all sections and classes of Hindus. According to the definition in the article, ‘hindu’ will include the Buddhists and jains, and even if they convert to Buddhism the hindu temples are open to them.

Article 23(1) prohibits traffic in human beings, beggar and other similar forms of forced labour and lays down that any contradiction of this prohibition shall be an offence punishable. Bonded Labour Abolition Act, 1976 has been enacted by the Parliament. Indian Penal Code makes forced labour an offence via **Section 374**. Under **Section 3(1)(vi)** of The SCs and STs (Prevention of Atrocities) Act, 1989 compelling or enticing to do ‘begar’ or other similar forms of forced or bonded labour will invite a minimum punishment of six months imprisonment. Unlike the other fundamental rights, Articles 15(2), 17 and 23(1) are not just limits on the state action but binding on private individuals also.

Affirmative action in Education Affirmative action refers to action that is designed to assure future fairness of treatment in the absence of any specific legal finding of discriminatory practices whose consequences are to be remedied.²² Blacks Law Dictionary (9th Edition) defines it as a set of actions designed to eliminate existing and continuing discrimination, and to create systems and procedures to prevent future discrimination.

Affirmative action in India is fully supported by constitutional provisions.²³ The Constitution of India identifies for affirmative action, the castes which suffered the indignity as scheduled castes (SCs). **Article 341** provides for enlisting them via presidential order which can be amended by law of Parliament.²⁴ The state is enabled to adopt protective discrimination to integrate the people into the mainstream of national life. Article 15(4) inserted by **First Constitutional Amendment Act, 1951** enables the state to make special provisions for the advancement of SCs and STs notwithstanding the right against discrimination for all citizens. This amendment was necessitated by the Supreme Court’s decision in *State of Madras v.*

Champakam Dorairajan²⁵ which held caste based reservation for medical college seats violative of Article 15 (1).

By **Ninety- third Amendment Act, 2005** clause(5) was added to the article enabling the state to make special provision by law in relation to admissions of SCs and STs in educational institutions including private institutions whether aided by government or not. Pursuant to this laws have been made to reserve seats and relax marks in qualifying exams/admission tests, remission in fees(admission, exam, reevaluation etc.) and scholarships. The positive action programmes envisaged are far more wider than mere reservation of seats.

The Supreme Court of India has upheld clause (5) so far as it relates to the state-maintained institutions and aided educational institutions as constitutional. The question as to private and unaided educational institutions is left open to be decided in a later case.²⁶ While there are affirmative programmes in respect of medical, legal, engineering, management streams of education, including UGC national eligibility tests, there appears to be less such programmes in chartered accountancy and company secretary courses.

The National Commission to review the working of the Constitution has suggested that the girls and members of SCs and the STs shall have right to free education until they complete the age of eighteen years.²⁷

Affirmative action in Public Employment Article 16(4) enables reservation for the backward classes including SCs and STs in public employment in the state if in the opinion of the state they are not adequately represented in the services under the state. Unlike in education the original constitution itself provided for affirmative action in this regard. In 1995, by **Seventy-seventh Amendment**, clause (4A) was inserted in the article to enable reservations in promotions as well for SCs and STs. In 2001 **Eighty-fifth Amendment** amended (4A) to protect promotions with consequential seniority of the SCs and STs. Supreme Court of India had laid down a ceiling of 50% in reservations²⁸ Unfilled vacancies reserved for SCs and STs when added to the current year reservations crossed the 50% ceiling. By **Eighty-first Amendment , 2000** clause (4B) was added to the article. The state was enabled to consider unfilled vacancies of a year which were reserved as a separate class without the 50% ceiling rule coming in the way. By **Eighty –second Amendment Act , 2000** a proviso was added to **Article 335** which lays down that the claims of SCs and STs shall be taken into consideration consistently with the maintenance of efficiency of administration. *The amendment ensured that the rule in the article shall not prevent in making of any provision in favour of the members of the SCs and STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in the matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.*

Basic Duties Introduced by 42nd constitutional amendment, **Article 51A** enjoins all citizens of this country to abide by certain basic duties. It is a fundamental duty binding all citizens to promote harmony and a spirit of brotherhood amongst all the people of India. The duty to develop scientific temper, humanism and the spirit of enquiry and reform dismantles the inhuman and unscientific caste system. The duty to strive towards excellence and to rise the nation to higher levels of endeavour and achievement can scarcely be discharged if some of the people are marginalized and left out in the process.

Political Rights Political democracy is ensured under the Constitution. Citizenship is recognized of all persons on same criteria under the Constitution, articles 5-11. Citizenship is crucial to enjoy the rights to vote, contest elections and hold public posts. **Article 325** stipulates that there shall be only one general electoral roll for every territorial constituency in India. No person shall be ineligible for inclusion in the roll on grounds of religion, race, caste or sex. Under **Section 3(1)(vii)** forcing or intimidating a SC or an ST not to vote or to vote to a particular candidate or to vote in a manner otherwise than provided by law is an offence

punishable with a minimum sentence of six months imprisonment. In order to secure **adequate representation of SCs and STs** in the legislative bodies of the country, Constitution provides reservation of seats as nearly as the proportion of the population of the SCs and STs in the total population. **Article 330** provides for reservation of seats in the House of People, **Article 331** in the State Legislative Assemblies, **Article 243T** in Municipalities and **Article 243D** in Panchayats. **Article 334** protects these reservations up to **sixty years** from the commencement of the Constitution.

Mandate on State Just social order is a commitment of the Constitution. State is obliged to remove inequalities and backwardness from society. Directive Principles of State Policy, **Article 38** mandates the state to secure a social order in which justice – social, economic and political shall inform all the institutions of national life. State has a specific duty under **Article 46** to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the SCs and STs and shall protect them from social injustice and all forms of exploitation. Article 46 supplements Articles 15(2), 15(4), 16, 17 and 29(2)²⁹ The directive principles are designed to usher in a social and economic democracy in the country.³⁰..Articles in Part IV of the Constitution (i.e., Directive Principles) which indicate that it is the State's obligation to create social atmosphere befitting human dignity for citizens to live in³¹

Special Constitutional Commissions National Commissions for Scheduled Castes & Scheduled Tribes have been established under our Constitution for monitoring the safeguards provided to the SCs and STs. Prior to **Sixty-fifth amendment in 1990, Article 338** provided for appointment of a Special Officer for the Scheduled Castes and Scheduled Tribes to investigate all matters in relation to safeguards provided for SCs and STs. The amendment replaced the S O with a high level multi-member committee which will not only investigate safeguards but also inquire into specific complaints with respect to deprivation of any rights and safeguards to these people. The commission reviews the measures and make recommendations to the government. The commission shall make annual reports to the President who will place it in the Parliament. The report pertaining to the state shall be forwarded to the Governor of the state who shall lay it before the state assembly. The commission has been given the powers of a civil court to summon and examine witnesses etc.. In **2003, by Eighty-ninth amendment**, Constitution was rendered to provide two high level multi member commissions – one for SCs and another for STs. **Article 338A** provides for establishment of National Commission for Scheduled Tribes whereas **Article 338** provides for National Commission for SCs.

Protection of Civil Rights Act, 1955 (PCRA)

Art 17 laid down the state policy and to give effect to Art. 17, Parliament enacted the **Untouchability (Offences) Act, 1955**. The Act was renamed as the ‘Protection of Civil Rights’ in 1976. It repealed 21 existing state laws on untouchability.

The **object** of PCRA is to prescribe punishment for the preaching & practice of untouchability & for the enforcement of any disability on the ground of untouchability. PCRA does not define ‘untouchability’. **Civil rights** means any right that accrues to a person by reason of the abolition of ‘untouchability’ by article 17 of the constitution.³²

Offences Ss.3 – 7A define & punish offences arising out of untouchability. Enforcing religious & social disabilities, refusal to admit persons to hospitals, educational institutions etc., refusing to sell goods or render services, unlawful compulsory labour to do scavenging etc. are offences. Section 7 punishes prevention of exercise of civil rights, injuring for having exercised civil rights, inciting / encouraging the practice of untouchability, insulting an SC on the ground of untouchability, reprisal for exercising civil rights and excommunicating another for not practicing untouchability. Public servant neglecting investigation is considered as abetting offences under PCRA. Abetment of offence under this Act is treated a commission of the offence and punished accordingly.³³ The offences are cognizable & triable summarily³⁴ PCRA requires the courts to presume that the offences were done on the ground of untouchability if the victim is SC³⁵.

Penalties PCRA prescribes minimum sentence of imprisonment & also enhanced penalty on subsequent conviction. While convicting for refusing to sell or render service, the court may, without prejudice to other penalty, cancel or suspend license. The Govt. may suspend or resume the grants to institutions punished for refusing to admit if they receive govt. grants. State Govt. may impose collective fine on inhabitants of any area if it is satisfied that the inhabitants are concerned in or abetting the commission of offences under PCRA³⁶. Any person above 14 years if found guilty under PCRA shall not be extended the benefits of Probation of Offenders Act 1958³⁷. Conviction under PCRA is a disqualification to contest elections under Representation of People Act 1951, S.9.

Courts shall not recognize any custom or usage imposing any disability on any person on the ground of untouchability. Civil Courts shall not entertain or continue suits contrary to the provisions of PCRA. PCRA shall override other laws³⁸.

Duty of the State State Government under the coordination of Central Government shall ensure that civil rights are available to the concerned and there are sufficient facilities of legal aid to victims. The Govt. shall appoint officers for prosecution, establish special courts, set up committees for formulating & implementing measures, provide for a periodic survey of the working of PCRA & identify notorious areas in order to remove disabilities³⁹

The SCs & STs (Prevention of Atrocities) Act, 1989 (PA A) and The Central Rules

Four decades after UN Declaration on Human Right and Indian independence, we had to enact the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 to protect our brethren against various offences, indignities, humiliations & harassment. This reflects on our failure in our commitment to secure justice & dignity as resolved in the preamble to our constitution. PAA has the following **objectives**-

- to prevent the commission of offences of atrocities against the members of the SCs & STs.
- to provide for special courts for the trial of such offences.
- to provide for relief & rehabilitation of the victims of such offences.⁴⁰

Offences and Penalties Section 3(1) identifies 15 different acts like forcible feeding of obnoxious substances, intimidation to vote, fouling of water ordinarily used etc. as punishable

with a minimum sentence of 6 months imprisonment which may extend to five years and fine. Section 3 (2) identifies graver offences like fabricating false evidence and causing execution of an innocent SC/ST etc. where the punishments are seven years or life imprisonment or death. The offences can be committed only by persons who are neither SCs nor STs. It was unsuccessfully contested that Section 3 is violating the equality clause of the constitution as it makes a hostile discrimination against the caste hindus. Section 3 was upheld interpreting it in the light of the Preamble.^{40a} Causing disappearance of evidence or screening of offender of these offences shall be punishable with the punishment provided for that offence.⁴¹

A public servant committing these offences will be punished with minimum one year imprisonment.⁴² Any public servant who is not an SC or ST, willfully neglecting duties under this Act shall be punishable with a minimum sentence of six months extending to one year.⁴³ If the public servant is a SC or a ST and he connives with the perpetrators by willful neglect, he/she cannot be punished! Removal of persons likely to commit offences for a maximum period of two years under this Act may be done by externment orders of special court.⁴⁴ S.7 provides for forfeiture of property used by the convict in favour of the state. The property can be attached during the trial and later on conviction forfeited.

Provisions of anticipatory bail under S.438 of Criminal Procedure Code 1973 shall not relate to any case involving the arrest of any person under this Act as laid down in Section 18. The constitutional validity of this section was challenged vis a vis Article 21. It was held that S.18 was a procedure established by law and therefore not violative of Article 21⁴⁵ Mumbai High Court has granted anticipatory bail on the ground that there was no prima facie case under the Act made out in the complaint.⁴⁶ Section 360 of the Code and Probation of Offenders Act 1958 shall not apply to cases where the guilty person under this Act is above eighteen years old.⁴⁷ PAA shall override other laws & customs & usages.⁴⁸ Customs etc. justifying or enabling practices declared offences cannot be pleaded as defenses.

Implementation PAA ensures proper implementation by requiring the state govt. to notify a court of Session to be a special court and to appoint a special public prosecutor for every special court.⁴⁹ State Govt. has powers to impose & realize collective fines from residents of any locality for committing offences under this Act. *Preventive action and effective implementation of PAA are duties on the State Govt.*⁵⁰ **Section 23** of PAA empowers the Central Govt. to make rules for carrying out the purposes of the Act. Central rules under this Act were notified in 1995 - **Scheduled Castes & the Scheduled Tribes(Prevention of Atrocities) Rules, 1995**

Preventive and precautionary measures to be taken by the State government is listed out in **Rule 3**. Under this rule the government is under a duty to identify the area where it has reason to believe that atrocity may take place or there is an apprehension of reoccurrence of an offence under the Act; set up awareness centers and organize workshops; encourage NGOs; deploy special police force in the identified area etc. **Rule 4** requires the government to effectively supervise the prosecution by preparing a district wise panel of eminent senior advocates (at least seven years practice) for conducting the cases under this Act in the special courts and pay them fees on a scale higher than the other panel advocates of the state. **Rule 5** is about information to police on commission of offence under this Act. **Rule 6** requires the district Magistrate etc. to conduct spot inspection on any information of atrocity within his jurisdiction. Investigating officers shall be appointed after taking into account his past experience, sense of ability etc. provides **Rule 7**. **Rule 8** calls upon the state to set up a **SCs & STs Protection Cell** to be responsible for surveying the identified area & maintaining tranquility there, enquiring as to refusal to lodge complaint, negligence by public servant, etc. Under **Rule 9**, State shall nominate a Nodal Officer who shall coordinate the functioning of the officers appointed to implement this Act. **Rule 16** requires constitution of **state-level vigilance & monitoring committee** with **chief minister** as head & **Rule 17** requires such a committee at the district level.

Rehabilitation PAA **Section 21(2)** seeks to ensure social & economic rehabilitation of the victims of the atrocities. It lays down measures to provide legal aid to victims & traveling & maintenance expenses to witnesses & victims during investigation & trial **Rule 11** lays down that every victim of atrocity or of him/her dependents & witnesses shall be paid to & fro rail fare by second class in express/mail passenger train or actual bus or train fare from his/her place of residence to place of investigation The minor, women, old, disabled victims/witnesses shall be entitled to be accompanied by an attendant of his/her choice. There is provision to pay daily maintenance allowances not less than minimum wages and diet expenses. These allowances are to be paid immediately or within three days. In case of offences under Section 3 , the victim shall be reimbursed the medical expenses including blood transfusion, meals etc.

R.12 calls upon the District Magistrate to make arrangements for providing immediate relief in cash or in kind or both to the victims of atrocity, their family members & dependents, including food, water, clothing, shelter, medical and transport facilities & other essential items necessary for human beings. The norms & scale of relief is provided in the **schedule** to the Rules. *The relief provided in respect of death, or injury to, or damage to property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.* **Rule 13** requires the state government to take care in appointing persons with proper aptitude and understanding of the problems of SCs and STs and further ensure that SCs and STs are adequately represented in the administration and police force. **Rule 14** lays down a specific duty of the state to make necessary provisions in its annual budget for providing relief and rehabilitation facilities to the victims of atrocities.

Reservations shall be seen from human rights perspectives. In the international human rights regime today, reverse discrimination is a well articulated strategy to achieve factual equality in the society. Social mobility and flux always take place helping in cohesion in the society. But caste thinking and a high degree of suspicion among groups and individuals can stultify growth and true social change can happen only when economic progress reaches all. Political affiliations can be used in ameliorating the social conditions of the oppressed. Caste solidarity and political power can succeed in achieving high social, economic and political status in the society.^{50a}

Upliftment of the untouchables is their right. Reservations and special privileges for them is to achieve a noble goal of an equal society by ensuring to them a fair deal to live with self respect and dignity. In all these years, we seem to have achieved a very little. There appears no decisive or radical change in the depressed class of people. A public interest litigation seeking proper implementation of PAA is pending before the Mumbai High Court. More funds have to be released for ameliorative measures. Undeserved subsidy for all should be viewed with sincere circumspection and the funds thus generated shall be utilized. The persons who have benefited due to special measures shall be identified and they shall not be let to stand in the way of others who are yet out of reach of these much needed measures. False caste certificates and corruption is another scourge which has to be dealt with an iron hand lest reservations serve the undeserved. India is projected as an emerging economic super power. Let us first turn into humane power! As a country we shall resolve that our priority shall be no where else but focused in the matter of ensuring dignity for all; all other things have to wait.

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