



Social justice and untouchability in India: A constitutional perspective

Rakesh Chandra

Lucknow University, Department of Law, New Campus, Jankipuram, Lucknow, Uttar Pradesh, India

Abstract

Untouchability is an ignoble feature of Indian society. On the one hand, it symbolizes inequality; and on the other hand, it is violative of the principle of human dignity. Every human being is born free and equal. No human dictat can cause a schism on the basis of such concepts like untouchability between two human beings. Although many social reformers tried their hand to reform the social traditions, yet legal reforms could be taken after the independence when we got a new Constitution of free India. Article 17 of the Constitution specifically deals with untouchability. Our Supreme Court in her various judgments clarified the law regarding the abolition of untouchability. Besides that, there are separate statutes like Protection of Civil Rights Act, 1955 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which provide legal safeguards to ensure abolition of untouchability. This paper enumerates the legal provisions and the Apex Court Judgments to showcase the spirit of the founding Fathers enshrined in our constitution.

Keywords: social justice, untouchability, constitutional provisions, supreme court judgments

Introduction

Dr. Ambedkar in his essay; "Mukti Kaun Pathe?" (Which way to emancipation?), said: "*Untouchability is nothing but concrete inequality. Such a living example of inequality is to be found nowhere. Nowhere, at no point of time in the history of the world can we find such inequality, which is more instense than Untouchability*---^[1]

In due course of time, Dr. Ambedkar was elected as chairman of the Drafting Committee for preparing a draft Constitution of India on August 30, 1947. For his monumental effort, Michael Brecher described Dr. Ambedkar as the Chief Architect of the Indian Constitution and as the Field General of the campaign for a new Constitution. Article 1 of the Declaration of Human Rights adopted by the U.N.O. embodies this noble and human principle that "*All the human beings are born free and in equal dignity and rights, they are endowed with reason and conscience and should act towards one-another in a spirit of brotherhood.*" It is this concept of brotherhood of man which is contained in the Preamble of the Constitution and is given practical shape by abolishing title (Article 18) and untouchability (Article 17) and many other social evils which had made inroads into the social fabric of the Indian society.

"*Liberty, Equality and Fraternity*" which the Constitution seeks to secure for the people of India are to serve the primary objective of ensuring social, economic and political justice. Justice is the harmonious blending of selfish nature of man and the good of the society. "*Justice*" means the reconciliation of the individual conduct with the welfare of the society as a whole. The actions of an individual are "just" only if they promote the well-being of the society. The aim is to promote the common good rather than only the individual welfare ^[2]. Justice, briefly speaking is the harmonious reconciliation of

individual conduct with the general welfare of the society. Every man acts according to his self-interest, but his act or conduct is said to be "just" only if it promotes the general well-being of the community ^[3]. Ordinarily, the word "Justice" indicates legal justice which is available only through the courts which decide disputes between two individuals or between an individual and the State itself, when such dispute assumes the form of a litigation.

In the Preamble, the Constitution speaks of other forms of justice which a welfare state is bound to dispense to the people who made the Constitution ^[4]. Our Constitution aims at securing "*social, economic and political*" justice as well. Hence, we have legally enforceable Fundamental Rights and the Directive Principles provide for social and economic Justice as well. A large number of the enacting provisions of the Constitution can be read to show the ideal of social and economic justice.

In *Valsamma Paul vs. Union of India* ^[5]. Dr. Ambedkar's closing speech on the Draft constitution delivered on November 25, 1949 was quoted wherein he had said:

"*What we must do is not to be attained with mere political democracy; we must make our political democracy a social democracy as well. Political Democracy cannot last unless there lies on the basis of it as social democracy.*" Then it was said:

"*Social democracy means 'a way of life which recognizes liberty, equality and fraternity as principles of life.' They are not separate items in a trinity but they form union of trinity. To diverse one from the other is to defeat the very purpose of democracy. Without equality, liberty would produce the*

¹ Cited in Narendra Jadhav, "Ambedkar, Awakening India's Social Conscience", 208, Konark Publishers, New Delhi, 2014

² Justice R.C. Lahoti, Preamble, The Spirit and Backbone of the Constitution of India, 100, Eastern Book Company, Lucknow, 2004

³ Concept of Justice as reflected in the judicial opinion in Keshavanand Bharti Case, cited in Lahoti's. "Preamble, The Spirit and Backbone of the Constitution of India", 101, Eastern Book Company, Lucknow, 2004.

⁴ Durga Das Basu, Constitution of India (Vol. A/1, 7th Edn.) P. 37.

⁵ (1996) 3SCC 545, Para 6. Cited in Lahoti, The Preamble, "The Spirit and Backbone of the Constitution of India", 101, Eastern Book Company, 2004.

supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. Articles 15 (4) and 16 (4), therefore, intend to remove social and economic inequality to make equal opportunities available in reality. Social and economic justice is a right enshrined for the protection of society."

The Supreme Court went on to say that the right to social and economic justice is envisaged in the Preamble and elongated in the Fundamental Rights and Directive Principles, in particular Articles 14,15,16, 21, 38, 39 and 46 of the Constitution. Such justice can be achieved when the quality of life of the poor, disadvantaged and disabled citizens of the society is made meaningful. Equal protection requires affirmative action for the unequals.

In Muir Mills Co. Ltd. vs. Suti Mills Mazdoor Union ^[6] Justice Bhagwati observed that the concept of social Justice does not emanate from the fanciful notions of any particular adjudicator but must be founded on a more solid foundation. Social Justice is a very vague and indeterminate expression and no clear-cut definition can be laid down which will cover all the situations. The court noted, without commenting thereon, the suggested definition of social justice as connoting "*The balance of adjustments of the various interests concerned in the social and economic structure of the State, in order to promote harmony upon an ethical and economic basis.*" ^[7]

The emphasis is that everyone should get their just due for their labour irrespective of caste, creed, religion or sex or social position. There should be an equitable distribution of resources aimed at social democracy and a welfare state ^[8].

Justice is an attribute of human conduct. Law, as a means of social engineering, is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a socialist-secular republic Bharat. The Upanishad says that, "*Let all be happy and healthy, let all be blessed with happiness and let none be unhappy.*" Bhagwad Gita preaches through Yudhisthira that: "*I do not long for kingdom, heaven or rebirth, but I wish to alleviate the sufferings of the unfortunate*" ^[9].

Nature and Definition of Untouchability

Dr. Ambedkar argued in "Who Were the Untouchables?" *that untouchables were defeated tribes or "Broken Men" who lived outside the villages of the more victorious tribes and, since they were mostly Buddhist and refused to give-up their religion, they were subjected to the worst forms of degradation by Brahmins*" ^[10] He further said that "*Untouchability was born some time about 400AD.—out of the struggle for supremacy between Buddhism and Brahmanism which has so completely moulded the history of India and the study of which is so woefully neglected by students of Indian history.* (Ambedkar 1990, 7:379) ^[11]

However, endowed with such great humanitarian traditions of tolerance and respect for the mankind in the holistic sense, the

practice of untouchability appears to be a dark spot, to say the least. Our Constitution has dealt with this problem in its own way. In the case of Devarajaiah vs. Padmanna ^[12] it has been held by the Supreme Court that the subject matter of Art. 17 is not untouchability in its literal or grammatical sense, but the practice as it developed historically in India and that the word "Untouchability" is used in that sense in the Act. 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 boycott resulting from caste or other disputes.

Constitutional Provision

Article-17. Abolition of Untouchability:-"*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.*

From the perusal of Art. 17, it is amply clear that the word "untouchability" has not been defined in it. The same is the case with the Protection of Civil Rights Act, 1955. Wherein also the word untouchability has not been defined. Mahatma Gandhi in his "*My Philosophy of Life*" ^[13] stated that "*untouchability means pollution by the touch of certain persons by reason of their birth in a particular state of family. It is a phenomenon peculiar to Hinduism and has got no warrant in reasons or sastras*". According to Dr. Ambedkar, "*The untouchability is the notion of defilement, pollution, contamination and the ways and means of getting rid of that defilement. It is a permanent hereditary stain which nothing can cleanse*" ^[14].

Special Significance of Art. 17 Under Indian Constitution

- A. *Path-breaking Precedent:* Rights under Art. 17 are available against private individual as well and it is the duty of the State to ensure that these rights are not violated ^[15].
- B. Article 17 which makes the practice of untouchability an offence must be read with Art. 35 (a) (ii) which confers upon Parliament the *exclusive power* to make laws prescribing punishment for those acts which are declared to be offences under Part III. Art. 35 (b) continues existing laws which provide punishment for any act which is made an offence under Part III, subject to adaptation or modification under Art. 372. In the exercise of the powers, conferred by Art. 35, Parliament has enacted the Untouchability (Offences) Act, 1955." For enlarging the scope and making the penal provision more stringent, the Untouchability (Offences) Act, 1955 had been comprehensively amended by the Untouchability (Offences) Amendment and Miscellaneous Provisions Act, 1976 which came into force from 19 November 1976. With this amendment, the name of the principal Act has been

⁶ (1955) 1 SCR 991. Cited in Lahoti, The Preamble, The spirit and Backbone of the Constitution of India. P. 103.

⁷ Justice R.C. Lahoti, "The Preamble, The Spirit and Backbone of the Constitution of India", 104, Eastern Book Company, Lucknow, 2004.

⁸ Ibid

⁹ Justice R.C. Lahoti " The Preamble, The Spirit and Backbone of the Constitution of India", 104, Eastern Book Company, Lucknow, 2004.

¹⁰ Gail Omvedt, " Ambedkar, Towards An Enlightened India", 138, Penguin Books, Gurgaon, Haryana, 2008.

¹¹ Ibid

¹² (1958) A Mys. 84, cited in H.M. Seervai, "Constitutional Law of India", Vol.1, 691, Fourth Edition, Universal Law Publishing Company, New Delhi, 2012.

¹³ Edited by A.T. Hingorani, 1961 Edn. at p. 146, cited in Jagdish Swarup, "Constitution of India", L.M. Singhvi, Vol. I, P. 771, 3rd Edition, Thomson Reuters, New Delhi, 2013.

¹⁴ State of Karnataka Vs. Appa Balu Ingale, AIR, 1993 SC 1126, Ibid

¹⁵ Peoples Union for Democratic Rights Vs. Union of India, AIR 1983 SC 1473, Ibid.

changed to the *Protection of Civil Rights Act, 1955* ^[16] The Act provides penalties for preventing a person, on the ground of untouchability, from entering a place of public worship and offering prayers or taking water from a sacred tank, well or spring. The Act also prescribes penalties for enforcing any kind of social disability. Offences under the Protection of Civil Rights Act, 1955 are cognizable as well as non-compoundable ^[17].

Enforceability of Article 17:

According to *Dr. Durga Das Basu* ^[18] Article 17 is one of the few anomalous provisions included in Part III of our Constitution. The reasons cited by him are as under:

1. Firstly, untouchability, arises out of private conduct and can hardly be committed by the State. The possibility of the State supporting untouchability by legislation is also remote. Article 17 is thus practically levelled against private conduct and has little place in public law. Of course, it envisages a law to implement the Article to be made by Parliament [Art. 35 (a) (ii)]. But that is only an enabling provision. The only justification for its inclusion in Part III as against State action may be that any law made before the Constitution which might be inconsistent with the abolition of untouchability would be void under Art. 13 (1).
2. Secondly, though Article 17 itself does not create any right in favour of the person against whom untouchability may have been practised, but merely, forbids an action on the part of the wrongdoer and prescribes the remedy for violating that prohibition, namely, that he will be punishable according to a law to be made by Parliament, as regards the provisions of the Untouchability (Offences) Act, *Ramaswamy J.*, In the Karnataka case (para 24) has opined that it has not only created an offence but has provided to the victim an enforceable civil right after declaring the disability caused by untouchability as void.

Dr. Basu, in his book "Human Rights in Constitutional Law", has expressed his doubts about the maintainability of a Constitutional remedy when Art. 17 stands violated ^[19].

However, *Sir Ivor Jennings* in his book "*Some Characteristics of the Indian Constitution*" (1953) hazarded the opinion that even in such cases the Constitutional remedy under Art. 32 would be available ^[20].

But in *Peoples' Union for Democratic Rights Vs. U.O.I.*, ^[21] the Supreme Court observed impliedly that Art. 17 is an enforceable right. The Court said:

"Whenever any fundamental right which is enforceable against private individuals, such as for example a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the Constitutional obligation of the State to take necessary steps for the purpose of interdicting such violation and ensuring observation 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 obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful who is exploiting him."

Some Landmark Judgments of the Apex Court

Referring to Ranga Iyer's Bill (in the Bombay Legislative Council), Ambedkar said: "----- *If Untouchability is a sinful and immoral custom in the view of the Depressed classes it must be destroyed without any hesitation even if it was acceptable to the majority. This is the way in which all customs are dealt with by Courts of Law, if they find them to be immoral and against public policy*" ^[22].

The Courts in India, specially the Supreme Court and the High Courts have generally followed the above dictum of Dr. Ambedkar. Some of the landmark judgments of the Apex Court produced below bear testimony to this fact.

1. Venkataramana Devaru vs. State of Mysore, ^[23]:

It would be an offence if a Hindu excludes to harijan, on the ground of his birth, from his private temple. In this case Venkatarama Aliyar, J., of the Supreme Court observed thus."

".....One of the problems which has been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchable. A custom which denied to large sections of Hindus the right to use public roads and institution to which all the other Hindus has a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Article 17." (Para 23)

2. Bhasheshwar Nath vs. Commissioner of Income Tax Delhi & Rajasthan ^[24]

In this case, Subba Rao J., observed that "*Article 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That article in express terms forbids untouchability; obviously, a person cannot ask the State to treat him as an untouchable.*"

3. Surya Narayan Choudhary vs. State of Rajasthan ^[25]

The division Bench of the Rajasthan High Court in this case disapproved in strong words the prevailing practice of purification of harijans alone before permitting them to enter into the temple for worship by making them wear 'Kanthimala', sprinkling them with "gangajal" and giving them 'tulsidal'. The Court ordered that the practice shall be discontinued forthwith since this condition imposed on harijan devotees alone is discriminatory. This practice violates the right of equality guaranteed to Harijans by Arts 14, 15 and 17 of the Constitution, the Court held.

J.S. Verma, C.J. observed that "*It is tragic that on the eve of Gandhi Jayanti we are debating a Harijans' right to enter a public temple for worship as an equal; and directions of the*

¹⁶ H.M. Seervai, "Constitutional Law of India" 691, Vol I, Fourth Edition, Universal Law Publishing Company, New Delhi, 2012

¹⁷ L.M.Singhvi, "Constitution of India" 773, Vol I, Third Edition, Thomson Reuters, New Delhi, 2013.

¹⁸ Durga Das Basu, Commentary on the Constitution of India, 9th Edition, Vol.3, Lexis Nexis, Gurgaon, Haryana, 2014, p. 3180.

¹⁹ Durga Das Basu, Commentary on the Constitution of India, 9th Edition, Vol.3, Lexis Nexis, Gurgaon, Haryana, 2014, p. 3182

²⁰ Ibid

²¹ AIR 1982 SC 1473, Ibid.

²² Dhananjay Keer, "Dr. Baba Saheb Ambedkar", 229, Popular Prakashan, Mumbai, 2016.

²³; AIR 1958 SC 255.

²⁴ AIR 1959 SC 149

²⁵ AIR 1989 Raj 99

Court be needed for enforcement of this right to equality. All men are born equal and the classification between them thereafter is manmade and artificial against the divine dictate. To present them as unequals before God is, therefore, injustice and an insult to our Maker besides being contrary to the guarantee and mandate of equality in our Constitution and basic human right."

4 State of Karnataka vs. Appa Balu Ingale ^[26]

In this case, the charge against the respondents was that they restrained the complainant party by show of force from taking water from a newly dug-up borewell on the ground that they were untouchables. *K. Ramaswamy, J.* held that: *"The thrust of Article 17 and the Act (Protection of Civil Rights Act, 1955) is to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base. It seeks to establish a new ideal for society- equality to the Dalits, on a par with general public, absence of disabilities, restrictions or prohibitions on grounds of caste or religion, availability of opportunities and a sense of being a participant in the mainstream of natural life."* (Para 36).

5. State of M.P. and Another vs. Ram Kishna Balothia and Another ^[27]

In this case, the Supreme Court held that section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 which contains non-applicability of provision for anticipatory bail under sec. 438 cr. p.c. in respect of offences under Sec. 3 of the Act is not violative of Arts. 14 and 21 of the Constitution having regard to the historical background and social conditions.

6. Swaran Singh vs. State ^[28]

In this case, the Supreme Court ruled that calling a member of the Scheduled Caste "Chamar" with intent to insult or humiliate him in a place within public view is certainly an offence under Sec. 3 (1) (X) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Court further held that whether there was intent to insult or humiliate by using the word "Chamar" will depend upon the context in which it was used.

7. Arumugham Servai vs. State of Tamilnadu ^[29]

Markandeya Katu, J. held in this case that- *"We would also like to mention the highly objectionable two tumbler system prevalent in many parts of Tamilnadu. This system is that in many teashops and restaurants there are separate tumblers for serving tea or other drinks to scheduled caste persons and non-scheduled caste persons. In our opinion, this is highly objectionable, and is an offence under the SC/ST Act, and hence those practising it must be criminally proceeded against and given harsh punishment if found guilty. All administrative and police officers will be accountable and departmentally proceeded against if, despite having knowledge of any such practice in the area under their jurisdiction they do not launch criminal proceedings against the culprits."*

8. Suhasini Baban Kate (Sou.) vs. State of Maharashtra ^[30]

[Offence of insult on the ground of untouchability] The petitioner was a lady about 30 years. There were no bad antecedents to her credit. She was a married woman with three kids, the youngest being of one year. The alleged incident obviously occurred on the spur of moment and the alleged utterances were also out of momentary rising of temper all of a sudden. Beyond certain bare utterances, the petitioner did nothing more. However, she was kept in custody for three days. Having regard to the nature of the incident, it was found unnecessary to send her back to Jail and she could well be released on the sentence already undergone in the interest of justice, although the minimum sentence prescribed was one month.

9. Bagpat Case ^[31]

The Supreme Court on 16 sep 2015 directed the Delhi Police to protect a 23 year old dalit girl and her family who fled from Bagpat in Utter Pradesh to Delhi after a khap panchayat condemned her and her younger sister to be raped and paraded naked as punishment for their brother's elopement with a married, dominant caste woman. In the third consecutive hearing, a bench of *Justices Chelameshwar* and *A.M. Sapre* showed the highest Judiciary's deep concern for the family's plight and ensured that the protecting arms of the law was firmly in their support. The girl had moved the court against the khap panchayat's ire. The girl's brother was arrested in May, a day after he and the woman were handed over to the police. A local court ordered his release on bail, but the family was unable to find anyone to serve as a guarantor. The S.C. directed his release on a personal bond, and ordered the U.P. Police to form a team led by a senior officer and investigate the drug charges (for being in illegal possession of psychotropic substances) against him.

Conclusion

From the above discourse it can be said in no uncertain terms that our Constitution amply contains the principles of Social Justice Right from the Preamble, Fundamental Rights to Directive Principles of State Policy and in various other provisions. The Constitution truly reflects the vision of welfare state with a view to ameliorating a historical injustice perpetrated on Scheduled Castes, Scheduled Tribes and other downtrodden people widely termed as Dalits. The Founding Fathers had introduced a right in the shape of Art. 17 which is indeed a Fundamental Right and is justifiable too. Although the word *"Untouchable is not specifically defined in the said Article, yet it covers the whole gamut of social disabilities hurled at the aforementioned persons."* Affirmative action is thus inbuilt and interwoven in our Constitutional scheme and does not require any external support. ³² In the light of this Constitutional provision, many Acts have been passed by the legislature to safeguard the interests of scheduled castes & scheduled tribes. Definitely, fundamental rights, such as those guaranteed under Art. 17 are of no avail, unless the State is able to enforce them effectively. Lastly, the Apex Court and other subordinate courts' role cannot be minimised at all. The

²⁶ AIR 1993 SC 1126

²⁷ (1995) 3 S.C.C. 221

²⁸ (2008) 8 SCC 435

²⁹ (2011) 6 SCC 405

³⁰ 1985 Mah LR 341, Cited in Singhvi, Constitution of India, Vol 1, P. 774

³¹ The Hindu, dated 17 september 2015, p. 13

³² V.N. Shukla's Constitution of India, Ed. by Mahendra Pal Singh, P. A-49, Twelfth Edition, Eastern Book Company, Lucknow, 2013.

courts have acted like sentinels of democratic values and have preserved the spirit of Constitution. Though the vicious practice of untouchability has got socio-political as well as economic angles also, yet the driving force of the Constitution of India has undoubtedly dented the growth of untouchability in this country. Naturally, one can hope to look for untouchability free society in India in the days to come, and to realize the dream of Social Justice fulfilled in letter and spirit of the Constitution.

While replying to the debate during the third (and final) reading of the Constitution on November 25, 1949, Dr. Ambedkar made an eloquent and spell-binding speech in which he also reflected about the future. He said: *“On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up”*^[33].

This is high time we pay a heed to these prophetic words in the interest of Indian democracy.

References

1. Basu, Durga Das, Commentary on the Constitution of India, Vol. 3, 9th Edition, Lexis nexis, Gurgaon, Haryana, 2014.
2. Jadhav Narendra, Ambedkar, Awakening India's Social Conscience, Konark Publishers Pvt. Ltd, New Delhi, 2014.
3. Keer, Dhananjay, Dr. Baba Saheb Ambedkar, Popular Prakashan, Mumbai, 2016.
4. Lahoti RC, PREAMBLE J. The spirit and Backbone of the Constitution of India, Eastern Book Company, Lucknow, 2004.
5. Om vedt, Gail, Ambedkar, Towards An Enlightend India, Penguin Books, Gurgaon, Haryana, 2008.
6. Singhvi LM. Jagdish Swarup; Constitution of India, Vol-1, Third Edition, Thomson Reuters, New Delhi, 2013.
7. Seervai HM. Constitutional Law of India, Vol.-1, Fourth Edition, Universal Law Company, New Delhi, 2012.
8. Shukla VN. Constitution of India, Twelfth Edition, Eastern Book Company, Lucknow, 2013.
9. The Hindu, dated, 2015.
10. Constituent Assembly Debates, Vol. XI, Sixth Reprint, Lok Sabha Secretariat, New Delhi, 2014.

³³ Constituent Assembly Debates, Vol. XI, Sixth Reprint, p.979, Lok Sabha Secretariat, New Delhi, 2014.