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## A LEGAL ANALYSIS OF UNTOUCHABILITY LAW IN INDIA PROBLEM AND COUSES

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### ABSTRACT:

The dawn of August 15, 1947 heralded a new era for the people of India who at the midnight hour wake up to freedom and sovereignty after years of subjugation to foreign rule. Freedom brought new promises as well as many problems. This was so in all fields namely political, economic, social and cultural. One of the many such hydra-headed problem which the founding fathers of the Indian constitution addressed themselves to, was the problem of 'untouchability' which was persuading the entire country. In this research paper we shall be arguing that inspite of numerous movements, constitutional provision and legislative measures the reality of the untouchables is far from encouraging. Caste prejudices and practice of

untouchability is still continuing in Indian society. To curb the practice of untouchability we have made our suggestions in the last of this paper.

***"I do not want to reborn but if I am reborn I wish I would be reborn as a harijan, as an untouchable, so that I may lead a continuous struggle against the oppression and indignities that are heaped upon these classes of people."***

**MAHATMA GANDHI**

**KEYWORDS:** namely political, economic, social and cultural.

### HISTORICAL DEVELOPMENT:

Untouchability is a legal, moral and social wrong. It is repugnant to reason and to the instinct of pity or love. The tyranny and the oppression caste upon the socially backward classes by certain historically prevalent practices attaching stigma upon them led to the cancerous growth of social inequality affecting the vitals of the nation. Untouchability is the by product of caste system. The first reference of cast system has found in Manusmriti written by 'King Manu'. He has divided Hindu

society into four compartments i.e. "chaturvarna". The caste system has to characteristics<sup>1</sup>.

- i) Its membership is confined to those who are born in it.
- ii) Its member are forbidden to marry outsiders.

The lowest castes in this hierarchy are often referred to as untouchables and are described variously as Avarna, Antyaja, Himshudra, Harijans, Dalit, Untouchables and so forth. The word untouchables as a name generally applied to persons in the lowest classes of Hindu Society is a literal translation of the Hindi word "Achhut". The websters dictionary vividly describes

untouchables as – *"member of a large hereditary group in India having traditional Hindu belief and quality of defiling by contact the persons, food or drink of a member of a high caste, and formerly being strictly degraded and restricted to menial work. From its very inception the term has been hated as it amounted to a degrading appellation for the people concerned."*

It is believed that untouchability was practised in India since Manu's times. They are expected to do the lowliest

Jobs-sweepers and scavengers, attendants at cremation grounds etc. They are subjected to severe restrictions and disabilities and have very few privileges. In daily life the practice of untouchability often takes the form of denial of access to common water sources place of worship, village schools, communal dinners and celebrations and social and religious functions<sup>2</sup>.

### LAWS IN BRITISH INDIA:

The British Law in principle did not recognize the caste structure. They established a nation wide legal system, which resulted in the movement of disputes from caste and village tribunals to the governments courts which supported the norm of equality before the law<sup>10</sup>.

By the early 20<sup>th</sup> century, the communal quota began to be viewed as a step towards equality. Though the state of Mysore inaugurated the first regime of communal quota in 1918 the reservations were only for the non Brahmin "backward castes". Some relief was given by the 1919 reforms. In 1938 for the first time in British India, governments intervened to secure the opening of temples when the Bombay and Madras legislatures passed temple entry acts. Encouragement to the education of the untouchables increased and measures were taken to secure for them some posts in Government Service. Before independence 27 Acts had been enacted by various legislatures to give more legal rights to those who had till then experienced social and religious disabilities due to the practice of caste<sup>11</sup>.

### LAWS IN INDEPENDENT INDIA:

At the transfer of power in 1947, it was widely accepted that caste system would have no place in Independent India. The framers of the Indian constitution took care to safeguard the interests of the minorities. Particularly untouchables to give them a sense of security to protect them against any discrimination, and to help them to get integrated in the main stream of national life. Consequently the Indian constitution in its very preamble assures every citizen of social, economic and political justice and equality of status and opportunity. Various provisions has been incorporated in constitution for prohibiting discrimination on grounds of caste and to promote the interests of weaker section especially untouchables.

In Indian constitution untouchables are known as scheduled castes. The constitution does not specify the castes which are to be called as the scheduled castes. It leaves the power to list those castes and tribes to the president, i.e. the Central Executive. Schedule castes, according to article 366 (24) read with article 341 are those castes, races or tribes or groups these of in each state and union Territory would be regarded as the scheduled castes for the purposes of the constitution in relation to that state or Union Territory. Thus the lists of the scheduled castes may vary from state to state and one Union Territory to another as regards the states, the president issues the notification after constitution with the Governor of the State concerned. It is not open to anyone to include any caste as scheduled caste. It is therefore not possible to give evidence that a particular caste is a Scheduled caste even though not mentioned in the Presidential order<sup>12</sup>. Even the court cannot modify, add or subtract any entry in the Presidential order. The function of the court is to interpret what an entry in the Presidential order is intended to mean<sup>13</sup>. The important constitutional safeguards for the schedule caste are as follows:-

#### a) Developmental and Protective Safeguards:-

- i) Article 14 – right to equality for all persons.
- ii) Article 15 (1) – Prohibits discrimination on ground of race or caste etc.
- iii) Article 15 (2) – Prohibits both the state and private individuals from making any discrimination on caste to use public places and public utilities.
- iv) Article 15 (4) – State has power to make special provision for advancement of the Scheduled Caste.
- v) Article 15 (5) – State have power to make special provisions related to admission to educational institutions including private educational institutions for the advancement of S.C.
- vi) Article 17 – Forbids the practice of untouchability in any form.

- vii) Article 23, 24 – Prohibits Traffic in Human beings and ‘bagar’ and other similar forms of forced labour, which are one of the form of exploitation of S.C.
- viii) Article 25 (2) (b) – Throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
- ix) Article 46 – State will promote special care for educational and economic interests of the weaker section especially the S.C.
- x) Article 244 – Administration of Scheduled Areas.
- xi) Fifth Schedule – Provisions as to the administration and control of scheduled areas.
- xii) Article 29 (2) – Prohibits discrimination on the base of caste in admission into any educational institution maintained or aided by state.

### b) Political Safeguards:-

- (i) Article 164 (1) – There shall be a Minister incharge of tribal welfare who may in addition be incharge of the welfare of the Scheduled Castes in State of Chhattisgarh, Jharkhand, Madhya Pradesh and Orissa.
- (ii) 243 ‘D’ and ‘T’ – In every Panchayat and municipality seats shall be reserved for the Scheduled Castes. 1/3 of the total number of seats shall be reserve for women belonging to the S.C.
- iii) Art. 330, 332, 334 – Seats shall be reserved for Schedule Castes in house of People and legislative assemblies.

### c) Service Safeguards:

**i) Article 16** – Article 16 (1) guarantees equality of opportunity in matters of appointment or employment in state services clause (2) says that no citizen shall on grounds only of caste etc. discriminated in employment under the state. Clause (4) says that state have power for the reservation of appointments or posts in favour of any backward of citizens which is not adequately represented in the services of State. Clause 4A enables the state to make provision for reservation in matters of promotions for S.C. Clause (4B) empowers state to end the 50% limit for scheduled castes in backlog vacancies which could be filled up due to non availability of eligible candidates of these categories in the previous years<sup>15</sup>.

**ii) Article 335** – This provision imposes a constitutional obligation on the various governments to take steps to ensure that the claims of members of the S.C. are duly considered in making appointments to government services. In provides that the claims of S.C. are to be taken into consideration consistently with the maintenance of efficiency of administration in making appointments to services and posts in connection with the affairs of the Union or of a State.

### National Commission for Scheduled Caste (Article 338)-

Article 338 provides a National Commission for the Schedule Castes. The commission shall consist of a chairman, vice chairman and three other members, appointed by the President of India. The Commission investigates and monitors all matters relating to the safeguards provided for S.C. under constitution, any law or any other by govt. The commission is to inquire into specific complaints with respect to deprivation of any rights and safeguards of these people and to participate and advise on the planning process of socio-economic development of the S.C. The central and every state government are required to consult the commission on all major policy matter affecting S.C.<sup>16</sup>

The commission is to make an annual report to the President. It can also make a report as and when it thinks necessary. Commission has been given power of the a civil court trying a suit and, in particular in respect of such matters as summoning and examination of witnesses, discovery and production of documents. The Commission has several state offices located in different states and Union territories. These offices serve as the “eyes and ears” of the commission as these offices keep the

commission informed of all important activities, decisions and orders of the state government concerning scheduled caste<sup>17</sup>.

### Parliamentary Committee for S.C.:-

In 1968, Parliament appointed a committee as the welfare of the S.C. The committee consists of 20 members elected from Lok Sabha and 10 elected from the Rajya Sabha. It has been invented with powers to criticize, guide and control the government of India in the matter of S.C. It considered the reports of the commission of S.C. The committee reports to both Houses of Parliament on the action to be taken by the Government for the Welfare of these people. The committee also goes into the question of their employment in services under the central government including the public sector undertakings. The committee could thus go deeper into the major recommendations made by the commissioner and could assess how far these recommendations has been implemented<sup>18</sup>.

### Legal Safeguards for S.C.-

There are a number of laws both central and state which provide for Safeguards to SCs. Some of these emanate from the various constitutional provisions. An illustrative list of such laws is given below:-

1. The protection of civil rights Act 1955 and its Rules.
2. The S.C. / S.T. (Prevention of Atrocities) Act 1989 and its Rules (1995).
3. The Bonded Labour system (Abolition) Act, 1976 (in respect of SCs).
4. The child labour (Prohibition and Regulation) Act 1986 (in respect of SCs).
5. The minimum wages Act 1948 (in respect of SCs).
6. Acts and regulation inforce in different states to prevent alienation of land belonging to SCs for

example – U.P. Zamindari Abolition and Land reforms Act, 1950. In some states such provision exists in the land Revenue Code.

### The Protection of Civil Rights Act 1955:

Article 17 of Indian constitution abolishes “untouchability” and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law. This article is included in Part-III of the constitution which catalogues our fundamental rights. The abolition of untouchability is a right in as much as it provides a remedy against a disability. In the word of Dr. Ambedkar –

*“it is a great fundamental right, a charter of deliverance of 1/6<sup>th</sup> of the Indian population from perpetual subjugation and despair from perpetual humiliation and disgrace. Abolition of untouchability in itself is complete and its effect is all pervading applicable to state action as well as acts or omissions by individuals, institutions or juristic body of persons<sup>19</sup>.*

In exercise of power conferred by article 35 (a) (ii) parliament has enacted the “Untouchability (offences) Act, 1955. Due to many loopholes this law was not effective in eradicating the practice of untouchability. Hence to review its working, a committee was constituted under the chairmanship of Shri L. Elayaperumal in 1965<sup>20</sup> its report submitted in 1969. The report revealed clearly the poor implementation of the Act. After that, Act was amended by the ‘Untouchability (offence) Amendment Act 1976 and this was renamed as **“The Protection of Civil Right Act, 1955”**. The Act which came into being on the 19<sup>th</sup> Nov., 1976. The Act defines civil right as “any right accruing to a person by reason of the abolition of untouchability by Article 17 of the consittution<sup>21</sup>. 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. Penalties are also provided for enforcing any kind of social disability such as denying access to a shop, restaurant, public hospital or educational institution, hotel or any place of public entertainment, or denying the use of any road, river, well, tank, water, tap bathing ghat, cremation ground, sanitary convenience, dharamshala or utensils kept in such institutions and hotels and restaurants<sup>22</sup>. The Act also lays down penalties for refusal to

sell goods or render services to a person on the ground of untouchability or molesting, injuring or annoying a person or organising of boycott of a person who has exercised the rights accruing to him as a result of the abolition of untouchability<sup>23</sup>.

The offence under the Protection of Civil Rights Act are cognizable as well as non compoundable.<sup>24</sup> The striking feature of this legislation is that where an offence is committed under the Act to any scheduled caste, the court shall presume, unless the contrary is proved, that such an act is committed on the ground of untouchability<sup>25</sup>. A public servant who willfully neglects the investigation of any offence punishable under the Act is deemed to have committed an offence under the Act. State Government are authorized to impose collective fines on the inhabitants when people in an area are involved in offences of untouchability<sup>26</sup>. *In Asiad project workers case*<sup>29</sup>, the Supreme Court has held that the fundamental right under article 17 is available against private individuals and it is the constitutional duty of the state to take necessary steps to see that these fundamental rights are not violated.

*In State of Karnataka Vs. Appa Balu Ingale*<sup>28</sup>, the respondents were tried for offences under Sec. 4 and 7 of the Protection of Civil Rights Act, 1955. The charge against the respondents was that they restrained the complainant party by show of force from taking water from a newly dug up tubewell on the ground that they were untouchables. The Supreme Court upheld the conviction and held that Abolition of untouchability in itself is complete and its effect is all pervading applicable application to state action as well as acts or omissions by individuals institutions or juristic body of persons.

### SC/ST (Prevention of Atrocities) Act 1989:

Due to lack of proper implementation PCR Act 1955 has not come to its means. Untouchability instead of becoming weak has received a re-birth in this period and has gained new strength and vitality<sup>29</sup>. It has loosened its grip on the religious sphere but tightened its hold on the secular sphere. This reformulation of caste system has given to it a fresh lease of life. To cut the most monstrous caste discrimination in the whole India, Parliament has enacted. ***"The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989***. This Act is complementary to PCR Act 1955. The objects and reasons accompanying the corresponding Bill stated as follows:-

*"Despite various measures to improve the socio economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons....."*

The Act was made to fulfil three purposes-

- i) To Prevent the commission of atrocities against the members of the SC and ST.
- ii) To provide for setting up of special courts for the trial of offences under the Act.
- iii) To provide for the relief and rehabilitation of victims of such offences.

The SC/ST Act 1989 was brought into force from 30th January 1990 in order to check and deter crimes against SC/ST by persons belonging to other communities. These enactments have extended the positive discrimination in favour of SC/ST to the field of criminal law in as much as they prescribe penalties that are more stringent than the corresponding offences under Indian Penal Code or PCR Act. The Act contains a list of such acts as fall within the category of atrocity. These acts have been made punishable with imprisonment for a term of six months to five years and with fine. Provisions has been made for designating special courts for the purpose of providing for speedy trial of offences under the Act.<sup>50</sup> Provision has also been made for imposing collective fines.<sup>31</sup>

Provisions of this Act over side the provisions of any other Act<sup>32</sup>. Every year the central government has to lay on the table of each House of Parliament a report on the measures taken by itself and the State Governments in pursuance of this Act <sup>33</sup>. The State Governments are required to make provision for the economic and social rehabilitation of the victims of atrocities, and provide them legal aid.<sup>34</sup>

## CONCLUSION AND SUGGESTIONS:

To curb "untouchability" the cancer of society, we may take following important steps-

1. The Law Commission should constantly fall back upon feedback from research institutes specializing in the problems of the SCs and itself interview groups of SCs and hear the various parties; and amend procedures accordingly. If socially conscious persons are appointed such simplified procedure can be helpful in enabling the SCs to use the law as a support in their struggle to demand their rights.
2. The escalating cost of litigation and the painfully slow and complicated judicial procedure have to be streamlined and simplified if law is to make any sense to the SC victims most of whom are illiterate, poor and powerless.
3. Ignorance of their rights has been another bottleneck in bringing justice and equality to millions of untouchables in India. A concerted drive to spread legal literacy among the weaker sections would be a solution to this. This would include knowledge of various laws such as Minimum Wages Act, Land Reform Laws, Bonded Labour (Abolition) Act, PCR Act etc. which are relevant to them. This campaign will support the section of the SCs who are beginning to wake up to their situation.
4. In this context of bringing Judicial Power to the grass roots level and spreading legal literacy, the role of para-legal personal can never be over emphasized. The para legal personal must be chosen preferably from among the scheduled castes and their training programmes should be adopted to the specific needs of the community.
5. Governmental action alone cannot be relied upon for the emancipation of the Scheduled Castes, voluntary groups i.e. NGO's, Civil Societies have to play a major role. Active assistance and support in this direction can be provided by voluntary organisations who can set up social justice cells in the rural and urban areas. The cell may enroll advocates, journalists, social activists and other interested persons from various professions and human rights organisations on and when required.
6. Radical land reforms are needed to break up monopoly hold of land lords specially in the State of Bihar and Jharkhand. Some states has done good job like West Bengal and U.P. They have to be made as models for the other ones.
7. Since most cases of untouchability affects poor and vulnerable individual of society. They are not able to use assistance and legal aid by special public prosecutor and special court established under SC/ST Act 1989. There is great scope in this connection if the liberal interpretation of locus standi i.e. public interest litigation should be extended to all special courts set up under Sec. 14 of SC/ST Act 1989. These will very helpful if by reason of poverty or disability, the victims cannot approach the court for judicial redress, any public spirited individual or institution acting in good faith can move in special courts for judicial redress.
8. People participation in the administration of justice with the help of "Nyaya Panchayats" must be encouraged. This alternative forum is helpful for the resolution of disputes of untouchability at the grass root level. The Nyaya Panchayats should rely on the indigenous justice potentiality of the People and their sense of justice. A part from promoting accessibility to the institution of justice for the poor person the Nyaya Panchayats can adopt a simple informal procedure.
9. The Joint Committee of both Houses of Parliament recommended, small committees at state and district levels to guard the working of the PCR and SC/ST Act, 1989, known as "Sentinels". The SC/STs Commission in its Fifth report, apart from other suggestions, recommended: "It is found that mostly State Govt's have not established "sentinels". Thus watch has not kept on the working of the Acts which are very essential for the removal of social disabilities. So it is recommended that for effective and powerful implementation of the Laws. 'Sentinel Committees' have to formed in all states."

Thus, at last we find that lack of political will, the apathy of the administration and the ignorance of the scheduled castes regarding their basic human rights have contributed to the present state. To curb untouchability the system of justice needs to be brought nearer to the SCs and the downtrodden. Law is only a door substitute in the combat against social evil. A vigilant watch upon the wrong doers, the mastering of public opinion, the enlargement of the hearts of the higher classes and above all the

ethical and moral condemnation of the existing system are necessary to uproot this evil from the body of our social system.

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