THE DOOR LEFT AJAR: UNTOUCHABILITY'S PROBLEMATIC HISTORY WITH THE LAW

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Abstract

The Supreme Court of India's pronouncement in Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors. brought about with a it a host of challenges both legally and societally. This paper attempts to deconstruct the notion of untouchability and its various forms as discussed in the Hon'ble Justice Mr. Chandrachud's opinion in this judgment. This paper discusses the notion of untouchability in India and attempts to emphasise on the caste-based nature of the same. It comments on the extrapolation of untouchability to various temporary forms. It then examines the international manifestations of untouchability by analysing untouchability in several other countries. It then concludes by establishing certain fundamental characteristics of untouchability that might assist the judiciary and parliament in defining the essential features of untouchability.

Keywords: Untouchability, Permanent, Temporary, Caste, Article 17.

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I. Introduction

In an age where the developing world is touted to be hot on the heels of the developed world in terms of socio-economic progress, India is gradually being seen as a force to reckon with. In the midst of this revolutionary and apparently transformative period in Indian Society, the Supreme Court of India has seemingly taken up the mantle of spearheading this social change in the country. In 2018, the court passed a historic judgment, in *"Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.".* In this landmark verdict, it declared unconstitutional the restriction which prohibited women between the menstrual age of ten to fifty from entering the Sabarimala Temple in the Indian State of Kerala. In this judgment, Dipak Misra, C. J. delivered the majority opinion for himself and A. M. Khanwilkar J. while R. F. Nariman and Dr D. Y. Chandrachud, JJ passed separate concurring opinions; Indu Malhotra, J. was the sole dissenting judge in the five-judge constitutional bench. While deliberating over the questions of law at hand, each of the learned judges touched upon aspects such as the history of the temple and the relevant customs, reference, essential practices doctrine, rights of religious denominations, precedents of constitutional value and on the aspect of untouchability. In the opinion of the author, the most striking aspect of this Judgment lay in the novel and radical interpretation of untouchability as enshrined in Article 17 of the Indian Constitution.[1]

II. Justice Chandrachud's Opinion

Chandrachud J, in his radical take on untouchability under Article 17 of the Constitution, opines that the prohibition of women into the Sabarimala Temple on grounds of menstruation, comes under the ambit of Article 17. In order to comment on the Learned Judge's opinion, it is important that the nuances of his opinion be explored first. In discussing the proposition of untouchability before the court, Chandrachud J, states that Article 17 is prohibitory of the social practice of untouchability which is of a discriminatory and inhuman nature. He lays emphasis on the transformative intent of the constitution with the help of Article 17. He then quotes renowned

[1] Indian Young Lawyers Association and Others v. The State of Kerala and Others, 2018 SCC OnLine SC 1690.

historian Mr. Granville Austin where the latter says, *"the mainstream of society, individuals, and groups that would otherwise remain at society's bottom or at its edges."*[2] The learned judge then very poignantly states that this article endeavours to provide equality and justice to those who have been relegated to the lowest ring of a traditional belief system. He also states that the intent of Article 17 is to provide the victims of the feudal and caste based social order a hope for a better future. In the next part of his judgment, the Learned Judge then proceeds to discuss the Constituent Assembly Debates on the article dealing with untouchability. He then goes on to discuss the addition of *"in any form"* into the article where he comments that the same was done to make the article more comprehensive.

The Learned Judge then mentions a few occasions where other members of the Constituent Assembly were keen to add cast and religion specific phraseology into the article, but the amendments moved for the some were rejected. It is mentioned that B. N. Rau was of the opinion that the parliament would enact the redevelopment legislation which would suitably define untouchability. But, in the course of events that transpired, even the Untouchability Offences Act did not provide a definition. The following reliance of Chandrachud, J, on the Debates starts heading in a problematic direction. He discusses the need felt by Naziruddin Ahmed to give a *"better shape"* to the *"rather loose"* Article 11 (in the draft constitution) about untouchability. He then discusses Prof K. T. Shah's concerns where be briefly mentions certain forms of untouchability such as menstruating women, funeral and other death related ceremonies, and mentions about temporary untouchability in the Quran amongst others.[3] Naziruddin Ahmed had submitted an amendment which purported to modify the article, the clause read as *"No one shall on account of his religion or caste be treated or regarded as an "untouchable" and its observance in any form may be punishable by law".*[4] Nether was this amendment accepted by Dr Ambedkar, nor did he respond to Prof Shah's concern. The initial draft proposed by Dr Ambedkar was accepted.

[2] *Id.*
[3] LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, Nov. 29, 1948 *speech* by PROF. K.T. SHAH, http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C29111948.pdf (Jul. 6 2020).
[4] LOK SABHA SECRETARIAT, CONSTITUTIONAL ASSEMBLY DEBATES, Nov. 29, 1948 *speech* by NAZIRUDDIN AHMED, http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C29111948.pdf (Jul. 6 2020).

This above sequence of events in the Constituent Assembly meetings were interpreted by the Learned Justice Chandrachud in a manner where the refusal of the assembly to narrow the scope of untouchability by defining it indicated that they did not wish to make the term restrictive. The addition of the words *"in any form"* in the article, according to the Learned Judge, bestowed the article with a bread ambit. He also believes that the refusal of Dr Ambedkar to respond to the concerns of temporary untouchability was indicative of concurrence. In addition to these presumptions the Learned Judge, proceeds towards more unsteady ground in trying to understand the nature and history of untouchability through the works of Dr Ambedkar himself. The Learned Judge rightly feels that Dr Ambedkar's struggles in the area of social emancipation have been directed towards mending the unequal social order. He then emphasizes on the "moral trajectory" that the Constitution has laid down for us that helps us combat discrimination and stigmatization. He then goes on to mention in great detail the various instances of discrimination that Dr Ambedkar had faced during the cause of his life. He states that the victims of such atrocities have constantly fought against suppression in such an unequal society. Justice Chandrachud feels that Article 17 is the *"Constitutional recognition of these resentments"*.[5] He attempts to portray Article 17 as a *"revolt against social hierarchy"* and as reparation against those that were historically wronged. He then emphatically states that Article 17 was a *"powerful guarantee, to preserve human dignity, and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism"*.[6] He also emphasizes that any form of social exclusion that would violate human dignity would constitute a form of untouchability. He then proceeds to establish the causation of caste-based untouchability with the nexus of purity and pollution, he then insinuates this nexus with the issue of temporary untouchability of menstruating women. He then interprets the absence of the definition of untouchability as on indication of the Constituent Assembly's consensus on bestowing such a wide ambit to Article 17 beyond the confines of the caste system.

[5] CHANDRACHUD, *supra* note *1*.
[6] *Id.*

III. Untouchability and Troubled Waters

The Learned Judge, in the respectful opinion of the author, enters the dangerous territory of extrapolating the scope of the article in unnatural ways. The Learned judge is very right in pointing out the transformative ideal of the Constitution and its paradigm changing endeavours but his abstinence on applying Article 17 to this scenario opens up a huge opening for ambiguity in the law. The transformative ideal of the Constitution in this scenario has been applied by a majority of the bench in this case where they have applied the far–reaching provisions of Articles 14 and 25 of the Constitution along with relevant case laws but the application of Article 17 would leave a lacuna in the law. In justifying his opinion, the Learned Judge has placed great reliance on the works of Dr Ambedkar and the Constituent Assembly Debates. In order to understand the literal meaning of untouchability, it is important that we consider a few fundamental and popular sources as well. The Oxford Dictionary defines the adjective untouchable as, *"of or belonging to the lowest caste Hindu group or the people outside the caste system".* It goes on to describe the noun as, *"A member of the lowest –caste Hindu group or a person outside the caste system, contact with whom is traditionally held to defile members of higher castes"*.[7] Dr B. R. Ambedkar was of the opinion that, *"untouchability is the nation of defilement, pollution, contamination and the way and means of getting rid of that defilement. It is a permanent hereditary stain which nothing can cleanse".*[8]

The word untouchability encompasses the practice of no contact/no touching between a person of a lower case with a person of a high caste. This denial of caste equality to the members of the lower castes in terms of access to places of worship, public utilities, shops, restaurants, institutions of social importance, amongst others would come in the ambit of untouchability.[9] Although, it could be stated with reasonable certainly that the roots of untouchability could be traced back to religion, but it is virtually impossible to remove its fundamental connection with the caste system in India. It would be meaningless to describe untouchability in a manner which is detached from the caste system. The phenomenon untouchability enforces disabilities on to the Dalits which

[7] Untouchability | Meaning of Untouchability by Lexico, Lexico Dictionaries | English (2020), https://en.oxforddictionaries.com/definition/untouchability (last visited July 1, 2020).
[8] Rakesh Chandra, *Social Justice and Untouchability In India: A Constitutional Perspective,* 3 International Journal of Law 107-111 (2017).
[9] D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 2066 (8 ed.).

would not ordinarily be enforced on members of higher castes. One of the root causes of untouchability, as seen in its primary form, sprouts from one's birth in the Scheduled classes and the subsequent social stigma that accompanies it.[10] It is important to note that positive rights were created with regard to untouchability for the Dalits.[11] In reference to the ambit of Article 17 and the legislation to thwart untouchability it has been suggested by several eminent jurists that the grammatical construction of the word *"untouchability"* in inverted commas in the Constitution indicates that the word should not be construed in its literal or grammatical sense but as it is historically developed in India.[12] A case, *Jai Singh And Another v. Union of India (UOI) & Ors*., of the Karnataka High Court was cited[13] which was subsequently verified by the Supreme Court in *State of M. P. v. Ram Krishna Bolathia*.[14] The Kerala High Court, in the case of *N. Adithyan v. Travancore Devaswom Board*[15] has succinctly opined that *"The word "untouchability" has not been defined, but it unmistakably refers to the despicable obsolete attitude practical towards persons belonging to "lower" castes in the pre-constitution India, particularly to Harijans"*. This decision of the Kerala High Court was affirmed by the Supreme Court in 2002.[16]

Chandrachud, J also enters troubled waters when he interprets the acquiescence of the Constituent Assembly to define untouchability as being in favour of leaving on unreasonably wide ambit for the application of untouchability. In the plethora of works of Dr Ambedkar cited by the Judge describing the horrors of untouchability, there is credible mention of untouchability being a permanent phenomenon and one that is not removable in the eyes of the orthodoxy. The purity – pollution nexus that is relied upon by the judge has its own set of problems. The 41-day Vratham that is mandated to be performed by every devotee who harbours a desire to visit the temple is followed to purify the mind and body of the person. *"Maintaining oneself as "pure and unpolluted", it is believed, would lead to the path towards attaining Godhead or to be one with Lord Ayyappa*".[17] This ritual of ridding ordinary devotees of their contamination also bears a proximate connection to purity and pollution as envisaged by Chandrachud, J. In addition to these

[10] *Id.* at 2067.
[11] *Id.*
[12] Devarajiah v. B. Padmanna, AIR 1958 Kant 84.
[13] Jai Singh And Another v. Union of India (UOI) & Ors., AIR 1993 Raj 177.
[14] State of M. P. v. Ram Krishna Bolathia, AIR 1995 SC 1198.
[15] N. Adithyan v. Travancore Devaswom Board, AIR 1996 Ker 169.
[16] N. Adithyan v. The Travancore Devaswom Board, AIR 2002 SC 3538.
[17] CHANDRACHUD, *supra* note *1*.

possible lacunae in the law by adopting a Literal Interpretation of the word untouchability, it should be noted that there are other provisions of the law under the aegis of the Constitution that fulfil the same transformative ideal as stated by Chandrachud, J. The scope of Article 17 of the Indian Constitution and a reliable clarification of the meaning of the word untouchability has largely eluded the Indian Judiciary. In order to further expound the opinion of the Hon'ble Justice Mr. Chandrachud on untouchability in the Sabarimala case, it is important that a holistic perspective on the word is utilized which would include legal and non-legal sources.

In order to further understand the legal interpretation of the word "untouchability", it is important that we delve deeper into the aspect of *"the practice as it had developed historically in this country"*, as mentioned in *Devarajiah* is explained in greater depth.[18] This phrase mentioned in *Devarajiah* prima facie gives on extremely wide historical ambit to trace the practice of untouchability but is imperative that a Literal construction of the term should not be taken into account. A literal interpretation could include persons who are temporarily untouchable for reasons such as being infected by the contagious disease or epidemic, connections with birth and death, and social boycott amongst other reasons. Such an interpretation would not be able to do justice as to the intended scope of the phrases "in the scope of historical development" which only intends to cover the persons affected by the miseries of the caste system.[19] In pursuance of discovering the scope of untouchability, it is necessary that the social history of India and the legal landmarks in the efforts for their eradication are considered.[20] It is extremely straight forward to note that such on a movement in the Indian Legal History to recognized and eradicate temporary forms of untouchability that do not have any direct nexus with caste, has not been observed. In order to supplement the nuances of untouchability in the eyes of the law, it has been observed that provisions of the law with regard to untouchability prior to the enactment of constitution such of The Madras Removal of Civil Disabilities Act, 1938 along with after legislations mentioned in the Schedule to the Untouchability (Offences) Act, 1955 need to be perused.[21] Thus, it seems intuitive and reasonable to conclude that from a strictly legal perspective, temporary untouchability and a literal Construction the word would not fit appropriately in the space carved for Article 17 of the

[18] BASU, *supra* note 9.
[19] V.N. SHUKLA & M.P. SINGH, THE CONSTITUTION OF INDIA (5 ed. 2018).
[20] BASU, *supra* note 9.
[21] *Id.* at 272.

Indian Constitution. In order to further excavate the meaning and ambit of the work untouchability, one could consider the provisions of the Untouchability (Offences) Act. It services the presumption that if an act/atrocity as enumerated under section 4 were to be committed upon a member of the Scheduled Caste, then the act would be considered enforcing untouchability.[22] Additionally, in order for the prosecution to utilize the provisions of the (then) act, it must prove that the victim did belong to a lower caste and that the disability had been imposed on the basis of birth in such a lower caste. This further leads us to the conclusion that the intention of the UO Act (and subsequent legislation) covered caste based permanent untouchability and not that of a temporary nature.[23]

Dr B. R. Ambedkar, in the preface to his book *"The Untouchables",* provides us with slightly more clarity on the nature of untouchability that he was aiming to track in India.[24] He said "Untouchability is not a short or temporary feature. It is a permanent one. To put is straight, it can be said that the struggles between Hindus and the untouchables is a permanent phenomenon and it is eternal, because the high-caste people believe that the religion which has placed you at the lowest level of the society is itself eternal".[25] In 1965, the Central Advisory Board for Harijans Welfare of the Government of India in the Department of Social Welfare by a resolution, constituted a committee under the Chairmanship of Mr. L. Elayaperumal to examine the issue of untouchability in India along with its socio-economic challenges. The committee, in its report, was of the opinion that untouchability was not a separate institution, but a *"corollary of the institution of the caste system of Hindu Society"*.[26]

The impetus behind Article 17 and Protection of Civil Rights Act, 1955 is to rid Indian Society from the historic following of the Orthodox practice of untouchability.[27] The Supreme Court is of the opinion that the removal of untouchability would lead towards establishing a more equal society for Dalits which would put them at the same level as the general people.[28] [29]

[22] Untouchability (Offences) Act, 1955, No. 22, Acts of Parliament, 1955 (India).
[23] BASU, *supra* note 9.
[24] D.J. DE, THE CONSTITUTION OF INDIA 647-650 (4 ed. 2018).
[25] *Id.*
[26] COMMITTEE ON UNTOUCHABILITY, ECONOMIC AND EDUCATIONAL DEVELOPMENT OF THE SCHEDULED CASTES, REPORT OF THE COMMITTEE ON UNTOUCHABILITY, ECONOMIC AND EDUCATIONAL DEVELOPMENT OF THE SCHEDULED CASTES AND CONNECTED DOCUMENTS (1969).
[27] ARVIND P DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA 285-286 (2 ed. 2007).
[28] State of Karnataka v. Appa Balu Ingale, AIR 1993 SC 1126.
[29] H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA (4 ed. 1997).

In order to peruse a different perspective on untouchability, we can explore the views of Learned Professor and Jurist Marc Galanter on untouchability. In his book *"Competing Equalities; Law and the Backword Classes in India"* [30], Galanter is of the opinion that Indian Courts have not been favourable towards treating all circumstances when a person is treated as being unclean as a kind of pollution. Temporary and reversible states of pollution suffered by people should not come under the ambit of Article 17 of the Constitution. He goes on to give instances such as woman after childbirth, menstruation, mourners, diseased persons and of those who eat forbidden food where such instances should not come under the ambit of untouchability under Article 17. Galanter, in my opinion, also hints at a much larger problem that the judiciary could face in terms of *"situational or relative"* impurity with respect to the differences between priests and temple attendants when contrasted with ordinary worshippers/visitors to the temple. The untouchability, as envisaged by Galanter, deals with those persons who have been regarded as untouchables in the course of historic development on the basis of their birth outside of the four *"Varnas"*[31] In understanding the manner in which untouchability has been understood in courts of law, one can notice the attempts by judges of the apex court to define Harijans. Justice V. R. Krishna Iyer was of the opinion that *"this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu Division"* were the Harijans.[32] It is interesting to note that the Supreme Court in *Sastri Yagnapurusdasji V. Muldas Bhundardas Vaishya*[33], has clarified that temple entry legislation does not erase the distinction between priest (*poojaris*) and temple attendants as compared to ordinary devotees. It simply puts untouchables on par with ordinary worshippers and does not interfere with the position of the Poojaris.[34] If a literal textual interpretation of the work *"untouchability"* were to be adopted by courts, there would be an elongation of the ambit of Article 17 along with more ambiguity to already precedent due to the lack of a reliable definition of untouchability.

[30] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984).
[31] *Id.*
[32] State of Kerala v. N. M. Thomas, AIR 1976 SC 490.
[33] Sastri Yagnapurusdasji v. Muldas Bhundardas Vaishya, 1966 AIR 1119.
[34] *Id.*

IV. Untouchability in the International Context

The practice of untouchability has long been associated with India and is known to be *peculiar* to Hindus. It could be argued that caste-based untouchability is mostly prevalent in India, but it is essential to note that this issue plagues other societies as well. In addition to countries such as Nepal, Sri Lanka and Bangladesh, who have substantial Hindu populations, there are other countries that are affected by this vice as well. This treatment of certain sections of society as impure by birth, exist in countries such as Japan, Korea, Tibet, amongst others. In addition to direct forms of untouchability, forms such as racial segregation in the United States of America and the apartheid in South Africa could also be construed along similar lines. In this section, untouchability and its different manifestations globally will be compared to identify the prominent and recurring characteristics in them. These characteristics will be applied in the Sabarimala scenario to determine and adequacy of Justice Chandrachud's opinion.

In the Indian experience of untouchability, certain groups within the community are looked down on as an inferior part of the collective. This form of caste discrimination is a hierarchical division where there exists almost rigid impermeability and no change of caste. It is essential that untouchables be distinguished from mere outcasts or persons with lower social status. In order to distinguish untouchability in the current scenario it is essential to deconstruct into certain elements. This deconstruction and the formulation of the prominent ingredients of untouchability, although notional, will help us in analysing the context of the Sabarimala issue. Firstly, it is essential that there exists a rigid caste structure with hereditary forces in play to ensure that in most cases, birth is the most prominent reason for the initiation of this discrimination. Secondly, this birth of a person in a particular social stratum endows the person with the capability of attaining limited virtue.[35] No amount of good *karma* by an untouchable could rid the persons of their birth caste. Thirdly, there was an essential component of pollution that was present in cases of untouchability. This pollution was evidently in stark contrast of the purity of the upper castes.[36] A closer glance at this nuanced take on Indian untouchability will now be used as a metric to explore different cultures and their tryst with untouchability.

[35] William Newell, *The Comparative Study of Caste in India and Japan*, 1 Asian Survey 3-8 (2020).
[36] Herbert Passin, *Untouchability in the Far East*, 11 Monumenta Nipponica 247-267 (1955).

1. Untouchability in Japan

In the indigenous religion of Shintoism in Japan, great emphasis, like Hinduism, is placed on ritual purity. Purity was not only a physical concept but was also a mental one Cleanliness of the mind and body was essential to attain divinity. Thus, acts which could pollute one were frowned upon by Shintoism and termed as *impure* and *corrupted*. The advent of Buddhism in Japan furthered this categorization by prohibiting the killing and consumption of animals. Thus, *blood, dirt and death* related work started to be stigmatized as impure tasks. This has an evident parallel in India, where lower caste persons historically and contemporarily have been made, to slaughter animals, tan their hides, clean public places, manually scavenge drains and latrines amongst other *menial* tasks. In Japan, the *Eta-Hinin* were a part of society that was isolated from the community by reason of them being impure and defiled. The word "*Eta*" in Chinese characters could be construed to mean abundantly defiled.[37] Like the untouchability in India, these persons were relegated to a low status with little chance of inter-marriage or changing occupations. The touch of the Eta Person was thought to be defiling, these persons had their own places of worship as well.[38] The Eta people were historically thought to be a part of the "*base*" people as compared to the "*good*" people of Japanese society. They were often excluded from the census and were equated with animals. In a very famous Japanese case decided by a local Magistrate in 1859, an Eta man was killed by a non-Eta gang during a gang-war. In this case, the city magistrate very famously held that an Eta person was one seventh an ordinary person. He added that in order to be punished for murder of one person, the accused should have killed six more Eta people. This was an institutional manifestation of the discrimination faced by the Eta people. Like India, in many areas, the Etas were compelled to travel on one side of the street. There were restrictions on their free movement timings, and they were almost always confined to the "*ghettos*" of the settlements.[39]

2. Untouchability in Korea

[37] *Id.*
[38] Hugh H Smythe, The Eta: A Marginal Japanese Caste, 58 AMERICAN JOURNAL OF SOCIOLOGY 194-196 (1952).
[39] George A De Vos & Hiroshi Wagatsuma, Japan's invisible race (1972).

In Korea, the *outcastes* of society bore a marked resemblance to both Indian and Japanese *outcastes*. They were forced to live in segregated areas of the cities and towns as compared to the rest of the population. These *Paekchong* people of Korea were restricted to the orthodox *dirty* and *lowly* tasks such as butchery, tanning, among others. This bears serious resemblance to the *chamar* community and other similar ones in India who have been historically relegated to tasks such as slaughter of animals, tanning, etc. and the *chandala* people who perform funeral rights for upper caste persons.[40] Social communication and physical contact between ordinary persons and the *Paekchong* people was prohibited. They were not deemed to be worthy and virtuous enough to obtain citizenship or the right to choose military service. Confucianism in Korea made segregations on the assumption that there were natural differentiations between the lower castes and the upper echelons of society. These differences deemed it incumbent on the lower castes to perform certain menial tasks which were too polluted for the upper caste members.[41] In 1894, the Kobo Reform was initiated in Korea after the Sino-Japanese War placed greater influence of the region in the hands of the Japanese Empire. This reform removed all discrimination against the Paekchong people and made them legally equal to any other citizen of Korea. Although this discrimination was outlawed in 1894, it was prevalent for the first few decades of the twentieth century until its effective social discontinuation.[42]

3. Racial Segregation in the United States

In addition to the caste-based discrimination of Asia, if one were to explore the slavery and racial segregation of the Unites States of America, it seems natural to draw parallels between the Indian and American System of oppression. In the case of the United States and South Africa, race-based discrimination was visible to the naked eye as compared to the rather invisible but omnipresent form of discrimination in India along caste lines. The racial and caste dimensions between the USA and India share a common characteristic of a hierarchical order with massive disparity in the ensuing power equations. In a *regular* social structure, there are usually three

[40] Dipankar Gupta, *Continuous Hierarchies and Discrete Castes*, 19 ECONOMIC AND POLITICAL WEEKLY 1955-1958 (1984), http://www.jstor.org/stable/4373768 (last visited June 1, 2020).
[41] PASSIN, *supra* note *36*.
[42] Shin Gi-Wook & Michael Robinson, *Colonial Modernity in Korea*, 184 HARVARD UNIVERSITY ASIA CENTER (1999).

classes: financially sound upper-class, middle class and the poor class. In the context of the United states, these did exist a fourth class irrespective of one's financial capacity; that layer was that of race. They have historically belonged to the lowest rung of the ladder like the untouchables of India. Racial segregation was notorious in the United States till the middle of the twentieth century. People of colour were required to have separate housing, educational, recreational and other facilities as compared to the *whites*. Segregation was outlawed by several statutes in the late 1960's, but there is still a certain stigma today. [43] In 2009, in Philadelphia, while children were seen exiting a swimming pool after black children were seen entering the pod.[44] It is essential to note that in the twentieth century, racial segregation in the United States, bore a striking resemblance to the Indian experience of untouchability, but there are still strong dissimilarities in their fundamental structure. In 1896, the Supreme Court of the United States of America, in *Plessy v. Ferguson*, held segregation to be constitutional. This was supported by the reasoning that people of colour were "*separate but equal*".[45] Although this was overruled more than half a century late in *Brown v. Board of Education*, [46] in 1954, but it is essential to note the rationale of segregation. In the case of untouchables as discussed earlier, separation was not only a mark of physical divisions, but was also a mark of inferiority, inequality and defilement.

4. Untouchability in Nigeria

In Nigeria, the *Osu* Caste System is an ancient system of discrimination and slavery, usually practiced in Igboland. Osus are isolated from the *diala*, the free and *real* lgbo people and are considered inferior than the latter. They possess similarities with other examples discussed earlier where they are not allowed to live in areas where the *diala* people live and are also prohibited from inter marriage. The Osu were often sacrificed to their parent deity Ajala. They were also prohibited from using shared spaces, vessels, amongst other avenues of physical contact. This caste system of Osus in Nigeria does resemble the Indian Societal ladder in many ways.

[43] James Lyons & Joanne Chesley, *Fifty Years after Brown: The Benefits and Tradeoffs for African American Educators and Students*, 73 THE JOURNAL OF NEGRO EDUCATION (2004).
[44] Susan Candiotti & Jean Shin, Swim club accused of racial discrimination against kids, CNN (Jul. 9 2009), http://edition.cnn.com/2009/US/07/09/philly.pool/index.html.
[45] Plessy v. Ferguson, 163 U.S. 537 (1896).
[46] LYONS, *supra* note *43.*

Firstly, the Osus received their caste in a hereditary fashion. One was born as an Osu or diala and change into the other caste was very rare. Membership in that particular life was fixed and would only by death. Rules of castes forbid dialas and Osus from marrying each other. Like in the Hindu System, *real* lgbos and Osus had to distinguish their caste by using indicative names. Osus were prohibited from enjoying common neighbourhoods, restaurants, amongst others. In the event that any transgression did occur, then a ritual cleanse would be needed.[47]

V. Overlapping Untouchability

In the above discussed examples, one could note several overlapping characteristics in such a practice. Firstly, most of these outcastes are considered inferior, defiled and corrupted. Their physical touch could be considered as polluting for the regular people and that they were sub-par humans. In all examples, there is isolation, segregation, no intermarriage, communal worship, amongst other exclusions for the fear of moral and physical corruption. The most obvious similarity between these excluded groups it that they were being confined to the most *menial* jobs and duties that were shrugged off by the higher castes. Other than the United States, discriminated persons were subjected to death related works, cleaning and scavenging jobs amongst others. These systems use characteristic of their ultra-rigid hereditary hierarchies and thus cause exclusion of particular castes. In the case of America, slavery and racial segregation serve as important tools to study discriminated and oppressed people, but, in spite of their experiences and suffering, do not stand on the same societal plane as untouchability. African Americans did not originate from the same ethnicity as the white people, as in the case of India, Japan, Korea and Nigeria. This form of race relation was markedly different from the centuries of societal structuring of untouchables. Although segregation did exist, but its nexus with pollution was different and not as severe as the other countries analysed.

VI. Interpretational Challenges

[47] Daniel A Offiong, *The Status of Slaves in Igbo and Ibibio of Nigeria*, 46 Phylon (1960-) 49-57 (2020).

The tussle between textual and more expansive interpretations of the law have revelaed themselves in several jurisdictions, in light of the evolving moralities of the recent times; analysing one such recent conflict, before the United State Supreme Court, could assist in understanding such a legal conundrum. In the case of *Bostock v. Clayton County,* the United States Supreme Court was faced with a situation where an employer had fired his employee on the basis of his sexual orientation. The employee claimed that discrimination on the basis of sexual orientation would be covered under the ambit of *discrimination with respect to sex* as under Title VII of the Civil Rights Act, 1964. The majority opinion of the Supreme Court adopted a *purposive approach* and opined that *sex* could be expanded to cover sexual orientation and gender identity. In this judgment, Justices Alito, Thomas and Justice Kavanaugh delivered their separate dissenting opinions. The predominant theme in both these dissenting opinions was that of judicial overreach, where the Supreme Court had encroached the boundary of legislation and had exceeded its constituent power.

Over the course of the judgment, textual interpretation, purposive interpretation and legislative intent, in addition to other concepts were deliberated by the Court before reaching its conclusion, which bear resemblance to the opinion of Justice Chandrachud, in *Indian Young Lawyers Association.* It should be noted here that the context of this *radical* expansive interpretation, as compared to Untouchability, is significantly different. In several states of the U.S., at the time prior to the judgment, there existed no statutory protection against discrimination at workplace on the basis of sexual orientation.[48] The Court felt that in addition to the lack of a statutory remedy, the intent of Title VII was to prevent any kind of discrimination at one's workplace, other than one's employment performance.[49] In the Indian context, there exists specific remedies for Untouchability, under the Untouchability (Offences) Act under the larger umbrella of Article 17. With respect to the constitutional support in favour of the entry of women into temples, Articles 14, 15, 19(1), 21 and 25(1) do indeed support the same. The experience of Untouchability is centuries old and embedded in subcontinental culture. In such a scenario, in spite of the availability of specific statutory and constitutional provisions, such a radical encroachment into other

[48] Katherine Carter, *Questioning the Definition of "Sex" in Title VII: Bostock v. Clayton County*, GA, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 59 (2020).
[49] 17-1618 U.S. Reports 1 (2019) *Bostock v. Clayton County, Georgia.*

provisions seems unnecessary, in the opinion of the author; in the American context, the Court was compelled to attempt such an expansive approach in light of an existing legal vacuum, unlike the Indian scenario. The purpose of this comparison lies in identifying the differences in the respective contexts before applying either statutory interpretation methods.

It is also that we discuss the enactment of *The Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016* in the context of prohibition of religious entry. The Act provides an expanded definition of social boycott where several forms of caste, sex, and religion-based discrimination are covered under Section 3; this Act prohibits *social boycott* by individuals or groups. It is imperative to note that this Act, although dealing with caste, religion and sex-based discrimination, does not make use of the term *untouchability;* the preamble to the Act explicitly makes use of the term *social boycott* and omits the word *untouchability.*[50] This tacit omission serves as an acknowledgement in the difference between social boycott and untouchability. It should be noted that discrimination in India is consists of several layers, and that the inclusion of all forms of discrimination, under the ambit of Article 17 would be an unnatural expansion of the article.

VII. Conclusion

It should be noted that the experience of untouchability as envisaged by Article 17 of the Indian Constitution, in the opinion of the author, intends to cover forms of caste-based untouchability and its characteristics as discussed above. Including temporary and other non-conventional forms of untouchability, could needlessly expand the ambit of the clause. There remain the risks of over-broadening where instances of a refusal to shake hands due to religious beliefs[51] could be extrapolated to include untouchability. It is essential that a hollow expansion of the scope of untouchability could trivialize the unspeakable experiences of the traditionally intended beneficiaries of Article 17.

[50] Maharashtra Protection of People form Social Boycott (Prevention, Prohibition and Redressal) Act, 2016, Mah. Act No. XLIV of 2017.
[51] Christina Anderson, *Muslim Job Applicant Who Refused Handshake Wins Discrimination Case in Sweden,* N.Y. TIMES (Aug. 16 2018), https://www.nytimes.com/2018/08/16/world/europe/sweden-muslim-handshake.html.

In order to fully understand the implications of a liberal understanding of the word untouchability, it is imperative that its different forms are recognized. Untouchability could be imposed on persons in a host of ways, it could be imposed/deemed by reason of one being born in a particular caste, by the commission of certain restricted acts which would accrue sin, moving to certain religious sects and by other physical impunities. It should be understood that according to texts of the relevant periods, the difference between untouchability that was hereditary and the impurity that was temporary was reasonably clear; those persons that were considered impure for relatively brief period of time had the choice of ridding themselves of the impurity; certain traditional penances and purificatory rights could be performed in pursuance of the same.[52] A legal reconciliation of this expanded understanding would have problematic implications for courts.

A literal interpretation of the word untouchability without a clear definition or boundaries, could possibly widen the ambit of Article 17 beyond the reach of the law. It is essential that *Untouchability* be defined through legislation or by a judgment of the Supreme Court to remove the ambiguity surrounding its legal applicability. In *Indian Young Lawyers Association,* although the intention of Chandrachud, J, is noble, but the means used to rationalise the results could be problematic. The impact of such a loose end could end up giving rise to contradictory judgments of High Courts over the country.

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[52] Malay Neerav, *A Historical Analysis of Segregation of Untouchable Castes in North India From A.D. 600-1200*, 172 AMITY BUSINESS REVIEW (2019).