

RELIGIOUS PRACTICES AND EVOLVING JURISPRUDENCE OF ARTICLE 17

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The judgement of the Supreme Court in the Indian Young Lawyers Association v. State of Kerala was widely celebrated. It allowed for the entry of women aged between 10 and 50, who were earlier prohibited on account of age-old taboos relating to menstruation in Sabarimala temple. Most of the analysis of the judgement, however, tends to focus on its impact on right to freedom of religion under Article 25 and Article 26. In this essay, I argue that Article 17 will be brought into mainstream of judicial interpretation since the scope of 'untouchability' under Article 17 has been expanded by Indian Young Lawyers Association. This involves enabling the constitutional courts to issue criminal directives which will lend teeth to the prohibition on untouchability. Given the potential of Article 17 to now prohibit various discriminatory practices, I will argue that it presents a new vision of jurisprudence of 'non-discrimination' that is more in conformity with the 'modernizing force' of the Constitution, and opens up new possibilities for doing away with discriminatory religious practices in years to come.

I. INTRODUCTION

Constituent Assembly Debates ('CADs') reveal the ideals and aspirations of the Constitution, helping us retrace the roads taken by the founding fathers and mothers of the Constitution to arrive at our Constitutional provisions.¹ Those men and women had conflicting ideological beliefs, yet they founded our modern ideas of fundamental rights over the 'Raj's' ruins. CADs help us resolve controversies on understanding the true meaning of constitutional provisions and often are used by the judges to liberally interpret fundamental rights.² In *Indian Young Lawyers Assn.* (hereafter '*Sabarimala case*')³, Justice D.Y. Chandrachud used CADs to expand 'untouchability' under Article 17. The expanded Article 17 includes

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¹ *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501, page 652 ¶289 (D.Y. Chandrachud, J.).

² See Vikram Raghvan, *Why do our constitutional debates matter*, (October 05, 2016), <https://www.livemint.com/Opinion/mLactWgKWt6iKosuEyBNMI/Why-do-our-constitutional-debates-matter.html>, last seen on Nov. 11, 2018.

³ *Indian Young Lawyers Assn. v. State of Kerala*, 2018 SCC OnLine SC 1690.

discrimination and exclusion on the basis of gender and other factors which fall under the concept of ‘purity-pollution’.

I shall begin by outlining the dominant approach of the High Courts and the Supreme Court, i.e. bare text approach towards the understanding and interpretation of Article 17 of the Constitution. This leans towards a restrictive interpretation, i.e. it interprets “untouchability” as caste-based discrimination **(I)**. I will then go on to reflect the transformative approach towards ‘untouchability’ adopted by Justice Chandrachud in his concurring opinion in the *Sabrimala* case. Justice Chandrachud infused a new inclusive approach by focusing on the vision of the Constitution and Article 17. I shall also bring in insights from the CADs to discuss what purport Article 17 was to have **(II)**. Thereafter, I will adopt a practise-based approach where tests laid down in *Sabrimala* case will be applied to the practice of social boycott **(III)**. Subsequently, I will take a look at the concept of expanding judicial powers in relation to criminalizing discriminatory religious practices falling under the ambit of ‘untouchability’ **(IV)**. Finally, I will conclude with examining what promise the *Sabrimala* case holds for exclusionary religious practices by analysing the Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016**(V)**.

II. ARTICLE 17: THE TRADITIONAL VIEW- RESTRICTIVE AND TEXTUAL

Article 17 of the Constitution, titled “Abolition of Untouchability”, provides that “*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 the law*”.⁴ In all cases when the Supreme Court was faced with the task of interpreting what constituted ‘untouchability’ under Article 17 of the Constitution or when a reference was made to it, it always took “untouchability” to be a caste-based disability. The definition of “untouchability” was clarified by a Single Judge of the Mysore High Court (now Karnataka High Court) in *Devarajiah v. B. Padmanna*⁵. Here, it was held that “untouchability” refers to the social disabilities historically imposed on certain classes of people by reason of their *birth* in certain castes. Ruling out the literal construction of the term, the Single Judge observed,

“A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observances such as are associated with birth or death on account of social boycott resulting from caste or other disputes. The imposition of untouchability in such circumstances has no relation to the causes which relegated certain classes of people beyond the pale of the caste

⁴ INDIA CONSTITUTION. Art. 17.

⁵ 1957 SCC Online Kar 16 : AIR 1958 Mys 84.

system. *Such relegation has always been based on the ground of birth in certain classes*".⁶(Emphasis supplied)

Putting "untouchability" within quotation marks might suggest at first sight that its meaning is limited to its specific, historical sense, that is, caste-based discriminations.⁷ However, In *State of Karnataka v. Appa Balu Ingale*, the Supreme Court held that the thrust of Article 17 is to liberate society from blind and ritualistic adherence to traditional beliefs; that it seeks to establish a new ideal society.⁸ The disabilities to which Dalits were subjected have been outlawed and subjection of these would be violative of Parts III and IV of the Constitution.⁹

Based on a literary interpretation without taking into account CADs, these factors suggest that the operation of Article 17 was confined to caste-based disability alone, and excluded discriminations on the basis of gender and other socio-economic factors. Thus, the modernizing force¹⁰ of Article 17, which actually should have covered discrimination in all forms and not limited itself to caste-based discrimination only, was held back from realising its full potential.

III. ARTICLE 17: TRANSFORMATIVE APPROACH- LIBERAL AND CONTEXTUAL

The *Sabarimala* case saw a broader interpretation to 'untouchability' under Article 17 of the Constitution. The glaring difference between opinions of Indu Malhotra, J., and Chandrachud, J., is a fit example to show the importance of CADs. Placing heavy reliance on CADs, this judgement is also unique in the sense that it has departed from years of literal interpretation since the Constitution came into being and marked the opening of the transformative potential of Article 17. It can go a long way in protecting the dignity of those who have been victims of discrimination, prejudice, and social exclusion.

⁶ *Id.*, ¶ 6.

⁷ But see Gautam Bhatia, *The Sabarimala Hearing and the Meaning of "Untouchability" under Article 17 of the Constitution*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, July 18, 2018, <https://indconlawphil.wordpress.com/2018/07/18/the-sabarimala-hearings-and-the-meaning-of-untouchability-under-article-17-of-the-constitution>, last seen on Nov. 12, 2018.

Mr. Bhatia argues that like the use of the word "shops" in Art. 15(2), there exist good arguments to widely interpret "untouchability" so as to include other exclusionary practices. In *Indian Medical Assn. v. Union of India*, (2011) 7 SCC 179, the Supreme Court interpreted the word "shops" in its broader sense of economic transactions and provisions of services generally, and not in the limited sense of the physical shop-floor.

⁸ *State of Karnataka v. Appa Balu Ingale*, 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, ¶ 36.

⁹ *Id.*, ¶ 23.

¹⁰ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (OUP 1966) 63 argues that Indian constitution is a document of 'social revolution'.

A. Perspectives from CADs

The framers of the Constitution left the term “untouchability” undefined. The proceedings of the Constituent Assembly suggest that this was deliberate. Reflecting on the draft, the constitutional advisor B N Rau remarked that “untouchability” would have to be defined in the law which would be enacted in future to implement the provision.¹¹ On 21 April 1947, Jagjivan Ram made a query on the general scope of untouchability. He asked whether untouchability would include inter-communal untouchability as well.¹² In response, the Committee came to the general conclusion that “the purpose of the clause was to abolish untouchability in all its forms – whether it was untouchability within a community or between various communities”.¹³ When the draft of Article 11 came before the Constituent Assembly for discussion on 29 November 1948, one member, Naziruddin Ahmad, sought to move Amendment No. 372 to substitute it with the following Article:

*“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 made punishable by law”.*¹⁴

However, the amendment proposed by Naziruddin Ahmad was rejected by the Constituent Assembly.

The Sub-Committee, when it met on 14 April 1947 to consider its draft report on Article 17, decided to add the words “in any form” after the word “untouchability”.¹⁵ This was done specifically in order “to make the prohibition of the practice [of “untouchability”] comprehensive”.¹⁶ It is thus clear that the framers of the constitution had no intention to restrict “untouchability” to its religious and caste-based manifestations.

The opposition to transformative reading of Article 17 is reflected in Justice Indu Malhotra, dissent. She has used the CADs statements of V.I. Muniswamy

¹¹ B. SHIVA RAO (ed.), THE FRAMING OF INDIA’S CONSTITUTION: A STUDY, INDIAN INSTITUTE OF PUBLIC ADMINISTRATION 202(1968).

¹² *Id.*

¹³ *Supra* note 3, ¶ 249.

¹⁴ Constituent Assembly Debates (29 November 1948), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29, last seen on Dec. 04, 2019.

¹⁵ This was Art. 11 of the Draft Constitution which corresponds to Art. 17 of our present Constitution. It read as:

“11. “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.”

See Draft Constitution of India, Drafting Committee of the Constituent Assembly of India (Manager Government of India Press, New Delhi, 1948).

¹⁶ *Supra* note 3, ¶ 249.

Pillai¹⁷ and Dr. Manmohan Das¹⁸ to limit the term “untouchability” to caste-based reservations only. However, the said opinion does not take into account that the draft article was categorically amended to include the words “in any form” after the word “untouchability”¹⁹ which shows the intention of constitution-makers as discussed above. Further, Malhotra J., underlined the opinion of eminent jurist, H.M. Seervai, that Article 17 must be read with the Untouchability (Offences) Act, 1955, which punishes offences committed in relation to a member of a Scheduled Caste.²⁰ However, the said reading of Article 17 from Untouchability (Offences) Act, 1955 fails to take into account insights from draft Article 11 of the Constitution. Malhotra, J., relied upon *Venkataramana Devaru v. State of Mysore*²¹ to understand the meaning of “untouchability” as limited to caste-based reservations only.²² However, as already pointed out in **I. Article 17: The Traditional View – Restrictive and Textual**, the *Venkataramana* case was based upon a literal reading of Article 17 without taking CADs into account and thereby not interpreting Article 17 as per the real intentions of framers of the Constitution.

Legal scholar, Charles Henry Alexandrowicz had pointed out that CADs were frequently ignored by the Courts when deciding constitutional cases. He was of the firm opinion that this was a mistake as CADs offered great guidance value. CADs can be used to interpret the silences in the Constitution; they solve ambiguity, ease the relations between the legislature and judiciary, lessen the need

¹⁷ During the debates, Mr. V.I. Muniswamy Pillai had stated:

“...Sir, under the device of caste distinction, a certain section of people have been brought under the rope of untouchability, who have been suffering for ages under tyranny of so-called caste Hindus, and all those people who style themselves as landlords and zamindars, and were thus not allowed the ordinary rudimentary facilities required for a human being... I am sure, Sir, by adoption of this clause, many a Hindu who is a Harijan, who is a scheduled class man will feel that he has been elevated in society and has now got a place in society...”

Statement of Shri V.I. Muniswamy Pillai, Constituent Assembly Debates (November 29, 1948), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29, last seen on Dec. 12, 2019.

¹⁸ While quoting Mahatma Gandhi, Dr. Manmohan Das said:

“...Gandhi ji said I do not want to be reborn, but if I am reborn, I wish that I should be born as a Harijan, as an untouchable, so that I may lead a continuous struggle, a life-long struggle against the oppressions and indignities that have been heaped upon these classes of people.

... Not only Mahatma Gandhi, but also great men and philosophers of this ancient land, Swami Vivekananda, Raja Ram Mohan Roy, Rabindranath Tagore and others, who led a relentless struggle against this heinous custom, would also be very much pleased today to see that independent India, Free India, has at last finally done away with this malignant sore on the body of Indian Society.”

Statement of Dr. Manomohan Das, Constituent Assembly Debates (November 29, 1948), available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29, last seen on Dec. 12, 2019.

¹⁹ See *Supra* note 15.

²⁰ H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Vol. I (4th edn., Reprint 1999), ¶9.418 at p. 691.

²¹ AIR 1958 SC 255.

²² *Supra* note 3, ¶ 14.6 (per Indu Malhotra J.).

for constitutional amendments, and keep the Constitution flexible to the needs of changing times.²³ Political Science scholar, N. Srinivasan, hints that CADs are to be regarded as the keystones to the construction of written constitutions.²⁴ Given that the Constituent Assembly is the place where most of the deliberations have happened, one can use CADs to take a look beyond the actual words and phrases and understand the essence of a provision.

However, Indian judges refused to rely on CADs and were of the opinion that only the actual words and phrases of the text mattered.²⁵ After the *Kesavananda Bharati v. State of Kerala*²⁶ case and Granville Austin's book titled *Indian Constitution: Cornerstone of a Nation*, the attitude of the judiciary changed and the Judges began openly citing CADs.²⁷

B. Sabrimala Case

Justice Chandrachud construes stigmatization, exclusion of individuals and groups on the basis of social hierarchism, and principle of 'purity-pollution' to be the essentials of the institution of "untouchability" which Article 17 strikes against. This logic was applied by Justice Chandrachud in the *Sabrimala case*. Here, the practice which prohibited entry of women aged 10-50 into Sabrimala temple was under question. The said practice was based upon the notion that menstruating women between the said age group were 'impure'. This resulted in their exclusion from the place of worship, i.e. Sabarimala temple.

An application of "untouchability" in this context was elaborately stated by Justice Chandrachud. Stigmatizing practices based upon social order, whether patriarchal or otherwise, leading to exclusion may result in "untouchability". Additionally, this applies though the religious philosophy underlying such concepts of 'purity-pollution' may vary from religion to religion, given that Article 17 covers untouchability in "any form".²⁸

Justice Chandrachud's concurring opinion also shows a particular concern towards considering women as untouchables – "*Article 17 certainly applies to untouchability practices in relation to lower castes, but it will also apply to the systemic*

²³ Raghvan, *supra* note 2.

²⁴ N. Srinivasan, The Theory of the Constituent Assembly, 1 (4) The Indian Journal of Political Science 376-392, (1940).

²⁵ *C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643, ¶91 —reliance was placed on *Administration General of Bengal v. Prem Lal Mullick*, 1895 SCC OnLine PC 3 : (1894-95) 22 IA 107 and *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406 : (1963) 1 SCR 491.

²⁶ (1973) 4 SCC 225.

²⁷ Raghvan, *supra* note 2.

²⁸ The importance of religious philosophy underlying 'purity-pollution' would become clearer in the analysis of Social Boycott as a practice based upon 'purity-pollution' in **III. 'Transformative' Article 17 into Practice: Social Boycott**.

humiliation, exclusion and subjugation faced by women”.²⁹ It is reflective of the emancipatory value of Article 17. Much like the founders of the Constitution, Justice Chandrachud has carefully avoided pigeon-holing Article 17. In the following words, Justice Chandrachud has shown consciousness for future practices, and his visionary approach is clearly visible.

*“The operation of the words used by the Constitution cannot be confined to a particular form or manifestation of “untouchability”. The Constitution as a constantly evolving instrument has to be flexible to reach out to injustice based on untouchability, in any of its form or manifestations”.*³⁰

IV. ‘TRANSFORMATIVE’ ARTICLE 17 INTO PRACTICE: SOCIAL BOYCOTT

Social boycott, or “ostracism”, takes place when an individual is banished from society (if not physically, then from all public spaces and socially) for a perceived breach of that society’s rules.³¹ Such exclusion is on the basis of the decisions of panchayats, which may either be self-appointed by one’s own religious community calling out members within that religious-group, or it may be on a village level which shuns people or several groups in the religion itself. An individual who is ‘socially boycotted’ is treated as ‘inferior’ and ‘impure’ by the rest of the community. Social boycott is used as a weapon in both rural and urban communities to reinforce existing power structures.³² It is deployed against the deprived sections of society – including women and lower caste people – and also sometimes against the members of the same community to get them to toe the line.³³ More often than not, this practice has been used against couples marrying outside their caste or religion.³⁴ Other categories of victims include women who sought employment and those who refused the diktats of caste panchayats. At times, boycott is used on accounts of sheer jealousy and spite.³⁵ Thus, social boycott takes within its fold *inter alia* violation of intra-religious and inter-religious norms.

²⁹ *Supra* note 3, ¶ 258 (per D.Y. Chandrachud J.).

³⁰ *Id.*, ¶256.

³¹ Alok Prasanna Kumar, *Social Boycott Act Constitutional Validity and Article 26*, 51 (21) ECONOMIC AND POLITICAL WEEKLY, May 21, 2016, at 10.

³² *Id.*

³³ Aarefa Johari, *Fifty Years after Court Struck Down Law to Ban Social Boycotts, Maharashtra May Get a Second Chance*, (2015), (Nov. 14, 2018), <http://scroll.in/article/734977/fifty-years-after-court-struck-down-law-to-ban-social-boycotts-maharashtra-may-get-a-second-chance>.

³⁴ Niha Masih, *An unwritten social boycott scripting the fate of many*, HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/an-unwritten-social-boycott-scripting-the-fate-of-many/story-wol8BFD6fKzQCbeIx2yIP.html>.

³⁵ Kumar, *supra* note 31, at 10.

Although the practice of excommunication is largely similar to social boycott, the two differ in certain fundamental aspects. Excommunication necessarily involves cutting off of a person from religious places of worship and fellow worshippers, a social boycott need not do so.³⁶ The primary difference, however, lies in the nature of the authority being claimed: social boycott need not involve “religious authority” whereas excommunication is carried out in the name of “religious authority”, mostly by the religious head.³⁷ Thus, the religious element is evident in the practice of excommunication while social boycott is employed more in cases of gender injustice and caste prejudice. In both these scenarios, the status of the socially boycotted or excommunicated person is reduced to an “untouchable” resulting in his subjugation, oppression and exclusion from society.³⁸

The logic underlying such practice of social boycott and excommunication is that after an individual has failed to observe certain tenets of the ‘social rule’, whether religious or caste based, he is ‘polluted’ and no more ‘pure’ and ought to be excluded from society. Thus, rights of an individual are violated by the majority in the name of their ‘majoritarian’ beliefs. This goes against the promise of Article 17 of the Constitution where it is supposed to act as a modernising force.³⁹ In fact, this attracts the test laid down in *Sabrimala case*, and must be regarded as an offence punishable in accordance with law, as Article 17. Since the scope of Article 17 has been broadened to include all forms of ‘discriminations’, all practices involving structures of oppression and domination will be covered and this will help to secure dignity of individuals against community oppression. Justice Chandrachud’s words in *Sabrimala* is of particular note here; In the following extract, he underlines the concerns of minority rights (here individual rights) over protection of cultural rights (here community rights):

*“In the dialogue between constitutional freedoms, rights are not isolated silos. In infusing each other with substantive content, they provide a cohesion and unity which militates against practices that depart from the values that underlie the Constitution – justice, liberty, equality and fraternity. Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions, but on the structures of oppression and domination which exclude these identities from participation in an equal life.”*⁴⁰

³⁶ Kumar, *supra* note 31, at 11.

³⁷ Kumar, *supra* note 31, at 11.

³⁸ See *The caste aways*, Aug. 18, 2018, (Nov. 14, 2018) <https://www.livemint.com/Leisure/64EeWQ7wsyf56vQrNIK9TN/The-caste-aways.html>.

³⁹ Austin, *supra* note 10.

⁴⁰ D.Y. Chandrachud, J., *supra* note 3, ¶ 294.

V. ARTICLE 17: EXPANDING JUDICIAL ROLE IN LEGISLATION

Unlike most fundamental rights under Part III of the Constitution, Article 17 is enforceable against everyone – the State, groups, individuals, legal persons, entities and organised religion. This right can be enforced directly by moving either the Supreme Court⁴¹ or the High Courts.⁴² Additionally, it has the effect of making a practice declared to propagate ‘untouchability’ to be an offence punishable by law. In *State of Karnataka v. Appa Balu Ingale*, the Supreme Court of India had observed that “*The practice of untouchability in any form is ... a crime against the Constitution.*”⁴³

In fact, the long arms of the criminal law will lend teeth to the enforcement of the prohibition. It is pertinent to note at this stage that the constitutional courts can issue directions with a view to enforce fundamental rights which may sometimes be perceived as legislative in nature.⁴⁴ These directives “*for enforcement of fundamental rights is a basic feature of the Constitution*”⁴⁵ and continue to remain in force till an appropriate legislation is enacted.⁴⁶

It is even more interesting that there has never been a directive issued by the Supreme Court with regard to criminal offence. They have always been civil in nature because the rights for which these directives were issued were civil in nature. However, the entire mandate of Article 17 is to forbid “untouchability by making it an offence punishable by law” and no fundamental right in Part III of the Constitution except Article 17 provides for a criminal offence. There had never been a necessity to give a criminal directive to prohibit ‘untouchability’, as before *Sabrimala* case ‘untouchability’ was already made a punishable offence by the Protection of Civil Rights Act, 1955 [earlier known as the Untouchability (Offences) Act] and later by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

After *Sabarimala* case, a practice which has been declared as violative of Article 17 and which has not been declared an offence up till that point by the appropriate legislature, the Supreme Court can issue directives which may be in the nature of criminal offence.⁴⁷ In fact, such directives will be in the nature of social emancipation and these do not require the element of *mens rea*.⁴⁸ At the

⁴¹ INDIA CONSTITUTION. Art 32.

⁴² INDIA CONSTITUTION. Art 226.

⁴³ *State of Karnataka v. Appa Balu Ingale*, 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, Page 481 ¶ 21.

⁴⁴ *Subhash Kashinath Mahajan v. State of Maharashtra*, (2018) 6 SCC 454 ¶ 32.

⁴⁵ *Id.*, ¶ 31.

⁴⁶ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, ¶ 16.

⁴⁷ Directives can be issued to fill voids in the absence of legislation. *See Id.*, ¶ 17.

⁴⁸ *Supra* note 43, ¶ 38, Page 486. (Supreme Court of India).

same time, the judges must be aware of their limitation to act as a ‘legislator’.⁴⁹ Their scope of law-making is narrower⁵⁰ and they legislate only between gaps; they are only supposed to fill the open spaces in law.⁵¹ However, judges should refrain from ‘judicial redrafting’⁵² and they should not take up the task of ‘rule of unelected’.

VI. INDIAN YOUNG LAWYERS ASSOCIATION: ARTICLE 17 AND WAY FORWARD

Following the *Sabarimala* verdict, courts will be forced to test most religious practices on the touchstone of Article 17 while deliberating upon their constitutionality. For the purpose of ascertaining whether a particular religious practice propagates “untouchability”, tests enumerated in *Sabarimala* case would apply. Religious practices violating Article 17 will not only be banned but also a legislation declaring such religious practices as a criminal offence will be enacted or proper amendments to the existing preventive legislation will be made.⁵³ Pending such action by the legislature, it would be well within the competence of the High Courts and the Supreme Court to issue directives making such religious practice to be a criminal offence for its prohibition.

In 2017, a welcome step was taken by the Maharashtra legislature by enacting The Maharashtra Prohibition of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016 [‘Maharashtra Boycott Prohibition Act’] to curb the practice of social boycott, becoming the first State in India to make it a criminal offence. It is interesting to note that scheme of Maharashtra Boycott Prohibition Act underlines the principles enunciated in *Sabarimala* case under Article 17. Maharashtra Boycott Prohibition Act defines caste panchayats

⁴⁹ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, (Universal Publishers, 8th edn.) for a detailed discussion.

⁵⁰ This has been grounded in the idea that power to declare under Art. 141 of the Constitution includes power to issue directives.

⁵¹ Cardozo, *supra* note 49, at 113.

⁵² This was discussed at length by Justice D.Y. Chandrachud in Justice *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1. He observed that,

“The Constitution does not contain a separate article telling that privacy has been declared to be a fundamental right. Nor has the Court tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting ... To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected”.

⁵³ It can be argued that legislation for the said purpose could also have been enacted by appropriate legislature without such practices coming under the ambit of Art. 17. However, attention needs to be drawn towards the increased duty of the legislature in the presence of express mandate of Art. 17. Further, in absence of Art. 17 legislature had option to enact a civil/criminal legislation but now it is mandatory to enact a criminal legislation which would act as a better deterrence.

very broadly to include body or Committee, registered as well as unregistered panchayats, which regulates behaviour of members of the community and various practices in the same community.⁵⁴ This Act prohibits 'social boycott' by any means by a group or an individual,⁵⁵ and makes it a criminal offence punishable by law.⁵⁶ Imposition of 'social boycott' also includes preventing or obstructing performance of any religious rites and so on, and it as broad as committing social ostracism on any grounds; and the members of 'community' is also with reference to religion.⁵⁷ Preamble to the Act enshrines the intention of legislature to curb any form of social boycott:

"WHEREAS promoting amongst the citizens fraternity, assuring the dignity of individual is enshrined as one of the goal in the Preamble to the Constitution of India;

*AND WHEREAS the social boycott of any person or a group of persons is violation of the fundamental rights enshrined in part III of the Constitution"*⁵⁸

These provisions read together with the statement on legislative intention make it very clear that the Act is not limited to caste-based social boycott only and includes religious social-boycott as well. Under Section 3 of the Act, social boycott can be committed by an individual or group belonging to any 'community';⁵⁹ 'community' is defined under Section 2(1)(b) of the Act and includes communities on religious grounds as well.⁶⁰

At this stage, it becomes important to analyse how tests laid down in *Sabrimala case* apply to the Act. Social boycott occurs to reinforce community beliefs and is carried on the ground that the deviant individual or group is no longer fit for the group;⁶¹ and hence, impure due to non-compliance of community norms. Founded upon the notions of this impurity, discrimination is meted out to such deviant people where 'untouchability' is manifested by actively excluding such through various means. It is this exclusion founded on the notions of 'purity-pollution' operating irrespective of gender, caste, religion or any other ground that Article 17 seeks to abolish and make it a criminal offence.

Social boycott is still prevalent throughout India.⁶² and there is no protection against such acts in the absence of central laws Therefore, gross violation of

⁵⁴ S. 2(1)(a), The Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Act, 2016.

⁵⁵ *Id.*, S. 2(1)(g).

⁵⁶ *Id.*, S. 4.

⁵⁷ *Id.*, S. 3.

⁵⁸ *Id.*, Preamble.

⁵⁹ *Id.*, S. 3.

⁶⁰ *Id.*, S. 2(1)(b).

⁶¹ See Kumar, *supra* note 31, at 10.

⁶² *Id.*, at 10.

the fundamental right against “untouchability” under Article 17 takes place. To get rid of this practice, people can move the High Courts or the Supreme Court to not only ban this practice but also direct the appropriate legislature to enact laws making such practices a criminal offence. In fact, the Maharashtra Boycott Prohibition Act will act as a suitable model for the state legislatures and parliament. Pending such enactment, the said courts can also issue a directive in the nature of punishing a criminal offence. Thus, an aggrieved person has recourse to dual remedies - legislative enactment or judicial directives.

VII. CONCLUSION

Elevation of religious and other discriminations to the status of “untouchability” under Article 17 would definitely add teeth to the claims of prohibiting such discriminatory religious practices. The impact of its elevation to a fundamental right can be estimated from the elevation of privacy to a fundamental right from Article 21.⁶³ After the privacy judgement, privacy became a topic for public discussion and common man began asking questions about privacy.⁶⁴ A need for legislation on protection of privacy was realised by the Parliament and an expert committee, Justice B.N. Srikrishna committee was constituted.⁶⁵ This highlights the importance attributed to a right which has the status of fundamental right. Following this as an example, one can expect how practices propagating ‘untouchability’ will be dealt with, both by public and the legislature.

Justice Chandrachud has rightly recognised Article 17’s significance as, “*it is a provision which has a paramount social significance both in terms of acknowledging the past and in defining the vision of the Constitution for the present and for the future.*”⁶⁶ In fact, Article 17 along with Articles 15 (2) (b) and 25 (2) (b) will prove to be the golden triangle of freedom from exclusion and discrimination, much like Articles 14, 19 and 21 which are said to be ‘golden triangle of liberty’. It will be reflective of true emancipatory character of the Constitution, lifting as it does from the status of wretchedness and subordination – communities, castes, tribes and women – to full citizenship⁶⁷ and will have profound impact upon our legal and constitutional landscape for years to come.

⁶³ In Justice *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, Supreme Court declared right to privacy as a fundamental right under Art. 21 of the Constitution.

⁶⁴ Rajiv Singh, *How Right to Privacy can be a life-changer*, THE ECONOMIC TIMES, 27 August 2017 <<https://economictimes.indiatimes.com/news/politics-and-nation/how-right-to-privacy-gets-a-leg-up-after-supreme-court-judgement/articleshow/60237173.cms>> accessed 14 November 2018.

⁶⁵ Saurabhi Agarwal, *Data protection bill may be tabled in winter session*, THE ECONOMIC TIMES, 3 August 2018, <<https://economictimes.indiatimes.com/tech/internet/data-protection-bill-may-be-tabled-in-winter-session/articleshow/65251657.cms>> accessed 14 November 2018.

⁶⁶ Justice D.Y. Chandrachud, *supra* note 1, ¶ 248.

⁶⁷ Outline of Arguments, *Voices against 377* (Respondent 8), *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762 ; cited in Gautam Bhatia, *Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution*, Indian Law Review, 1:2, 115-144, DOI: 10.1080/24730580.2017.1396529.