VI

UNTOUCHABILITY: CONSTITUTION, LAW AND PLAN

Upendra Baxi

I. INTRODUCTION

Contemporary examination of the problems of the scheduled castes focuses on the question of educational and job reservations\(^1\) and occasionally on the issue of reservation of legislative seats for the scheduled groups.\(^2\) There is also moderate concern with the enforcement of Untouchability Offences Act now renamed as the Protection of Civil Rights Act.\(^3\) No doubt, issues raised in the domain of compensatory discrimination are crucial, having large redistributive implications. But by focusing on these issues social scientists and lawyers have become too heavily involved in the problems and the plight of the relatively more well-off, if not affluent, untouchable groups and enclaves of need and deprivation distinctive to them. The problems of the poorest and most exploited untouchable groups do not often enough emerge to the fore. Just as national planning gets involved in the process aptly described as “the creaming of the poor” so does the scientific writing.

This paper raises some issues concerning a group of rather neglected sections of scheduled castes, namely scavengers and sweepers and

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the problems of plan and law they raise for us.

Of all groups among the scheduled castes, the most depressed and cruelly exploited is the group of scavengers and sweepers, which comprises incidentally numerically the largest section of the scheduled castes. Scavengers and sweepers form a fair bulk of Indian citizens to whom the Constitution promises, in its sonorous preamble, recitals, dignity and fraternity and justice economic, political and social! A most cogent empirical refutation of the pledges of the Constitution, in nearly forty years of the working, is provided by the plight of Indian scavengers and sweepers, who have to carry human excreta in torn wicker baskets to distant places to stenching rubbish dumps. The occupation is unclean, filthy and degrading. And yet thousands of men, women and children—all Children of God—are condemned to this “avocation” out of necessity to earn a living. Most of these human beings are turned into agents and carriers of filth by the state since they are employed at job by the municipal corporations or panchayats. And the state which is commanded by Article 17, a fundamental right, to abolish untouchability has for forty years nurtured the very conditions of scavenging which perpetuate it.

The story is tragic but needs to be told, even if briefly, in the interests of some vigorous state action in future. For, we are an independent people and country. And one fundamental right that accrues to us as such people is the right to hope for miracles!

The conditions of scavengers and sweepers have been the subject matter of investigation at least by three government committees since independence: the Barve Committee,4 the Malkani Committee5 and the Salappa Committee.6 In addition, the Malkani Committee produced a more specific report on the customary rights to scavenging in 1966. The annual reports of the Commissioner of the Scheduled Castes and Tribes has contained periodic accounts of the plight of scavengers. The overall picture which emerges from all this official literature is enough to shock the conscience of civilized persons everywhere. The shock is all the more great when we find that the evils of the system, the degradation and dehumanization to which it condemns people, continue in their sinister forms unabated since 1949. There are many common features to the three reports, although they straddle three different points of time in the last quarter century. If nothing else, this raw fact must bring home the truth that the rate of ameliorative change has been both cruelly slow and inadequate.

4. The Scavengers Living Condition Enquiry (State of Bombay) Report (Govt. of Maharashtra, 1949) (Referred to as Barve Committee).
5. Report of the Committee on Customary Right to Scavenging (Ministry of Home Affairs, Govt. of India, 1966); also Report of Scavenging Conditions Enquiry Committee (Ministry of Home Affairs, Government of India, 1980). Both these are referred to and known as Malkani Committee.

II. THE CONDITION OF SCAVENGERS

The Malkani Committee reported in 1960 (and the Salappa Committee was repeating the theme in 1975) that in most states there exist “primitive type of latrines” where the scavenger has to crawl through a narrow passage “pushing the basket with one hand, resting his body weight on the other” and make his way into, and exit from, the latrine chamber carrying excreta in the same manner. Further, “he has to thrust his hand inside the chamber through a narrow opening and often to “thrust his head inside the hole to see and do proper cleaning”. In about 80% to 90% of cases “latrines have no receptacle and excreta drops directly to the ground”; this undermines the flooring in course of time making cleaning of the latrine even a more arduous and filthy job. It was also noted that in the majority of service latrines “there are no arrangements for keeping the night-soil, urine or ablation water separate” aggravating the difficulties of manual removal of excreta. No scrapers were provided to scavengers; nor were gloves. Night-soil was usually carried to dumping pits as head loads in wicker baskets. Where buffalo driven bullock carts were used, the “scavenger has to sit over the edge of the cart and cannot remain separate from the rubbish. By the time he reaches the dumping ground, he is from head to toe completely covered with dirt and refuse”. In some places night soil was carried by tanks and to remove it at the dumping site a scavenger had to enter the tank and empty it bucket by bucket!

There is at least one example of what happens (and may still happen in some parts of India) if you were a scavenger employed by jail or a scavenger inmate of a jail (whether as undertrial or convict) best described in the Committee’s own words:

At Yerwada Jail (Pune) and also at Ahmedabad Jail, the Committee saw big drums of about 20-30 gallons capacity carried on a bamboo pole by two prisoners. They are kept near the latrines and all their night-soil when collected is carried to the jail boundary wall. On a terrace near, they have installed a churning apparatus which is also operated by a prisoner. A stream of night-soil falls outside the jail wall through a pipe into a small pool. We saw a man standing bare-footed in the pool with night-soil up to his knees, trying to churn it with his feet and a bucket in his hand. In doing so he was completely sprinkled over with night-soil. Other prisoners who handle big drums also get soiled while putting, lifting or tilting the drums.

No comments on this passage, one hopes, are necessary.

Scavenging has been increasingly municipalized, though it is also done by private contracts, which are hereditary in some areas. The system of private contracts involves hereditary occupational rights for scavengers, which are also transferable and alienable by way of sale or mortgage. These rights involve, for example, a division of areas or households for scaveng-
ing which are hereditary; the householder may not alter the arrangements save through consent of the concerned scavengers. The old scavenger may in turn sell at a price his rights to new ones. Moreover, under this system the right of proceeds from the disposal of night-soil vest with the scavengers. It is difficult to ascertain the extent of the regime of these customary rights; but the Malkani committee in 1966 ascertained that it prevailed in some parts of Uttar Pradesh, Madhya Pradesh, Rajasthan, Gujarat, Punjab, Karnataka, Jammu and Kashmir. In areas where scavenging is not municipalized, and where scavengers from the northern parts of India have migrated to south, the system may also be widely prevalent.

Interestingly, the (second) Malkani Committee was faced with the question whether the right to dispose away the nightsoil was indeed a customary right and whether if it existed it was a right to property under the Indian Constitution, of which scavengers may not be deprived without compensation. On the first question, the Committee acknowledged that customary rights of scavengers “are an extension of the traditional rural jajmani system”. But the Committee adopted a purely legalistic approach to the proof of customary rights and went on to find that “the evidence . . . is hardly sufficient to establish any of the essential attributes of a valid custom”. Under the law, a valid custom has to be proved as a “rule of long usage”, “morality and public policy”. In all respects, the claim that a custom exists must be proved “by clear and unambiguous evidence” and mere evidence of long usage is not such evidence. The Committee forfeited itself by reference to a few decisions of High Courts which had held such custom was not proved, and not enforceable anyway, so as to bind the employer as an exclusive right of the plaintiff. In other words, these were cases primarily involving the right of the employers to obtain services of scavenger contrary to one incident of the custom which required consent of the scavenger whose services were sought to be replaced by others. These were not cases, however, involving the question of their rights to sell for price the night-soil collected. Indeed, the Committee found that some provisions in municipal laws recognized the right and provided for natural justice as well as compensation for acquisition of scavenging rights. Despite this, it felt that such rights should not be recognized and suggested, somewhat awkwardly (having denied the existence of such customary rights in the first place) that they be “abolished”. Even more awkwardly, the Committee recommended ex-gratia payments for the rights thus proposed to be abolished while rejecting the idea of payment of due compensation. It more firmly recommended that the right to disposal and proceeds from the night-soil must vest in municipalities, even where scavenging work may still be done privately.

This clearly was an ill considered decision. The Committee did realize that municipalization of the work will have to be phased. It stressed that given the financial condition of most municipalities there will be many difficulties in the process. It also recognized that private scavenging will continue. But it was not, prepared to recognize a right to property in the claim of customary practice to the proceeds of the night-soil. From such sample survey that it was able to make of few towns, it was able to state (though not conclusively) that the proceeds of the night-soil formed an insignificant part of the monthly earnings of scavengers. If this were to be the current national position, then under any formula of due compensation the burden of recognition of such rights as property rights would not have been very high for the state. But, as noted, the Committee proceeded to assess the existence of customary rights in a manner that virtually made the proof of these impossible. With some specially commissioned research, rather than searching for evidence through field trips and oral evidence of witnesses testifying before it, the Committee could surely have found some appropriate evidence for or against the customary claims and the monetary values involved. As it is the Committee went by hunches and a certain amount of ideological disfavour of these rights, at the very time when payment of compensation to landlords for expropriation of their lands was a much debated constitutional and political question, inside and outside the Supreme Court and Parliament of free India.

III. BRIT JAIMANI RIGHTS

The Committee's stand at least produced one note of dissent. Shri K. L. Balmiki insisted that the Brit Jaimani system of rights (described above) include “rights which are used by scavengers as property rights” and that these rights are sold or negotiated in large numbers by scavengers; “there are” had added “promissory notes in thousands” evidencing these transactions. He, therefore, felt that acquisition of such rights should follow the constitutional requirement of compensation, which may be as high as five to ten thousand rupees, according to the value of the mortgage or sales transaction over the brit rights. He not merely urged compensability; he also insisted that adequate provision should be made for compensation in the Fourth Five Year Plan. And he too could not help adding the poignant question that is “zamindars, inspite of their exploitation of the peasants were compensated, why should these humble owners of customary rights enjoy similar benefit?”

The dissenting note also pointed out that without “proper, decent and adequate compensation, it is not possible to solve this problem”. Hasty solutions, it warned (quite rightly) would not help and indeed create more misery than they would cure. Leaving ex gratia payment to the municipa-
lities, which experience perennial shortage of funds, would lead to meagre returns to affected people; and in any case municipalization of scavenging services was not going to be either rapid or total or thorough going. Disturbance of the existing customary rules, in the circumstances, would only further disadvantage the scavenging classes. Nor can the discretionary programmes, or indeed guidelines for such programmes, assist scavengers in finding alternative employment whereas compensation, upon verification of claims, could be of more substantial help.

In thus voicing his dissent, Valmiki was just urging the Committee, though not in explicit terms, to be consistent with its own earlier recommendation in its 1960 report. There the Committee, with the same composition as in 1966, recognized the customary rights, referred explicitly to articles 31 and 41 of the Constitution, and expressly urged that “the municipalities/other local bodies etc. should pay reasonable compensation in cash to such scavengers as may be affected and do not obtain employment due to acquisition of their customary rights.” But the Committee noted then that it was well known that “many of the local bodies will not be in a position to pay reasonable compensation” and, therefore, recommended that the state and central governments must specifically assist financially such bodies. It even urged a nationally uniform policy in regard to the “basis, mode of payment and the amount of compensation”.12 It is perplexing that in five to six years’ time, the same body of men (save the dissenting member) should have so thoroughly changed its position on such a vital issue.

The Malkani Committee was, of course, genuinely concerned to abolish not just the regime of hereditary rights, claiming the title of custom but was also interested in rationalizing and humanizing where necessary and eliminating where possible the system of scavenging altogether. In the former direction, it made a number of proposals, too richly detailed for a bare review here. But the main thrust of these proposals was a programme of municipalization of scavenging, payment of adequate wages and housing facilities and, most important of all, mechanization, as far as possible, of the job. In this set of recommendations, it was in agreement with the Bombay Scavenging Condition Enquiry Committee, 1960 (called after its Chairman as the Barve Committee) and its recommendations stood reinforced by labours of the Salappa Committee on conditions of scavengers in Bangalore which reported in 1975. The main insistence in all these recommendations was that carrying of night-soil in baskets or drums or man-driven carts should be eliminated, and prohibited even by declaring it as an offence; and that all facilities which will avoid degrading contact with filth and waste should be eliminated by appropriate devices. These included adequate provision for wheel barrows, rubber gloves, scrappers, sheets or M.S. plate of particular length and curvature, uniforms, gum-boots, headgear, tools for cleaning underground drainages etc. In addition, the law must make it obligatory on householders to used receptacle of certain materials. Not many such laws have been so far enacted. The expenditure thus involved in affording these innovations as well as managing the change and overseeing constantly its implementation should be met by grants from central and state governments and where necessary by appropriate scavenging tax or cess. The Malkani Committee was quite categorical that all these measures should form a part of integrated national programme and the welfare of scavengers and modernization and humanization of the conditions of their work should be an item in national planning at the level of five year plan formulations.

IV. SANITATION AND MUNICIPAL SERVICES

The second strategy involved a frontal attack, again at the national level, in eliminating systematically in cities and towns, the system of latrines which have to be manually cleaned and their replacement by water borne and underground drainage systems, with simultaneous provision for alternate work. The Malkani Committee appreciated the substantial financial outlays involved in this programme and therefore urged a phased programme as well as integrating this programme with planning at a national level. It also appreciated that there will be an interim phase in which service latrine system will still operate in cities and towns and accordingly, like the other two committees, made a number of specific suggestions to ameliorate their plight in terms of wages, facilities, ex gratia payments, housing etc. It also suggested special administrative frameworks for administration of programme for the betterment of the conditions of scavengers.

A recent survey,13 as well as the Annual Reports of the Commissioner for the Scheduled Castes and Tribes, suggest that bulk of these recommendations have gone unheeded. It is true that under the grant in aid schemes, revised in the light of the Malkani Committee recommendations, an expenditure of Rs. 36.42 lakhs and Rs. 107.96 lakhs was incurred in the Second and Third Five Year Plan periods. Despite this “the system of carrying night-soils as head loads still continues” for reasons which are truly astounding. The Commissioner’s report for 1970-71 mentions, for example, that the wheel barrows supplied by municipalities are heavy and faulty and there is scant provision for repair and replacement! No storage sheds or facilities have been provided! Maintenance grants seem to pose a major problem; so does the problem of administrative efficiency and coordination.

The attention of the national planners to the problems of scavengers seems to have wavered somewhat. The Fifth Five Year Plan draft provided an outlay of Rs. 40 crores for sewerage schemes for forty towns and from this Rs. 2 crores were to be spent for conversion of dry or service latrines and for modernizing methods of garbage collection and disposal. This amount was to be invested by way of pilot projects in 10-15 cities and

12. Id. at 84-85 (emphasis deleted.)

towns. The plan objectives clearly stressed that there was "a constraint of resources for full fledged sewerage schemes to increase the efforts of conversion of dry latrines into sanitary latrines in unsewered areas" and the total amount of Rs. 78 crores for sanitation programmes in general was conceded to "be small compared to the needs."\(^\text{14}\) It is also interesting to note that the much vaunted Minimum Needs Programme did not include abolition of the scavenging system or at any rate amelioration of the plight of the poorest of the poor. The draft outline for the Sixth plan makes an allocation of Rs. 15/- crores; but not all that amount is for conversion of dry latrines into service latrines. Other major needs of expenditure on this head include: public health engineering, water and air pollution control, training, survey, investigation and planning, rigs programme and solid waste disposal.\(^\text{15}\)

The story of housing scheme seems equally discouraging.\(^\text{16}\) Only a poignant fact might here be mentioned. In scavenger housing colonies or bastis there does not exist, by and large, underground drainage facilities and the colonies are very often "surrounded by the dumping grounds for the nightsoil!"\(^\text{17}\)

V. CONDITIONS OF EMPLOYMENT

One more aspect of the conditions of scavengers and sweeper groups pertains to the actual conditions of employment under municipalities. Available empirical material, though slender, suggests continuing exploitation, regardless of the command of the constitution and the mandate of the law. The Malkani Committee found, for example, that wages paid to municipal scavengers and sweepers were often below the standards prescribed under the Minimum Wages Act; there was differentiation of wages between the sexes; the workload norms were not fixed; child labour was often involved; female scavengers were given heavy and onerous work. There were also the off-hand complaints concerning irregular payment of wages and unauthorized deductions from wages. It naturally recommended appropriate measures in this regard. It is not possible to say how many of these suggestions have been accepted by local bodies. But one can infer that the state of municipal finances being what it is, the overall situation as discovered by the Malkani Committee would not have changed either spectacularly or even adequately.

This inference finds support in the empirical studies. Satyapal Dang found in seven municipal areas in Punjab as late as 1974 that women sweepers are given part time jobs, without weekly rests or maternity leave or even paid leave on public holidays. They are not provided with uniform or allowances such as house rent allowance; their average monthly wage is around Rs. 80. Part time female workers are at some places given work exceeding work given to full time male sweepers; the work span of the former often extends to 10-12 hours, despite the fact that they are "part time". It was also found that the municipal corporations engaged more part time women workers than men; in many cases the percentage of the former was more than 60% over the latter.\(^\text{18}\)

VI. CONCLUSION

This resume of the working conditions of scavengers and sweepers in contemporary India, although sketchy, highlights several issues of plan, policy and the law. It is clear that abolishment of the occupation has not been considered feasible. Amelioration of their working conditions has been attempted but without any really worthwhile results. The basic needs of this most depressed groups of people have not sufficiently caught the attention of the planners and policy makers nor the enthusiasm of leaders and legislators especially from the scheduled castes. They have comparatively paid greater attention to the issue of reservations under the constitution. The scheduled caste organizations have also relegated the plight of the scavengers and sweepers to a low priority and they have failed to act as any significant pressure group to advance their claims of welfare on the legal and political system. Nor is there much evidence of vigorous Dalit activities in this area although there are some welcome stirrings in this direction, particularly in Maharashtra.

The only contribution made by law and lawmakers to their plight seems to be a negative one; namely, the denial that the brti jainani rights are customary rights recognizable under the Constitution as property rights and subject to the requirement of due compensation in case of acquisition. This accords well with the 'class character' of lawpersons-lawyers, judges, scholars who have been engaged in vigorous debate on the scope of the right to property as a fundamental right. The issue of the rights of sweepers and scavengers has never entered the mainstream legal consciousness in the country.

Nor have the Bar and the Bench, and the mushrooming legal aid and advice programmes shown any awareness of the exploitative conditions of work imposed upon the scavengers and sweepers under the employment of municipal corporations or related local bodies. In perpetuating these conditions, the state is itself violating several provisions of fundamental rights and more importantly the directive principles parts of the Constitution. More importantly, because the executive and the ruling parties have also always been the most strident in justifying their policy positions with reference to the directive principles of state policy. In a sense, the exploitative conditions of work constitute governmental defiance of the law and the constitution, which can be best summed up as a crucial component of the

\(^\text{15}\) Draft Outline of the Sixth Five Year Plan p. 249 (1978).
\(^\text{16}\) Dubey & Murdia, supra note 13 at 127-32.
\(^\text{17}\) Id. at 128.
overall governmental lawlessness in the country since Independence.19

But an anguished invitation for collective introspection on the circumstances responsible for this state of affairs is, naturally, no substitute for a programme of action, even though it might be the first step. As one unversed in the art and science of economic planning, it appears to me that scavengers and sweepers will remain with us as an occupational group for the simple reason that expenditure in sewerage is substantial and that any proposal to give it high priority has not much prospect of success in view of the other competing categories of basic needs (such as drinking water, health, rural electrification and so on). Nor is it likely that this conception of priorities can be substantially influenced by political intrusion. Scavengers and sweepers have no political "voice" or presence; other scheduled caste groups which have access to power and influence seem almost totally unconcerned with their fellowmen in this group. Nor is there sufficient civic consciousness among the intelligentsia of their plight; in the circumstances cultivation of public opinion becomes a task of social movements and organizations which too do not appear to have appreciated the problem as one of the high priority.

We have to live with the fact that this occupational group will continue for at least another half century or more. If this is the promise, then both law and policy should move towards amelioration of their plight on the lines already suggested by several enquiry committees and summarized earlier in this section. Both the Planning Commission and the Finance Commission can tie up their programmes of subsidies and grants in aid to the states to provision of adequate facilities to mitigate the indignity of labour involved in this occupation. The States in turn should ensure non-exploitative service conditions under municipalities and reconsider the issues of compensation for acquisition of customary rights, whether or not (in view of the changes in the Constitution) these legally qualify as property rights. The item of raising scavenging cess should be considered at all levels. The Commissioner of Scheduled Castes and Tribes should be urged to give his constant attention to the analysis and monitoring of programmes for his group. Many other short term suggestions in this vein could be made.

But perhaps it is only possible to move law, policy and planning in this direction when the intransigent reality of the prolonged survival of this occupation and of the resource constraints are conceded. The latter, however, cannot just be accepted as an argument for continuance not just of the occupation but also of its present plight for an indefinite period of time. Perhaps, the emergent jurisprudence of social action litigation can provide a much needed authoritative policy/enforcement approach.20 It is striking, though, that even this form of innovation on the creative uses of judicial power for the impoverished has not touched these atisudras.