UNTACTHABLE'S ACCESS TO WATER: TWO MORALITIES OF LAW ENFORCEMENT

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The Constitution through the proclamation in Article 17 abolishes "untouchability", forbids its practice in any form and requires that imposition of disability in any of its forms shall be declared an offence. The Untouchability Offences Act, 1955 (hereafter UOA) and the new recasting of it in 1976 in the Protection of Civil Rights Act (hereafter CRA) forbid, in terms, enforcement of any disability on the ground of untouchability against any person with regard to "the use of or access to any river, stream, spring, well, tank, cistern, water tap, or other water places or bathing ghats...". It prescribes minimum punishment of imprisonment for not less than one month and a maximum of six months. Similar punishment is to be vested against enforcement of disability on the ground of untouchability on access to, and use of, "any place used for... a public purpose maintained wholly or partly out of State funds or dedicated to the use of the general public..."

This, more or less, is the law of the land. What happens in reality is far more complex. There is, all over India, denial of access to water facilities to untouchables: corresponding prosecutions are miniscule. Incidents of beating, torture and even grievous hurt and murder for use of water facilities exclusively reserved to savarnas by themselves is an everyday affair; not so the initiation of investigation and prosecution. What is more, the Indian state has found it necessary to cope with the inherent injustice and inhumanity of the deprivation by creating or condoning separate facilities of water for the untouchables. This marks not just an admission that the law has been found difficult of enforcement but that state is itself compelled to breach it (since the words of the statute include the state) in the title of doing justice to untouchables! The justification for this kind of rescue programme is complex; we revert to this matter towards the end of this section after briefly examining the available empirical material.

There are plenty of random instances of discrimination in, and even outright prohibition of, access to water resources, including primarily drinking water. A look at some of the reports of the Commissioner of the Scheduled Castes and Tribes would show that the incidence of such discriminatory practices is very large indeed. Even where the attention of the relevant Government has been drawn to such practices, the remedial action is often slow and halting, and very rarely adequate. For example, the gharihis system of drawing drinking water in some parts of Rajasthan was adversely commented upon by the Commissioner and some remedial steps were taken. Even so, the Commissioner was able to demonstrate in the Twenty First Report that the practice of separate sources for drawing water continued; so did the practice of providing separate taps for drinking water. Even when the rather primitive and arduous method of gharihis was discontinued in some parts of the state by energized wells separate facilities continued to be provided. The Report also notes that in the U.P. the Harijan and Social Welfare Department has provided separate drinking facilities for untouchables in some areas. There are also problems of discrimination inter se among the untouchable groups; for example, the relatively "high" occupational castes among the untouchables refuse the 'low' caste access to water facilities. The overall result, is thus to institutionalize two levels of untouchability and of discriminatory access.

But apart from these occasional reports, we do not have serious empirical examination of the profiles of such discrimination for states and union territories. Lamented Professor I. P. Desai's work on access to water facilities to untouchables in Gujarat is the only available empirical account. He found that out of 69 villages, only five villages allow untouchables access to water resources on the basis of "complete equality with the savarnas". In 13 villages the same water source is used by both savarnas and untouchables. But there are user restrictions which clearly indicate the practice of untouchability; that is, for example, the untouchables cannot stand on the same side of the well as the savarnas or where separate taps are provided or where rules of priority of use of the source are prescribed and observed. As against this in 44 villages "water is believed to be polluted by the touch of untouchables and a separate arrangement is made for them", usually though a separate well "mostly in their locality". If water is taken from a river or stream or pond or lake both by savarnas and untouchables then the places from which water can be drawn by the latter are rigorously fixed. Very often, the separate wells are located at some distance from the village; in that case untouchables utilize their fixed positions at the common source. Finally, there were seven villages where the belief in pollution is very strong but where alternate sources of water are also not available for untouchables. They are therefore not able to satisfy "the primary need for water not because there is scarcity of water but because they are untouchables" (emphasis added). Percentage-wise the distribution of access to water facilities is given on page 188.

2. Id. 159.
<table>
<thead>
<tr>
<th>Percentage</th>
<th>Category of Access</th>
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<tr>
<td>7</td>
<td>No discrimination on ground of untouchability; common access to water;</td>
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<tr>
<td>19</td>
<td>common access; but with certain restrictions on the manner and timing of access to water by untouchables;</td>
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<tr>
<td>64</td>
<td>separate water facilities for untouchables; savarnas have exclusive access to their sources.</td>
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<tr>
<td>10</td>
<td>no access by untouchables to any water facility at all; they are dependent at the mercy of savarnas.</td>
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A very important finding of the Gujarat study is that “the observance of untouchability in regard to different behavioural situations does not differ according to the practice of getting water from a common or separate source”. In other words the incidence of belief in pollution varies in the savarnas dealings with untouchable occupational castes and in the general realm of public behaviour such as commuting in public buses, at post offices, interactions in work situations (such as on fields, payment of wages etc.) and in temple entry. It is not our intention here to attempt even a summary review of these variables. But the general finding is important on the question: should the state foster separate water facilities to untouchables? The answer given by Professor Desai is in the affirmative. In his own words it is this: “. . . untouchability will not be encouraged if untouchables are given separate sources of water. It might not be weakened either except in an indirect way”. He also observes, by way of general conclusion on this subject, that “there is no change in the practice of untouchability but that there is change in the behaviour regarding untouchability, without change in the belief in pollution and in untouchability”. Apart from these conclusions, Professor Desai also recommends separate facilities on humanitarian and pragmatic grounds. The untouchable's dependence on the savarnas must be reduced in so vital a basic human need as water. The immunity of every day humiliation in this regard, he says, with “other things” would eventually lead to a situation where “they would gain more self respect and confidence”. This recommendation does not seem to have influenced the state, at least in Gujarat. The Twenty Fourth Report of the Commissioner for the Scheduled Castes and Tribes outlines the vigorous steps taken to liquidate discrimination in access to water facilities by a tough minded approach to the enforcement of the anti-untouchability law. During the emergency years, the Government drew up, and what is more implemented, a plan of action. This plan included identification of patterns of discrimination by villages.

4. Id. at 114.
5. Ibid.
6. See supra note 3 at 115.

Suspension of saranph and talatis in these villages, and initiation of police complaints for violation of the CRA. The Sarpans were also removed under the Panchayat Act by the District Development Officer himself, without awaiting complaints from the untouchables. In 13 districts of the state, 180 officials were suspended: these included 76 Sarpanches, 13 Deputy Sarpanches, 40 Talatis and 50 Police Patels. It has not been possible to ascertain whether after the emergency they were reinstated on the ground that this entire plan was “perverted” by emergency arbitrariness or “excess.” Certainly, the Report of the Commissioner does not so suggest, although it was published on 7 March 1977. But the plan is impressive; the Commissioner rightly applauds it and recommends it for emulation, again rightly, by other states. We have no information as to whether there were any “takers” of this model in other states in India. One would expect, however, that states with a continuing tradition of social innovation in this arena like Maharashtra and Tamil Nadu might pursue similar programmes.

On the other hand, in states lacking such traditions there is some evidence (even without such careful investigation as that of Professor Desai) that Professor Desai’s conclusions have been anticipated and implemented by encouraging provision of separate facilities. Such a policy needs close examination. It raises, the problem of two moralities of law enforcement. The Protection of Civil Rights Act forbids, under the command of the Constitution, discrimination in access to water resources and facilities on the ground of untouchability.

Indeed, the law as amended in 1976 goes a few steps further. First, it prescribes that “whosoever abets any offence under this Act shall be punishable with the punishment provided in the offences; and under explanation to this section 10 it is further provided that a public servant who willfully neglects the investigation of any offence punishable under the Act shall be “deemed to have abetted an offence punishable under this Act.” Denial or discrimination of water facilities or access to these is an offence. Second, the extremely wide language of section 7(1) (a) of the Act, as amended, makes an offence any behaviour which “prevents any person from exercising any right accruing to him by reason of the abolition of untouchability under Article 17 of the Constitution;” similarly by clause (b) molestation, injuries, annoyance of persons for exercising his rights under the article are also made offences.

If despite this the state asks its officials to provide for separate wells or taps for untouchables, it is unlikely that the state policy or administrative directions to officials would provide them shield against conviction for knowing violation of the law. The law forbids equally the state and the citizen from discriminating in regard to access to water resources and facilities; can the state, which made the law in the first place, be heard to say two standards of enforcement are necessary, desirable and justified? But obviously these will have to prevail for by and large prosecutorial initiative remain with the state and it is unlikely that it will prosecute its own officials for
acting under its own dictates. This kind of dual enforcement of the law carries a number of consequences. The law enforcement officials themselves would may begin to regard the provisions as dead letters because instead of compelling, under threat of prosecution and conviction, citizens to abandon or pelling, the policy of the governments concerned would modify discriminatory access, the policy of the governments concerned would suggest that some kind of accommodation with dominant castes is preferable. This kind of feeling will also reinforce those who practice access discrimination, not just by savarnas but also by those untouchable groups who engage in this practice against the low caste brethren in their own community. The beneficiaries of the law, should they be aware of it, might also come to realize that no serious business is meant by the state under the law. The overall legitimation costs for the legal and political system, in course of time, also appear high.

But clearly more than legal and political issues of the above kind are here involved. The point is, as Professor Desai has forcefully put it, substantial empirical evidence demonstrates that provision of primary need facilities like water through separate wells or taps is not likely to “encourage” or perpetuate untouchability which is a function of many complex socio-economic variables. Besides, as he, in effect, puts it: can the satisfaction of a basic human need like access to water be allowed to remain contingent on the vagaries of law enforcement?

On the first point, it may be straightway said that what is true of 68 Gujarat villages may not hold true for the rest of the state and certainly not for the rest of the country. It may be found that there are linkages between discriminatory access to water resources and perpetuation of untouchability. This hypothesis gathers credibility from Desai’s overall conclusion, noted earlier, that there is after all “no change in the belief in pollution and untouchability” despite many discernible changes in behaviour regarding untouchability.

Be that as it may, the second point does make perfect sense. As we shall see in the ensuing section even when commission of offences under the CRA are subsumed under the rubric “atrocities” against untouchables, prosecution and disposal move virtually at a snail’s pace, given (among other things) the problem of workload or arrears in courts. On the other hand, the problem raised earlier concerning two moralities of enforcement, with all its complex costs, immediately arises here. And that cannot just be put aside for, overall, it might have the additional cost of perpetuating belief in pollution and untouchability which it is the essence of the constitutional scheme to annihilate.

But in addition there is also a philosophical or ideological problem. To be sure, primary needs should not remain unmet and the dignity costs in meeting these needs by the vulnerable groups should be eliminated or at least minimized. But if we have a choice of meeting their basic needs on the platform of equality, rather than through provision of “separate but equal” facilities, which one should we adopt? And from whose moral standpoint this choice ought to be made? Does prudence (as distinct from morality) inescapably lead us to conclude that provision of separate facilities is the only superior alternative we have under the present situation? If this is so, does prudence also compel us to adopt this alternative without at the same time revising the moral postulates of equality so firmly embedded in the Constitution and the law? But if a revision of these postulates is incumbent, what direction should it take and how a decision for such revision should be taken are questions which need to be clearly raised and answered.