# EXPANDING ARTICLE 17: LOGIC & EQUALITY

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## ABSTRACT

*Article 17 of the Indian Constitution prohibits "Untouchability". The jurisprudence on this article has been negligible. Thus, courts have dealt with issues of social discrimination through religion– Articles 25 and 26-which has resulted in social discrimination being linked to religious rights. For instance, the Supreme Court recently expressed doubt regarding the correctness of its judgment in Sardar Syedna, which upheld the right to excommunicate people, in light of 'Constitutional Morality' (Articles 25 and 26), implying that excommunication from all aspects of social life belies religious reasons which in contemporary times would be apathetical to the Supreme Court's idea of Constitutional Morality. In an attempt to remedy this conflation, this paper looks at Article 17 to say that it holds value in cases of social discrimination irrespective of basis–religion or otherwise. Justice Chandrachud J.'s reasoning in Sabarimala opened the doors for interpreting Article 17 expansively. Such interpretation of Article 17, following Chandrachud J.'s reasoning, has the potential to give way to a new form of the non-discrimination doctrine that includes instances of discrimination (social boycotts, ex-communication, etc.) without disturbing the case laws on religion. This paper gives a new meaning to Article 17 in two ways- by identifying the purpose of Article 17 to protect against discrimination belying the 'Purity-Pollution' logic; and by introducing the 'exclusionary effect' as a separate phenomenon worthy of*

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*consideration in addition to this 'logic'.*

## INTRODUCTION

Article 17 of the Indian Constitution provides for protection against "Untouchability" as a fundamental right.[1] It is noteworthy that "Untouchability" appears in quotes, implying a specific meaning to the term.[2] This specific meaning has been understood to be the social practice of "Untouchability" prevailing in Hinduism.[3] Meaning the practice of exclusion of purported 'lower castes' from social gatherings and public places like wells, temples, etc. It entails an exclusion of people from participation on aspects of social life on apparent This reasoning has prevailed in the Indian courts as of now.[4] However, Justice D.Y. Chandrachud J. in *Indian Young Lawyers Association and Ors. v the State of Kerala and Ors.*[5] ('*Sabarimala*'), introduced a novel interpretation of Article 17. Chandrachud J. went beyond just the historical understanding of "Untouchability" and expanded the scope of Article 17 by emphasizing the logic of Purity-Pollution. In doing so, Chandrachud J. strayed away from the prevailing judicial trend.[6]

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1 Constitution of India 1950, Article 17; Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (2018) 6; U. R. Rai, *Fundamental Rights and Their Enforcement* (2011) 624.

2 Rai (n 1) 625.
Rai understands "single quotes" to imply that the word "Untouchability" does not carry they "usual meaning". Interestingly, he also notes a connection between Article 17 and Article 15(2) while looking at the word "disabilities arising out of 'Untouchability'" in Article 17. This connection, originally appearing in the Constituent Assembly Debates will be explored by this paper in the coming sections.

3 See n 11.

4 See Karnataka High Court, in the case of *Devarajiah v B. Padmanna* AIR 1958 Kant 84; *The State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126; Gopal v State of Maharashtra (2020) 2 AIR Bom R (Cri) 339; P. Rathinam v State of Tamil Nadu (2009) 78 AIC 659 (Mad); K. Prabhakaran v The District Collector, Madurai District & Ors. 2015 SCC OnLine Mad 8704; *Vimla Govind Chorotiya v State of Maharashtra* (2022) 2 AIR Bom R 157, etc.

5 *Indian Young Lawyers Association and Ors. v State of Kerala and Ors.* MANU/SC/1094/2018.

6 See n 4.

This paper argues for an expanded interpretation of Article 17 based on this effect-based equality consideration. Chandrachud J.'s approach, though a positive step, still lacks the appropriate framework to have the effect on Article 17 as it intends to. This discussion around Article 17 becomes relevant and contemporary with the 9-judge bench constituted by the Supreme Court to consider the issues mentioned in the *Sabarimala* review. The bench framed seven new issues for consideration with one of them being on the scope and ambit of religious freedom and the interplay between religious freedom and the limits thereon. More recently, in June 2023, the Madras High Court in the case of *Elephant G Rajendran v The Registrar General and others*[7] has given a very broad reading to Article 17 to include "*all practices of social ostracism and exclusion that have their bases in ritual ideas of purity/pollution and hierarchy/subordination*".[8] In this context where conversations around religious freedoms and their extent are being taken up by the courts and simultaneously, Article 17 post *Sabarimala* is occupying a more nuanced meaning, this paper contributes to this discourse by providing an expansive interpretation of Article 17 with emphasis on equality.

This paper argues for expanding Article 17 through the equality aspect, because the Equality Approach is more appropriately in line with the historical context of Article 17, which this paper has derived from the plethora of case laws and a history of the practice. This allows for a wider set of practices to be considered under Article 17, unlike Chandrachud J.'s logic. The Logic Approach, although a potential alternative, is incomplete, as this paper will show. This paper contends that the harm that Article 17 seeks to prevent is that of exclusion *stemming from* the logic of Purity-Pollution, hence, the incorporation of the Equality Approach.

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7 *Elephant G Rajendran v The Registrar General and others* [2023] LiveLaw (Mad) 171.

8 ibid.

In Part I, this paper outlines the traditional approach to Article 17 and differentiates it from Chandrachud J.'s reasoning in *Sabarimala*. In Part II, this paper critiques Chandrachud J.'s approach by exploring the question – why does an Article 17 inquiry need to incorporate the logic of Purity-Pollution in the first place? This paper argues that Chandrachud J.'s approach, although a step in the right direction, is incomplete and needs to be refined. Here, this paper introduces the Equality Approach as well as the Logic Approach. In furtherance of this, in Part III, this paper analyses the two approaches and argues for the Equality Approach by dissecting it and going into its nuances. In Part IV, this paper will highlight the procedural nuances of the approach and clarify its working. Finally, in Part V, this paper looks at the limitations of the Equality Approach and concludes thereafter.

## I. Understanding Article 17 and Where Sabarimala Comes in

### A. Evolution (Lack thereof) of Article 17 since 1950

Having undertaken a qualitative assessment of Supreme Court and High Court judgements (post-independence) concerning the meaning of "Untouchability", this paper identifies that the Indian Courts have understood "Untouchability" in a historical sense, solely restricted to the caste based practice prevalent in the Hindu society. Out of 83 High Court and Supreme Court judgments (65 and 18 respectively) concerning Article 17 and "UUntouchability",[9] a total of

9 These cases have been filtered using the SCC Database.

31 judgments (8 Supreme Court[10] judgments and 23 High Court[11] judgments) have directly dealt with the meaning of "Untouchability"

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10 Supreme Court cases, notably *The State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126 [14], [18]-[24]; Heikham Surchandra Singh v. Representative of Lois Kakching 1997 2 SCC 523 [5] citing Law Commission Report to interpret "Untouchability"; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1; A.S. Narayana Deekshitulu v State of A.P. & Ors. (1996) 9 SCC 548 [89]; State of MP v. Ram Krishna Balothia 1995 3 SCC 221 [6]; Adi Saiva Sivachariyargal Nala Sangam v. Govt. of TN 2016 2 SCC 725 [47]; N Adithyan v. Travancore Devaswom Board 20028 SCC 106 paras [12], [15]; M Chandra v. M Thangamuthu 2010 9 SCC 712 [41]; all deal with the meaning of the "Untouchability" appearing either in Article 17 or relevant statues (see n 9)

11 See notably Devarajiah v. B. Padmanna, 1957 SCC OnLine Kar 16 [10] which recognises the lack of a definite meaning of "Untouchability", [11]-[21] affirmed in *Sabarimala*; Commander Kamaljeet Singh Bhatti (Retired) & Ors. v State of Maharashtra 2016 SCC OnLine Bom 9029 [3] (unreported); Gopal v State of Maharashtra (2020) 2 AIR Bom R (Cri) 339 [6]-[7]; P. Rathinam v State of Tamil Nadu (2009) 78 AIC 659 (Mad [2]-[7], [10]; K. Prabhakaran v District Collector, Madurai District & Ors. 2015 SCC OnLine Mad 8704 [6]-[10]; Vimla Govind Chorotiya v State of Maharashtra (2022) 2 AIR Bom R 157 [11], [20]; Govind v State of Maharashtra (2019) 3 AIR Bom R (Cri) (NOC 77) 25 [13]; S. Gnanvel v The Principal, St. Joseph of Cluny Matric Higher Secondary School & Ors. (2012) 2 CWC 575 [2] and [8]; Pavadai Gounder v State of Madras 1972 SCC OnLine Mad judgment by Ramamurti, J. [1]-[3] and notably [4]; Ramchandra Machwal v. State of Rajasthan, 2015 SCC OnLine Raj 9660 citing *P. Rathinam* at [9], interprets "Untouchability" in similar fashion at [10] and [11]; V. Rajendran v. District Munsif, 1996 SCC OnLine Mad 442 [12]-[20] citing Shastri Yagnapurhdasji v Muldas Bhumdardas Vaishya AIR 1966 S.C. 111, State of Karnataka v. Appa Balu Ingle in context of the Madras Removal of Civil Disabilities Act, 1938, Devarajiah v. Padmanna A.I.R. 1958 Mysore 84 and Untouchability (Offences) Act, 1955; State v. Bhaishankar Uttamrai, 1955 SCC OnLine Bom 248 [32]-[34], [63], [109] in context of the Bombay Harijan (Removal of Social Disabilities) Act, 1946 s. 2(f); Daulat Kunwar v. State of Uttarakhand, 2017 SCC OnLine Utt 58 [11] in context of Protection of Civil Rights Act, 1955 s. 2(d) and the meaning of "shops" along with s. 4 in context of Article 17; Bhanudas v State of Maharashtra 2017 SCC OnLine Bom 7238 [37] notes "Untouchability" in Article 17 to be in context of Caste System prevalent in the Hindu Society; The Board of Trustees Arulmighu Poottai Mariamman Temple v The Revenue Divisional Officer-cum-Executive Magistrate, Kallakurichi, Villupuram District & Ors. 2009 SCC OnLine Mad 264 [2] and [26]; Chandrama Singh v. State of Bihar, 1999 SCC OnLine Pat 721 [14]; Monu v. State of M.P., 2016 SCC OnLine MP 12178 [10]-[12] citing the Supreme Court in the case of State of Karnataka v. Appa Balu Ingale; Duni Chand v. Sriniwas, 1993 SCC OnLine J&K 31 judgment of R.P. Sethi, J at [1]-[3] and [12] notes there to be a connection between Article 17 and s. 7 of the Untouchability Offences Act, 1955 in the meaning of "Untouchability" appearing in both the instruments; Stephen Doss v. District Collector, 2015 SCC OnLine Mad 13161 [7] and [19]; Mariswamy v. State by the Police of Kude, 1997 SCC OnLine Kar 438 [13], [19], and [20] citing Devarajiah v. B. Padmanna affirms the historical understanding of the term; Bishashwar Prasad v. State of U.P., 1965 SCC OnLine All 459 [10] connects Article 17 to s. 7 of the Untouchability (Offences) Act, 1955; Surya Narayan Choudhary v. State of Rajasthan 1988 SCC OnLine Raj 31 [7] attributes the historical meaning of "Untouchability" to be the intent of the framers; State of Karnataka v. Laxminarayana Bhat, 1991 SCC OnLine Kar 44 [55].

while interpreting Article 17, or in the context of statutes relating to "untouchability" which are linked to Article 17 of the Indian Constitution.[12]

In this context, analysing Chandrachud J.'s approach in *Sabarimala* has the potential to pave the way for a refined form of the 'non-discrimination' doctrine, one that preserves human dignity by allowing it to attack the branding of human beings as pure/impure, often associated with the Case caste system. This paper argues that his approach, though a step in the right direction, is still incomplete. This paper agrees in principle with Chandrachud J.'s consideration of the logic of Purity-Pollution for Article 17. However, expanding Article 17 by simply using this logic would be meaningless as Part II (C) of this paper will show. Chandrachud J. puts the logic of Purity-Pollution at the core of Article 17. Though not wrong, his approach needs to be in line with the historical basis of Article 17 as well by considering the exclusionary effect of such practices as the starting point of inquiry.

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12 Statutes such as Protection of Civil Rights Act, 1955, s. 7(1)(d) and Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 Objects and Reasons ("Untouchability as used in the Act is connected to Article 17 by the High Court of Madhya Pradesh in Arif Khan v. State of M.P., 2019 SCC OnLine MP 6979 [11] citing *Monu v State of MP* (n 8) at [21] and by M.P. Chothy v State of Kerala 202 SCC OnLine Ker 4254 [25] – "*The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, flows from Article 17*") and even Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, The Prohibition of Employment as Manual Scavengers and their Rehabilitation Acts, 2013, are generally understood to give effect to the provisions contained in Article 17 of the Constitution.
Generally, in cases involving caste offences, a reference is always made to Article 17 in light of these specific statutes (See *Vimla Govind Chorotiya v State of Maharashtra* (n 3) [11], [20] as an example along with Monu v. State of M.P (n 8) [10]-[12], A.S. Narayana Deekshitulu v. State of Andhra Pradesh, (1996) 9 SCC 548 [92], aresh Kumar Singh v. Union of India, 1996 SCC OnLine Pat 438 [8] and Loknath v State of Karnataka [12]). Furthermore, in *Safai Karamchari Andolan v Union of India* (2014) 11 SCC 224, Supreme Court was concerned with enforcing the provisions of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. In doing so, it placed reliance on Parts IIthis paper and IV of the Indian Constitution and the enforcement of fundamental rights guaranteed under Article 17 among others (14, 21 and 47 of the Constitution of India). Hence, the connection between Article 17 and these statues makes such cases relevant for the purposes of this paper.

This is what this paper calls the Equality Approach because it accounts for a holistic understanding of discrimination by basing the inquiry on exclusion as the starting point, compared to its raw alternative – the Logic (of Purity-Pollution) Approach.

### B. The Traditional Approach And Where Sabarimala Stands Out

With the context of judicial treatment of 'Untouchability' and Article 17 in mind, this section looks at the 'Traditional Approach To Article 17' which is derived from the previous section, in contrast with the approach followed in *Sabarimala*. The aim here, is to bring out the difference in these divergent approaches and lay the foundation for shifting the understanding of Article 17 from 'Untouchability' to the logic of Purity-Pollution.

The term 'Untouchability' in Article 17 is nowhere defined in the Indian Constitution,[13] and up until now, the judiciary has dealt with its interpretation in a historical context-based sense by confining it to the practice of caste-based discrimination only. [14] Notably, the

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13 See Durga Das Basu, *Short Constitution of India*, Eleventh Edition (1994) 102. Commenting on Article 17 of the Constitution read with Untouchability (Offences) Act, 1955 he states, "*the word "Untouchability" has not, however, been defined by the Act just as there is no definition in the Constitution*; Marc Galanter, 'Untouchability and the Law' (1969) *Economic and Political Weekly* 4(1/2) 131, 139; *Devarajiah v B. Padmanna* AIR 1958 Kant 84 [4]; Centre for Academic Legal Research, 'Analyzing the Scope of 'Untouchability' under Article 17' (*CALR,* December 19, 2020) <https://calr.in/analyzing-the-scope-of-"Untouchability"-under-article-17> accessed 6 May 2022.

14 B.R. Ambedkar, *The Untouchables: Who were they and why they Became Untouchables* (Kalpaz Publications 1948, republished in 2017) 21. Dr. Ambedkar mentions that "*Non-Hindu societies only isolated the affected individuals. They did not segregate them in separate quarters. The Hindu society insists on segregation of the Untouchables. The Hindu will not live in the quarters of the Untouchables and will not allow the Untouchables to live inside Hindu quarters. This is a fundamental feature of Untouchability as it is practised by the Hindus. It is not a case of social separation, a mere stoppage of social intercourse for a temporary period. It is a case of territorial segregation and of a cordon sanitaire putting the impure people inside a barbed wire into a sort of a cage. Every Hindu village has a ghettto. The Hindus live in the village and the Untouchables in the ghetto.*" Dr. Ambedkar's understanding of it was in line with purity/pollution, attached it to caste-based discrimination; See also Mahatma Gandhi's *My philosophy of Life* where he considers 'Untouchability' to be the acts/practices committed against Dalits as described therein;

Karnataka High Court,[15] while tackling this issue in the case of *Devarajiah v. B. Padmanna* (1957),[16] restricted the scope of "untouchability" to the historical context of the practice and not a literal understanding of the term.[17] The Supreme Court reaffirmed it in *The State of Karnataka v. Appa Balu Ingale* (1992),[18] by confining the scope of the word to the discrimination faced by Dalits, as under the caste system in India.[19] In his judgment, Justice K. Ramaswamy provides the rationale behind this, and concludes "Untouchability" to be the "*basic and unique feature, inseparably linked up with the caste system and social set up based upon it.*"[20]

Chandrachud J., in *Sabarimala,* departs from this approach by choosing to inquire further into the logic behind the caste system;[21] he

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L. Elayaperumal, 'The Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Connected Documents' (1969 New Delhi, Department of Social Welfare); M Kagzi, Mangal Chandra Jain, *Segregation and Untouchability Abolition* (1976, New Delhi: Metropolitan Book Co.) 207 notes that "*Untouchability connotes the acts, action or practice of non-touching of the members of the lowest by the caste Hindus, which means separation, segregation and isolation of such persons from the higher caste Hindus. It means keeping the Harijan untouchables outside the mission*"; Gerard Baader, 'The Depressed Classes of India: Their Struggle for Emancipation' (1937) *An Irish Quarterly* Review 26(103) 399, 400-403; Lela Dushkin, *The Policy of the Indian National Congress Toward the Depressed Classes, an Historical Study* (1967) notes that "*Untouchability is ordinarily used in all sense, first to refer to the pollution - stigma attached to untouchables, secondly to refer to the set of practice engaged in by the rest of the society to protect itself from pollution conveyed by the untouchables and to symbolise their inferior status*."

15 Note that the court cautions against construing 'Untouchability' in the literal sense, meaning those who cannot be touched literally. Rather, it opts for a historical context-based approach by looking at the evolution of the practice in India *Devarajiah v B. Padmanna* AIR 1958 Kant 84 [4].

16 *Devarajiah v B. Padmanna* AIR 1958 Kant 84.

17 Note that the court here was not interpreting Article 17 but the word 'Untouchability' under The Untouchability (Offences) Act, 1955 which made the practice a punishable offence, and for reaching an understanding about 'Untouchability', the court looks at Article 17. It mentions at [4]:
"*There is no definition of the word 'Untouchability in the Constitution also. It is to be noticed that that word occurs only in Article 17 and is enclosed in inverted commas. This clearly indicates that the subject-matter of that Article is not "Untouchability" in is literal or grammatical sense but the practice as it had developed historically in this country.*"

18 *State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126.

19 ibid [11]-[17].

20 *State of Karnataka v Appa Balu Ingale* [18].

21 He also relies on the Transformative Constitution theory and analysis of Assembly

acknowledges the logic of Purity-pollution to "*constitute the core of caste*."[22] He then proceeds to look at its working within the domain of caste and outside it as well (the society, regarding women).[23] He extracts the logic as a separate phenomenon, found in the practice of 'Untouchability,' as its core.[24] He considers Article 17 to be attacking that essence of the caste system[25] and not only its manifestation in the caste system because such logic can manifest in a kind of Untouchability that the Constitution[26] seeks to prohibit by mentioning the words "*in any form*."

Simply put, the genus is the logic of Purity-Pollution, (and one of) the species is the caste system. Article 17 targets the genus and this, consequently, allows for the presence of *different kinds(s*) of 'Untouchability. The principle here is that all practices of the caste system are bound to follow the logic but not the other way around, and since Article 17 targets the logic, the scope of Article 17 goes beyond the caste system.

## II. Expansive Interpretation of Article 17 – A Critique

Having established the distinct approaches to Article 17, this part of the paper critiques the idea of expanding Article 17 in meaning and ambit. It explores arguments for reading Article 17 expansively. It discards Assembly Debates as the sole set of possible arguments for expanding Article 17 because of their inherent inconsistencies. Instead,

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Debates to infer an expansionary connotation to Article 17. My focus, however, is on the logic aspect only.

22 *Sabarimala* (n 4) [253].

23 ibid [258].
"*Menstruation has been equated with impurity and the idea of impurity is then used to justify (women's) exclusion from key social activities*."

24 *Sabarimala* (n 4) [253].

25 ibid.

26 The Constitution of India, 1950.

it looks at historical reasons and equality considerations for refining Article 17.

### A. The Assembly Debates Argument

Starting with the very basis of almost all judgments on the interpretation of Article 17, the Constituent Assembly Debates find relevance. One of the primary reasons due to which Article 17 has come to be understood in its current form is because of the heavy reliance of courts on the Constituent Assembly Debates on Draft Article 11 (now Article 17).

However, an analysis of these debates can lead to a different proposition as well. Following this trend of using Assembly Debates, this paper presents some reasons against a restricted Article 17. *Firstly*, it is noteworthy that during the Constituent Assembly Debates, the lack of a definition for 'Untouchability' had come up. While some of the members understood the term in the context of historical caste-based discrimination, none of them proposed a narrow definition *in opposition* to an expansive one.[27] *Secondly*, the presence of Article 15(2) was noted to contend that its guarantee against 'horizontal discrimination' in access to hotels, shops, public restaurants, etc. was superfluous because of Article 17, as it already abolished such exclusionary practices that were based on caste.[28] Thus, a preliminary look at these debates leads to the inference that an expanded Article 17, though novel, is not entirely inconceivable.

Another way to look at these two Articles (Article 15(2) and 17) is that since Article 15(2) already covered caste and religion-based

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27 Gautam Bhatia, 'The Sabrimala Hearings 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-sabrimala-hearings-and-the-meaning-of-Untouchability-under-Article-17-of-the-constitution/> accessed May 6, 2022.

28 ibid.

discrimination, a narrow reading of Article 17 would make it redundant, therefore, the scope of Article 17 must be beyond just caste-based discrimination. Moreover, consider the amendment proposed by Mr. Naziruddin Ahmad to draft Article 11 (now Article 17). He had moved for the Article to be amended such that it only covered instances of religious or caste-based 'Untouchability'. But his amendment was rejected. Considering the rejection of Mr. Naziruddin Ahmad's amendment to the concerned Article,[29] which would have restricted it to only caste and religion,[30] a notion *against* attributing a limited meaning to Article 17 can be inferred and such was also noted by Chandrachud J. in his judgment in *Sabarimala.*[31]

However, such arguments are easily countered using literature on Constituent Assembly Debates, which shows an inclination of some other members to construe the term in a narrow sense. That is to say that there was a multiplicity of arguments and views on the scope of 'Untouchability' and Article 17, and there is no definite conclusion

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29 Naziruddin Ahmad had the following understanding of draft Article 11 (now Article 17): "*this paper submit that the original article 11 is a little vague. The word "Untouchability" has no legal meaning, although politically we are all well aware of it; but it may lead to a considerable amount of misunderstanding as in ale gal expression. The word 'untouchable' can be applied to so many variety of things that we cannot leave it at that. It may be that a man suffering from an epidemic or contagious disease is an untouchable; then certain kinds of food are untouchable to Hindus and Muslims. According to certain ideas women of other families are untouchables. Then according to Pandit Thakurdas Bhargava, a wife below 15 would be untouchable to her loving husband on the ground that it would be 'marital misbehaviour'. this paper beg to submit, Sir, that the word 'untouchable' is rather loose. That is why this paper have attempted to give it a better shape; that no one on account of his religion or caste be regarded as untouchable. Untouchability on the ground of religion or caste is what is prohibited.*" Hence, he moved to propose the following amendment:
"*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.*" This amendment would have restricted Untouchability to its religious and caste-based manifestations only. But it was rejected. *Sabarimala* (n 4) [249]; Constituent Assembly Debates, November 29, 1948, *speech by* Naziruddin Ahmad 62, para 183.

30 Constituent Assembly Debates, November 29, 1948, *speech by* Naziruddin Ahmad 62, para 183, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> Accessed May 6, 2022.

31 *Sabarimala* (n 4) [250].

about the true scope of Article 17 which can be gathered solely from the Assembly Debates. Such is also the reasoning that Justice Indu Malhotra relied on in her judgment in *Sabarimala*.[32] She mentions that "*a perusal of the Constituent Assembly debates on Article 11 of the Draft Constitution would reflect that "Untouchability" refers to caste-based discrimination faced by Harijans, and not women as contended by the Petitioners*."[33] So, this argument which argues for expanding Article 17 solely based on Assembly Debates is as easily made as it is countered. *Lastly*, as Justice Malhotra notes, even scholars like H.M Seervai[34] and M.P Singh[35] have pushed for a historical, caste-based understanding of 'Untouchability' under Article 17. So, sole reliance on Assembly

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32 ibid [310.7].

33 ibid [310.4]. Notably, she mentions Mr. V.I. Muniswamy Pillai and Dr. Monomohan Das to construe a narrow meaning for 'Untouchability' in Article 17.
She notes: *"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... this paper 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.*"
Furthermore, Dr. Monomohan Das, quotes Mahatma Gandhi while undeniably accepting the meaning of "Untouchability" as intended under the Constitution*:* "*Gandhiji said this paper do not want to be reborn, but if this paper am reborn, this paper wish that this paper should be born as a Harijan, as an untouchable, so that this paper may lead a continuous struggle, a lifelong 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 Ors. 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.*"

34 H.M. Seervai, *Constitutional Law of India: A Critical Commentary* (4th edn. vol I, Reprint 1999), paragraph 9.418, 691. He notes " *that "Untouchability" must not be interpreted in its literal or grammatical sense, but refers to the practise as it developed historically in India amongst Hindus. He further states 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."*

35 M.P. Jain, *Indian Constitutional* Law, (6th edn., revised by Justice Ruma Pal and Samaraditya Pal, 2010) 1067. He states: "*Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do no come within the purview of Article 17. Article 17 is concerned with those regarded untouchables in the course of historic developments.*"

Debates does not yield a definite conclusion on the exact scope of 'Untouchability' and Article 17.

This paper recognizes the lack of a decent argument that compels one to consider only one type of literature from CADs. Hence, relying solely on these debates to expand or restrict Article 17 would be naïve and misguided. Still, these debates are not entirely irrelevant. From a perusal of the points mentioned above and counterpoints by Justice Indu Malhotra,[36] it can definitely be extracted from CADs that there was an absence of consensus or even a single member's preference for a narrow definition of 'Untouchability' and Article 17 *in opposition* to an expansive one.

Furthermore, a plausible argument from the Assembly Debates can be made to argue against an expanded Article 17.[37] This is the Misappropriation Argument that attacks this form (expanded) of Article 17. It considers the newly expanded scope of 'Untouchability'

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36 ibid [310.2]-[310.4].
Justice Malhotra mentions – "*All forms of exclusion would not tantamount to "Untouchability". Article 17 pertains to "Untouchability" based on caste prejudice. Literally or historically, "Untouchability" was never understood to apply to women as a class. The right asserted by the Petitioners is different from the right asserted by Dalits in the temple entry movement. The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practises of the Sabarimala Temple.*" [310.2].

37 During the debates, such arguments had come up. As Santanu Kumar Das noted – "*This clause is intended to abolish the social inequity, the social stigma and the social disabilities in our society. We must ourselves first observe the law for otherwise there would be no sense in asking others to act upon it. If we fail to observe it, it would be impossible to root out this evil. Provincial Governments enact laws for the welfare of the Harijans; they pass bills for the removal of "Untouchability", for the removal of disabilities and for permitting temple entry but you will be surprised, Sir, if this paper tell you that our members act as fifth columnists in the rural areas, for they tell the people there that these laws are not in force and thus they themselves act against the law. this paper would request the Members of the House to try their best to make the law effective so that this present social inequity in the country may be removed. Sir, this paper support the clause whole-heartedly.*" Thus, he showed his support for the draft article in its original form, based on a caste system based understanding of "Untouchability".
Constituent Assembly Debates, November 29, 1948, *speech by* Santanu Kumar Das 62, para 172, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29> Accessed May 6, 2022.

under Article 17 to be akin to misappropriating the struggles of caste discrimination by regarding practices that are not solely based in caste discrimination as 'Untouchability'. It removes caste from the focus of Article 17 by considering practices that go beyond caste discrimination to be included under the heading of 'Untouchability.'

Consequently, it dilutes the historical implications associated with caste-based practices. Resultantly, the meaning and gravity of caste discrimination stands misappropriated. Extending this argument further weakens the consideration of Assembly Debates (specifically Ahmad's amendment) for expanding Article 17. The people who had questioned the scope of Article 17 in the CADs were upper-caste men. Therefore, giving primacy to their views, it may be argued, is another form of subjugating Dalit voices.

In response to these points, this paper deals with the Misappropriation Argument *first*. The response would be a consideration of the phrase "*its practice in any form is forbidden*" present in Article 17.[38] The Article itself acknowledges the presence of *forms* of 'Untouchability' and protects against all such forms, out of which caste is the basis of one. This implies Article 17 has a broad scope.[39] So, when an expanded Article 17 bases its inquiry on the logic of Purity-Pollution, like Chandrachud J., the basis of 'Untouchability' and hence, caste discrimination is attacked. Hence, it is put forward that including practices based on the logic of Purity-Pollution under Article 17 does not misappropriate the issue of caste discrimination, but rather prevents a stigma similar to Untouchability from evolving by outlawing analogous disturbing practices.

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38 *Sabarimala* (n 4) [255].
39 ibid [250].

*Secondly*, this approach does not displace caste from the core of Article 17 because the historical practice of Untouchability remains prohibited even under an expanded Article 17. It is argued that by considering this logic of Purity-Pollution, the essence of caste discrimination is proscribed and consequently, all practices based in this logic, *including* the caste system, are sought to be outlawed. This understanding of Article 17 works to prohibit all practices that may be similar to the caste system in effect by attacking the very basis of a practice like the caste system. This reinforces the protection against Untouchability along with *its forms* and takes it a step further by outlawing its basis as well.

*Lastly*, the 'primacy to upper-caste views' argument is countered as Dalit voices are not being subordinated here. This is because (a) none of the members, *including* those from the Dalit community, preferred a narrow definition *in opposition* to an expansive one,[40] and (b) by incorporating the logic, historical Untouchability still remains prohibited. Rather, this approach harmonizes the two ideas in the CADs (narrow v. expansive Article 17). It incorporates Dalit voices by having historical Untouchability under the fold of Article 17 and other voices by locating logic as the driving factor of an Article 17 inquiry to include other types of 'Untouchability' as well. These "types" may include menstruation, discrimination in funeral rites/practices, the phenomenon of 'Temporary Untouchability', etc.[41]

In summation, this paper does not argue for an expansive interpretation only based on CADs, which would be an originalist argument to make. There exist inherent inconsistencies in these Debates regarding the ambit of Article 17. Relying solely on these will lead to a situation similar to one between Justice Chandrachud J. and

40 Bhatia (n 24).

41 Subsequent sections of this paper will deal with these types in more detail.

Justice Indu Malhotra in the Sabarimala judgment. Both of them used similar sources to arrive at contrasting conclusions on the Article 17 issue. Rather, this paper refutes the arguments against expanding Article 17 by using the Assembly Debates to introduce counter arguments.

### B. Historical Basis of Untouchability – The Need to Incorporate the Logic

Expanding Article 17 simply because it can be done is not appropriate as the sole reason for interpreting this provision a certain way. The explicit need to incorporate this logic which is essential to the spirit of Article 17 in terms of its purpose also needs to be shown and the purpose of this section is precisely that.

The expanded approach needs to have a basis to legitimately incorporate the logic of Purity-Pollution under Article 17 as a starting point of inquiry. This basis can be identified in the historical understanding of Untouchability read with the purpose of Article 17. This expanded Article 17 is quite different from the current historically understood Article 17 because unlike the latter, it considers the logic of Purity-Pollution as the focal point of inquiry. On the other hand, the former considers the caste system as the focal point of inquiry, thereby restricting its scope compared to the expanded Article 17.

The difference in these two versions is illustrated as follows – the expanded form would include the caste system within its fold, among other analogous practices based in the logic of Purity-Pollution whereas the historical form of Article 17 would only include the caste system which is necessarily based in this logic of Purity-Pollution. Therefore, its scope is simply the caste system and any consideration of the logic of Purity-Pollution is virtually meaningless. Analogous

practices would fall out of the scope of Article 17, rendering the phrase "*in any form*" appearing in the Article meaningless.

In this light, it is important to acknowledge how Chandrachud J. in *Sabarimala* starts his inquiry for Article 17. He considers this logic of Purity-Pollution to be at the core of caste-based Untouchability.[42] But he doesn't back this notion up with any literature around Untouchability, which is one of the criticisms of his argument and one of the reasons this paper considers his approach incomplete hence this paper *firstly* identifies this logic in the historical practice of "Untouchability" as its basis and *secondly,* places it under an expanded Article 17.

Moreover, Chandrachud J. focuses strictly on the logic of Purity-Pollution as the starting point. This form of expansion of Article 17 is unsustainable in its working as Parts II and IV of this paper will show. Rather, a more appropriate focus of inquiry which Chandrachud J. also hints at, though not as the starting point, is the exclusionary effect which is bound to stem from the logic of Purity-Pollution. This effect is evidenced by an analysis of the historical basis of Untouchability in Hinduism to attribute a purpose to Article 17.

The idea of Purity/Impurity (pollution) has been prevalent throughout Hindu society in both, domestic and public life – food & water, occupations, kinship, marriage, religious action & belief, access to temples/monasteries, etc.[43] Even in caste, the key idea of hierarchy has originated in "*priestly ceremonialism*," implying the general belief to be rooted in purity.[44]

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42 *Sabarimala* (n 4) [253].

43 A. M. Shah, 'Purity, Impurity, Untouchability: Then and Now.' Sociological Bulletin, 56(3) 2007, 355.

44 Compiled by Vasant Moon, *Dr. Babasaheb Ambedkar Writings and Speeches* (vol. 1 1st edn., Dr. Ambedkar Foundation Ministry of Social Justice & Empowerment, Government of India, 1979) 'Chapter 1: Castes in India: Their Mechanism, Genesis and Development' 5.

Such notions of Purity-Pollution, applicable since birth have played key roles in the separation and the hierarchical arrangement of castes.[45] The principle of hierarchy can be identified in the caste system.[46] The arrangement of this hierarchy was based on the level of purity and the indicator for it was the observance of the rules of Purity-Pollution.[47] Resultantly, castes have been ranked on their 'level of purity,' based on their compliance with such rules.

Basically, the higher one climbs up the caste ladder, the higher level of purity one would find. In summation, Purity-Pollution has been the basis of caste distinction, making it the idea behind the caste System and thus, Untouchability. If we trace the 'logical' flow, it becomes evident that Purity (or, the lack thereof) starts as a basis for distinction, which in the context of caste, spawned Untouchability as we have historically witnessed.

By considering a context other than caste, one could conceive a different form of Untouchability. For example, menstruation. In a gendered context, as opposed to caste, the notions of Purity-Pollution manifest as menstrual taboos.[48] Consequently, menstruation is seen as

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45 Shah (n 36) 356.

46 See Dumont L, *Homo Hierarchicus: An Essay on the Caste System* (University of Chicago Press, 1970) Introduction; M Kagzi, Mangal Chandra Jain, *Segregation and Untouchability Abolition* (1976, New Delhi: Metropolitan Book Co.) 207 notes that "*Untouchability connotes the acts, action or practice of non-touching of the members of the lowest by the caste Hindus, which means separation, segregation and isolation of such persons from the higher caste Hindus. It means keeping the Harijan untouchables outside the mission*"; Marc Galanter, 'Untouchability and the Law' (1969) *Economic and Political Weekly* 4(1/2) 131, citing the Privy Council decision of *Sankaralinga Nadan v Raja Rajeswara Dori* 35 this paper AC (1908) affirmed by the Bombay High Court in *Sankaralinga Nadan v Raja Rajeswara* (1908) 10 BOMLR 781.

47 A. M. Shah, in his 'Purity, Impurity, Untouchability: Then and Now,' acknowledges the enormity and the complexity of the literature on such rules. He mentions, "*even if one manages to read the entire literature on purity/impurity, this paper doubt if one would be able to grasp all its ramifications. A complete list of pure/impure actions, ideas, and materials would occupy a whole book, perhaps as large as an encyclopaedia*."
Shah (n 36) 356.

48 Mitoo Das, 'Menstruation as Pollution: Taboos in Simlitola, Assam' 2008 *Indian Anthropologist* 38(2) 29, 30.

a 'polluting agent' (in Hinduism), containing dirt/impurities,[49] and as a result, women have been relegated to an inferior position vis-a-vis men, resulting in a need to ostracize them for certain periods, resulting in their social exclusion.[50]

This notion of impurity is distinct from caste, where the observance of rules determined one's level of Purity. The principle apparent here is that the context in which the notion(s) of Purity-Pollution are practised, gives rise to a stratification (it may be caste hierarchy or gendered or otherwise), which spawns a form of Untouchability, derived from the context (for example, inferiority-based exclusion of women, or impure castes).

Hence, looking at (say) only caste, to determine 'Untouchability' is a misdirected approach as its manifestation can change with context, and it does not address the core of the issue. So, logic needs to be the focal point of Article 17.

### C. Refining the Process – Introducing the Exclusionary Effect

This logic-driven approach to Article 17, this paper argues, still needs to be refined. This has to be done by incorporating the exclusionary effect of any practice, as the starting point of any Article 17 inquiry, and only then would the logic be considered. Here, this paper explicitly acknowledges the 'exclusionary effect' as a phenomenon, aside from the logic of Purity-Pollution, something that Chandrachud J. fails to do in *Sabarimala*.

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49 Some Vedic texts describe menstrual blood as "*impure and dangerous because it was the result of Indra's curse . . . women the bearers of the discharge, the curse, the danger, and the impurity were in turn subjected to severe restrictions*."
ibid 31.

50 Das (n 41) 31.

This paper presents two possible forms that an expanded Article 17 inquiry can take. *First*, it starts and ends at the logic only, that is, the logic of the practice is looked at. If found to be based on 'Purity-Pollution,' (like caste discrimination), it becomes a form of Untouchability as under Article 17 and hence outlawed. The rationale here is that the very act and significance of branding a human being as pure/impure falls so foul of human dignity that even in a world without Article 17, it would offend the principles of equality and dignity. So, any practice that is concerned with the purity/impurity of a human being is barred under the scope of Article 17.

The emphasis is only on the logic of any practice and not on the form this logic will take, the way it will play out in a context, etc. The argument is that any practice that is grounded in Purity-Pollution is a form of Untouchability and it does not matter whether or not it excludes people. The very idea that a human being is pure/impure is problematic enough to be under Article 17. This is what this paper calls the Logical Approach to Article 17 and Chandrachud J. largely[51] follows it in *Sabarimala*.

Chandrachud J. in *Sabarimala* talks of Article 17 as a "*powerful guarantee to preserve human dignity*"[52] but he does not stop there. He further includes "*stigmatization and exclusion of individuals and groups on the basis of social hierarchism*," to be under Article 17 as well.[53] He alludes to the concept of 'exclusion' in the context of the logic of Purity-Pollution **without** going into the nuances or the significance of it. This is where his argument needs sharpening.

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51 This paper says this because he refers to exclusionary effect as well but the focus and the basis of his argument seem to be the logic only. Exclusion is not elaborated upon. Chandrachud J.'s sole focus remains the logic first and foremost and not the exclusionary effect.

52 *Sabarimala* (n 4) [252].

53 ibid.

This paper argues that his approach needs to start by considering the exclusionary effect of any practice and only then check whether this exclusion *stems from* the logic of Purity-Pollution, which, if it does, would come under Article 17. Summarily, this paper contends that to legitimately expand the scope of Article 17, the inquiry has to start by considering whether the practice is exclusionary and only then check for the presence of Purity-Pollution. This is what this paper calls the *Equality Approach* and this is the *second* form of inquiry for an expanded Article 17.

There is a considerable difference between the 2 approaches. The Logic Approach focuses only on logic and not its manifestation or its consequences. It overlooks exclusion and hence, is incomplete. It is not the case of this paper to attack The Logic Approach, but simply to point out its incomplete nature. That, in contrast to the alternative this paper suggests, it cannot work to include practical cases of Purity-Pollution and exclusion. Moreover, it lacks focus as there is no guiding principle behind it. It discounts the very manifestation of an idea, essentially making it difficult to identify that idea in the first place.

Contrastingly, the Equality Approach is guided by principle. It falls in line with the historical context of Article 17 and the fight against caste inequality. Additionally, it also deals with the possibility of the extension of the logic of Untouchability and the consequences thereon. It identifies the logic of Purity-Pollution by incorporating the effect of this logic, i.e., exclusion, and starts from there. This gives an identifiable starting point and direction to the inquiry. It allows the room to include practices that go beyond the caste system and operates on the same principles as caste-based Untouchability, under Article 17.

## III. Equality Approach v. Logic Approach – Why Consider the Effect?

With the two approaches introduced, this section of the paper puts them against each other to bring out why the logic of Purity-Pollution alone belying Article 17 would be incomplete. This paper goes on to suggest a solution to make the approach complete – by introducing the exclusionary effect of the logic, the practical manifestation of it. It will argue for considering this effect under Article 17 specifically keeping in mind the history, purpose, and practical application of the provision.

### A. Argument From History

As this paper has established above, at the core of the historical practice, sits the logic of Purity-Pollution. However, this conception of Untouchability, stemming from the logic and presenting as it did under the caste system, is incomplete. Its aim/consequence, which is 'exclusion' needs to be considered as well. Ambedkar defines caste as "*a self-enclosed unit [that] naturally limits social intercourse, including messing, etc. to members within it.*"[54]

He attributes this rigidity not to an explicit, positive restriction, but to the natural result of caste, which is exclusiveness.[55] From the need to preserve exclusivity (say, of caste, etc.) arose the idea of exclusion. The goal is esotericism, to identify what makes a caste exclusive, and preserve those characteristics from being diluted by association with those who lacked them. This is to say an

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54 Ambedkar (n 26) 8.

55 Ambedkar also mentions Émile Senart, a French authority, who relates caste groups to the ceremonial questions of pollution and deems 'irrevocable exclusion' from the group, to be the final form of penalty, authorizing the sanction of the community. Ambedkar (n 26) 6.

individual/caste (etc.), is not simply branded pure/impure for no reason, there has been an end goal for it – Exclusion.

Expanding on the above-mentioned examples, historically speaking, this logic has manifested in the exclusion of certain castes by either avoiding their physical contact or ostracizing them from social life – exclusion from wells, homes, temples, etc. or otherwise.[56] Even in the case of menstruating women, notions of Purity-Pollution have manifested as social taboos that seek to justify the exclusion of menstruating women from social life.[57]

Ultimately, the logical flow of the argument is this – the logic of Purity-Pollution brands people as either pure or impure. This leads to the establishment of a hierarchy, and following this, some form of exclusion (social, literal, or otherwise) is practised against the group/individuals ranked lower on the list. Without considering the exclusionary effect, the inquiry, therefore, is incomplete because this logic is only visible on ground through actual exclusion. The end goal of this ordeal is to exclude. Creation of hierarchies, purity/impurity, all work for the purpose of segregating people.[58]

While Article 17 may not be solely restricted to the historical practice of caste-based discrimination, its aim has been acknowledged to be that of 'social transformation.'[59] It represents the struggles to break away from an '*unequal social order,*'[60] created primarily because of the caste system. Thus, caste-based Untouchability has at least some bearing on the interpretation of Article 17 in that, the harm it seeks to prevent is of exclusion, *stemming* from the logic of Purity-Pollution.

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56 Judy Whitehead, 'The Mirror of Inequality: A Reinterpretation of Homo Hierarchicus' Social Scientist, 10(11) 1982 33, 45.
57 Das (n 31) 34.
58 Ambedkar (n 26) 5-8.
59 *Sabarimala* (n 4) [251].
60 ibid.

Consequently, since the practice of caste-based Untouchability is incomplete without exclusion,[61] its incorporation under the inquiry for Article 17 becomes imperative. The Equality Approach, therefore, is more in line with the historical context of Article 17 and the movement it began for social reform.

### B. Argument From Scope

Adding the extra layer of 'exclusionary effect' gives direction and defines the scope of Article 17 while ensuring that the principles of caste-based Untouchability remain at its core. Since the *Equality Approach* is more in line with the historical context of Article 17, adding the provision of 'exclusionary effect' legitimizes the scope of Article 17 to only those cases where a *form* of Untouchability is practised in its entirety. This paper does not deem branding people as pure/impure as unproblematic for human dignity. But simply recognizing the existence of this logic, without it manifesting as exclusion is imperfect and does not encapsulate 'Untouchability' in its entirety. As mentioned above this whole ordeal operates with a purpose. Historically, this purpose has been to exclude. Thus, recognising exclusion is fundamental to refining an expended Article 17.

While such branding is a step toward practising Untouchability, this paper maintains that an 'exclusionary effect' is bound to follow such logic which is why an inquiry for Article 17 has to start with the consideration of the presence of an exclusionary effect (present or not). But this logic alone is not 'Untouchability,' as it is yet to manifest as exclusion. The acknowledgement of the effect is crucial, as this harm of exclusion from Purity-Pollution, is what Article 17 attacks.[62]

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61 That is not to say that exclusion is not present in other forms of 'Untouchability'. The fact that it was the ultimate goal of caste-based Untouchability and that primarily, this practice sparked the movement for social reform, it is imperative to consider the effect.

62 Arguments for Social Transformation, as Chandrachud J. puts it, in *Sabarimala*. He notes at [248]:

This argument has a procedural bearing and the inquiry must start by considering exclusion and only then proceed to look at the logic. Consider the purpose of this inquiry – preventing the exclusion of individuals and not only merely declaring the group/individual as 'not impure'. A lack of consideration of the 'effect', could arguably justify exclusion (the end goal of Untouchability), and allow caste groups to conflate the issue by arguing to maintain their 'exclusiveness' in other ways, possibly, by justifying the practice to be of 'ritualistic importance',[63] something the judiciary has acknowledged in the past and subsequently awarded 'purificatory ceremonies,' necessitated by 'pollution' due to the presence of 'untouchables'.[64]

Emphasizing the procedural nature of this argument, this paper puts forward that the incorporation of the effect will not raise the threshold for the petitioner seeking relief under an expanded Article 17. On the contrary, it will reduce the standard of proof required for the petitioner. Previously, the standard was to show the existence of the logic of Purity-Pollution for seeking relief. Now the threshold is only to show exclusion, without considering whether its motive lies in Purity-Pollution. The existence of exclusion itself becomes the ground on which an inquiry for the logic can begin. The onus of this inquiry is not cast on the petitioner as subsequent parts will show.

This paper maintains the 'presumption of exclusion' stand and as a result, the petitioner need not prove it separately in cases where

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"*Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation. Article 17, along with other constitutional provisions61, must be seen as the recognition and endorsement of a hope for a better future for marginalized communities and individuals, who have had their destinies crushed by a feudal and caste-based social order.*"

63 *Anandrav Bhikaji Phadke v Shankar Daji Charya* ILR 7 Bom 323.

64 Marc Galanter, 'Untouchability and the Law' Economic and Political Weekly 4(1/2) 1969 131.

logic is explicitly identifiable as of Purity-Pollution. Moreover, this paper envisions this presumption as refutable, so the respondent is not left without a remedy. This paper will elaborate on this aspect in Part IV.

### C. Argument From Principle

Simply put, the existence (identification) of the logic of Purity-Pollution is not going to be so clear as to recognize it *prima facie*. Since there is no universal understanding of Purity-Pollution. It has varied from 'ritual impurity' to 'literal impurity', in the context of jobs, 'impurity' based on adherence to rules, and even menstrual taboos and more. Thus, having the petitioner prove the presence of this undefined concept in a court of law is a very high threshold to meet because it is a Part III inquiry.[65] There has to be a principled methodology for such an inquiry, which the Logic Approach lacks. It looks only at the logic without considering its effect, and hence, is disorganized as it lacks an explicit starting point.

How does one even start looking for the logic? Logic is not always apparent and is often hidden under layers of reasoning. Do you look for each and every manifestation of the logic (caste, menstruation, occupation, etc.)? Where and in what context, do you look for it? Who all are harmed by it? How do you confirm that people/groups have been branded as pure/impure? Does this branding need to be codified? Do you wait for the instances where such logic is clearly apparent to show up, or do you just evaluate every single aspect of society to look for it? Either of these methods is unrealistic.

Looking for every manifestation of logic, in every context is not realistic. Therefore, this paper proposes a principled approach –

65 Part VI of this paper will elaborate on this claim.

the Equality Approach. Considering that Article 17 seeks to prevent the harm of exclusion *stemming from* the logic of Purity-Pollution, you start with the presence of that effect, its manifestation, as it is (a) conceivable because people experience it through 'exclusion,' and (b) more in line with the historical context of caste struggle and places the social transformative role of Article 17 at the core. Once (a) is identified, the inquiry for Article 17 would begin.

Such is plausible as there is a legitimate basis for the inquiry – Exclusion. Whether such exclusion is based on Purity-Pollution is to be decided by the inquiry. The aforementioned questions can be answered if the *Equality Approach* is followed. The starting point is the manifestation of logic (exclusion from a certain activity of a certain people) in a specified context, and for a specified people/group. Only these are considered within the sphere of the exclusionary effect. Under this approach, identifying Purity-Pollution is conceivable by considering the presence of relevant facts, the context of the exclusion (its nature, basis, justification of the basis, etc.), and the nature/demographic/religion/commonality (etc.) of the excluded group.

Consider *Anandrav Bhikaji Phadke v Shankar Daji Charya*,[66] (1883) where the Bombay High Court was hearing an appeal regarding a matter wherein Brahmin defendants, belonging to the 'Palshe' caste, were alleged to have 'infringed the right of exclusive worship', of the petitioners (upper-caste Brahmins), by entering and performing worship in the sanctuary of a temple.[67] Here, a misappropriation of the

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66 *Anandrav Bhikaji Phadke v. Shankar Daji Charya* ILR 7 Bom 323. Available at Book Depot Branch of the Legislative Department of the Bengal Secretariat 'The Indian Law Reports, Bombay Series' (1883) Volume VIthis paper South Asia Archive, available at <http://www.southasiaarchive.com/Content/sarf.100032/212272/002> Accessed June 26, 2022.

67 ibid.

logic of Purity-Pollution is apparent. From the judgement, it becomes clear that sole reliance on the 'logic' (Purity-Pollution) behind any practice overlooks the forms in which this logic can manifest through exclusion in various contexts. *Anandrav Bhikaji Phadke* is a clear archetype of this phenomenon.

This paper acknowledges the outdated nature of the judgment and considers it extremely unlikely for this judgment to stand in today's context, but that is not my purpose in introducing it. Through the stance taken in this judgment, this paper aims to bring out why the consideration of the effect is imperative.

The Bombay High Court, while 'applying its mind', acknowledged the exclusive right of worship, of upper-castes as "*one which the Courts must guard, as otherwise, all high-caste Hindus would hold their sanctuaries, and perform their worship, only so far as those of the lower castes chose to allow them*."[68] Here, the protection of this exclusion-based right is grounded in the preservation of the nature of the sanctuary.[69] The very presence of the Palshe is considered to 'pollute' the temple premises because they, as people from a 'non-privileged' caste make their way into the sanctuary.[70]

Since they are not privileged, that environment becomes 'polluted' and thus unfit for the upper castes (or as the court notes, privileged castes) to offer prayers, and hence, avoiding this 'pollution' of the premises (and not the caste – Palshe) becomes imperative. So, this prohibition on the right of upper castes because of a 'polluted' atmosphere is identified as the core issue.

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68 *Phadke* (n 48) [329].
69 ibid [324].
70 *Phadke* (n 48) [325].

As per the High Court, the only way to remedy this is to acknowledge the exclusionary right so that their (upper castes') right is not contingent on lower (non-privileged) castes 'allowing' them to offer prayers by refraining people of their stature from entering the temple premises. The logic of Purity-Pollution seems to have been shifted by the Bombay High Court and applied to the 'place' while a farcical reason, like 'privilege', is used to justify caste exclusion.

Analyse this argument using the Logic Approach. It fails to offer any reason to probe the basis of 'privilege' because the question of human dignity through purity/impurity of the caste never arises. The Caste is not branded Untouchable/impure but rather, 'not-privileged', so, since the place 'gets' polluted, it is to be avoided. The caste is never branded 'impure' as the presence of non-privileged people causes the 'pollution.' Here, the logic of Purity-Pollution is obscured behind a scapegoat factor, like that of 'privilege,' while the logic is underhandedly practised.

There are possible derivations of this argument that conceal the Purity-Pollution logic behind a farce while practising a form of Untouchability, based on such logic. This is a shortcoming of the Logic Approach.[71]

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[71] Another similar case coming up in 1908, by the privy council led to a similar conclusion as *Anandrav Bhikaji Phadke v Shankar Daji Charya*. In the case of *Sankaralinga Nadan v Raja Rajeswara Dorai* 35 this paper AC (1908), the Privy Council (rater reaffirmed by the Bombay High Court) upheld the exclusion of people belonging to the Shanar caste from a Hindu temple and granted damages for its purification after scrutiny of their social standing by observing that "*their position in general social estimation appears to have been just above that of Pallas, Pariahs, and Chucklies [regarded as unclean and prohibited from the use of Hindu temples] and below that of the Vellalas, Maravars, and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples*" *Dorai* [182]; Galanter (n 39) at 131-132.
The court further concluded that the presence of Shanar people was repugnant to the "*religous principles of the Hindu worship of Shiva as well as to the sentiments and customs of the Hindu worshippers*." *Dorai* [182]; Galanter (n 39) at 132.
Consequently, Untouchable Mahars who entered the enclosure of a village idol were convicted on the ground that "*where custom ordains that an untouchable, whose very touch is in the opinion of devout Hindus pollution, should not enter the enclosure sur- rounding the shrine of any Hindu god*" it held their entry into the temple to be a defilement in violation of Section

But, if you consider the Equality Approach, you start with the effect. 'Exclusionary-right', as it has been called will never find justification under it. Clearly, there is an exclusionary effect that is operating against a group, and exclusion from the temple sanctuary is based on the logic of Purity-Pollution because this is a consequence (lack thereof) of 'privilege' which is attached to the place. Purity-Pollution, here, is easily identified by looking at the context of exclusion as well as the justification offered for it. But here, by stating that lack of 'privilege' 'pollutes' a place, it is argued that 'privilege' is the immediate basis of exclusionary treatment and not Purity-Pollution. Purity-Pollution, here, is presented as a consequence rather than a reason for lack of privilege. The Logic Approach can plausibly befall this style of argumentation.

Unlike the Logical approach which looks at the logic of Purity-Pollution operating against an individual or group by the branding of pure/impure, the Equality approach looks at the ultimate effect of a practice which is exclusion in this case. Thus, it is not restricted to the immediate reasoning for the practice. So, in this case, this reason was 'privilege' but the effect was ultimately exclusion. Exclusion *stemming from* this tag is what Article 17 targets. It doesn't matter who gets that tag as long as it is based on the logic.

### D. The Logic Approach & *Sabarimala*

To bring out the implications of the argument from principle, consider *Sabarimala* and the Logic Approach. A different conclusion can be reached provided some necessary assumptions be made.

Envision the exact scenario as *Sabarimala* – the procedural history, facts, issues, some arguments, (etc.) but the only difference is

295 of the Indian Penal Code 1860. Galanter (n 39) at 132.

that in this world, the Logic Approach is followed for the interpretation of Article 17. The case filed by the Indian Young Lawyers Association finds its way to the Supreme Court and is argued accordingly by the two sides. Now, since the Logic Approach is prevalent and it would have a bearing on the arguments put forward by the respondents in defence of restricting the entry of menstruating women into the Sabarimala temple.

So, it is entirely plausible for the respondents to argue that since the *deity* of Lord Ayyappa is an eternal celibate, the presence of menstruating women makes the **temple premises impure** as his vow of eternal celibacy is broken. So, owing to that, the impurity of the temple needs to be remedied and to do so, restricting women becomes imperative.

Over here, the challenge to Article 17 will fail as the logical approach won't remedy this situation. This is because the reason for exclusion would be the deity's celibacy, making Purity-Pollution a consequence of menstruating women's presence and not a cause for restrictions on their entry. Celibacy is the cause. This will be supplanted with the fact that other temples of Lord Ayyappa across India do not restrict menstruating women from entering the temple premises because the vow of celibacy of the deity is specific to this one temple.[72] So, here, the reasons for exclusion are not a direct functioning of the logic of Purity-Pollution but factors affecting the celibacy of the deity. A logic-based inquiry would consider celibacy-affecting factors and deem exclusion to not be based on Purity-Pollution **of** women. Keep

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72 Even Justice Indu Malhotra recognizes this in her judgment in *Sabarimala*. She notes at [310.2]: "*The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practices*." Further, she adds: "*Women of the notified age group are allowed entry into allother temples of Lord Ayyappa. The restriction on the entry of women during the notified age group in this Temple is based on the unique characteristic of the deity, and not founded on on any social exclusion of the Sabarimala Temple*." Sabarimala (n 4) [310.3].

in mind that that the argument is that menstruating women are not 'impure' but the premises, in consequence of this presence only become impure as a result. This impurity of the premises is a result of the presence of women who are menstruating which ultimately hampers the vow of celibacy of the deity. So, since this vow of celibacy is broken, factors which bring about this consequence – the presence of menstruating women only, must be restricted. Contrastingly, as per the Equality Approach, the nature of such an argument would have no bearing on the outcome. There is resultant exclusion operating on the logic of Purity-Pollution, regardless of the source of exclusion.

Here, an argument may be made that following the logic approach, this whole ordeal falls foul of human dignity in the first place by allowing for such branding of pure/impure. In this case, then, Articles 17 along with 21 would come into place and thus, then it may be said that Article 17, following the logic approach allows for an inquiry-based on 'human dignity' as its basis. But here more problems come to light. There exists literature[73] which explores the question of equality from the lens of dignity. It is found that human dignity is unsustainable as the sole basis of any inquiry in a discrimination matter. Though an important factor, in isolation, the human dignity aspect is insufficient as the only benchmark to establish an anti-discrimination claim.[74] Rather, as Fredman notes, dignity must be one factor in a multi-factorial analysis and an equality claim. Fredman notes that in many jurisdictions "*dignity is a central pillar of the constitutional text itself*," addressing directly the history of humiliation and degradation.[75] However, she also notes the fact that 'human dignity' as a concept "*has*

73 Sandra Fredman, *Discrimination Law* (3rd edn., Clarendon Law Series, London, 2002) 20-25, 28, 137-138.
74 ibid.
75 ibid 20-22.

*its difficulties*."[76] She notes the multiplicity of interpretations of the concept often leading to opposite results as intended. She mentions the South African case of *President of the Republic of South Africa v Hugo*[77] where a Presidential pardon accorded to all incarcerated mothers of young children was challenged by a male prisoner who happened to be the sole caretaker of his children for sex-based discrimination and human dignity.[78] Though the Court rejected this argument, there was a notable dissenting opinion. Kriegler J. noted that the assumption of women being the primary carers of children was an affront to their dignity. He further mentioned:

> *One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely. . .*[79]

In furtherance of problems with basing equality claims solely on 'human dignity', Fredman also notes that "*there is a risk that dignity comes to be regarded as an independent element in discrimination law, requiring a claimant to prove not just that she has been disadvantaged, but that this signifies lack of respect of her as a person.*"[80] She notes the Canadian case of *Gosselin v Quebec*[81] where it was held "*that proof of disadvantage on grounds of an enumerated characteristic would not in itself be discriminatory if the claimant could not prove in addition that this disadvantage signified that society regarded her of less value than others.*"[82] This is precisely one of the issues identified by this paper in an approach that is based in the logic for Article 17. Lastly, as

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76 ibid 23.
77 *President of the Republic of South Africa v Hugo* (CCT 11/96) [1997] ZACC 4.
78 ibid.
79 ibid [80].
80 Fredman (n 69) 23-24.
81 *Gosselin v Quebec* 2002 [SCC] 84 (Canadian Supreme Court).
82 Fredman (n 73) 23-24.

a solution to avoid such pitfalls, Fredman proposes approaches that regard 'dignity' as just one aspect of equality instead of it constituting the whole concept under a singular notion of 'human dignity'.[83] Thus, she argues for "*dignity to be regarded as one facet of a multi-dimensional notion of equality, which also comprises disadvantage, accommodation of difference, and participation.*"[84] Such is the argument which this paper also purports to make. Instead of following the logic inquiry which reduces the whole claim of equality only to this dignity aspect of human beings, it seeks to include the exclusionary effect as a separate phenomenon in addition to, and stemming out of this logic and adds a layer of *disadvantage* resulting from such practices at the core of the claim for equality.

It must be noted that as a practical matter, it is yet to be seen the exact difference between an inquiry followed via the logic of Purity-Pollution and one followed via the Equality consideration. It may even be that practically, there is no difference between following the Logic or Equality approach. However, it is the position of this paper that if the Equality Approach is made the basis of an Article 17 inquiry, then the case to be established by the petitioner would not only be procedurally easier as the next part will show but also jurisprudentially stronger as previous parts have shown.

## IV. Procedural Nuances of the Equality Approach

Having laid out the content of the exclusionary effect and the subsequently expanded Article 17, this paper now expands the procedural significance argument made in Part III (B). This paper stands by the presumption of the exclusion line of reasoning because historically speaking, the logic of Purity-Pollution has ultimately

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83 ibid.
84 ibid.

manifested as exclusion.[85] So, realistically the practice of the logic of Purity-Pollution will not be devoid of any consequences, it will manifest in the form of exclusion. It won't just be there and stay dormant. But as shown above, starting with an inquiry for the logic will lead nowhere. The consideration has to start from the presence of an exclusionary effect.

Hence, this paper contends the presumption of exclusion if and only if the logic of Purity-Pollution is explicitly established. This paper maintains that every manifestation of the logic of Purity-Pollution will manifest as exclusion but every exclusion need not be based on this logic only. So, starting the inquiry from exclusion and then checking the rationale for exclusion would be the procedure for Article 17. Here, if the exclusion is always presumed then the argument becomes circular – exclusion is there because of the logic (presumed) and the logic is there because of the exclusion (historically understood as such). So, there are two ways to consider the presumption of exclusion argument. *Firstly*, this presumption is refutable and in the *second* case, it is irrefutable.

If one were to consider the latter case, i.e., an irrefutable assumption of exclusion, then the whole process falls apart because of a circular argument. If the exclusionary effect is taken to be incontestable in every case involving the logic of Purity-Pollution, then there is no sense in considering the effect under any inquiry, because as long as the logic is shown the court would irrefutably presume exclusion. The inquiry would then turn into establishing the presence of the logic of Purity-Pollution. Note that the problem is not the presumption but its irrefutable nature. This basically becomes the

85 Ambedkar (n 26) 8.

Logic Approach only with the dead weight of 'exclusion' that adds no real value to the inquiry.

Presuming the presence of the logic of Purity-Pollution from any exclusion is fallacious but exclusion from the logic is fine as long as that presumption can be contested. This would imply that the respondent can refute an Article 17 challenge by showing that no exclusionary effect is stemming from the impugned practice. This shifts the burden of proof away from the petitioner and hence, an impracticable standard of somehow 'proving' exclusion is not imposed on her. Therefore, the latter case i.e., a refutable assumption of exclusion has to be considered.

The presence of the logic of Purity-Pollution, unlike the 'exclusionary effect,' cannot be presumed if the exclusion is shown as it assumes every single instance of exclusion to be based on that logic only.[86] Rather, this assumption would end up misappropriating the struggles of caste by equating Untouchability with discrimination.

Finally, the inquiry, as this paper envisions would be the State's prerogative because Article 17 can be applied horizontally, to non-state actors. Basically, the concept of Indirect Horizontality puts an obligation on the state to not only 'not violate a fundamental right' but to also ensure that no other party violates that right – a positive obligation, ensuring a progressive realization of rights.[87]

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86 All forms of exclusion need not be based on this logic only. There can be exclusion based on sex, race, age, and anatomy (height, weight, etc.), which may/may not be permissible. But as far as Article 17 is concerned, exclusion stemming from Purity-Pollution is the focus.

87 Aparna Chandra, '*Equality*,' Constitutional Law I, lecture on Substantive Equality (April 19, 2022), National Law School of India University Bangalore.

## V. Limitations of the Equality Approach

With one of the aims of this paper – laying down substantive and procedural intricacies of an expanded reading of Article 17 – undertaken, this paper now moves to the limitations made in the arguments.

### A. The Manifestation Argument & The Dignity Question

Starting with the procedural assumptions this paper has made, it is conceivable to think of cases where despite the logic of Purity-Pollution being apparent, there may not be exclusion *per se* (the Manifestation Argument). Exclusion may possibly manifest in a different form, such as having separate accommodations for those 'impure'.[88] Then essentially, the dignity question comes up – does it not fall foul of the right to a dignified life as enshrined by Article 21 of the Indian Constitution to allow for the branding of people as pure/impure? This paper acknowledges this limitation of the Equality Approach. It does not deal with the dignity question entirety but for the purposes of this paper, the relevant arguments have been dealt with in the preceding part. Thus, this paper maintains that an inquiry that is based solely on this dignity question would be inadequate to establish a claim for equality.

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88 See A.M. Shah, 'Purity, Impurity, Untouchability: Then and Now' Sociological Bulletin 2007 56(3) 355; "Pune Housing Society's Separate Lift for Domestic Workers Sparks Debate, Splits Netizens" (The Indian Express May 8, 2022) <https://indianexpress.com/article/trending/trending-in-india/pune-society-elevator-usage-notice-sparks-debate-online-netizens-divided-7905557/> accessed June 18, 2022; "Society in Mumbai's Bandra Is Allegedly Using Separate Lifts for Owners and Servants" (India Times April 19, 2020) <https://www.indiatimes.com/trending/social-relevance/society-in-mumbais-bandra-is-allegedly-using-separate-lifts-for-owners-and-servants-511234.html> accessed June 18, 2022.

Furthermore, in response, this paper claims this harm of being branded pure/impure is not one that Article 17 prevents. It targets the exclusionary effect which *stems* from the logic of Purity-Pollution. This paper admits that branding people as pure/impure falls foul from a human dignity standpoint and needs to be prohibited, but not under Article 17 because (a) Article 17 has at least some basis in the historical Untouchability prevalent in India and, (b) since this practice is not complete without exclusion, the historical connection is not complete, so Article 17 would not cover it. But this does not legalize such branding. Articles 15(1) & 15(2) prohibit discrimination based on caste, among other things.[89] Thus, this notion of branding could arguably be included under them.

### B. Dissecting The Manifestation Argument

Coming to the Manifestation Argument, 3 things need to be considered: (a) Is it possible to think of instances where logic *sans* exclusion is apparent? (b) If one can conceive such cases, what if they are more central than marginal? and (c) Even if there is no exclusionary effect, shouldn't Untouchability only be concerned with the classification aspect of it? (c) is just another form of the dignity question and has been dealt with. Regarding (a) & (b), this paper put forward the presumption stance and maintains that exclusion would always necessarily follow from the tag of pure/impure. So, such cases are not possible, but this paper will consider them from an academic standpoint.

Regarding (a) this paper argues that in such a practice then, the logic would have been incorrectly identified and that it would not fit in with the historical connection between Article 17 and 'Untouchability' in understanding its forms. This paper maintains that

89 Constitution (n 15) Articles 15(1) and 15(2).

the caste struggle did have at least something to do with the incorporation of Article 17 as evidenced by the discussion of its nature during the CADs.

So, by including the logic *sans* exclusion, the historical connection is severed. However, a tweaked form of (a) can be proposed here which deserves consideration. It can be said that exclusion can manifest in different forms and need not be exclusion *per se* – instances like differential treatment, prohibitions, etc.[90]

This paper argues such instances are only steps (if based on Purity-Pollution) in the process of practising a 'form' of Untouchability that does not meet Article 17 standards (yet) and can be answered under Article 15(1) and (2). So, it will be covered under Article 17 as soon as the practice has an exclusionary effect. Contending these steps problematic in themselves would be going back to the dignity question.

### C. Where The Equality Approach Falls Apart

Regarding (b) from the previous section, this paper acknowledges the consequences that this quantification will have. Should such cases occupy the core rather than the penumbra, the question takes a different form and comes down to where the balance of convenience[91] lies. In this case that would be with those people who

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90 See for reference "Pune Housing Society's Separate Lift for Domestic Workers Sparks Debate, Splits Netizens" (The Indian Express May 8, 2022) <https://indianexpress.com/article/trending/trending-in-india/pune-society-elevator-usage-notice-sparks-debate-online-netizens-divided-7905557/> accessed June 18, 2022; "Society in Mumbai's Bandra Is Allegedly Using Separate Lifts for Owners and Servants" (India Times April 19, 2020) <https://www.indiatimes.com/trending/social-relevance/society-in-mumbais-bandra-is-allegedly-using-separate-lifts-for-owners-and-servants-511234.html> accessed June 18, 2022.

91 Basically, considering which party's suffering is more convenient to be remedied if a particular course of action is followed. For example, in a world where the instances of people being branded as pure/impure exist with such huge numbers and impact that they overshadow that of people facing exclusion from this branding, it becomes more appropriate to remedy the suffering of the larger group, moreover, the former approach

are branded as compared to those being excluded owing to such branding, so the inquiry would then have to be restricted to the Logic Approach. In this context, this paper acknowledges that the Equality Approach would fall flat. Such is the biggest flaw of this paper's argument.

### D. The Argument from Within

Lastly, there exists an argument against the Equality Approach which stems from the wording of Article 17 itself.[92] The latter part of the Article deems an offence, '*the enforcement of any disability arising out of "'Untouchability*'.[93] Here, one can argue that the words '*any disability*' be read to include the branding aspect under Article 17.

But this paper counters it by contextualizing the phrase. It is also followed by '*arising out of Untouchability*'. Untouchability is complete when (i) there is exclusion, and it is based on (ii) the logic of Purity-Pollution. Branding, in itself, is a component of Untouchability, as long as exclusion is not an effect, 'Untouchability' is not complete.

Rather, the phrase '*any disability*', has to be read in the context of 'exclusion' only. It would, therefore, qualify the scope of Article 17 to include every sphere where exclusion, based on Purity-Pollution is practised. Ultimately, the 'exclusion' that is based on Purity-Pollution, in every context – social, occupational, private, temple entry, association during certain periods, and more, is the scope of '*any disability*'. This brings out the absolute nature of Article 17.

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would always encapsulate the latter (in every form of the logic of Purity-Pollution exists exclusion but not the other way around), so, it is convenient to follow that approach.

92 Constitution (n 15) Article 17.
*"Abolition of 'Untouchability' – '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.*"

93 ibid.

## CONCLUSION

There is a strong rationale for using Article 17 to target other forms of discrimination. Article 17 prohibits discrimination on the basis of "*birth*", and it can be argued that discrimination based on Purity-Pollution is a form of discrimination on the basis of birth. Additionally, Article 17 prohibits discrimination that is "*derogatory to human dignity*," and it can be argued that discrimination based on Purity-Pollution is a form of discrimination that is derogatory to human dignity.

However, there is also a lack of a strong legal basis for using Article 17 to target other forms of discrimination. The Supreme Court of India has not yet ruled on whether Article 17 can be used to target other forms of discrimination.

If the Supreme Court of India were to rule that Article 17 can be used to target other forms of discrimination, this would be a significant development in Indian law. It would mean that the Indian Constitution would provide a strong legal basis for challenging discrimination based on Purity-Pollution, disability, sexual orientation, and other grounds.

This paper has provided a sophisticated account of how Article 17 can be read to include other forms of discrimination based on Purity-Pollution. It has shown that there exists a stronger rationale for using Article 17 to target other forms of discrimination and possibly bring Article 17 within the fold of the anti-discrimination guarantees in the Indian Constitution. Chandrachud J.'s approach to Article 17 marks an important jurisprudential development in Article 17 but as of now, his approach has lacked a strong legal basis. In this paper, I sought to provide it through the inclusion of the exclusionary effect. That is the contribution I have made. It remains to be seen what

practical difference this requirement makes to Article 17. It may help us unlock the true potential of Article 17 by including practices derogatory to human dignity. Further questions for research are still left looming before a concrete version of a reformed Article 17 is presented before us. As mentioned, it is yet to be seen what practical difference these 2 approaches will make when applied in practice. Questions such as - What are other contexts in which purity pollution logic will have an exclusionary effect? etc. need to be considered as well. Furthermore, the extent of Article 17 inquiries can be explored, given that sexual orientation or disability based discrimination is not covered under Part III. Can Article 17 serve as the constitutional home for the violation of the Fundamental Rights of these groups? Perhaps, it is yet to be seen.

If the Supreme Court of India were to rule that Article 17 can be used to target any form of discrimination that is "*derogatory to human dignity*", this would be a major victory for those who are fighting against discrimination in India. It would mean that the Indian Constitution would provide a strong legal basis for challenging all forms of discrimination, regardless of the ground on which it is based.

It is important to note that this is a complex issue, and there are a variety of different perspectives on it. The conclusion that I have presented is just one perspective, and it is important to consider all of the different perspectives before forming an opinion on this issue.