

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION No. 7455 OF 2001

NAZ FOUNDATION

..... Petitioner

Vs

GOVERNMENT OF N.C.T. OF DELHI & ORS.

..... Respondents

Note on the Constituent Assembly Debates and Equality on behalf of Respondent No. 8

1. The Constitution was framed, with the recognition that there were many communities, such as the Untouchable Castes and the tribal communities that faced discrimination and, often, brutal subjugation. The Constitution was also framed with a deep concern that the majority should not be allowed to ride roughshod over minority communities. The Constitution was thus seen as a document which, recognising that all human beings are of the same inherent worth, sought to ensure that all communities and individuals had equal protection of the laws and at the same time had the freedom and the right to preserve the particular identities. The Constitutional text, especially provisions relating to Fundamental Rights reflect an abiding commitment to the principles of equality and diversity.

Constituent Assembly Debates – notions of discrimination based on caste and tribe

2. The notion of equality in the Indian Constitution flow from the 'Objectives Resolution moved by Jawaharlal Nehru on Dec 13,1946. Objective (5) of the resolution read, 'wherein shall be guaranteed and secured to all the people of India justice, social, economic and political: equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and morality; and (6) wherein adequate safeguards shall be provided for minorities, backward classes and tribal areas, and depressed and other backward classes.'¹ Copy annexed hereto as **Annexure R1**.
3. Nehru, in his speech moving this Resolution, noted, '*...at this stage, it is surely desirable that we should give some indication to ourselves, to those who look to this Assembly, to those millions in this country who are looking up to us and to the world at large, as to what we may do, what we seek to achieve, wither we are going. And I wish this House, if I may say so respectfully, should consider this Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion... [The Resolution] seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.*'²
4. This spirit invoked by various marginalized sections of India's population as mirroring their own aspirations. Of particular relevance was the response by Mr Jaipal Singh who spoke on behalf of the tribal people. He said,

¹ CAD VOL I , pg 4.

² Ibid. pg.5.

*'Sir, I rise to speak on behalf of millions of unknown hordes- yet very important- of unrecognised warriors of freedom, the original people of India who have variously been known as backward tribes, primitive tribes, criminal tribes and everything else. Sir I am proud to be a jungli, that is the name by which we are known in my part of the country. Living as we do in the jungles, we know what it means to support this Resolution. On behalf of more than 30 millions of Adivasis (cheers), I support it not merely because it may have been sponsored by a leader of the Indian National Congress. I support it because it is a resolution, which gives expression to sentiments, which throb in every heart in this country...Sir, if there is any group of Indian people that has been shabbily treated, it is my people. They have been disgracefully treated, neglected for the last 6,000 years.'*³

A copy is annexed at **Annexure R2**. This has also been cited in *India after Gandhi*, by Ramchandra Guha, relevant extracts of which are annexed hereto at **Annexure R3**.

5. With respect to the untouchable communities their aspirations were most clearly reflected in Art 17 of the Constitution and the debates on the draft of this provision.
6. Art 17 reads, *'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.'*
7. In the Constituent Assembly Debates, speaking about the rationale of this law:
 - a. Shri V.I. Muniswamy Pillai noted, *'the very clause about untouchability and its abolition goes a long way to show to the world that the unfortunate communities that are called 'untouchables' will find solace when this Constitution comes into effect. It is not that a certain section of the Indian community that will be benefited by this enactment, but a sixth of the population of the whole of India will welcome the introduction and the adoption of a section to root out the very practice of untouchability in this country. 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 the tyranny of the 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. The sting of untouchability went deep into the hearts of certain sections of the people and many of them had to leave their own faiths and seek protection under religions which were tolerant. I am sure, Sir, by the adoption of this clause many a Hindu who is a Harijan, who is a scheduled caste man will feel that he has been elevated in society and he has now got a place in society.'*⁴

A copy is annexed hereto at **Annexure R4**

- b. Dr. Monomohon Das noted, *'This clause does not propose to give any special privileges and safeguards to some minority community, but it proposes to save one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace. The custom of untouchability has not only thrown millions of the Indian*

³ Ibid. p. 143. See also , Ramachandra Guha, *India after Gandhi*, Picador, New Delhi, 2008. p. 115-116.

⁴ CAD VOL VII pg 665

*population into the dark abyss of gloom and despair, shame and disgrace, but it has also eaten into the very vitality of our nation.*⁵

8. Dr. Ambedkar was very clear that *‘the problem of the Untouchables is a formidable one for the Untouchables to face. The Untouchables are surrounded by a vast mass of Hindu population which is hostile to them and which is not ashamed of committing any inequity or atrocity against them.’*⁶ A copy of his comments are annexed hereto at **Annexure R5**. Giving examples Dr. Ambedkar makes the case that discrimination and social boycott are one of the core problems faced by the untouchable communities. He notes that, *“It is difficult to expect that in a country like India where most persons are communally minded those in authority will give equal treatment to those who do not belong to their community. Unequal treatment has been the inescapable fate of the untouchables in India...Many other minority communities may be suffering from similar treatment at the hands of the majority community. It is therefore necessary to have such provisions to ensure that all citizens shall have equal benefit of the laws, rules and regulations...”*⁷
9. While both the scheduled castes and untouchable communities were the subjects of Constitutional concern, it is a fact that concerns pertaining to sexual orientation and gender identity were not specifically raised during the Constituent Assembly Debates. The Constitution, however, was never intended to be a static document. Instead, the Constitution was seen as an emancipatory text, as a text which would be able to respond to future claims made by oppressed communities. The reading of the intention of the Constitution makers as embodied in the discussions on both the Fundamental Rights and the Objects Resolution indicated that what was important was in Nehru’s words, ‘the spirit behind the resolution’. That spirit needs to be interpreted in an purposive manner, keeping in mind the changing context of human suffering.
10. As the US Supreme Court aptly noted,
- “Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They know times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”*⁸
11. Similarly, the Indian Supreme Court in *Nagaraj v. Union of India*, noted that,
- ‘Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing*

⁵ Ibid.

⁶ Shiv Rao B, Framing of India’s Constitution, Vol II, pg. 103

⁷ Shiv Rao, Framing of India’s Constitution, pg 99

⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003) at p. 18

*conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.*⁹

12. One of the cornerstones through which the Constitution can be 'adapted to changing conditions and purposes' and particularly to emerging forms of discrimination is through the notion of human dignity. Human dignity finds its expression in the preamble and has been read into Art 21 and forms the very basis of Art 17.
13. Pointing out to the 'epoch making declaration that "untouchability" is abolished and its practice in any form is forbidden.' Ramaswami, J., in a concurring judgement notes, '*The preamble of the Indian Constitution imbued among its people with pride of being its citizens in an integrated Bharat with fraternity, dignity of person and equality of status. But casteism; sectional and religious diversities and parochialism are disintegrating the people. Social stratification need restructure. Democracy meant fundamental changes in the social and economic life of the people, absence of iniquitous conditions, inequalities and discrimination.*'¹⁰
14. In *Francis Coralie Mullin v. Administrator, U.T. of Delhi*, the Supreme Court pointed out that, 'We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.'¹¹
15. It is submitted that to interpret the notion of dignity which runs through the Indian Constitution in the light of 'changing circumstances and purposes' the Hon'ble Court ought to examine contexts in which the notion of dignity has been developed to accommodate newer forms of discrimination. It is submitted that the principles underlying the Constitution as initially embodied in the Objects Resolution and finally becoming a part of the Preamble of the Constitution is the key to understanding and responding to emerging forms of discrimination which were not specifically contemplated by the makers of the Constitution, such as sexual orientation and gender identity.

New Delhi
25, September, 2008

Counsel for Respondent No. 8

⁹ (2006 8SCC 212 at para 16.

¹⁰ State of Karnataka v. Appa Balu Ingale, AIR1993 SC 1126 at para 10.

¹¹ 1981(1) SCC608 at para 8.