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# The Human Dignity Argument against Manual Scavenging in India

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## Abstract

In this article, we argue that manual scavenging and the 2013 Act which prohibits it are unconstitutional as they violate human dignity, the prohibition against untouchability, and the right to life enshrined in the Constitution of India. We bring out contradictions and limitations in the Supreme Court's jurisprudence on manual scavenging and show that it misses out on deploying its own strong anti-untouchability and human dignity-based jurisprudence in the judicial treatment of manual scavenging. This progressive jurisprudence outlaws all forms of social exclusion and does not allow for any exceptions to the right to human dignity. We then propose a framework which outlines the unconstitutionality of the very practice of manual scavenging through an in-depth and conjoint analysis of the Indian constitutional jurisprudence on prohibition untouchability, right to human dignity and right to life. A conjoint reading of the three principles brings out the real potential of the Indian Constitution in safeguarding the rights of manual scavengers, a feat which must begin with a complete abolition of all forms of scavenging work without exception. Arguing against the acceptability of allegedly "safe" sanitation work, we propose an alternative framework to understand and critique manual scavenging, without which a complete eradication of manual scavenging is impossible.

## Keywords

Manual scavenging, caste discrimination, untouchability, Dalits, sanitation work, human dignity

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## Introduction

If one paid heed only to the statements of the Indian government, the conclusion reached would be that manual scavenging—the manual cleaning of human faeces in the sanitation chain—is long eradicated. In fact, government actors, including the Social Justice Minister, claim that there have been no deaths through manual scavenging (Varma, 2021), and sanitised discourse around "sanitation workers" deems the problem sorted and ready for the archives. Despite decades of activism, it is blatantly clear that manual scavenging remains invisible and misunderstood. Manual scavenging, which is performed by workers according to a recent large-scale survey 97.25 per cent come from the Dalit community (Mahatme, 2021), the formerly "untouchables", continues rampantly across urban and rural India, everywhere from household latrines to governmental sewer lines and waste treatment plants.

With non-governmental organisations, as well as the majority of scholars, asserting that the way forward is to enforce the existing law on manual scavenging, we beg to differ. In particular, we criticise the judiciary, which has long been hailed as the sole state actor to take manual scavenging seriously, and ask to what extent the Supreme Court of India (SCI)'s approach to eradicating manual scavenging is sufficient in doing so.

In this article, we present manual scavenging as a violation of human dignity, and hence of the right to life, and dissect the different facets of the practice that lead to infringements of dignity. We show that the SCI has not treated manual scavenging at par with other violations of dignity. The SCI has not made connections between its strong constitutional jurisprudence on untouchability and the right to life, and manual scavenging, resulting in compromising and apologetic conclusions on manual scavenging. We finally propose an approach the SCI could take in order to incorporate a proper understanding of manual scavenging more in line with its own precedents and the constitutional interpretation. Rather than making sanitation work "safer", we argue for a recognition of the unconstitutionality of the existing law on manual scavenging, as it does not address the violations of dignity that confront sanitation workers daily—not just those without safety equipment. Unless a complete prohibition is put in place, the eradication of manual scavenging will remain a distant reality.

### *Structure of Article*

We first revisit existing criticisms of the government's approach on manual scavenging to establish that there is a clear consensus that the executive, and to some extent the legislative, approach manual scavenging without properly incorporating an understanding of caste and non-technical considerations. We then highlight that the *Prohibition of Employment of Manual Scavengers and their Rehabilitation Act, 2013* has been commended for incorporating a recognition of the wider social context within which manual scavenging occurs, but that it nonetheless does not go far enough as it uncritically considers sanitation work with safety equipment completely acceptable. Building on existing criticism of the 2013 Act, we then proceed to ask whether the

Supreme Court of India (SCI), which has otherwise been hailed for being proactive and a defender of social justice, has criticised the Act.

After laying out our methodology and aims, we take a step back, and clarify key terms in the debate that are often conflated. We then identify what is problematic about manual scavenging and establish that given the backdrop of caste, the very act of engaging with human faeces becomes a violation of dignity. Having established that manual scavenging is at its core a human dignity problem, we then turn to the SCI's jurisprudence on human dignity to show that there is a strong legal case to be made that all engagement with faecal matter must be prohibited, regardless of safety equipment. However, we show that the SCI has only strongly affirmed the right to dignity in its jurisprudence on the right to life and the prohibition of untouchability—but not in its jurisprudence on manual scavenging, even in the much-commended cases *Delhi Jal Board vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and Others* (2011), and S*afai Karmachari Andolan vs. Union of India* (2014). In each, dignity is invoked either not at all, or merely symbolically, in its manual scavenging judgements. In light of this evident discord, we propose a line of legal reasoning that would adequately link the existing SCI understanding of dignity with manual scavenging, and argue that this would result in declaring the parts of the 2013 Act unconstitutional that permit engaging with faecal matter.

## Criticism of the Executive and Legislative Interventions

The executive and legislative of the Indian Government have been amply criticised in scholarly literature for their approach to manual scavenging. Such criticism includes that it focuses on constructing sanitary latrines instead of taking a systems-approach and addressing issues in the entire sanitation system, or that it focuses on rural at the expense of urban India (Ingole, 2016). Notably, these criticisms appear to now be slowly addressed—leaving only the third, and most vocal, scholarly criticism of its approach: That its laws and policies focus on technical solutions to eradicating manual scavenging while leave unaddressed the role of caste in causing and perpetuating manual scavenging (Bhowmick & Purakayastha, 2016; Coffey & Spears, 2017; Doron & Raja, 2015; Gupta, 2016; Katiyar, 2014; Permutt, 2011; Ravichandran, 2011). These authors have also highlighted that the eradication of manual scavenging has featured only as an afterthought or formality in the government's wider sanitation efforts. The *Swachh Bharat Mission*, for instance, professes to aim at eradicating manual scavenging and constructing sanitary toilets, although efforts have consistently focused on the latter. In fact, some scholars have highlighted that not just is the current approach insufficient to eradicate manual scavenging, but it also actively contributes to its worsening. Ghosh (2019) highlights that Swachh Bharat "implicitly rel[ies] on this form of labour, without concern for the lives, safety and working conditions of such workers" (p. 192). Authors have argued that this hyperfocus on sanitary toilets stems from a "*deification of defecation* without addressing the real issue of the *politics of dirt* [emphasis original]" (Bhowmick & Purakayastha, 2016, p. 164), and linked

this to ritual pollution within the Brahmanical belief system. It is through this lens that authors have argued that the executive's approach is simply not concerned with eradicating manual scavenging, as constructing sanitary toilets is an exercise in distancing ritually polluting material from non-Dalits.

This criticism of the government's approach in schemes and policies also extends to its legislative approach. The *Prohibition of Employment of Manual Scavengers and Their Rehabilitation Act*, *2013* is the culmination of a near decade-long legal struggle to hold state governments accountable for their failure to take steps towards ending manual scavenging. Indeed, especially practitioners have commended that the Act sees manual scavenging as a social justice rather than sanitation issue, that "it recognizes a constitutional obligation to correct the historical injustice and indignity suffered by manual scavenging communities by providing alternate livelihoods and other assistance" (Human Rights Watch, 2014, p. 5), and that it "explicitly adopts an understanding that manual scavenging is [...] against the spirit and essence of the Constitution of India" (Koonan, 2021, p. 157). Regardless of praise for the social awareness embedded in the Act, there is a small amount of literature that critically points out the shortcomings of the legislative provisions in achieving its objective of eradication. After all, the Act explicitly states that "a person engaged or employed to clean excreta with the help of such devices and using such protective gear, as the Central Government may notify on this behalf, shall not be deemed to be a 'manual scavenger'." Authors have highlighted that this amounts to only a "conditional prohibition", and provides a partial justification for the exploitation of Dalits (Koonan, 2021; Wankhede, 2021; Wilson & Singh, 2017). As Wankhede (2021) has shown, the 2013 Act has the following limitations: First, according to the definition of manual scavenger in Section 2(1)(g), a person fails to qualify as a manual scavenger after being provided with protective equipment. Therefore, a person continues to be engaged in dehumanising work but is altogether excluded from corresponding rehabilitation benefits. Second, this "conditional prohibition" revitalises an approach of a 1976 legislation—of prohibitions with conditions, which was abandoned in 1993, and therefore constitutes regression. Third, this conditional prohibition perpetuates social exclusion, entrenches historical discrimination based on caste hierarchy and excludes manual scavengers through a change in their legal status.

## *Critiquing the Judicial Discourse?*

Despite ample existing criticism of the executive and legislative, the fact that the SCI deemed the enactment of the 2013 Act sufficient to end the ongoing *mandamus* on the public interest litigation before it appears to be largely overlooked in existing literature. In fact, the only criticism of the SCI relates to its engagement with the previous Act on manual scavenging of 1993, where Permutt argues, for instance, that the Court "has passively relied on the States to implement policies to eliminate manual scavenging, without any accompanying active enforcement action" (Permutt, 2011, p. 283). Other criticism of the judiciary is even older, and not specific to the SCI; Mandal (2008), for instance, shows that judicial actors in the 1960s explicitly justified manual scavenging

on grounds of alleged inalienable "customary rights" of manual scavengers to clean the toilets of a particular household.

That the SCI would let a law with loopholes suffice as the grand culmination of a public interest litigation is a puzzle. Despite putting in place "progressive safeguards" through interim orders, the SCI's final judgement in the landmark *Safai Karamchari Andolan* case is disappointing as it fails to acknowledge the limitations of the 2013 Act, thereby perpetuating—rather than addressing—manual scavenging (Wankhede, 2021).

Since the SCI has in other cases established itself as a "guardian of human rights", or even "fearless activist" directly tackling divisive issues head-on (Permutt, 2011, p. 281), we build on Wankhede's (2021) previous article to scrutinise in detail why the SCI should have questioned the conditional prohibition.

## Methodology

In this article, we are broadly concerned to what extent the Supreme Court's existing approach to eradicating manual scavenging is sufficient in doing so. Coming to a grounded and nuanced answer to this question requires tackling several underlying questions, such as understanding what the Court's approach is, and what "eradicating" manual scavenging even requires. It is therefore as much an empirical as it is a normative project.

Importantly, legal research and research on the coherence and adequateness of a given piece of jurisprudence in relation to another is never a neutral or objective act (Munger & Seron, 1984). Law does not exist in isolation, and neither do the people making conclusions about law. In our case, our article is rooted in a deep concern about manual scavenging, and a desire to inform social activists, judges and others who want to take active steps to counter it. In fact, when we first discussed writing this article, it was in order to inform future public interest litigation. All research that such as ours stems from a concern with social justice is inevitably normative.

To build up our normative argument, we employed methods associated with the integrative literature review, a "form of research that reviews, critiques, and synthesises representative literature on a topic in an integrated way such that new frameworks and perspectives on the topic are generated" (Torraco, 2005, p. 356). On the basis of an integrative literature review on manual scavenging, we then came to a preliminary hypothesis on what judicial approach would be needed to adequately tackle manual scavenging, arguing that it must strongly rely on human dignity. It is not our claim that this human dignity argument will completely eradicate manual scavenging, but only that it is a vital starting point to seriously consider the project of eradication.

Importantly, our research goes beyond mere doctrinal examination of judicial interpretation, a method that we largely follow in critically evaluating the judgements of the SCI. Instead, we both critique the legal basis itself and discern empirically whether the approach of the SCI is consistent with its approach in other cases. Combining both doctrinal legal methodology and critical insights, we investigate

"to what extent" the SCI's approach is sufficient in eradicating manual scavenging, therefore asserting in a positivist manner that courts hold power, while also rejecting the idea that courts have the sole correct interpretation of the law. As our research stems from a concern with social justice, we are acutely aware that the legal system offers ways to both legitimise oppressive social relations or challenge them. Our partially doctrinal analysis is therefore rooted in a lens that actively seeks out ways in which judicial discourse legitimises or perpetuates harm. This rather liberal understanding of "doctrinal" research resonates with the tradition of Critical Legal Studies, in that we "document and [...] map the incoherent and illogical underpinnings of liberal legalism which reveal the myriad ways in which law legitimates inherently unequal social relations." (Munger & Seron, 1984, p. 257). While we could have presented our findings with reference to sociological theory, we chose to refer to other jurisprudence. This is because our research is practically oriented, and we found it important to root our argument in the language and frame of reference of the legal system and the SCI itself (Vranken, 2010).

## Manual Scavenging as a Human Dignity Violation

### *The "Manual" in Manual Scavenging*

Our research question asks to what extent the Supreme Court of India's approach to eradicating manual scavenging is sufficient in doing so. Before proceeding to answer what its approach has been, we find it necessary to carefully examine what precisely is meant with manual scavenging, and what would be needed to "eradicate"—rather than just "improve" or "counter" it. In this context, we also want to take the opportunity to clarify terms that are often conflated, and expound our understanding and use of each.

By "sanitation workers", we refer to those who are otherwise referred to as "safai karamchari", who are "all sorts of workers engaged in cleaning jobs, including those who handle dry and wet waste, and those who sweep" (Dubey, 2018, p. 50). The reason we use the English term sanitation work is simply to be able to comfortably address an international audience. The term *safai karamchari* itself was introduced into the legislative context by activists who wanted to make a clear distinction between the identity of a manual scavenger, and the *occupation* of working with waste (Human Rights Watch, 2014). According to the legal definition, manual scavengers are those sanitation workers who, through the lack of adequate protective equipment, engage directly with faecal matter. As the remainder of our article shows, this definition is flawed in its emancipatory potential. Suffice it to mention here, even the existence of safety equipment does not mean that a sanitation worker will not be in direct touch with faecal matter at all; too big or too small equipment, or unforeseen circumstances for which insufficient tools have been given, can quickly result in a situation where a clear distinction between "sanitation worker" and "manual scavenger" becomes muddled. Additionally, sweepers also frequently have to manually clean human waste in areas where people openly defecate, making the distinction between sanitation work

and manual scavenging fluid (Human Rights Watch, 2014; Walters, 2019). Therefore, as the legal definition of manual scavenging simply is not accurate, we for practical purposes consider "manual scavengers" to be not just those sanitation workers who engage with human faecal matter *without* protective equipment, but to strictly be any person who engages with faecal matter and liquid waste. This includes tasks all along the sanitation chain in urban and rural India, such as cleaning open defecation spots, latrine, drain, and sewer cleaning, and septic tank desludging.

Manual scavengers are united by the fact that those employed are disproportionately Dalits, "untouchables" outside the Hindu caste system. Overall, according to a 2021 survey of 43,797 manual scavengers by the Union Social Justice and Empowerment Ministry, 97.25 per cent were Dalits, compared to their share of population of 16 per cent (Mahatme, 2021). This figure excludes workers who are not Hindu, as they are not recorded as Dalits in the census. The true number of Dalits is expected to be even higher, as entire Hindu communities have in the past converted to another religion to escape the "untouchable" label (Thorat, 2021). As they failed to do so, with caste discrimination being carried into their new religion, there are also Dalit manual scavengers from other religions and scheduled tribes (Lee, 2015).

## *The Problem with Manual Scavenging*

Having established that the boundaries between "manual scavenging" and "sanitation work" that government discourse has attempted to establish are flawed and of little use, we consider it necessary to scrutinise whether it is appropriate to say that sanitation work becomes unproblematic in the presence of safety equipment. As we show, the need to eradicate manual scavenging comes not just from the fact that those engaged in manual scavenging die prematurely and are stuck in a cycle of poverty. While these are indeed important issues that must be tackled, manual scavenging more fundamentally involves a complete denial of equal rights. Here, we take a step back and ask what exactly "the problem" with manual scavenging is, as this is a basis for establishing what then must be done in order to fully "eradicate" manual scavenging. As we emphasise, caste sanctions and caste discrimination lie at the core of the problem.

In official government discourse on manual scavenging, policymakers and legislators recognise problems associated with the practice of manual scavenging, but limit this to the discussion of a lack of fair working conditions, severe health problems, and premature death. The underlying problem associated with manual scavenging, from which the other problems arguably stem, has less of a spot in the limelight. Manual scavengers, in addition to the direct and visible violence such as death, are subjected to immense structural and cultural violence rooted in caste and untouchability (Shahid, 2015). "Untouchability" as an institution, as Shah et al. (2006) have aptly described, "refers not just to the avoidance or prohibition of physical contact [with an untouchable] but to a much broader set of social sanctions" (p. 21). Shah et al. (2006) narrate how untouchability is contemporarily exercised through "forced inclusion in a subordinated role", in which individuals are forced to perform "publicly visible acts of (self-) humiliation and subordination [...] such as [...] standing

with a bowed head, not wearing clean or 'bright' clothes" (p. 21). Being forced to perform unpaid or underpaid work, or being denied property, are more examples of modern manifestations of untouchability (Singh et al., 2019). Notably, it is not the case that untouchability is practised only in rural India; instead, caste-based discrimination continues in urban India, although often taking on new forms (Singh et al., 2019). Former manual scavengers in particular are consistently considered as incapable of property ownership and entrepreneurship, including by the very government officials who make decisions about whether to provide them loans (Joshi & Ferron, 2007). Especially children suffer extremely under the social sanctions imposed against their scavenging parents (Walters, 2019). Importantly, these acts are *de facto* instances of forced subordination, and lead to the denial of financial support, housing, and other necessary bases for living an adequate life.

As discussed earlier, as many as 97.25 per cent of manual scavengers surveyed by the government of India were Dalits, in addition to an unknown proportion of those from other religions who converted from Hinduism to escape their Dalit caste identity. Notably, Dalits themselves have a system of graded inequality, as specific sub-castes among Dalits are assigned sanitation work, and ostracised by Dalits of a higher caste standing. This is relevant, as we show later, as it matters little for the proper eradication of manual scavenging as a concept whether a manual scavenger receives safety equipment or not, and whether their immediate experience of engaging with faecal matter ceases to be directly injurious to their health and life. As Walters (2019, p. 53) writes: "Faeces is a polluted object, the job of removing and disposing of faeces is a polluted occupation, and the individual and sub-caste prescribed to do such work are polluted individuals and groups." By the very fact that they work with ritually and physically polluting objects—excrements—they are ostracised and subjected to inferior living conditions (Walters, 2019).

Neither governmental schemes nor the 2013 Act incorporate an accurate understanding that even sanitation work *with* equipment is deemed ritually polluting and thus leads to severe social ostracism. It is therefore not sufficient to make the immediate experience of engaging with faecal matter less or non-hazardous to humans. Rather, the problem at hand is that mere engagement with faecal matter leads to social exclusion, stigmatisation, being treated as an untouchable and systemic violence (the problem with manual scavenging). In other words, it must be recognised that the problem is with the very job of a person working in sanitation. That there is any dignified version of manual scavenging is a complete myth, which in turn perpetuates social exclusion and systemic violence faced by Dalits involved in the practice.

## Manual Scavenging, Untouchability, Right to Life and Human Dignity: The Judicial Discourse of the Supreme Court of India

In the previous sections, we have highlighted that manual scavenging is harmful not just because it is harmful to health, but because merely engaging with faecal matter is considered ritually polluting, and thereby leads to severe social exclusion, stereotyping

and stigmatisation of the individuals. The problem with manual scavenging, we have shown, is ultimately the one of human dignity. Existing literature has already highlighted that the predominant governmental approach to manual scavenging does not incorporate an adequate understanding of this. Less scrutinised, however, is the approach of the Indian judiciary. As introduced earlier, we seek to investigate to what extent the approach to eradicating manual scavenging of the Supreme Court of India (SCI) is sufficient in doing so, to which the discussion now turns.

This section provides an account of the deployment of human dignity as a fundamental right under the Indian Constitution by the SCI in its judicial discourse. As we understand it, the SCI has discussed the principle of human dignity broadly in three ways: *manual scavenging and human dignity; untouchability and human dignity; right to life and human dignity*. This section deals with the first two of these categories, to show that human dignity is merely discussed ornamentally in manual scavenging jurisprudence. The next section will analyse the third category and show that the SCI has a wide-spanning and emancipatory understanding of human dignity elsewhere that it could adopt in its manual scavenging jurisprudence. By discussing these categories separately, we work towards a critical assessment of the way human dignity as a principle and fundamental right is reflected in the judicial discourse on manual scavenging, untouchability, and generally. This will help identify shortcomings in the legal argumentation of the SCI and help construct our main argument that the SCI does not adopt an approach that can eradicate manual scavenging.

In contrast with a recent paper (Gupta, 2022), we categorically leave out an analysis of principle of human dignity in international human rights law instruments and jurisprudence of the UN Human Rights Committee, as we firmly believe that such an exercise of borrowing from Western debates ignores the vital resource that existing Indian jurisprudence emanating from a conjoint reading of the principles of the Indian Constitution provide to anchor any critique or normative analysis.

## *Manual Scavenging and Human Dignity*

To date, only two cases by the SCI have concerned relevant questions of law pertaining to manual scavenging: The Public Interest Litigation in S*afai Karmachari Andolan (SKA) vs. Union of India*, filed in 2003, and the case filed against the *Delhi Jal Board* (DJB) in 2011. In both the *SKA* and the *DJB* case, the issue at hand was the non-implementation of laws prohibiting manual scavenging and compensation for sewer deaths. In both, the SCI invoked human dignity sporadically, and even then merely emblematically. Beyond the cases of *SKA* and *DJB,* the judicial discourse of the SCI in *Indian Young Lawyers Association* and *State of Maharashtra vs Union of India* (2018) is notable. These cases discuss the human dignity principle and manual scavenging, while addressing, respectively, the larger questions of untouchability and social exclusion faced by women, and discrimination faced by Dalits. When we outline the limitations of the first two judgements, we draw largely on the latter, as they provide

a helpful framework to understand the overlap of human dignity, manual scavenging, untouchability and right to life in Indian fundamental rights jurisprudence.

As a perceived landmark judgement in anti-caste jurisprudence in India, *SKA* provides for a range of measures to try and completely eradicate the practice of manual scavenging, and outlines the responsibility of the central government and state governments towards eradication and rehabilitation. As the case was treated as a continuing mandamus for several years, the judgement motivated the government to bring about the 2013 Manual Scavenging Act to replace the previous 1993 Act. Therefore, while the case had originally been a petition seeking enforcement for the 1993 Act, the SCI deemed the 1993 Act insufficient. As we show below, however, the 2013 Act is grossly inadequate, too, as it is founded in the SCI's judicial discourse which fails to recognise that any engagement with human faeces is a violation of human dignity.

*SKA* does not discuss how manual scavenging violates the principle of dignity. The discussion is only limited to how the practice of manual scavenging is "squarely rooted in the concept of the caste-system and untouchability". That it does not discuss how manual scavenging violates dignity does not mean it does not mention the concept at all. The SCI refers to international conventions and covenants prohibiting the practice of manual scavenging, and cites Articles 1 and 23(3) of the Universal Declaration of Human Rights, which invoke dignity language. However, where the court mentions dignity, it does so tangentially and as a linguistic tool. In paragraph 23.2, for instance, it claims that governments must "provid[e] support for *dignified* livelihood to safai karamchari women in accordance with their choice of livelihood schemes [emphasis added]." This apparent complete absence of a human dignity approach in critically assessing the 1993 Act and introducing the new 2013 Act in the case that is a landmark in the manual scavenging jurisprudence leaves a critical legal void.

The predecessor to the *SKA*, the SCI in *DJB* (2011) also only symbolically evokes human dignity language. *DJB* was a civil appeal emanating from the order of the Delhi High Court directing the Delhi Jal Board to award compensation to the families of deceased sewer workers. The significance of the judgement, at the outset, is that it promisingly describes the inherent nature of the sewer work and its relation to the human dignity of sewer workers.

However, the SCI notes that sewer workers are forced to carry out the work of manually cleaning sewers because of persisting poverty and due to a lack of alternative livelihood options. The court puts forward the case that the compelling power that forces people to work in sewers in "most unfavourable conditions and regularly face the threat of being deprived of their life" is *poverty*–which stands in stark contrast to the conclusions we made earlier about caste (Para 3 and 20).

On the nature of sewage work undertaken by sewer workers, the SCI recognises it as "inherently hazardous and dangerous to life." Importantly, the emphasis of the SCI in outlining the hazardous and life-threatening nature of work points to the larger limitations of the judicial discourse in *SKA*, which excludes sewer work and

only considers dry latrines. Furthermore, the SCI in DJB argues that the inherently hazardous nature of the work means it has an explicit obligation to do justice:

> In this scenario, the Courts are not only entitled but are under constitutional obligation to take cognizance of the issues relating to the lives of the people who are forced to undertake jobs which are hazardous and dangerous to life. (Para 32)

This recognition of its constitutional obligation is central to our critique of the SCI's own failure to adequately instrumentalise human dignity as a fundamental right to address the perpetuation of manual scavenging in general.

The SCI in *DJB* only superficially outlines the relevance of human dignity. It rules that it is the constitutional duty of all the major constituents of the state, the legislative, executive and judiciary, to "protect the rights of every citizen and every individual and ensure that everyone is able to live *with dignity* [emphasis added]." In paragraph 27, it also reiterates that the definition of the right to life in Indian jurisprudence is expansive and "means the right to live with dignity, free from exploitation."[1]

Overall, while the SCI in *DJB* and *SKA* cites relevant jurisprudence, including acknowledging human dignity as an inherent right, it in neither case incorporates this understanding holistically. Instead, mentions of human dignity appear to be symbolic, as they do not meaningfully inform the Court's conclusions to the questions of the case. In the following, we now turn to the invoking of human dignity in the SCI's jurisprudence on untouchability, to assess the judicial approach.

## *Untouchability, Human Dignity and Right to Life*

The interrelation between the offence of untouchability, the aim of the complete prohibition of the practice of untouchability and the inherent human dignity principle involved in the constitutional prohibition can be found in the two landmark judgements of *Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.* (2019) and *Union of India vs. State of Maharashtra and Ors.* (2020). These cases are relevant not just as comparison in similar subject matters, but also because the SCI frequently refers to manual scavenging as an example of a violation of human dignity and right to life.

*Indian Young Lawyers Association,* or colloquially known as the 'Sabrimala case', concerned the constitutionality of the complete exclusion of women between ages 10 to 50 from entry into the Lord Ayyappa temple in Sabrimala. Though the case specifically concerned the social exclusion of women, Justice Chandrachud in his separate concurring opinion discussed the content and scope of the constitutional

[1] Cites in Para 27 the following cases: *Chairman, Railway Board v. Chandrima Das* (2000) 2 SCC 465; *Common Cause, A Registered Society v. Union of India* (1999) 6 SCC 667; especially *Kharak Singh v State of U.P.* and *State of Maharashtra v. Chandrabhan Tale*.); *Bandhua Mukti Morcha v Union of India*; *Maneka Gandhi v. Union of India*; and *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*.

prohibition of untouchability under Article 17 of the Constitution, and emphasised that human dignity is within the constitutional scope of the untouchability prohibition.

Rooted in the trinity of dignity, equality and liberty, the fundamental rights that form the foundation of the constitutional makeup categorically reject all forms of social exclusion, and imagine social reordering based on a constitutional order that promotes justice, equality, dignity and liberty of all individuals. In the SCI's opinion:

> Human dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court…In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future-of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity. (Para 300)

This linkage between the anti-exclusion principle and dignity is foundational to the court's analysis of Article 17 on untouchability, as it recognises graded inequality and the theory of 'purity and pollution' on which the practice of untouchability is based. The SCI then cites two underlying moral justifications for the prohibition of untouchability as an enforceable fundamental right:

> First, "untouchability" is violative of the basic rights of socially backward individuals and their dignity. Second, the framers believed that the abolition of "untouchability" is a constitutional imperative to establish an equal social order. (Para 323)

Under this backdrop, the prohibition of untouchability is meant to oppose all forms of exclusion and give constitutional backing to the vision of a more equal society. The central aim of the prohibition of untouchability is emphatically rooted in the dignity of those persons who were historically subjugated due to their identities in caste hierarchy:

> By abolishing "untouchability", Article 17 protects them from a repetition of history in a free nation. The background of Article 17 thus *lies in protecting the dignity of those who have been victims of discrimination, prejudice and social exclusion*… Article 17 must be construed from the perspective of its position as a powerful guarantee to preserve human dignity and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism… The Constitution has designedly left untouchability undefined. *Any form of stigmatization which leads to social exclusion is violative of human dignity and would constitute a form of "untouchability".* The Drafting Committee did not restrict the scope of Article 17. The prohibition of "untouchability", as

> part of the process of *protecting dignity and preventing stigmatization and exclusion*, is the broader notion, which this Court seeks to adopt, as underlying the framework of these articles. (Para 341–342) [emphasis added]

Additionally:

> The (untouchability prohibition) guarantee against social exclusion based on notions of "purity and pollution" *is an acknowledgment of the inalienable dignity of every individual. Dignity as a facet of Article 21* is firmly entrenched after the decision of nine Judges in *K.S. Puttaswamy v. Union of India* ("Puttaswamy") (2017) 10 SCC 1. (Para 355) [emphasis added]

In the *Indian Young Lawyers Association* judgement, social exclusion linked to untouchability is therefore consistently recognised as a violation of human dignity. Thus, according to the SCI:

> Individual dignity cannot be based on the notions of purity and pollution. "Untouchability" against lower castes was based on these notions, and violated their dignity. It is for this reason that Article 17 abolishes "untouchability", which arises out of caste hierarchies. Article 17 strikes at the foundation of the notions about "purity and pollution". (Para 343)

We will build upon this understanding to critically evaluate the problem with the judicial discourse on manual scavenging further below.

The SCI critically observes that despite the constitution guaranteeing every human being the inalienable right to dignity, Dalits continue to face indignity and social oppression. The SCI here also refers to manual scavenging, and recognises that "a section of Dalits has been forced to continue with the indignity of manual scavenging". In fact, the SCI even cites Gidla, Coffey and Spears' finding that manual scavengers face dual-discrimination, not only from the upper-castes but also from within Dalit communities, wherefore the manual scavenger caste is the most marginalised sub-caste among Dalits. The SCI expressly writes that:

> Manual scavengers have been the worst victims of the system of "purity and pollution". Article 17 was a promise to lower castes that they will be free from social oppression. Yet for the marginalized communities, little has changed… The Dalits and other oppressed sections of society have been waiting long years to see the quest for dignity fulfilled. Security from oppression and an opportunity to lead a dignified life is an issue of existence for Dalits and the other marginalized. (Para 346)

This, the court—in a case not explicitly about manual scavenging—expressly recognises that manual scavengers are the worst victims of untouchability, dual stigma, humiliation, social exclusion and discrimination, which violates their fundamental

right to human dignity. This stands in stark contrast to the discussion in *SKA* and *DJB*, which are explicitly about manual scavenging but do not make such a connection.

The above analysis of the judicial discourse also supports the first major argument of this article, which we have laid out further above: Manual scavenging is rooted in social exclusion based on the notions of purity and pollution, and violates the much acknowledged inalienable guarantee of dignity.

Before analysing the next judgement, *Union of India*, it is important to point out that SCI jurisprudence on the guarantee against social exclusion is not limited to untouchability prohibition only. In what is a categorical recognition of other types of social exclusion apart from untouchability, the court has directly recognised "the guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21." (Para 357) The SCI thus reads of different fundamental rights conjointly, and highlights how different practices can fundamentally violate the constitutional scheme founded on dignity, justice, equality and liberty.

The striking feature of *Union of India*, a case where the constitutionality of *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,* 1989 was in review before a constitutional bench, is the vast range of questions that the court poses in its analysis of untouchability and manual scavenging. Acknowledging the "ignominy and abuse" that Scheduled Castes and Scheduled Tribes, to which Dalits belong, have been suffering for centuries, the SCI commented:

> They cannot enjoy equal civil rights. *So far, we have not been able to provide the modern methods of scavenging to Harijans due to lack of resources and proper planning and apathy*. Whether he can shake hand with a person of higher class on equal footing? Whether we have been able to reach that level of psyche and human dignity and able to remove discrimination based upon caste?...*We see sewer workers dying in due to poisonous gases in chambers* [*sic*]. *They are like death traps. We have not been able to provide the masks and oxygen cylinders for entering in sewer chambers, we cannot leave them to die like this and avoid tortious liability concerned with officials/machinery, and they are still discriminated within the society in the matter of enjoying their civil rights and cannot live with human dignity*. (Para 45 and 49) [emphasis added]

The SCI further links this absence of human dignity to not just the prohibition of untouchability, but the right to life:

> Under Article 21, the right to life includes the right to live with dignity. Basic human dignity implies that all the persons are treated as equal human in all respects and not treated as an untouchable, downtrodden, and object for exploitation. It also implies that they are not meant to be born for serving the elite class based upon the caste. (Para 46)

The judicial discourse in *Union of India* expressly recognises the importance of the human dignity principle in the lives of manual scavengers, and categorically concludes that manual scavengers cannot live with dignity in violation of their constitutional rights.

## *Human Dignity in Indian Constitutional Law*

Drawing on the above analysis, this section maps the Indian human dignity debate under Article 21 of the Constitution. The above analysis has shown that the concept of human dignity in Indian fundamental rights jurisprudence has been expansively interpreted and has been oriented at understanding human suffering. It is beyond the scope of the section to map all the cases which interpret human dignity; this section will focus on landmark judgements that explain human dignity as generally understood in fundamental rights discourse.

The interpretation of the right to life under Article 21 of the Indian Constitution to include the right to live with human dignity was first conceptualised as an enforceable right in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981). In the judgement, the SCI held that "every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live." Though the SCI at the time reduced human dignity to the provision of "bare necessities of life", subsequent jurisprudence has built upon this interpretation and imbued the right with real expansive content.

The content and the meaning of the right to life with human dignity has been recently analysed and summarised in the landmark judgement of the five-judge constitutional bench in *Navtej Singh Johar v. Union of India* (2018). In discussing consensual sexual conduct between two homosexual adults, human dignity assumes a central position. The SCI unanimously holds that human dignity is integral to the right to life guaranteed under the Indian Constitution. In paragraph 127, the SCI holds that dignity is an "inseparable facet of human personality" and that dignity is at the pedestal of "a sacrosanct human right and sans dignity, human life loses its substantial meaning."

The SCI further engages with case law of the apex courts from various jurisdictions across the world, as well as international human rights law, and summarises that there is a unanimous global agreement that constitutional courts are obligated to "protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless." (Para 268.6)

## *Summary*

To summarise, we have made three key findings: First, case law on the right to life in Indian fundamental rights discourse explains that human dignity is a fundamental and inalienable human and constitutional right. Second, SCI jurisprudence on untouchability has indeed recognised that manual scavenging is an inherent violation of human dignity through the social exclusion and stigmatisation it is linked to. However, third, there is a complete absence of human dignity analysis in case law

explicitly on manual scavenging itself. Neither the landmark judgement of *SKA* nor of *DJB* critically evaluate human dignity as a legally protected good. The three strands of jurisprudence—untouchability, right to life, manual scavenging—provoke many important questions pertaining to the existing understanding of manual scavenging by the legislature and judiciary. Our discussion now turns to a critical analysis thereof.

## SCI's Failure to Take Its Constitutional Obligations Seriously

This section provides a further in-depth critique of the absence and narrow conception of human dignity from manual scavenging jurisprudence. It shows that this narrow conception of human dignity in *SKA* and *DJB* constitutes a failure of the judiciary to take seriously its constitutional obligations to take cognisance of the plight of the manual scavengers and of the problems with the conditional legal prohibition.

The complete absence of critical engagement with the concept of human dignity is complemented by a differential interpretation and differential application of dignity language for manual scavengers from the generally understood meaning. As existing untouchability jurisprudence has shown, the SCI expressly recognises that manual scavengers face the worst manifestations of social exclusion and untouchability violating their inherent dignity, a fundamental constitutional right. However, this conclusion neither finds mention in jurisprudence that is explicitly on manual scavenging, nor has this jurisprudential understanding been deployed to challenge the constitutionality of manual scavenging. We therefore contend that the SCI's approach to eradicating manual scavenging does not give manual scavenging the treatment it is due—of unconstitutionality.

Having established that the judicial discourse of the Supreme Court lacks an incorporation of its conclusions and argumentations made elsewhere, and therefore treats manual scavenging differentially when it truly matters, we can now turn to answering our research question: To what extent is this approach sufficient in eradicating manual scavenging? As we show, the problem with the approach is not simply that it has loopholes and is inconsistent with wider SCI jurisprudence. Rather, we argue, the central issue is that this leads to a refusal of the judicial and legislative regimes to take cognisance of the harmful effects of the legal prohibition and safeguards on manual scavenging, which *de facto* is permissible in law. As seen from the preceding analysis, the SCI in its interpretation of human dignity has reiterated its constitutional obligations to take cognisance and address social exclusion and violations of human dignity. After all, the 2013 Act that followed *SKA* only conditionally prohibits manual scavenging (Wankhede, 2021): It allows human engagement with faecal matter if provided with safety equipment. As we established earlier, this does *not* end the harms of manual scavenging, as the mere engagement with faecal matter leads to serious social exclusion.[2] The legal prohibition and safeguards therefore render

[2]This understanding is embedded in the social and cultural connotations that stigmatize Dalits for their engagement with faecal matter. However, we intentionally leave the empirical question of

the plight of manual scavengers invisible by not taking constitutionally mandated cognisance of the social exclusion of Dalits that manual scavenging causes. As the preceding analysis points at a complete absence of the human dignity understanding in manual scavenging jurisprudence, the direct assent given to the 2013 Act by the SCI in *SKA* informs the debacle of the judicial discourse in not only failing to critically evaluate the legislative reforms, but also in considering the legislative interventions to be a panacea for eradicating the practice. Commenting on the 2013 Act, the SCI in *SKA* held:

> For over a decade, this Court issued various directions and sought for compliance from all the States and Union Territories. Due to effective intervention and directions of this Court, the Government of India brought an Act called *"The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013" for abolition of this evil and for the welfare of manual scavengers.* The Act got the assent of the President on 18.09.2013. The enactment of the aforesaid Act, *in no way, neither dilutes the constitutional mandate of Article 17 nor does it condone the inaction on the part of Union and State Governments under the 1993 Act. What the 2013 Act does in addition is to expressly acknowledge Article 17 and Article 21 rights of the persons engaged in sewage cleaning and cleaning tanks as well persons cleaning human excreta on railway tracks.* [emphasis added]

The SCI here explicitly claims two things: First, that the 2013 Act was brought in force for the "abolition" of manual scavenging and the "welfare" of the manual scavengers. Second, that the 2013 Act does not dilute the constitutional mandate of Article 17, which prohibits untouchability, and acknowledges the right against untouchability and social exclusion and right to life with human dignity. This finding of the SCI remains unchallenged and unreviewed in judicial discourse and academic writings on manual scavenging in India.

We find ourselves in complete disagreement with the SCI's approach that empathises with the legislative reforms by way of the 2013 Act. We submit that in doing so, the SCI adopts a narrow view of the guarantees against social exclusion and right to life with human dignity as understood in the Indian constitutional jurisprudence. Had the SCI better appreciated the central premise of human dignity and anti-exclusionary principle in the Indian constitutional framework, it would not have arrived at the finding that 2013 Act furthers the guarantees under Articles 17 and 21.

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whether nurses, care workers, end of life careers, hospital orderlies etc, face similar forms of stigmatization and social exclusion undertaking the work, as it demands a comparative study of how other societies in absence of caste-based discrimination and untouchability treat their essential workers who dispose of faces disposal of faeces. We are grateful to Prof. Barbara Harris-White, University of Oxford for pointing this out and for her indepth review of this article.

## A New Argument for the Unconstitutionality of Manual Scavenging

The SCI's approach and corresponding judicial discourse is a major contributor towards perpetuating manual scavenging. This is the case even though the SCI has, on the issues of untouchability and the right to life, provided a solid basis for argumentation that could contribute more to the eradication of manual scavenging. Given our outline of manual scavenging above as a violation of human dignity, existing human dignity jurisprudence would in our view help adequately in problematising the very act of manual scavenging, with or without the protective equipment, and the conditional prohibition under the 2013 Act. Our critique provides a clear path ahead to argue for the unconstitutionality of both the very practice of manual scavenging and the 2013 Act, which we assert the SCI must take in order to advance towards its eradication.

The foundation of the argument for the unconstitutionality of manual scavenging as we envision it is to challenge the permissibility of manual scavenging *in any form*. In short, there are four reasons why we argue this, based on the integrative literature and case law review from above:

1. There is no dignified way to do manual scavenging. Protective equipment does not ensure the dignified treatment of manual scavengers. Adding a medium in between interactions with faeces does not do away with social exclusion due to the persistence of purity and pollution.
2. The physical safety and health of so-called sanitation workers therefore does not comprehensively provide human dignity.
3. The fundamental right discourse on untouchability, human dignity and the right to life prohibits any form of social exclusion. By extension, any practices that further untouchability and other forms of social exclusion are also unconstitutional.
4. The constitutional discourse on the right to life puts an obligation on constitutional courts to protect the human dignity of all individuals. The courts must facilitate measures that enable an individual to have a substantive realisation of the right to dignity.
5. Since constitutional courts are obligated to undertake judicial review of practices and legislation which derogate from the fundamental rights in Chapter III of the Indian Constitution, we submit that the apparent unconstitutionality of manual scavenging should not go unnoticed.

This analysis also allows us to conclude that the 2013 Act cannot survive the constitutional test. This is due to the violence in the legislative approach which makes the plight of manual scavengers invisible through a change in the identity of "manual scavengers" to "sanitation workers", which neglects the caste-related discrimination and social exclusion that these communities continue to face, despite the change in the terminology and provision of protective equipment.

The legislative imagination of how to eradicate manual scavenging falls blatantly short of a holistic understanding. As discussed in depth earlier, it holds that providing safety gear definitionally converts a manual scavenger into a sanitation worker (Wankhede, 2021). The 2013 Act therefore gives legal legitimacy to the practice of manual scavenging by turning its formal character from "manual scavenging" to "sanitation work", a binary we have established is misguided. This "new regime" articulates sanitation work as devoid of caste discrimination, stigma, humiliation, exclusion and discrimination, despite the fact that engagement with faecal matter itself is considered ritually polluting, and that almost all "sanitation workers" are Dalits.

The conditional prohibition therefore allows manual scavenging to continue despite the goal of completely eradicating the practice. To allow the idea of purity and pollution to continue under the garb of sanitation work and invisibilising manual scavengers is a violation of the constitutional right against untouchability and the right to life with human dignity, and does not stand the constitutional test manifested in the expansive and anti-exclusionary right to life.

We contend that there are therefore at least three things the SCI must do to in order for its approach to logically build on its own precedent:

1. It must take cognisance of the fact that its own jurisprudence on manual scavenging blatantly sidelines human dignity.
2. It must understand any engagement with faecal matter as unconstitutional.
3. It must rule that the 2013 Act, or at least the conditional prohibition of manual scavenging it contains, perpetuates manual scavenging and is unconstitutional.

A judgement of the Supreme Court that would adequately reflect the realities of manual scavenging, therefore, may be one that imposes a moratorium on all human engagement with faeces. Given that constitutional rights trump any other considerations, ensuring the constitutional right to dignity would entail prohibiting all sanitation work in which people need to interact with faecal matter, and mechanising the entire process.

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