CASTE AND LAW

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Friends

The topic given to me is 'Caste and Law'. I happen to be a lawyer among other things. So they seems to have chosen this topic for me. 'Caste was the law' in our country for centuries. Today we are discussing law in the context of overcoming Caste, in the context of overcoming Caste disabilities, discrimination, annihilation of Caste whatever it is. That very change is a very significant change. It was the law for centuries, may be not law in the modern sense. Law in the pre-modern times may not have been as universally implemented as in modern times; on the other hand it may have been more cruelly implemented when it was than in modern times. I won't go into that distinction. It was a law in the sense of being a binding norm of social conduct enforced violently by those in power. That is the characteristic of law and in that sense Caste was the law in Hindu society for centuries.

Today things have changed to such an extent that we are able to discuss what is the role that law is playing in overcoming caste. The reason being that the very expectations about law have changed. Law in the sense of Dharma, the expression used in Hindu society is merely a declaration of the nature of the world. Dharma is a declaration of; this is the nature of the world, that is Dharma, unalterable nature of the world. The way it is created by the creator.

Today the expectation is, yes, even today law does declare that this is the sanctioned order of society. It still does so. Simultaneously law also provides scope for change and it is there that we are locating the discussion of law vis-à-vis caste. Time given to me is slight, but this is a topic which one can expound for any amount of time.

There are three things that we have to look at. One is the constitution of India vis-à-vis caste, second is the other legal provisions, statutory provisions, third of course is the courts. Courts are very important because the law is not what the legislature made, the law is what the courts say the legislature made. That is a very important distinction. Even a lawmaker, either an M.L.A or an M.P cannot say I made a different law. He is not allowed to say. Once the courts say this is the law you have made, that is the law and the legislature

will have to amend the law if they feel this is not the law they made, which for instance happened very recently when the Supreme Court of India seven judges declared it is unconstitutional to direct the private sector colleges to give reservation. That judgment is unconstitutional. But even if the constitution makers had been alive today, they would simply have to amend the constitution, they cannot do anything. And they have amended the constitution now, a totally unnecessary amendment caused by unconstitutional judgment. That's just to illustrate the …..

When you look at the constitution, a positive significant feature is that it outlaws caste. It declares that not only untouchability is declared to be unconstitutional, but any discrimination on the basis of caste is declared to be unconstitutional and this is placed in the chapter on fundamental rights. So it is a fundamental right of every citizen not to be discriminated on the ground of caste. That is the positive feature of the constitution. It is a positive right, not to be discriminated on the ground of caste among other things, on the ground of religion, on the ground of gender, on the ground of community, language, region but also caste.

But otherwise , and this is a general criticism we can make about the constitution of India, that it does contain a number of goals, objectives, directives which are in the direction of social, economic and political justice, but its instruments are very weak. The constitution of India is positive from a Human Rights point of view to the extent that it does include a number of directives and goals which are conducive to the enlargement of Human Rights. But the instruments it provides are extremely weak. And that is not an accident because the assumption underlying the kind of constitution we have is that it is the administration which is going to bring about the change which is, let us say hoped for by the constitution and not positive initiative from the effected people themselves. Now if we had had a constitution which relied on the initiative of the concerned people, who need the rights, who need justice, for achieving justice the instruments would have been stronger. Instruments are weak precisely because the reliance was placed on the administration, the legislature and the executive to bring about the changes, which was unrealistic and ofcourse has largely failed.

So instruments are weak. But they were weaker than even intended was discovered by the rulers of this country when reservations in education, which were there prior to the constitution, both in British India and in Indian states, at a time when neither British India had a constitution with welfare goals nor the Indian states had constitutions with welfare

goals, yet, atleast in south India there were reservations in educational institutions. But after getting a constitution which has a goal of social justice, political justice, economic justice, it was found that reservations are unconstitutional. It did not strike the judges of the Supreme Court that it is a very odd judgment to have given.

That till yesterday they were lawful. They were being implemented, in Madras, Mysore they went back to 50 years prior to the writing of Indian Constitution, in societies, in states which had no binding or mandatory constitutional goals of welfare or justice, but having got a constitution which declares such goals it was found that under the constitution reservations in education institutions are unconstitutional. And then constitution amended and article 15 clause 4 had to be included, which is an instrument, a mild instrument but still an instrument, that it enables once again the state to make special provisions for socially and educationally Backward Classes. Why they use the word Backward Classes, why did they not specifically say caste was it good, bad it is a very big discussion, which I think I don't have time to go into. But they used the word Backward Classes. Once again, it is formulated as something which allows the government to do something rather than as an instrument in the hands of the people to achieve something, to achieve change, to overcome discrimination. For a long time it was seen only as an enabling provision that if the government wants to it can give reservations. That is all article 15(4) was supposed to mean. Similarly article 16(4) in employment. It took a long time for the Supreme Court to express the view that it is not merely enabling, it is a positive right and that view survived only for five years or six years, again this court has gone back to the old view.

1989, Justice Madan in one judgment said if a class of citizens are, as matter of fact socially, educationally backward, they have a right to be given reservations. They have a right to ask for it and take it. And he deduced this not by going into Indian history, the specificities of caste and caste discrimination, but from a well accepted principle of administrative law. That if the government has a power to do something and that power is for a public purpose, then it must do that thing, it can't say it is my will and pleasure, I will do or I won't do. For instance, it has a power to give drinking water it can't say whether I will give or not, it's my will and pleasure. It has to give because it is for a public purpose.

There may be other powers the governments have which are not for public purposes, that is the discretion of the government. So this is a simple principle which everyone will understand. Applying this to reservations justice Madan said since giving of reservations is

a public purpose, it is for taking society forward in the direction of an egalitarian society, in the direction of social political justice, economic justice, therefore the power to give reservations is not discretionary; you must give if the conditions are there. 1989 he gave this judgment, 1996 the present chairman of the National Human Rights Commission justice Anand went back on this and said nothing doing, it is only enabling provision, if the government gives you take otherwise you have no right to ask for it. That is the law today.

As I said what the constitution is, is what the courts declare it to be. And now the courts have declared that this provision, which goes a little beyond merely declaring caste to be outlawed, which allows people who have been discriminated on the grounds of caste to have some benefit, something which will enable them to go forward from what was perhaps intended to be an instrument in the hands of the people, it was relegated to merely an enabling power in the hands of the government alone for a long time, for a very short time it was declared to be an instrument, again it has gone back to the old view. That is the way courts have been interpreting. Infact when you talk of reservations, if one goes through the entire history of the supreme courts, one must say its struggle with the concept of reservations, our courts are the bastion of the upper caste for a very long time they continued to so. It is the one area where they are resisting very strongly any notion of reservations. And the struggle that these judges have had with the notion that caste is a very fundamental reality of Indian society, that positive measures are required to overcome caste, the struggle that they have had with every notion is very obvious if you go through all the judgments. It took a long time for courts even to say, in the beginning they went on saying that everyone should have equal opportunity in employment and education, so giving reservations is an exception to equal opportunity, that is what they went on saying, that reservations are an exception to equality. It sounds absurd. But that's how they formulated it. Here equality meant equality in the sense that every application has to be equally treated when you go for employment or for a seat in an educational institution, that was equality. So giving reservations is an exception. That is how they saw it for a very long time.

It was 25 years after the constitution was written, that for the first time they have said reservation is not an exception to equality; it is something in the furtherance of equality. It should be obvious. It took the judges of Supreme Court, the most meritorious judicial brains in the country 25 years to say this. It is something which is in the furtherance of equality. But today if you go through the recent judgments you will find out

that they are going back, they don'y declare it that they are going back but they are infact going back.

And today the reality which I think citizens have not fully realized is that whether any class of people will get reservations or not is not going to be decided by the government, which all said and done, inspite of corruption, inspite of everything, they have to be elected and therefore they are responsive to social conditions, they are not going to decide, the courts are going to decide. The courts have gradually usurped the power of the government to give reservations without declaring it to be. They can't declare it because the constitution won't allow them to declare. But in fact they are doing so. Infact they are doing so.

And a very recent judgment of our High Court when they struck down reservations given to Muslims. A principle laid down is that, I won't go into the technical details, a principle of proportionality which was developed in American administrative law recently has now been imported by at least one judge of our High Court who says we will not only see whether you have the power to give reservations, we not only see whether you have enough data with you, we will also see whether it was proper on your part to give reservations. That means we will decide policy. That principle proportionality he said we will enforce in the matter of reservations and that is the ground on which five judges of the High Court struck down the reservations given to Muslims declaring that the High Court thinks Muslim don't deserve reservations. The high court has no business to think this way or that way. It only has to see whether the constitutional power is there with the government, have they followed it in a rational, reasonable manner. That's all. Policy making is not their business, but they have declared it and we can be sure that in future issues of reservations the policy is going to be determined one way or the other way by the courts. One judgement after the other one can see this trend.

If I am focusing on reservations it is not because it is most the important thing. It is the only thing available. As I said in the very beginning the instruments available in the constitution for overcoming caste disabilities and discrimination are very few. As in general the constitution's instruments for achieving the goals of social economic and political justice are very few and slight in number. Reservations is one and even that has been disabled in this manner, especially, infact mainly by the courts and their understanding so that repeatedly parliament has been forced to amend the constitution. Two amendments have come. One is that in promotions also reservations can be given.

How did the courts discover it can not be given one does not know. If you look at the declarations being made by the courts, in the matter of reservations they don't even give reasons. They are supposed to give some reasons. If you say something you must give a reason. They don't even give reasons. They declare in oracular manner.

For instance we are all familiar with the principle that total reservations shall not exceed 50%. In the beginning they used to say this because, for 25 years after the constitution came into being they held that giving of reservations is an exception to equality. Equality means all applications forms are to be treated equally. So you are treating some application forms separately so that is an exception to equality and it stands to common sense that exceptions cannot be more than the rule and therefore reservation cannot exceed 50%. No greater logic than this was there. Reservations is an exception to equality, exception cannot be more than the rule. It would defeat the whole meaning of exception, therefore reservations shall not exceed 50% is what they have said in the beginning. Now after 1975 they are supposed to have said reservations are no longer exception to equality, it is in furtherance of equality, still they stick to the old rule of 50% as maximum limit, there is no logic left. There is no reason. They still keep on proclaiming that limit without any rationale, without any reason, any logic. And Supreme Court expects every lower court to give reasons, it won't give reasons. Lower courts are told you must give reasons because I have to sit in appeal, I must know why you have given the judgment. I won't give reasons because only god is there, and nobody goes to god for appeal.

These are general bad habits of the courts, but these bad habits create kais when they are applied to socially necessary legislations, socially necessary positive action. This is as far as the, the one instrument available in the constitution for overcoming caste disabilities goes.

Then I will touch the other very important law which again has played an important role in giving strength to the, especially scheduled castes and scheduled tribes that is the penal law usually described as the Prevention of Atrocities Act, Scheduled castes and Scheduled tribes Prevention of Atrocities Act. All those who are active in Dalit movement, or Human Rights Movements or any kind of social movement are aware that this is a law; infact it is an unusual law in the sense that it is very well drafted. Usually laws which are meant for the benefit of the powerful are very carefully drafted, laws which are for the benefits of the weak are very badly drafted. I am not making a rhetorical statement. I can

prove it. They are very badly drafted because they just don't care. You make a law because somebody said you have to make a law, and you make a law. That's all. Income tax act is very carefully drafted. Recent legislation that they have made for banks to recover loans are very carefully drafted. You look at the protection of human rights act; you cannot make sense of the act because it is so carelessly drafted. You don't even know what the act means. It is so carelessly drafted. Look at the persons of the disabilities act for physically disabled people very badly drafted. The one well drafted legislation which is for social justice is the scheduled castes and scheduled tribes prevention of atrocities act. Well drafted though there are a few defects. If find time I will speak about them. But this act has been destroyed both by the executive and the judiciary. It is the only law which says that not doing your duty under this law itself is a crime. In India not doing your job is not a crime. It may not even misconduct. If you look at the conduct service rules of government servants, doing business is misconduct, talking of politics is misconduct, not doing your job is not misconduct, various other things are misconduct. Similarly for a policemen not to do his job is not misconduct. This is one act which says specifically that willfully not doing your duty under this law a crime, not merely misconduct, it is a crime punishable with one year imprisonment. If any other law had such a provision the police would have been so careful in giving effect to the law, but they know that this will never be used by anybody and so they are so casual about it. And courts have played their role in disabling this act in many ways. I will give two or three instances. Our High Court of Andhra Pradesh has been at the lead in these matters.

One is that many provisions in this act say if a person belonging to schedules caste and scheduled tribe is beaten, assaulted, insulted, humiliated on the ground that he or she belongs to SC or ST then it's an offence. Now the courts say if it is not clear that it was done on the ground that the person belongs SC or ST, this act is not applicable and so we will strike down the case.

One defect in this law which was not there in the earlier law the protection of civil rights act, what was the original anti-untouchability act had a provision which says that if any one commits an offence under this act it is presumed by law that it was committed on the ground that the victim belongs to the scheduled caste. A presumption was there in the old law, which was not included in this law. But courts could have read the presumption into it. Courts do so very often when they want to. A presumption could have been read that social structure being such if a non-dalit person insults and humiliates dalit person it

can be presumed that the mindset of society has operated. It can be rebutted by the accused. That is a presumption.

Instead courts have said because the law said on the ground that the victim is SC or ST , unless that is specifically stated there they won't allow the prosecution to go on. And this is not at the end of the trial, this is on the complaint itself. So an illiterate dalit who goes to a police station gives a complaint saying so and so came and abused me in the name of my caste and humiliated me, will also have be to remember to add one sentence that he said this on the ground that I am dalit. Everybody has to read the law and go to the police station , because that FIR itself will be questioned in the High Court by the upper caste person and the High court will say because it is not said that on the ground that he is a dalit, it is said we are quashing the investigation. I am not joking. It is happening day in and day out in the high court. Now these are not accidental, these are not accidental because if you sit in the High Court or any court for that matter and listen to the comments being made by the judiciary, only in the context of this act that is SC and ST preventions of atrocities act and in the context of domestic violence, section 498(A) of the Indian Penal Code, you repeatedly hear the judges commenting these are false cases. You will repeatedly hear the judge and the lawyer everybody openly, casually, laughing and joking and saying we all know very well my lord these are false cases.

Judge also nods his head, that these laws are misused and abused. Now every law is misused and abused. Lawyers are, they are mainly for that. They are not meant for implementing the law, they for misusing and abusing law. That is the whole profession. And some laws in fact are meant only for being misused like Income Tax Act is meant for being misused. Income tax practitioner is one who will tell you how to misuse the Income Tax Act. He is a very noble practitioner, he can become a judge also.

So it is not the accidental that only the misuse of these particular statutes is commented upon, it is not accidental because the mindset is that these laws should not be there at all. The mindset of the judiciary and the entire profession is that these laws should not have been made at all. Now they have been made, we will look only, we will pick holes in these laws and in their enforcement, we won't see about how they are to be enforced.

Another rule in this S.C, S.T Prevention of Atrocities Act says that an offence under this act has to be investigated by a police officer of rank Deputy Superintend of Police, not by a sub-ordinate. It must have been only to ensure, because a sub-ordinate police officer presumably will be influenciable by the local upper caste people, therefore they wanted , I

am assuming, a higher officer do the investigation. What happens is if the sub-ordinate will file the charge sheet, the accused will come to the court and say charge sheet was filed by a sub-ordinate, you quash it, the High Court quashes the charge sheet. Something which was meant for the victim is used as the protection for the accused. And our High Court is doing it systematically, some judges differed, it went before a larger bench, they also said it has to be quashed.

There is another provision which says that if somebody humiliates a person belonging to the Dalit or Adivasi communities, the provision says humiliated in a place in public view that's an offence. In a place in public view specifically means it need not be viewed by anybody, it is not as that you have to be humiliated only in the presence of some person, but if it is an open place which could have been viewed by anybody that is sufficient to make it an offence. High Courts have systematically read down a place in public view to simply mean public view. So our High Court has given a number of judgments saying nobody was there, therefore it is not an offence. The law doesn't say so. The law doesn't say somebody must have seen the or heard the humiliation. Law says it should be an open place, at that point of time nobody may have been there. It should be a place which is open, it could have been viewed by anybody and not entirely a private place. It can even be a somebody's house if the window is open. That also will be a place in public view. But our High Court interprets and practically reducing place in public view to simply public view. Now a different view has been taken by another judge, and what will happen we don't know.

I am saying this because police and judiciary have come together to destroy this law and the various provisions of criminal trial have been abused by the accused to defeat the fundamental , a very important purpose of having this act at all, which purpose was to have a quick and efficacious trial. The whole point of having a special law, special courts and special public prosecutors was that in such offenses if the trial drags on for a long time the victims will get demoralized. And the accused will again threaten them, will again use a number of methods of trying to cow them down, to wear down their resistance, to wear down their determination to avoid this the law has intended, a special law has been made, special courts have been setup to ensure that cases are disposed of fast. That's a declared purpose of the law, not to be interpreted by anybody, it is declared purpose of law. Law itself says so for quick and speedy disposal of the cases. That should be kept in my mind by all courts. At every stage the accused come to higher court on some plea, the higher court

stays the entire prosecution without even looking into the what was the purpose of this law.

And we have the classic case in Andhra Pradesh. We are now in the fifteenth anniversary year of that offence, a massacre of eight dalits in Tsunduru in Guntur district. It happened in August 1991. we are today in August,2006. The trial is still going on in Guntur after fifteen years. The upper caste accused used every possible mechanism to come to the High Court and get it stayed for a long time. High Court judges did not even look into the purpose of the law. The purpose is speedy trial. O.K if he has come to the court, you hear him, hear him that day itself, within one week you send it back one way or the other, no, you keep it pending. You stay the whole thing and keep it pending.

First they came to the court and said the Dalits are all Christians, therefore they are not scheduled castes. Unfortunately the act defines scheduled caste as the same as in the constitution. And we all know that converts to Christianity or Islam , for various reasons, entirely political, nothing to do with social realities, they decided to exclude such converts from the definition of scheduled caste. May be in urban areas there is some difference between a convert and a non-converted SC, but in villages its all identical. They are not even treated differently. Andhra Pradesh, Tamil Nadu we have huge areas where scheduled castes have converted to Christianity. There is no difference at all. Everybody knows this. It can be used only in a court of law or to defeat reservations. So they came to court saying they are Christians. So we cannot be prosecuted under this act under in this special court. The High Court kept it pending for a long time. Then the High Court said let it be determined by the district court. Fortunately the pastor of the local Baptist church came and said they never come to my church at all, they are not Christians. He gave evidence. So it was accepted that they are Dalits not Christians.

Then the next stage. Should the court hall be in Guntur or in the village where the atrocity took place? Government has a power to set up the court anywhere. It decided to set up in that village. Again they came to the high court. Not once, twice they came to the high court on this, again got the whole thing stayed. That act also empowers the government to appoint a special public prosecutor who is desired by the victims. It's again a very special law. Normally the victim has no choice. Infact one of the defects of the Indian Criminal law is the victim only is a witness. You are the victim of the offence, once it goes to the court; you are simply a witness and nothing else. But this act says that the victims can also say we want that lawyer to prosecute. That is permitted by this law. So one civil

rights lawyer is appointed by the government that again they come to the high court and challenge and get its…….(not recorded)

Legislature made a law is what the courts make of what the legislature made. And the courts have made this out of the SC, ST prevention of atrocities act, that it is treated as an unwanted piece of legislation which unnecessarily interferes in the normal course of adjudication, unnecessarily interferes in the healthy course of social life, unnecessarily creates conflicts in villages. That is the attitude of the Sub-Inspector of police, it is the attitude of a judge sitting in a court, majority, I am not denying exceptions are there. And that's how this act has been now almost made, I won't say useless, but its utility has been reduced so much. And ofcourse on this side also Dalit movement and Human Rights Movement, we too have not been able to really make use of the wide provisions available in the act except merely to file a complaint under section 3 sub section 1subsection 10 that is the only complaint that is filed. The number provisions available , we have been repeatedly advising and trying to help but the weakness of Dalit Movement, the weakness of Dalits themselves , their very backwardness makes a difficult for them to make the full use of the law which again becomes a disability.

I think my 25 minutes is over so I am have to stop here. I have briefly attempted to tell you caste and law in the context of the constitution the most important provision being reservations and criminal law the most important being the SC ST prevention of atrocities act. And in particular I have said how the courts have perverted law and the constitution which itself was imperfect, not in its goals, but in its instruments. I will stop here may be you can have some discussion. Thank you.

Q&A

Q1. My name is Laxmanan. I am coming from MIDAS. My question is related to reservations issue that is does ICSSR institutions and UGC are complementary institutes are confronting institutes because some of the ICSSR institutes does not have a reservations and also refuse to even add a sentence the institution is equal opportunity institution and deprived section are encouraged to apply, a sentence which refused to carry the advertisement, such a level of ICSSR institution is there, few years back series of articles carried by EPW on the status of ICSSR institutions where they cover only how the academic, ICSSR research has been quality and other things, but they are completely negated how far

the ICSSR institutions are sensitive to the social justice issues. I am raising this issue because in the larger context what arguments they have been posting against when the people are demanding reservations in the ICSSR institutions that ICSSR institutions are not a creation of statute and it is an autonomous body, so there is no need of following reservations and despite being a 50-50 matching grant from the respective state and HRD ministry. How we deal with this kind of a issue.

A: See the HRD can direct the ICSSR institutions, that is the government of India can direct those institution to implement reservations and they will have to do so, because the government has the power to implement reservations in every institution which is controlled by it. And I am sure ICSSR institutions are controlled by government both in terms of policy and also interms of finances. The defect lies with the government itself. And you are talking of the UGC, what is the attitude of UGC itself? Hyderabad University which is a central university, which is bound by all law which applies to employment in central government and therefore by the Mandal commission, the Mandal commission recommendations were upheld by the Supreme Court 14 years ago in 1992, today we are in 2006, till today University of Hyderabad does not give reservations for OBCs. A writ petition was filed in the High Court. High Court asked the UGC to say what is your view. UGC won't even file an affidavit saying this is my view. And then we moved a contempt case against UGC chairman Mr Hari Gowtham, he used to go all yagnas and everywhere, wherever these things are to be --- he never comes to a court. Finally we got him to the court. He came to the court, apologized for not telling his view, but still did not tell his view, and he has gone away. So UGC's attitude is no different from that of the ICSSR. The question is the attitude of the government of India. What is the government of India doing? It has every power in law to direct any institution under its control to give reservations. It is not doing so. And the people are disabled because as I said the judgment of the Supreme Court now says it is an enabling provision, not your right. If the government gives you take, you can't ask as matter of right, this was what justice Anand who has now become the chairman of National Human Rights Commission, because to become the chairman of NHRC no qualification is required other than that you are a former chief justice of India, nothing more is required. So he is sitting there.

Q: I like your presentation immensely; I am Rodrigues, but just to poke some devil's doubts in your presentation. Now if you think that the kind of law that exists is not favourably disposed towards Backward Classes and particularly the Dalits. Why do you want to suggest at the

end that Dalits have not come to explore the range of possibilities that law itself offers? Why should Dalits invest their energies, time and resources into a project which you yourself seems to be suggesting, you know basically keeps them in bondedness. This is one. The second one is, I thought that there are two central provisions within the constitutional provisions. One is the provisions on Backward Classes, and I entirely go with your argument. But there are other provisions for Scheduled Castes exclusive. Now there has been a huge controversy in India whether those provisions have been good or bad for Dalits. But I have a feeling that today that argument is largely settled interms of organized Dalit opinion saying that reservations have been good for Dalits. Now these are constitutional provisions. What is your comment on this

A: As far as the first question is concerned, I think I specifically said the Prevention of Atrocities Act is a well drafted law, it's a good law, quite a comprehensive law, drafted by some people who had a notion of what really happens in …… My point was that the law has been enervated by the executive and the judiciary in giving effect to it, judiciary in interpreting it. And therefore it is worthwhile fighting. We are fighting; it is worthwhile fighting to ensure that the spirit of the law is actually implemented. There are some defects are there. I said for instance the presumption, given the nature of our society if somebody who is a non-dalit humiliates a dalit, it should be presumed that it was done on the ground of caste. It is for the person to rebut it saying I had some other reason. That lack of the presumption is a defect. Such defects are there, but the law itself is basically good and well drafted. Infact I also said it is a rare case of a law for social justice which is well drafted. That is the reason why I believe it should be used much more extensively, it can be used much more extensively.

As far as reservations are concerned I don't think there is any real doubt that they have done a lot of good. And they are still capable of doing a lot of good. Problem is that the withdrawal syndrome we are now seeing, the government, it has every power, I want to say this because the Supreme Court is sending out wrong signals. The only difference between public sector and private sector is in the case of public sector government can itself give reservations by merely passing an executive order, in the case of private sector it has to make law. That is the only difference; nothing else is there in the constitution. Rubbish is being written by the judges of Supreme Court saying that it has no power to direct the private sector even by law to give reservations. That is rubbish. But then with the gradual withdrawal of the government from various activities, handing over things to the private

sector, it effectively amounts also to the withdrawal from reservations as a principle, and instead of this, Manmohan Singh, Prime Minister saying we will give reservations, he goes on saying. You tell us how you discharge your social obligations, he says this to Reliance and Tatas and so on. My question is what will Manmohan Singh do to discharge his obligations forget about Reliance and TATA. He as a leader and Prime Minister of this country what is he and his government is going to do for discharge their obligations. He says you tell us what you will do to discharge your obligations. They will put it very nicely. They will say we will do everything possible to encourage Dalits to become directors. Everything possible is everything is possible. That's all. It may turn out to be impossible later. In this context, I think the struggle to ensure that these provisions of reservations are extended to the private sector, implemented honestly is essential and all this talk of reservations going only to the rich among the Dalits and so on is rubbish which the upper castes are doling out that has to be opposed.

Q: Balagopal I don't think you require any appreciation, it has been your continuous commitment to the critique of law. I must share that with you since yesterday we are finding problems with the institutions. There are some ---you can still retrieve and recover institutions, which is fine I suppose. But your argument goes against what we have been holding, our faith and our confidence in institutions is really veering down. I have just wanted to make a small supporting point, I agree with you that the courts at the lower level are little more casteist than the higher ups. Let us give them concession. I also agree with you that by not presuming the mindset also declared their one sort of casteism , the mindset which is built up around casteism. It is against the Dalits for example it is not presumed. But in a reverse fashion presumption is very active. Let me give the example of the Bhavari devi judgement of, I think the district court, where the honourable justice says how can a Brahmin ever think of raping an untouchable woman. So the presumption is there. That is enough. You can't do it

A: I only disagree with your initial observation that casteism is less in the higher courts and more in the lower courts. As a matter of fact, even interms of composition you will find more judges from a deprived background in the lower judiciary than in the higher judiciary. Higher judiciary is very bad especially in its view of caste, may be in other areas it is a little more mixed. In general about the Supreme Court one can say this for the last ten to fifteen years it has been at the forefront of rewriting law in defence of what you call globalization. Globalization is not merely about the economy, it is a total attitude towards

society, social development, history, human rights and everything. Supreme Court has been at the forefront. Parliament has not amended any law. If you actually see parliament has not amended a single law to suit globalization, Supreme Court is doing the job. It is doing it very effectively and sitting there, they say that criticizing us is contempt of court and we don't have to be elected, they are the most meritorious, they come through merit. That part of your comment I disagree.

Q: in 1989 when this act was passed Upendra Bhakshi , he gave a public lecture and I was present for the public lecture and he wrote on this particular law saying that it is going to be a major revolution in law. I am hardly building up on the kind of arguments that you were suggesting. The legal community might perceive something as very eadical but as you are arguing now, but even these radical laws eventually begin to be so puny. Colud you comment on this that very often radical judgments, even the 1975 judgment that you are referring to, eventually they turn out to be so puny interms of their reach and implications. Do you only ascribe it to the kind of society that we are in? or is it there is something built into the legal institutions which actually leads to this kind of an outcome?

A: I think essentially it has to do with the kind of society we are living. You said about legal community, the entire legal community never reacted to the 1989 act as Upendra Bhakshi did. He was in a minority. Ask the majority of the lawyers sitting in any court they will talk of this act with all the contempt that they have for the Dalits. That is the attitude frankly. What happens is when you make a law, which goes against social structure it comes into a collision with social structure. Now in that collision on the other side there is a very powerful social structure, on this side there has to be a force which will push it, which will fight, which will struggle and overcome. If that is wanting, if that is lacking then the law will be…. law itself is nothing neither it is only something which enable peoples to do something. The people should be able to get organized and fight and that is where the weakness of organized Dalit movement comes in. I think about Andhra Pradesh we can say that approximately from 1985 to 91, 92 we had a good organized Dalit movement, subsequently it has been badly splinted for various reasons. I think it is true of Karntaka, I happen to know. Tamil Nadu also to some extent. So the social structure itself not only was that historically unequal, it continues to be unequal also interms of political strength. That has weakened the act itself. I would put that as the main reason.

Q: you have I think very eloquently described the perversion of institutions. You must tell us what is the sources of this perversion. Is it a constitutive design failure, in the sense that the

institution has been constituted in a perversive manner or is the institution fine but the operators are perversive, and therefore no reform suggestions are possible? Secondly if this is the case then what are the alternative institutions need to be constituted and what is the nature of these alternative institutions? Then let us take up the case of law itself.

A: In the context of judiciary, what has constituted the judiciary is the constitution itself. And I think as I said in the very beginning, one of the defects of the constitution is that it's goals are by and large acceptable to those with a democratic view but its instruments are weak. In that sense the very constitution of the institutions is such that reliance is placed upon the executive, the administration to push through the goals of the constitution rather than empowering the people through proper constitutional instruments to achieve it. To this is added, as you have said the operators of the institutions, not in terms of individuals but social classes. In the case of caste, it is social castes, the communities which are sitting there. Even if you have a judge who either comes from a deprived community or has a point of view which is congenial to the rights and welfare of such communities, the way they are hesitant to express it when they are sitting in the court, justice Savanth was a judge of the Supreme Court, only after he retired one came to know that he is an ardent follower of Jyothiba Phule. it was never known when he was sitting in the Supreme Court . He is a very intelligent judge, has written very good judgments but that inhibition that he shall not express his point of view which others who have a Brahminical point of view or a capitalist point of view never hesitate. So here you have the failure of the system through the human aspect is not only that those who are from dominant positions in social life are sitting there, even those who come from the dominated positions feel inhibited. The totality of it has functioned I think.

As far as the constitution is concerned, there was discussion about review of the constitution, if we are going to review it; the urge for review came from a negative Golwalkarite viewpoint, which was destructive of the positive elements of the constitution. But a review for providing more enabling instruments to the people would be fruitful. The other is a constant public criticism, which will strengthen the voices of those in the judiciary who are for a greater democratic perspective, and for the internal composition also demand has repeatedly being coming up just as we have reservations in other academic areas and other areas why not also in judiciary. These I think are necessary whether they are sufficient I cannot say. These are necessary to begin with at least.

Q: what I think is that I find very difficult in the way you approach the law. Is your faith in it? You do criticize it; everything that you say is a criticism is of how the law is functioning, how judges behave, how actual procedures are mistaken and misused and so on. There is enormous critique of what is happening. But underlying all that is a total faith in that institution. And I think that is the strength with which you proceed and you know that I would be grateful that we have that strength available to us in this context. But I think that is where the relationship of a political unit to an institution is obscured in that kind of faith in the institutions, that a political challenge to an existing order will only come through not a rejection of the institution, not necessarily wholesale rejection of the institutions. But some kind of pressure at the institution itself that there must be a challenge of the law and the operations of the law, the conceptual formation of the law, its mode of thinking, not just the challenge of the corruption of the law which I think you do with as much imagination as I could ever hoped any one that anyone could do.

A: I don't really have that much faith in the law. Infact I began by saying that the constitution itself is inadequate. The constitution is a foundational law. It is inadequate in the sense that it has not empowered the people to achieve the goals and rather depended upon administration and that would be a fundamental critique of the law. If I have spoken more positively it is because the second instance I took up that is the 1989 act. That is a rare instance of a well drafted law, which I have pointed out one defect that the presumption is not there which was there in the protection of civil rights act. Otherwise it is a well drafted law. If I have taken some other law, I would have probably criticized the law more than the judges. So I definitely don't have any such….. And even if I had such a faith before I became a lawyer after becoming a lawyer it is impossible to have such faith in law. Because you know what law is?

Q: --a distinction between law and laws that they would be bad laws, badly drafted laws well drafted laws and so on. But that if you saying here is an institution call the law, the judiciary, the law, it is a very central institution of liberal political line the tension with that institution itself is something that practitioners like you, appellants , victims, etc should be encouraged to develop?

A: That is an altogether different of level of discussion I think. Whether we can imagine a society which does away with the notion of a central law itself. It is a discussion which is possible but not in the context in which I have been asked to speak today. I would put it that way.