

Redefining Justice: Legal Scholarship in Critical Caste Studies

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Background

In October 2023, Brandeis University's *CASTE: A Global Journal on Social Exclusion* held the Sixth International Conference on the Unfinished Legacy of Dr. B.R. Ambedkar, centered on the theme "Law, Caste, and The Pursuit of Justice." The idea behind the conference was to explore the relationship between caste and law and establish the groundwork for developing anti-caste jurisprudence. At the conference, the Chief Justice of India, Dr. Justice D.Y. Chandrachud, delivered the keynote address titled "Reformation Beyond Representation: The Social Life of the Constitution in Remediating Historical Wrongs."

During his address, the Chief Justice highlighted several key points. First, he noted that the institution of law has often been used to maintain existing power structures and institutionalize discrimination, leaving behind a legacy of injustice that still shapes the lives of marginalized social groups. Second, he discussed how Dr. Ambedkar attempted to institutionalize social revolution through the law. Third, he mentioned that arguments in courtrooms often demonstrate a constant struggle between the constitutional aspects of the law and entrenched social practices. Fourth, he referred to Dr. Ambedkar's characterization of "social practices" as a law within itself, imposing social sanctions and violence on those who do not comply. Last, he emphasized the need for society to adopt a radical agenda through constitutional means that target structures of discrimination.

In this background, I will reflect on the significance of integrating a critical analysis of law and legal systems within the Critical Caste Studies movement. This is significant for two reasons. First, legal academia and scholarship in India, which is largely dominated by the oppressor castes, has been mostly "caste-blind." The only exception to this has been the discussions surrounding affirmative action and some of the most grotesque caste-based atrocities. Second, the anti-caste scholarship has, for

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the most part, ignored the field of law in examining how caste and casteism are deeply entrenched in our contemporary laws, policies, and institutions.

The notion that law facilitates racial subjugation is a theoretical framework advanced by Critical Race Theory (CRT) scholars. CRT originated in the American legal academy in the 1970s and expanded to other fields of study during the 1980s and 1990s (Crenshaw et al. 1995). CRT scholars argue that racism is not always explicit and overt but is deeply and pervasively entrenched in our structures, such as laws, policies, norms, and practices. CRT was a response to critical legal theory, which ignored the questions of race and racism when analyzing the legal systems.

Critical Caste Theory or Critical Caste Studies (CCS) is a discipline that has been inspired by CRT in America and partially took root due to the discontent amongst anti-caste scholars around the invisibilisation of caste in mainstream scholarship but also as a need to produce original scholarship on caste. In particular, in 2016, the suicide of a scholar from the Dalit community, Rohith Vemula, sparked a radical conversation on caste. In his suicide note, he wrote: “My birth is my fatal accident.” This incident led to street protests and started a renewed conversation on the ways in which caste has been institutionalized and the need for a critical study of caste in contemporary times.

Although the coinage and popular use of the term “Critical Caste Studies” is new, its roots and evolution are in anti-caste thought. Critical Caste Studies, regardless of when it was recognized as a distinct discipline, can be traced back to the works of Jyotirao Phule and Dr. Ambedkar, two leading anti-caste thinkers in India from the nineteenth and twentieth centuries, respectively, who raised questions about the structures and patterns of exclusion that reproduce the caste system.

Phule, Dr. Ambedkar, Structures of Discrimination, and CCS

Interestingly, in his book *Gulamgiri* or *Slavery*, written in 1873, Phule referred to the system of caste as a system of slavery while also dedicating the book to nineteenth-century Americans who abolished slavery. He theorized how the Brahmins devised various ways to perpetuate their interests (Patil 1991). Phule’s writings reveal a distinct field that studies the invisible structures that reproduce Brahmanical supremacy and privilege, akin to what CRT scholars have identified as “Critical Whiteness Studies” (Applebaum 2016).

Dr. Ambedkar referred to the caste system as a system of “graded inequality” (Ambedkar 2020a). Like Phule, Dr. Ambedkar also critiqued India’s ruling castes. He argued that the intellectual class in India is just another name for the Brahmin caste, and so long as this class is opposed to reform of the caste system, the chances of annihilating the system are remote. In emphasizing the grip or hold of the caste system on society through social norms, customs, and practices, he referred to the caste system as the “law of caste” (Ambedkar 2020b). According to Dr. Ambedkar, caste persists as a legal code with harsh penalties for the violation of its rules: “Castes have no mercy for a sinner who has the courage to violate the code” (Ambedkar 2020b).

His theorization of the intricate relationship between caste and law in ancient India is foundational to the CCS.

Moreover, Dr. Ambedkar traces the legal function of the caste system long before figures like Manu, who implemented a legal-religious code called “Manusmriti”. He notes, “One thing I want to impress upon you is that Manu did not give the law of caste and that he could not do so. Caste existed long before Manu. He was an upholder of it and therefore philosophized about it...” (Ambedkar 2020b). It is, however, unfortunate that the foundations of critical legal studies laid down by Dr. Ambedkar have not been adequately explored to understand how the caste system is reproduced through contemporary law and legal systems in India. This exploration of the law, legal norms, and institutions, therefore, presents a significant task before Critical Caste Theorists in India.

Over several decades, scholars have examined various dimensions of caste, such as social practices, economic relations, gender, and sexuality (Thorat & Kumar 2009; Paik 2023; Rao 2009; Rege 1998; Thorat, Madheswaran & Vani 2023). In recent times, there has been a growing interest in the field of CCS. Ayyathurai (2021) argues that the reason behind the lack of traction for the Critical Caste Studies project is the inadequate critique of caste in academia. His argument is based on two key points: First, “Brahmin-power, which has religiously, culturally, politically, and economically propagated a caste-based segregation of Indian society throughout pre-colonial, colonial and post-colonial history, has been ineffectively problematised” (Ayyathurai 2021); and second, “The Critical Caste Studies’ *raison d’être* comes from the failure of South Asian humanities and social sciences to pin down caste/casteism as the self-privileging groups’ invention and imposition of social supremacy” (Ayyathurai 2021). Paik conceptualizes “Critical Dalit Pedagogy,” which “centres the interconnections between caste, class, ‘public’ institutions such as education and ‘private’ realms like the family, gender, desire, marriage, and sexuality from the vantage point of stigmatised Dalit women” (Paik 2022). There have been CCS formulations on the relationship between caste and technology (Shanmugavelan 2022), caste and business (Bapuji, Chrispal, Vissa & Ertug 2023), caste and psychology (Pathania, Jadhav, Thorat, Mosse, & Jain 2023), caste and knowledge production (Kisana 2023), among others. However, these discussions often overlook the role of law as a crucial element to be examined in the context of caste studies.

Critical Race Theory and Critical Caste Studies: Some Theoretical Endeavours

In the last decade, legal scholars such as Sumit Baudh have designed courses such as “Critical Race Theory and Caste” (Baudh 2018). The course description notes: “CRT illuminates the core phenomenology of law in the U.S. and its relationship with race. Some of the questions, vocabulary, and conceptual frameworks—that are imminent in this scrutiny—of race and law—could be useful for examining the relationship between caste and the law in India. Could CRT, a theory that has originated in the

U.S., be useful for illuminating the relationship of law and caste in India?” (Baudh 2018). This inquiry presents an interesting avenue in the CCS movement while also raising important questions about the extent to which CRT can be directly applied to the caste question in India. For instance, can the framework of intersectionality apply to cases involving the Prevention of Atrocities (PoA) Act? The court’s invocation of intersectionality involving a disabled Dalit woman has been criticized for increasing the burden of proving what led to the offense – “whether it was her caste, gender or disability” (Singhania 2021).

CRT scholars Achiume and Carbado (2021) have argued for a dialogue between CRT and TWAIL (Third World Approaches to International Law) to understand systemic racism globally. Their article highlights the “related ways” in which both CRT and TWAIL scholars have “contested the legalization of white supremacy,” “problematized the degree to which regimes of inclusion can operate as mechanisms of exclusion,” presented “critiques of colorblindness,” “engendering either criticism or willful disattention or non-engagement by mainstream scholars in both fields,” and reimaged “law’s emancipatory potential for racial justice and substantive equality, while remaining clear-eyed about the limits and costs of such engagements.” The work of Achiume and Carbado can be expanded to gain further insights into how racist colonial practices interacted with existing domestic social systems such as caste. Specifically, it is important to examine the impact of the racist colonization mission in South Asia and its relationship with the pre-existing internal colonizing system of caste.

Scholars like Vasanthi Venkatesh (2022) have sounded a note of caution in the development of such international legal scholarship on race and racism. She proposes the centering of caste-marginalized voices in developing a truly “critical” international law scholarship. She highlights how scholars coming from oppressor caste locations, writing on subaltern perspectives, tend to dismiss the oppressed caste perspectives. Venkatesh stresses the necessity of moving towards a “counterhegemonic legal order,” which requires “critical international law scholarship to scrutinize claims of subaltern, ‘critical’ Global South narratives, which may unconsciously reinforce epistemological hegemony.”

On this point, to examine the relation between caste as a legal system of oppression and colonization, I had previously argued, “Dr. Babasaheb Ambedkar’s writings provide a framework to understand the pre-colonial foundations that led to colonial and post-colonial criminalization of certain communities” (Wadekar 2022).

The emphasis on pre-colonial *internal colonization*¹ in South Asia through the law of caste thus questions the narrow domain of decolonization studies, which restricts itself to colonial-era exploitation. The study of pre-colonial caste rules indicates that the subsequent colonial oppression in India and other countries was not in isolation. Scholars have shown that the British colonizers colluded with the existing caste

¹I have borrowed the term from Gutiérrez (2004), who used the term “internal colonialism” to argue, “As a colonized population in the United States, Blacks and Chicanos suffered the effects of racism, were dominated by outsiders, much as colonial subjects in the Third World, and had seen their indigenous values and ways of life destroyed.”

system to the advantage of the oppressor castes (Yang 1985; Piliavsky 2015). Mukul Kumar (2004) argues that the constitution of notions of crime and community-based criminality under the Criminal Tribes Act of 1871 was a result of this collusion. The decolonization project fails to recognize this crucial aspect, which now has emerged as a feature of CCS. By inspecting legal systems and their historical evolution during the pre-colonial and colonial eras, scholars can reflect on the intricate ways in which caste-based oppression has been institutionalized over time.

Legal Studies as a Key Component of Critical Caste Studies

A question also emerges as to why the study of the interrelationship between law and caste has focussed on the emancipatory potential of law rather than analyzing it as a site of violence. In the US, CRT scholars have examined law as both source and site of violence and argue that modern law is not objective or neutral. This inquiry emerged from the reconstruction era efforts in the US, which, in the garb of constitutional reform, were followed by the retrenchment of racist laws and policies (Alexander 2010). The Indian Constitution, India's founding document, has been a caste-conscious document since its inception. This is in contrast to the "color-blind" American constitutionalism—an approach criticized by Gotanda (1991). He argues that the concept of color-blind constitutionalism employed by the US Supreme Court is a racial ideology that promotes white racial supremacy.

The Indian Constitution recognized substantive equality, abolished untouchability, provided punishment for this practice, granted the equal and universal adult franchise, provided affirmative action (quotas) for oppressed castes, and so forth. Thus, it was assumed that law could serve as a positive tool in the anti-caste discourse. Existing legal scholarship on caste in India, therefore, has mainly focussed on the "non-implementation" of the law as a challenge to equality and has not probed into the inherent limitations of the law in securing justice for the marginalized castes.

Critical Caste Studies: The Way Forward

CCS must examine how contemporary laws and legal systems continue to perpetuate and reinforce caste inequalities. For instance, the judgments on affirmative action by the Indian Supreme Court were instrumental in creating a stereotype that students and professionals coming from oppressed castes lack merit (Bhaskar 2021). Despite the existence of robust protective legislation like the Prevention of Atrocities (PoA) Act, numerous court judgments have perpetuated caste-based gender stereotypes, particularly against caste-marginalized women. In sexual violence cases, for instance, courts often uphold an unrealistic standard of "ideal victimhood," reinforcing stereotypes of caste-marginalized women as "promiscuous" and undermining the credibility of their evidence (Wadekar 2021). Laws, such as the Habitual Offenders Act, continue to target denoted tribes who were historically branded as "born criminals"

(UN CERD 2005). The contemporary legal system in India, therefore, relies on and shapes the social discourse on caste and casteism.

One major task before CCS is to examine patterns of indirect discrimination and the disparate impact of certain laws and policies on marginalized castes. The doctrine of disparate impact evolved in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in the US, provides that a policy that appears to be neutral on its face may still have a disproportionate impact on a protected group, and must therefore be examined accordingly. This doctrine has been applied by the Supreme Court of India in the *Navtej Singh Johar* case (2018 INSC 790) in reading down section 377 of the Indian Penal Code that criminalized homosexuality. This opens the avenue for legal remedies in cases of institutional discrimination, which have not been addressed in the PoA Act.

The suicide of Dalit scholar Rohith Vemula and the protests that followed brought the discussions on “institutional discrimination” to the forefront. Institutional discrimination highlights that acts of discrimination are not a result of individual prejudice alone but are deeply entrenched within institutions and are structural in nature. CCS, therefore, has a crucial responsibility to explore how the law can hold not only individuals but also institutions accountable. However, the current discussion concerning caste and law is mainly focused on the effectiveness of criminal statutes such as the PoA Act and the demand for more severe punishment despite the persistent low conviction rates in these cases. Criminal law primarily captures individual intent and overt forms of discrimination, often failing to address the hidden and structural forms of casteism that exist in areas such as education, housing, and employment.

Scholars in the US have examined how government policies can create segregation in housing, educational disparities, etc. (Bonilla-Silva 2003; Rothstein 2017). Existing works in India have also identified housing and job discrimination (Thorat, Banerjee, Mishra & Rizvi 2015; Mishra 2023). CCS must scrutinize government policies or the impact of judgments such as the *Zoroastrian Cooperative Housing Society* case (2005 (5) SCC 632) that may either facilitate housing discrimination or uphold inaction to prevent discrimination.

CCS must also scrutinize the ideology of caste-blindness in diluting constitutional guarantees like affirmative action. Gotanda (1991) contends that the adoption of color-blind ideology (“Our Constitution is Color-Blind”) by the United States Supreme Court serves as a mechanism to uphold white supremacy, as it absolves white Americans of accountability for their accrued intergenerational privileges. From the perspective of dominant white Americans, constitutional guarantees of non-discrimination suffice and even provide a pretext for further power consolidation, as they invoke non-discrimination arguments to maintain the status quo. Criticism against affirmative action in India, particularly quotas for Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBCs), echoes similar sentiments, suggesting that formal equality measures are adequate and substantive equality measures are discriminatory and anti-meritocratic. CCS necessitates an examination of how caste-blind critique of the constitutional guarantees for the caste-oppressed is used to accumulate more power for the oppressor castes.

Furthermore, CCS stands to gain from reassessing the conventional liberal understanding of law as a tool for justice. In this regard, a reading of Derrick Bell and Dr. Ambedkar can prove insightful. Bell's (1980) conception of interest convergence helps us understand how the rights of the oppressed are only advanced when they converge with the interests of the oppressor. Fanon, in "Black Skin, White Masks" (1952), articulates that the only thing we get is "white liberty and white justice."

The framework of interest convergence is on the lines of Dr. Ambedkar's critique of the liberal notion of rights. In 'Annihilation of Caste' published in 1936, he observes, "Few object to liberty in the sense of a right to free movement, in the sense of a right to life and limb." He continues that the same people would object to the liberty of the oppressed to benefit from "the effective and competent use of [their] powers." CCS would benefit from moving beyond the abstract association of law with justice and scrutinizing the liberal oppressor caste beliefs about legal rights and justice that prevent the seizure of Brahmanical power. It is essential to analyze whether liberal conceptions of legal reforms aid in the freedom of marginalized social groups.

CCS, thus, should focus on analyzing the interplay between law, power, and caste-based inequalities. Legal systems, both old and new, have played a dominant role in shaping and perpetuating caste oppression. By analyzing laws, judicial decisions, and legal proceedings from a critical caste lens, scholars can identify how legal systems have failed to protect the rights and dignity of individuals belonging to caste-marginalized groups.

CCS is now being supported as a separate study field by institutions such as Brandeis University. There is a huge scope for legal scholarship to contribute to the development of the CCS movement in the coming years.

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