

## Remedying Historical Wrongs: Plain-speaking in the Time of India's Rise

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While adjudicating a gender justice question in the Supreme Court in 2018, Dr. Justice D.Y. Chandrachud made a profound observation about the circumstances in which the Constitution of India had come into being. He held that the Constitution was the “end product” of not just the well-known struggle against colonial rule but also “a struggle of social emancipation going on since centuries and which still continues”.

The reference to the social struggle as one of the two causative factors is indeed profound, especially since this complexity has been largely missed by historians. The omission on their part is despite the telltale sign that the freedom fighters who dominated the Constituent Assembly chose a caste equality champion, Dr. B.R. Ambedkar, to play the crucial role of chairing its drafting committee.

It was therefore apt that Justice Chandrachud recalled his 2018 judgment in a lecture he delivered at Brandeis University five years later on the subject of “remedying historical wrongs”. Of the several insights offered by him in his lecture on 22 October 2023, this one jumped out at me because of a personal reason. My recently published book, *Caste Pride: Battles for Equality in Hindu India*, revealed some of the legal aspects of the social struggles that had preceded and followed the making of the Constitution. The significance he attached to the social struggle vindicated, to my mind, the revelations made by my book.

At the same time, there is a divergence too. It's on the unlikely but remarkable progress made during the colonial period on the social front, in terms of norm-setting and extending the concept of equality to the lowest layer in the caste hierarchy. Given that these legal developments were hitherto overlooked, it is understandable that Justice Chandrachud does not touch upon them. Instead, he makes this otherwise unexceptionable remark that “the legal system has often played a pivotal role in perpetuating historical wrongs against marginalised social groups”. The systemic bias was most glaring in the case of “the laws in ancient and medieval India” which had,

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as pointed out by Justice Chandrachud, “sanctions against the communities whom we now call as Dalits”.

This is a huge admission for the Chief Justice of India to make at a time when the country is swamped by a rhetoric of reviving its ancient glory or restoring its status as Vishwaguru or world teacher. He deserves all the more praise for acknowledging the unpalatable truth that the traditional pattern of inequality has extended to the modern era as well. The example he cited was the egregiously discriminatory policies “highlighted” by Ambedkar of the Peshwa regime in Poona which survived till 1818. Whether the British conquest of the Peshwa regime should be mourned as the end of the last Hindu empire or celebrated as an emancipatory event for Dalits is still a politically fraught debate, which is the backdrop to the ongoing Bhima Koregaon case in which several activists have been allegedly framed.

What is as debatable is the equivalence drawn by Justice Chandrachud between the Peshwa regime and British India: “The colonial rule was no better in India.” The examples he cited to buttress this claim included legal scholar Marc Galanter’s finding that the British colonial courts “refused to rule in favour of oppressed castes, when it came to matters of personal law and religious customs”. To be sure, in a bid to play it safe, the colonial courts did tend to side with conservative Hindus rather than reformists (even if they happened to be at times from upper castes).

Historians have however under-explored the wealth of archival evidence showing that the colonial regime was no monolith. It had its share of reformists. Take the issue of representation which is significantly pertinent to Justice Chandrachud’s lecture. “The idea of representation,” he says, “was an essential ingredient of remedying historical wrongs”. Yet, because of the gaps in the mainstream history of caste, the lecture misses a civilisational breakthrough made by British India in giving representation to untouchables on a legislative forum.

The breakthrough took place in 1919 when the Governor of the Madras Presidency Lord Willingdon, as brought out by my book, nominated M.C. Rajah to the Madras Legislative Council. Since the electorate of the time (confined as it was to a sliver of the Indian elite) was unlikely to elect an untouchable, Willingdon chose the nomination route. This paved the way for the enactment of a statutory provision to that effect, in order to give untouchables a voice in lawmaking. For the far-reaching precedent he set with Rajah, Willingdon deserves an honourable mention in history as neither the Congress party, which led the freedom struggle in India, nor the Justice Party, which went on to pioneer social justice in Madras, had made any such demand at the time for integrating untouchables.

Another unsung hero of the colonial administration was Viceroy Lord Irwin who ruled out all objections to the enactment of the first ever law against untouchability. The enactment itself had been pulled off in Madras in 1926 against all odds by a legislator from the untouchable community, R. Veerian. This too was a civilisational breakthrough for India as a discriminatory practice that had for centuries been considered a religiously sanctioned way of life for upper caste Hindus was overnight transformed into a penal offence.

Given that such watershed moments came to light only through my book, it's not surprising to come across here the popular misconception that the colonial rule made little contribution towards remedying historical wrongs. An irony that cannot however be ignored relates to a historic episode from Ambedkar's own life, uncovered by an earlier book written by Dalit scholar Anand Teltumbde, *Mahad: The Making of the First Dalit Revolt*. It flies in the face of the common assumption that the colonial courts never upheld the right of lower caste members to ignore discriminatory customs. Dr. Teltumbde's book provides a counter example embodied by the swift conviction and imprisonment in 1927 of nine caste Hindus who had assaulted untouchables the same year for daring to draw water from a public tank at Mahad under Ambedkar's leadership.

Let me clarify though that such illustrations, which bust the colonial stereotype, do not in the least detract from the overall thrust of Justice Chandrachud's lecture, namely, the need to look beyond representation in order to deal with the challenge of "reformation" as part of "the social life of the Constitution". In effect, exploring how the Constitution functions within the broader context of a society, "impacting not only the legal and political spheres but also the cultural, economic and social aspects of citizens' lives". As a corollary, his idea of reformation is to ensure that the marginalised and underrepresented communities "not only have a seat at the table but also have a meaningful voice in decision-making processes".

In other words, just meeting the statistical goals of affirmative action and diversity is hardly enough. The minimum that any country with pretensions of being a liberal democracy should seek to achieve is to provide an effective say to its minorities and historically oppressed groups. Much to his credit, Justice Chandrachud makes it clear that despite its undoubtedly sound constitutional framework, India still has a long way to go before it can claim to have carried out such a reformation. Indeed, he is as candid about India's present as he is about its past.

In what he frames as "social law vs. constitutional law", Justice Chandrachud says that the arguments in courtrooms demonstrate that there is "a constant tussle between constitutional aspects of the law and entrenched social practices". He adds that this could be construed as "the gap between the aspirational values of the Constitution and the social realities of the day." Clearly, "social realities of the day" is a tacit reference to the current environment in which there is rampant weaponisation of mixed marriages, live-in relationships, dietary preferences, clothing choices and other such matters of personal freedom. He could well have added that if the struggle against social evils like caste did not get its due in the nationalist history of the colonial period, it's because the oppressors in the political struggle were foreigners while the oppressors in the social struggle were India's own elite.

There is also an allusion in the lecture to growing ultra-nationalism where he discusses the diverse ways in which people engage with or interpret the Constitution. "While one set of elites critique the Constitution as a document of foreign inspirations, the oppressed social groups have used the language of the Constitution to demand their rights." For reformation to happen in the teeth of such an ideological conflict,

Justice Chandrachud puts the onus on the privileged classes that have thrived on caste inequities. He says, “(T)he initiative is needed not from those who have been oppressed but from those who have been oppressors”. As if that was not radical enough, he adds: “The society therefore needs a collective agenda, where the power of the historical oppressors is constantly questioned.” India would do well to pay heed to this call to action.

The urgency of reformation, as defined by Justice Chandrachud, is most evident from the persistence of the violence engendered by caste. On this, he has some words designed to shake the privileged out of their state of denial. In fact, those words are derived from one of his own judicial orders of 2021: “Atrocities against members of the Scheduled Castes and Scheduled Tribes are not a thing of the past. They continue to be a reality in our society even today.” His lecture improves on that admission as he says that, “despite legislations prohibiting caste-based discrimination, incidents of violence against the protected communities are *on the rise*.” (Emphasis added)

Having quoted several Supreme Court judgments to show “the transformative potential” of the Constitution, Justice Chandrachud acknowledges that there were also those that did not serve that lofty purpose. “Some of the judgments have been criticised for being regressive, and have been overturned for the right reasons.” He could well have confessed that there have also been judgments that have been criticised for being regressive but have still not been overturned.

About five months prior to his lecture, the Supreme Court rejected a plea to review its 2022 judgment which had upheld by a 3:2 majority the introduction of a quota exclusively for the poor among the upper castes. The minority judgment had held that the exclusion of the poor among the lower castes from that quota in educational institutions and government jobs violated the fundamental right to equality. Even so, the review petition was rejected without any hearing in the court or giving any reasons for the decision. As such, it is not a decision that sits comfortably with the egalitarian spirit animating Justice Chandrachud’s lecture.