

Reformation Beyond Representation: The Social Life of the Constitution in Remediating Historical Wrongs

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Professor Laurence Simon, Professor Sukhadeo Thorat, faculty members at Brandeis University and other universities, members of the library, staff, participants of the Conference, members of the audience, and ladies and gentlemen.

When Prof. Simon and Prof. Thorat came to the Supreme Court of India to invite me to deliver the keynote address for the ‘Sixth International Conference on the Unfinished Legacy of Dr. B.R. Ambedkar’, I was curious to know what this conference was about, what was the idea behind its inception, and how did a university in the United States get involved in organising an annual academic conference dedicated to Dr. Babasaheb Ambedkar—popularly known as the chief architect of the Indian Constitution, and an inspiration to millions of people in India and around the world.

Prof. Simon and Prof. Thorat passionately told me that the Conference was instituted in 2015, and that there have been five editions of the Conference, prior to the one which we are attending right now, and one of the main objectives of the Conference is to address the issues around caste. I was told that Brandeis University, named after Justice Louis Dembitz Brandeis, is committed to social justice, and in furtherance of it, has been at the helm of running a couple of initiatives focusing on social inequalities in South Asia. Apart from this conference, the Centre for Global Development and Sustainability of the University, headed by Prof. Simon, in collaboration with Prof. Thorat in India, also runs an academic journal titled *CASTE: A Global Journal on Social Exclusion*, and organises the Bluestone Rising Scholar Award for promoting research in areas related to social inequalities.

I am here as much in terms of my own personal tribute to Dr. Babasaheb Ambedkar whose life, whose work, whose vision has deeply influenced me as a human being and now as a judge. I also use this occasion to celebrate the [Bluestone Rising Scholar] Award which was conferred on my very distinguished former Law Clerk, Anurag

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Bhaskar¹ who is now working at the Centre for Research and Planning at the Supreme Court of India.

The theme for this year's edition of the conference is 'Law, Caste, and the Pursuit of Justice.' As the theme revolves around law, this may be the reason that I have been invited today to deliver the keynote address of the Conference. But I will follow in the footsteps of Justice Louis Dembitz Brandeis who became well known globally for the Brandeis briefs. Because as judges we have to be increasingly cognizant of social reality and to understand that the law itself does not exist in a vacuum, the law exists because of and has a direct connect with society, and what better way to begin this than by a reference to Dr. Ambedkar himself. I must say that I am delighted to be invited to deliver this keynote address—more so, as the Conference in a way pays a tribute to the legacy of Dr. Ambedkar, whom we all see as a guiding light, as a beacon.

I also share a personal connection with Dr. Ambedkar. When my father, late Chief Justice Y.V. Chandrachud, was a young lawyer, he would often go to a café, close to the Bombay High Court, called The Wayside Inn at Kala Ghoda in Mumbai. He always saw a man sitting there the entire afternoon, writing down his thoughts and making notes. That man was none other than Babasaheb Dr. B.R. Ambedkar who would spend afternoons between court cases writing his notes for the constituent assembly and his thoughts for the ultimate Constitution that he was going to be an architect for. My father also appeared against Dr. Ambedkar in a case involving an electricity dispute.

The title of my keynote address is 'Reformation Beyond Representation: The Social Life of the Constitution in Remediating Historical Wrongs'. In my address, I shall largely be referring to the Indian Constitution, but I will be making references to the American Constitution wherever necessary.

Before proceeding, I will briefly outline the contours of my address today. I intend to begin by discussing what we understand by 'historical wrongs'. I shall discuss what the role of the law was in the era of historical wrongs. I will then talk about how leaders such as Dr. Ambedkar conceptualized an alternative framework of emancipatory constitutionalism to address the historical wrongs. I will discuss how the idea of *representation* was an essential ingredient of remediating historical wrongs. However, representation is only one way of remediating historical wrongs. Today, I want to look beyond representation. There has been a constitutional discourse on social reformation apart from the idea of representation. I shall discuss how the courts play a crucial role in this regard. At the end, I shall discuss why the discourse on reformation must not be limited to courtrooms, and must be considered in the canvas of a larger social discourse on equality.

Historical Wrongs

Throughout history, marginalized social groups have been subjected to horrendous, egregious wrongs, often stemming from prejudice, discrimination, and unequal power dynamics. From the brutal transatlantic slave trade that forcibly uprooted

¹ "Celebrating the Winners of the 2021 Bluestone Rising Scholar Prize", <https://heller.brandeis.edu/news/items/releases/2021/caste-journal-bluestone-rising-scholar-prize.html>

millions of Africans to the Native American displacement, to the caste inequalities in India affecting millions of backward—though Bahujan—castes, to the oppression of indigenous Adivasi communities in India, to the systemic oppression of women, LGBTQ+ individuals, and other minority communities, the annals of history are stained with instances of profound injustice. These wrongs have caused immeasurable suffering and have left lasting scars on these communities, underscoring the urgent need for societal reflection, reconciliation, and efforts to rectify past injustices in the ongoing quest for a more equitable and inclusive world.

What sets these wrongs apart is that they deny that core truth of human equality. Reasonable people, governments, and courts can disagree over various aspects of human rights such as questions of privacy and personal liberty. However, the historical wrongs I discuss deny individuals their right to participate and reap the benefits of living together in society based on the *identity* of the individual. Bahujan castes denied access to public spaces, and slaves denied their very liberty based on nothing beyond who they were. Such wrongs pertain not to what rights people have, but rather who constitutes the demos capable of claiming rights from society. Thus, when I say ‘historical wrongs’, it is not just about individual bad actions of a few individuals, but social systems and arrangements of identity-based exclusion that go against the grain and idea of human equality and what may be considered a just and fair society (Laitinen & Särkelä 2020).

Unfortunately, the legal system has often played a pivotal role in perpetuating historical wrongs against marginalized social groups. Like in the United States, slavery was legalised in certain parts of India as well (Mohan 2015). P. Sanal Mohan in his book, *Modernity of Slavery: Struggles against Caste Inequality in Colonial Kerala* (Mohan 2015: 39) highlights the experiences of several oppressed castes, who were enslaved in the erstwhile Indian princely State of Travancore and other states. This slavery was only abolished in 1855. Even before that, the laws in ancient and medieval India had sanctions against the communities, whom we now call as *Dalits* or the Scheduled Castes (Thorat & Aquil 2021). Dr. Ambedkar himself highlighted how the policies of the Peshwa regime discriminated against the oppressed castes (*BAWS* Vol. 1 2019: 54). The colonial rule was no better in India. The colonial era Criminal Tribes Act 1871 criminalized indigenous tribes, several castes, and eunuchs by declaring them as ‘born criminals’. The British colonial courts, as Marc Galanter has eloquently traced in his essay, ‘Law and Caste in Modern India’, refused to rule in favour of oppressed castes when it came to matters of personal law and religious customs (Galanter 1963).

In the United States, from the codification of discriminatory laws that supported the institution of slavery to the Jim Crow laws enforcing segregation in the American South (Klarman 2007), to the forced assimilation policies targeting indigenous peoples (Hibbard 2022; Ellinghaus 2006), the legal framework has frequently been weaponized to systematically oppress and marginalize certain communities (Klarman 2007). The judgments of the United States Supreme Court were regressive on several instances, including *Dred Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), and

Korematsu v. United States (1944). Furthermore, both in the United States and India, the oppressed communities were denied voting rights for a long time.

In that way, law as an institution was used to maintain existing power structures, and to institutionalize discrimination, leaving a lasting legacy of injustice that continues to shape the lives of these groups. Even when these laws have been eventually overturned or repealed, the legacy of their harm can persist for generations, underscoring the complex and enduring relationship between law and historical wrongs committed against marginalized social groups.

These historical wrongs perpetuate injustice by creating a social system where the marginalised communities are not allowed to rise above their oppression. It creates a kind of self-perpetuating and hierarchical structure of society, which leads to normalisation of injustice towards certain groups. This normalisation can creep up to the instances where alienation of these communities make them the ‘*other*’ in societies (Greer & Jewkes 2005: 20). Otherness can create a rift of violence and exclusion of these communities as well (Greer & Jewkes 2005: 20).

For instance, historical marginalisation leads to exclusion in accumulating resources or capital that ought to be equally distributed in the society. This exclusion leads to difficulty in overcoming marginalisation even if there has been a recognition of historical wrongs. Consequently, it becomes imperative for the institutional setup of constitutional democracies to ensure that safeguards to these communities are upheld, and policies are made for the upliftment of these communities. Recognizing these historical injustices underscores the crucial role of legal reform and the need for a just and inclusive legal system to address past wrongs and work toward a more equitable society.

Emancipatory Constitutionalism

Remedying historical wrongs ought to be the goal of any constitutional system. This has been emphasized by leaders from the oppressed communities, who interpreted constitutionalism from the lens of social change. Indeed, using the British Constitution at the time and contemporary State constitutions as a baseline, Akhil Amar outlines the methods through which the American Constitution rejected historical bases for wielding power and exercising franchise, such as hereditary titles and property ownership that were the norm at that time (Amar 2005). However, the framers of the United States Constitution failed to remedy the issue of slavery. This was questioned by Frederick Douglass, American abolitionist and social reformer. In a speech before the Scottish Anti-Slavery Society in Glasgow, Scotland on March 26, 1860, Douglass outlined his views on the American Constitution, and stated: “I... deny that the Constitution guarantees the right to hold property in man, and believe that the way to abolish slavery in America is to vote such men into power as well use their powers for the abolition of slavery.”

In India, the constitutional imagination of equality was done by Dr. Ambedkar. He envisaged a form of constitutionalism that was deeply rooted in democratic principles, social justice, and the protection of individual rights (*BAWS* Vol. 1 2019: 243–278).

His vision for the Indian Constitution was shaped by his commitment to ending the deeply entrenched social injustices and discriminations prevalent in Indian society (*BAWS* Vol. 12 2019: 661). In several of his writings, he advanced a transformative constitutionalism that aimed to address the historical injustices and systemic discrimination faced by the marginalized and oppressed communities in India. His vision was rooted in the principles of equality, social justice, and the protection of fundamental rights. In his classic yet undelivered address, which he later published as “Annihilation of Caste” in 1936, he stated: “If you ask me, my ideal would be a society based on Liberty, Equality, and Fraternity” (*BAWS* Vol. 1 2019: 57). Later, Dr. Ambedkar brought these values in the language of the Constitution itself, from the Preamble across the entire canvas of the Indian constitution (CAD 1949).

Dr. Ambedkar tried to institutionalise *social revolution through law*. He believed that a just and inclusive society could be achieved through a robust legal framework that would safeguard the rights and dignity of all citizens, particularly those from historically disadvantaged backgrounds. That is the reason why he held a different approach with the other leaders of Indian independence, who focused on political freedom without addressing social freedoms (*BAWS* Vol. 1 2019: 41–44). For Dr. Ambedkar, political freedom was neither an end in itself nor complete or sufficient in itself and to him freedom would lack the core of its soul, unless freedom came with social freedom. He wrote: “[P]olitical reform cannot with impunity take precedence over social reform in the sense of the reconstruction of society... [T]he makers of political constitutions must take account of social forces” (*BAWS* Vol. 1 2019: 42). Thus, in Dr. Ambedkar’s conceptualisation, the idea of a constitution goes beyond its traditional role as a mere set of rules and principles. It extended the constitution’s capacity to liberate and empower marginalized and oppressed groups. The ‘emancipatory’ idea of the Constitution, which Dr. Ambedkar advanced, sought to address historical injustices, challenge systems of discrimination, and advance the cause of emancipation and equality.

Furthermore, Dr. Ambedkar’s constitutionalism aimed at creating a robust framework of checks and balances, where the constitution would serve as a bulwark against potential abuses of power, ensuring the protection of the rights of all citizens. One of the key aspects of Dr. Ambedkar’s constitutionalism was the inclusion of affirmative action measures, known as reservations in India, to uplift historically disadvantaged groups. For several decades, he advocated for incorporation of mandatory affirmative action provisions into the Constitution (Thorat & Kumar 2020: 1–58). He believed that such measures would help rectify historical injustices by providing opportunities and representation to the marginalized. He called mandatory affirmative action a form of ‘Checks and Balances’ (*BAWS* Vol. 9: 171).

Today, the non-discrimination and affirmative action are often differentiated by references to a negative and a positive form of liberty. Arguments that the state ought to *abstain* from discriminating are distinguished from a positive command or mandate to uplift individuals who have suffered from historical wrongs. It is also

argued that affirmative action is fundamentally contrary to the idea of equality, or colour blind equality at the least. You find facets of this rationale not only in India but in the US as well, including in recent times. In countries such as India where affirmative action is actively pursued, non-discrimination and affirmative action are also differentiated through institutional roles. It is seen as being the court's duty to enforce non-discrimination norms but mandates for affirmative action are left as questions for elected officials.

However, Dr. Ambedkar did not view equality and affirmative action as contradictory. This is because he conceived liberty and equality as intrinsically connected norms.

Notions of negative freedom contemplate freedom *from* interference. However, as republican scholars have argued for centuries, the idea of freedom as the absence of State restrictions fails to recognise the difference between being free *from* interference and being free *to* act (Pettit 2012). Using the classical republican example, a slave may never be put in a cage or beaten, but that does not make them free to act. Negative conceptions of freedom characterise liberty as the absence of *episodic* interference, for after all, interference is inherently temporal. When a person is imprisoned they are not free, when they are released they are free. However, such negative conceptions of freedom ignore the ongoing deprivations that can arise out of dominating relationships or societal arrangements outside of episodic interferences with liberty. An individual may not be imprisoned, but the social, legal, and economic structures that govern their lives may lead to domination on the site of caste, race, gender, disability, or economic well-being.

I would submit that Dr. Ambedkar took aim at precisely such forms of dominating relations and societal arrangements when seeking to secure freedom as a means of social transformation. In "Annihilation of Caste", he characterises liberty as "the destruction of the dominion which one man holds over another." He argued that "If the source of power and dominion is, at any given time or in any given society, social and religious, then social reform and religious reform must be accepted as the necessary sort of reform" (BAWS Vol. 1 2019: 45). That is, even where domination is the result of actions by non-State actors or structural societal arrangements, liberty is at risk and must be remedied through by the State. After all, liberty does not mean liberty to discriminate.

By characterising liberty as *relational*, not episodic, Dr. Ambedkar conceived of liberty and equality as two sides of the same coin. For him, ensuring liberty required ensuring that every person in a society had sufficient standing that they were not dominated, whether that be through economic, social, or religious power. Unlike narrower conceptions of liberty that seek solely to prevent episodic State intervention, conceiving of freedom as non-domination allows the very site of State intervention to be liberty *generating*, by eradicating sources of dominating power. Thus, Dr. Ambedkar conceived of a reformative movement that was simultaneously interventionist yet liberty enhancing.

This is not to say that Dr. Ambedkar ignored the risks of excessive State intervention. His vision also encompassed the establishment of an independent judiciary that would serve as a guardian of the Constitution, interpreting and upholding its principles. He famously called Article 32, which provides to citizens the right to move the Supreme Court, as the “heart and soul of the Constitution” (CAD 1948).

In essence, his vision for constitutionalism emphasized not only the protection of fundamental rights but also the active promotion of social equality and justice, making it a cornerstone of modern India’s democratic framework. The Indian Constitution in 1950 incorporated a set of fundamental rights, such as the right to equality, the right to freedom from discrimination, and the right to equal protection under the law. Apart from affirmative action, the most important impact of Dr. Ambedkar’s formulation was Article 17, which abolishes untouchability, which was placed in the chapter on fundamental rights, along with the provisions of equality and non-discrimination. It was hoped that these provisions would break the shackles of caste-based discrimination and untouchability, fostering a more equitable and harmonious society.

The Impact of the Indian Constitution

The ‘social life’ of a constitution refers to how a constitution functions within a society, its impact on the daily lives of citizens, how citizens perceive it, and its adaptability to changing social, political, and cultural dynamics. This phrase recognizes that a constitution is not just a static legal document, but a living framework that interacts with and shapes the social and political environment in which it operates. In essence, the social life of a constitution is about 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. It reflects the dynamic and evolving nature of constitutional governance as it responds to the needs and values of the people it serves.

The adoption of the Indian Constitution was seen as a moment of tectonic shift in Indian history. American historian Granville Austin travelled to India to document the process of drafting India’s Constitution. In his classic book, *The Indian Constitution: Cornerstone of a Nation*, Austin termed the Indian Constitution ‘a social revolutionary statement’, ‘by its very existence’ – ‘a modernizing force’ (Austin 1966: xiii). Austin narrated, and I quote:

Representative government with adult suffrage, a bill of rights providing for equality under the law and personal liberty, and an independent judiciary were to become the spiritual and institutional bases for a new society—one replacing the traditional hierarchy and its repressions. Other constitutional provisions were designed to spread democracy by protecting and increasing the rights of minorities, by assisting underprivileged groups in society to better their condition, and by ending the blatant oppression of the Scheduled Castes

and Tribes. These provisions have brought into, or closer to, the mainstream of society individuals and groups that would otherwise have remained at society's bottom or its edges. (Austin 1966: xii-xiii)

In that sense, the Constitution attempted to replace fundamental wrongs with fundamental rights. Affirmative Action or representation was a crucial component of constitutional foundations laid down in India. As mentioned earlier, Dr. Ambedkar fought tooth and nail to get the provisions of affirmative actions incorporated into the Indian Constitution. It was his belief that the oppressed should have their own representation, and that representation would develop political conscience among these communities (*BAWS* Vol. 1 2019: 243–278). Dr. Ambedkar stated that if British colonial rule over Indians was morally wrong, then in the same way the rule of oppressor castes over the oppressed was equally wrong (Bhaskar 2021). This again highlights his idea of freedom as relational. He saw no difference between the actions of a colonial power in jailing political prisoners and the denial of access to public resources by oppressor castes. What mattered was the dominating relationship between the two individuals concerned. While the British departed in 1947, the dominating effects of caste oppression subsisted.

Since Independence, affirmative action policies in India have offered crucial support to oppressed social groups by providing them with opportunities for education, employment, and representation that might otherwise be inaccessible due to deeply entrenched inequalities. As noted in the judgment of the Supreme Court of India in *Indra Sawhney v. Union of India AIR 1993 SC 477* (1992): the “Objective was to change the social face as it shall advance public welfare, by demolishing rigidity of caste, promoting representation of those who till now were kept away thus providing status to them, restoring balance in the society, reducing poverty and increasing distribution of benefits and advantages to one and all.”

In theory as well as in practice, these policies serve as a means to level the playing field, granting access to opportunities that may have been systematically denied in the past. By actively including underrepresented individuals in education and employment sectors, affirmative action helps break down barriers. It develops a psychological assurance that individuals from marginalized backgrounds have a shot at achieving their full potential and contributing to the collective well-being of the community.

Looking at the statistics, the representation of constitutionally protected social groups (called Scheduled Castes and Scheduled Tribes) has increased in the government services under the various categories during the last seven decades. At the dawn of independence, representation of Scheduled Castes and Scheduled Tribes in services was minimal (GOI 2022: 9). As per available information, as on 1 January 1965, the representation of Scheduled Castes in Groups A of government services, which are top-level bureaucratic was just 1.64 per cent, which has increased to 13.21 per cent as on 1 January 2022. Likewise, while representation of Scheduled Tribes as on 1 January 1965 in Group A was 0.27 per cent, it has increased to 6.01 per cent as on 1 January 2022 (GOI 2022: 9; *The Hindu* 2022). This is the direct impact of the

Constitution. The presence of marginalized communities in services, education, etc., is, in itself, a realisation of a constitutional mandate.

This is how the social presence of oppressed communities demonstrates the success of the social life of the Constitution, in the way that it is implemented. Furthermore, the oppressed communities in India used the vocabulary of the Indian Constitution, with the focus on equality and affirmative action, to mobilise and reclaim their sense of dignity (Bhaskar 2021: 109–131). The Constitution of India legitimised the obvious personhood of the oppressed communities.

This was one way to facilitate and empower individuals from marginalized backgrounds to break free from cycles of oppression, and helps in rectifying historical injustices. Moreover, it sends a clear message that society is committed to correcting systemic biases and working towards greater equality, ultimately fostering a more just and inclusive environment for all.

Limits of Debates around Affirmative Action

However, the mere presence of members of oppressed groups in government services must not be seen as the only parameter to analyse the power structures of society. Let's consider the example of a press release, which stated: "the representation of SCs, STs... in the posts and services under the Central Government, as on 01.01.2016, was 17.49%, 8.47%... respectively. Representation of SCs and STs is more than the prescribed percentage of reservation, (15% and 7.5%, respectively)" (PIB 2019). However, this press release does not mention how many Scheduled Castes are in top decision-making positions in government and how many in lowest level positions. The real question therefore is: What is the representation of Scheduled Castes and Scheduled Tribes in top positions? The statistics show that out of a total of 322 officers currently holding the posts of Joint Secretaries and Secretaries, which are top level bureaucratic services, in different Ministries/Departments under Government of India, only 16 belong to Scheduled Castes, which is 4.9 per cent of total posts, and only 13 belong to Scheduled Tribes, which is only 4 per cent (*The Hindu* 2022). These statistics indicate that focusing only on the total number of employees, rather than examining how many Scheduled Castes and Scheduled Tribes hold top positions, is misleading. Reformation beyond representation entails ensuring that marginalized and underrepresented communities not only have a seat at the table, but also have a meaningful voice in decision-making processes.

There is also a concern that representation must not be confused with diversity—in spaces where representation is not legally mandated. Scholars state that the sole focus on diversity can lead to tokenism, where individuals from underrepresented groups are viewed as symbols of diversity rather than being valued for their skills and qualifications. This can undermine their professional and personal growth. Ellen Berrey, through his book, *The Enigma of Diversity: The Language of Race and the Limits of Racial Justice* (Berrey 2015), has struck a chord of caution that the invocation of 'diversity' must not be reduced to tokenism. She argues: "diversity advocates'

efforts to minimise group divisions and expand the bounds of social membership have focused on symbolism more than on social causes. Much discourse on diversity leaves advocates without a language, you are talking about inequality” (Berrey 2015: 8–9). Diversity therefore needs to be understood from the perspective of representation and social discrimination. Institutions need to be more diverse, because communities that have been subjected to historical discrimination are underrepresented. Thus, as in India, historical wrongs form an independent justification for affirmative action irrespective of considerations of diversity.

The idea of representation through affirmative action must be facilitated by discourse on broader systemic issues such as unequal access to quality education to everyone. Affirmative action in itself cannot solve the issue of universal education, rather it is connected to the latter. When a greater number of people from oppressed groups would gain education, their presence in institutions through affirmative action will increase. That is when the full potential of affirmative action would be seen. Thus, social reformation involves dismantling systemic barriers and addressing structural inequalities. This could encompass reforms in education, healthcare, criminal justice, and economic systems that have historically disadvantaged certain groups.

Furthermore, even the slightest success of affirmative action is used by the caste elites to dismiss the issues around caste inequalities. Arguments are advanced that just because affirmative action is being provided, structural issues of discrimination don't exist any more. Such binary narrations must be rejected, at the constitutional and the social level. Affirmative action and prevention of caste discrimination in India or racial discrimination or remedying different forms of injustices are complementary to each other. They are not different poles, rather they are intersecting phenomena. That is to say, social transformation requires several different measures at the same time. Therefore, apart from emphasising solely on affirmative action and representation, the constitutional and social discourse must also engage in reflecting on a wider range of methods to remedy historical wrongs.

Reformation beyond representation means that the mere presence of diverse groups within a political or administrative system is not enough. That it extends to a deeper transformation of power dynamics, policies, and social structures is what matters. It emphasises the need for substantive change in the way that societies and governments operate. It is in this context of reformation that the Constitution plays a crucial role.

Potential of the Constitution

A broader framework of constitutionalism underscores the transformative potential of constitutional law to promote social justice and human rights. This approach often involves interpreting and applying constitutional provisions in ways that actively work to correct historical wrongs and to promote a more inclusive and equitable society, thereby serving as a vital tool for social progress and the realization of fundamental rights.

After Independence, there are several judgments of the Supreme Court of India, which challenge structural barriers. I would like to mention a few recent judgments. The Court in *Navtej Singh Johar v. Union of India 2018/INSC/790*, decriminalised consensual sexual conduct between individuals of the same sex. The Court noted that “[t]he ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution”. It was further held that “[f]or those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives”, and that the Constitution “has within it the ability to produce a social catharsis.”

In another important judgment in *Indian Young Lawyers Association v. State of Kerala 2018/INSC/908*, while deciding a case of exclusion of women from the Sabrimala Temple due to a long-standing religious practice, the Court held that discriminatory practices cannot be allowed merely due to it being a custom. Even though the case has been pending for reconsideration, it is important to note that the judgment acknowledged that the Constitution of India is the “end product” of not just a struggle against colonial rule, but also a struggle of social emancipation going on since centuries and which still continues. This struggle of emancipation, the Court noted, “has been the struggle for the replacement of an unequal social order” and “a fight for undoing historical injustices and for righting fundamental wrongs with fundamental rights.”

A challenge to an affirmative action policy was adjudicated in *B.K. Pavitra v. Union of India (2019) 16 SCC 129*. In deciding the case, the Court observed that “[f]or equality to be truly effective or substantive, the principle must recognise existing inequalities in society to overcome them”, and that reservations or affirmative action policies are “the true fulfilment of effective and substantive equality by accounting for the structural conditions into which people are born”.

In another case titled *Babita Puniya v. Secretary, Ministry of Defence (2020) 7 SCC 469*, the Supreme Court of India ruled in favour of the permanent commission of women officers in the Indian Army, it was later followed in the Indian Navy and Air Force as well. Pursuant to the judgment, the Indian Army applied the same physical evaluation criteria that a male officer would have to pass to get permanent commission at the age of 25 years to women officers who are seeking permanent commission at the ages of 45 or 50 years. This was challenged before the Supreme Court in the case of *Lt Col. Nitisha v. Union of India (2021) 15 SCC 125*. The Court held that applying identical physical evaluation criteria to both women and men, men here being at the age of 25 years and women being above 45 years, constituted indirect and systemic discrimination against the women officers. The Court held that “a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction” and that “Structures, in the form of organizations or otherwise” ought to “be probed for the systems or cultures they produce that influence day-today interaction and decision-making.” It was held that “[t]he duty of constitutional courts” is to “also structure adequate reliefs and remedies that facilitate social redistribution by providing for positive entitlements that aim to negate the scope of future harm.”

Taking note of the oppression against the Scheduled Castes and Scheduled Tribes, the Court in *Hariram Bhambhi vs. Satyanarayan AIR 2021 SC 5610*, while adjudicating a bail matter of a person who was accused of committing caste based violence, held that: “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. Hence the statutory provisions which have been enacted by Parliament as a measure of protecting the constitutional rights of persons belonging to the Scheduled Castes and Scheduled Tribes must be complied with and enforced conscientiously.”

These judgments show the transformative potential of the Constitution and the active role of courts. However, it would not be wrong to say that judgments such as the above are not always the case. Some of the judgments have been criticized for being regressive, and have been overturned for the right reasons.

Social Law v. Constitutional Law

The arguments in courtrooms also demonstrate that there is a constant tussle between constitutional aspects of the law and entrenched social practices. We can understand this as the gap between the aspirational values of the Constitution and the social realities of the day. Dr. Ambedkar had termed ‘social practices’ as a *law within itself* imposing social sanctions and violence on those who do not comply (*BAWS* Vol. 1 2019: 23–98). Thus, in addition to the constitutional and legal sovereignty that governs people, there also resides a governing power in various social and cultural institutions that determines how people live their lives.

While constitutional principles often embody ideals of justice, equality, and human rights, deeply ingrained social norms and practices can sometimes run counter to these principles. This clash is particularly evident in cases involving issues like gender equality, religious freedom, and caste discrimination. For instance, despite constitutional guarantees of gender equality, deeply rooted patriarchal customs may persist, leading to gender-based discrimination and violence. Similarly, despite legislations prohibiting caste-based discrimination, incidents of violence against the protected communities are on the rise (*Deccan Herald* 2023).

Courts and legal systems often find themselves at the centre of this tension, as they must interpret and apply the law in a manner that respects constitutional principles. This challenge calls for a nuanced approach, including legal reforms, public education, and advocacy efforts, aimed at shifting societal norms in alignment with constitutional ideals. It is an ongoing struggle to ensure that constitutional principles are upheld even in the face of deeply entrenched practices that may hinder progress towards a more just and equitable society.

Constitution Outside Courtrooms

For social reformation to happen, the discourse needs to extend beyond the courtrooms and judges. And you might find it surprising that a judge says that. But this is exactly why the topic of my address contains the phrase ‘social life of the Constitution’. Of

course, the Constitution is ‘a terrain of struggle’ (Shivji 2023: 79–83). But, lawyers arguing in courts are not saviours in themselves or operate in vacuum. They build upon the work of the scholars, community leaders and activists, and all other stakeholders. The role of the citizens in constitutional adjudication has to be highlighted.

As Issa G. Shivji, a Tanzanian author and expert in law, notes, it must be acknowledged that: “[L]egal struggles are only one front of the social struggles of the working people. Therefore, they cannot be waged in isolation from other battlefronts” (Shivji 2023: 79–83). He adds that other sites of struggle include mobilisation among people (Shivji 2023: 79–83). Constitutional historian and scholar Michael Klarman notes that several civil rights lawyers did work outside the courtroom in educating the African American community about their rights under the American Constitution (Milano 2019).

In India, right from the adoption of the Constitution, the people of India have engaged with it in different ways. 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 (Bhaskar 2021: 109–131).

The social life of the Constitution in that sense is not in courtrooms, but in how the values of the Constitution are perceived by the society. For instance, the enormous amount of literature produced by writers from Dalit or Adivasi communities takes the constitutional discourse to the masses. In this regard, I would like to mention some of the writings.

Prominent Dalit women authors, such as Urmila Pawar and Baby Kamble, have highlighted the struggles of their communities, providing a foundation for understanding the complexities of caste, class, gender, and power structures in Indian society. Contemporary Tamil writer Bama, in her autobiographical novel, *Karukku* (1992), has chronicled the joys and sorrows experienced by Dalit women in Tamil Nadu. In that way, these writers have shown a mirror about how discrimination works.

A scholar from America and later settled in India, Gail Omvedt documented the movement of Dalits in a constitutional democracy (Omvedt 1994). Baburao Bagul shared his lived experiences as a Dalit in his Marathi book, *Jevha Mi Jaat Chorli Hoti* (translated in English as *When I Hid My Caste*, 1963). A significant work has been of Om Prakash Valmiki, whose autobiography is titled, *Joothan*. The word ‘Joothan’ refers to scraps of food left on a plate, destined for the garbage or animals. India’s oppressed castes, who were treated as Untouchables, were forced to accept and eat joothan for centuries, and the word in Valmiki’s book encapsulates the pain, humiliation, and poverty of a community forced to live at the bottom of India’s social pyramid. Although untouchability was abolished in 1949, Dalits continue to face discrimination, economic deprivation, violence, and ridicule. This is what has been narrated by Valmiki, when he describes his life as Untouchable (Valmiki 2008).

The writings, as mentioned earlier, present a lived experience of constitutionalism, as the experience of law is not in vacuum. They show the constant clash between the social realities and the aspired experience of equality under the Constitution.

Several Indian movies have also portrayed references to the Indian Constitution and its principles, reflecting its significance in the country's social and political fabric. Such films touch upon various aspects of Indian society and its relationship with the Constitution, highlighting the ongoing dialogues and struggles that revolve around constitutional principles and values (*Livemint* 2018). They offer a thought-provoking perspective on how the Constitution influences the lives of ordinary citizens and the complexities of its implementation in the diverse Indian context.

However, for reformation to happen, the initiative is needed not from those who have been oppressed, but from those who have been oppressors. Society therefore needs a collective agenda, where the power of the historical oppressors is constantly questioned. In the context of the Constitution, this involves a scrutiny of legal practices, which perpetuate discrimination.

A Radical Agenda of Constitutionalism

Society must therefore adopt a radical agenda through constitutional means, where structures of discrimination are targeted. We already have certain theoretical frameworks to analyse the broader structures of inequalities.

In the United States, scholars of Critical Race Theory (CRT) have rejected the philosophy of 'colorblindness.' They have highlighted the persistence of 'stark racial disparities' in the United States, despite decades of civil rights reforms. They raise structural questions about how racist hierarchies are enforced, even in seemingly neutral institutions. According to Kimberle Crenshaw, one of the founders of CRT, history and social reality shows that racism operates in American law and culture in many aspects (Fortin 2021). Devon Carbado, a CRT scholar, argues that racial progress is not linear, rather they have been setbacks which undo that progress. According to Carbado, "CRT repudiates the view that status quo arrangements are the natural result of individual agency and merit". He argues, "We all inherit advantages and disadvantages, including the historically accumulated social effects of race. This racial accumulation—which is economic (shaping both our income and wealth), cultural (shaping the social capital upon which we can draw), and ideological (shaping our perceived racial worth)—structure our life chances. CRT exposes these inter-generational transfers of racial compensation" (Carbado 2011: 127).

Similarly, in India, there has been an attempt by scholars to conceptualize the framework of 'Critical Caste Studies.' Anthropologist and historian Gajendran Ayyathurai argues that, "In Critical Caste Studies, the history of caste hegemony and the archives of the oppressed as well as caste-free and anti-caste memories and histories of Indian societies are a central concern" (Ayyathurai 2021). Historian and theorist Shailaja Paik conceptualizes an anti-caste 'critical 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).

Another scholar has argued, “Dr. Babasaheb Ambedkar’s writings provide a framework to understand the pre-colonial foundations that led to colonial and post-colonial criminalisation of certain communities” (Wadekar 2022). Dr. Ambedkar had focused on the value of ‘Fraternity’, which he termed as ‘another name for democracy’. Fraternity means mutual respect for each other. Fraternity can only be achieved, if the dignity of everyone is recognised. India has enacted several legislations which aim to protect the dignity of the oppressed communities.

Such frameworks are necessary for expanding the discourse on constitutionalism. In that sense, the social life of the Constitution is about fostering a culture of inclusion, equity, and empathy. It encourages society to challenge stereotypes and prejudices and cultivate a more profound understanding of the experiences of all its members. It is a call to action to actively combat discrimination, bias, and exclusion in all aspects of life, promoting a more just and harmonious society that transcends mere numerical representation to create a genuinely equitable and inclusive future. Contemporary notions of justice emphasize equitable distribution of resources, inclusivity, and the protection of marginalized groups.

Concluding Remarks

In conclusion, I would refer to the philosophy of Dr. Ambedkar. His idea of constitutionalism was instrumental in transforming Indian society by dismantling the deeply entrenched caste hierarchy and promoting social, economic, and political empowerment for marginalized groups. His legacy continues to shape the constitutional values of modern India, serving as a beacon for social reform and the pursuit of justice for all. As a corollary, the social life of any constitution goes beyond tokenism and necessitates active engagement, active listening, and taking the perspectives and concerns of oppressed communities seriously. It means acknowledging the unique experiences and challenges faced by these groups and incorporating their input into policy development and implementation.

As Dr. Ambedkar said, “However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.” (CAD 1949)

Thank you very much for inviting me today. I hope that the conversation on combating inequalities continues, and we all collaborate to make it happen.

References

- Amar, Akhil Reed (2005). *America’s Constitution: A biography*. Random House.
- Ambedkar, B.R. (2019). Annihilation of Caste. *Babasaheb Ambedkar: Writings and speeches*. (Ed. Vasant Moon). Vol. 1.
- (2019). Evidence before the Southborough Committee. *Babasaheb Ambedkar: Writings and speeches*. (Ed. Vasant Moon). Vol. 1.

- (2019). Waiting for a Visa. *Babasaheb Ambedkar: Writings and speeches*. (Ed. Vasant Moon). Vol. 12.
- Austin, Granville (1966). *The Indian Constitution: Cornerstone of a Nation*. Clarendon Press.
- Berrey, Ellen (2015). *The enigma of diversity: The language of race and the limits of racial justice*. University of Chicago Press.
- Bhaskar, Anurag (2021). ‘Ambedkar’s Constitution’: A radical phenomenon in anti-caste discourse?. *CASTE: A Global Journal on Social Exclusion*, 2(1), 109–31. <https://doi.org/10.26812/caste.v2i1.282>
- (2021). Reservations, efficiency, and the framing of Indian Constitution. *Economic & Political Weekly*, 56(19), 7–8. <https://www.epw.in/journal/2021/19/special-articles/reservations-efficiency-and-making-indian.html>
- Bureau, *The Hindu* (2022). SC/ST representation at secretary, joint secy level in Centre stands at 4% and 4.9%: Govt data in Rajya Sabha. December 15, 2022, sec. India. <https://www.thehindu.com/news/national/scst-representation-at-secretary-joint-secy-level-in-centre-stands-at-4-and-49-govt-data-in-rajya-sabha/article66267048.ece>
- Carbado, Devon W. (2011). Critical what what commentary: Critical race theory: A commemoration: Afterword. *Connecticut Law Review*. p. 127.
- Constituent Assembly Debates. <https://loksabha.nic.in/writereaddata/cadebatefiles/C25111949.html>
- DHNS. n.d. A worrying rise in atrocities on Dalits. *Deccan Herald*. Accessed December 23, 2023. <https://www.deccanherald.com/opinion/editorial/a-worrying-rise-in-atrocities-on-dalits-2666912>
- Douglass, Frederick (1860). The Constitution of the United States: Pro-slavery or anti-slavery?. https://civics.asu.edu/sites/default/files/2021-06/Q75%20Douglass%2C%20Is%20the%20Constitution%20Proslavery%20or%20Antislavery%2C%201860_CPTL.pdf
- Ellinghaus, Katherine (2006). Indigenous assimilation and absorption in the United States and Australia. *Pacific Historical Review*, 75(4), 563–85. <https://doi.org/10.1525/phr.2006.75.4.563>
- Fortin, Jacey (2021). Critical race theory: A brief history. *The New York Times*, November 8, 2021, sec. U.S. <https://www.nytimes.com/article/what-is-critical-race-theory.html>
- Galanter, Marc (1963). Law and caste in modern India. *Asian Survey*, 3(11), 544–59. <https://doi.org/10.2307/3023430>
- Govt of India 2022: Office of JS & CAO, Ministry of Defence. n.d. www.caomod.gov.in. Accessed on October 20, 2023 <https://caomod.gov.in/DHTI/Literature%20for%20AFHQ%20Employees/Reservation%20in%20Services.pdf>
- Greer, C., and Y. Jewkes (2005). Extremes of otherness: Media images of social exclusion. *Social Justice*, 32(1), 20–31. <https://openaccess.city.ac.uk/id/eprint/22470/>
- Hibbard, Michael (2021). Indigenous planning: From forced assimilation to self-determination. *Journal of Planning Literature*, 37(1) 0885412221102664. <https://doi.org/10.1177/08854122211026641>
- It is time for a new subfield: ‘Critical caste studies.’ (2021). South Asia@LSE. July 5, 2021. <https://blogs.lse.ac.uk/southasia/2021/07/05/it-is-time-for-a-new-subfield-critical-caste-studies/>
- Jha, Lata (2018). Ten Indian films on the caste system. *Mint*. July 23, 2018. <https://www.livemint.com/Consumer/6nnJc915E2imyZKE0jkVtj/Ten-Indian-films-on-the-caste-system.html>
- Klarman, Michael J. (2007). *Unfinished business: Racial equality in American history*. Oxford University Press.

- Laitinen, Arto, and Arvi Särkelä (2020). Social wrongs. *Critical Review of International Social and Political Philosophy*. November, 1–25. <https://doi.org/10.1080/13698230.2020.1853435>
- Milano, Brett (2019). The work of pioneering civil rights lawyers evinces hope and resilience in today's political landscape, says Klarman. Harvard Law School. Accessed December 23, 2023. <https://hls.harvard.edu/today/the-work-of-pioneering-civil-rights-lawyers-evinces-hope-and-resilience-in-todays-political-landscape-says-klarman/>
- Mohan, P. Sanal (2015). *Modernity of slavery: Struggles against caste inequality in colonial Kerala*. Oxford University Press.
- Omvedt, Gail (1994). *Dalits and the democratic revolution*. Sage Publications Pvt. Limited.
- Pettit, Philip (2012). *On the people's terms: A republican theory and model of democracy*. Cambridge University Press.
- Press Information Bureau, Government of India (17 July 2019), "Representation of Reserved Categories", <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579065>
- Representation of reserved categories. (2019). Pib.gov.in. <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579065>.
- Shivji, Issa G. (2019). Do constitutions matter? The dilemma of a radical lawyer. *Journal of National Law University Delhi*, 6 (2), 79–83. <https://doi.org/10.1177/2277401720986004>
- Thorat, Amit, and Mohammad Aquil (2021). Historic legacy of untouchability and caste enslavement: A case of reparative justice. *Journal of Social Inclusion Studies*, 7 (2), 107–116. <https://doi.org/10.1177/23944811221084404>
- Thorat, Sukhadeo and Kumar, Narender (2008). *B.R. Ambedkar*. Oxford University Press.
- Understanding civil liberties from an Ambedkarite perspective—the leaflet. (2022). Theleaflet. in. April 14, 2022. <https://theleaflet.in/understanding-civil-liberties-from-an-ambedkarite-perspective/>
- Valmiki, Omprakash (2008). *Joothan: An untouchable's life*. Columbia University Press.
- What Dalit people taught us about education and why we must commit to it. n.d. *The Wire*. Accessed December 23, 2023. <https://thewire.in/caste/what-dalit-people-taught-us-about-education-and-why-we-must-commit-to-it>