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REFORMATION BEYOND REPRESENTATION:

The Social Life of the Constitution in Remedying Historical Wrongs

THE BRANDEIS LECTURE DELIVERED BY

Hon'ble Dr. Justice Dhananjaya Y Chandrachud
The Chief Justice of India

At the Sixth International Conference on the Unfinished Legacy of Dr. B.R. Ambedkar
October 24, 2023 | Brandeis University

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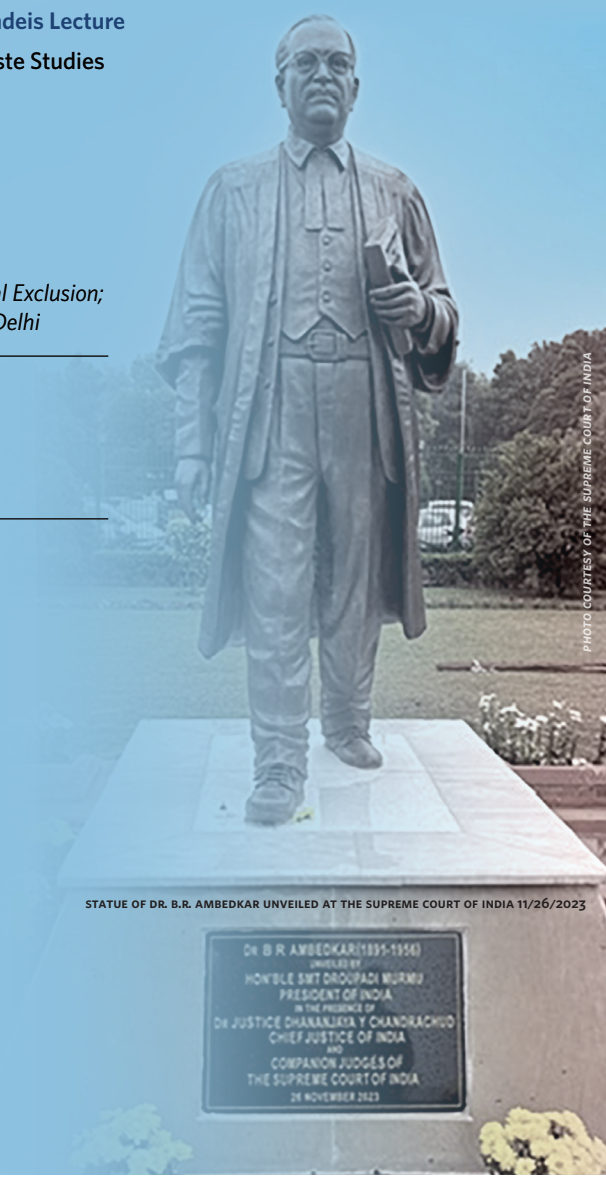

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STATUE OF DR. B.R. AMBEDKAR UNVEILED AT THE SUPREME COURT OF INDIA 11/26/2023

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

Dr. Justice Dhananjaya Y Chandrachud[1]

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

[1]Chief Justice of India

Bhaskar[1] 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 Brandies 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 Remedying 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 remedying historical wrongs. However, representation is only one way of remedying 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.

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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 Remedying 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 reimagined "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

[1]I 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; Piliavksy 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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Ambedkar's Emancipatory Constitutionalism

"Rights are Real only if they are accompanied by Remedies."

—Dr. Ambedkar, 1947

Sukhadeo Thorat[1]

Chief Justice of India Dr. D. Y. Chandrachud delivered a lecture on the theme of "Reformation Beyond Representation: The Social Life of the Constitution in Remedying Historical Wrongs", at the Sixth International Conference on the "Unfinished Legacy of Dr. B.R. Ambedkar: Law, Caste, and the Pursuit of Justice" at Brandeis University, Waltham (USA). The lecture brought to the forefront insights on the complex issue of the historical wrongs faced by the excluded caste of Untouchables in India and Dr. Ambedkar's role in providing safeguards in the Indian constitution for their upliftment. Justice Chandrachud elaborates on the nature of emancipatory constitutionalism embedded in the Indian Constitution and Dr. Ambedkar's role in its articulation for social justice to the Untouchables and transforming an unequal caste-ridden society towards the goals of equality and liberty to all citizens. The CJI indicated the outcome of the reformatory provisions in the Indian Constitution in the form of legal safeguards against caste discrimination and affirmative action policies. At the same time he also pointed towards the limited impact of reformatory measures due to persisting contradictions between what he termed the "social life and constitution life", the gap that persists in the values of equality, liberty and fraternity enshrined in the Constitution and the traditional values and customs that govern the actual social relations of Hindus towards low caste Untouchables. The CJI referred to the systematic discrimination and structural inequalities in resources and education as a root cause of the persistence of the problem of Untouchability, and proposed solutions outside the courtroom by civil society against caste discrimination and untouchability, particularly by the oppressed castes. On several points, he draws a parallel between the Untouchables in India and the African Americans in USA. The canvas of enquiry is comprehensive and inclusive of crucial legal and constitutional issues. In the brief comments below, I elaborate on the main propositions laid down by Justice Chandrachud in his speech.

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How Harmful are the Historical Wrongs?

Justice Chandrachud began by arguing that "the annals of history are stained with instances of profound injustice. What sets these wrongs apart is that they deny individuals their right to participate and reap the benefits of living together in society based on the identity of the individual. …Thus, when I say 'historical wrongs', it *is 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.*" Justice Chandrachud goes on to add that, "Unfortunately, the legal system has often played a pivotal role in perpetuating historical wrongs against marginalized social groups in ancient India (BCE 1500-BCE 600), medieval (CE 700-CE 1756) and colonial British India (1758-1947). Law as an institution was practiced to maintain existing power structures, and to institutionalize discrimination, leaving a lasting legacy of injustice that continues to shape the lives of these groups."

What is the nature of this historical wrong to which Justice Chandrachud referred to? The historical wrong has its origin in a period sometime between BCE 1000-BCE 600 in the later Rigvedic time of ancient India. The first definite indication of the social organization of the caste system shaped by graded inequality is mentioned in the Purusha Sukta of the Rigveda (BCE 1000-BCE 600). The Purusha Sukta ordained that, "For the prosperity of the world, He (the creator) from his mouth, arms, thighs and feet created the Brahmin, Kshatriya, Vaishya and Shudra respectively" (Ambedkar 1987). By the end of the later Vedic period (about BCE 600), the Varnas gradually become hereditary, endogamous and birth-based and emerged in its full form with some of its essential features: clear separation of people in groups or castes, crystalized by the practice of endogamy or marriage within caste, restrictions on inter-caste dining and social relations, and residential segregation, which evolved in stages. The caste system involved four castes, but later the fifth caste, namely, Untouchables emerged and was integrated into it. Untouchability had taken a firm and definite shape around CE 200, although its early signs go back to around BCE 600 (Jha 2018).

The practice of caste and untouchability, although it began as taboo, was made legal, the credit of which goes to Manu, the author of the *Manusmriti* codified sometime around BCE 200 (Buhler 1886). The *Manusmriti* comprised the culmination of all the stands in early legal literature and gave it a definite legal shape. Reference to some legal provisions in the *Manusmriti* provides an idea about the harm done to the Shudras/Untouchables:

The legal restrictions related to ownership of property (Buhler 1886: 401)

"No superfluous collection of wealth must be made by a Shudra, even though he has power to make it, since a servile man, who has amassed riches, becomes proud, and, by his insolence or neglect, gives pain even to Brahmins."

"No collection of wealth must be made by a Shudra even though he be able to do it, for [a] Shudra who has acquired wealth gives pain to Brahmins."

"A Brahmin may take possession of the goods of a Shudra with perfect peace of mind, for, since nothing at all belongs to this Shudra as his own, he is one whose property may be taken away by his master."

The restrictions on occupation (Buhler 1886: 401)

"One occupation only the Lord prescribed to the Shudra; to serve meekly even these other three castes."

"If a Shudra is unable to subsist by serving Brahmins, he may serve a Kshatriya, or he may also seek to maintain himself by attending on the wealthy Vaishya."

"The remnants of their food must be given to him, as well as their old clothes, the refuse of their grain, and their old household furniture."

"But let the Shudra serve the Brahmin."

The restrictions on learning (Buhler 1886: 401)

"A twice-born man who has — (improperly) divulged the Vedas (to a Shudra and women) commits sin, and atones for his offence, if he subsists for a year on barley."

"If the Shudra intentionally listens for committing to memory the Vedas, then his ears should be filled with (molten) lead and lac; if he utters the Vedas his body should be cut to pieces."

"Let the three twice-born castes (that is Brahmin, Kshatriya and Vaishya), discharge (prescribed) duties, study (the Vedas) but among them, the Brahmin (alone) shall teach it, not the other two, that is and established rules.

Privileges of a Brahmin at the cost of Shudra (Buhler 1886: 401)

"But let a Shudra serve Brahmins, either for the sake of heaven or with a view to both this life and next, for he who is called the servant of a Brahmin thereby gains all his end."

"The services of the Brahmins alone are declared to be an excellent occupation for Shudra, for whatever else besides this he may perform will bear no fruits."

"Whatever exists in the world is the property of the Brahmin, on account of excellence of his origin the Brahmin, indeed, is entitled to all."

The Untouchables, like the Shudra suffered from denial of rights but also faced a stigma of "impurity and untouchability" causing defilement to the higher castes. Their impure and polluting status results in complete segregation and separation from the rest of Hindu society. Not only did their touch cause pollution but pollution was also caused through proximity, sight, hearing, and speech. With these ugly disabilities they eked out a miserable existence, and this was the most sickening and pernicious development in the social organization of the Hindu caste system.

An equally deplorable feature to which Justice Chandrachud referred is the slave status of the Untouchable, referring to the work of Sanal Mohan (2015) who has depicted the worst kind of slavery of Untouchables in South India where they were the property of high castes, and hence could be sold and purchased. Children and wife and husband could be sold separately, hired out, physically assaulted, disfigured by

cropping off the nose and even killed or required to live and work on waterlog farms, known as an "agro-slave" and "soil slave". The Law Commission of 1840 empirically found slavery among the Untouchables as an all-India phenomenon (Banaji 1937). The Hindu laws about slavery leave little doubt about the community-based character of slavery faced by an Untouchable. This became quite obvious from the legal provisions in the *Manusmriti*, codified around BCE 200.

The *Manusmriti* ordains (Buhler 1886: 417; Sahoo 2013: 453):

"*A Shudra, whether bought or unbought, should be reduced to slavery because he is created by God for the service of a Brahmin.*"

Manu further says:

"*Even if a Shudra is made free from the services of a master one should not consider this as his absolute freedom from slavery, because servitude remains in him as (an) integral part of his nature or it is one of his basic tendencies to serve others from which none can actually disassociate him.*"

This was the situation during the ancient Rigvedic period (BCE 1000-BCE 600) on the status of Shudras/Untouchables. The caste system however continued without much interruption in the later period, in what is called the Medieval period that includes the Islamic period as well (CE 700-CE 1400). About caste in the Medieval period, Shireen Moosvi (2011 and 2003) has argued that: "There was no desire at all to declare a war against either the caste system or to undermine it. They (Islamic rulers) continued to regard the caste system as a permanent feature of society. There is no evidence that any of the oppressed castes secured better treatment." Moosvi suggests that "within Islamic thought, there was a strong hierarchical streak, which, for example, greatly distinguished between the free-born and the slave; slaves were intrinsically low-born and subjected to contempt being vain fellows and purchased ones. . . .Thus, the Arab society in which Islam arose had deep rooted concepts of tribal differentiation, which continued under Islam, . . . With this experience in Iran behind them, the Arab policy with regard to caste could well have been predicted." (Moosvi 2003)

Not much changed during the British period (1758-1950). Among the British, who took over India in the second half of the eighteenth century (CE 1757) from the Mughals, it was Warren Hastings, the first Governor of Bengal, who made the following rule in 1772 when he introduced full-scale reforms in the judicial system for the first time in the history of British colonial rule in India.

"*That in all suits regarding inheritance, marriage, caste, and other religious usages as institutions, the Laws of the Koran with respect to Mohammedans and those of the Shaster (Shastras) with respect to Hindoos, shall be invariably adhered to; on all such occasions the Maulvis or Brahmins shall respectively attend to expound the Law, and they shall sign the report & assist in passing the decree.*"

The Hindu Law was, consequently, not the classical Brahminical law itself. It was a law system based on the Brahminical law but readjusted for the British judicial administration (Banaji 1937).

The British also faithfully carried forward the Hindu and Islamic slavery right from 1772 till 1843, when slavery was delegalized with the adoption of Act V in 1843 and abolished with the adoption of the Indian Penal Code in 1860 (Banaji 1937). Selective legal reforms were introduced under pressure from those against untouchability and other reformers, some of which are mentioned in detail in the book by Manoj Mitta (2023). Commenting on the half-hearted efforts by the British, Dr. Ambedkar in his speech on November 20, 1930 at the First Round Table Conference held in London to frame the Indian (British) Constitution in 1935, in front of the King and Prime Minister of England, observed:

"*When we compare our (referring to the Depressed Classes) position, with the one which it was our lot to bear in Indian society of pre-British days, we find that instead of marching on we are only making time*" — and he goes on to argue that — "*The British government has accepted the social arrangements as it found them, and has preserved them faithfully in the manner of the Chinese tailor who, when given an old coat as a pattern, produced with pride an exact replica, rents, patches and all. Our wrongs have remained as open sores and they have not been righted, although 150 years of British rule have rolled away.*" Dr. Ambedkar goes on to say that: "*The reason why it (the British Government) did not intervene is because it is afraid that its interventions to amend the existing code of social and economic life, will give rise to resistance*" (Busi 2016).

The historical wrong to which Justice Chandrachud rightly referred was the most ugly, sickening, pernicious and vicious byproduct of caste, Untouchability, which has eked out a miserable existence for too long, from BCE 600 to 1950, for about 3000 years, a suffering that is rarely to be found anywhere in the world. It deserves to be rooted out.

Emancipatory Constitutionalism in Indian Constitution

The Indian Constitution adopted in 1950 overturned the legal framework of the *Manusmriti*. Justice Chandrachud rightly observed that: "Dr. Ambedkar advanced a *transformative constitutionalism* and brought values of ideals of Liberty, Equality, and Fraternity in the language of the Constitution itself, from the Preamble across the entire canvas of the Indian constitution. In Dr. Ambedkar's vision, the idea of a constitution goes beyond its traditional role of securing fundamental rights, and extends the constitution's capacity to liberate and empower marginalized and oppressed groups."

Before we analyse Justice Chandrachud's interpretation of Dr. Ambedkar's idea of Emancipatory Constitutionalism as embedded in the Indian Constitution, it is useful to understand the proposition related to an idea of emancipatory constitutionalism conceived by Dr. Ambedkar. In the very first meeting of the Constitution Assembly held on December 1946 which discussed the objective of the Constitution, Dr. Ambedkar observed: "*I find that this part of [the] Resolution, although it enunciates certain rights, does not speak of remedies. All of us are aware of the fact that rights are nothing unless remedies are provided whereby people can seek to obtain redress when rights are invaded. I find the complete absence of remedies . . . . There are certain*

provisions which speak of justice, economic, social and political . . . . I would have expected some provisions whereby it would have been possible for the state to make economic, social and political justice [a] reality" (Busi 2000).

Thus Dr. Ambedkar's vision for constitutionalism encompasses not only the provision of fundamental rights but also the remedies to enable the citizen to access fundamental rights**.** This vision influenced the making of the Indian Constitution. Justice Chandrachud captures the features of Emancipatory Constitutionalism incorporated by Dr. Ambedkar. He mentions that the Indian Constitution in 1950 provided for fundamental rights, such as the right to equality, equality before law or equal protection of law, equality of opportunity in matters of public employment, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, right to freedom of speech and expression, freedom of religion, protection of life and personal liberty, and right against exploitation and forced labour. However provisions go much beyond fundamental rights, and also includes the (commitment of) remedies in terms of legal safeguards against discrimination and affirmative action policy to ensure fair share to the discriminated groups in legislature, public service and educational institutions and other public spheres (National Law University 2016). For instance, Article 17 abolishes untouchability, and placed in the chapter on fundamental rights, along with the provisions of equality and non-discrimination *and* the enforcement of any disability arising out of "Untouchability" is treated as an offence. Justice Chandrachud states that Dr. Ambedkar tried to institutionalise "*social revolution through law and through a robust legal framework that would safeguard the rights and dignity of untouchable people*". Beside the key aspect of Dr. Ambedkar's transformational constitutionalism, was the inclusion of affirmative action measures into the Constitution as a remedy to ensure fair share to discriminated classes in legislature, public services, educational institutions, including a provision of National Commission for Scheduled Castes to oversee their progress.

Another significant feature of Dr. Ambedkar's Emancipatory Constitutionalism which needs to be mentioned was the inclusion of "Directive Principles of State Policy" in the Constitution. Justifying the inclusion of directive principles, Dr. Ambedkar on November 4, 1948, while speaking on the Draft Constitution argued that, "*It is a novel feature in a constitution. What are called Directive Principles is merely another name for Instruments of instructions for framing the policies for the wellbeing of the people.*" In 1981, the Supreme Court clarified that the difference between the Fundamental Rights and the Directive Principles lies in that Fundamental Rights seek to assure political freedom to the citizen, while Directive Principles aimed to secure social and economic freedom by appropriate state action. In another instance, the Supreme Court in 1973 clarified: "The purpose of Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. The constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. The Fundamental Rights and Directive Principles — together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience" (National Law University 2016).

However the affirmative action as part of the Constitution had to be justified as it did not fall in line with the traditional notion of constitutionalism. For instance, for each provision of fundamental rights, the Constitution states that: "Nothing in these articles shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the scheduled Tribes," for reservation in legislature, public services and education institutions, which the Constitution did. Some contended against these provisions claiming that these were contradictory and interfered with liberty, as they believe that interference by the state holds a negative impact on liberty; liberty is contemplated as freedom from interference by the state. Justice Chandrachud stated that: "Dr. Ambedkar did not view equality or liberty and affirmative action as contradictory." Justice Chandrachud was right in interpreting the mind of Dr. Ambedkar when he says, "The negative conceptions of freedom ignore the ongoing deprivations that can arise out of dominating relationships or societal arrangements — 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." He goes on to add 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. He quoted Dr. Ambedkar from his famous book, *Annihilation of Caste*, as saying that, "*He characterises liberty as the destruction of the dominion which one man holds over another*" and adds, "*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. 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*," observed Justice Chandrachud.
At another instance Dr. Ambedkar had stated that:

> *Liberty to be real must be accompanied by certain social conditions. In the first place there should be social equality. Privileges tilts the balance of social action in favour of its possessors. The more equal are the social rights of citizens, the more able they are to utilize their freedom. If liberty is to move to its appointed end it is important that there should be equality. In second place there must be economic security. A man may be free to enter any vocation he may choose. . . .Yet if he is deprived of security in employment he become a prey of mental and physical servitude incompatible with the very essence of liberty. Without economic security, liberty is not worth having. Men may well be free and yet remain unable to realise the purpose of freedom. Liberty takes root in a milieu of equal social rights and economic security.* (*Dr. Babasaheb Ambedkar: Writing and Speeches*, volume 3, 1987: 39-66)

Thus, "Dr. Ambedkar conceived of a reformative constitutionalism that was simultaneously interventionist yet liberty enhancing", observed Justice Chandrachud.

In essence, his vision for constitutionalism emphasized not only the protection of fundamental rights but also the active promotion of social equality and justice through state action.

Progress but Limited

Justice Chandrachud mentioned that these 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. The representation of constitutionally protected social groups (called Scheduled Castes and Scheduled Tribes) has increased in the government services closely in proportion to their population share during the last seven decades. However, Justice Chandrachud also recognised the limits of this progress as the presence of members of oppressed groups in top positions of policy making is low. Of a total 322 officers 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, lacking a meaningful voice in the decision-making processes. We may add that most importantly, caste discrimination still persists despite the law. For the period 2001 to 2016, a total of 2,57,961 cases of discrimination were registered by the Scheduled Castes which comes to a yearly average of 16,123 cases per year under the Protection of Civil Rights Act 1955 and Prevention of Atrocities Act 1989. This is only the tip of the iceberg: primary studies revealed that discrimination is deeply embedded in social relations and persists in significant measure in the economic, social, cultural and religious spheres. Justice Chandrachud attributed this persistence to the gap between the aspirational values of the Constitution and the social realities of the day, what he described as a gap between "*social life and Constitution life*". He attributed this gap to "systemic caste barriers" as well as the "structural inequalities in resources and education".

With regard to systemic caste barriers, he referred to Dr. Ambedkar who termed social practices associated with caste system and untouchability as a "*law within itself* imposing social sanctions and violence on those who do not comply." These deeply ingrained social norms and practices run counter to constitutional principles. Justice Chandrachud also recognised that often the legal system gets influenced by caste prejudices. He referred to the proposition of Critical Race Theory in USA which rejected the philosophy of "colour blindness" which implies that racism operates in American law in several aspects. Drawing up a similar situation in India, we could say that the extremely low conviction rate in the cases of caste discrimination and atrocities is closely linked with the caste bias embedded in legal administration engaged in the delivery of legal justice. The Standing Committee of the Ministry of Social Justice and Empowerment confirmed, "*The official attempt to dilute the spirit of the (Protection of Atrocity) Act at every stage — from non-registration of cases, failure to investigate according to due process of law, not filing the chargesheet in court within time, not giving relief and compensation to the victims, not providing protective and preventative measures*" (Thorat 2017).

Justice Chandrachud attributes structural inequalities in ownership of resources and education as a second reason for the persistence of deprivation among the Untouchable groups. Recent official data on ownership of wealth did support this proposition. It shows that in 2013, the Scheduled Castes (SC) owned only 7 per cent of the country's wealth, which is much less than their population share of 18 per cent, while the share of high castes is 45 per cent, which exceeds their population share of 21 per cent. The average value of wealth per household among the SCs is Rs. 6,00,000/- (six lakh) as compared to Rs. 29,00,000/- (twenty-nine lakh) for higher castes. The SC owned almost six times less wealth per household as compared to high castes. The low ownership of capital assets results in high dependence of Scheduled Castes on wage labour, about 44 per cent as compared to 11 per cent among high castes. Similarly, the educational attainment rate of SC was 20 per cent, which is way behind that of the high castes at 43 per cent and the national average of 26 per cent. This results in low per capita income and high poverty and malnutrition. In 2015/16, the incidence of underweight, and anaemic children, and child mortality among Scheduled Caste children was higher than others. Similarly in cases of housing, about 18 per cent of SC live in bad houses, compared to 6.7 per cent for high castes. About 13 per cent of SC live in slums, which is much higher than 4.6 percent for high castes. The percentage of houses without latrine facilities was 71 per cent for SC, compared to 37 per cent for high castes. The cumulative impact of high poverty and malnutrition is reflected in low life expectancy — the average age at death in 2018 being 55 years among the Scheduled Castes compared to 60 years for high castes (Thorat 2017).

It is precisely for this reason that Justice Chandrachud staked a claim to go beyond the policy of representation — a reformation involving dismantling systemic barriers and addressing structural inequalities. In his view this will have to come from outside the court room by civil society. And for reformation to take place, the initiative necessarily has to come 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, which require expanding the discourse on constitutionalism.

Ambedkar's Alternative Emancipatory Constitutionalism

Justice Chandrachud's analysis of Ambedkar's reformatory constitutionalism presented above, however, is based on the 1950 Constitution. Obviously this does not carry Dr. Ambedkar's ultimate view expressed in his writings. We know that the 1950 Constitution is the outcome of common consensus developed in the Constitution Assembly by majority members. And this consensus which Ambedkar helped to develop as a Chairman of the Drafting Committee is not entirely his own. Ambedkar was a pragmatic reformer; his staunch pragmatism was shaped by his teacher in Columbia University, John Dewey (Scott 2023). His goal was to incorporate and push through in the Indian Constitution his ideas on Constitution as much as he could to optimise the gains for discriminated communities and for the Nation.

In my view, Ambedkar's own notion of the Indian Constitution is contained in the Draft Constitution submitted to the Constitutional Assembly in 1947 in the form of "State and Minorities" (Ambedkar 1945). The principles underlying Ambedkar's idea of Emancipatory Constitutionalism were stated by him, as mentioned above, in the very first meeting of the Constitution Assembly held in December 1946 to discuss the objective of the Constitution. To repeat, Dr. Ambedkar had stated that "*rights are nothing unless remedies are provided whereby people can seek to obtain redress when rights are invaded.*" As a follow-up, he outlined a framework of remedies in the Draft Constitution submitted to the Constitution Assembly in 1947. Ambedkar's Draft Constitution, besides fundamental rights, also provides what he called "Remedies against invasion of Fundamental Rights" which include protection against unequal treatment, protection against discrimination, and protection against economic exploitation. Besides, it includes more specially safeguards for protection of Minorities and the Scheduled Castes. However, Dr. Ambedkar could incorporate only some of the remedies against discrimination for Scheduled Caste and religious minorities in the 1950 Constitution. This included a ban on untouchability and affirmative action in legislature, public services, provision for promotion of education of the Scheduled Castes, and setting up of a commission for Scheduled Castes and Directive Principles and certain rights of religious minorities. He was unsuccessful in being able to include the more basic remedies for protection of religious and social minorities as Dr. Ambedkar's proposal on the political and economic structure of the Constitution and safeguards to religious and social minorities went far beyond the framework of the British idea of a Constitution and the notion of Parliamentary Democracy. First, to consider the nature of Parliamentary Democracy: the proposal was outlined in "Communal Deadlock And A Way to Solve It" in an address to the All India Scheduled Caste Federation on May 1945. Two year later this was included in the Draft Constitution, "State and Minorities" in modified form submitted in 1947, as mentioned above. According to him, the British Parliamentary Democracy system gives legislative and executive power to a party which has secured a majority in legislature. The government so formed continues in office only as it can command a majority in the legislature. The British system of government however, rests on the premise that the majority is a political majority which people decide based on the policies. However, in "India the majority is not a political majority. It is communal majority. In India majority is born, it is not made. A political majority is not [a] fixed or a permanent majority. It is a majority which is always made, unmade and remade. A communal majority on the other hand is a permanent majority fixed in its attitude, (based on religion and caste), one can destroy it, but one cannot transform it. That is the difference between a communal majority and a political majority." (Ambedkar 1945)

In India, Dr. Ambedkar argued, with the majority being a communal majority, no matter what social and political programs it may have, the majority will retain its communal character linked to religious and caste identity. Given this fact, it is clear that if the British system was copied it would result in permanently vesting executive

power in a communal majority, to the advantage of the majority and to the disadvantage of the minorities. In his view, in India, there is perpetual antipathy between majority and minorities and on which account the danger of communal discrimination by the majority against minorities forms an ever-present menace to the minorities (Ambedkar 1945). Dr. Ambedkar therefore proposed a significant reform in the British-type of Parliamentary Democracy for its adoption to the Indian context. He proposed reform both in the quantum of legislature of the majority and minorities and protection against communal Executive. The reforms were to be governed by three principles, that include, principle of Relative Majority, principle of Confidence in Executive and the principle of "Unanimous" Rule.

As regards principle of "Relative Majority", Dr. Ambedkar argued that majority (community) rule is untenable in theory and unjustifiable in practice. Therefore a majority community may be conceded a "relative majority" of representation but it should never claim absolute majority. The relative majority of representation in legislature could be achieved by reducing the (large communal majority) seats of the majority community in the legislature. The seats taken from the majority then should be distributed among the minorities in reverse proportion to their social standing, economic position and educational condition. Thus, a reduction in the number of seats of the majority and corresponding increase in the seats of the minorities will give, what he called a "balanced representation", such that no one community is placed in a position to dominate another by reason of its number. This will give effective representation to the minorities, in so far as the effectiveness of the representation depends upon its being enough to give the minority the sense of not being entirely overwhelmed by the majority.

Ambedkar also proposed the reform in the method of election of the legislature from the minorities. Between the joint electorate and separate electorate method, he preferred the reformed separate/joint electorate. Later he proposed, what he termed "Qualified Joint Electorate", which in his view would ensure the election of true and real representatives of the minorities.

The second principle that Ambedkar proposed as a safeguard against a communal Executive is the principle of "Confidence in Executive". He suggested that the majority party which has secured a majority in the polls is deemed entitled to form a government but only in a manner such that it has the "confidence" of all minorities in legislature. First, the representation of the minorities in Executives should be necessarily in proportion to their share in legislature. Second, the Executive of a majority party in legislature should be constituted in a manner such that it will have its mandate not only from the majority party legislature in House but also from minorities in legislature. For this to happen, the Prime Minister, Cabinet members and Cabinet member of the minority should have the confidence of the whole house. Therefore to gain this confidence, the Prime Minister and members of the Cabinet from the majority community should be elected by the whole house and the representatives of the different minorities in the Cabinet should be elected by each of minority members in the whole house. This will install confidence in the Executive of the majority party.

The third principle that Dr. Ambedkar proposed was the rule of "Unanimity" wherein mere majority rule is not sacrosanct for an important decision. Citing the example of USA, he said that "…matters included in Fundamental Rights are of such supreme concern that mere majority rule is not enough to interfere with them. . . . The (USA) Constitution says that no part of the Constitution shall be altered unless the proposition is carried by three-fourths majority and ratified by the states. This shows that in the United States Constitution, for certain purposes mere majority rule is not component." Ambedkar also gave the example of The League of Nations which followed the rule of unanimity. Ambedkar's intention in quoting these examples was to emphasize that in important decisions relating to the minorities, the rule of unanimity or of two-third majority should be applied and not the majority rule alone (Ambedkar 1945). These were three serious reforms that he proposed in the British parliamentary system for its adoption into the Indian context. However, these reforms were bypassed by the Constitution Assembly members in the framing of the 1950 Constitution.

Also Ambedkar's remedies against economic exploitation to ensure liberty were not made part of the Constitution, as the Constitution Assembly members did not find them in line with the traditional notion of British constitutionalism.

Deviating from the traditional notion of a Constitution which includes only fundamental rights and the accompanying political structure (with Legislature, Executive and Judiciary) and leaves the reform in economic structure to the legislature, Dr. Ambedkar said that: "*The useful remedy adopted by Democratic countries is to limit the power of the Government to impose arbitrary restrains in the political domain and to invoke the ordinary power of the legislature to restrain the more powerful in the economic field.*" He goes on to add, "*The inadequacy nay futility of the plan has been well established …. The successful invocation by the less powerful of authority of the legislature is a doubtful proposition. Having regard to the fact that even under adult suffrage all Legislature and Government are controlled by the more powerful, an appeal to the Legislature to intervene is very precarious [and] safeguards against the invasion of the liberty of the less powerful*" (Ambedkar 1947: 36). Ambedkar proposed an alternative in his proposed plan. He argued that it, ". . . *seeks to limit the power of the Government to impose arbitrary restraints but also of the more powerful individuals or to be more precise to eliminate the possibility of the more powerful having the power to impose arbitrary restraints on the less powerful by withdrawing from the control he has over the economic life of people*" (Ambedkar 1947: 36). He therefore advocated for a particular type of economic structure to be a part of the Constitution. And the economic structure that he proposed was a modified form of State Socialism, which included state ownership of agricultural land, basic and key industries, insurance, and education and the rest in the private sector. Dr. Ambedkar provided justification both for state socialism as an economic system and also for making it a law of the Constitution. He justified socialist economy to ensure the liberty of the individual and suggested that "the purpose of a socialist economy was to protect the liberty of the individual from invasion by other individuals which is the object of enacting Fundamental Rights. The connection between individual liberty and

the shape and form of the economic structure of society is apparent." He argued that *"Anyone who studied the workings of the system of social economy based on private enterprise and pursuit of personal gain will realize how it undermines the premise on which democracy rests. People have to relinquish their constitutional rights in order to gain their living and to subject themselves to be governed by private employers.*" In a private economy, both the employed and the unemployed are compelled to relinquish their fundamental rights for the sake of work to survive. This was the justification for the alternative economic structure in the form of state socialism. The proposal was essentially meant to safeguard the liberty of the individual.

Equally relevant was the justification to make socialism a part of the (law) Constitution, what he termed 'constitutional state socialism'. Dr. Ambedkar recognised that the proposal to make the economic structure as part of the Constitution marks a departure from the existing Constitution whose aim is to prescribe the form of the political structure of society and leave the economic structure untouched. According to him, "This happens because Constitutional Lawyers have been dominated by the antiquated conception that all that is necessary for the perfect Constitution for Democracy was to frame Constitutional law with Adult Suffrage and Fundamental rights — the old time Constitutional Lawyers believed that the scope and function of Constitutional Law was to prescribe the shape and form of the political structure of society. They never realised that it was equally essential to prescribe the shape and form of the economic structure of society, if Democracy is to live up to its principle of one man, one value." Dr. Ambedkar therefore urged that the, "*Time has come take a bold step and define both [the] economic structure as well as political structure of society by the law of the Constitution. All countries like India which are late-comers in the field of Constitution-making should not copy the faults of other countries. They should profit by the experience of their predecessor*" (Ambedkar 1947: 38–39).

It emerges from the above discussion that the proposal in Ambedkar's Draft Constitution of emancipatory or socially transformative constitutionalism was far more radical than the one embedded in the 1950 Indian Constitution. The tragedy is that Ambedkar's proposal on economic structure and on safeguards to minorities was not fully appreciated by the Constitution Assembly. The caution issued by Dr. Ambedkar has come true within a short period of 75 years after the adoption of the Constitution.

Justice Chandrachud concluded his speech with this admonition by Dr. Ambedkar. The CJI quotes Dr. Ambedkar who said, "*However good a Constitution may be, it is sure to turn out bad because those who are called to work on 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 on it, happen to be a good lot*." Justice Chandrachud did not elaborate on the caution pronounced by Dr. Ambedkar in a speech on November 25, 1949 in the Constitution Assembly (Constitution Assembly Debates 1949). However, we observe Ambedkar's concerns coming true in a short period of time, in the way the Constitution has been misused during the last ten years or so. The (good) Indian Constitution has been moulded with regard to its governing principles of secularism, socialism, and

democracy on several issues (by "the bad lot in authority", to cite Dr. Ambedkar), and has pushed the Indian nation closer to becoming a majoritarian Hindu theocratic state and (perhaps) a communal democracy (Angana Chatterji, Thomas Hansen & Christophe Jaffrelot, 2019).

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

Manoj Mitta[1]

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.

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The Twilight of Equality and the Birth of Fraternity: A Commentary on Chief Justice Chandrachud's Historic "Brandeis Lecture"

Rajesh Sampath[1]

In his brilliant keynote address at the 6th International Conference on the Unfinished Legacy of Dr. B.R. Ambedkar: Law, Caste, and Pursuit of Justice at Brandeis University in 2023, Chief Justice Chandrachud delivered hope and inspiration. For a Chief Justice of any modern democracy to admit that constitutions do not live in the ethereal abstraction of principles and concepts but are firmly embedded in societies is both surprising and refreshing. To quote his statement: "As judges we have to be increasingly cognizant of social reality and to understand that the law itself does not exist in a vacuum…" (Chandrachud 2024: 2). In paying homage to the great Dr. B.R. Ambedkar, the chief architect of the Constitution of independent, modern India, Chief Justice Chandrachud acknowledges that the law has a greater responsibility than just addressing current issues where disputes over injustices occur. Rather, the Court must also 'remedy historical wrongs' (Chandrachud 2024: 1), thus paving the way for a bold vision to rethink the role of law in society. Since society is beset with historical and structural inequalities, then what the Chief Justice is asking for is a fundamental rethinking of the relationship between law and justice, which was the theme of the 2023 conference at Brandeis University.

The Chief Justice laid out five major parts to his keynote address. He first addresses what he means by "historical wrongs" (Chandrachud 2024: 1). He then taps the deep knowledge and wisdom of Dr. B.R. Ambedkar whose twin achievements were birthing the modern democratic Indian Constitution while engaging in the lifelong social movement to eradicate the caste system in India, particularly the millennia-long oppression of the most vulnerable, namely the Dalit peoples. In Ambedkar's work, the Chief Justice reads an "alternative framework of emancipatory constitutionalism to address historical wrongs" (Chandrachud 2024: 2). He then argues that although "representation" is essential in any democratic polity, we need to go "beyond" it

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(Chandrachud 2024: 1). What this means is that we need to see the Constitution in a new way, one in a manner where it is possible to envision "social reformation apart from the idea of representation" (Chandrachud 2024: 2). With this courageous step that proffers reformation of society, the ethical call to action transcends "courtrooms, and must be considered in the canvas of [a] larger social discourse on equality" (Chandrachud 2024: 2).

In drawing out the moral consequences of the Chief Justice's opening remarks on the framework of his keynote address, we can articulate some initial conclusions. Often, we see legal systems, and the judges who occupy them, as inherently conservative, not in terms of political positions per se; but rather, the law demands a fidelity to precedent and tradition. This is the slow blast furnace that invites perpetual scrutiny of such precedents, in which an overturning takes place not because of the passing social and political pressures of the day, but because the law must re-align itself with a new set of facts or advancements in different scientific and social scientific fields when they occur. In other words, the law is slow to change because it is the bulwark that maintains social cohesion, order, and stability so that democracies do not devolve into civil wars or chaos in both realms of ideas and practices. And so, for the Chief Justice of the world's largest, most vibrant, and perhaps most complex democracy to suggest that 'reform' is key to 'remedying historical wrongs' (Chandrachud 2024: 1) and engaging in social transformation in the quest for equity and fairness, not just equality and liberty, is quite breathtaking. Like Ambedkar, we do not have to keep apart the great social challenge to not only realize justice for all, but to undo long-standing structural and historical injustice; but instead of seeing law—the glue that holds all representative democracies together—as the enemy of change, it can be seen as an engine for radical transformation.

It was inspiring to see the Chief Justice draw from the powerful theoretical frameworks in the U.S. context, such as Critical Race Theory. Starting in the late 80s, 'CRT,' as it is known as an acronym, has questioned basic values that appear sacrosanct and neutral such as colorblind meritocracy in the post-Civil Rights era. In fact, such liberal ideologies based on individual rights conceal the fact that law plays a role in perpetuating social injustices. Such present miscarriages descend from the pasts of slavery and segregation that lead to disparate outcomes in terms of equality and equity across the board—from voting to housing to education, particularly for Black people and other marginalized racial and ethnic groups. Racism is not just embodied in individual acts of hate, violence, and discrimination but is baked into the basic institutions of society down to the microscopic fibers of everyday life (Delgado & Stefancic 2023). Similarly, in the Indian context, the law should not be focused, exclusively, on individual crimes and atrocities. Rather, it must redress the entire historical albatross of the caste system. This basic anatomy of Indian society leads to unfathomable disparities today in terms of what the American philosopher of justice, John Rawls termed as "primary social good"; the latter include "rights, liberties, and opportunities, and income and wealth…and a very important primary good is a sense of one's own worth" (Rawls 1999: 79).

Seen from a wider conception of social justice, the law has a powerful role, alongside politics, systems of governance, and civil society, in maximizing the fair distribution of these goods. But in the mind of the Chief Justice, representation in democracy may be key, but when a society is saddled with prodigious historical evils, such as slavery in the U.S. or caste in India, then 'reformation becomes necessary' (Chandrachud 2024: 6). Passionately, he states that the:

> …social life of the 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 (Chandrachud 2024: 15).

The call for 'activism' is visionary and to follow through the implications on the Chief Justice's profound reflection, the law embodies the life of a society. If society is bogged down by historical injustices, then reckoning of the past is required to transform the present. Again, the inspiration of Dr. B.R. Ambedkar is illustrative. The highest ideals of equality and liberty in any democracy are obvious; but what is harder to achieve is the egalitarian dream of 'fraternity,' which brings forth a Kantian imperative. Indeed, the act of doing good for others must operate from the contentless law, the instinct as act emanating deep within oneself, of doing such good. Therefore, the highest manifestation of individual freedom is not based on some predetermined injunction or prohibition that one finds outside of oneself, say in religion or a constitutional monarchy. It certainly cannot be based on caste, which forces upon groups a duty that cannot be justified, namely keeping some people at a lower level of the social and human order, for the sake of purity and hierarchy. Rather, it must come from within the individual alone, to which no single substantive moral content can monopolize the free act of the individual to do good without that individual's free assent to be governed and therefore self-governed as a moral law unto themselves. To achieve this pure democratic ethos in societies that have long-standing historical oppressions, such as the Native American genocide and Black slavery in the U.S. and the caste system and criminalization of tribal peoples in India, is that highest ideal for which we must strive.

In conclusion, we quote the Chief Justice's words on Dr. B.R. Ambedkar, which resonate far beyond the confines of the courtroom:

> 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 recognized" (Chandrachud 2024: 15).

We find these concluding words by the Chief Justice remarkable. They point to an indomitable spirit on the quest to do what is right, blending humility with responsibility given the enormous power of the office he holds. We thank him for inspiring us with what may be recalled by future generations as a historic address.

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