



## WHAT WOULD AN AMBEDKARITE JURISPRUDENCE LOOK LIKE?

—Aravind Narain\*

**Abstract** Dr. Ambedkar is famously known as the father of the Indian Constitution. This article goes beyond this epithet and explores Ambedkar’s jurisprudential contributions to Indian law. The article argues that Ambedkar saw the rules of caste as law and in the state’s legal intervention to combat caste-based discrimination articulated the importance of both norm creation and having a procedure for enforcement—ideas that continue to influence law-making till date. Further, the article identifies “fraternity” and “constitutional morality” from the Ambedkarite corpus as key legal concepts, and stresses upon their relevance in finding solutions to problems that India faces today.

### I. INTRODUCTION

*In India, caste was the law for centuries.*

—Balagopal<sup>1</sup>

*The right which is grounded by law,  
but is opposed by society is of no use at all.*

—Dr. Ambedkar<sup>2</sup>

*This tyranny of the majority must be put down with a firm hand  
if we are to guarantee to the untouchable the freedom of speech and  
action necessary for their uplift.*

—Dr. Ambedkar<sup>3</sup>

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\* The author is the Geneva Director of Arc International and a Founding Member of the Alternative Law Forum, Bangalore.

<sup>1</sup> K. Balagopal, “Democracy and Caste in India” (Speech at CIEFL, Hyderabad on Aug. 12, 2006).

<sup>2</sup> Narendra Jadhav, AMBEDKAR SPEAKS VOL. I 186 (2013).

<sup>3</sup> Jadhav, *supra* note 2, at 232.

*[The constitution only] 'contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality'.<sup>4</sup> [The framework of constitutional morality would mean that] 'there must be no tyranny of the majority over the minority'... 'The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt'.*

—Dr. Ambedkar<sup>5</sup>

*Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.*

—Dr. Ambedkar<sup>6</sup>

Dr. Ambedkar's presence in India is ubiquitous in terms of national iconography: with national holidays as well as universities being named after him.<sup>7</sup> Perhaps the best-known image of Dr. Ambedkar is of him holding the Constitution in his hand and looking into the distance. Statues depicting Dr. Ambedkar holding the Constitution in his hand dot innumerable villages, cities and towns around the country as an iconic representation of the way the Dalit community in particular chooses to remember its favourite son.

Though the Constitution was central to the Dr. Ambedkar that India has chosen to remember,<sup>8</sup> there has only been scattered research into understanding what was Dr. Ambedkar's contribution to Indian jurisprudence apart from the epithet that Dr. Ambedkar was the 'father of the Indian Constitution'. Prof. Baxi tellingly notes that "*the Indian social science landscape has disarticulated Babasaheb Ambedkar by studious theoretical silence.*"<sup>9</sup>

In this climate of silence, Prof. Baxi's contribution is to assert that Dr. Ambedkar was the originator of the idea of the 'lawless laws of Hinduism' which

<sup>4</sup> Jadhav, *supra* note 2, at 291.

<sup>5</sup> Jadhav, *supra* note 2, at 292.

<sup>6</sup> Parliament of India, Constituent Assembly Debates (Proceedings), Vol XI, 25 Nov. 1949. <http://parliamentofindia.nic.in/ls/debates/vol11p11.htm>.

<sup>7</sup> Perhaps indicative of Ambedkar's posthumous popularity was an Outlook poll on the most popular Indian after Gandhi, the winner by far was Ambedkar. The Greatest Indian After Gandhi, OUTLOOK THE MAGAZINE, (Jun. 11, 2012) <http://www.outlookindia.com/magazine/story/the-greatest-indian-after-gandhi/281103>.

<sup>8</sup> Prof. Baxi in a germinal article talks about seven Ambedkar's including Ambedkar the authentic Dalit, the exemplary scholar, the activist journalist, the pre Gandhian activist, the constitutionalist and the renouncer. See Upendra Baxi, *Emancipation and justice: Babasaheb Ambedkar's legacy and vision* Cf. In Upendra Baxi and Bhikhu Parekh, CRISIS AND CHANGE IN CONTEMPORARY INDIA 122-49 (1995).

<sup>9</sup> *Id.* at 121.

not only denied “*equality before the law as a principle to the untouchables, thus erecting a permanent edifice of subalternity over them down the ages*” but also “*inscribed the extra territorialisation of whole communities of human beings and their castigation as being outside the pale of humanity.*”<sup>10</sup>

However, while the ‘lawless laws of Hinduism’ were what enabled the expulsion of the Dalits from the political community, it was also the law to which Dr. Ambedkar turned to, in order to right the thousand wrongs of history.

Dr. Ambedkar’s vision of the law was deeply rooted in his own experience of discrimination under the rigid laws of caste. It was arguably this experience of suffering at the hands of the caste laws authored by society which turned him to the relentless quest to combat caste through various forms of law and love. He experimented with norm creation through the prohibition of untouchability and tirelessly sought to operationalize the norm through a close attention to procedure. He introduced the term ‘constitutional morality’ into public and constitutional discourse to make the point that Indian democracy could not be founded on majoritarianism, but rather it must be based on a constitutional ethic of respect for dispersed and powerless minorities. While working closely with law, he was intensely aware of its limitations as seen by his advocacy of the concept of fraternity. Fraternity in his understanding pushed positive law to its limits, and its true operationalization had to be premised on a form of love of citizen for his fellow citizen.

## II. CASTE AS LAW

One of the influential theories of law is the Austinian one of law as a command of the sovereign. This notion has at least these three characteristics:

1. Law as a command
2. A political superior issues such a command to a political inferior.
3. A political superior is one who is “by and large” obeyed.

Dr. Ambedkar poses a counter to this theory, coming from his experience of being at the receiving end of caste discrimination. In one of his few autobiographical writings, he chronicles his experience of being repeatedly subject to indignity. The young Dr. Ambedkar notes that:

“For instance, I knew that in the school I could not sit in the midst of my class students according to my rank but that I was to sit in a corner by myself. I knew that in the school I was to have a separate piece of gunny cloth for me to squat on in the

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<sup>10</sup> *Id.* at 141.

class room and the servant employed to clean the school would not touch the gunny cloth used by me. I was required to carry the gunny cloth home in the evening and bring it back the next day. While in the school I knew that children of the touchable classes, when they felt thirsty, could go out to the water tap, open it and quench their thirst. All that was necessary was the permission of the teacher. But my position was separate. I could not touch the tap and unless it was opened for it by a touchable person, it was not possible for me to quench my thirst. In my case the permission of the teacher was not enough. The presence of the school peon was necessary, for, he was the only person whom the class teacher could use for such a purpose. If the peon was not available I had to go without water.”<sup>11</sup>

It is from this experience of discrimination in all aspects of his social life right from his childhood and all through his adult life that Dr. Ambedkar comes to his understanding of law. Law in Dr. Ambedkar’s understanding is not limited to what the State legitimizes, but extends to what the society sanctions. In effect, there is an origin other than the determinate sovereign for the birth of law. This concept of law emerges from Dr. Ambedkar’s understanding of Indian society.

“Custom is no small thing as compared to law. It is true that law is enforced by the state through its police power and custom unless it is valid is not. But in practice this difference is of no consequence. Custom is enforced by people far more effectively than law is by the state. This is because the compelling force of an organized people is far greater than the compelling force of the state.”<sup>12</sup>

A more detailed discussion of this idea of law beyond state law is undertaken in the germinal essay, *The Annihilation of Caste*. In Dr. Ambedkar’s analysis, “*what is called religion by the Hindus is nothing but a multitude of commands and prohibitions.*” Hinduism, he argues, cannot qualify as a religion as “*the essence of religion is that it is based upon principle and not upon rules. The moment it degenerates into rules, it ceases to be a religion as it kills responsibility which is the essence of a truly religious act.*”<sup>13</sup>

Dr. Ambedkar concludes that “*what the Hindus call religion is really law or at best legalized class ethics.*”... “*The first evil of such a code of ordinances, misrepresented to the people as religion, is that it tends to deprive moral life of freedom and spontaneity and to reduce it to a more or less anxious and servile*

<sup>11</sup> *Waiting for a visa*, at <http://www.ambedkar.org/ambcd/53.%20Waiting%20For%20A%20Visa.htm>.

<sup>12</sup> Bhimrao Ramji Ambedkar, DR. BABASAHEB AMBEDKAR, WRITINGS AND SPEECHES VOL. I 283 (ed. Vasant Moon, 1979).

<sup>13</sup> *Id.*

*conformity to externally imposed rules. Under it, there is no loyalty to ideals, there is only conformity to commands.*"<sup>14</sup>

Thus, force and command is the basis of the law of caste. Balagopal in a lecture on '*Caste and Indian law*' succinctly captured this central point by stating that, "*In India, caste was the law for centuries.*"<sup>15</sup>

The fact that the rules of caste enjoy the status of law in Indian society has the inverse implication that laws prohibiting caste-based behaviour suffer from a lack of social legitimacy. Hence the rules of caste enjoy greater sanction than any state based law. In this context, Dr. Ambedkar doubts whether rights, which guarantee 'untouchables' freedom from discrimination, have the character of rights at all.

As he puts it,

"Law guarantees the untouchables the right to fetch water in metal pots...Hindu society does not allow them to exercise these rights... In short, that which is permitted by society to be exercised can alone be called a right. The right which is grounded by law, but is opposed by society is of no use at all."<sup>16</sup>

Therefore, in a paradoxical sense, when it comes to the question of caste, the caste-based rules of society enjoy the status of law, with the law of the state being consigned to being nothing more than an ineffectual commandment.

What Dr. Ambedkar challenges us to do is re-think what law in the Indian context is. Is it limited to the notion of state law or even custom, which had the validity of law? Or does it go beyond these two notions to encompass caste-based rules which can compel behaviour, sometimes even more effectively than the law of the state? If that is so what then is to be done?

### III. COMBATING CASTE DISCRIMINATION THROUGH STATE LAW

State law, when it comes to combatting the thousands of injustices of Indian society lacks social legitimacy. As such, it is a deeply weakened instrument when it comes to dealing with caste-based discrimination. However, in an otherwise totalitarian environment where the rigid laws of caste control all aspects of life, state law provides an entry point to begin questioning caste domination. State law is thus an important instrument for taking forward the struggle against discrimination based on caste.

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<sup>14</sup> *Id.* at 299.

<sup>15</sup> Balagopal, *supra* note 1.

<sup>16</sup> Jadhav, *supra* note 2, at 186.

Dr. Ambedkar asks whether, in a society with a deep-rooted majoritarian bias, the law can be mobilized to protect the interests of a geographically scattered minority? He argues that the coercive power of the law is a force that should be mobilized against the culturally and socially sanctioned prejudice of the majority community.

As he puts it,

“Sin and immorality cannot become tolerable because a majority is addicted to them or because the majority chooses to practise them. If untouchability is sinful and an immoral custom, then in the view of the depressed classes, it must be destroyed without any hesitation even if it was acceptable to the majority.”<sup>17</sup>

In this context of this majoritarian bias, the coercive force of the law must be mobilized on the side of right and morality. Speaking of the most insidious form of violence faced by the untouchables, namely the social boycott, he argues: “*this tyranny of the majority must be put down with a firm hand if we are to guarantee to the untouchable the freedom of speech and action necessary for their uplift.*”<sup>18</sup>

The power of the law to counter majoritarian power was mobilized to first articulate the norm that untouchability was a constitutional offence, then to legislate the norm through the enactment of the Protection of Civil Rights Act, 1955 (earlier known as the Untouchability (Offences) Act, 1955), and the SC/ST Atrocities Act, 1989 and subsequent amendments to the Atrocities Act.

### **A. Articulating the norm of untouchability as a constitutional crime**

In a speech in 1930 at the First Round Table Conference, Dr. Ambedkar first articulated the idea that untouchability should be considered a criminal offence.

“First of all, we want a Fundamental Right enacted in the Constitution which will declare ‘Untouchability’ to be illegal for all public purposes. We must be emancipated from this social curse before we can at all consent to the Constitution; and secondly, this Fundamental Right must also invalidate and nullify all such disabilities and all such discriminations as may have been made hitherto. Next, we want legislation against the social persecution to which I have drawn your attention just now, and for this we have provided certain clauses which are based upon

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<sup>17</sup> B.R. Ambedkar, WHAT CONGRESS AND GANDHI HAVE DONE TO THE UNTOUCHABLES, (2012) Cf. Narendra Jadhav, AMBEDKAR WRITES VOL I, 296 (2014).

<sup>18</sup> Jadhav, *supra* note 2, at 232.

an Act which now prevails in Burma in the document which we have submitted.”<sup>19</sup>

Sixteen years after Dr. Ambedkar first advocated for it, the ‘practise of untouchability’ was criminalised, with the Constituent Assembly passing what was to become Article 17 of the Indian Constitution.

Article 17 reads:

“Abolition of Untouchability- Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.”

The debate in the Constituent Assembly was overwhelmingly in support of the said Article (Draft Article 11) with increasing number of members seeing it as a new dawn. One such member, Shri Muniswamy Pillai opined that, “*the very clause about untouchability and its abolition goes a long way to show the world that the unfortunate communities that are called ‘untouchables’ will find solace when this Constitution comes into effect.*”<sup>20</sup> Another, Dr. Monomohan Dass, said that, “*for the sake of fairness and justice to the millions of untouchables of this land, for the sake of sustaining our goodwill and reputation beyond the boundaries of India, this clause which makes the practice of untouchability a punishable crime must find a place in the Constitution of free and independent India.*”<sup>21</sup> In addition to this support, there was a note of caution. Shri Santanu Kumar Das stated that, “*the fact is that we merely want to enact laws about it and expect the rural people to observe these laws. We must ourselves first observe the law for otherwise there would be no sense in asking others to act upon it. If we fail to observe it, it would be impossible to root out this evil...our members act as fifth columnists in the rural areas, for they tell the people there that these laws are not in force and thus themselves act against the law.*”<sup>22</sup>

These three speeches in the Constituent Assembly make clear the function that Article 17 is expected to serve. A predominant sentiment in the speeches of both Shri Muniswamy Pillai and Dr Manomohon Singh is that there is a symbolic strength to the very enactment of what was to become Article 17. The message which is sent across is that a practice which has defined Hindu society will no more be tolerated once the Constitution comes into force. The importance of this symbolic declaration cannot be underestimated especially when compared to the millennial history of Hinduism. Normatively, it was a new dawn.

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<sup>19</sup> Narendra Jadhav, *AMBEDKAR SPEAKS* VOL III 126 (2013).

<sup>20</sup> Parliament of India, Constituent Assembly Debates (Proceedings), Vol VII, 29 November, 1948 <http://parliamentofindia.nic.in/ls/debates/vol7p15.htm>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

The second function of the provision is to serve as a criminal law. As pointed out by Dr. Monomohan Dass the amendment makes untouchability a ‘punishable crime’. The implication of this is that the law must effectively outlaw and punish a practise which is sanctioned by society. The symbolic declaration is not enough, what is also needed is punishment for the practise of untouchability.

The third function which the provision must serve is to ensure that the act of making untouchability a criminal offence must be implementable. As pointed out by Shri Santanu Kumar Das, enough laws have been enacted to protect SC/STs but the key challenge remains their enforcement. The members’ speech hints at the difficulties of implementing a law which is avowedly counter majoritarian, as even Congress members function as ‘fifth columnists’ and ensure that the law passed by their own party remains a law only on paper.

These three purposes which underlie the debate on what was to become Article 17 continue in the period onwards when the intent underlying Article 17 is sought to be actualized through legislative interventions.

The contribution of Dr. Ambedkar is to the articulation of the norm which is the basis for all subsequent work with respect to ensuring the dignity of the Dalit community, namely that the practice of untouchability should be considered a crime which has recognition in the fundamental rights of the Constitution.

## **B. Articulating the necessary elements of a counter majoritarian law**

While recognition in the Constitution of the practice of untouchability as a crime was important, it would need to find statutory expression for this Constitutional prohibition to have any impact. The Bill which was moved in Parliament to actualize the Constitutional vision was the Untouchability (Offences) Bill in 1954. Dr. Ambedkar’s response to the Bill in a speech in the Rajya Sabha addresses the key question of how to legislate when the law is against the sentiments of the majority.

Dr. Ambedkar begins by making it clear that he is uncomfortable with calling the statute, Untouchability (Offences) Bill and preferred the title Civil Rights (Untouchables) Protection Act. The reason for this is because the original title of the Bill:

“gives the appearance that it is a Bill of a very minor character, just a dhobi not washing the cloth, just a barber not shaving or just a mithaiwala not selling laddus and things of that sort. People will think that these are trifles and piffles and why has parliament bothered and wasted its time in dealing with dhobis and barbers and ladduwallas. It is not a Bill of that sort. It is

a Bill which is intended to give protection with regard to Civil and Fundamental rights...<sup>23</sup>

Thus, the conceptual basis of the statute has to be clearly articulated - it is not dealing with 'trifles and piffles' but rather with 'civil and fundamental rights', and the legislation must articulate the constitutional vision of protecting citizens from discrimination from their fellow citizens.<sup>24</sup>

To actualize this vision, Dr. Ambedkar argues that the statute should move away from the language of untouchability and move towards conceptualizing the offence as perpetrated on the body of the Scheduled Caste person. As he puts it, referring to Shri Kailash Nath Katju who tabled the Bill, "*I don't know why he should keep on repeating Untouchability and Untouchables all the time. In the body of the Bill he is often speaking of Scheduled Castes. The Constitution speaks of the Scheduled Castes and I don't know why he should fight shy of using the word Scheduled Castes in the title of the Bill itself.*"<sup>25</sup>

Dr. Ambedkar then addresses the problems faced in enacting a law which in its intent and character is counter majoritarian.

"The first loophole that he points out is the compoundable nature of the offence which will ensure that the law remains a dead letter. He illustrated this point by referring to the Thakkar Bapa Committee Report on conditions of the depressed classes. He quoted from the report to make the point that "the Untouchables were not able to prosecute then [their] persecutors because of want of economic and financial means, and consequently they were ever ready to compromise with the offenders whenever the offenders wanted that the offence should be compromised. The fact was that the law remained a dead letter and those in whose favour it was enacted are unable to put in action and those against whom it is to be put in action, are able to silence the victim."<sup>26</sup>

<sup>23</sup> Jadhav, *supra* note 2, at 232.

<sup>24</sup> As Gautam Bhatia argues, Article 17, Article 15(2) and Article 23 should be seen as a golden triangle. 'Each of these articles protects the individual not against the State, but against other individuals, and against *communities*. And at the heart of the triangle lies Ambedkar's revolutionary insight: that the denial of human dignity, both material and symbolic, is caused not only by public power, but by *private* power as well – and the task of constitutionalism is not limited to satisfactorily regulating public power in service of liberty, but extends to positively guaranteeing human freedom even against the excesses of private power.' Gautam Bhatia, *Why the uniquely revolutionary potential of Ambedkar's Constitution remains untapped*, SCROLL (Apr. 14, 2016) <https://scroll.in/article/8066606/why-the-uniquely-revolutionary-potential-of-ambedkars-constitution-remains-untapped>.

<sup>25</sup> Jadhav, *supra* note 2, at 231.

<sup>26</sup> Jadhav, *supra* note 2, at 234.

The second loophole, pointed out by Dr. Ambedkar was with respect to the question of punishment. The punishment prescribed is a maximum of six months or fine. He is scathing on the question of the Bill fighting shy of prescribing a punishment commensurate with the gravity of the offence. He observes:

“My Honourable friend was very eloquent on the question of punishment. He said that the punishment ought to be very very light and I was wondering whether he was pleading for a lighter punishment because he himself wanted to commit these offences. He said, “let the punishment be very light so that no grievance shall be left in the heart of the offender.”<sup>27</sup>

What emerges through the discussion on the Untouchability (Offences) Bill, 1954 is the lack of seriousness of the Government in bringing into effect a law tasked with combatting a deeply entrenched majoritarian prejudice. The only person who seemed to grasp the nature of this enormous task was Dr. Ambedkar.

The law that was finally enacted, which had the title of Untouchability (Offences) Act, 1955 did not address the key concerns raised by Dr. Ambedkar, i.e., naming the subject of the offence as the Scheduled Caste, ensuring non-compoundability as also adequate punishment.

What emerges so powerfully in the debate is a commitment by Dr. Ambedkar not just in articulating the norm, but working on actualizing the norm. This means working with the mechanism of the law and thinking through the elements of procedure. When jurisprudence is meant to protect the interests of the oppressed it cannot just stop at norm development but should further work with the technicalities of procedure to arrive at the best legislative design. It is this combination of an attention to norm development as well as legislative design that characterizes an Ambedkarite vision of the law.

### **C. Towards crafting a counter majoritarian law: The SC/ST Atrocities Act, 1989 and subsequent developments**

Although the Untouchability (Offences) Act, 1955 was renamed the Protection of Civil Rights Act, 1955 through an amendment in 1974, the gaps pointed out by Dr. Ambedkar in the Untouchability (Offences) Bill, 1954 were only rectified in the SC/ST Atrocities Act of 1989, a full thirty four years after the Protection of Civil Rights Act, 1955. The three aforementioned loopholes noticed by Dr. Ambedkar in his comments on the Untouchability Offences Bill were plugged by this new Act.

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<sup>27</sup> Jadhav, *supra* note 2, at 236.

*First*, the Act made a shift from the phrase of ‘untouchability’ to the phrase ‘atrocities’. This made it clear that what was being punished was not a minor transgression but rather a serious criminal offence.

The general terms in which the Protection of Civil Rights Act was crafted was converted into a specification of the forms of atrocities committed against the SC/ST population. The listing of the nature of offences perpetrated on the SC/ST population reads almost like an anthology of the way caste discrimination and atrocity is perpetrated on the bodies and lives of the SC/ST population.

The offences range from those perpetrated on the body such as forcing the SC/ST members to eat inedible substances to forcibly removing their clothes and parading them naked. It also includes electoral offences, gender based offences and other offences that injure dignity.

*Secondly*, the SC/ST Atrocities Act made offences under it non-compoundable, thereby trying to address the fear that those who filed the case will not have the wherewithal to sustain a lengthy prosecution or pressure from the perpetrator, and might go in for a compromise.

*Thirdly*, the gravity with which the offences created under this Act were to be dealt with was also clear in the punishments section. Under this Act punishments ranged from six months’ imprisonment to death penalty.

However, in spite of these changes, the conviction rate with respect to offences under the SC/ST Atrocities Act is less than 1%. This is largely due to the failure to implement a law that is ultimately against the conventional morality of a majoritarian public. A public interest litigation (PIL) filed with respect to implementation of the SC/ST Atrocities Act makes it clear that there are many ways in which a counter majoritarian law can be subverted in its implementation.<sup>28</sup>

This experiment in conceptualizing an ideal counter majoritarian law continues with the latest avatar being the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.<sup>29</sup>

<sup>28</sup> Some of these failures are: (1) FIR’s are registered without reference to proper sections of the Act (2) chargesheets are invariably filed late (3) accused are not arrested and allowed to roam free (4) investigations are often not done by the Deputy Superintendent of Police but by junior officers, rendering acquittal on grounds of improper procedure (5) victims are forced to turn hostile on threats of economic and social boycott.

See Jayashree Mangubhai and Aloysius Irudayam, *Building a subaltern women’s perspective*, In Kalpana Kannabiran, CHALLENGING THE RULES OF LAW 150 (2008).

<sup>29</sup> This was based on the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Ordinance, 2014 passed by the UPA government. Some of the key features of the 2015 Act are:

1. While the concept of social and economic boycott which was stressed by Ambedkar as being key offences to conceptualize found expression through Sections 4, 5 and 6 of the Protection of Civil Rights Act 1955, the tragedy of the statute remained its minimal punishments and

## D. Limitations of a counter majoritarian approach

It was never Dr. Ambedkar's case that one could craft a water-tight counter majoritarian law. While it was important to analyse and work on key jurisprudential and procedural elements of such a law, it was evident to him that it would not be enough by itself...

As he puts it:

“Rights are protected not by law, but by the social and moral conscience of society...But if the Fundamental Rights are opposed by the community, no law, no parliament, no judiciary can guarantee them in the real sense of the word. What is the use of the fundamental rights to the Negroes in America, to the Jews in Germany and to the Untouchables in India? As Burke said, there is no method found for punishing the multitude. Law can punish a single, solitary recalcitrant criminal. It can never operate against a whole body of people who are determined to defy it. Social conscience is the only safeguard of all rights-fundamental or non-fundamental.”<sup>30</sup>

The history of implementation of these laws might support this opinion of Dr. Ambedkar. The way the procedure in the SC/ST Atrocities Act has been deployed to circumvent its protection is a strong indictment of the difficulties in implementing counter majoritarian laws.

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hence its ineffectiveness. For the first time the 2015 amendment defines the offence of social boycott and economic boycott specifically and awards a significantly higher punishment for the said offences thereby indicating a greater state seriousness in thinking of both social and economic boycott as offences worthy of punishment.

2. There is a Chapter on the rights of victims and witnesses under Section 15 A which attempts to address some of the key problems faced in prosecution including intimidation, coercion and threat of violence by making it the responsibility of the state to ensure protection of victims from intimidation and coercion.
3. In the key definitional section under Section 3 it increases the number of offences which can be committed against SC/ST persons from fifteen to twenty nine.
4. The offences against women who are SC/ST are also expanded in the ordinance to include under Section 3 w (i), ‘touches a woman belonging to the SC/ST tribe knowing that she belongs to the SC/ST’, when such act of touching is of a sexual nature and is without the recipients consent; It also criminalises under Section w(ii) the ‘use of words, or gestures of a sexual nature towards a woman belonging to a SC or ST knowing that she belongs to a SC or a ST.

The dignity offences are also elaborated in greater detail including offences of ‘garlanding with footwear or parading naked or semi naked’, forcibly committing on SC/ST acts such as removing clothes from the person, removing moustaches, painting face or body or any other similar act which is derogator to dignity.’

<sup>30</sup> Jadhav, *supra* note 18, at 222.

A case study of the acquittal in the *Tsundur massacre*<sup>31</sup> as well as the *Laxmanpur Bathe massacre*<sup>32</sup> shows the challenges of ensuring justice through the coercive power of the law when the might of the organized society is against it. However, the narration of the failures of a counter majoritarian legislation is not to disavow or reject such efforts but rather to propose that a counter majoritarian legislative effort must be supplemented by other efforts to challenge the caste hierarchies of Indian society.

#### IV. FRATERNITY: AT THE LIMITS OF POSITIVE LAW

Dr. Ambedkar was deeply inspired by the idea of liberty, equality and fraternity as propounded in the French Revolution. Taking these ideas forward in the famous Mahad Satyagraha on March 20, 1927, he asserted the right to equality by giving a call for Dalits to break the social prohibition from drinking water from a public tank in Mahad. In his speech, he explicitly saw the Mahad Satyagraha as similar to the National Assembly in France convened in 1789. As he put it, “*Our Conference aims at the same achievement in social, religious, civic and economic matters. We are avowedly out to smash the steel-frame of the caste- system.*”<sup>33</sup> He goes on to say that “*Our movement stands for strength and solidarity; for equality, liberty and fraternity*”.<sup>34</sup>

While the importance of the idea of equality and liberty are self-evident when it comes to the question of protecting the rights of the Dalit community, what was the value of fraternity? In the Constituent Assembly, Dr. Ambedkar analysed the relationship of these terms.

“These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.”<sup>35</sup>

<sup>31</sup> The acquittal by the Andhra Pradesh High Court has now been stayed by the Supreme Court. See Express News Service, *SC Stays Acquittal of 56 in Tsundur Case*, THE NEW INDIAN EXPRESS (Aug. 1, 2014) [http://www.newindianexpress.com/states/andhra\\_pradesh/SC-Stays-Acquittal-of-56-in-Tsundur-Case/2014/08/01/article2357490.ece](http://www.newindianexpress.com/states/andhra_pradesh/SC-Stays-Acquittal-of-56-in-Tsundur-Case/2014/08/01/article2357490.ece).

<sup>32</sup> State of Bihar v. Girija Singh, 2012 SCC OnLine Pat 1573.

<sup>33</sup> B.R. Ambedkar, WRITINGS AND SPEECHES, VOL 17, 62 (2014).

<sup>34</sup> *Id.* at 64.

<sup>35</sup> Parliament of India, *supra* note 6.

With respect to the relationship between equality and liberty, it is not a simple unilinear relationship, but rather a conflictual one. The emphasis on liberty could compromise equality and the emphasis on equality could compromise liberty. This conflict between liberty and equality has occupied theorists for some time.<sup>36</sup>

The insight that Dr. Ambedkar provides is that it is only when fraternity becomes a way of life that the conflict between the different interests that liberty and equality seek to promote can be resolved. Fraternity has received step siterly treatment when compared to her more famous kin, liberty and equality. In fact, ‘fraternity’ was even omitted from the precursor to the Preamble, namely the Objectives Resolution moved by Jawaharlal Nehru.<sup>37</sup> The reason ‘fraternity’ found its way into the Preamble owes a lot to the initiative of Dr. Ambedkar. As Chairperson of the Drafting Committee he explicitly introduced fraternity into the text of the Preamble.<sup>38</sup>

He expands in greater detail on why fraternity was the key term in this trinity.

“Fraternity means a sense of common brotherhood of all Indians....It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve... [This is because] In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than a coat of paint.”<sup>39</sup>

The challenge of course is how one should promote the value of fraternity. How can the law build a common culture where fraternity becomes a way of life? How do you build links between members of different castes, such that ultimately dissolves the feeling of difference? The answer to this question is really an acknowledgement of the limits of positive law. To achieve fraternity as a way of national being, one’s endeavours will have to go beyond the law.

In ‘*What Congress and Gandhi have done to the Untouchables*’, Dr. Ambedkar gestures towards a social space outside the law when it comes to

<sup>36</sup> See Jan Narvison and James Sterba, *ARE LIBERTY AND EQUALITY COMPATIBLE?*, (2010).

<sup>37</sup> Lok Sabha Secretariat, *Constituent Assembly Debates Vol. I*, 57-65 (1999).

<sup>38</sup> The Committee has added a clause about fraternity in the preamble, although it does not occur in the Objectives Resolution. The Committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new Constitution should be emphasized by special mention in the Preamble. Cf. Shiva Rao, *THE FRAMING OF INDIA’S CONSTITUTION VOL III* 510 (2010).

<sup>39</sup> Parliament of India, *supra* note 6.

the struggle to bring about social change. Talking about the work the Gandhi-initiated Anti-Untouchability League should do, he indicates the necessity of fostering what he calls ‘social intercourse’.

“I think the League should attempt to dissolve the nausea, which the Touchables feel towards the Untouchables and which is the reason why the two sections have remained so much apart as to constitute separate and distinct entities. In my opinion, the best way of achieving it is to establish closer contact between the two. Only a common cycle of participation can help people to overcome the strangeness of feeling, which one has when brought into contact with the other...”<sup>40</sup>

The reason for focusing on social contact is because Dr. Ambedkar was convinced that, *“the touchables and the Untouchables cannot be held together by law, certainly not by any electoral law substituting joint electorates for separate electorates. The only thing that can hold them together is love....”*<sup>41</sup>

Of course, this idea of love is premised upon an acknowledgement of the legitimacy of the just demands of the Untouchables.

“Outside the family, justice alone, in my opinion can open the possibility of love and it should be the duty of the Anti-Untouchability League to see that, is made to do justice to the Untouchable. Nothing else, in my opinion, can justify the project or the existence of the League.”<sup>42</sup>

In Dr. Ambedkar’s writing one finds a clue that to achieve this change one needs to challenge the prejudice in the intimate sphere.

“Do not be under the wrong impression that untouchability will be removed only by removal of a ban on personal meetings and drawing of water from wells..... it will remove untouchability at the most in the outer world, but not from the inner world. For that the ban on inter-caste marriage will have to be removed. Once that happens untouchability will vanish from inside the house.”<sup>43</sup>

The question of inter caste marriage as a solvent of caste appears forcefully again in his essay, the Annihilation of Caste.

<sup>40</sup> Jadhav, *supra* note 18, at 307.

<sup>41</sup> Jadhav, *supra* note 18, at 307.

<sup>42</sup> Jadhav, *supra* note 18, at 308.

<sup>43</sup> Jadhav, *supra* note 2, at 97.

“I am convinced that the real remedy is inter marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being kindred, becomes paramount, the separatist feeling- the feeling of being aliens- created by caste will not vanish. The real remedy for breaking Caste is intermarriage. Nothing else will serve as the solvent of caste.”<sup>44</sup>

Dr. Ambedkar’s advocacy of the concept of fraternity has important implications for contemporary India not only with respect to challenging caste hierarchy but also other hierarchies in Indian society. The idea of fraternity is possibly even more salient in the contemporary era with the recently stoked controversy around ‘love jihad’ and the so called ‘anti Romeo squads’ in Uttar Pradesh.<sup>45</sup>

There have been serious and sustained attacks on fraternal ways of living by the Hindu Right Wing. An example (among myriad such threats) of a threat to fraternity due to the actions of the Right Wing is there in the series of human rights reports produced by the PUCL-K that document a series of attacks on social as well as romantic relationships between young people belonging to different religious communities.<sup>46</sup> The Right Wing tries to use vigilante violence not only to curb love relationships across lines of caste and religion but also to restrict social interactions including visiting each other’s houses on religious festivals, attending weddings and socializing together whenever this is done across religious lines.

Using an Ambedkarite lens, we need to understand love relationships and social interactions across lines of caste and religion as not just an exercise of the individual right to love and the right to association, but really as an active promotion of the principle of fraternity. These relationships of love and association, formed across lines of caste and religion, are really nothing less than people’s resolve to implement the Preamble’s promise of fraternity.

<sup>44</sup> B.R. Ambedkar, *THE ANNIHILATION OF CASTE*, (1936) Cf. Narendra Jadhav, *AMBEDKAR WRITES VOL. II* 217 (2014).

<sup>45</sup> See Ratan Mani Lal, ‘Love jihad’ in Uttar Pradesh: BJP’s latest strategy against Akhilesh, *FIRSTPOST* (Aug. 25, 2014) <http://www.firstpost.com/politics/love-jihad-in-uttar-pradesh-bjps-latest-strategy-against-akhilesh-1678829.html>; Amit Shah promises anti-Romeo squad to protect girls, *THE INDIAN EXPRESS*, (Feb. 3, 2017) <http://indianexpress.com/elections/uttar-pradesh-assembly-elections-2017/amit-shah-promises-anti-romeo-squad-to-protect-girls/>

<sup>46</sup> See Anindita Sengupta, *PUCL-K Report: Cultural policing in Dakshina Kannada*, *ULTRA VIOLET* (Apr. 20, 2009) <http://youngfeminists.wordpress.com/2009/04/20/pucl-report-cultural-policing-in-dakshin-kannada/>; , PUCL Karnataka, *Fact Finding Report| Attacking Pubs and Birthday Parties ~ Communal Policing by Hindutva Outfits* (Nov. 5, 2012) <http://puclkarnataka.org/?p=672>.

## V. CONSTITUTIONAL MORALITY: ITS RELEVANCE IN A MAJORITARIAN DEMOCRACY

There are at least three references in Dr. Ambedkar's corpus to the notion of 'constitutional morality'.

In a speech in a parliament on the Constitution (Fourth Amendment) Bill, 1954, he notes:

“But as soon as Swaraj presented itself, everybody thought- that there was the prospect of political authority passing into the hands of a majority, which did not possess what might constitutionally be called ‘Constitutional Morality’. Their official doctrine was inequality of classes. Though there is inequality in every community or whatever be the word, that inequality is a matter of practice. It is not an official dogma. But with a majority in this country, inequality as embodied in their ‘Chaturvarna’ is an official doctrine. Secondly their caste system is a sword of political and administrative discrimination.”<sup>47</sup>

In another speech titled, ‘Conditions precedent for the successful working of democracy’, he identifies the observance of ‘constitutional morality’ as one of the ‘conditions precedent’ to democracy. In his judgment the constitution only ‘contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality’.<sup>48</sup> The framework of constitutional morality would mean that “*there must be no tyranny of the majority over the minority*”... “*The minority must always feel safe that although the majority is carrying on the Government, the minority is not being hurt, or the minority is not being hit below the belt*”.<sup>49</sup>

The most famous reference to the idea of constitutional morality was, of course, in the Constituent Assembly while presenting the draft Constitution, where Dr. Ambedkar had quoted Grote, the Greek historian, thus: “*The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.*”<sup>50</sup>

Dr. Ambedkar goes on to say,

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<sup>47</sup> Narendra Jadhav, AMBEDKAR SPEAKS VOL. II 421 (2013).

<sup>48</sup> Jadhav, *supra* note 2, at 291.

<sup>49</sup> Jadhav, *supra* note 2, at 291.

<sup>50</sup> Parliament of India, Constituent Assembly Debates (Proceedings) Vol.VII Part II: November 4, 1948 <http://parliamentofindia.nic.in/ls/debates/vol7p1b.htm>.

“By constitutional morality Grote meant “a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure sure of these very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own.”<sup>51</sup>

He concludes that,

“The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.”<sup>52</sup>

Clearly, the idea of constitutional morality was a theme to which Dr. Ambedkar returned frequently. What could Dr. Ambedkar have meant in his repeated invocation of constitutional morality? Plausibly the importance of the concept flowed from his experience of advocating for the rights of the depressed classes. He was acutely conscious that a democracy that was based upon a majority that constituted not a political majority but a communal majority was deeply dangerous to the very notion of democracy.

As he put it, “*in India, the majority is not a political majority. In India, the majority is born; it is not made. That is the difference between a communal majority and a political majority. 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 is a permanent majority fixed in its attitude...*”<sup>53</sup>

Pratap Bhanu Mehta, in one of the few academic engagements with the idea of constitutional morality, correctly identifies this important thrust in Dr. Ambedkar’s work.

“After all, the burden of Grote’s great history of Athenian democracy was to defuse the criticism of Athens that popular sovereignty was a threat to freedom and individuality. Once

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> B.R. Ambedkar, *Communal deadlock and the way to solve it*, Address delivered at the Session of the All India Scheduled Castes Federation held in Bombay on May 6, 1945, <http://www.ambedkar.org/ambcd/09.%20Communal%20Deadlock%20and%20a%20Way%20to%20Solve%20It.htm>.

popular sovereignty or the authority of the people had been invoked, who else would have any authority to speak?”<sup>54</sup>

At its heart, the Ambedkarite notion of constitutional morality is a response to the particular conditions of India, where majorities are often communal majorities and where minorities may not have bargaining power in the Parliament. If parliamentary representation only throws up communal majorities then where are minorities to go? Would not minorities be at the sufferance of majority opinion which misunderstands democracy to be equal to popular sovereignty?

The first time the concept of constitutional morality as propounded by Dr. Ambedkar found a contemporary public resonance was when it was cited by Justice Shah in his celebrated decision in *Naz Foundation v. Govt. of NCT of Delhi*,<sup>55</sup> when the Court ruled that Section 377 of the IPC was *ultra vires* Articles 14, 15 and 21.

The dilemma faced by the Delhi High Court was in crafting a judgment which would secure the rights of the LGBT community against the viewpoint of representatives of religious communities that homosexuality was against their religious beliefs and hence against public morality.

The Court chose to sidestep the debate on religion and sexuality by arguing that it was not a relevant consideration at all. Even if a majority of the followers of a particular religion were against homosexuality, and by extension, ‘public morality’ was against homosexuality, then public morality would be superseded by ‘constitutional morality’.

As Justice Shah put it,

“Thus, popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.”<sup>56</sup>

The implications of this line of thinking are profound for our very understanding of democracy in what is after all a diverse, plural and hierarchical society like India.

<sup>54</sup> Pratap Bhanu Mehta, *What is constitutional morality?* (2010) at [http://www.india-seminar.com/2010/615/615\\_pratap\\_bhanu\\_mehta.htm](http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm).

<sup>55</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1.

<sup>56</sup> *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1, 36.

While the *Naz* decision extended the life of the concept of constitutional morality to LGBT citizens, the power of the concept lies in its possible application to other ‘unpopular minorities’. In a country that routinely faces challenges from far-right forces, this call to constitutional morality—and the understanding that brute electoral majorities do not mean that minorities of every strip and hue can be effectively lorded over is even more important.

## VI. CONCLUSION

This paper has sought to argue that the legal concepts put forward by Dr. Ambedkar are of great relevance today. We need to view the failures of the SC/ST Prevention of Atrocities Act through a historical lens. The ‘failures’ have to be located in the context of Indian society and the dominance of the ideas of caste as law. The law of the state has to be understood as nothing less than a brave attempt to challenge societal hierarchies of over two thousand and five hundred years. In this context both norm articulation and an attention to the details of procedure are very important. A key Ambedkarite idea is that legal activism cannot stop at norm articulation but must struggle with the difficult task of actualizing the norm in a deeply flawed society.

Perhaps the greatest relevance of the ideas embedded in Dr. Ambedkar’s legal corpus can be found in the notions of fraternity and constitutional morality. In a society that is still deeply hierarchical, communal and parochial, it is imperative to build the fellow feeling Dr. Ambedkar calls fraternity, and at other points, love. It’s really essential that fraternal relations be built through such a politics of love.

This draws attention to the importance of the judiciary internalising a belief in constitutional morality, which must play the role of ensuring that Indian democracy does not become the brute rule of the majority. It is the constitutional responsibility of the judiciary to ensure that majoritarian sentiments are kept in check through the morality of the constitution. In these challenging days, it is integral that we go back to the Ambedkarite corpus and retrieve the key notions of fraternity and constitutional morality as a guide to a more constitutional future.