Caste and Race in the Legal Systems of India and the United States

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Comparison itself seems to imply a potential that may seduce into jumping far too early towards far-reaching conclusions.—Andre Gingrich

Recent works by Isabel Wilkerson, Susan Bayly, Gail Omvedt, Célestin Bouglé, Rosalind O'Hanlon and many others offer a global sociocultural understanding of caste. Wilkerson book *Caste: The Origins of Our Discontents* is designed, the author has commented, to shine a light on the American caste system. As an Indian legal student familiar with both systems, I'd like to propose incorporating elements of the Indian legal framework into US law, in order to mitigate racism in the US.

Ambedkar's View of the Caste System

Politician, jurist, social reformer, economist and architect of the Indian constitution, Dr. Bhimrao Ambedkar played a crucial role in framing the laws of independent India. Born a Dalit (they were formerly known as *untouchables*), Babasaheb, as he is often known, extensively critiqued the Indian caste system, arguing that India is largely characterised by cultural unity and that, to create mutually exclusive castes within an otherwise homogenous society, people had to be divided by endogamy (in-marriage), a kind of "artificial chopping." Blacks, whites and Native Americans in the US, Ambedkar writes, are not culturally united in the first place: hence, even though these groups might be endogamous, they have not given rise to a caste system like the one in India.

Ambedkar explains that to maintain exclusivity of caste there have to be an equal number of men and women within each individual caste. If there is a surplus of one sex, people will marry and have children outside their caste, thereby desecrating its exclusivity.

In "Annihilation of Caste," a speech he wrote for the 1936 Annual Conference of the anti-caste Hindu reform group the Jat-Pat-Todak Mandal—but which was considered too "unbearable" to be delivered—Ambedkar testifies that "the Dalit was not allowed to use the public streets" and "was required to have a black thread on his wrist … to prevent the Hindus from getting themselves polluted by his touch by mistake."

The caste system, as prescribed in various Hindu teachings, customs and scriptures, stipulates that to be a good Hindu a person must fulfil his caste obligations. When the British colonizers came to India, they ushered in a modern era in which religion began to loosen its grasp on society and people began breaking those taboos and branching out into sociocultural domains previously forbidden to their castes. Specific professions were no longer monopolised by people from a particular caste. This led to inter-caste violence.

Is Race a Form of Caste?

Oliver Cox has argued that US racism developed as a result of the relationship between the bourgeoisie and the proletariat under capitalism. Black people were proletarianized to sate the opportunistic hunger of businessmen. In India, on the other hand, caste relations were the result of ancestry and the society had no scope for capitalist competition. The Indian caste system is not based on physical characteristics. The idea of progress—of rising above one's caste—is absent from this system. Low caste Shudras might imitate Brahmins, but they do not aspire to become Brahmins.

Gerald D. Berreman defines caste as a "hierarchy of endogamous divisions in which membership is hereditary and permanent," noting that, while the terms used and the justifications offered may differ in different cultures, the structure and customs of discrimination are similar in India and the US. Both systems incorporate an idea of symbolic, rather than physical, pollution—a distinction made clear by the treatment meted out to women from the Nat and Bhatu castes, for example, who were forced to work as dancing girls or prostitutes. The low caste women were accused of polluting the ground they walked on—but it was not considered to be pollution when upper caste men engaged their services for entertainment or sex. Likewise, a white person might not otherwise mingle with black people out of a fear of contamination that is strikingly absent when a black woman is subjected to sexual violence by white men. Wilkerson's description of her experience of sexual harassment by a white supremacist is one of the myriad testaments to the highly gendered operation of caste. Berreman also notes that "economic interdependence" is a common feature of the Indian caste system and US racism. Moreover, as Isabel Wilkerson notes, both systems divide people on an arbitrary basis—birth and physical traits, respectively.

Caste in Indian Law

As Marc Galanter has noted that the British colonizers combined many features of the legal systems of industrial—and so-called "modern"—societies with indigenous Indian laws to create the modern Indian legal system. American thought greatly influenced this system. Under Indian law, lower castes are referred to as *scheduled castes*, alluding to criteria established by the Census Commissioner of British India in 1931 to determine which castes were most "oppressed." One of the criteria for judging this was the amount of pollution that members of a certain caste would inflict upon Brahmins by physical contact or even by mere sight. This colonial legal legacy was retained by the government of independent India and still forms part of the Indian Constitution today.

Article 17 of the Indian Constitution abolishes the practice of untouchability and Article 14 lays down the right to equality before the law. As R. H. Tawney has commented, "formal equality of rights becomes the decorous drapery for a practical relationship of mastery and subordination."

The *equal* in *equality* specified by Article 14 does not mean *identical*, but *equitable*. This equitability is ensured by the principle of reasonable classification, which states that, if circumstances justify it, the state can treat different individuals differently. There is a two-fold test to ascertain the validity of a law in accordance with the principle of reasonable classification: (i) there are intelligible differences between the individuals who are being treated differently and (ii) the differential treatment bears a reasonable connection with the objective that it aims to achieve. It is owing to this principle that the Indian government has enacted laws like the 1989 Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and the 1955 Protection of Civil Rights Act. Articles 16(4) and 16 (4A) of the Indian Constitution explicitly allow the state to reserve positions in public employment for scheduled castes.

A trajectorial legal history has developed over past few decades with regard to reservations for scheduled castes under Article 16 of the Indian Constitution. In *Mohan Kumar Singhania v. UOI*, the Supreme Court of India held that Article 16(4) is an enabling provision that gives the state discretionary power to decide that a scheduled caste has been inadequately represented and provide quotas accordingly. This is an affirmative action programme: it is *not* about compartmentalising castes. If a reserved candidate secures a seat against a candidate from a general category, that candidate's seat will not be counted towards the reserved category and will not reduce the number of seats reserved for other candidates from that caste.

One major issue that has arisen with regard to reservation is that article 16(4) (reservations in promotions) should not provide reservations to such an extent that it stifles the general right to equal opportunity for all, provided by Articles 16(1) and 16(2). In 1963, the Indian Supreme Court devised a formula that would help to tackle this problem by placing a 50% limit on the total number of reserved seats. In 1964, the Indian Supreme Court was faced with a challenge to the "carry forward" rule, which allowed the vacant reserved seats from one year to be added to the subsequent year's reserved seats. The Indian Supreme court held this to be unconstitutional in its *Balaji* ruling because carrying seats forward in this way leads to more than 50% reserved seats in a single year. However, the *Thomas* court overruled *Devadasan*, thereby upholding the *carry-forward rule* and declared the 50% limit placed by the *Balaji* court merely cautionary and not absolute.

In the case of *Indra Sawhney v. UOI*, the Indian Supreme Court opined that the term "reservations" in Article 16(4) not only means "reservation *simpliciter*" but includes "preference, concession etc," which are lesser forms of reservations, such as the relaxation of eligibility criteria. The *Indra Sawhney* court also opined that the "creamy layer"—i.e. the socially advanced members of a scheduled caste—shall not be given the benefit of reservation policies. The most important contribution of *Indra Sawhney* was that it introduced the idea of merit in reservations. Article 335 of the Indian Constitution reads as follows:

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, *consistently with the maintenance of efficiency of administration,* in the making of appointments to services and posts in connection with the affairs of the Union or of a State. [emphasis supplied]

The Indian government issued legislative amendments that aimed to reverse the effects of all the aforementioned judgments. In the case of *M Nagaraj v. Union of India*, all these legislative amendments were challenged. The court held all the amendments to be valid and added that to prove the "inadequate representation" criteria for reservations of promotions, special empirical evidence must be presented by the state to prove the backwardness of a caste. In 2018, the Indian Supreme court declared *M. Nagaraj* to be bad law because it was a seven-judge bench decision in contravention of the nine-judge bench *Indra Sawhney* judgment. Therefore, the empirical evidence requirement has been waived. These judgements offer a possible road map for the adoption of a similar system in the US.

Race and US Law

The American counterpart of the Indian practice of untouchability is racial segregation, which was not only historically promulgated by society, but by Jim Crow laws that upheld the doctrine of "separate but equal." The central premise of these laws was that slaves were deemed to be property. The US Supreme Court upheld these laws in the case of *Dred Scott v. Sandford*. A chilling excerpt from the proceedings reveals the social and legal discrimination and oppression suffered by black people: "the rape of a female slave … might be regarded as an injury to the property, like squashing a carton of eggs." It took more than half a century for the doctrine of "separate but equal" to be overruled by the US Supreme Court, which held that racial segregation was incompatible with the Fourteenth Amendment.

In 1964, the US passed the Civil Rights Act, which protects black people against racism. With its passage, the idea of affirmative action started to take centre stage in debates about the rights of black people. The race-based quota system was challenged in the case of *Regents of the University of California v. Bakke*. The court pronounced in favour of the plaintiff. But the *Bakke* court also held that it was constitutionally permissible to consider race as a criterion in the admissions process of admissions. This case tipped the scales in favour of affirmative action.

Unlike its Indian counterpart, the US Constitution does not explicitly provide for reservations or affirmative action of any kind, not even in the Fourteenth Amendment, the American counterpart to Article 14 of the Indian constitution. The case of *United States v. Paradise* tested the validity of a one-black-for-one-white promotion scheme against the touchstone of "equal protection" clause of the Fourteenth Amendment. The court found the promotion scheme to be valid because it did not completely thwart the progress of white people. The case of *Fullilove v. Klutznick* examined the validity of a government scheme requiring the expenditure of 10% of federal funds on minority owned businesses. The court held the scheme to be valid under the "spending power of the government" clause and opined that said scheme could have been implemented by Congress under the commerce clause. These progressive judgements of the United States Supreme Court were changed with the advent of the Rehnquist court. The Civil Rights Act of 1991 overruled these judgements and re-established the protections ensured by the 1964 act.

The US should adopt the Indian model of affirmative action, wherein the constitution itself explicitly requires and justifies the implementation of affirmative action schemes like the quotas for the scheduled castes—with riders, of course—for two reasons.

First, US law needs to be more representative. The law itself has been the aggressor against black people in the US. To prevent this from reocurring, various tests, such as "strict scrutiny" and "compelling state interest" should be used to ensure the validity of the differential treatment schemes that are brought into being under the law. But, despite the rightful existence of such tests, there is a grievous absence of provision for affirmative action in the US constitution. Due to the absence of constitutional justification, even affirmative action programmes have to arbitrarily undergo such tests in order to be upheld. For example, as US legal scholars have noted, the need for the emancipation of black people seldom figures as a criterion satisfying the "compelling state interest" test. If the constitution had a provision for reservations of black people in government offices such as the legislature, the fear that the law might turn tyrant would be mitigated.

The second reason is the perilous state of affirmative action in the US. The fact that judges have to provide reasoning based on laws other than the Fourteenth Amendment is testament to this. Affirmative action can be overruled by another judgment at any time, since it is not part of sacrosanct constitutional law. The dynamic nature of the US Supreme Court means that a black person can be never be sure that she will not be deprived of the protections she enjoys due to the safety net of judicial pronouncements.

Although affirmative action is simply an explicit attempt to provide substantive equality to black people in compensation for past discrimination that denied them equal opportunities, judges shy away from providing a justification of the validity of affirmative action under the Fourteenth Amendment.

In India, by contrast, Dalits have benefitted from reservation as a right—not just an imperilled chimera of a right. Affirmative action is provided for in the Indian Constitution and is not a limited time offer based on judicial pronouncements.

Therefore, I believe that US legislation inspired by these Indian legal experiments and social experiences would be an enormously beneficial step towards providing what has been denied to the black population throughout American history, just as it has been denied to the Dalits in India.

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