

The Potential and Limitations of the Treatment of Caste Discrimination in International Human Rights Law

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This paper critically evaluates all the developments that lead to the making of caste discrimination an issue in international human rights law (IHRL) – both as racial discrimination and as an issue of the minority rights regime. It explores the reasons why such developments and the politics of it have proven to be insufficient in cause and totality in addressing the rampant abuses of the human rights of Dalits. While focusing on the obvious limitations of the minority rights regime in including Dalits as a minority, it weighs the limitations and the potential of the existing IHRL corpus in addressing caste discrimination. The paper will first outline the genealogy of caste discrimination in IHRL, which will provide a descriptive account of all the developments. I identify the treatment of caste in terms of a “violating norm” and as a “violation sub-category”. Then the paper seeks to engage with the theory on the limitations and critiques of IHRL, to argue that there are theoretical and legal-doctrinal fault lines in the conception of caste discrimination as a sub-set of descent-based racial discrimination both normatively and interpretatively. To support this argument the paper explores reasons for the failure of IHRL in critical legal thought – which outline the triumph of cultural and social pressures in the society over the language of IHRL. Following this, a novel attempt is made to develop the concept of “cultures of oppression” as a central theme in imagining a “Dalit critique of IHRL” which in my opinion is not only a normative contribution to the critical discourses in reimagining IHRL which is more responsive to the problems of Dalits, but also provides a new outlook for human rights movements to combat caste discrimination.

Keywords: caste discrimination, minority rights, human rights, social change, international law

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Genealogy of caste discrimination in International Human Rights Law

Dalit movement for “internationalisation” of caste discrimination: 1945 – present date

In a nutshell, the struggle for recognition of caste discrimination as a violation of international human rights law (IHRL) can be contemplated as “norm entrepreneurship”² The international advocacy carried out by Dalit groups from the 1980s onwards bore fruits only in 1996 when the Committee on the Elimination of Racial Discrimination (CERD) recognised caste discrimination as a form of discrimination based on *work and descent* under Article 1 of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³ The advocacy from the 1980s onwards has to be contextualised in the function which IHRL played in the post-cold war era as a “New Humanitarianism”⁴

This recognition came in the era of “politics for human rights” which according to Baxi was led by movements of resistance “arising from the responsiveness to the tortured and tormented voices of the violated”⁵

The post-1996 decade saw major human rights Non-Governmental Organisation (NGOs) such as the Human Rights Watch (HRW) collaborating with grassroots Dalit organisations in India in establishing a national organisational network of Dalit civil society organisations called the National Campaign on Dalit Human Rights (NCDHR) and later a transnational institution called International Dalit Solidarity Network (IDSN). Through these networks, the transnational advocacy has primarily mooted, rather rhetorically, for the recognition of untouchability as a “crime against humanity” and for abolishing of the caste system itself.⁶

One may question the “need” Dalit groups felt for demanding redressal of their wrongs in international law. The answer is not quite straightforward the way it is often outlined in the failure of domestic mechanisms in India in addressing the grievances of Dalits.

Significant guidance can be drawn from the pre-Indian independence history of the Dalit movement for emancipation, which involved mobilisation using the rights framework. Dr B.R. Ambedkar, the Principal architect of the Indian Constitution and Dalit social reformer, used the language of rights to give group recognition to Dalits.⁷ At the beginning of the 1920s Ambedkar constructed the identity of an “untouchable” as a separate political and social minority.⁸ This helped him in painstakingly voicing

2 LENNOX s. a.

3 UNCERD 1996c.

4 HOFFMANN 2010: 8.

5 BAXI 2008: 58.

6 BOB 2007: 180.

7 JAFFRELOT 2005: 34–35.

8 JAFFRELOT 2005: 34–35.

the problems of Dalits in the rights and legal framework making them worthy of safeguards and redressal.⁹

It can be said that using the historical experience of deploying rights framework, Dalits utilised the “political opportunity structures” to carry out their efforts in making caste discrimination an IHRL violation.¹⁰ The dichotomy of the absence of caste discrimination in the lexicon of IHRL, along with the strong opposition by the Indian government to the internationalisation, can also be viewed as a significant factor that motivated Dalit groups.¹¹

Caste discrimination as a “violating norm” and a “violation sub-category” in IHRL

The absence of “caste” as a sui-generis norm in any of the international human rights law treaties begs for a discussion on the sources of legal obligations on states to eradicate caste discrimination and provide safeguards to the affected groups if any.¹²

The presence of caste discrimination in IHRL has to be contextualised in terms of it violating the general IHRL corpus, I refer to it as the “violating norm”, and caste discrimination being a ground of violation in itself, as falling within a specific anti-discrimination theme such as racial discrimination – “violation sub-category”. The former is broader and general in nature. By its very nature, the caste system violates a range of civil, political, socio-economic and cultural rights, most commonly, the right to equality and human dignity.¹³ Such violation emanates from the prevailing systemic discrimination and violence that a member of a lower caste (Dalit) faces due to their disadvantageous position in the stratified society.¹⁴

The latter, on the other hand, refers to caste discrimination in itself as a sub-category of a specific international law anti-discrimination norms, racially based *descent* discrimination which is prohibited.

Caste discrimination as a violating norm in IHRL

As a “violating norm”, caste discrimination practically operates in various forms – in public, private, religious, social, economic and cultural paradigms.¹⁵ Based on the notion of graded inequality, barring the topmost caste (Brahmin), every other category relatively faces some form of disability or discrimination in the social hierarchy.¹⁶

9 WAUGHROY 2010: 344.

10 KEANE 2007: 218.

11 BOB 2007: 185.

12 WAUGHROY 2010: 327.

13 BOB 2007; for an overview of all the rights in the IHRL regime which caste discrimination violates see BABAR 2016: 117.

14 THORAT-UMAKANT 2004.

15 GALANTER 1969: 171.

16 AMBEDKAR 2014c: 106–107.

Caste being the reason for persistent inequalities, in society, it is safe to conclude that it not only violates the basic universal rights of liberty, equality and human dignity but also jeopardises the second and third-generation rights of these categories.

A guidance can be drawn from various UN human rights treaty bodies evoking “caste discrimination” as an issue violating treaty-specific rights with or without reference to descent-based discrimination.

The Human Rights Committee (HRC) in its concluding observation of India’s periodic report in 1997 raised concerns about the insufficiency of the measures taken by the government to curtail rampant discrimination and inter-caste violence faced by Dalits in practice.¹⁷ HRC further expressed regret on “the de facto perpetuation of the caste system entrenches social differences and contributes to these violations”¹⁸ and called upon India to adopt measures such as education programmes to eradicate discrimination faced by vulnerable groups.¹⁹ However, due to the failure of India in submitting a periodic report to the HRC since 1997, HRC has not received an opportunity to review the situation of caste discrimination under the International Covenant on Civil and Political Rights (ICCPR).

The Committee on the Elimination of Discrimination against Women (CEDAW) too has in the Concluding Observations on combined fourth and fifth periodic reports 2014 of India, raised concerns on the increase in caste-based violence against Dalit women and how they face multiple barriers while accessing justice, legal aid, and gynaecological/maternal health services.²⁰ It also raised concerns about the poor enforcement of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act and the underlying caste impunity of the perpetrators.²¹

Another important observation by the Committee has been regarding the intersectional discrimination faced by Dalit Women.²² Reiterating its General Recommendation 28,²³ the committee raised concerns on the absence of a comprehensive legal regime in the country which addresses both the direct/indirect and intersectional discrimination faced by women.²⁴

The Committee on Rights of the Child (CRC) raised concerns about the impact of caste discrimination on children under the themes of non-discrimination, the standard of living, education, leisure, cultural activities and special protection measures.²⁵ Under these themes, CRC raised concerns about the discrimination faced by Scheduled Castes children in enjoying rights under the convention such as access

17 UNHRC 1997: [15].

18 UNHRC 1997: [15].

19 UNHRC 1997: [23].

20 UNCEDAW 2014: 4–5.

21 UNCEDAW 2014: 34–35.

22 UNCEDAW 2010.

23 UNCEDAW 2010.

24 UNCEDAW 2014: 10.

25 UNCRC 2014: para. 31–32, 70.

to education, safe water, sanitation facilities and healthcare.²⁶ Like CEDAW and HRC, CRC too raised concerns about the failure of the “initiatives aiming at addressing inequalities and improving living conditions and access to education, health, and social services” in reference to children belonging to Scheduled Castes community.²⁷

This recognition of caste discrimination by UN bodies not only in India but also in over two dozen countries across the globe provides an insight on the global scale of the problem, which has been strongly argued by the Indian government to only exist domestically in India.

UN Special Procedure mechanisms and caste discrimination

Another major guidance can be drawn from the concerns raised by various UN Special Rapporteurs (SRs) under UN Special Procedure mechanisms, where caste discrimination has been addressed in over twenty diverse themes.²⁸ In principle, caste discrimination is considered to affect rights covered by all UN special rapporteurs,²⁹ and therefore this issue has been addressed in varying degrees by special mandate holders.

The Special Rapporteur on extrajudicial, summary, or arbitrary executions of his mission to India raised concerns on the executions of Dalits and criticised the inadequate implementation of legislation meant to avoid such killings.³⁰ Another major concern raised by the rapporteur was about violence against the Dalit community, especially communal violence, at the hands of non-state actors, and recommended that the government must not give shelter to non-state actors who perpetuate caste-based violence, because that is the result, that gives such actors the power to commit caste-based crimes with impunity.³¹

The Special Rapporteur on the right to food raised concerns about the effects of social segregation on the violation of the right to food, due to the intersectional nature of discrimination.³² The SR recommended that the government should take measures in improving access to food among children and adults alike.³³ Raising concerns on multiple ways in which Dalit children are discriminated against, SR again rightly pointed out that “these disparities, whether they are the direct or indirect consequences of governmental policies and practices, constitute violations of the prohibition of non-discrimination in the enjoyment of children’s right to food”³⁴

26 UNCRC 2014: para. 79–80.

27 UNCRC 2014; for discussion by the Committee on Economic Social and Cultural Rights (CESCR) see UNCESCR 2008: para. 13.

28 See IDSN 2022: 11–13.

29 IDSN 2022: 11–13.

30 UNCHR 2012.

31 UNCHR 2012.

32 UNCHR 2015.

33 UNCHR 2007.

34 UNCHR 2007.

The wide recognition of caste discrimination as a “violating norm” provides on the face of it, a promising picture. However, the “violating norms” provide only “implicit” recognition to the human rights abuses faced by Dalits. This is because the acts carried out in the name of caste discrimination violate specific human rights such as the right to equality, right to liberty, etc.

Caste discrimination as a “violation sub-category”

India ratified ICERD in the year 1968. In a period of about two decades, India diligently submitted reports to ICERD providing substantive information on the legal and policy safeguards for the emancipation of Scheduled Castes and Scheduled Tribes in India.³⁵ CERD reciprocated by lauding such efforts.³⁶ It further made inquiries about the steps taken by India to eradicate untouchability and caste discrimination in the country and along with it, the effectiveness of the laws criminalising caste discrimination.³⁷

However, neither India nor CERD ever explicitly recognised caste discrimination as a form of human rights violation falling within the folds of ICERD until 1996.³⁸ CERD in its Concluding Observation of India’s state party report in 1996, finally identified that caste is a sub-type of descent-based racial discrimination, and hence prohibited in IHRL, more specifically under Article 1(1) of the ICERD.³⁹

This observation by CERD has to be contextualised in light of India’s tenth to fourteenth consolidated periodic report where India categorically stated that: “The term ‘caste’ denotes a ‘social’ and ‘class’ distinction and is not based on race.”⁴⁰ India’s argument was based on the logic that the “use of the term ‘descent’ in article 1 of the Convention clearly refers to ‘race’ and although the caste and tribal systems are based on ‘descent’ they are not based on race, hence the situation of scheduled castes and scheduled tribes doesn’t fall within the purview of the convention. It was in response to this position that CERD observed “the term ‘descent’ mentioned in article 1 of the Convention does not solely refer to race.”⁴¹

Through this step, ICERD played a vital role in the internationalisation of caste discrimination as a violation of human rights, as a violation sub-category, law by making ‘descent’ “the legal home for caste” as seen from later developments in treaty-based bodies and mechanisms.⁴² Caste helped expand the wider international legal norm of ‘descent’, which includes caste as practised in India and across the globe but

35 WAUGHRA Y 2010: 336; see also UNCERD 1996b.

36 WAUGHRA Y 2010: 336.

37 WAUGHRA Y 2010: 336.

38 WAUGHRA Y 2010: 336–337.

39 UNCERD 1996c.

40 UNCERD 1996a.

41 UNCERD 1996c.

42 KEANE–WAUGHRA Y 2017: 137.

is definitely not limited to it. Caste thus is a subsumed category within descent-based racial discrimination.⁴³

Another major contribution of CERD in making ICERD as the “Pre-eminent human rights treaty” for recognising caste discrimination in IHRL is the General Recommendation 29 (2002) – on Article 1, Paragraph 1, of the Convention (Descent) (GR 29).⁴⁴ Modeled on GR 27 on Roma persons,⁴⁵ GR 29 reiterated the term “descent” in article 1(1) of ICERD “includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”.⁴⁶

General Recommendations/Comments (GR) are important tools for human rights treaty bodies in interpreting the convention to assist State Parties in drafting respective country reports under the conventions.⁴⁷ GR 29 falls in the category of “special categories of persons”⁴⁸ and it gave a global recognition to descent-based discrimination which also includes caste and analogous systems.⁴⁹

Following the lead, the UN Sub-Commission on the Promotion and Protection of Human Rights in its Resolution 2000/4, declared that discrimination based on work and descent is prohibited by IHRL.⁵⁰ Albeit, it did not include discussion on caste as a subsumed category falling under the category of work and descent, but only gave rise to subsequent discussions of caste in various working papers,⁵¹ appointments of two Special Rapporteurs on work and descent and adoption of Draft Principles and Guidelines for the Elimination of Work and Descent Discrimination.⁵²

As a later development in the Draft Principles, the UN Human Rights Council outlined the definition of “work and descent” to include “any distinction, exclusion, restriction, or preference based on inherited status such as caste...”⁵³ which in effect impairs the enjoyment of human rights in all spheres of society.⁵⁴

Minority rights framework

The recognition of caste discrimination as a possible violation of the UN minority rights framework is rather recent when compared to developments before other UN forums.

43 KEANE-WAUGHRAY 2017: 137.

44 UNCERD 2002b

45 UNCERD 2000.

46 UNCERD 2000.

47 ANDO 2008; see ÇALI 2013.

48 Other subcategories in which CERD's GRs can be classified are “reporting obligations and subjects of report”, the second to “methods of achieving ICERD goals” and “other issues”; see KEANE 2007.

49 KEANE 2007.

50 UN Sub-Commission 2000.

51 UN Sub-Commission 2003: 10–43.

52 UNHRC 2009: 6.

53 UNHRC 2009: 8.

54 WAUGHRAY 2010: 338.

The special rapporteur on minority rights in the 2016 report provided comprehensive insights on capturing caste within the international minority rights framework. At the outset, the report recognised “the complexity of addressing this topic within the minority rights framework, as there exists the view that caste systems are a way to organize society without the domination of majority groups, and that therefore, ‘lower caste’ groups may not strictly fall under the category of minority groups”.⁵⁵ Despite this express recognition of the limitations of the approach, the report confirms and recommends using the minority rights framework to address caste discrimination as Dalits who face caste discrimination “share minority-like characteristics”.⁵⁶ “The historic use of minority rights framework” to address marginalisation based on caste and “historically the use of particularly their non-dominant and often marginalized position, stigma” were foundational, according to the committee, for extending minorities status to Dalits.⁵⁷

A deeper insight into the place of caste in UN minorities mechanisms reveals a more nuanced picture of the “inclusive” approach of the UN minorities mechanism “in addressing discrimination based on caste and analogous systems of inherited status under the minority rights framework”.⁵⁸

The recognition of caste-based discrimination under the ICERD framework, as discussed previously, was a ‘passport’ for bringing Dalits within the international minority category based on their status as a group protected by ICERD.⁵⁹ As Waughray rightly observes:

In 2009, the minorities forum brought Dalits into the international minority category based on their status as a group protected by ICERD, stating that the term ‘minorities,’ as used in the Minorities Declaration, ‘encompasses the persons and groups protected under the ICERD.’⁶⁰

Waughray’s analysis of the issue of caste within the minority rights framework further outlines the limitations of the approach as “Dalits do not constitute a discernible ethnic, religious, cultural or linguistic minority”.⁶¹ The core definition of a minority with which there is an international consensus that it “embraces non-dominant groups possessing stable ethnic, religious or linguistic characteristics that differ sharply from those of the rest of the population, which have been retained over time and which members of the group wish to preserve”.⁶² Therefore, despite various UN

55 UNCHR 2016.

56 UNCHR 2016: para 21.

57 WAUGHRAY 2016: 154–155.

58 WAUGHRAY 2016: 154–155.

59 WAUGHRAY 2016: 156–157.

60 UNCHR 2009: Para 2, fn 160 cited by WAUGHRAY 2016: 156–157.

61 UNCHR 2016.

62 UNCHR 2016.

actors confirming Dalits as a minority, the acceptance of such a position remains far from being a universally accepted one.⁶³

Though the developments towards recognition of caste discrimination under the minority rights framework are welcomed, the upcoming parts will critique these interventions by analysing the emancipatory potential they have in addressing caste discrimination.

Critique of caste discrimination as a violating norm and violation sub-category

The primary reason for problematising the making of caste discrimination as a subset of descent-based racial discrimination and in a limited way also in the minority rights framework is the manner in which the former came to be recognised as a violation of IHRL.

The GR 29, which was adopted after a thematic debate on the issue, came only after 6 years of CERD declaring in its Concluding observation of India's periodic report, that caste discrimination is covered by ICERD and hence a violation of IHRL.⁶⁴ GR 29 does not outline any reason for including caste discrimination under descent-based discrimination, and therefore the discussion warrants a short insight into the thematic discussion which preceded the adoption of GR 29 by CERD.

However, it seems to be a general consensus among the CERD members that: a separate definition of descent is not needed as the term was clearly to include discriminatory systems based on some "inheriting characteristics", caste being one such system under its meaning;⁶⁵ the term "descent" had to be construed in the broadest possible manner to ensure that protection is extended to the groups which are discriminated on the basis of some inherited characteristics;⁶⁶ hence, the term descent should not be confined exclusively to caste but must also include caste as one of its facets not in reference to a country but as a global phenomenon.⁶⁷

On the defence of using ICERD to address the issue of caste discrimination, one of the former CERD members, Thornberry, outlines that caste or analogous forms of social stratification were included as a form of "descent" due to the "open character" of descent terminology as caste has "race-like" features outlined in Article 1 of ICERD.⁶⁸ He also defended such expansive interpretation on the basis of the "living instrument" principle.⁶⁹ Under this principle, the existing human rights corpus is used to address discrimination faced by certain groups "even in the absence of direct reference to the community in question".⁷⁰

63 WAUGHRA Y 2016: 156–157.

64 UNCERD 2002b.

65 UNCERD 2002a: para. 11, 18; see also KEANE–WAUGHRA Y 2017.

66 UNCERD 2002a: para. 5

67 UNCERD 2002a: para. 8, 10.

68 KEANE–WAUGHRA Y 2017.

69 KEANE–WAUGHRA Y 2017: 142–143.

70 KEANE–WAUGHRA Y 2017: 143.

I submit that this justification of the interpretative approach adopted by CERD is fundamentally problematic because while invoking the principle of living instruments, it was not guided by the rules of interpretation in international law.⁷¹ The evolutive interpretation deployed by treaty bodies and courts is based on the understanding that instruments are continuously evolving.⁷² However, this concept lacks its own independent standing, being guided by the principles of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT).⁷³

In *Judge v Canada*,⁷⁴ the UN Human Rights Committee held that ICCPR must be interpreted as a living instrument by contemplating the underlying rights in the context of “present-day conditions,” and held that the living instrument principle must be considered and applied in due regard to VCLT.⁷⁵

Another important reason for using the interpretative method outlined in VCLT while drafting the general recommendation/comment is the clarity of method needed to interpret a provision, given the competing views of different actors involved in the process.⁷⁶ The GR 29 merely “reaffirms” that descent includes forms of “social stratification such as caste and analogous systems of inherited status...”⁷⁷ without giving any reasons based on the context, the object and the purpose of the treaty, or without even the slightest mention of the teleological interpretations and specific treaty interpretation methods provided for, in the scheme of VCLT.⁷⁸

Such use of the “living approach” principle only comes out in the academic writing of erstwhile members of CERD and in some places, in observations made by CERD members in the thematic discussions, however, they do not form part of the reasoning in GR 29.⁷⁹

Thus, the CERD fails to provide a sound legal background for considering caste as a form of racial discrimination, which ought to be based on rules of interpretation under VCLT.

Even though the value of General Recommendations/Comments is often seen as quasi-legislative in nature and are even characterised as soft law, having no binding effect on the state parties, the vital role human rights treaty body play in expanding, clarifying and ensuring the protection of human rights of individuals and groups as part of treaty obligation of the state parties cannot be neglected.⁸⁰

The triumph of India’s opposition arises out of the failure of CERD in providing concrete reasoning for including caste discrimination as a sub-category of descent,

71 HERDEGEN 2020.

72 ORAKHELASHVILI 2008.

73 ORAKHELASHVILI 2008.

74 UNHRC, CCPR/C/78/D/829/1998, para. 10.3.

75 ORAKHELASHVILI 2008.

76 MECHLEM 2009: 927–928.

77 UNCERD 2002b.

78 ORAKHELASHVILI 2008.

79 UNCERD 1996c.

80 MECHLEM 2009: 905–947.

and also the lack of sound rebuttal of India's position. It merely states that India's argument is not the case.⁸¹ Though India could have denied such an obligation even in the existence of a strongly reasoned General Recommendation, but that would be at the percept of opposing a strong normative justification with rather an untenable and dubious logic.

Briefly, the other range of critiques targets such an interpretation of three broad themes: a) incoherency in the word "descent" from analysis of CERD's *travaux préparatoires*;⁸² b) absence of caste as a sui-generis category in IHRL,⁸³ and c) the paradox such an interpretation presents while not problematising caste as a socio-cultural system in itself.

Keane disputes such an interpretation is disputed, where Keane highlights the lack of foundational basis of caste discrimination in ICERD, a convention conceived on anti-apartheid, anti-colonialism and anti-Semitism sentiments.⁸⁴ This critique is untenable given the scope of VCLT, which recognises dynamic teleological interpretations of the human rights treaty on the basis of the "living instrument" principle.⁸⁵

Furthermore, Hugo and Weiner outline the paradoxical nature of this "positive" development, where caste discrimination is prohibited and the caste is not problematised.⁸⁶ This comes from the understanding that attacking caste discrimination will be less helpful when steps are not taken to address caste as a form of social and cultural stratified system which is discriminatory and exploitative in its very conception.⁸⁷ This non-attacking of caste also lays support to the claims of the defenders of the caste system as a "natural" cultural identity.⁸⁸

Experience of legal reforms with eradicating caste discrimination in India

The discussion in the preceding section indicates the limitations of legal and policy safeguards in addressing caste-based discrimination and violence in India. Such discussion shows that such failure cannot be attributed to a mere lack of political will.⁸⁹ The most compelling of these reasons is the role the cultural legitimacy that caste plays in the dismissal of formal legal safeguards, thereby perpetuating discrimination and triumph of the "rule of caste" over the "rule of law" in India.⁹⁰

The rationale for enacting anti-caste discrimination legislation in India is – to not only punish the offenders but to change the behaviour in society.⁹¹ In the context of

81 UNCERD 2002b.

82 KEANE 2007: 231–232, 237.

83 WAUGHRAV 2010: 353; KEANE 2007: 277.

84 KEANE 2007: 278.

85 HERDEGEN 2020; ORAKHELASHVILI 2008.

86 WAUGHRAV 2009: 414.

87 AMBEDKAR 2014a: 23–96.

88 KEANE–WAUGHRAV 2017: 129.

89 EISENMAN 2003: 133.

90 NARULA 2008: 255, 295.

91 GALANTER 1993: 217.

the Untouchability (Offences) Act, 1955, Galanter identifies the failure of the “Halo-effect” – which denotes general adherence to law – due to anti-discrimination laws being contrary to the “sentiments and established behaviour patterns of wide sections of public” and as they go “counter to the perceived self-interest and valued sentiments and deeply ingrained behavioural patterns”.⁹² This is also true for the subsequent legislation enacted by the Indian government to tackle the issue, as they have a cumulative effect of providing a symbolic means for Dalits to assert their rights in the public domain,⁹³ however in reality, given the steady rise of caste-related violence and discrimination, such legal mechanisms only help the perpetrators in committing crimes with impunity.⁹⁴

Narula problematises the sufficiency of the formal constitutional and legal safeguards for Dalits by coining the term “culture of under-enforcement”,⁹⁵ which depicts not only the limitations of the law in assuring the protection of Dalits, but also changes the social reality of India – which is “de facto segregation, exploitation, violence, and other forms of ‘untouchability’ practices”.⁹⁶

Emphasising on Thorat’s thesis of the need for addressing the embedded structures in Hindu society for proper realisation of rights, Narula argues that the rule of caste overpowers the rule of law in India, where the former expands *de facto* caste discrimination, and the latter prohibits caste discrimination in a *de jure* fashion.⁹⁷

Thorat attributes the lack of access to human rights of Dalits to the framework of “social behaviours” in the socio-religious and cultural institutions guided by untouchability which is opposed to constitutional and human rights corpus.⁹⁸

On human rights, Narula calls for adopting a two-fold strategy to redeem human rights promises: a) “remedying the effects of discrimination”; b) “dismantling the discriminatory mindset”.⁹⁹ It will be the second one that will be the foundation for imagining a Dalit critique of IHRL.

A more radical insight appears in Ambedkar’s foresighted analysis of “lawlessness as lawful” in the context of Hindu social order. It throws light on the fault lines between not only law and caste system but also the meaning of “law” when contextualised in Hindu social order and the political and social context in which formal law operates.¹⁰⁰

For Ambedkar, a manifestation of untouchability in the form of oppression, discrimination and structural violence faced by Dalits in the Hindu society is “lawlessness” if looked at from the prism of law as understood in the western liberal discourse. However, the same is considered completely lawful when contextualised

92 GALANTER 1993: 217.

93 GALANTER 1993: 218.

94 GALANTER 1993.

95 NARULA 2008: 297.

96 NARULA 2008: 257.

97 NARULA 2008: 275.

98 THORAT 2002.

99 NARULA 2008: 331.

100 AMBEDKAR 2014e: 62–64.

within the “Hindu Law of Persons”¹⁰¹ of ancient Hindu religion as proclaimed in various treaties and codes like Laws of Manu, Yajnavalkya, Narada, etc.¹⁰² This in Ambedkar’s conception is the epistemic factor “responsible for the perpetuation of untouchability and for the lawlessness”.¹⁰³ Such ingrained inequality transposing out of the “Hindu Law of Persons” is what made Ambedkar further conceive the identity of a Dalit as a “sub-human”, who are denied all forms of freedom in the Hindu Social Order.¹⁰⁴

This absence of conscience in Hindus towards untouchables is also true in contemporary India, where the non-adherence to the rule of law and rampant human rights abuses of Dalits proves Ambedkar’s thesis correct.

Ambedkar’s critique of rights stems from his understanding of caste as a system of graded inequality – by which he refers to a system where each caste as an exclusionary unit discriminates against another caste with a vested interest of self-preservation through perpetuating inequality.¹⁰⁵ Therefore, even untouchables have some interest in maintaining the social order as long as they get some privileges over other untouchables within their own caste structure.

Due to these societal realities, Ambedkar was critical of the effectiveness of the formal rights corpus and emphasised restructuring the social and moral conscience of the society, which is conducive to rights adherence, as against the one which completely rejects rights on a social plane.¹⁰⁶

The foregoing analysis is foundational in contemplating a Dalit critique of IHRL, where the “culture of oppression” emerging out of deep systemic norms requires due to focus and needs to be addressed by the international human rights movement. Before expanding on this proposition, it is vital to have brief insights into theoretical debates on the issue of law and social change.

Human rights and social change: Giving powers to rights it does not have?

Social change through the use of law indicates changes in the “social structure or in culture” of the society by evoking the language of the law.¹⁰⁷ On the issue of the gap between law and its actual compliance in society, Dror emphasises on the ever-lasting difference between the “actual social behaviour and the behaviour demanded by the legal norm”. Such a difference transforms itself into a “lag” or a gap when “the sense of obligation generally felt towards legal norms significantly differs from the behaviour required by law” leading to changes in the law but no substantial changes in society.¹⁰⁸

101 AMBEDKAR 2014e: 64.

102 AMBEDKAR 2014e: 64.

103 AMBEDKAR 2014d: 91.

104 AMBEDKAR 2014d: 93.

105 AMBEDKAR 2014c: 106–111.

106 AMBEDKAR 2014b: 222.

107 DROR 1959: 787, 797.

108 DROR 1959: 794.

Rosenberg's critical insights on the post-desegregation era social realities is critical to further expand on Dror's insights. Albeit the *Brown* judgement, which ruled the segregation policy in the U.S. as unconstitutional, led to a backlash from private groups, as well as from federal and local governments alike. Rosenberg argues that social and cultural constraints made it difficult if not impossible, to implement the *Brown* decision, as the culture of the society perpetuated slavery and apartheid making them non-conducive to social change.¹⁰⁹

Thus, human rights cannot by themselves change the fundamental injustices in society but are an important tool for social movements in fighting against societal issues.¹¹⁰

Imagining a Dalit critique of IHRL

The question which emanates from the above discussion is what new can a Dalit critique of IHRL contribute to the existing human rights movement. The role of a critical inquiry is not that of anti-human rights, but is of deconstructing the human rights claims and their utopia, to make the existing framework work.¹¹¹ The need for such a critique is because rights, both domestically and internationally, have at large been inadequate in addressing caste discrimination faced by Dalits in India, therefore naturally leading us to look for possibilities for reconstructing international law which is more responsive towards the rights of Dalits in India.

Dalit critique at the outset envisages targeting the very root of the discrimination, which I argue is the "culture of oppression" – in this case, the caste system itself. Non-prioritising and non-problematizing of the culture of oppression paralyse the human rights corpus in bringing about social change.

The foregoing expansive analysis of the theoretical insights indicates the challenge which the existing systemic forces and discriminatory attitudes pose, to the language of human rights. In developing a Dalit critique of IHRL, "cultures of oppression" take the central stage, by which I refer to the "culture" of non-adherence to the rule of law emanating out of oppressive cultural and social embodiments and religious legitimization generating *perpetual marginalisation*.

The terms "cultures of oppression" and "perpetual marginalisation" are further clarified from the discussion in this section and the preceding sections, which outline the limitation of human rights in bringing change in deeply entrenched discriminatory social and cultural attitudes leading to general lawlessness in the society.

One of the pivotal objectives of the Dalit critique is to challenge the IHRL and attempt at reconstructing its normative corpus, with the aim of centralising "cultures of oppression" as the primary target. This will only take place when the language of IHRL starts problematising the cultural and social embodiments in which law

109 ROSENBERG 2008: 82–83.

110 O'CONNELL 2018.

111 MÉGRET 2012.

functions. Many critiques of IHRL do somewhat focus on such an inquiry, clear from forgoing discussion, however, a Dalit critique by relying on such theoretical insights calls for a more specific inquiry towards identifying cultures of oppression in society and envisaging ways in which the social and cultural justifications of lawlessness could be addressed, if not completely eliminated.

A caveat at this juncture is vital. This imagining of Dalit critique does not claim and cannot claim to be a completely novel inquiry. It rather emanates from the above discussion, especially from the understanding of third-world critiques and Ambedkar on the role culture and social norms play in adherence to IHRL. This inquiry may be seen as a novel one, in the sense that it develops a nuanced argument about reconstructing human rights by identifying the core reason for perpetual marginalisation which calls for such reconstruction in the first place.

Ambedkar's thought-provoking insight on the "destruction of caste" is fertile to contribute to the Dalit critique of IHRL, where he emphasises on bringing "notional change" as the only answer to fight caste discrimination.¹¹² Such change will only arise if the structures from where the "caste system" as a system derives its sanctity from, are problematised and dismantled. Ambedkar's analysis is relevant for the present critique as it recognises targeting cultures of oppression, which in the context of India and Dalits would need problematising the notion of the caste system in its entirety.

It is also not right to discredit the movement in IHRL to evolve from norm-setting to "capacity building", undertaken by international human rights bodies with an emphasis on making Human rights achieve its intended goal. The issue is that such attempts have had very little success in addressing caste discrimination.¹¹³

The experience with human rights has shown us that the oppressive forces reinvent themselves in the form of "neo" regimes of oppression – neo-colonialism, and neo-apartheid for instance. Such a critique would also call for envisaging ways and strategies, and opening a discourse, on using human rights language for ending the perpetuating behaviour of oppressive regimes or cultures of oppression.

The above inquiry need not make Dalit critique seem to give even the faintest impression of being defensive of the IHRL regime. Nor does such a critique establish human rights as a panacea for changing the entire status quo in society. It is only critical of the failures of human rights in not addressing the cultures of oppression. While recognising the limitations of rights and their importance in social movements, it calls for developing an approach that confronts systemic issues that perpetuate marginalisation.

That way a Dalit critique would not imagine vesting human rights with the duty of changing the whole structure of the society or social norms but would stress moving away from the rhetoric of rights language and its utopian promises, and expect IHRL to play a role, a much-needed role, in social movements that challenge systematic discrimination and cultures of oppression. This imagination also demands IHRL

112 AMBEDKAR 2014a: 68.

113 EISENMAN 2003: 133, 171.

to problematise the symbolic adherence veil which masks the regime of cultures of oppression.

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