

THE SCOPE OF CONSTITUTIONAL MORALITY

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“The issue of the rights of sweepers and scavengers has never entered the mainstream legal consciousness in the country,” wrote Upendra Baxi in *Law and Poverty: Critical Essays*. “Nor have the Bar and the Bench, and the mushrooming legal aid and advice programmes shown any awareness of the exploitative conditions of work imposed upon the scavengers and sweepers under the employment of municipal corporations or related local bodies... [T]he exploitative conditions of work constitute governmental defiance of the law and the Constitution, which can be best summed up as a crucial component of overall governmental lawlessness in the country since Independence.”

Written in 1988, Prof. Baxi’s lines remain disconcertingly relevant today. We struggle against the caricaturing of this extremely stigmatising, violently exploitative and degrading form of forced labour by a government and civil society that showcases empty rhetoric and ceremony around “cleanliness”, while decimating an entire class of citizens through callous neglect with impunity.

There has been a steady rise in deaths of conservancy workers, and a steadier normalisation of the risks to life they bear on a daily basis. Why don’t sewer deaths bring the country to a grinding halt, as they should? Will a general strike of all conservancy workers across the country bring the country to its knees? Because then, it will not be a question of prime-time jingles on a clean India; the focus will shift on each of us to take the moral and physical responsibility of cleaning our own sewers and keeping ourselves free of the risk of toxic death.

To return to Prof. Baxi’s concerns on the place of law: Article 17 of the Constitution of India states: “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.” This is a fundamental right and therefore justiciable and enforceable by courts, which shall call governments to account.

In 2009, the Delhi High Court, in *Naz Foundation v. NCT of Delhi*, invoked Babasaheb Ambedkar’s delineation of constitutional morality in asserting the urgency of decriminalising consensual sexual relations proscribed by Section 377 of the Indian Penal Code. The court cited a second provision as well: Article 15(2) which prohibits any form of horizontal discrimination drawing again from the experience of untouchability that obstructed the universal use of public places, restaurants, water sources, etc. We witnessed last month a triumphal return of constitutional morality as a guiding principle for constitutional interpretation. A five-judge bench of the Supreme Court of India, in *Navtej Singh Johar v. Union of India*, deployed this framework to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

The genealogy of Ambedkar’s signposting of constitutional morality may be traced to the strength of anti-caste resistance and the abolition of untouchability. It is from this context that constitutional wisdom was applied to analogous situations of oppressions based on sexuality. It is time to call the government to account through a recursive method that takes us to the original constitutional proscription of untouchability, armed with the wisdom of the Navtej Singh Johar case.

The first aspect is the importance of judicial empathy. In a violently exclusionary society, the application of the Constitution to lives as lived is an extremely emotional moment. We have people from India’s most oppressed castes dying painful deaths without dignity in the sewers of

the same city where the court sits. There is neither accountability nor due diligence on the part of the state. The time for the expression of judicial empathy is now. Justice Indu Malhotra's lines in *Johar* are apposite: "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."

Given the urgency, with people dying daily despite constitutional and statutory protections, how do we right these historical wrongs, or at least "set the course for the future"? We are all agreed that the *de minimis* approach is bad law — rule by law rather than rule of law, as it should be, to echo Justice D.Y. Chandrachud. The fact that it is still possible for people to be sent into sewers without protection, and to be forced to perform degrading labour is enough for us to sit up and take note. Outgoing Chief Justice of India Dipak Misra set out four cardinal corners of the Constitution: Individual autonomy and liberty; equality sans discrimination; recognition of identity with dignity; right to privacy. He also underscored the centrality of fraternity to the constitutional value system. These signposts require us to contemplate and act on the meanings and expressions of "intrinsic dignity" for conservancy workers and safai karamcharis.

If "self-determination and the realisation of one's own abilities" lie at the core of personhood, how would forced, unsafe and degrading labour, and persistent untouchability figure in this new constitutional imaginary? In the case of safai karamcharis, we are today witness to the "violation of fundamental rights that strikes at the root of their existence" (Justice Misra), and there are no visible pathways to freedom in this virulent caste society. Lest we forget, untouchability is a crime under the Constitution.

Important for citizen consideration today is the fact that the Supreme Court, in deciding on the unconstitutionality of Section 377, recognised that the four corners of the Constitution rest on a social reality steeped in prejudice, stereotypes, parochialism, bigotry, social exclusion, and segregation. If decriminalising "unnatural" sex is one of the "necessary steps on the road to democracy", abolition of untouchability in all its forms remains an unrealised constitutional right.

The lesson on the importance of intersections in constitutional reasoning today is brought home to us in this case in yet another way. There is recognition by the court that majoritarian governments/sections work hard to keep oppressive structures in place, and that it is the duty of the court to place questions of liberty, equality, and dignity out of the reach of majoritarian impulses. The sanction for manual scavenging lies at the heart of majoritarian mindsets and structures. It is part of an ideological framework that permeates the institutional apparatus of government. If, as Justice Misra observes, "the sustenance of fundamental rights does not require majoritarian sanction", can we call for some constitutional-procedural deliberation on the "progressive realisation of rights" in this instance? The principle of non-retrogression in the matter of fundamental rights has now been unequivocally stated. But on our streets, we only observe it in the breach especially in the case of manual scavengers.

To end with Ambedkar: "We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy."

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