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# Ambedkar's Liberty Concept in Comparative Constitutional Thought

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## I Introduction

By dedicating his 1873 treatise *Gulamgiri* (Slavery) to the 'good people of the United States as a token of admiration for their sublime disinterested and self-sacrificing devotion in the cause of Negro slavery'[1] the militant anti-caste leader Jyotiba Phule sought to draw inspiration from the experience of the Civil War in that country for the struggle of Sudra emancipation from 'the trammels of Brahmin thraldom'[2] in India. This struggle reached a pivotal juncture on 29 November 1948 when the Constituent Assembly of Independent India under the supervision of Dr B.R. Ambedkar, a revolutionary constitutionalist from the Mahar community of Dalits,[3] abolished the practice of untouchability and forbade its practice in all forms.[4] If constitutional concepts migrated freely across jurisdictions, those flowing from the anti-caste movement ought to occupy a prominent place in the globalizing grammar of modern constitutionalism just as have the ones associated with the Western constitutional discourse on anti-slavery. But proceedings of the 2001 World Conference against Racism (WCAR) at Durban show that this has unfortunately not turned out to be the case. Here Dalits were

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compelled to use a language specific to race in order to internationalize the issue of caste discrimination.[5] This seems paradoxical since contrary to an influential strand in colonial anthropology that equated caste with race owing to an apparently common emphasis on skin colour and phenotype, it was Ambedkar who showed that the hierarchical caste system owed its origin to custom subsequently codified in the *Dharmashastra* and not in ethnology, as a result of which it could not be treated as a synonym for race.[6] However, over a period of time, it was race as a concept which came to be hegemonic in international fora and the Dalit resort to it at Durban was the only progressive option available to them under the circumstances.[7] More so as issues of caste and untouchability were deemed to be oddities peculiar to the South Asian subcontinent, both by the international public as well as the Indian government.[8] While the former may have been motivated by the belief that a universal framework was not appropriate here since these concerns were remnants of a deviant history local to South Asia alone, the latter was positively invested in furthering the logic of postcolonial difference whereby such social questions strictly pertained to the spiritual domain over which none but the nationalist elite could exercise sovereign authority. As a consequence, given their presupposed particularity caste and untouchability failed to command the attention of international comparative scholars as independent pedagogical categories. On the other hand, race and slavery, in spite of having their own Anglo-American and West European historical context, could produce legal and constitutional concepts which came to be seen as transhistorical and transcontextual enough to be generalizable to the rest of the world. This in a way corroborates the critical 'one-way traffic' thesis in comparative constitutional studies, which asserts that the inbuilt biases within the discipline make it predominantly oriented towards mapping constitutional transfers from the global North to the global South while spending very little time or effort in considering alternative possibilities which may encompass hitherto ignored regions as sources of constitutional concepts with transnational appeal.[9]

We believe that it is not fruitful to merely lament over or derive rhetorical purchase from this asymmetry of the comparative enterprise. Neither are we interested in setting up a new universal from the South to rival its dominant paradigms. Rather, in our understanding it would be possible to draw up a fresh approach to comparison cognizant of a wider variety of theoretical and practical experiences by probing the contours of the framing of universals in comparative constitutional studies and destabilizing some of their key presuppositions on account of what they effectively end up excluding. This paper pursues such an agenda by comparing Ambedkar's

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constitutional thought on liberty with its competing conceptualizations in European political traditions. It shows that unlike the figure of the slave which has been central to the imagination of liberty in its three most powerful formations—negative, positive, and republican—for Ambedkar it was the figure of the untouchable that defined his concept of what we would call 'liberty as non-oppression'. By doing so, this paper would complicate the universalist paradigm which relies upon the figure of the slave to conceptualize liberty no matter how so contested otherwise. This complication is neither particularistic by nature, in that Ambedkar's account is not relevant merely for the South Asian case of caste, nor is it suggestive of a simple replacement of the slave by the untouchable as a new universal paradigm of liberty conceptualization fit for all constitutional circumstances everywhere else in the world. Both these propositions would run us into discomforting difficulties. Instead what we are interested in doing through the example of Ambedkar is to take cautious steps towards a comparative methodology that does not treat universal and particular as oppositional categories, is aware of the critical intimacy which they are likely to share, and practices de-contextualization and re-contextualization without taking them as fixed pre-givens in terms of content, but rather always as objects of agential construction. What this amounts to in respect of comparative constitutional discourse on liberty is that the complimentary yet unstable categories of universal and particular within which it is framed are as much subjects of comparative enquiry as are the different conceptualizations of liberty themselves.

This essay is divided into three parts. Part one shall set up the figure of the slave as the ultimate *tertiumcomparationis* for the three rival conceptions of negative, positive, and republican liberty in European constitutional thought; that is, howsoever antagonistic with one another their respective proponents might present themselves as, what unites them is a common foundational engagement with slavery in respect to which their formulations on liberty are made. In part two, we move to Ambedkar's reluctance in relying upon the figure of the slave when conceptualizing liberty and instead basing it on the figure of the untouchable. So even while thinking deeply about liberty, he did not associate his account with what was most fundamental in the extant Western literature on the concept, and instead chose to politicize an almost defunct Indic tradition of Buddhism, which enabled him to conceive of liberty as non-oppression. Finally, in part three we will bring this discussion on liberty in conversation with interdisciplinary scholarship exploring the relationship between universalism and particularism. Our contention would be that comparativist approaches which are either

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exclusively universal or particular, or accommodative of particularities in an otherwise hegemonic universal framework are not productive. By reading Ambedkar as an exemplary comparativist on the liberty concept, we would suggest that a better way to do activist comparison is to contemporanize different time-spaces whereby these two categories are not only rendered unsettled but newer possibilities are opened up for bringing them in critical alignment.

## II Part One

Liberty as a concept has a long genealogy in the Western history of ideas, and is therefore hard to put within strict definitional constraints. It may be described as a contested concept with at least three predominant rival conceptualizations—negative, positive, and republican—which have withstood the vicissitudes of time. Although these distinctions have their roots in the ancient world and its transition to modernity, we would like to begin with Isaiah Berlin's mid-twentieth century classification of negative and positive liberty which has come to acquire canonical status in the literature.[10] Following Hobbes, Locke and Bentham, Berlin stated negative liberty to mean non-interference or non-coercion of a person's movement and will by others.[11] In contrast, following the thought tradition of Hegel, Green and Bosanquet he understood positive liberty as self-mastery, self-realization, and self-perfection. That is the ability to autonomously pursue one's genuine life goals.[12] While there may be a disagreement as to whether negative liberty shares with positive liberty an urge to probe obstacles interior to the self such as passions of the soul and effects of internalized social norms,[13] what categorically sets the two apart is the latter's perfectionist emphasis on fulfilling the essence of human nature, howsoever divergently it may have come to be defined. Different positive liberty theorists usually do so by drawing a distinction between a lower empirical self and a higher ideal self—a dangerous step whose authoritarian and anti-pluralist implications have historically been blamed for destructions wrought by political ideologies such as official communism, Nazism, Fascism and even nationalism as a result of which their accounts get condemned by someone like Berlin[14] although they have gone on to make substantive revisions to deal with such objections.[15] It is not necessary for us to entangle ourselves in this debate any further, but rather move to a third concept of republican liberty which although claiming to be the oldest in the liberty tradition, has recently been revived by philosophers such as Quentin Skinner and Philip Pettit as a response to the limitations of the earlier two versions.[16]

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Claiming to combine what is valuable in negative and positive traditions of liberty, it stresses upon absence of mastery by others or non-domination as the core of the republican variety. This view of liberty is negative to the extent that it cherishes a certain form of absence, but an absence defined in terms of domination rather than interference.[17] Domination eludes to the positive dimension of liberty in that it is associated with the issue of mastery, but instead of stressing upon self-mastery, republican liberty chooses to emphasise non-mastery by others as necessary and sufficient for its realization.[18]

Without getting into the merits and demerits of negative, positive, and republican liberty, we would like to briefly attend to the three forms of liberal, communitarian, and republican constitutionalism that have been perceived as emerging from these three accounts respectively. Crudely put, liberal constitutionalism cast in its most familiar Lockean rendition seeks protection for the so-called natural rights of individuals, including the right to private property, by limiting the intervention of external agencies in general and the state in particular. Parallel to the variety in theories of positive liberty, communitarian constitutionalism also seems to cover a wide range of institutional and societal possibilities, which, even if sharing a family resemblance, need not necessarily be compatible with one another. If we arbitrarily pick up on the Rousseauvian account as an influential statement in this thought tradition, it would be immediately clear that self-mastery can be attained only under arrangements where the General Will can be said to reign supreme rather than those where individualistic rights trump collective constitutional aspirations. Republican constitutionalism, as has been discerned in the Italian-Atlantic imagination of Cicero and Machiavelli, seeks to translate non-domination in constitutional terms by harping upon mixed constitutionalism and a contestatory citizenry as core features instead of sticking to the communitarian privileging of a popular majoritarian sovereignty.

These formulations on liberty and constitutionalism are no doubt irreconcilable, yet we would like to argue that on a closer scrutiny there is one aspect which unites them all, that being an engagement with the figure of the slave as their paradigmatic case of an unfree person. The expression liberty etymologically derives from the Latin word *libertas* meaning free men who are 'in their own power' as opposed to being 'under the power of someone else'.[19] Those living under the latter condition were referred to as slaves in the context of ancient Rome for the reason that they were subject to the arbitrary will of their masters. In other words, what was being suggested was that a person who is a slave is not free. It is precisely this tradition of thinking about liberty, wholly dependent on the figure of the slave for its articulation, that has inspired Republican theorists across times, for what else besides the

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condition of slavery can better signify the disdain for dominion or domination by others which they all share. We notice that republicanism travelled to the common law world in the medieval period instigating a similar love for liberty there, on occasions even managing to pose existential challenges to the monarchical system, which had to find a counter-revolutionary ally in the Hobbesian account of negative liberty to deal with this resistance. In order to establish that people living under monarchy continued to enjoy natural and civil liberties, Hobbes preferred a freedom of action approach to liberty which could be hindered only by physical impediments of the sort experienced by a slave in chains.[20] The negative liberty tradition grew subsequently under Locke and Bentham to also include within it nonphysical sources of unfreedom such as the coercion of a person's will, but an insistence on actual interference as the only possible instance of non-liberty meant that it nevertheless remained comfortable with a non-interfering benevolent master.[21] Proponents of positive liberty sought to present an idealized state of self-mastery as the only comprehensive negation of slavery in all forms. Thus, it can be seen that the figure of the slave plays a pivotal role as an aversive model in all the three narratives sketched before, even if there is disagreement with respect to its precise definition. In the language of comparative studies, it can be described as a pre-comparative *tertium,* which is commonly assumed yet only implicitly acknowledged in the comparative enterprise.[22] To be sure, there have been other subjectivities like serfs and vassals under feudalism, labourers under capitalism, women and children under patriarchy, and indigenous and colonized populations in modern states, which have featured prominently in the liberty discourse, but the figurative hold of slavery in the Western tradition of political thought has been such that their condition has generally been analogized with that of the slave.

## III Part Two

That the idea of liberty travelled from Europe to other parts of the world in the post-Enlightenment period is hardly disputable, even if there may have arisen different practices around its reception. More intriguing is how the figure of the slave has also managed to travel along with it to become an influential component in the imagination of those who spoke or wrote about freedom. This is not to ignore non-European histories of slavery and cultures of resistance surrounding them, but to simply point to the way in which the Western conceptualization of the slave has ended up serving as a dominant stimulant in liberty discourses elsewhere. Two examples which immediately come to mind may be cited: Franz Fanon's critical use of Hegel's master–slave

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dialectic while thinking about the emancipation of Blacks;[23] popular use of the Persian expression *azadi* for freedom in India during the colonial movement, and even more recently, as contrasted with the unacceptable subjugated position of the people described in terms of *ghulami* or slavery. The same was true for Phule as we noticed in the introduction to this essay. In this part, our contention would be that something interesting happens to the figure of the slave in Ambedkar's constitutional thought on liberty, so much so that it makes coherent sense only if we replace the condition of slavery with untouchability as his paradigm case of unfreedom.

We are not suggesting that Ambedkar consistently distinguished between the slave and the untouchable all throughout his intellectual career. Two other possibilities of conceptually interlinking untouchability with slavery also featured in his work. The first is where he treated untouchability merely as a synonym for slavery. Consider this. In his Evidence before the Southborough Committee, Ambedkar submitted that '[i]f one agrees with the definition of slave as given by Plato, who defines him as one who accepts from another the purposes which control his conduct, the untouchables are really slaves'.[24] Second is where everybody under the caste system is considered a slave to it. Ambedkar wrote:

> The Caste system has two aspects. In one of its aspects, it divides men into separate communities. In its second aspect, it places these communities in a graded order one above the other in social status … this gradation, this scaling of castes, makes it impossible to organize a common front against the Caste System. If a caste claims the right to inter-dine and inter-marry with another caste placed above it, it is frozen, instantly it is told by mischief-mongers, and there are many Brahmins amongst such mischief-mongers, that it will have to concede inter-dining and inter-marriage with castes below it! All are slaves of the Caste System. But all the slaves are not equal in status.[25]

If Ambedkar had really settled for such an equation of untouchability with slavery, we might not have come across the several paradoxes in his constitutional thought, which cannot be explained by a singular preference for either negative, positive, or republican liberty, along with its concomitant forms of constitutionalism discussed in part one. Let us enlist at least four of them.

First, Upendra Baxi reads Ambedkar as suggesting that the caste system is a 'dominance without hegemony' supported by the lawless laws of the Hindus.[26] In Ranajit Guha's original use of the expression which Baxi simply borrowed, dominance referred to a state of affairs where coercion outweighed persuasion that is one characterized by the absence of negative liberties.[27] This reading is corroborated by Ambedkar's endorsement of freedom of occupation,

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inter-caste marriages, and cessation of other caste-based coercive practices. But at the same time, instead of merely stopping at ameliorative measures to address these restrictions or aligning himself with progressive Hindu reformers of his age who spoke about elimination of untouchability by keeping *varnashram dharma* intact, he emphatically spoke in favour of annihilation of caste and social endosmosis.[28]

Second, Ambedkar's view of nationalism grounded in the construction of a social homogeneity led him to argue in favour of India's partition and propose a strong centrist imperium for the independent union.[29] But this did not prevent him from standing up for seemingly divisive constitutional mechanisms such as separate electorates and reservations, as also fervently practicing a politics of Dalit minoritarianism.

Third, in the Constituent Assembly, Ambedkar came across as denouncing 'bloody methods of revolution' as well as Gandhian style 'civil disobedience, non-violence and *satyagraha*' as a 'grammar of anarchy' and exhorted society to 'hold fast to constitutional methods of achieving...social and economic objectives'.[30] But those like Pratap Bhanu Mehta, who want to reduce him to an advocate of a liberal constitutional morality,[31] would be surprised to come across gestures of defiance such as going to the floor of Parliament and suggesting that the Constitution must be burnt since it did not suit anybody and that he was merely a hack who wrote it much against his will.[32] This is to merely add to the more well-known act of public dissensus, that being his conversion to Buddhism in a mass ceremony along with five hundred thousand followers two months before his death.[33]

Fourth, combining Marx and Buddha, Ambedkar acknowledged that private property was a source of sorrow[34] and called for its abolition through nationalization of basic industries including agriculture.[35] Yet we find in his practical engagements with the property question, instances such as these. In the Bombay Legislative Assembly, he vehemently argued in favour of regularizing *watan* lands owned by *Mahar*s to bring them under the regime of private property.[36] Secondly, in *Kameshwar Singh v State of Bihar*,[37] he argued against zamindari abolition without payment of just compensation to erstwhile landowners.

Fifth, Ambedkar is considered as one of the first to have perceptibly understood the inter-linkages between the violence of patriarchy and the caste system.[38] But at the same time, we also find in him as a legislator during the Hindu Code Bill debate, a reluctance to continue with customs relating to property inheritance favourable to women.[39]

These paradoxes suggest that Ambedkar's position on liberty does not fit any of its rival accounts in totality. Let us deal with each conception of liberty

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individually and illustrate how it falls short of helping us understand his constitutional thought coherently.

Taking negative liberty first, Ambedkar's arch enemy was not the state but the extant Hindu society, and so he could not have found much utility in a tradition of liberty which espoused that the state ought to keep away from intervening in an autonomously operating social sphere. One may nevertheless read him as proposing that the injunction of non-interference in the Indian context applied to society rather than the state, insofar as it prohibited things such as freedom of occupation and inter-caste marriages. But such a position is ruled out since he did not confine his targeting only to a gamut of coercive practices but rather the entirety of the caste order itself. What is more, the problem for him was not that the caste system was a dominance without hegemony; it was in fact hegemony supported by the consent of *dvija*s (that is, the twice born or the first four castes) situated at different rungs in a graded system of inequality. If at all, the caste system can be said to be dominance in Guha's sense only as regards the untouchables who were explicitly or implicitly coerced rather than persuaded to fall in line with its prescriptions. Even then, the negative liberty tradition could not have excited Ambedkar much, since he considered the caste system to be inextricably linked with the problem of untouchability, which meant that mere removal of coercive practices against the untouchables would not cure the larger problem with the caste system. In the same way as Republicans find it impossible to conceive of a free slave, Ambedkar found it unfathomable to think of a caste system with no untouchability. For this reason, we agree with Chris Bayly that Ambedkar was counter-liberal, in so far as liberalism is aligned with the negative liberty tradition.[40]

There is much in Ambedkar's thinking on nationalism, state socialism, and Buddhism which gives an impression of simply being influenced by various strands in the positive liberty tradition. But such an easy association must be avoided, for his thinking posed a fundamental objection to this line of thought. Ambedkar's interest in Buddhism shows that his conceptions of individual and collective selfhood could not have been grounded in an ontology of substances—that is, it could not have possessed a determinate and concrete essence worth preserving.[41] Furthermore, unlike those who privileged self-mastery as opposed to being a slave, Ambedkar could not have normativized Brahminism in opposition to untouchability.[42] As a result, in his constitutional project of citizenship, the social value thus far associated with the elite was not presented as an aspiration generalizable to the masses. Coupled with this, as is clear from a careful look at our paradoxes, he was as anxious about this tradition's anti-pluralist and authoritarian implications as

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had been proponents of negative liberty. No doubt Ambedkar was antagonistically predisposed to communism and Gandhism, since he saw them as ideologies challenging the very legitimacy of the nation-state project which he valued; but this did not in any way prevent him from deconstructing majoritarian communal rule masquerading as nationalism.[43] This explains his support for and participation in different forms of constitutional politics which favoured political minorities and his radical revision of orthodox Buddhism as a religion for the minor.[44] Similarly, his advocacy for abolition of private property did not lead him to ignore the dictatorial potential which such projects had been capable of unleashing in recent history. He, therefore, demanded a non-violent abolition without any bloodshed, which in constitutional terms got translated into a rather liberal sounding formula of 'no acquisition without public purpose and just compensation'.[45] To add to this, he did not entirely share the Marxian hostility for private property, since the more basic fight for the stigmatized untouchables was to first make space for themselves in capitalist modernity even if this be through the mediating language of universal bourgeois rights.[46]

Ambedkar has often been situated in the republican constitutionalist tradition and not without justification. We find in his work for the Constituent Assembly a deep concern for institutionalizing political power in such a way that it is not monopolized by any particular party or organ of government.[47] Perhaps his discomfort with anti-pluralist and authoritarian tendencies in communitarian constitutionalism could effectively be addressed by the contestatory role for the citizenry envisaged under republican constitutionalism. But such an assessment holds provided we resort to its critical agonistic versions which look beyond formal categories such as individual citizenship and unitary body politic, to appreciate the wide disparities separating socio-economic elites from subalterns in all walks of life, and being open enough to make them relevant for radical politics of recognition and redistribution.[48] Furthermore, Ambedkar's selection of Buddhism as a civic religion for his community of Dalits would seem dangerous from a secular republican perspective based on the public private distinction. However, from his point of view, the caste system was in its core a religious problem requiring a religious solution, and could not have been dealt with by legal means alone.[49] In fact, instead of merely seeking to connect his conception of constitutional morality to the literature on procedural and direct democracy, it might also be productive to draw affinities with his formulation of Buddha's *dhamma* and idealization of the sangha as a model for the political community of the nation to emulate. Never the less, in spite of these qualifications, Ambedkar's constitutional corpus comes across as broadly resonant with the republican liberty tradition,

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at least much more so than it is with either of the previous two accounts. But if non-domination was indeed his central driving motivation, Ambedkar would have left untinkered woman friendly customs on property inheritance in his Hindu Code Bill. For him, given their intrinsic interlinkages in the Indian context, the only workable solution to the violence of patriarchy was the elimination of caste root and branch. In our understanding, what separates Ambedkar from republican liberty decisively is that he could not have approached an institution like caste, with its hierarchy and graded inequality, through a binary prism of domination and non-domination. Untouchables did not have to deal merely with one identifiable master; it was a larger network comprising caste Hindus, even Muslims and British, which contributed to their systemic subordination.[50]

Ambedkar's constitutional thought thus cannot be confined to any of the three rival conceptions of liberty. But is it not possible to read him as a pragmatist who drew upon whatever suited his purpose from these accounts? If this were the case, he would have managed to reconcile what we believe, following the likes of Berlin[51] and Skinner, have been historically and conceptually irreconcilable. But our clinching contention in this regard is that more than the competing stipulations contained in the negative, positive and republican liberty traditions, Ambedkar's major discomfort was actually with the figure of the slave in which all of them were grounded, and his critical intervention was to have managed to displace it by the figure of the untouchable while thinking about liberty. It is not that he believed India to have lacked a culture of slavery; rather, at several places he asserted that it was an important legal institution among the *savarna*s which got corrupted by graded inequalities of the caste system. In fact, he opined that if this were the only problem confronting the Hindus, 'it would have had at least one beneficial effect. It would have been a levelling force. The foundation of caste would have been destroyed.'[52]

Although not entirely consistent all throughout, we have been able to find the following points which makes it amply clear how he distinguished the case of the untouchable from that of the slave. First, unlike untouchability, slavery was not obligatory. This implied that slavery was simply permissible and it was never mandatory for a master to hold another as his slave. However, as Ambedkar poignantly observed, 'an Untouchable has no option. Once he is born an Untouchable, he is subject to all the disabilities of an Untouchable.'[53] The possibility of emancipation is, therefore, never present in the case of an untouchable. Second, whereas slavery was a de-jure and therefore a direct practice of discrimination, untouchability was merely a de-facto and therefore, an indirect one. Thus, Ambedkar suggested that although a slave was

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aware of his/her position of unfreedom in society, an untouchable was always deliberately kept unconscious of it.[54] He believed that it is this deception that added to the robustness of the caste system. Third, in spite of both being illiberal social orders, slavery was better than untouchability on account of the fact that a master, either for his own benefit or out of benevolence, in the former system was likely to take care of his slaves' material and intellectual development.[55] Fourth, citing Hindu religion as the source of untouchability, Ambedkar noted that 'Legally the slave was not a freeman. Yet, socially he had all the freedom necessary for the growth of his personality. Legally the Untouchable is a freeman. Yet, socially he has no freedom for the growth of his personality.'[56] Fifth and most importantly, in Ambedkar's words,

> [T]he serf and the slave were permitted to have physical contact, from which the Depressed Classes are debarred. What is worse that this enforced servility and bar to human intercourse, due to their untouchability, involves, not merely the possibility of discrimination in public life, but actually works out as a positive denial of all equality of opportunity and the denial of those most elementary of civic rights on which all human existence depends.[57]

These differences between the figures of the slave and untouchable read with our previous discussion clearly shows that none of the three accounts of negative, positive and republican liberty could have by themselves served Ambedkar's fashioning of a legal and political project for Dalit emancipation. Here, one may argue like Ananya Vajpeyi that more than liberty, it was the concept of social equality which framed his response to the question of untouchability.[58] That Ambedkar's thinking on liberty was integrated with his love for equality and fraternity is evident,[59] but this does not suffice to establish a lexical priority for the latter two over the former. Further we believe that it is more generative to study the liberty concept by locating it within a 'constellation of satellite concepts' rather than confining it to precise definitional demarcations. Having made these caveats, we would now venture to assert that there is something distinct that liberty could bring to the table for Ambedkar when grounded in the figure of the untouchable. It enabled clear thinking about liberation from oppression—a social concern which preoccupied him the most, without being constrained by limitations of non-interference, self-mastery, and non-domination. Critically for Ambedkar, unlike categories of interference and domination, untouchability could not be stripped down to a legal definition. In his words, 'Untouchability is a social concept which has become embodied in a custom and as custom varies so does untouchability.'[60] As a result we submit that it makes a lot of sense to use oppression which is a non-jural expression to describe the experience

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of untouchability in all its variegated manifestations. In order to talk about liberation from the oppression of untouchability, we would be well served in looking at Ambedkar's re-interpretation of the Indic discourse on *Nibbana,* the hegemonic versions of which, particularly during the anti-colonial movement, situated it within a transcendental framework of individual renunciation. Traditionally, this conception of liberty was conceived as other-worldly, but as modernity took roots in India, it was imaginatively refashioned as a this-worldly phenomenon by Hindu social reformers culminating in the figure of Mohandas Gandhi. This-worldly liberty in a transcendental framework of the individual renouncing society meant that a person could continue to engage in this world and yet be not of it.[61] Ambedkar was definitely this-worldly in orientation but had very little tolerance for the hegemonic transcendental framework of individual renunciation, which was in his understanding not only a Brahmanical vice but also something for which orthodox Buddhists could be held guilty.[62] At base, what he was interested in was not the liberation of individuals which would have naturally kept the oppressive social structure of caste intact. In order to deal with untouchability, nothing apart from a collective liberationary mobilization of Dalits would have served his purpose. It is this conception of liberty as non-oppression grounded in the figure of the untouchable that Ambedkar sought to generalize with varying degrees of success in his career as a constitutionalist.

## IV Part Three

Our engagement with Ambedkar on liberty for the purpose of comparison should make it clear that we are *not* interested here in critiquing disciplinary conventions of comparative constitutional studies from the point of view of post-colonial difference which seems to have colonized most global South perspectives in academia today. Ambedkar, as is well known, was for the longest time, not taken seriously enough in India by its nationalists for his offensively radical anti-Hindu position, its Marxists for his liberalism and obsession with caste, and its Subaltern scholars for his arch-modernism and uncritical statism. There has been a recent surge of attention in his corpus largely due to the democratic successes of Dalit politics. But even then, he has been refashioned in consonance with the preferences of established ideological camps, either as a de-radicalized quasi-Hindu nationalist, a Marxian theorist of class, or someone whose politics could simply be situated on the side of subaltern heterogeneity finally deemed reconcilable enough with nationalist homogeneity. This is not to say that ideology can be eliminated from discourse, but simply to point to the fact that concerns of autonomy

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from the West never racked his imagination in the same way as they might have done to many of his illustrious contemporaries. So our questioning of the way in which concepts such as liberty or the figure of the slave come to be framed in comparative constitutional thought is by no means aligned to a celebration of particularity otherwise suffering epistemic neglect at the hands of universal metanarratives. We are broadly familiar with the terms of the Watson-Legrand debate on universality and particularity in comparative law but do not find them illuminating after a point.

We believe that universality and particularity cannot be pitted in opposition with one another and are therefore interested in a third approach in inter-disciplinary comparative studies which claims to reckon with both of them seriously as complementary analytical categories. But our difficulty with proponents of this approach in comparative law such as Günter Frankenberg and Ran Hirschl is their tendency to treat universality and particularity almost as fixed pre-givens, thereby presenting an untrue lop-sided picture of the way in which constitutional transfers really pan out.[63] Take Hirschl for instance, who while criticizing proponents of universalism and particularism for overstating their respective cases, gives examples of specific constitutional areas such as basic rights where particularistic concerns of context were less powerful as opposed to other areas like polity-specific aspirational goals and organic features of respective constitutions where idiosyncrasies and contingencies became more relevant.[64] Similarly Frankenberg, although sympathetic to processes of global decontextualization and subsequent recontextualization in local settings, ultimately seems to fall prey to the 'one way traffic' thesis.[65] His global warehouse of constitutional ideas acts as a universal mediator where particular concepts are reified, formalized and idealized before they are ready for transfer.[66] Even though he may admit that this is merely an imaginative construct, the determinate way in which it comes to be defined, effectively ends up privileging only those constitutional ideas which germinate in the global North. No wonder that he brackets off Article 17 of the Indian Constitution as an oddity rooted in at most a South Asia specific history of untouchability, thereby having no potential for decontextualization and recontextualization.[67]

The likes of Hirschl and Frankenberg are led astray by their inability to appreciate that universality and particularity do not have static stipulative definitions which would enable us to treat them as strictly segregable categories. As can be seen from our discussion of the concept of liberty and its grounding in figures of the slave and the untouchable, it is not so easy to identify what counts as universal and particular in a comparative enterprise. Not only can traces of one be found in the other, but at times the two are so

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radically dispossessed of their claimed characteristics that the entire distinction between them gets destabilized. The figure of the slave which universally frames the European discourse on liberty becomes in Ambedkar only a particularity which although shared by India did not help him formulate a conception of liberty relevant for his emancipatory project. Taking cue from an Indic metaphor, we liken European liberty frameworks which claim global hegemony in comparative discourses to the 'oilman's oxen'. In the same way as the oilman's oxen are tied to a pole and made to move in circles around it, we believe that European concepts of liberty have for long been tied to the silent pre-comparative tertium of the slave. It is because of such a historically rigid attachment that negative, positive and republican frameworks of liberty failed to transcend their limitations of origin. This is precisely what Ambedkar was able to show us. However, it is not our intention to classify the slave as empirically particular for all constitutional context since it has continued to remain crucial in shaping liberty discourses across traditions beyond Europe, just as the historical component in the figure of the slave has been recalcitrant towards framing European liberty concepts as universal. Reading Ambedkar as a comparativist, we inferred that the figure of the slave was eventually displaced by that of the untouchable, on the basis of which he was able to formulate liberty as non-oppression. The empirical untouchable may indeed be a peculiarity produced by the Hindu caste system, but this does not condemn its figuration and the resultant conceptual possibility opened up to a perennial life of particularity. At the same time, we do not believe that there is any point in thinking of the untouchable as a new universal that can somehow replace the slave in liberty discourse, as it might come to be perceived in another context as characterized by the same sort of limitations as was the case with the latter for Ambedkar. All we are saying here is that there is nothing intrinsic to untouchability and liberty as non-oppression which may hinder their cross constitutional generalization, provided they are permitted as tenuous a relationship to specific histories of origin as so often happens to be the case with concepts travelling from the global North to the global South.

Thus, our conclusion is that the relationship between universality and particularity is messier than what most comparativists would have us believe. It would be generative to treat both as constituting a dyad,[68] with each element capable of bearing different constructions on different occasions depending upon the political orientation of the comparativist. Ambedkar's investment in activist comparison led him to a method which has helpfully been termed as contemporanization, that is the bringing together of materials from a diversity of time-spaces into encounter with one another for the purpose of transforming the contemporary.[69] He could by no stretch of imagination

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be called a disciplinary postcolonial critic, but instead a theoretician and practitioner interested in building new concepts based on different legal and historical sources across traditions. For him, like the historical particularity of slavery, untouchability was a particular Dalit experience, emancipation from which necessitated the mobilization of a universal liberty concept alongside an equally universal Buddhist liberation theology, but only after both were sufficiently modified to speak to his concerns—the former by being decoupled from the figure of the slave, and the latter by being dissociated from its culture of transcendental individual renunciation. These corrective interventions we have shown enabled him to arrive at the concept of liberty as non-oppression, which if nothing else, has at least been able to galvanize Dalits as a subjectivity in resistance movements which have, from time to time challenged the might of hegemonic socio-political consensus in various spheres of life.

There is no reason why Ambedkar's constitutional thought on liberty cannot be more widely contemporanized across the globe. Illustratively, his perceptive appreciation of the caste system as a social rather than ethnological phenomenon coheres very well with the contemporary identification of disciplinary interlinkages between biology and sociology. It is common in critical studies today to probe the way in which various markers of the human body have come to be constructed, with race, gender and even sex now being viewed in sociological rather than strictly biological terms.[70] The graded inequalities and cultures of ghettoization within which Ambedkar's figure of the untouchable was situated are also endemic to racism in different parts of the world. Even if slavery as a legal institution may no longer be officially in vogue, its lingering effects and pernicious indirect manifestations at various junctures should have brought the figures of the former slave and untouchable in convivial conversation with one another as everyday survivors of racism and caste system respectively. There is much in India's constitutional policy on reservations substantially drafted by Ambedkar that can and has contributed to discussions pertaining to affirmative action programmes elsewhere. Perhaps the reason for its comparative robustness is testimony to his insistence on politicizing the social problem of caste, which is not how the question of race is constitutionally perceived say in the United States. This may possibly explain why the relatively benign discourse on affirmative action there has not been able to progress beyond debates over 'colour blindness' and diversity. Further, Ambedkarite discussions on touchability and untouchability also resonate with feminist politics encouraging women entry in temples, mosques, and shrines, at least in South Asia if not elsewhere. His understanding of caste as rooted in religion and therefore requiring a solution in religion can be connected with Muslim

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feminists who read the problem of patriarchy in similar terms and proceed to enunciate radically creative non-patriarchal interpretations of Islam, sometimes even daring to blame the Qur'an itself for its sexist readings.[71] Finally, since the figure of the untouchable has not been set up here as a new universal for all liberty based movements, we do not mind the possibility of its displacement by another figure if need arises. The same can be said for Ambedkar's conception of liberty as non-oppression. Unlike rival accounts of European liberty, we are not making the ambitious normative claim that all assertions of liberty ought to have something to do with oppression in order to properly qualify as liberty claims. There may be non-oppressive contexts for which negative, positive, republican or even another freshly developed conception of liberty may be more relevant. What needs also to be admitted is that there may emerge situations for which liberty as non-oppression might need to be thought about without invoking the figure of the untouchable. In Ambedkar's time, Dalit political alliances with other groups such as Muslims, Sudras and Adivasis could not fructify, and he was left with no option but to fashion a minoritarian politics for his community. Today, when Dalits choose to or are compelled by circumstances to go it alone, the pursuit of liberty as non-oppression grounded in the figure of the untouchable continues to inspire, but when the coming together on a common platform with other oppressed communities becomes possible, we are not entirely clear about its utility as a basis for liberty claims, for such a majoritarian politics may be united not by a commonly shared experience of untouchability, but rather by a common oppressor as adversary.[72] Liberty as non-oppression should thus remain open ended enough so that it can be drawn upon for a broad range of libratory causes even where the figure of the untouchable is not seen as integral to discourse formation. This may be done perhaps by conceiving the oppressed person as an empty signifier which bears no definite content, and is therefore free to represent different subjectivities in different contexts, without needing to analogize itself to the untouchable.

## Notes and References

* We would like to thank Professor Ishwara Bhat for providing us a working space at WB NUJS. Our deepest gratitude to Professor Mahendra Pal Singh, without whose guidance and inspirational motivation this paper could not have been written.

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2. Fule, *Slavery*.
3. Dalits referred to the group of untouchables formally outside the fourfold caste system, also known as Atisudras and Panchamas. However, no distinction was

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commonly made between the fourth caste of Sudras and Atisudras when Phule wrote *Gulamgiri*.

4. 'Constituent Assembly of India, Vol. VII', http://parliamentofindia.nic.in/ls/debates/vol7p15.htm.
5. See Kalpana Kannabiran. 2012. Tools of Justice, pp. 150–1. New Delhi: Routledge.
6. B.R. Ambedkar, 'Castes in India: Their Mechanism, Genesis and Development', http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/txt_ambedkar_castes.html.
7. See Nivedita Menon. 2011. 'Caste on the International Stage', *Economic and Political Weekly*, 46(3): 15.
8. Menon, 'Caste on the International Stage'.
9. Upendra Baxi. 2013. '"Ordering" Constitutional Transfers: A View from India', in Günter Frankenberg (ed.), *Order from Transfer: Comparative Constitutional Design and Legal Culture*, pp. 189–209. London: Edward Elgar Publishing.
10. Henry Hardy (ed.). 2002. *Isaiah Berlin Liberty: Incorporating Four Essays on Liberty*. Oxford: Oxford University Press.
11. In specific terms, to use his words, it was the answer to be obtained by enquiring 'what is the *area* in which a person or a group is or should *be left* to do or be what he is *able* to *without interference* by other persons?' He asserted: 'by being free, I mean not being interfered by others' and that 'the area of interference should be as small as possible'; Hardy, *Isaiah Berlin Liberty*, p. 169.
12. In order to understand what positive liberty was all about, Berlin suggested that the following question be posed: 'What or who is the *source of control* or *interference* that can determine the person to do or be this or that?' Hardy, *Isaiah Berlin Liberty*, p. 169.
13. We have in mind thinkers such as Plato, Mill, Marx, and Freud.
14. Hardy, *Isaiah Berlin Liberty*.
15. See Charles Taylor. 1989. 'Hegel's Ambiguous Legacy for Modern Liberalism', *Cardozo Law Review*, 10: 857–70; and Joseph Raz. 1986. *The Morality of Freedom*, pp. 1–16. Oxford: Clarendon Press.
16. Quentin Skinner. 2008. *Hobbes and Republican Liberty*. Cambridge: Cambridge University Press; and Philip Pettit. 2002. *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press. See also Quentin Skinner. 2002. 'A Third Concept of Liberty', *Proceedings of the British Academy*, 117: 237–68.
17. Skinner, *Hobbes and Republican Liberty*; and Pettit, *Republicanism*.
18. Skinner, *Hobbes and Republican Liberty*; and Pettit, *Republicanism*.
19. Skinner, *Hobbes and Republican Liberty*, p. x.
20. Thomas Hobbes, *Leviathan*, pp. 124–5, http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf.
21. Hardy, *Isaiah Berlin Liberty*.
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30. 'Constituent Assembly of India, Vol. VII'.
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32. Dhananjay Keer. 1962. *Dr. Ambedkar: Life and Mission*, p. 447. Bombay: Popular Prakashan.
33. See generally, Sangharakshita, 1986. *Ambedkar and Buddhism*, esp. ch. 7. Cambridge: Windhorse Publication.
34. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 3, pp. 441–62.
35. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 1, pp. 381–452.
36. For discussion on Ambedkar's engagement with watan lands, see Anupama Rao. 2009. *The Caste Question: Dalits and the Politics in Modern India*, pp. 63–117. London: University of California Press.
37. 1962 AIR 1166 (22 February 1962).
38. Sharmila Rege. 2013. *Against the Madness of Manu*, pp. 14–56. Delhi: Navayana Publication; and Eleanor Newbigin. 2013. *The Hindu Family and the Emergence of Modern India*, pp. 170–2. Cambridge: Cambridge University Press.
39. Newbigin, *The Hindu Family*, p. 177.
40. Christopher Bayly. 2011. *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire*, p. 277. Cambridge: Cambridge University Press.
41. The phrase 'ontology of substances' is borrowed from Hans Lindahl who used it in the context of Carl Schmitt's constitutional theory. See Hans Lindahl. 2008. 'Constituent Power and Reflexive Identity', in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism*. Oxford: Oxford University Press.
42. This stance was utterly different from that of his contemporaries like Rabindranath Tagore and Mohandas Gandhi who normativized Brahmin and Sudra values respectively; see Ashis Nandy. 2010. *Bonfire of Creeds*. Oxford: Oxford University Press.
43. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 9.

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44. See Ajay Skaria. 2015. 'Ambedkar, Marx and the Buddhist Question', *South Asia: Journal of South Asian Studies*, 38(3): 450–65.
45. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 3, pp. 441–62.
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47. In his last speech before the Constituent Assembly of India, Ambedkar stated:

> [I]n India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

See 'Constituent Assembly of India, Vol. VII'.

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49. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 5, p. 93.
50. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 2, pp. 504–5 and vol. 12, pp.75–154.
51. Hardy, *Isaiah Berlin Liberty*, p. 42; Skinner, 'A Third Concept of Liberty', p. 241.
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54. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 5, p. 15.
55. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 5, p. 16.
56. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 5, pp. 91, 93.
57. Moon, *Dr. Babasaheb Ambedkar Writings and Speeches*, vol. 2, pp. 503.
58. Ananya Vajpeyi. 2012. *Righteous Republic: The Political Foundations of Modern India*, p. 212. Harvard: Harvard University Press. It is to Berlin that an emphasis on maintaining analytical clarity while dealing with the concept of liberty can be traced in Hardy, *Isaiah Berlin Liberty*, p. 72.
59. 'Constituent Assembly of India, Vol. VII'.
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63. Refer to Günter Frankenberg. 2010. 'Constitutional Transfer: The IKEA Theory Revisited', *International Journal of Constitutional Law*, 8: 563; and Ran Hirschl. 2014. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press.
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65. Frankenberg, 'Constitutional Transfer'.
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