

ORIGINAL ARTICLE

The Trauma of Constitutions: Criminalising the Past in Italy and India

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Abstract

This article investigates the role of constitutional texts in memorialising historical guilts and traumas by delving into an unconventional and hitherto unexplored comparison: the Italian Constitution's final Provision XII against the reorganisation of the fascist party, and the Indian Constitution's Article 17 against caste-based untouchability. Both Constitutions, written in the same years, encoded their respective hurtful and traumatic pasts into their fundamental laws through these provisions, which explicitly mandated criminal legislations. After reconstructing the two very different contexts from which these constitutional provisions emerged, the article examines the very similar ways in which the two Constituent Assemblies incorporated historically motivated, criminalising clauses in their respective texts. It subsequently analyses the difficulties that legislators in both contexts encountered as they had to pass penal legislations emanating from the Constitutions, as well as the restrictive and contradictory interpretations of these legislations provided by the judiciary. By means of an original incursion into comparative constitutional history, this article contributes to a wider reflection around the interplay between historical traumas, constitutions, and mandates within them as a form of criminalisation of painful pasts.

Negotiating the Past

Constitutions are not only formal-technical documents that apportion rights, organise governmental functions, and distribute powers, but are also deeply symbolic texts that represent the historical and cultural contours of a nation, and exemplify its ideological manifestations.¹ Constitutions, as Nomi Claire Lazar has

¹ Grazyna Skapska, *From "Civil Society" to "Europe": A Sociological Study on Constitutionalism After Communism* (Leiden: Brill, 2011), 5.

argued, set up a temporal rhetoric for the national community, presenting the conditions of its past, present, and future.² As documents that provide a legal basis to navigate a people's past, they also negotiate its future in light of, more or less, violent legacies.³ Constitutions reflect the "birth-pangs of a nation," insofar as nations often emerge from various historic struggles and injustices, and in asserting a collective self-identity, they are forms of autobiographical emphases and elisions, "reflecting on and describing (*graphie*) its [a community's] own self (*autos*), that is, its past and future life (*bios*)."⁴ In other words, constituting texts are part of the means at a nation's disposal to record aspects of days gone by and lay the vision for those to come. At times, just as autobiographies go, constitutions also become the means to retrospectively censor the past and attempt to shape the future in light of previous failures or incapacities. For this purpose, they feature not only declaratory but also mandative aspects in the forms of prohibition and criminalisation.

Written constitutions are also considered to be a matter of status, "an indispensable symbol," a "sign" of "independence and political maturity."⁵ Arnold Zurcher has highlighted the rapid proliferation of constitutional documents after the Second World War, a period of post-war reassessments and readjustments, as well as decolonisation movements, on the global scale: "The world witnessed an outpouring of such documents that is without parallel. Not even the periods of the most violent revolutionary upheaval, like those of 1789, 1850, or 1919, witnessed a greater number of efforts to reduce the basic concepts of national polity to written form."⁶ In 1946, in the immediate aftermath of the War, five countries chose the modality of a constituent assembly to remake their national orders while concurrently expurgating the worst facets of the previous era: China, Czechoslovakia, Venezuela, Italy, and India. In the wake of unprecedented cataclysm, when the world was reeling and emerging from the effects of a devastating conflict, codifying the norms of government and collective aspirations in a written form became the ideal modality for nation-making.

Among these jurisdictions, the Constitutions of Italy and India are paradigmatic instances of negotiating the past, by also criminalising it, in the hope of a reconciled and pacified future. Although emerging from two very different socio-political contexts, they employed the same strategy to deal with respectively pressing issues at the time of their national origins. The Italian and the Indian Constitutions thereby exemplify what Elazar Barkan and Ariella Lang have called "memory laws," namely, laws that may be employed as "a mechanism to confront the past ... to offer historical clarification and even

² Nomi Claire Lazar, "Time Framing in the Rhetoric of Constitutional Preambles," *Law & Literature* 33, no. 1 (2021): 1–21.

³ Héctor López Bofill, *Law, Violence and Constituent Power: The Law, Politics and History of Constitution Making* (London: Routledge, 2021).

⁴ Jacques de Ville, "The Autobiographical Constitution," *Law and Humanities* 18, no. 1 (2024): 75.

⁵ Arnold J. Zurcher, "Introduction," in *Constitutions and Constitutional Trends Since World War II: An Examination of Significant Aspects of Postwar Public Law with Particular Reference to the New Constitutions of Western Europe*, ed. Arnold J. Zurcher (New York: NYU Press, 1951), 3.

⁶ *Id.*, 2.

justice to victims” or alternatively as an “attempt to repress demands for redress and whitewash mass atrocities.”⁷ Tactics of criminalisation to conciliate and structure contentious histories are often deployed in multitudinous ways for diverse ends, ranging from the emancipatory and redressive to the perverse and oppressive. Whatever be its aspiration and mode, laws manipulating and memorialising past events are ingenious rhetorical tools that provide a ready historical narrative to inform and condition contemporary behavior and future expectations.⁸ The focus of this article is precisely the ways in which constitutions distinctively act as forms of “memory laws,” in the specific context of criminalisation *through* explicit constitutional mandates for penal legislation. By providing an analysis of two exemplary case studies of how fragmented and divisive histories have been negotiated through criminalising provisions within constitutional texts, this article is an exercise in historical and comparative constitutionalism. More specifically, by comparing the ways in which the Italian Constitution has encoded the ignominy of the fascist regime and the Indian Constitution has recorded the violence of untouchability, this article will demonstrate that constitutions can effectively be used to mark a symbolic exit from a painful and traumatic history.

The members of the Italian Constituent Assembly were affiliated with political parties that had been outlawed by the regime and had been directly involved in the resistance movement; their shared traumatic experience and resulting commitment to anti-fascism represented the intellectual and political glue that held the Assembly together. On their part, some members of the Indian Constituent Assembly belonged to the class of the alleged “Untouchables,” having been born and brought up within a system of caste-based discrimination and segregation; that traumatic personal background, coupled with growing consensus on the need for radical social reform, impelled their drafting efforts as they became constitution-makers in the Assembly. Trauma, as Shoshana Felman has noted, can be interpreted as “the basic underlying reality of the law,” and it even impregnates constitutions with new meanings, drives, and foci, reorienting a collective future to prevent the repetition of a shameful past.⁹ Following Gad Yair, who has argued that “constitutions are pre-written by traumatic narratives” insofar as national formations often emerge from “long-buried historical pains,”¹⁰ this article aims at contributing to the legal-historical scholarship on constitutions by grounding the analysis in collective memory and trauma. We do so by carefully retrieving and juxtaposing the backgrounds and contexts of two

⁷ Elazar Barkan and Ariella Lang, “Mapping Memory Laws,” in *Memory Laws and Historical Justice: The Politics of Criminalizing the Past*, ed. Elazar Barkan and Ariella Lang (Cham: Palgrave Macmillan, 2022), 1.

⁸ See Frederick M. Lawrence, “Memory, Hate, and the Criminalization of Bias-Motivated Violence: Lessons from Great Britain,” in *Breaking the Cycles of Hatred: Memory, Law, and Repair*, ed. Martha Minow (Princeton: Princeton University Press, 2002).

⁹ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002), 172.

¹⁰ Gad Yair, “Cultural Trauma and Constitution: Precursors of Political Traditions and Collective Identities,” *European Journal of Cultural and Political Sociology* 11, no. 1 (2024): 44–45.

constitutional texts, the Italian final Provision XII and the Indian Article 17. By showing the uncannily similar way in which these texts have memorialised historical guilts and wounds, of fascism and untouchability, respectively, this article provides a comparative analysis of the unusual use of constitutional provisions to explicitly mandate criminal legislation. This mandative, and traumatically induced, aspect within constitutional texts is what joins Italy and India in an otherwise distant relationship.

While there are multiple instances of general prohibitive provisions within constitutions (examples include the prohibition of torture, capital punishment, and enslavement), and fewer instances of specifically historical influences,¹¹ our examination provides a ready case study for the comparatively inclined reader of two very different contexts where a comparable approach to historical guilt and trauma has emerged, indicating the larger role of constitutions in historical memory and cultural practice compared to the merely formal and rationalist interpretation afforded to it by constitutional law scholarship generally.¹² While other works have recently examined different constitutions from a historical and comparative perspective, including Chris Thornhill's cross-analysis of the Italian, German, and Japanese Constitutions and Justin Collings's juxtaposition of the US, South African, and German Constitutions,¹³ this article considers two texts that remain to be comparatively examined. Notably, these two documents were written in the same years: the Italian Constituent Assembly was first convened in late June 1946, and the Indian Assembly in December that year; the Italian Constitution was subsequently enforced in January 1948, and the Indian Constitution in January 1950. However, despite the similar timeframe, the analogy between the Italian and the Indian cases is, admittedly, far from intuitive: while, at the time of drafting, Italy was a former imperial power (which, even after becoming a republican and democratic state, was still claiming the restitution of its former African colonies),¹⁴ India was a newly born postcolonial nation, just emerging from centuries of British colonialism and the contemporaneous partition and scission from Pakistan.

¹¹ See, for example, the historical *Constitution impériale d'Haïti* of 1805, which incorporated the traumas of enslavement and imperialism (Article 2 abolished slavery, whereas Article 12 mandated that no white person be allowed to set foot on the island as master and proprietor). Examples of modern constitutions include: the German Constitution of 1949, which prohibits associations and political parties aimed at undermining the democratic and constitutional order (Articles 9 and 21) and outlaws acts aimed at preparing for a war of aggression (Article 26); the South African Constitution of 1996, which memorialises the crimes of apartheid by "recognising the injustices of our past" in the preamble, including "non-racialism" among its founding values (Article 1), and disallowing discriminations based on racial difference (Articles 9, 25, and 29); and the Rwandan Constitution of 2003, which declares genocide a crime (Article 10). Online access at <https://www.constituteproject.org/> (last accessed 1 September 2025).

¹² See William E. Conklin, *Images of a Constitution* (London: Routledge, 1989), especially part II, "The Rationalist Image of a Constitution"; Graham Gee and Grégoire Webber, "Rationalism in Public Law," *Modern Law Review* 76, no. 4 (2003): 708–34.

¹³ Chris Thornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure* (Cambridge: Cambridge University Press, 2016); Justin Collings, *Scales of Memory: Constitutional Justice and Historical Evil* (Oxford: Oxford University Press, 2021).

¹⁴ Emanuele Ertola, *Il colonialismo degli italiani: Storia di un'ideologia* (Rome: Carocci, 2023), 131–39.

From a legal perspective, while Italy is a civil law country, India (despite the prominent role of codification in the country's legal history) is part of the common law world. Moreover, while fascism was a twentieth-century, twenty-year-long calamity, untouchability represented an ancient tradition; the extent of the respective traumas, therefore, inevitably differed in the two contexts. Furthermore, the two cases strike as dramatically different as soon as one considers not only their socio-political contexts but also, and more importantly, the backgrounds of constitutional drafting and the purposes of their respective criminalising clauses. Whereas Italy underwent a regime change from authoritarianism to democracy, India aimed at transitioning from social oppression to a more egalitarian system at the time of national independence.

Nonetheless, the implications of this comparison emerge compellingly by appreciating the difference, rather than overstating the similarities, between Italy and India. Inspired by Collings, who has recently investigated constitutions as “sites of memory” by juxtaposing three constitutional traditions characterised by, or emerging from, very different “historical evils” (enslavement, apartheid, and Nazism),¹⁵ this article argues that it is precisely by virtue of the difference between the Italian and the Indian *contexts* that the similarity of the *method* adopted by their Constitutional Assemblies becomes striking. This research adopts the perspective articulated by prominent constitutional scholars, Zachary Elkins, Tom Ginsburg, and James Melton, who have argued that “a set of cases with a highly contrasting set of social and political conditions, but a similar set of outcomes,” can be specially illuminating by revealing the ways in which otherwise disparate constitutions can adopt similar mechanisms of endurance, survival, and engagement with the past.¹⁶ Once looked at from this angle, the Italian Provision XII and the Indian Article 17 show how a *methodologically identical strategy* (of criminalisation through constitutional mandates) was employed to come to terms, apprehend, and reconcile with different traumatic pasts. In other words, it is from the perspective of their constitutions that the two contexts become comparable, and it is by virtue of the socio-political distance between them that their constitutional clauses emerge as a comparative phenomenon in the form of a cross-cultural legal strategy adopted to respond to otherwise incomparable histories. Such an analysis thereby sheds new light on how the encoding of hurtful pasts into constitutional law by means of criminalising provisions was enforced across jurisdictions.

Despite the gulf—geographical, political, and social—separating the two countries and their respective processes of regime change and national independence, it is pertinent to observe how the members of both Constituent Assemblies were aware that they were debating and drafting within a transnational context characterised by epochal transformations, as well as similar preoccupations to their own. For instance, in 1949, the member of the Indian Assembly, H.V. Kamath, directly referred to the constitutive similarity

¹⁵ Collings, *Scales of Memory*, 3–4, 14–15.

¹⁶ Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2012), 179.

between Italy and India, when he noted that: “In season and out of season ... we are passing through a crisis. I am sure that the Italian Constituent Assembly, when it met two years ago soon after World War II was over, was faced with no less grave a crisis.”¹⁷ Almost fifty years later, the former prominent member of the Italian Assembly, Giuseppe Dossetti, recalled the constitutional debates of the 1940s in these terms: “Not even the most unprepared ... of the Constituent Assembly members could forget the tens of thousands deaths; the radical changes in the world map; the almost total alteration of the ways of life; the decline of European cultures; the diffusion of Marxism to different parts of the globe; the turmoil and novelties in the religious sphere; the urgent need for economic and social reconstruction within and among nations; the emergence of a new solidarity; and the general aspiration to a ban on war.”¹⁸

While mindful of the turbulent times and changing geopolitics beyond their respective national borders, the Italian and the Indian Assembly members made sure to include in their draft Constitutions two provisions that relate not to the crimes committed by an outsider on the “natives”—who have set out to emerge as a national self-collective along with the Constitution, as its twin sibling—but are aimed rather at a part of the national self as the aggressor and oppressor. The constitutional provisions criminalise a portion of the citizenry itself, expunging the ignominious event and/or tradition that pervaded much of the collective self’s past, not unlike the Freudian melancholic self that emerges by turning against—and is psychically constituted by militating towards—a part of itself.¹⁹ There is, in fact, a peculiar ambivalence that is at play in the rhetoric and working of the Italian Provision XII and the Indian Article 17: they recognise the community not as a coherent, cohesive, stable, and monolithic identity, oppressed versus oppressor, but as capable of, and simultaneously occupying, both sides and sites, bellicose and belligerent, divided and divisive, compliant and complicit. Both Constitutions are cognisant of a fractured and fractious collective, held up by a precarious unity. These constitutional passages uniquely bring to the fore the ways in which a constitution performs the Freudian functioning of anxiety, the dynamics of which reflect the methods used to retrospectively overcome an overwhelming trauma that could not be

¹⁷ *Constituent Assembly Debates*, vol. 9, 111, ¶120 (1949). Kamath, while discussing the draft emergency provisions, provides a longer comparative account of the constitutive crises that faced Italy and India.

¹⁸ See Enzo Cheli, *Nata per unire: La Costituzione italiana tra storia e politica* (Bologna: Il Mulino, 2012), 21. Translation by the authors.

¹⁹ Sigmund Freud, “Mourning and Melancholia,” in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Strachey (London: Hogarth Press, 1957), vol. 14, 237–48; Judith Butler, “Psychic Inceptions: Melancholy, Ambivalence, Rage,” in *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997), 167–200. On the relation between psychoanalytic theory, Freudian melancholy, and the law, see Peter Goodrich and David Gray Carlson (eds.), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (Ann Arbor: University of Michigan Press, 1998); Peter Goodrich, “Melancholegalism: Black Letter Theory and the Temporality of Law,” *Crisis & Critique* 3, no. 2 (2016): 166–203; Przemyslaw Tacik, “Melancholy and the Law,” *Law and Critique* 33 (2022): 23–39.

stopped earlier.²⁰ Insofar as they reflect the ambivalent nature of a twin inheritance, Provision XII and Article 17 are the liminal clauses which embed and entrench, within their founding documents, the reaction of two young democracies to the threat of being compromised from within, and thereby (attempt to) reconcile past guilts and traumas through the prospective criminalisation of actions.

This is a ripe time for such an investigation, given the recent burgeoning interest in constitutions as bearers of the scorch marks of history. By demonstrating how the prohibitive aspects of Provision XII and Article 17, along with criminal legislation anticipated in, and mandated by, these two articles, assiduously incorporate traumatic events or traditions into the two countries' fundamental laws in order to prevent a feared regression, this article demonstrates the specific ways in which constitutional criminalisation has been used to record and sanction contingent and intimate histories, attempting to obliterate a part of the collective self's identity so as to proffer a renewed hope for an emancipatory national life. We argue that it was through the idiosyncratic measure of adopting criminalising provisions within constitutional texts that members of both Constituent Assemblies hoped to ensure the non-return of either archaic or recent pasts in future social and political vicissitudes. The Italian and the Indian Constitutions, in this way, written at the same time in the post-war period, and emerging from two very different contexts, exemplify the similar ways in which national collective selves countenance the past, memorialise guilt, record traumas, prevent repetition, and offer a hope of political freedom and social justice in an otherwise fractured terrain. Constitutions are formative sites not only of state-formation, as Upendra Baxi has argued,²¹ but also of contentious struggles aimed at shaping the new nation as per particular aspirations. Seen in this light, Provision XII and Article 17 represent a watershed between an appraisal of one's history as disgraceful and the aspirational and emancipatory creation of a legal medium out of an otherwise violent state of affairs. Criminal law, explicitly mobilised by both constitutional texts, is the way in which this has been addressed in both contexts.

In the next section, we delineate the background and circumstances in which the Italian Provision XII came into existence. By paying close attention to what the Constituent Assembly envisaged, and how some of the "transitory and final provisions" were entrenched as permanent within the constitutional text, we

²⁰ Freud's notion of anxiety emerges from the reluctance to let go of a previous traumatic breach into the psyche. Anxiety, thereby, becomes the coalescence of libido to retrospectively overcome a traumatic breach; see Sigmund Freud, "Instincts and Their Vicissitudes," in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol. 14, 117–40. In a historical sense, the impulse and desire to criminalise the past can be read as the symptom-gain of an anxiety to not redo and allow for the repetition of violent pasts or their legacies to proliferate. For an argument which makes use of Freudian psychoanalysis in thinking about the origin of the Indian nation in the fratricide of the partition, see Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton: Princeton University Press, 2021).

²¹ Upendra Baxi, "Constitutionalism as a Site of State Formative Practices," *Cardozo Law Review* 21 (2000): 1183–210.

7show the precise method by which the trauma of fascism, and the guilt over it, led to the criminalisation of the reorganisation of the Fascist Party. We also show the ways in which this declarative provision was followed by specific legislation enforcing the spirit of Provision XII. In the section following that, we chart out the constituting process through which Article 17 was unanimously enshrined as a criminalising provision against caste-based untouchability. We then provide a synoptic overview of the legislation that was directly derived from the mandative aspect of Article 17, and how the judiciary has engaged with this legal framework. Taken together, we provide a juxtaposition of the specific ways in which a former imperial power and a postcolonial nation have adopted in the same years analogous strategies to counteract the ignominious aspects of their respective identities and obliterate a part of the self in favor of a more egalitarian and democratic political and social order. We assess, in the conclusion, whether such a criminalising strategy, in each of the cases, has been successful or whether these provisions remain, for all practical purposes, symbolic dead letters.

Constitutionalising Trauma I: Italy's Provision XII

Italian society—currently governed by a party which descends from the demise of the neo-fascist MSI (*Movimento Sociale Italiano*)—appears to be still characterised by what John Foot has called a “divided” public memory resulting from contrasting interpretations of the fascist past and the resistance movement.²² Attempts to reconcile that dividedness have sometimes recovered Benedetto Croce's definition of the dictatorship as an execrable, yet exceptional, “parenthesis” in the country's history; as if the fascist *ventennio* was a merely transitory interruption to, and a “momentary lapse” in, an otherwise gloriously liberal tradition.²³ Within this context, the provision in the country's fundamental law against the reorganisation of the Fascist Party is doubly remarkable. Not only does this explicitly anti-fascist commitment contrast with the silences and omissions which have historically played a role in Italy's “divided memory,” but it also openly repudiates the idea—implicit in the “parenthesis” notion—that the roots of democratic Italy should lie in the pre-fascist era rather than in an uncompromising condemnation of the regime.²⁴ It is well-known how the shared “anti-fascist paradigm”²⁵ provided the Christian democrats, the socialists, the communists, and the liberals comprising the Constituent Assembly with the common ground which they needed to write the country's new constitutional text together from mid-1946 to late 1947.²⁶ While the desire for national reconciliation after twenty years of

²² John Foot, *Italy's Divided Memory* (Basingstoke: Palgrave Macmillan, 2009), 1–3.

²³ See Collings, *Scales of Memory*, 5–8; Charles L. Leavitt, “‘An Entirely New Land?’ Italy's Post-War Culture and Its Fascist Past,” *Journal of Modern Italian Studies* 21, no. 1 (2016): 4–18.

²⁴ Massimo Luciani, “Antifascismo e nascita della Costituzione,” *Politica del diritto* 2 (1991): 183–200.

²⁵ Antonio Baldassarre, “La costruzione del paradigma antifascista e la Costituzione repubblicana,” *Problemi del Socialismo* 28, no. 7 (1986): 11–32.

²⁶ On the process of constitution-making, see Sabrina Ragona and Giacomo D'Amico, “The Evolution and *Gestalt* of the Italian Constitution,” in *The Max Planck Handbooks in European Public Law*,

authoritarianism and two years of civil war led to the passing of measures which actually frustrated the plan to de-fascify the judiciary and the public administration, as well as to extending a de facto general amnesty for ordinary and political crimes perpetrated during the Nazi-fascist occupation,²⁷ the Constitution, enacted on 1 January 1948, was intentionally conceived as the foundational document bearing testament to the collapse of the fascist state.

Several articles in the Constitution incorporate the Constituent Assembly's rejection of the previous regime, from the recognition of the inalienable rights and equality of all citizens (Articles 2 and 3) to the repudiation of war (Article 11). Nonetheless, it is only in two of the eighteen "transitory and final provisions," located at the end of the Constitution following 139 articles, that this latent anti-fascist background becomes patent. According to Provision III, members of the Constituent Assembly who had been sentenced to a five-year imprisonment by the fascist Special Tribunal for the Defence of the State—and who were, therefore, proven anti-fascists—would become part of the first republican Senate. Even more notable is Provision XII: while, according to its first clause, "the reorganisation, under whatever form, of the disestablished Fascist Party is prohibited [*è vietata*]," its second clause excluded "the leaders responsible for the fascist regime" from both the electorate and the body of eligible candidates for the following five years. Another irrevocable rupture with the previous order, in which the monarchy had been complicit with fascism, is provided by Provision XIII, which forbade the descendants of the House of Savoy from entering the national territory, deprived them of the right to vote and the eligibility to be elected, and confiscated their properties.

From a formal point of view, the eighteen transitory and final provisions represent a peculiar addition to a constitutional text, which, unlike most other contemporary constitutions, includes, for the rest, only proper articles and does not even feature a preamble. In fact, the majority of the Constituent Assembly wanted even the most general principles to be formulated in the guise of constitutional norms, and therefore restrained themselves from writing an introductory "mission statement" whose legal force could be questioned.²⁸ The function of the transitory and final provisions—which, as agreed upon by most constitutionalists, are an integral part of the Constitution despite their only seemingly marginal location—is that of setting the terms of the transition from the old to the new order, establishing norms which are sometimes temporary, at other times final, and which in all cases represent a deviation from the general and a-historical tone of the principles enunciated in the previous 139

ed. Armin von Bogdandy, Peter Huber, and Sabrina Ragone (Oxford: Oxford University Press, 2023), 273.

²⁷ Mirko Della Malva, *Diritto e memoria storica* (Milan: Giuffrè Francis Lefebvre, 2020), 194–97; see also Toni Rovatti, "Politiche giudiziarie per la punizione dei delitti fascisti in Italia: La definizione per legge di un immaginario normalizzatore," *Italia contemporanea* 254 (2009): 75–84.

²⁸ Piero Calamandrei, "Cenni introduttivi sulla Costituente e sui suoi lavori," in *Commentario sistematico alla Costituzione italiana*, ed. Piero Calamandrei and Alessandro Levi (Florence: Barbera, 1950), vol. 1, cxxxvi. On constitutional preambles, see Tom Ginsburg, Nick Foti, and Daniel Rockmore, "We the Peoples': The Global Origins of Constitutional Preambles," *The George Washington International Law Review* 46, no. 2 (2014): 305–40.

articles.²⁹ As far as Provision XII is concerned, it is now widely accepted that, whereas the second clause is explicitly transitory, the first is permanent.³⁰ Its status is no different, therefore, from that of other constitutional articles. Significantly, it was initially discussed and drafted as part of Article 49, which entrenched the citizens' freedom to associate into parties, and subsequently "slipped" among the final provisions for reasons of unspecified "editorial opportunity."³¹

As remarked by several legal scholars, Article 49, by ruling that "all citizens have a right to freely associate with each other into parties in order to contribute to determining national politics with a democratic method," ratifies the birth of an "open democracy," as opposed to the model of a "protected democracy" outlined in the German Fundamental Law of 1949. While Article 21 of the *Grundgesetz* declares that parties aimed at undermining the democratic order are unconstitutional,³² the Italian Article 49, by mandating that political parties ought to respect democratic methods, only dictates a procedural limitation to party organisation without imposing any ideological check on their principles.³³ Article 18 incorporates further limitations to the freedom of association, from which secret and militarised societies are excluded.³⁴ Hence, according to the joint letter of Articles 18 and 49, political associations animated by *ideas* which are undemocratic and even unconstitutional—as long as they comply with institutional procedures and are not characterised by secrecy or militarism—are not prohibited by the Constitution.³⁵ For this reason, monarchical parties are not unconstitutional even though their purpose is contrary to the Constitution (as per Article 139, stating that "the republican form" can never be amended). This remarkable openness can be explained by the very same history of the resistance, during which parties which had previously been outlawed by fascism took governing functions upon themselves

²⁹ Rolando Tarchi, "Premessa," in *Commentario della Costituzione: Disposizioni transitorie e finali I–XVIII. Leggi costituzionali e di revisione costituzionale (1948–1993)*, ed. Giuseppe Branca and Alessandro Pizzorusso (Bologna: Zanichelli, 1995), 1–15.

³⁰ Barbara Pezzini, "Attualità e attuazione della XII disposizione finale: La matrice antifascista della Costituzione repubblicana," in *Alle frontiere del diritto costituzionale: Scritti in onore di Valerio Onida*, ed. Marilisa D'Amico and Barbara Randazzo (Milan: Giuffrè, 2011), 1384–85.

³¹ Tarchi, "Premessa," 53; Giulio Enea Vigevani, "Origine e attualità del dibattito sulla XII disposizione finale della Costituzione: I limiti della tutela della democrazia," *MediaLaws: Rivista di diritto dei media* 1 (2019): 5.

³² Inga Markovits, "Constitution Making After National Catastrophes: Germany in 1949 and 1990," *William and Mary Law Review* 49 (2008): 1307–46; Richard H. Pildes, "Political Parties and Constitutionalism," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward Elgar, 2011), 260. On "defensive" democratic measures, see Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge: Cambridge University Press, 2015).

³³ Vigevani, "Origine e attualità," 7–8; Ragone and D'Amico, "The Evolution," 305.

³⁴ On Articles 18 and 49, see Alberto Predieri, "I partiti politici," in *Commentario sistematico alla Costituzione*, vol. 1, 197–205.

³⁵ Felice Blando, "Movimenti neofascisti e difesa della democrazia," *Costituzionalismo.it* 1 (2014); Felice Blando, "Il presente e la storia: Limiti tra diritto e politica nel divieto di ricostituzione del partito fascista," *AIC: Associazione Italiana dei Costituzionalisti* (2024).

within the National Liberation Committee after 1943 and assumed constitutional powers in 1946.³⁶ With Articles 18 and 49, the Constituent Assembly constitutionalised party competition and opposition. The only exception to the freedom of association—that is, the only circumstance in which ideological opposition is made a crime and becomes unconstitutional—is enunciated by the first clause of Provision XII against the Fascist Party. A persistent historical guilt is now entrenched as a marked exception in the Italian constitutional politics of party formations.³⁷

The constitutional Provision XII was not the first legal norm prohibiting fascist organisations in Italy. *Decree 195* was passed in April 1945 to “punish fascist activities in liberated Italy,” targeting those who pursued such activities within armed gangs and attempted to re-establish the Fascist Party “under whatever form or denomination.” Subsequently, in February 1947, Article 17 of the *Paris Peace Treaties* imposed the international obligation on Italy to prevent the reorganisation of fascist movements aimed at “depriving the people of their democratic rights.” Finally, in December 1947, the very same Constituent Assembly passed *Constitutional Law 1546*, valid for five years, which outlawed the reorganisation, “under whatever form, of the disestablished Fascist Party” (Article 1), the performance of “fascist activity” (Article 3), the “public exaltation of fascist figures and ideologies,” as well as the organisation of “demonstrations featuring a fascist character” (Article 7); monarchical parties were also outlawed, but only as long as they tried to re-establish the monarchy “by violent means” (Article 2).³⁸ Translating these provisions into a constitutional norm was by no means an easy task.

During the Constituent Assembly debates around Article 49 in November 1946, after maintaining that it was imperative to “exclude from democracy those who are its proven enemies,” Palmiro Togliatti, the Secretary of the Communist Party, also stressed the necessity to be careful in wording what would become Provision XII, lest it be later weaponised to arbitrarily outlaw other parties on grounds of their allegedly “fascist” principles.³⁹ As a consequence, the members opted for a formula which would specifically proscribe a historically determined political formation: Provision XII forbids not any generic party but rather *the disestablished Fascist Party*.⁴⁰ Nonetheless, several scholars have convincingly argued that the Assembly was not only looking backward but also forward by specifying that the reorganisation of the Fascist Party was prohibited “under whatever form,” cognisant of the plurality of modes through which fascism could resurface. That Provision, from this

³⁶ Calamandrei, “Cenni introduttivi,” xcv; Predieri, “I partiti politici,” 171, 193.

³⁷ Francesca Paruzzo, “La XII Disposizione transitoria e finale: Tra garanzia ‘antirazzista’ della legge Mancino e specificità della matrice antifascista,” *Osservatorio costituzionale* 3 (2024): 125.

³⁸ Paolo Barile and Ugo De Siervo, “Sanzioni contro il fascismo ed il neofascismo,” in *Novissimo Digesto Italiano* (Turin: UTET, 1969), vol. 16, 549–61; Alessandro Pizzorusso, “Disp. XII,” in *Commentario della Costituzione*, 197; Predieri, “I partiti politici,” 205; Pezzini, “Attualità e attuazione,” 1385–90.

³⁹ “La nascita della Costituzione: Le discussioni in Assemblea Costituente a commento degli articoli della Costituzione” (19 November 1946); online access at <https://www.nascitacostituzione.it/04finali/12/index.htm?disp12-004.htm&2> (last accessed 1 September 2025); Paruzzo, “La XII Disposizione,” 123.

⁴⁰ Vigevani, “Origine e attualità,” 9–10; Ragone and D’Amico, “The Evolution,” 306.

perspective, features a retrospective character by censuring the guilt and recording the traumas of the country's fascist past, while also projecting its own normative power into the future.⁴¹ Having the recent history of the Fascist Party in mind, the members conceived of Provision XII as a barrier, as Alessandro Pizzorusso put it, against the unforeseeable (and therefore impossible to legally define and forbid) developments of neo-fascism.⁴² Another problem related to Provision XII concerns its "harmonisation" with Article 49: is that Provision an exception to the Article sanctioning the freedom of association, thus representing a "rift" within the constitutional text?⁴³ Or is it rather a more specific reiteration of that same Article, which, by maintaining that parties must comply with the "democratic method," already implicitly outlawed the intrinsically anti-democratic Fascist Party?⁴⁴

These were some of the issues raised during the debates around the drafting of *Law 645* of 1952, commonly known as "Scelba Law," named after the Minister of the Interior.⁴⁵ By including Provision XII in the Constitution, the Constituent Assembly had bound the legislature, insofar as the first clause of the Provision necessitated supplementary, "actualising" criminal legislation.⁴⁶ *Scelba* (amended, with minor changes, by *Law 152* of 1975) forbids the organisation of associations pursuing the anti-democratic goals of the Fascist Party by means of violent methods and/or racist propaganda (Article 1); it further outlaws, as separate crimes, the public exaltation of fascist figures, principles, and events ("apology of fascism" as per Article 4) as well as "fascist performances" (by means of words, gestures, etc.) at public assemblies (Article 5).⁴⁷ Subsequently, *Law 205* of 1993 (the so-called "Mancino Law") extended the scope of *Scelba* by establishing an increase in the penalty in case of an "apology" crime involving racist ideas and methods (Article 4).

Whereas, in January 1952, Minister Scelba referred to the first clause of Provision XII, which his draft law set out to "actualise," as the "spiritual, historical, and legal foundation of the Italian Republic,"⁴⁸ judicial discourse has, over the years, limited the outreach of this law, which in turn resulted in a restrictive interpretation of Provision XII.⁴⁹ It was the Constitutional Court which, in a few rulings issued between 1957 and 1974, confirmed the constitutionality of *Scelba*

⁴¹ Tarchi, "Premessa," 57–58; Pizzorusso, "Disp. XII," 198; Paruzzo, "La XII Disposizione," 123; Barbara Pezzini, "Fascismo/antifascismo: L'alterità politica matrice della Costituzione repubblicana," *Costituzionalismo.it* 1 (2025): 117.

⁴² Pizzorusso, "Disp. XII," 198; Blando, "Movimenti neofascisti."

⁴³ Barile and De Siervo, "Sanzioni," 561.

⁴⁴ Pezzini, "Attualità e attuazione," 1387.

⁴⁵ "1 Legislatura: Scheda lavori preparatori. Atto Camera: 2549"; online access at https://legislature.camera.it/chiosco.asp?source=/altre_sezionism/8793/8874/8875/documentotesto.asp&content=/dati/leg01/lavori/schedela/trovaschedacamera.asp?pd=2549 (last accessed 1 September 2025).

⁴⁶ Ugo De Siervo, "Attuazione della Costituzione e legislazione antifascista," *Giurisprudenza costituzionale* 2 (1975): 3267–310; Tarchi, "Premessa," 50; Pezzini, "Attualità e attuazione," 1388–89.

⁴⁷ On the legal-historical context, see Federico Mazzei, *De Gasperi e lo "Stato forte": Legislazione antitotalitaria e difesa della democrazia negli anni del centrosinistra (1950–1952)* (Florence: Le Monnier, 2013).

⁴⁸ Barile and De Siervo, "Sanzioni," 562.

⁴⁹ Pizzorusso, "Disp. XII," 200.

while at the same time establishing that it could be employed to disband neo-fascist associations and prohibit neo-fascist activities only in the event of a “concrete” or “considerable danger” of organisation of such movements.⁵⁰ As a consequence, only two neo-fascist movements were disbanded,⁵¹ and the law was not successfully mobilised to prevent the integration of the MSI within the parliamentary spectrum.⁵² The emphasis on “concrete danger” (without which the apology of fascism and “fascist performances” had generally not been deemed to be crimes) has been recently mitigated by the United Penal Sections of the Supreme Court of Cassation in a ruling of January 2024, concerning a neo-fascist commemoration held in Milan in 2016. By establishing a continuity between “concrete” and “presumed” danger, the ruling has resulted in a partial revitalisation of anti-fascist legislation.⁵³

The aftermath of Provision XII was not limited to the contested legitimacy of its “actualising” legislation: challenges have also been brought against the Provision itself as part of the constitutional text. Following a first attempt in 1982, in 1994 (while the “descendants” of neo-fascism were becoming part of the government coalition for the first time), some Members of Parliament affiliated to the liberal and libertarian Radical Party advanced a proposal for a constitutional law aimed at repealing both Provision XII and Provision XIII.⁵⁴ Whereas Provision XIII against the House of Savoy was eventually declared “exhausted in its effects” by *Constitutional Law 1* of 2002,⁵⁵ Provision XII remained in force. In 2011, a group of right-wing Senators submitted another draft constitutional law for its repeal.⁵⁶ The claims advanced by the Radicals and the Conservatives in 1994 and 2011, respectively, were remarkably similar. On the one hand, both groups stressed the contingent character of the Provision, as belonging to bygone political circumstances. According to these

⁵⁰ Corte Costituzionale 1/1957 (26 January 1957); Corte Costituzionale 74/1958 (6 December 1958); Corte Costituzionale 4/1972 (19 January 1972); Corte Costituzionale 254/1974 (12 November 1974). See also Domenico Pulitanò, “Legge penale, fascismo, pensiero ostile,” *MediaLaws: Rivista di diritto dei media* 1 (2019): 13; Carlo Brusco, “Contrasti giurisprudenziali sull’interpretazione e applicazione delle leggi di contrasto al neofascismo,” *Questione giustizia* (2019); Francesco Spaccasassi, “Le manifestazioni usuali del fascismo tra legge ‘Scelba’ e ‘Mancino,’” *Questione giustizia* (2022); Paruzzo, “La XII Disposizione,” 116.

⁵¹ Ordine Nuovo in 1973 and Avanguardia Nazionale in 1976; see Gabriele Trombetta, “Un caso repubblicano: Lo scioglimento del movimento politico Ordine Nuovo (MPON),” *Federalismi.it* 27 (2021): 199–237.

⁵² Pezzini, “Attualità e attuazione,” 1391–92, 1398; Pezzini, “Fascismo/antifascismo,” 139–40.

⁵³ Sezioni Unite Penali della Corte di Cassazione 16153/2024 (17 April 2024); see also: Salvatore Curreri, “Costituzione e neofascismo: Quando il saluto fascista è reato?” *MediaLaws: Rivista di diritto dei media* 1 (2024); Pezzini, “Fascismo/antifascismo,” 143–47.

⁵⁴ “Atti Parlamentari, Camera dei Deputati, XII Legislatura: Proposta di legge costituzionale n. 591”; online access at https://documenti.camera.it/_dati/leg12/lavori/stampati/pdf/45415.pdf (last accessed 1 September 2025).

⁵⁵ Della Malva, *Diritto e memoria storica*, 223–24.

⁵⁶ “Senato della Repubblica, XVI Legislatura. Disegno di legge costituzionale n. 2651: Abrogazione della XII disposizione transitoria e finale della Costituzione”; online access at https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Ddlpres&leg=16&id=530824&part=doc_dc (last accessed 1 September 2025); Spaccasassi, “Le manifestazioni usuali del fascismo.”

politicians, the constitutional mandate was no longer “transitory and final” [*transitoria e finale*] but rather “past and gone” [*transitata e finita*]. On the other hand, the proponents emphasised the urgency of disposing of all remnants of “special legislation” supposedly infringing on the “principle of liberty” by postulating a “crime of opinion.”⁵⁷

However, other court decisions have, over the past few years, shed a different light on the deepest meaning of Provision XII. In 2013, the Fifth Section of the Council of State ruled that the “Fascismo e Libertà” movement be excluded from a local electoral competition based on that Provision.⁵⁸ As per the ruling, the freedom to associate into political parties, sanctioned by Article 49 of the Constitution, is “preliminarily and preventively” limited by the first clause of Provision XII, which, by mandating that certain movements be “forbidden by the legal order from the beginning [*originariamente*],” established an “original prerequisite to political participation.”⁵⁹ Therefore, whereas the second clause of Provision XII—the backward-looking, punitive norm against the figures responsible for the fascist regime—was not only unequivocally temporary but also explicitly formulated as an exception to the Constitution’s Article 48 sanctioning the universality of the right to vote, its first, permanent clause against the reorganisation of the Fascist Party was not only forward-looking but can also, as the Council of State’s ruling suggests, be conceived as foundational for the entire constitutional text.⁶⁰

As suggested by scholars like Barbara Pezzini and Giulio Enea Vigevani, the first clause of Provision XII should be understood not as an exception to Article 49, an ex-post anomaly vis-à-vis the generalised freedom of association, but rather as a precondition to that very Article, an ex-ante, *ab origine* limitation to its validity aimed not at punishing neo-fascist organisations but at banishing them from politics altogether.⁶¹ This same interpretation of Provision XII was also advanced at the drafting of *Scelba* in June 1952: the constitutional Provision was not a “repressive” measure “break[ing] [other] constitutional norms” but was rather “defensive and preventive,” by identifying those who, in the new Republic, were to be placed “outside the Constitution and outside each and every law descending from it.”⁶² Hence, in spite of its location at the end of the constitutional text, the first clause of Provision XII is, as Felice Blando put it, “the provision directing all other provisions.” As maintained in 1952, “the

⁵⁷ “Atti Parlamentari, Camera dei Deputati, XII Legislatura: Proposta di legge costituzionale n. 591”; “Senato della Repubblica, XVI Legislatura. Disegno di legge costituzionale n. 2651.”

⁵⁸ Consiglio di Stato, Sez. V, 1354/2013 (6 March 2013); see also Consiglio di Stato, Sez. V, 2573/2013 (11 May 2013). See Giuseppe Donato, “Il valore precettivo della XII disposizione finale e l’estromissione delle liste neofasciste dalle competizioni elettorali,” *Rivista AIC: Associazione Italiana dei Costituzionalisti* 3 (2019): 585–96.

⁵⁹ “Consiglio di Stato, sentenza n. 1354/2013: Sull’esclusione da una competizione elettorale locale di una lista recante il simbolo del fascio ai sensi della XII disp. trans. Cost.,” *Federalismi.it* 6 (2013); Vigevani, “Origine e attualità,” 1–2, 15.

⁶⁰ Tarchi, “Premessa,” 38, 57; Pezzini, “Fascismo/antifascismo,” 155–56.

⁶¹ Pezzini, “Attualità e attuazione,” 1381, 1386–88; Vigevani, “Origine e attualità,” 11, 15–16; Pezzini, “Fascismo/antifascismo,” 159, 161.

⁶² “I Legislatura: Scheda lavori preparatori,” 38537–38 (6 June 1952).

Constitution is enforced as long as the norm prohibiting fascist activities is rigorously applied.”⁶³ This norm ultimately becomes, therefore, not merely a provision against a specific party but rather a categorical condemnation of the political project embedded in its ideology. Provision XII, in effect, portrays the Italian Constitution, as Marta Cartabia and Nicola Lupo noted, as a “never-again” constitution, “renouncing the previous regime” and mandating its non-return.⁶⁴

By including a Provision relegating fascism to a previous era (“vietare,” namely, to prohibit, comes from the Latin *vetus*, “old,” and etymologically means “to put something aside among the old things”), the Italian Constituent Assembly turned the country’s heinous history into the backbone of its fundamental law. One of the most prominent of their number, Piero Calamandrei, stressed that the Constitution was the outcome of “a political struggle between the past and the future, from which a new legal order was born.”⁶⁵ Provision XII, while processing the trauma of the authoritarian regime, the World War, and the Nazi-fascist occupation,⁶⁶ also encodes a cry of alarm about the danger of neo-fascist revivals. By maintaining the outdatedness of Provision XII and providing a restrictive judicial interpretation of its implementing legislation, the nation faces the risk, in the words of Corrado Caruso, of a “psychoanalytical suppression of the foundational trauma of its republican Constitution.”⁶⁷

Despite the diversity of contexts, a comparably peculiar interplay between the spirit and the letter of the Constitution and its judicial interpretations can be found as we move from Southern Europe to South Asia, and more specifically to India, where a different kind of historical trauma encountered similar difficulties as it was translated into law through an analogous mechanism of a prohibitive constitutional provision mandating criminal legislation.

Constitutionalising Trauma II: India’s Article 17

On 26 January 1950, when India’s Constitution came into force, the nation, not unlike Italy, entered a life of contradictions. As B.R. Ambedkar, the Chairman of the Drafting Committee and a prominent *Dalit* member of the Constituent Assembly, prophesied: “In politics we will have equality and in social and economic life we will have inequality.”⁶⁸ The historical ignominy of caste

⁶³ Blando, “Movimenti neofascisti”; “I Legislatura: Scheda lavori preparatori,” 38538.

⁶⁴ Marta Cartabia and Nicola Lupo, *The Constitution of Italy: A Contextual Analysis* (Oxford: Bloomsbury, 2022), 1; see also Paruzzo, “La XII Disposizione,” 113.

⁶⁵ Calamandrei, “Cenni introduttivi,” lxxxix.

⁶⁶ Yair, “Cultural Trauma and Constitution,” 54.

⁶⁷ Corrado Caruso, “Un patto repubblicano contro il neofascismo,” *AIC: Associazione Italiana dei Costituzionalisti* 1 (2024).

⁶⁸ *Constituent Assembly Debates*, vol. 11, 165, ¶325 (1949). Ambedkar is widely credited for adeptly performing the role of the chairperson of the Drafting Committee of the Constitution, and being instrumental in shaping the anti-caste provisions within the constitutional text. At another place, he pointed out how the Republic of India was to become “a republic ‘of the Touchables, by the Touchables and for the Touchables,’ ‘an empire of the Hindus over the Untouchables’”; see Kalpana

closely tailed the founding of the nation. As D.D. Kosambi has articulated, caste in early Indian history emerged from class: “Caste is class at a primitive level of production, a religious method of forming social consciousness in such a manner that the primary producer is deprived of his surplus with the minimum coercion. This is done with the adoption of local usages into religion and ritual, being thus the negation of history by giving fictitious sanction from ‘times immemorial’ to any new development, the actual change being denied altogether.”⁶⁹ A pernicious and pervasive form of discrimination based on hereditary attributes assigned at birth, resistance to the rigid social system of caste provoked radical designs in the constitutional text. Untouchability, which designated the *Dalits* (which literally meant “oppressed” or “broken” in Marathi, and referred to Indian citizens who were outside the fourfold Hindu social classification of *chaturvarna*) as “Untouchables,”⁷⁰ was abolished as per Article 17 of the Constitution,⁷¹ and all forms of practising untouchability, from drawing water from public wells to being denied entry into temples, were made offences punishable by law.⁷²

As Ambedkar elucidated, the notions of “purity” and “pollution” were crucial motifs that structured the social system of untouchability: “The Hindus who touch them and become polluted thereby can become pure by undertaking purificatory ceremonies. But there is nothing which can make the Untouchables pure. They are born impure, they are impure while they live, they die the death of the impure, and they give birth to children who are born with the stigma of Untouchability affixed to them. It is a case of permanent, hereditary stain which nothing can cleanse.”⁷³ What eventually became offences mandated by the Constitution carried the weight of historical inequity, as forms of traditional discrimination, ostracisation, and exclusion. Ambedkar’s insistence on “a social code” of untouchability brings to the fore the extant sociolegal sanctions that attended practices of untouchability, which Article 17 sought to abolish: “In every village the Touchables have a code which the Untouchables are required to follow. This code lays down the acts of omissions and commissions which the Touchables treat as offences.” Ambedkar goes on to provide an exhaustive list of provisions—which the Untouchables must abide by—that comprised such a

Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (New Delhi: Routledge, 2012), 209.

⁶⁹ Brajdhulal Chattopadhyaya (ed.), *Combined Methods in Indology and Other Writings* (New Delhi: Oxford University Press, 2005), 59.

⁷⁰ For a succinct distinction between *varna* (comprising the fourfold Hindu scriptural social classification), *Dalits* (the fifth *varna* displaced en masse outside the fourfold classification, and who were designated as the Untouchables), and *Jati* (gradational classes, within each *varna*, that regulate endogamy within and prohibit exogamy), see Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Calcutta: Stree, 2013), 9.

⁷¹ Article 17 of the Indian Constitution reads as follows: “‘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.”

⁷² B.R. Ambedkar, *Dr Babasaheb Ambedkar: Writings and Speeches*, ed. Vasant Moon (New Delhi: Ambedkar Foundation, 2014), vol. 5, 21–22.

⁷³ B.R. Ambedkar, *The Untouchables: Who Were They and Why They Became Untouchables?* (New Delhi: Amrit Book Co., 1948), 21.

social code, ranging from separate and segregated dwelling quarters to kinds of names that must be bestowed on Untouchable children (evoking contempt); from prescriptions of behavior, appropriate demeanor, dress, and manners, to materials that can be used for building houses; from rules of proximity, regulations of wealth and acquisitions, and kind of languages spoken to marks that must be borne on the body and occupations that only Untouchables can perform. In essence, every aspect of an Untouchable's life and death was clearly circumscribed and encoded as per the set of prescriptions of untouchability.

It was this totalising aspect of caste-based sociolegal codes that the Indian Constitution sought to countervail through Article 17. As Ambedkar noted, the political structure, in the form of the constitution, ought to take into account the social bases that give the political its form: "In framing a constitution the Social structure must always be kept in mind. The political structure must be related to the social structure. The operation of the social forces is not confined to the social field. They pervade the political field also."⁷⁴ The anti-caste provisions in the Indian Constitution emerge from this understanding of a continuity between the social and the political. The traumatic marks of historical caste-based violence were now memorialised through a historically relevant penal provision in the Constitution.⁷⁵ Centuries of oppression, marginalisation, and exploitation led, at the moment of the nation's founding, to a resurgent desire to annihilate the roots of caste and untouchability. Yet, despite this unusual decision to inscribe a criminalising provision within a constitutional text, Ambedkar's scepticism apropos a national life of contradictions was not unfounded.⁷⁶

What undergirds the notion of untouchability has historically been "defilement, pollution, contamination, and the ways and means of getting rid of that defilement."⁷⁷ Social classes were in toto categorised as either pure,

⁷⁴ B.R. Ambedkar, *Mr Gandhi and the Emancipation of the Untouchables* (Jullundur: Bheem Patrika Publications, 1943), 42.

⁷⁵ In addition to Article 17 of the Indian Constitution, human trafficking and beggary were also made offences punishable by law as per Article 23. Together, both these articles aim at abolishing human exploitation through criminal proscription. What marks Article 17 specially is that it bears the brunt of a historical social system enabled by hereditary notions of purity and pollution, and as such criminal sanction within a constitutional provision for a historical, and ritually ordained, social inequity finds an unusual instance through Article 17, especially given that historical, and ritually ordained, forms of patriarchal marginalisation and exploitation remained outside the purview of constitutional criminalisation. For an elaboration of Ambedkar's role in the abolition of caste as distinct from, albeit related to, his contributions to the anti-caste provisions in the Indian Constitution, see Dag-Erik Berg, *Dynamics of Caste and Law: Dalits, Oppression, and Constitutional Democracy in India* (Cambridge: Cambridge University Press, 2019), 36-73.

⁷⁶ An indispensable factor in untouchability explicitly entering the constitutional text emanates from Ambedkar's radical legal politics, in wielding the law as a tool of transformation, emancipation, and social justice against a historically persistent use of social legality for violence and oppression. As Jesús Cháirez-Garza has recently argued, "it was mainly through the work of Ambedkar that untouchability was transformed from being considered a religious practice with regional undertones into a political problem with national ramifications"; Jesús F. Cháirez-Garza, *Rethinking Untouchability: The Political Thought of B.R. Ambedkar* (Manchester: Manchester University Press, 2024), 4.

⁷⁷ Ambedkar, *Dr Babasaheb Ambedkar*, 3.

and therefore higher in the system of gradations, or impure, and therefore lower or outside. A historical attendant of the caste system, what Ambedkar believed was created out of a “superimposition of exogamy on endogamy,” untouchability was a potent means of rigid communal segregation. Based on a rough delineation of communities, caste and untouchability, originally designated via occupational classes and matrimonial regulations, eventually received scriptural sanction, which entrenched the segregations.⁷⁸ At the time of the Constitution’s drafting, India had already witnessed several decades, if not centuries, of anti-caste resistance by social reformers and mystics ranging from the likes of Kabir, Jyotiba and Savitribai Phule, and Periyar,⁷⁹ to the more contemporary Mohandas Gandhi and Ambedkar.⁸⁰ The Constitution’s penal provision was born out of sustained lineaments of this anti-caste movement. The provision, thereby, represented centuries of trauma and violence, and the corpus of the constitutional text mimics the burdens of lacerations and lashes on the corpses of the Untouchables. Law, in effect, as Robert Cover articulated in another context, was wielded “in a field of pain and death,” and utilised as a forceful tool of emancipation and revolutionary social justice.⁸¹

Article 17 was first conceived through two draft provisions, meant for Article 11 of the draft Constitution, posited by K.M. Munshi and Ambedkar, respectively, in the Fundamental Rights Sub-Committee of the Constituent Assembly. The Sub-Committee accepted, almost without change, Munshi’s proposal as it currently stands in Article 17.⁸² The proposal was accepted by the Advisory Committee and subsequently by the Constituent Assembly without much debate. Although Naziruddin Ahmed suggested that the form of untouchability envisaged in draft Article 11 should be made clear, that is

⁷⁸ Kannabiran, *Tools of Justice*, 128.

⁷⁹ It must be stressed that although Kabir, Periyar, and the Phules raised forceful oppositions to caste and untouchability, their method and epistemological framework were far from similar. Kabir worked within the framework of mysticism whereas the Phules and Periyar engaged with caste within the tradition of social reformation and rationalism, through the Satyashodak Movement in Maharashtra (Phules) and the Self-Respect Movement in Tamil Nadu (Periyar).

⁸⁰ Kannabiran, *Tools of Justice*, 143–48 and *passim*. Pertinent to note that Ambedkar resented Gandhi’s politics on caste and felt that Gandhi greatly betrayed the Untouchables when he went on a fast unto death against the Communal Award in 1932, which granted separate electorates for the *Dalits*. For Ambedkar’s critique of Gandhi and Gandhian politics on caste, see Ambedkar, *Mr Gandhi*, and B.R. Ambedkar, *What Congress and Gandhi Have Done to the Untouchables* (Bombay: Thacker and Co., 1945). For recent examinations of the tenuous relationship and conflicting positions of Ambedkar and Gandhi, see Aishwarya Kumar, *Radical Equality: Ambedkar, Gandhi, and the Risk of Democracy* (Stanford: Stanford University Press, 2015), and Arundhati Roy, *The Doctor and the Saint: Caste, Race, and Annihilation of Caste. The Debate Between B.R. Ambedkar and M.K. Gandhi* (Chicago: Haymarket Books, 2017).

⁸¹ Robert M. Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601.

⁸² The only change to Munshi’s draft entailed substituting “shall be an offence” for “is punishable by law of the union,” indicating thereby that provisions on untouchability can emanate from multiple levels of government. The phrase “enforcement of any disability arising out of ‘untouchability’” was added into the provision after deliberations within the larger Constituent Assembly; see Shiva Rao, *The Framing of India’s Constitution: A Study* (Bombay: N.M. Tripathi, 1968), 202–3.

based on caste, this suggestion was negated.⁸³ In effect, with the Constitution coming into force, untouchability was proscribed by means of the constitutional mandate. Just as the Italian Provision XII mandated, and was followed by, criminalising legislation, such as *Scelba* and *Mancino*, giving effect to the provision, so too Article 17 mandated, and was followed by, specific criminalising legislation emanating directly from it. As Justice K. Ramaswamy of the Supreme Court of India noted in a 1993 decision, these legislations were not to be understood as mere penal laws, what he termed as “penal law simpliciter,” but forms of aggravated penal laws, bearing the historic weight of untouchability. Article 17 and its offspring were the result of a criminal jurisprudence made to countenance social trauma.⁸⁴

The first post-constitutional legislation to arise out of the force of Article 17 was the *Untouchability (Offences) Act, 1955*.⁸⁵ Although the Lok Sabha (Lower House of Parliament) debates reveal a predominant support for such a legislation being passed, there were considerable concerns regarding the efficacy of a criminal provision in abolishing untouchability. Multiple provisions in the *Act* deal with explicit punishments to be dealt out for, among other things, social and religious disabilities, and overt practices of untouchability itself.⁸⁶ The debates of the Lok Sabha are replete with various voices echoing the historical traumas that have led to the promulgation of the legislation, emanating from the enabling provision in the Constitution. When the Minister of Home Affairs and States introduced the bill to the House, he explained, evoking Gandhi, that such a framework ought to be discerned as a “*prayaschit*” (atonement) for the oppression of the past.⁸⁷ Expiation for past sins was to propel legal frameworks and regulations. To penalise untouchability was meant to not only prevent the repetition of age-old customary violence but also to embody a constitutional and legal mark of a violent history. A mark that remembered the injustices of the past and provided

⁸³ *Constituent Assembly Debates*, vol. 7, 62, ¶164 (1948). In judicial interpretation, it has been consistently held that because the word untouchability in Article 17 is in double inverted commas, it has a specific connotation of caste-based untouchability as understood by the Constituent Assembly; see *Devarajiah v. B. Padmamma* AIR (1958) KANT 84, ¶4 and *State of Karnataka v. Appa Balu Ingale and Others* AIR (1993) SC 1126, ¶18. In a 2018 decision, Justice D.Y. Chandrachud, the former Chief Justice of India, attempted to expand the scope of “untouchability” to include patriarchal notions of purity and pollution apropos menstruation. This interpretation was challenged by Justice Indu Malhotra in the same decision, who sought to restrain the term to caste-based untouchability alone. As such, given the deadlock, the latter interpretation, which conforms to earlier judicial decisions, remains authoritative; see *Indian Young Lawyers Association v. The State of Kerala* AIR ONLINE (2018) SC 243.

⁸⁴ *Appa Balu Ingale and Others*, SC 1126, ¶18.

⁸⁵ The title of *The Untouchability (Offences) Act, 1955*, which came into force on 1 July 1955, was changed to *The Protection of Civil Rights Act* in 1976. Earlier legislations were passed in several states which criminally proscribed untouchability. As Kannabiran has documented, “starting with the *Madras Removal of Civil Disabilities Act, 1938*, legislations for the removal of social disabilities and for temple entry were passed in Mysore (1943 and 1948), Orissa (1946), the Central Provinces and Berar (1947), Bombay (1946 and 1947), the United Provinces (1947), West Bengal (1948), East Punjab (1948), Saurashtra (1948), Madhya Bharat (1949), Coorg (1949), Bihar (1949), Travancore–Cochin (1950), and Hyderabad (1358 Fasli)”; Kannabiran, *Tools of Justice*, 213.

⁸⁶ Especially as contained in Sections 3–7.

⁸⁷ *Lok Sabha Debates*, vol. 4, Seventh Session, 405–6 (26 August 1954).

posterity with a veritably heinous precedent to countenance. Guilt, trauma, and anxiety fueled the much-delayed recognition of social injustice in the form of constitutionally sanctioned criminal laws. India bears within its Constitution, and legislation directly anticipated in the Constitution, marks and traces of its social and collective guilt on the question of caste. Atonement implies a sense of guilt, although whether the guilt inscribed within the legal frameworks proved to be useful was another question altogether.

The debates in the Lok Sabha also reveal a profound sense of insufficiency with the proposed penal frameworks. Many speakers suggested that criminal provisions alone would be ineffective in rooting out untouchability unless they are coupled with positive measures to ensure the emancipation of the Untouchable castes.⁸⁸ The overwhelming sense of the members of the House had been that such provisions, while necessary, would not be effective by themselves in the amelioration of the Untouchables unless other welfare schemes were simultaneously promulgated by the Union Government. When the bill returned to the House after a year, and after a Joint Committee of both Houses had worked on it, there were not many changes to the bill, except for the removal of a definition of untouchability in an earlier draft and an increase in the punishments to make the offences of a stricter character.⁸⁹ Barring minor changes to some of the provisions, on a clause-by-clause reading, the entire bill was passed without many changes to the draft that had come out from the Joint Parliamentary Committee. It was further decided, after much discussion within the House, that considering Articles 15 and 16 already provide for substantive positive measures based on affirmative action and reservations, reproducing similar measures within the *Untouchability Offences Bill* would become redundant, given that the latter, as argued by G.B. Pant, was to emphasise and foreground the criminalisation of untouchability.⁹⁰ The zone of criminalisation, it was urged, must be a class apart and separate, indicative of the special legislative status that must speak to the declarative aspect of Article 17. In effect, the *Untouchability (Offences) Act* was a direct offshoot and offspring of the mandative portion of that Article.

⁸⁸ As N. Somanna argued, “We should not only punish untouchability, but also make provisions for amelioration and social welfare of the community. It can provide for such positive measures. So, my humble submission is that it is necessary that in this Bill we should provide for such ameliorative measures. Otherwise, the very object of this Bill will never be served”; *Lok Sabha Debates*, vol. 4, Seventh Session, 434 (26 August 1954). Somanna’s concerns were echoed by many others, including Subba Rao, A.K. Gopalan, P. Ramaswamy, A. Krishnaswamy, and Rachiah during the course of the debates on the draft bill.

⁸⁹ These changes were summarised by G.B. Pant, the new Minister of Home Affairs and State, in the 1955 session of the Lok Sabha: *Lok Sabha Debates*, vol. 3, 6542 and *passim* (27 April 1955).

⁹⁰ Id. Articles 15 and 16 of the Indian Constitution deal with the specific measures of the right to equality, which is enshrined in Article 14. Article 16 even enables the state to reserve appointments and posts for the “backward class of citizens,” which includes the Scheduled Castes. For a recent appraisal of affirmative action, in the form of reservations, as a species of “distinct kind of formalism”—what the authors characterise as “caste formalism”—see Madhav Khosla and Pratap Bhanu Mehta, “Caste Formalism: The Law and Politics of Equality in India,” *Law and Contemporary Problems* 87, no. 3 (2025): 205–91.

Courts in India have been more or less proactive in enforcing the textual provisions, although the enforcement of the spirit of the Constitution and subsequent legislation has been paltry, at best.⁹¹ Although the Supreme Court of India has, on multiple occasions, noted how caste and caste-based crimes have evolved from their erstwhile sphere of sacrality and religious sanction, over the years, into ossified social classifications, far surpassing their original religious referents, judicial discourse on caste-based atrocity has prevaricated and remained ambiguous.⁹² This is most directly evinced in the judicial discourse on protection from caste-based offences. For instance, in 1989, when a second legislation was enacted to further prevent atrocities based on caste, through the *Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act*, the Supreme Court had to take up the question, on three separate occasions, of whether the Act, and more specifically Section 18, was *ultra vires* of the Constitution, resulting in three different resolutions each time. Whereas in *Balothia*, the Court held that Section 18 (which stipulated that the anticipatory bail protections of the *Code of Criminal Procedure* do not apply to caste-based atrocities) was not violative of the right to equality provisions of the Constitution given that caste-based atrocities, due to their peculiar power dynamic and chilling-effect, constituted a separate class and therefore cannot be compared with offences under the *Indian Penal Code*, the Court diluted this decision in *Subhash K. Mahajan*, under the unfounded substantiation that caste-based complaints were hyperbolic and often false.⁹³ In *Subhash Mahajan*, the Court had mitigated the effect of Section 18 by mandating that prior governmental approval must be sought before securing an arrest under the provisions of the Act, ignoring the original object of the Act to prevent intimidation of victims of caste-based atrocities arising out of practices of untouchability. Subsequently, the Government of India amended the Act and inserted a new provision, in the form of Section 18A, which nullified the directions of the *Subhash Mahajan* Court. The amended provision was upheld by the Supreme Court in its most recent iteration on this issue in *Prathvi Raj Chauhan*.⁹⁴ These contradictory and often opposing judicial impulses can be read as symptoms of an ambivalent anxiety that emanates from divergent engagements with caste and untouchability. In other words, the splits and schisms that attend these judicial decisions originate from conflicting appraisals of untouchability, which endures as a latent force despite the seeming and avowed unanimity of the judiciary in apprehending it.

The judicial history of Section 18 of the *Prevention of Atrocities Act* represents not only the inconsistencies and prevarications of judicial reasoning when it comes to caste-based crimes but also the larger uncertainties that lie at the

⁹¹ See Berg, *Dynamics of Caste and Law*, for a rigorous examination of the judicial and institutional engagement with untouchability and caste-based atrocities.

⁹² *M.R. Balaji and Others v. State of Mysore* AIR (1963) 649; *Indra Sawhney v. Union of India and Others* AIR (1993) SC 477.

⁹³ *State of M.P. and Others v. Ram Krishna Balothia and Others* AIR (1995) 1198; *Dr Subhash Kashinath Mahajan v. The State of Maharashtra* AIR (2018) SC 1498.

⁹⁴ *Prathvi Raj Chauhan v. Union of India and Others* AIR (2020) SC 1036.

foundations of the judicial discourse on caste.⁹⁵ Although India has not witnessed a concerted effort to repeal Article 17 or its offspring, unlike the repeated challenges in Italy, there have been sustained aspirations to soften its blow. While the Supreme Court has reiterated that legislations aimed at caste-based violence emerge from the special criminal measures that have been entrenched within the constitutional text to target centuries of violence against the *Dalits*, these measures are often institutionally watered down or otherwise disregarded and countervailed by administrative mechanisms, as Dag-Erik Berg has demonstrated.⁹⁶ While Article 17, and legislations emanating from this enabling provision, were affirmed as separate and special insofar as they encoded historical injustice through emancipatory proliferations,⁹⁷ this rhetoric has remained unevenly applied and endorsed in the specific instances that came before the institutional mechanisms. What remains clear, however, despite the multiple renditions and often conflicting legacies of court decisions, is a consistent recognition of Article 17 as a record of historical violence and trauma, even though the Courts prevaricate on whether caste-based violence is equally pervasive today.⁹⁸ That caste-based atrocity, in the various practical forms of untouchability, was the traumatic inducement for Article 17 remains judicially accepted, despite inconsistencies in its contemporary appraisals.

Conclusion: Securing the Future

As recently argued by Mirosław Sadowski, a “memory law,” properly defined, is not any law concerning memory (as enactments and administrative regulations establishing commemorations or monuments), but rather a piece of legislation specifically aimed at producing a “shift in collective memory” usually through “punitive” and “repressive” measures “criminalising certain statements,” or practices, “about the past.” Memory laws, so understood, are characterised by a strongly politicised background and emerge as a distinctively “political phenomenon,” being ushered in by state authorities to establish a specific official narrative regarding a traumatic phenomenon or atrocity in order to make amends for it, leave it behind, and/or prevent its repetition.⁹⁹ Italy’s

⁹⁵ Kannabiran, *Tools of Justice*, further develops this point.

⁹⁶ Berg, *Dynamics of Caste and Law*, especially Chapter 5, “Goals of Law, Goals of Order: Institutional Conversion After Atrocities.”

⁹⁷ Balothia (1995); Devarajiah v. B. Padmamma AIR (1958) KANT 84.

⁹⁸ For instance, even the Subhash K. Mahajan decision marks the historical context of the caste-based provisions in the Constitution and subsequent legislations.

⁹⁹ Mirosław Michał Sadowski, *Intersections of Law and Memory: Influencing Perceptions of the Past* (Abingdon: Routledge, 2024), 143–44; Barkan and Lang, “Mapping Memory Laws,” 2. Among the recent scholarship on memory laws and the debate on their meaning and interpretations, see Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2016); Yifat Gutman, “Memory Laws: An Escalation in Minority Exclusion or a Testimony to the Limits of State Power?” *Law & Society Review* 50, no. 3 (2016): 575–607; Nikolay Kaposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2017); George Soroka and Félix Krawatzek, “Nationalism, Democracy, and Memory Laws,” *Journal of Democracy* 30, no. 2 (2019):

Provision XII and India's Article 17 not only provide two early examples of memory laws well before the proliferation of such legislation since the 1990s; they are also distinguished by their lasting and "founding" character resulting from them being part of constitutional texts.¹⁰⁰ By examining these historically informed and traumatically motivated clauses of the Italian and the Indian Constitutions, this article—besides providing an incursion into a hitherto unexplored constitutional comparison—shows how constitutions can represent new beginnings while also being grounded in the painful memories of history.

The difference between the two case studies must, once more, be duly stressed: whereas the Italian Provision XII targets a political party, the Indian Article 17 is aimed at outlawing a category of social classification. Yet, the two provisions are comparable insofar as they represent the means by which, in the same couple of years, two fledgling democracies attempted to defend their newly established principles of political freedom on the one hand, and social equality on the other, against their respective internal enemies, through the method of a constitutional mandate for criminal legislation. These provisions, born from anti-fascist and anti-caste resistance, turned the Italian and the Indian Constitutions into militant texts, which mobilised their own legal force against the cult of violence of fascism and the constant violence of caste-based discrimination, respectively, through prohibitive and criminalising clauses. By incorporating passages that lack the conventional, a-temporal character of constitutional dicta, these two Constitutions embed the legal marks of two different and nonetheless equally disgraceful and traumatic histories, as well as the anxiety for a future made uncertain by the potential re-emergence of a violent past. The members of both the Italian and the Indian Constituent Assemblies formulated a constitutional mandate to pass criminal legislation and made this mandate integral to the creation of two new legal orders, springing from a rupture and discontinuity with the previous system. The two case studies prove the difficulty of both inscribing historical trauma in a fundamental text, by crystallising the refusal of political and social coercion into a constitutional norm, and of subsequently translating this constitutional norm into criminal law. Both case studies demonstrate, moreover, the problems encountered by judicial discourses and practices in apprehending the special contours of this constitutionalised criminal law.

Precise definitions proved challenging to Italian legislators, who, as per the Constitution, faced the conundrum of defining the contents of the fascist ideology and practice within a piece of legislation. Provisions excluding parties

157–71; Nikolay Koposov, "Historians, Memory Laws, and the Politics of the Past," *European Papers* 5, no. 1 (2020): 107–17.

¹⁰⁰ On memory laws and constitutions, see Anna Wójcik and Paula Rhein-Fischer, "Introduction to the Special Section 'Memory Laws and the Rule of Law'," *European Constitutional Law Review* 19, no. 4 (2023): 591–601; see also the related notions of "mnemonic constitutionalism" and "constitutional memory" as elaborated in Uladzislau Belavusau, "Mnemonic Constitutionalism and Rule of Law in Hungary and Russia," *Interdisciplinary Journal of Populism* 1, no. 1 (2020): 16–29, and Reva B. Siegel, "The Politics of Constitutional Memory," *The Georgetown Journal of Law and Public Policy* 20, no. 19 (2022): 19–58.

from elections are ubiquitous and have been passed by several modern states.¹⁰¹ In the Italian context, however, not only is this ban included in the Constitution but it also exceptionally targets not anti-democratic parties in general but a specific party in particular, which is thereby signaled as the only specific exception to the freedom of association. Within a national context characterised by a collective self-absolution from both the responsibilities of the Second World War and the violence of the Italian Empire in Northern and Eastern Africa,¹⁰² the Italian Parliament had to confront the problem of passing legislation seemingly limiting other constitutional liberties. The debates around *Scelba* and *Mancino*, as well as more recent draft laws (including the 2017 *Fiano Bill*, aimed at introducing a new provision against Nazi-fascist propaganda in the *Penal Code*), show the ways in which the Constitution's Article 21 sanctioning the freedom of thought and Article 49 guaranteeing the citizens' liberty to associate into political parties have been weaponised against legislations implementing Provision XII.¹⁰³ The restrictive judicial interpretation of these laws has, over the years, resulted in a substantial laxity with neo-fascist movements in Italy.¹⁰⁴ As stressed by several legal scholars, the role of constitutional Provision XII should be constantly revived not only as a testimony to the past but also, and more importantly, as an anti-fascist "collective commitment against the permanent danger of authoritarian regression of the political order" in the future.¹⁰⁵ The revitalisation of the "anti-fascist paradigm" of the Italian Constitution would, in this way, result not in the mere disownment of a historical party but in an utter repudiation of the "liberticidal and racist type of society and state" embedded in the fascist political project.¹⁰⁶

The problem of resurgence permeates the Indian context as well. Despite the constitutional mandate and supplementary criminal legislation, caste and untouchability pervade the social fabric of the Indian nation. Members of lower castes are routinely killed, maimed, ostracised, excluded, violated, abused, and socially and economically degraded even after seven decades of the Constitution coming into force.¹⁰⁷ The Courts, to their credit, have generally upheld the constitutional mandate of Article 17 and its emancipatory vision, but continue to be evasive on crucial practical questions emerging from the criminalisation of untouchability, leading to the weakening of the legislation.¹⁰⁸ Administrative institutions have a more disparate history in that the provisions are safeguarded and their vision proliferated in some places, but drastically

¹⁰¹ Issacharoff, *Fragile Democracies*, 1410.

¹⁰² Della Malva, *Diritto e memoria storica*, 210.

¹⁰³ *Id.*, 243; Paruzzo, "La XII Disposizione," 113, 117.

¹⁰⁴ Caruso, "Un patto repubblicano."

¹⁰⁵ Vigevani, "Origine e attualità," 9–11.

¹⁰⁶ Brusco, "Contrasti giurisprudenziali."

¹⁰⁷ Kavita Chowdhury, "Seven Decades After It Was Abolished, Untouchability Continues to Be Practiced in India," *The Diplomat*, 23 August 2022; "Hidden Apartheid: Caste Discrimination Against India's Untouchables," *Human Rights Watch*, 12 February 2007.

¹⁰⁸ Shivaraj Huchhanavar, "From Transformation to Dilution: The Weakening of the SC/ST (Prevention of Atrocities) Act Through Judicial Decisions," *The Leaflet*, 14 April 2024.

transgressed or diluted in others. History moves unevenly and slowly to correct past errors, and while the legislation and constitutional provisions provide tremendously potent mechanisms, through criminalisation, to deal with the guilt and trauma of the yesteryear, social justice is yet to emerge in a satisfactorily sustained form. History burns its memory into the mind, as Nietzsche once wrote, and the burns of caste have impressed and branded themselves through a criminal law provision within a constitutional text. Nevertheless, the effectiveness of such an unusual mechanism is yet to receive its full remit, and remains to be strongly employed toward the abolishing of untouchability in a country that is still plagued with widespread caste-based discrimination and rampant social stigmatisation. By outlawing traditional discriminatory punishments prescribed by the sociolegal code of untouchability while mandating punishments for discrimination against *Dalits*, Article 17, and its ancillary criminal legislations, are a much-needed exception to the rule to hit at the roots of a well-established and entrenched historical practice. However, they have remained, at the local level, sparsely useful and used, and where boldly used, often become the locus for retribution and retaliation.

Understanding the histories of Provision XII and Article 17 provides two exemplary instances of not only jurisdictions that are struggling to weed out political and social evils but also the conflicts immanent in the operation of exceptions within the rules. In the cases of both Italy and India, the lack of success of the criminalising strategy adopted by both Constitutions arguably betrays the insufficiency of the legal frameworks to translate historical guilt and traumas into permanently binding legal measures, and points to the undiminished importance of civic and political education as well as social and welfare policies. In retrospect, Piero Calamandrei described the constitutional text by means of an evocative metaphor, which can be applied to the Italian and the Indian Constitutions alike: the constitution is “one of those buildings hastily erected during a housing crisis, where one moves, out of necessity, even before masons have left.” Whereas, on its freshly painted facade, “old malignant weeds” can be seen sprouting back, the bearing walls are nonetheless solid and stable, precisely because they have been cemented by a painful past.¹⁰⁹ To expand on Calamandrei’s powerful analogy, constitutions are not archaeological sites; they are not empty, vacant buildings, but densely peopled ones, and built to last and house future generations of residents. The political battle over Provision XII and Article 17 is still open, and is a struggle over the meaning of the past, including its legacies of violence, discord, and acrimony, as much as the contentious yet hopeful shaping of the future.

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¹⁰⁹ Calamandrei, “Cenni introduttivi,” cxxxviii–cxxxix.

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