

CHAPTER IX FRATERNITY

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The making (and remaking) of constitutions, designated as the constituent power, manifests the power, strength, and movement of the multitudes. Constitutions as grammars of the constituted power often tend towards the reduction of the constituent power, thus diminishing the range of the political.

If we were to regard constituent power as 'the origin of the political,' then the negation of the political by the constituted power invites continual 'struggles to emerge in order to emerge as strength.'¹

The Preamble of the Constitution of India affirms a determination to secure amongst the people a feeling of fraternity, ensuring the dignity of the individual and the unity of the nation.² The historic ideal of fraternity integrated with liberty and equality (the trinity) has been an omnipresent feature of Indian democratic politics. The significance of the constitutional trinity has been highlighted in *Kartar Singh v. State of Punjab*³, wherein the court refers to the closing speech of Dr. Ambedkar in the Constituent Assembly;

The principle of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of

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¹ Upendra Baxi, "Preliminary Notes of Transformative Constitutionalism", BISA Conference: Courting Justice (Delhi 2008). Available at <http://www.conectas.org/IBSA/UBNotesonTransformativeConstitutionalism.pdf>

² The Preamble of the Constitution of India.

Text also embodied by the National Commission to Review the Working of the Constitution: A Consultation Paper on Literacy in the Context of Constitution of India, Vigyan Bhawan (2001). Available at <http://lawmin.nic.in/ncrwc/finalreport/v2b1-5.htm> (Last visited 10.1.2013).

In *Pradip Jain v. Union of India* AIR 1984 SC 1420 the court stated; Preamble of the Constitution is framed with great care and deliberation so that it reflects the high purpose and the noble objective of the Constitution makers.

³ (1994) 3 SCC 569.

democracy. Liberty cannot be divorced from equality. Nor can equality and liberty be divorced from fraternity.

Even so, fraternity has more than often been absent from the miniscule exploration of the constitutional ideals present under the Preamble.⁴ Observably, it is the "forgotten element of democracy"⁵.

Historically, 'liberty, equality, and fraternity' became a major influence on political thought since the French Revolution. The Revolution marked the triumph of the people and pronounced the Declaration on Rights of Man and of the Citizen in 1789. In modern societies, although there are many differences in interpretation...the idea of fraternity is less directly accepted, but the principles of collective action and social responsibility are widely recognized'.⁶ According to Johnston, fraternity was rather less central to the preconceptions of the enlightenment predecessors of the revolutionary era, their emphasis being given rather to the 'rights of man' and to the equality of entitlement to those rights.⁷

To date, our pre-occupation with liberty and equality has left vacant a conceptual upbringing of *fraternity* in the postcolonial context.

⁴ In 2011, scholar and historian K.N. Panikkar while interacting with the students in Chennai leveled a critical narrative of the Constitutional promises. He expressed; that "while Indian democracy had evolved an institutional structure on the basis of the principles and prescriptions laid down in the Constitution, there existed a wide gulf between precept and practice", "while cultural plurality was the strength of the Indian civilization, the absence of cultural equality had led to the exclusion of many from the mainstream life", "the widening gulf between religious communities, coinciding with the influence of religion from the private to the public sphere, has led to a religionisation of society and commodification of religion." See Special Correspondent, "Several Basic Guarantees of Statute Remain Inaccessible to Vast Sections of Population", *The Hindu* (Chennai, July 2011). Available at <http://www.thehindu.com/news/national/article2219573.ece> (Last visited 10.1 2013).

⁵ Justice Charles Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraterntiy: The Unspoken Third Pillar of Democracy" 45 *McGill Law Journal* 569 (2000).

Justice Gonthier refers to "fraternity" as an essential value as that of liberty and equality. However, fraternity has not been discussed more often in comparison to the other two values.

⁶ Paul Spicker, *Liberty, Equality, Fraternity*, The Policy Press, U.K. 1 (2006).

⁷ Gerald Johnston, "Liberty, Equality, Fraternity: Democratic Ideals and Educational Effects", Vol. 12 No.4 *British Journal of Sociology of Education* 492 (1991).

1. Popularizing *Fraternity*

From the scholarship available we can gather that *fraternity* has been subjected to several interpretations and linked with several virtues. For a few, it stands close to the actualities of solidarity, humanity, compassion, companionship, and brotherhood.⁸ For others, it is the "glue that binds equality and liberty to the civil society" and "presents a sense of continuity with the past and the future".⁹ Omvedt replaces the word fraternity with "community" as an important component of a human vision for the new millennium along with equality and justice.¹⁰ According to Wilson McWilliams (*The Idea of Fraternity in America*, 1973) fraternity- a relation of affection founded on shared values and goals, is a permanent social and psychological need of human development, yet one that is discouraged and inhibited by the institutions and processes of modern industrial societies.¹¹

In addition to the Indian Constitution, constitutions across the globe have committed themselves to the vision of brotherhood and harmony in society. The Preamble of the Constitution of Brazil (New Constitution in 1988) states;

We, the representatives of the Brazilian People, assembled in the National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society...¹²

⁸ The Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. See *Universal Declaration of Human Rights*, GA Res. (1948).

⁹ *Supra* note 5.

¹⁰ Gail Omvedt, "Liberty, Equality, Community: Dr. Ambedkar's Vision of a New Social Order" Available at <http://www.ambedkar.org/research/LibertyEquality.htm>

¹¹ Wilson Carey McWilliams, *The Idea of Fraternity in America*, University of California Press, London 7 (1973). McWilliam also argues that fraternity is a bond based on intense interpersonal affection; involves shared values or goals considered more important than mere life; implies a necessary tension with loyalty to society at large.

¹² R.C Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India*, Eastern Book Company 126 (2004).

In more recent times, it has aroused the enthusiasm of scholars and states amidst global disintegration and unrest. In *S v. Makwanyane*¹³, the South African court referred to *ubuntu* or shared solidarity as a constitutional value;

The concept of *ubuntu* is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In 1993, the Parliament of the World's Religions with the support of two hundred leaders from diverse backgrounds adopted the declaration *Towards a Global Ethic*. The Declaration personifies the values of fraternity;

We must treat others as we wish others to treat us. We make a commitment to respect life and dignity, individuality and diversity, so that every person is treated humanely, without exception. We must have patience and acceptance. We must be able to forgive, learning from the past but never allowing ourselves to be enslaved by memories of hate. Opening our hearts to one another, we must sink our narrow differences

¹³ (1995) 3 SA 391 (CC)

for the cause of the world community, practicing a culture of solidarity and relatedness.¹⁴

In 2011, the Canadian Institute for the Administration of Justice in collaboration with the McGill University organized a symposium on *Responsibility, Fraternity and the Sustainability in Law* to highlight fraternity as an intrinsic value and a mode of conduct aiming for the realization of human and social needs.¹⁵ In Latin America (since 2006) there has been a collaborative effort between scholars and state officials to conceptualize *fraternity*. More specifically, *The Forgotten Principle: Fraternity in Law and Politics* (First published in 2006) by Antonio Baggio has taken the lead in bringing the study of fraternity back to the mainstream of political and historic discussions.¹⁶ According to Baggio there are many forms by which fraternity among human beings may be fulfilled, but in the end, the concept needs to be translated into the political sphere for it to have a positive impact on the community at large.¹⁷ Baggio identifies the two conditions that he considers key for fraternity to become a political category. First, it must properly be a criterion for political decisions; and second, it must affect the way the other two political categories (liberty and equality) are conceived. "Baggio has underlined how fraternity is a dynamic reality, signifying a co-belonging to the other, and constitutes the beginning of a reality to be reckoned with, in which liberty and equality represent the other poles of confrontational differences".¹⁸

¹⁴ The Parliament of the World's Religions, *The Declaration Towards a Global Ethic*. Chicago, USA (September 1993). Available at

http://www.parliamentofreligions.org/_includes/FCKcontent/File/TowardsAGlobalEthic.pdf

¹⁵ See Jola Gjuzi, "Substantiating the Principle of Sustainable Development with the Principle of Fraternity: The Case of Corporate Social Responsibility" Available at <http://cisdl.org/gonthier/public/pdfs/papers/Conférence%20Charles%20D%20Gonthier%20-%20Jola%20Gjuzi.pdf>

¹⁶ Rodrigo Mardones, "Fraternity in Politics: New Scholarship and Publications from Latin America" Vol. 1 No. 2 *Journal of Dialogue and Culture* 72 (October 2012).

Mardones deals in brief with the contemporary works on fraternity; Antonio M. Baggio, *Fraternity in Political Perspective* (2009), Osvaldo Barreneche, ed., *Recent Studies about Fraternity* (2010), Pablo Ramírez, ed., *Fraternity and Conflict* (2011), Domingo Ighina, *The Ember under the Ashes* (2012).

¹⁷ *Ibid* at 74.

¹⁸ Marco Luppi, "Myth and Fraternity" (2012). Available at http://www.iu-sophia.org/News_1399 (Last visited 10.1.2013).

There is visibly an attempt to define fraternity as a political or legal value, more simply than a historic/rhetorical one. Fraternity is seen to be reflected in the everyday lives of the community, wherein there is sharing of common experiences, threats, and values. The ability to re-construct fraternity as reality would obstruct us from rationalizing the process of mass/social mobility, integration, or cohesion in general or situationally. Fraternity as solidarity or brotherhood may very well be read with the conditions of mass conflict, social disintegration, communal ties, etc. It is a dynamic and propelling ideal within law and society, worthy of the same respect as the values of equality and liberty.

2. The Global Fraternity

Global fraternity or universal brotherhood is a theme worth entertaining for several scholars. Universal fraternity reflects "diverse fraternities"¹⁹ or situationally expressing the "solidarity of global resistance"²⁰ The experience of globalization and interdependence underlies the existence of common problems and the need for coordinated solutions to these problems.

In addition to the increasing literature on *fraternity*, brotherhood and social cohesion, the ideal has also paved the way for global reforms to instill the value of *brotherhood* in the younger generations. Globalization of political values like that of fraternity has affected the paths of several "multicultural nation-states".²¹ For instance, in *Grutter v. Bollinger*²², the US court has highlighted the role of education as the foundation of good citizenship.

¹⁹ Sophia University Institute, "Fraternity as a Relational Principle, in Law and Politics" Available at http://www.iu-sophia.org/_News_1377

²⁰ *Supra* note 1 at 19.

²¹ Paul Enriquez, "Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence" Vol. 43: 1265 *Vanderbilt Journal of Transnational Law* 1295 (2010).

²² 539 U.S. 306, 331 (2003)

3. *Fraternity and the Indian Society*

India has rich diversity which the Constitution has preserved and respected. The Constitution itself incorporates the zeal of the nation; "it is the creation of the people of India who, being dissatisfied with the then existing constitutional arrangements, wanted to make a fresh start".²³ The Constitution does embody the essence of fraternity through its text and interpretations.

Fraternity means a sense of common brotherhood of all Indians...In a country like ours with so many disruptive forces of regionalism, communalism and linguism, it is necessary to emphasize and re-emphasise that the unity and integrity of India can be preserved only by a spirit of brotherhood.²⁴

In *Rajasthan State Electricity Board v. Sultan Mohd.*²⁵ The High Court of Rajasthan stated;

the expression "fraternity" has not been defined in the Constitution but it appears that this expression is wide enough to include every bond of unity between two or more human beings, whether the bond, is temporary or it is permanent, whether it is contractual or sacramental; whether it is voluntary or commanded by law. Suffice it to say that fraternity referred to in the preamble to the Constitution of India, refers to human bonds among the people as well as the bonds between the sovereign and the subjects. The bond of fraternity, not only binds the

²³ Mahendra P. Singh and Surya Deva, "The Constitution of India: Symbol of Unity in Diversity" 53 *Yearbook of Public Law Germany* 649-686 (2005). Also see Nicholas Robinson, "India's Constitutional Anxiety: Has the Constitution Transformed Indian Society?", (Book Review) *The Caravan: A Journal of Politics and Culture* (November 2012). Available at <http://www.caravanmagazine.in/books/indias-constitutional-anxiety>

²⁴ Words of Dr. Ambedkar quoted in Justice R.C Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India*, Eastern Book Company 106 (2004).

²⁵ (2000) III LLJ 691 Raj

parties to it, it creates mutuality of interaction and shifting of certain responsibilities according to the nature and form of the bond. Whatever may or may not be the obligation of the parties on account of the bond of fraternity between them, one thing is very obvious that unless the parties to the bond of fraternity would not honour, protect and enforce the rights of other parties to the bond, the bond of fraternity cannot survive... Fraternity, in our opinion, imposes a duty on every party, to honour, protect and enforce the rights of the other parties to the bond and this appears to be at the root of the maxim that wherever there is a right there must be a corresponding duty on some other fellow and there must be a remedy available for enforcing the right. The bond of fraternity which exists between the sovereign and subjects, makes it obligatory on the part of sovereign to enforce the rule of law and to administer justice to all citizens by honouring their rights and by taking appropriate steps to protect and enforce the same even if the citizen does not ask for it...

Under Part IV A of the Constitution of India, fundamental duties (Article 51A) have been prescribed. The provision states under clause (e); it shall be the duty of every citizen of India- to promote harmony and the spirit of common brotherhood amongst all people of India transcending religious, linguistic, and regional or sectional diversities...²⁶ Fundamental duties have been interpreted so that citizens must exercise their fundamental rights keeping in mind the duties provided under the Constitution.²⁷ Part IV A "re-endorses fraternity as cited in the Preamble...the framers of the Constitution gave a new dimension to the concept of fraternity. It was not only to raise the status of many who were looked down upon by the privileged castes but also to bring about harmony

²⁶ Fundamental Duties were incorporated by the 42nd Amendment Act.

²⁷ See J.C Johari, *The Constitution of India: A Political-Legal Study*, 4th Ed. Sterling Publishers Pvt. Ltd. 95-96 (2007).

and understanding between the various segments of the Indian society so that the country appeared to be one, for all intents and purposes".²⁸

Part III of the Constitution dealing with fundamental rights gives freedom to minorities and "accommodation is the key concept that characterizes this constitutional approach to diversity..."²⁹ To many, fraternity is often referred to specifically in the context of backward classes and religious minorities.³⁰ In *Indira Sawhney v. Union of India*³¹, "fraternity was used by the in two distinct, yet related fashions: to defend the practice of reservations under the Constitution on the basis of fraternity, and also to warn of its effects on fraternal relations when undertaken in an unguided manner."³²

In *Ashok Kumar Thakur v. Union of India*³³ the apex court stated; the Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to 'we he people of India'. Reservation unless protected by the constitution itself, as given to us by the founding fathers and as adopted by the people of India, is a sub-version of fraternity, unity and integrity and dignity of the individual.

In *Krishna Swami v. Union of India*³⁴ the apex court emphasized the role of the courts *vis-à-vis* the idea of fraternity. The court stated that the independence of the judiciary in the scheme is essential to establish real parliamentary democracy and maintenance of rule of law to usher in an egalitarian social order, removing the existing imbalances,

²⁸ Aparajita Baruah, *Preamble of the Constitution of India: An Insight and Comparison with other Constitutions*, Deep and Deep Publications 63-64 (2007).

²⁹ Balveer Arora, "Diversity and Unity in the Republic of India" in Luis Moreno, Cesar Coleno (Eds.), *Diversity and Unity in Federal Countries*, McGill-Queens University Press 200-226 (2010). Also available http://www.academia.edu/450290/Diversity_and_Unity_in_the_Republic_of_India (Last visited 10.1.2013)

³⁰ Muchlund Dubey, S.N. Jha, and Rajiv Balakrishnan, *Social Development in India – The Policy Canvas: An Overview of the Last Fifty Years & Emerging Issues for the Twenty-First Century*, Council for Social Development, New Delhi.

³¹ (1992) Supp (3) SCC 217

³² Smaran Shetty and Tanaya Sanyal, "Fraternity and the Constitution: A Promising Beginning in *Nandini Sundar v. State of Chhatisgarh*" 4 *NUJS Law Review* 455 (July-Sept 2011)

³³ (2008) 5 SCALE 1

³⁴ (1992) 1 SCALE 484. Also see *Consumer Education and Research Centre v. Union of India* 1995 (1) SCALE 354.

social and economic inequalities, assuring liberty, equality, fraternity and to further justice-social, economic and political with dignity of the persons and fraternity to integrate Bharat. Independence of the judiciary thus constitutes the cornerstone and the foundation on which our democratic polity itself is to rest and work on sound principles.

The "ideal of fraternity imposes specific duties on the state to promote social cohesion and solidarity. In particular, it requires the state to ensure a certain minimum degree of well-being for 'socially excluded people"³⁵. Several endeavors keep the spirit of fraternity alive amongst the Indian community. In 2002 the Bhopal Conference: Charting a New Course for Dalits for the 21st Century was held to deliberate the welfare of the Scheduled Caste and Scheduled Tribes. The Bhopal Conference endorsed the ideals of civil society enshrined in the Constitution of India; reaffirmed that concerted action by the community as a whole is necessary for the upbringing of the oppressed sections; conscious that the hurdles that caste Hindu society- and its tentacles in government, media, voluntary sector, etc. is likely to hurt any serious movement that challenges the entrenched system of discrimination and exclusion; hoping that this country will no longer remain an exception to the global norm of progress, equality, justice, peace and social harmony. The Conference was a citizen-government initiative to pave the way for social inclusion and respect.³⁶

In 2005 the Prime Minister set up a High-Level Committee to prepare a report on the social, economic and educational status of the Muslim community of India. The Committee known as the Sachar Committee, 2006 made recommendations for the formulation of policies that "sharply focus on inclusive development and

³⁵ Tarunabh Khaitan, "Fraternity", *Outlook India* (15th May 2009). Available <http://www.outlookindia.com/article.aspx?240443>

³⁶ Text available at <http://www.ambedkar.org/News/TASKFORCERECOMMENDATIONS1312003.PDF>

'mainstreaming' of the Community while respecting diversity."³⁷ The Constitution offers "affirmative programmes for the disadvantaged sections", "makes special provisions for the protection of different languages and linguistic groups in the country".³⁸

The Indian civil society has also played a significant role in creating and maintaining feelings of togetherness and solidarity.³⁹ More recently, the Indian state witnessed the strength of "community" ties while addressing the concerns over good governance/anti-corruption, or the pathetic conditions of safety and wellbeing of women. In a contemporary perspective, the disregard for fundamental rights of the citizens has espoused a sense for recreating a better sense of belonging and compassion for the community members. The quality of brotherhood/integrity/respect is an inherent feature of Indian society.

So can this energy and desire for collective harmony be constructively utilized? Can community lead the way for a duty-shaped society? Must not the young citizens be educated about the historic and modern values of solidarity/inclusion? To what extent may we utilize the freedom conferred by the state to achieve fraternity; inclusion, respect and love? It is truly interpreted that the "Indian unity and fraternity today suffers a syndrome of divisiveness, disparity and despair. The glory and greatness of India, its internal integrity, fraternal amity and cosmic comity consists in its finest principles of spiritual, temporal unity and beauty, which are our unique legacy, notwithstanding the racial, casteist diversity and cultural plurality...Unfortunately, the protection given to minorities is being travestied into a perversity by a grave

³⁷ Priya Parker, "Summary of Sachar Committee Report" (2006) Available at <http://www.prsindia.org/administrator/uploads/general/1242304423~Summary%20of%20Sachar%20Committee%20Report.pdf>

³⁸ *Supra* note 23 at 686.

³⁹ See Prabhakar Singh, "Constitutionalism in International Law during the Times of Globalization: A Sociological Appraisal", *Indian Yearbook of International Law and Policy* (2009); Neera Chandokhe, "The 'Civil' and the 'Political' in the Society: The Case of India" in Peter Burnell and Peter Calvert, "Civil Society in Democratization", Frank Cass, London (2004); Pranab Bardhan, "Our Self Righteous Civil Society", XLVI Vol. No. 29 *Economic and Political Weekly* (July 2011).

misconception. By a sinister misinterpretation of casteism, religion and other denominations, political communalists paint them dubiously as 'minority rights'. What a social disaster and semantic calamity! Therefore, a clear, transparent, categorical definition of secularism and its constitutional non-negotiability is necessary..."⁴⁰

The promotion and realization of '*fraternity*- bond and respect' will pave the way for the Indian democracy; specifically the way for better enjoyment of liberties and social justice. "The importance of fraternity, in both a historical and legal sense, would then be in the recognition of the importance of the group's identity, as well as the fundamental rights of the persons constituting such groups."⁴¹ Fraternity may have been forgotten in the debates, but it continues to live and reflect in the aspirations and strength of the community.

⁴⁰ Justice V.R Krishna Iyer, "The Indian Constitution in 2050", *Halsbury's Law Monthly* (October 2008), Available at <http://www.halsburys.in/the-indian-constitution-in2050.html>

⁴¹ ⁴¹ Smaran Shetty and Tanaya Sanyal, "Fraternity and the Constitution: A Promising Beginning in *Nandini Sundar v. State of Chhatisgarh* 4 *NUJS Law Review* 461 (July-Sept 2011)